



JUDICIAL REFORM IN TURKEY AND THE EU'S POLITICAL CONDITIONALITY

(MIS)FIT BETWEEN DOMESTIC PREFERENCES AND EU DEMANDS

Meltem Müftüleri-Baç

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Abstract

This paper investigates the process of judicial reform in Turkey in the last 15 years, with a focus on the reversal of such reforms since 2013. To do so, it asks whether and to what extent these reforms as well as their changing pace and direction have been driven by the political conditionality of the EU and its credibility, on the one hand, and the domestic costs of adaptation, on the other. While the European Union accession process mattered greatly for the Turkish political transformation, it has been by no means the sole determinant of political changes. There are multiple factors shaping Turkey's initial compliance with the EU's political norms, and later their reversal including political costs of adaptation and veto players. The paper aims to explore this (mis)fit and the extent to which the EU's credibility in its membership conditionality mattered in terms of Turkey's path of reforms. The key proposition in the paper is that the EU's lack of credibility combined with increased domestic material costs of judicial reforms at home triggered the backsliding and the reversal of judicial reforms in Turkey. It not only sheds light on the interplay of the EU's credibility and the high domestic costs; the paper's findings also challenge the emphasis of the literature on EU conditionality and the EU's role as an external anchor even when accession negotiations stalled as in the Turkish case.

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1. Introduction

The opening of accession negotiations with the European Union (EU) in 2005 was a turning point for Turkey's political transformation. Since its candidacy in 1999, Turkey has entered a stage of political change with political adaptation to EU rules in return for expected material economic gains stemming from EU accession. Significant hurdles in the Turkish political adaptation to the EU's rules could be found in the area of judicial reforms with high material costs of adaptation that mostly resulted from policy misfits between the EU and domestic rules. The internal developments in Turkey and its accession process to the EU in 2005 pointed towards a future of a democratic Turkey closely integrated into the European order. However, in 2016, it looks more than ever as if the negotiations process has stalled with the prospects of Turkey's accession to the EU not only being undermined by the EU's enlargement fatigue but a backsliding of the country into authoritarianism under the Erdoğan regime (Müftüler-Baç/Keyman 2012; Keyman 2013; Özbudun 2014; Tezcür 2009).

This paper investigates the process of judicial reform in Turkey in the last 15 years, with a focus on the reversal of such reforms since 2013. To do so, it asks whether and to what extent these reforms as well as their changing pace and direction have been driven by the political conditionality of the EU and its credibility, on the one hand, and the domestic costs of adaptation, on the other. While the EU accession process mattered greatly for the Turkish political transformation, it has been by no means the sole determinant of political changes. There are multiple factors shaping Turkey's initial compliance with the EU's political norms, and later their reversal including political costs of adaptation and veto players. In order for judicial reform packages to be adopted, there is hence a need for a strong fit between domestic preferences and EU policy conditionality (Ademmer/Börzel 2013; Schimmelfennig 2009).

The paper aims to explore this (mis)fit and the extent to which the EU's credibility in its membership conditionality mattered in terms of Turkey's path of reforms. The key proposition in the paper is that the EU's lack of credibility combined with increased domestic material costs of judicial reforms at home triggered the backsliding and the reversal of judicial reforms in Turkey. It not only sheds light on the interplay of the EU's credibility and the high domestic costs; the paper's findings also challenge the emphasis of the literature on EU conditionality and the EU's role as an external anchor even when accession negotiations stalled as in the Turkish case.

To do so, the paper looks at Turkey's judicial reforms in three different time periods, from 1999 to 2006, from 2007 to 2013 and from 2013 to present. The empirical analysis demonstrates that from 1999 to 2006, there was a strong fit between the preferences of the ruling elites in Turkey and the EU's policy demands. EU policy conditionality - both its credibility and the clarity of EU demands - was strong, paving the way for judicial reforms. From 2006 to 2013, the preferential fit remained relatively strong, but EU policy conditionality began to weaken, losing its credibility. As a result, the material costs of adaptation could not be overridden by EU conditionality, and judicial reforms began to lose their muster even though the preferential fit still sustained the judicial reform process, albeit at a slower pace. However, from 2013 onwards, a preferential misfit emerged, with the ruling elites sharply moving away from political reforms and starting

to reverse the gains of the previous periods mainly in order to weaken the domestic opposition. The continued decline in EU policy conditionality and the accession process's credibility combined with an alteration in the domestic preferences after 2013 led to a backsliding in judicial reforms in Turkey.

These findings beg the following questions: Did EU conditionality have unexpected consequences for Turkey's judicial reform? And if so, is this related to the inability of domestic political actors (Gürsoy 2012; Keyman 2013) to accept EU conditions or is it related to the loss of credibility (Schimmelfennig 2009) in the Turkish eyes regarding the EU's accession goal? To answer these questions, we need to look at the political reforms - specifically with regards to judicial reform and the EU's role in these reforms. The independence of the judiciary, its impartiality and efficiency constitute the areas within which judicial reforms were needed for Turkey to meet the EU *acquis* on justice, freedom and society. Nonetheless, the EU's *acquis* concerning the judiciary provided Turkey with a pressing need for reforming its own judicial system¹, especially if aimed at accession to the EU.

The paper first reviews the literature on the EU's role in fostering democratization and the rule of law in Turkey, and secondly provides an empirical analysis of the Turkish judicial reforms as they are influenced by the EU. Finally, it addresses the backsliding to authoritarianism and the reversal of judicial reforms since 2013. The paper draws its empirical data from the EU's Progress Reports, primary declarations from politicians and EU officials as well as face to face interviews conducted with EU and Turkish officials on judicial reform in spring 2015.²

2. Turkey's judicial reforms and the EU's political conditionality

Turkey has aimed to gain membership in the European Union as a foreign policy objective in line with its inclusion into the Cold War institutional arrangements (Müftüler-Baç 1997). This is why it applied to the then European Community (EC) in 1959 and signed an Association Agreement in 1963 after being declined membership. Its association with the EC revolved around economic concerns, which culminated in Turkey's application for full membership in 1987 (Öniş 2007). While Turkey's democratic credentials and economic problems prevented the opening of accession negotiations at the time, the EU enacted the Association Agreement's goal of a customs union for industrial products, which was realized in 1996. Even though a political dialogue was launched within the auspices of Turkey's association with the European Community, the main tools and strategies, which the EU began to use to influence Turkey's political change, emerged only in the 1990s, first with the 1995 Customs Union Agreement (Kubicek 2011; Öniş 2007) and then second with the Turkish inclusion into the EU's enlargement process (Noutcheva/Aydın-Düzgüt 2012; Müftüler-Baç 2005; Özbudun 2007), based on its eligibility stemming from the 1963 Association Agreement. The European Union's enlargement process launched in 1997 included Turkey in the list of applicant countries and expected Turkey to conform to the EU's Copenhagen criteria. In 1999, Turkey was declared an "official

1 This point was strongly emphasized in the interviews conducted with the EU Delegation officers in Ankara as well as the Turkish Ministry of Justice's EU desk officer on 30 March 2015.

2 Aylin Ece Çiçek, Ph.D. candidate in political science, and Meltem Müftüler-Baç conducted the interviews and Brooke Luetgert provided feedback to various drafts of the paper.

candidate destined to join the EU³ with the Helsinki summit decision, and in 2005, accession negotiations commenced. It is through these turning points that the EU's transformative power over Turkey is felt along with a transfer of rules. Judicial reform sits at the center of this rule transfer. There are two key issues underlying judicial reform in Turkey: one concerns the independence of the judicial system, and the other concerns the upholding of the principle of the rule of law.

Regarding compliance with EU political norms and rules, the implicit promise of membership might be sufficient on its own for fostering domestic reforms, or alternatively the EU would need to compensate the acceding countries for the political costs to be incurred as a result of these changes via its technical and financial assistance. The effectiveness of the EU's rule transfer depends on the EU's credibility and the material costs of adaptation (Schimmelfennig/Sedelmeier 2005; Börzel/Risse 2012). Yet, it is also still contingent on domestic conditions. If these are not favorable towards rule adoption, for example, if the government in power exhibits authoritarian tendencies, then the EU's ability to bring about reforms through its external modes is severely limited (Schimmelfennig 2009). This is why there is a direct link between the EU's credibility - measured through its commitment, financial assistance and the smooth running of the accession process - and the domestic factors at home, demonstrating political will to undergo often highly costly political change (Ademmer/Börzel 2013). These are not necessarily mutually exclusive processes as the government's readiness to accept these high costs depends on the EU's commitment to the process, which in turn depends on the acceding country's commitment to the costly political reform. Schimmelfennig et al's (2003) external incentives model presents this mutually reinforcing relationship as a process whereby the EU sets the main rules and conditions to which the acceding states must adjust in order to reap the benefits stemming from membership in this exclusive club. The EU's ability to engage with social and political actors in an acceding country is instrumental in enabling political reforms (Börzel/Risse 2000), but the process of engagement only works if and when the possible rewards exceed the domestic costs of rule adoption. The literature on political conditionality conceptualizes the EU's ability to transfer its rules to its external neighborhood, especially in its candidate states, as largely positive. However, the example of Turkey shows that the EU's political conditionality in the area of judicial reform presents a mixed picture. This is an outcome of the decreased credibility of the EU's accession process and the increased political costs at the domestic level. This might be precisely the framework needed to understand the Turkish judicial reform at the beginning of the accession process, and the downturn experienced since 2013.

Since 1998, both political and policy conditionality are highly visible in the Turkish context through informal and formal channels. The EU's Progress Reports are the key tools which formed the basis of the road map for judicial reform.⁴ At the same time, the EU officials were in constant political dialogue with their Turkish counterparts, specifically through the Reform Monitoring Group, the Delegation offices in Ankara and also through the Ministry of EU Affairs, originally the Secretariat General for EU Affairs, from 2001 to 2011. However, according to the EU Delegation in Ankara, political dialogue with the Ministry of Justice directly on judicial reform is more productive, as the involvement of the Ministry of EU Affairs as an intermediary

3 European Parliament (1999) 'Helsinki European Council 10 and 11 December 1999. Presidency Conclusions', available at http://www.europarl.europa.eu/summits/hel1_en.htm, accessed 8 January 2016.

4 Interviews with the EU Delegation political section, Ankara, 30 March 2015.

increases bureaucratic impediments.⁵ The EU supported the transformation of the Turkish judicial system with financial assistance and through twinning mechanisms. Turkey benefitted from the Pre-Accession Financial Instrument from 2001 to 2006 and the Instrument for Pre-Accession Assistance (IPA) after 2007. It actively participated in the twinning projects and the EU's Technical Assistance and Information Exchange instrument (TAIEX) program. The twinning projects in Turkey have been operational since 2002, with the highest level of concentration in the judicial sector. A significant percentage of the financial assistance for Turkey both under the IPA I and IPA II were for judicial reform - approximately 15-17 percent in each year and financial period. Table 1 provides an overview of the financial assistance tools for Turkey. This is a clear signal regarding the EU's priorities towards Turkish reforms. The EU's IPA I (2007-2013) and IPA II (2014-2020) were the key instruments of the EU's assistance for Turkey's judicial reforms after 2006. The EU relied on these financial instruments to signal its commitment to Turkey's accession process, despite the mixed signals coming from its members.

The first step of the EU seeking to transform the judicial sector in Turkey was directed towards the reform of the 1982 constitution. The 1982 Turkish constitution - which replaced the 1961 constitution - is the most recent constitution outlining the separation of powers and legal structures in Turkey. Article 9 of the 1982 constitution clearly states that "judicial power shall be exercised by independent courts on behalf of the Turkish Nation".⁶ Various articles of the 1982 constitution (137 to 140) spell out the independence of the judiciary and the key principle of separation of powers. Article 138 in particular guarantees the independence of the judiciary in Turkey and guards the principle of separation of powers (Tezcür 2009). Yet, it is mainly the 1982 constitution which forms the basis of the contestations in judicial reform. The judicial institutions, their relative independence from the elected officials, the prosecution of the opposition for political reasons and the legal basis for fundamental freedoms lie at the very heart of these contentions (Tezcür 2009; Sancar 2007; Hazama 2011).

The second step in assessing the EU's influence on Turkey's judicial reform is to trace the structural changes in the judicial institutions. The main organs of the judiciary are the courts, the Supreme Council of Judges and the Prosecutors (Hâkimler ve Savcılar Yüksek Kurulu, HSYK), the Court of Cassation (Yargıtay), the Council of State (Danıştay) and the Constitutional Court (Anayasa Mahkemesi). The Council of State is the highest judicial organ for administrative matters and the High Court of Appeals is the highest organ for justice and home affairs. The Constitutional Court is responsible for supervising and enforcing that all laws, decrees and rules conform to the 1982 constitution. It also has tutelage powers over the political behavior in Turkey, specifically in controlling the behavior of the political parties in line with the basic legal founding principles of the Turkish Republic (Shambayati/Kirdiş 2009; Tezcür 2009). These two aspects - amending the 1982 constitution and the restructuring of the domestic judicial organs - constitute the basis of judicial reform in Turkey.

The EU's influence on Turkish judicial reform can be assessed differently across three distinct periods: from 1999 to 2006, from 2007 to 2013, and from 2013 to present. In all of these different periods, while the EU

5 Interview with the Political Counselor, EU Delegation to Turkey, Ankara, 30 March 2015.

6 The 1982 Constitution of the Republic of Turkey is available at https://global.tbmm.gov.tr/docs/constitution_en.pdf, accessed 6 January 2016.

accession process was on track, it seems that there were different sets of external and internal factors that led to the adoption of judicial reforms. The empirical parts below address these periods with a view on the role of the EU in influencing rule transfer in judicial reform, and the role of the domestic conditions.

3. The Golden Years: 1999-2006

The EU's leverage on Turkey's political reforms has been most effective in the period from 1999 to 2006 (Ugur 2010; Müftüler-Baç 2005; Özbudun 2007; Nas/Özer 2012). In this time period, the EU's credibility and its commitment to the Turkish accession process were high, as indicated by Turkey being elevated to candidacy in 1999 and the opening of accession negotiations in 2005. The domestic political preferences in Turkey were also favorable to the transfer of rules from the EU, as even though there were significant costs involved in meeting the EU's norms, there was also a strong political will to meet the EU's accession criteria. In short, a relatively strong preferential fit (Ademmer/Börzel 2013) existed between the EU's demands and rules, and the domestic rules. The costs of adaptation in this period for judicial reforms to meet EU rules were offset by the expected material benefits of EU accession. This is also why the 2001 economic crisis⁷ in Turkey made the EU accession goal more desirable. More importantly, the 2002 elections led to a parliamentary majority for the AKP (Justice and Development Party), enabling it to pass many relatively controversial reform packages, and adopt the EU rules without major political opposition. The AKP in this time period committed itself to the EU accession goal and signaled its commitment by adopting multiple judicial reform packages. The interplay of the EU's commitment as well as the domestic receptivity and will to comply enabled rule transfer from the EU to Turkey, and fostered the restructuring of the domestic institutions, such as the judiciary. The EU's emphasis on judicial independence was critical in influencing the Turkish government's decisions to embark on a path of reform in the judicial system.⁸ The political costs of reforms were not very high, as the ruling party after 2002 had a high popular support, the parliamentary majority and faced a relatively weak opposition.

An important aspect of the judicial reforms in Turkey was linked to the Council of Europe's evaluations of the Turkish judiciary. Even though Turkey was one of the founding members of the Council of Europe in 1949, when it came to the acceptance and implementation of the Council of Europe's rules and European Court of Human Rights (ECtHR) decisions, it lagged behind the EU. As a result, the European Commission relied on the Council of Europe's reports and ECtHR decisions in its initial assessments of the Turkish judiciary. For example, in 1996, the Council of Europe established a monitoring mechanism to evaluate the judicial process in Turkey. In 1999, it became clear that in terms of judicial independence, the European Union's political evaluation of the Turkish judiciary partly depended on the decisions made by the Council of Europe and the ECtHR.⁹ The message was clear and loud, if Turkey wanted to be included into the EU's enlargement process as a candidate country, it needed to adopt significant reforms in its judiciary. The

7 In February 2001, the Turkish lira was significantly devaluated, leading to a severe recession in the country.

8 Interview on judicial reforms with a Professor of Constitutional Law from Yakin Dogu University, London, 20 March 2015.

9 This point is stressed in the interviews with the officials from the political counselor section in the EU Delegation, Ankara, 30 March 2015.

EU's political conditionality, expressed in the EU's Progress Reports in 1998 and 1999, provided Turkey with clear guidelines as to what kind of reform was expected in exchange for the carrot of candidacy. This is reflected in the European Commission's first Progress Report on Turkey in 1998, where the Commission clearly stated that the Turkish judicial system needed to be brought to the European standards as follows:

“The judicial system includes emergency courts (the state security courts) which are not compatible with a democratic system and run counter to the principles of the European Convention on Human Rights. Major efforts need to be made to ensure the real independence of the judiciary and to give the judicial system the human and material resources it needs to operate in a manner consistent with the rule of law”.¹⁰

The EU's political conditionality was highly visible regarding Turkey's judicial reforms from 1999 to 2006. In this time period, Turkey adopted nine harmonization packages in order to meet these criteria in addition to the changes in its Civic Code (2001), Labor Law (2003), Penal Code (2004) and the Criminal Procedures Code (2005). The 2001 Accession Partnership Document for Turkey clearly delineates the objective of “judicial independence as a precondition for Turkey's accession” (Council of the EU 2001). To a certain extent the EU's role in bringing about substantial political changes in Turkey in the period before 2005 is now empirically verified in the Turkey-EU literature (Aydın-Düzgit/Gürsoy 2015; Börzel/Soyaltin 2012; Kubicek 2011; Hazama 2011; Tezcür 2009). The EU's official Progress Reports, the Commission's declarations, the Council's Presidency conclusions as well as the Pre-Accession Financial Instruments were the EU's key tools to signal both its commitment to the Turkish accession and prioritization of judicial reform.

In line with the Commission's recommendations, the Turkish government adopted nine different constitutional amendments from 1998 to 2006, drafted 148 new laws and adopted multiple political and legal reform packages for meeting the EU's Copenhagen criteria (Müftüler-Baç 2005; Keyman 2013; Kubicek 2011). To give specific examples, as a rule transfer from the EU, the Turkish government in 2004 changed Article 90 of the 1982 constitution and stipulated that all international agreements Turkey entered into, including European legislation, would have priority over the Turkish legislation.¹¹ In another direct example, in response to the EU's concerns, the military judges serving on the State Security Courts (SSCs) were removed in 1999, while the courts were abolished in 2002. The main motivation for the removal of the military judges came from the Council of Europe and the ECtHR, as the latter in 1998 declared that the military judges' presence violated the European Convention of Human Rights, and in 1999 condemned and punished Turkey in nine different cases for violating fair trial principles.¹² This position was reflected

10 European Commission (1998) 'Regular Report from the Commission on Turkey's Progress towards Accession', p. 14, available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/turkey_en.pdf, accessed 6 January 2016.

11 This was reflected in an interview with a Professor of Constitutional Law, Yakin Dogu University, held in London at a conference at the London School of Economics on 20 March 2015 as the most important effect on the Turkish judicial strategy, effectively altering the very basis of the Turkish constitution and its view on state sovereignty.

12 European Commission (1999) 'Regular Report from the Commission on Turkey's Progress towards Accession', p. 9, available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/turkey_en.pdf, accessed 6 January 2016.

in the Commission's Progress Reports, indicating a need to remove military judges from the SSCs.¹³ When the Turkish government adopted these changes in 2002 and 2003, it was effectively addressing the EU's concerns regarding judicial reform with the amendments to the 1982 constitution and the domestic institutional restructuring.

From 2000 onwards, i.e. after Turkey became a candidate country, the EU Reports indicated the list of legal changes to be adopted for accession negotiations to begin. According to the EU Delegation to Turkey, the Progress Reports had the most important role in shaping Turkish judicial reform,¹⁴ as seen in the example above. This was reiterated as a key point by the Ministry of Justice bureaucrats as "we take all the points in the EU Progress Reports very seriously, and in our judicial reform and harmonization packages, refer to those key points in our argumentation".¹⁵ From 1999 to 2006, Turkey adopted multiple reforms (Müftüler-Baç 2005; Özbudun 2007; Noutcheva/Aydın-Düzgüt 2012), addressing the EU's concerns regarding judicial independence, impartiality and effectiveness. The most critical ones can be listed as the abolishment of the State Security Courts (2002), the establishment of a Justice Academy (2003), the establishment of Heavy Felony Courts (2003), the adoption of a new Penal Code (2004), the Criminal Procedures Code (2005) and the Law on the Prosecutors and Judges (2005). The period from 1999 to 2006 is particularly important due to the reforms and legal amendments concerning the Turkish judicial system, and the main actor as well as driver for these amendments was the European Union, including its political conditionality.¹⁶ That is because, at the time, the EU's credibility, and therefore, its effectiveness over Turkey was the highest in terms of the benefits it could offer, i.e. candidacy in 1999 and the opening of accession negotiations in 2005. The judicial reforms introduced in this period are an indication of the relative success of the external incentives in the Turkish case.

At the same time, from 1999 to 2006, different social and political forces at the domestic level all supported the Turkish quest for accession. There was a significant political will in the country to meet EU conditionality, and the domestic political costs of adaptation were moderate, mostly due to the parliamentary majority of the AKP, but also due to the perceived attractiveness of EU accession. The ultimate reward of accession provided the main incentive for Turkey's adoption of the EU-inspired political and legal reforms, as corroborated by the former director of the Human Rights Association in Turkey.¹⁷ The Reform Monitoring Group in the Office of the Prime Ministry and the EU Harmonization Committee within the Turkish Parliament acted as the key institutions for the deliberations on and preparations for these reform packages. The judicial reforms followed the National Plan for the Adoption of the *acquis* adopted in 2001, revised in 2003, and again in 2008. Having said this, the EU was particularly concerned with the separation of powers in Turkey and prioritized judicial reforms (Shambayati/Kirdiş 2009). The extensive judicial reform packages adopted from 1999 to 2006 were important in strengthening the independence of the Turkish judiciary. The EU assisted these changes with its Pre-Assistance Financial Instrument (2001-2006) as well as its twinning projects.

13 European Commission (1998) 'Regular Report from the Commission on Turkey's Progress towards Accession', p. 16, available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/turkey_en.pdf, accessed 6 January 2016.

14 Interview with the Political Counselor official at the EU Delegation to Turkey, Ankara, 30 March 2015.

15 Interview with the EU Desk officer in the Ministry of Justice, Turkey, 30 March 2015.

16 Interview with the former Director of the Human Rights Association in Turkey, London, 20 March 2015.

17 Author's interview with the former Director of the Human Rights Association in Turkey, London, 20 March 2015.

The Turkish judicial reforms in the period from 1999 to 2006 provide empirical proof for the EU's external incentives of reinforcement by reward; the interplay of the EU's credibility, the possible reward of accession and the domestic players' willingness to incur the costs of rule adoption made the judicial reforms possible.

4. The slowing down of reforms: 2007-2013

In the post-2007 period, Turkey's judicial reforms continued, but at a slower pace. An important factor in this time period was the changing nature of the EU's commitment to Turkey. The alteration in the relative strength of the EU's conditionality had an impact; while the ruling elite adopted the necessary reforms for EU accession and incurred the costs of adaptation, they did not expect to reap the benefits from EU accession, as the probability of accession declined. At the same time, there was a change in the preferences of the incumbent elites - the AKP - not only related to the EU but as a result of internal political changes and the increased societal opposition to their rule. The strong preferential fit of the previous time period began to decline after 2007, while EU conditionality weakened.

To turn to the EU's policy conditionality, in December 2006, the Council adopted the Commission's recommendation regarding the suspension of eight chapters relating to the customs union in the Turkish negotiations. Furthermore, the 2006 Council decision also established that unless Turkey implemented its 2005 Protocol, opening its harbors and ports to vessels from Cyprus, no chapter would be provisionally closed (Müftüler-Baç 2008). In addition, it is in this time period that Turkey began to face vetoes from France and Cyprus, even on chapters where it met the EU *acquis*. Once the accession negotiations began to lose their credibility - as France vetoed five chapters and Cyprus six in addition to the eight chapters frozen by the Council in 2006 -, the Turkish willingness to adopt highly costly judicial reforms declined. It was to be expected that the pace of reforms would slow down parallel to the Turkish perceptions about the declining credibility of EU conditionality.

However, it is also in this period that domestic political struggles in Turkey came to the forefront, increasing the costs of adaptation. In 2007, a constitutional crisis erupted over the presidency, 2008 saw political struggles over the headscarf issue and by 2010, the Ergenekon and Balyoz¹⁸ cases turned out to be main instruments for the elimination of the secular opposition to the ruling party, the AKP. While the AKP strengthened its electoral hegemony, it nonetheless encountered organized societal opposition, especially from the secular circles. Political struggles that erupted slowed down the political reform process, as the domestic political costs began to increase and while there was a decline in the EU accession goal's likelihood. Perhaps not surprisingly, as the Turkish judicial reforms lost their momentum, the EU's signals concerning its commitment to Turkey became weaker.

Nonetheless, some important changes were adopted in this time period. For example, the judicial provisions that allowed civilians to be tried in military courts were removed from the Turkish constitution in

18 The Ergenekon (2007-2010) and Balyoz (2009-2011) cases involved the highest military officials, journalists and civil society representatives being locked up under false pretenses of plotting against the government.

2009 in order to satisfy the impartiality requirement of the EU's judicial rules. While capacity building was not the key concern in the EU's political conditionality towards Turkey, new institutional structures, such as regional courts of appeals, altering the two-tiered structure of the judiciary, were deemed necessary to increase the judiciary's capacity. It was for this reason that in 2009, the Minister of Justice adopted a Judicial Reform Strategy to address certain shortcomings in the Turkish legal system, seen through the prism of Chapters 23 and 24. The regional courts of appeals, which the EU had asked to be established to reduce the case loads on the Court of Cassation, were created on paper, but were not implemented. The existence of multiple types of courts for different sorts of crime was against the EU *acquis*, an issue raised by the European Commission in its evaluations.¹⁹ Another area that remained in need of reform was the custody periods in Turkey, where suspects could be detained while their trials were underway for five years for crimes in general courts, and up to ten years for crimes against the state and terrorism charges. These long custody periods were criticized as violations of individual rights by the EU and the Council of Europe. From 2007 onwards, custody periods became a serious source of domestic debate as well as a source of contention between the EU and Turkey. However, it was only in 2013 that the Constitutional Court decreased the custody period for crimes involving terrorism to five years.

Significant judicial reforms were adopted to restructure domestic judicial institutions, particularly in terms of their set-up, power and functions. Two judicial institutions, the HSYK and the Constitutional Court (Anayasa Mahkemesi - AYM), sat at the center of the political and legal debates for such reform. The judicial reforms were evaluated by the European Commission regarding Turkey's capacity to meet the EU *acquis* in Chapter 23 (European Commission 2011b), indicating the reforms' place in policy conditionality. An important aspect of the judicial institutions' role in enabling Turkey to meet the EU's policy conditionality was their composition as well as the process of selection for their members. The most significant judicial reform package in this regard was adopted in 2010 with the constitutional referendum changing the composition and election process for the main judicial institutions - the HSYK and the AYM. These reforms constituted the second aspect of judicial rule transfer from the EU. Therefore, a few words are in order to provide the context within which this restructuring took place.

The HSYK, established in 1962, is the main body within the Turkish judiciary with the responsibility to appoint and remove members of the judiciary, specifically regarding the office of the public prosecutors. Article 159 of the Turkish constitution spells out its main responsibilities. It trains and promotes legal professionals, and is the main communicating channel for the decisions of the European Court of Human Rights and the Turkish judiciary. From 1998 onwards, when the first Progress Report on Turkey's ability to conform to the 1993 Copenhagen criteria was released, the EU was vocal about its concerns with regards to the HSYK, specifically its ability to represent the Turkish judiciary at large and the selection process of its members. These concerns were also summarized by the European Commission in its 2008 Progress Report:

“Concerns remain about the impartiality of the judiciary. On some occasions senior members of the judiciary made public political comments which may compromise their impartiality in future

19 Interview with a former official in the Directorate-General for Justice, the EU Delegation to Turkey, Ankara, 30 March 2015.

cases. As regards independence, there has been no progress on the composition of the High Council of Judges and Prosecutors or on the reporting lines of judicial inspectors” (European Commission 2008).

The 2008 Accession Partnership Document for Turkey stressed the need to

“ensure that the judiciary is independent of other state institutions, in particular as regards the High Council of Judges and Prosecutors and the inspection system. More specifically, ensure that the High Council of Judges and Prosecutors represents the judiciary as a whole” (Council of the EU 2008).

In 2009, the Ministry of Justice adopted a new Strategy for Judicial Reform²⁰, listing all the necessary changes to be made in line with the EU’s judicial independence criteria in response to the EU’s concerns with the HSYK. The key problem in the HSYK in terms of its role for the independence of the judiciary was its composition. Both the selection process of its members and that it was presided over by the Minister of Justice raised questions concerning the HSYK’s independence from the executive branch of the government. The judicial reform package adopted with a constitutional referendum on 12 September 2010²¹ addressed precisely these concerns. The referendum increased the size of the Assembly from seven to 22 prosecutors and judges, gave the President the power to appoint four of these, adopted a three department structure, created a separate secretariat and gave the HSYK a greater degree of autonomy from the government. The EU approved the 2010 legal changes, as stated by the European Commission in its 2013 Progress Report: “The High Council of Judges and Prosecutors continued with the implementation of its 2012-16 strategic plan, broadly promoting the independence, impartiality and efficiency of the judiciary” (European Commission 2013: 12).

Nevertheless, the EU remained critical of the HSYK composition due to the ongoing role of the Ministry of Justice in the HSYK, which it saw as a violation of the EU’s judicial independence norms. To be specific, the fact that an elected government official, i.e. a minister, presided over the Board was in stark contrast to a complete separation of powers between the executive and the judicial branches of government required in line with EU rules. The European Commission stressed the need for judicial reform in this respect, summarized in its 2013 Progress Report, as follows:

“Criticisms of the legislation on the High Council, including of the role given to the Minister of Justice and to the Under-Secretary of the Ministry, have, however, not been addressed as yet. In any constitutional reform, Turkey needs to consolidate the achievements of the 2010 constitutional amendments, in particular that more than half of the members of the Council are judges chosen by their peers from all levels of the judiciary, and address the shortcomings such as the role given to the Minister of Justice and to the Undersecretary of the Ministry” (European Commission 2013: 12).

20 Republic of Turkey Ministry of Justice (2009) ‘Judiciary Reform Strategy’, September, available at <http://www.sgb.adalet.gov.tr/Judicial-Reform-Strategy.pdf>, accessed 6 January 2016.

21 The Constitutional Amendment package can be retrieved from the Turkish Constitution webpage, available at <http://www.anayasa.gen.tr/5982.htm>, accessed 6 January 2016.

In short, judicial reform in the HSYK needed to address the role of the Minister of Justice as its presiding officer, which blurs the separation of powers principle. If the Chapter 23 were to be opened, this would constitute one of the key items over which the negotiations would be held.

The second key organ of the judiciary, which is in the spotlight for judicial reform in Turkey, is the Constitutional Court. The Constitutional Court is the highest organ checking the constitutionality and the legality of laws and bills adopted in the Parliament. It also acts as the Supreme Court for prosecuting elected governmental officials. The 2010 constitutional referendum granted Turkish citizens the right to individually apply to the Court if government decisions, laws or the implementation of laws violate their basic rights and fundamental freedoms, constituting an important change in the Constitutional Court. The adoption of the measure allowing individual applications to the Constitutional Court was initially designed to decrease the number of cases Turkish citizens take to the European Court of Human Rights. In 1987, the Turkish government granted its citizens the right to apply on an individual basis to the ECtHR when all other domestic sources of appeal were exhausted. This led to a tremendous increase in individual applications, which centered mostly on the violations of individual rights and liberties of the 1948 European Convention of Human Rights, which Turkey had signed and ratified in 1949. With the judicial reform eliminating the legal obstacle for individual applications to the Constitutional Court, a significant policy change was adopted. The right of individual application also transformed the Constitutional Court into an even stronger veto player.

Unexpectedly, increasingly after 2007, domestic veto players, such as the Constitutional Court, the Presidency and, unsurprisingly, the military, faced high costs stemming from the implementation of the judicial reforms. As the accession process became less credible, the struggle over judicial reform appeared like the instrumentalization of the political reforms for the ruling party's own material gains. In other words, the political struggles between different groups domestically impacted the rule transfer from the EU. The clear beneficiary of rule transfer and judicial reforms was the ruling AKP party. The domestic restructuring of judicial institutions increasingly resembled an instrumentalization of the judiciary against the AKP's political opponents and their removal from the political scene. This became apparent with the Ergenekon and Balyoz cases in 2009 and 2010, when military officers, civil society organization members, journalists and bureaucrats found themselves in custody and under trial for their alleged activities against the AKP government.

What needs to be noted here is that as Turkey adjusted to the EU's norms in judicial reform, i.e. engaged in a rule transfer from the EU, it increasingly relied on the Council of Europe and specifically the Venice Commission for guidelines. For example, in June 2004, the then Constitutional Court's president, Haşim Kılıç, requested help from the Venice Commission in revamping the Court's composition. Similarly, specifically after 2010, the Ministry of Justice in Turkey worked in close tandem with the Venice Commission, in particular for the adoption of an action plan for judicial independence. The Ministry of Justice drafted a time and action plan for judicial reforms according to this joint work, which was published in Turkey's *Official Gazette* in March 2014, but was not implemented. Nonetheless, the increased visibility of the Venice Commission and the Council of Europe in guiding Turkey's judicial reform, especially after 2011, is

important.²² When backsliding became apparent, it was the Council of Europe which became highly vocal about this.

In the period from 2007 to 2013, these two examples of judicial reform - institutional restructuring in the HSYK and the Constitutional Court - could be seen as the enforcement of the EU's conditionality. The 2010 constitutional referendum with its domestic institutional restructuring - especially regarding the HSYK and the Constitutional Court - remains an important judicial reform. In addition, the two cases demonstrate the ability of the EU to induce legal reforms even if the negotiations are stalled as has been the case in Turkey. This is possible through the instruments that the EU has at its disposal for stimulating legal reforms. However, what restricted the EU's ability to foster further judicial reforms in Turkey was the changing political atmosphere in the country and the authoritarian tendencies increasingly at display. As the ruling party's authoritarian tendencies grew, the costs of judicial reform also increased. As the EU no longer remained credible in the eyes of Turkey, the rule transfer from the EU to Turkey in the area of judicial reform slowed down.

As the negotiations did not proceed very smoothly and began to stall in this time period, the EU adopted the so called 'Positive Agenda in 2012' to revitalize the Turkish-EU relations and highlighted judicial reform as a critical cornerstone for Turkey's transformation. It might have been too little, too late as the domestic political scene was drastically altering. The EU-inspired judicial reforms provided the AKP with an opportunity to prosecute its opposition, and this demonstrated a change in the preferences of the ruling elite in the period from 2007 to 2013.

5. Backsliding and unintended consequences of EU conditionality: 2013-present

It is the backsliding into authoritarianism since 2013 that is highly revealing for the EU's ability to influence Turkey's judicial reforms. Since 2013, the EU's conditionality has become very weak, and there is a low fit or even a misfit between the preferences of the ruling elites and the EU's policy demands. First, the EU accession process was effectively frozen after 2013 which practically eliminated EU conditionality. Second, after 2013, the ruling party found itself fighting a battle for its own survival. This increased the misfit between the preferences of the ruling elite and the EU demands, resulting in a backsliding regarding judicial reform. An important factor concerning this backsliding in Turkey lies in the increased domestic turmoil, specifically in internal political fights (Özbudun 2014) and the increased costs that an independent judiciary represented when controlling the actions of the ruling party (Shambayati/Kirdiş 2009).

As in the previous periods, it is the interplay of the credibility of EU conditionality and the possible costs incurred by domestic political actors that determined whether Turkey would be committed to the path of judicial reform. However, reforms did not only slow down but got reversed. The key factor shaping that outcome seems to be the domestic political struggles, rather than the loss of the EU anchor. Since 2013, the AKP government found itself facing serious political opposition, even among its previous allies in the

²² I thank Emma Webb Sinclair, Amnesty International London, for bringing this point to my attention on 20 March 2015.

conservative circles. Two important developments stand out here; in June 2013, the AKP for the first time faced organized societal movements asking for its removal, first in the Gezi Park protests and second, with the corruption scandal in December 2013. The AKP began to fight for its own survival both as a political party and also for staying in office. At the same time, the EU anchor moved even further away as the new Commission President, Jean-Claude Juncker, made it clear that no enlargement would be possible until 2019, effectively freezing Turkey's accession to the EU.

A turning point for judicial independence in Turkey came at the end of 2013. On 17 December, public prosecutors started their investigations on a group of government officials and ministers concerning their suspected involvement in corruption.²³ The Turkish government under the AKP perceived these investigations as the judiciary's attempt to overthrow the government by a 'judicial coup'. Specifically, the Turkish government accused the Gulen movement²⁴ of controlling the judiciary and using judicial officials to stage a corruption scandal. In response, the government went after the judicial officers (the prosecutors and the police force) rather than those implicated in the corruption charges. As a result, the government dismissed hundreds of police officers following the prosecutors' orders and re-appointed public prosecutors to new posts. A crisis between the judiciary and the executive branches of the government erupted, indicating a change in the preferences of the ruling elite with regards to judicial reform.

It is these perceived threats by the AKP government from an independent judiciary that led to the adoption of a series of changes from 2013 onwards. The AKP government perceived the corruption case of December 2013 as a 'judicial coup', the attempt by its opposition to take control of the government. It is also for this reason that in March 2014, Twitter and YouTube were closed down to prevent leakage regarding the corruption charges. The judicial reform packages of 2013 and 2014 aimed at decreasing the relative independence of the judiciary from the executive, reversing the earlier waves of judicial reform.²⁵ First, in December 2013, a governmental decree was adopted to guarantee that all forms of investigations conducted by public prosecutors proceed only once they receive the green light from their superiors, specifically the Minister of Justice.²⁶ This effectively meant that even if the prosecutors wanted to issue search and arrest warrants for suspected criminals, such warrants would have to be approved by their supervisors - i.e. the Minister of Justice. This is largely because there is no separate unit for judicial crimes in the police force, and the prosecutors rely on the regular police forces - a criticism made by the EU as early as 2008. This particular governmental decree was to ensure that the Minister of Justice - an elected politician - controlled the judiciary. The decree formed the basis of a legislative bill prepared by the elected government for reforming the HSYK. The Turkish Parliament adopted the HSYK reform proposal in January 2014 as a new legal amendment, which became operational following the ratification by the Turkish President. With the adoption of the bill in February 2014, the Minister of Justice immediately reassigned close to 70 percent of the

23 *Hürriyet Turkish Daily* (2013) 'Ayakkabı kutusu Meclis kürsüsünde', 18 December, available at <http://www.hurriyet.com.tr/gundem/25395637.asp>, accessed 6 January 2016.

24 This is a religiously based social organization, which was in alliance with the AKP government until 2013. The corruption scandal led to a serious fault line between the two.

25 The reversal of reforms in this fashion was also emphasized in the interview with the political counselor section in the EU Delegation in Ankara, 30 March 2015, as a key factor in backsliding witnessed in Turkey.

26 Turkish daily newspaper *Zaman* (2014) 'Erdoğan'dan HSYK Açıklaması', 24 January, available at http://www.zaman.com.tr/politika_basbakan-erdogandan-hsyk-aciklamasi_2195374.html, accessed 6 January 2016.

judicial officers in the HSYK. This was an effective involvement of the executive in the judiciary,²⁷ a reversal of the judicial reforms of the earlier periods, including the 2010 constitutional referendum's amendments.

As a prime example of backsliding, this new judicial package of 2014 tied the HSYK firmly to the executive's control. The reform on the HSYK changed the independence of the Board, increased the Minister of Justice's control over the Board, specifically by making the Minister responsible for appointing some of the Board members without holding elections. Instead of the judiciary members electing their own Board, the HSYK Board would be hand-picked by the Minister, i.e. the executive. Since the HSYK is the key institution for the judiciary, if the elected official, i.e. the Minister of Justice, controls the judiciary by deciding who serves on the General Assembly of the HSYK, this would effectively end separation of powers. This, of course, went completely against the EU's rule transfer, as the EU had effectively asked the Turkish government to take steps to ensure the HSYK's independence from the Minister of Justice in its earlier Progress Reports. Even within the AKP's own ranks there was substantial criticism. For example, on 3 January 2014, Cemil Çiçek, the Speaker for the Turkish Parliament, summarized his opposition to these judicial changes as: "Article 138 of the Constitution (law that spells out the independence of the judiciary) is not functioning. Article 138 of the Constitution is dead in this country".²⁸ The reform package clearly violated the European rules on judicial independence. What seemed at stake was both independence and impartiality of the judiciary, but also to a certain extent its effectiveness. These judicial changes demonstrated that the preferential fit between the Turkish ruling elite and the EU rules no longer existed, and the domestic preferences now diverged almost completely from the EU demands.

The European Union's position on these developments was clearly expressed by the Commissioner for Enlargement Štefan Füle at the time:

"I urge Turkey, as a candidate country committed to the political criteria of accession, including the application of the rule of law, to take all the necessary measures to ensure that allegations of wrongdoing are addressed without discrimination or preference in a transparent and impartial manner [...] there is a need to guarantee the independence and impartiality of the judiciary's investigation into any wrongdoing, including corruption."²⁹

The Council of Europe was stern in its condemnation with Nils Muižnieks, Commissioner for Human Rights in the Council of Europe, stating: "Proposals to curb powers of High Council of Judges and Prosecutors represent serious setback for the independence of the judiciary in Turkey".³⁰ The spokesperson for

27 Author's interview with a member of the European Parliament in Brussels, 19 January 2015.

28 Demirtaş, S. (2014) 'Turkish Parliamentary Speakers Deplored End of Court Independence', *Turkish Hürriyet Daily News*, 3 January, available at <http://www.hurriyetdailynews.com/turkish-parliamentary-speaker-cicek-deplores-end-of-court-independence.aspx?pageID=238&nID=60549&NewsCatID=338>, accessed 6 January 2016.

29 Turkish daily newspaper *Zaman* (2013) 'EU Commissioner Füle Urges Transparency', 27 December, available at http://www.todayszaman.com/_eu-commissioner-fule-urges-transparency-in-corruption-investigation_335155.html, accessed 6 January 2016.

30 Turkish Daily newspaper *Today's Zaman* (2014) 'Europe Criticizes Turkish Government', 8 January, available at <http://www.todayszaman.com/news-336111-europe-criticizes-turkish-govt-move-to-curb-hsyk-power.html>, accessed 6 January 2016.

Commissioner Füle, Peter Stano, summarized the European Commission's position similarly as: "We are examining the draft from the perspective of the need to ensure the independence, impartiality and efficiency of the judiciary per Turkey's commitment to the political criteria for accession to the EU".³¹ A similar reaction came from the Venice Commission, as voiced by its spokesperson Daniel Höltgen, who declared: "The independence of the judiciary is a fundamental value of the Turkish Constitution. If the law is brought to the Constitutional Court, the Venice Commission believes that the Court will play its role of guarantor of the Turkish Constitution and its basic values".³² The incident over reforming the HSYK in line with the government's wishes was indicative of the underlying sources of contention. These declarations made it explicitly clear that since Turkey was moving away from the EU's norms on judiciary independence, it would not be reaping the material benefits of accession. The Turkish move away from the EU political rules and norms continued in 2015 with the June and November elections. When in the November 2015 general elections the AKP won a landslide victory, this clearly gave a signal for the continuation of the executive's control over the judiciary.

6. Conclusion

This paper demonstrated the EU's rule transfer and its effect on Turkish judicial reforms ever since the EU began to formally evaluate the Turkish judiciary in its 1998 Progress Report. The results are mixed. On the one hand, EU rules and norms were instrumental in highlighting areas where there was significant divergence - such as the independence of the judiciary and the problems in some of the legal institutions. On the other hand, the EU acted as an external veto player, which clearly signaled its preferences with regards to judicial reform with its stern warnings. The reform of the HSYK and the Constitutional Court with the 2010 constitutional referendum and the judicial reform packages adopted since 2005 highlight the EU's transformative power over Turkey. The decline in credibility of the EU's conditionality after 2007 led to a slowing down of reforms. Yet as the external driver for democratization, the EU still mattered for Turkish political and legal changes. It was the interplay of the EU's credibility and commitment to Turkey's accession coupled with the Turkish government's ability to pass reforms, both in terms of parliamentary capacity and the costs of adaptation that led to the adoption of reforms in the period from 1999 to 2006. Once EU credibility began to decline, so did the political reforms. However, the main break came in 2013, when negotiations were more or less frozen, the EU accession prospect not only moving further away but also becoming less desirable. It was in its essence domestic political struggles, which reached their peak in 2013, that led to a backsliding in judicial reforms. The weakening of EU conditionality combined with a preferential misfit between the domestic preferences as well as the EU's demands after 2007 led to a slowing down of the judicial reforms, and the sharp turn after 2013 led to their reversal.

From 1999 to 2006, the EU had been able to transfer its rules to the judicial system. The adoption of the judicial reform packages in Turkey was enabled as a result of a high conditionality and a strong fit between

³¹ Ibid.

³² Demirtaş, S. (2014) 'Venice Commission Urges Turkish Constitutional Court', *Hürriyet*, 6 March, available at <http://www.hurriyetdailynews.com/venice-commission-urges-turkish-constitutional-court-to-annul-judiciary-bill.aspx?pageID=238&nID=63242&NewsCatID=339>, accessed 6 January 2016.

the ruling elite's preferences and the EU's demands. At the same time, the EU's role in judicial reform was complementary to that of the Council of Europe and the European Court of Human Rights. In this regard it is particularly important that parallel to the European Commission's Positive Agenda, the Venice Commission of the Council of Europe published a report on judicial reforms in 2012³³ stressing the type of the required reforms. In 2014, Turkey's Ministry of Justice integrated these reforms into its roadmap. The Venice Commission's specific concerns regarding the Turkish judiciary constituted the basis for the judicial reform packages listed above, indicating a clear link between the EU's conditionality and the Council of Europe's rules.³⁴ The EU's conditionality was applied by use of Progress Reports, the Accession Partnership Documents (2001, 2003 and 2008) and the Joint Parliamentary committee meetings as well as the opening benchmarks of the Chapters 23 and 24, and finally the 2012 Positive Agenda. However, none of the EU commitments to Turkey could be adopted due to the effective veto from Cyprus. This constituted a significant alteration in the external environment and its incentives.

Having said this, the Turkish experience with the EU is qualitatively different from the current candidates in the Western Balkans as well as the Central and Eastern European countries, which joined in 2004 and 2007, respectively. First, Turkey has a long established state tradition stemming from centuries of authoritarian rule, and there are domestic level factors mitigating the EU's role. Second, Turkey found itself at the grips of a political power struggle between different actors in 2013, which led to an enhanced control of the government of all state institutions, including the judiciary. As the EU's attractiveness for Turkey is no longer as strong as it was in the 1990s, the government had a freer hand in pushing for certain changes that led to a backsliding, as illustrated by the changes in the HSYK in 2014. Third, the EU lost a significant amount of credibility in the Turkish eyes, as the negotiations process was stalled with individual vetoes from member states, such as Cyprus. It also needs to be noted that increasingly after 2013 the Turkish political leaders displayed a lack of political will towards the EU accession goal and demonstrated relatively little enthusiasm to meet the EU political criteria, if this meant increasing domestic opposition at home.

These factors add up to a situation where the EU's leverage concerning Turkish politics is not as strong and its conditionality does not have the same role as in the early 2000s. It is the interplay of the lack of the EU's credibility as an anchor for Turkey and the domestic forces at play in Turkey that led to this situation. Costs of adaptation increased without a hint of a reward in the near future. This lessened the commitment to rule adoption in Turkey. Yet, a further complication emerged with the political polarization in the country reaching a new climax in 2013. This in turn meant that increasingly after 2011, Turkey experienced a situation where individual rights and liberties were compromised and the basic pillars of liberal democracy, such as independence of the judiciary, were shaken, indicating a reversal of the political reforms underway since 2002. There was a slight change at the end of 2015, with the opening of Chapter 17 on Financial and Monetary matters for negotiations. Despite the relative stagnation of the negotiations, a revival of the process seems possible mostly due to the EU's wish to curtail the pressing refugee crisis it is facing. However, the extent to which the EU's influence over Turkey's judicial reforms is to be restored remains to be seen.

33 Neppi Modona, G. (2012) 'External and Internal Aspects of the Independence of the Judiciary', available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282012%29049-e>, accessed 23 April 2015.

34 Author's interview with Amnesty International Desk officer for Turkey in London, 20 March 2015.

This paper's analysis, therefore, constitutes an addendum to the conditionality literature by shedding light on the interplay of EU credibility and domestic costs, but also by demonstrating the conditions under which reforms could actually be reversed even for a country seemingly on track for EU accession. If the EU's conditionality remains strong with a high degree of credibility, and there is clarity of demands on what is to be done with regards to reaping the material benefits of EU accession, domestic changes in judicial reforms would be possible. However, when conditionality is weak, and the misfit between domestic preferences and EU demands is strong, backsliding is inevitable as in the Turkish experience with judicial reforms.

Table 1: IPA funds to Turkey 2007-2013 and 2014-2020³⁵

| Funding Mechanism | Transition Assistance and Democracy Building (€) | Judicial Reform (million €) | Funding Priority Indicator for Judicial Reform | Total (billion €) |
|-------------------------|--|-----------------------------|--|-------------------|
| IPA I 2007-2013 | 1.667,3 | 813,23 | 17% | 4.819 |
| 2007 | 256,7 | 373,46 | 17% | 497,2 |
| 2008 | 256,1 | | | 538,7 |
| 2009 | 239,5 | | | 566,4 |
| 2010 | 217,8 | | | 653,7 |
| 2011 | 231,2 | 439,77 | 17% | 799,9 |
| 2012 | 227,5 | | | 860,2 |
| 2013 | 238,5 | | | 902,9 |
| IPA II 2014-2020 | 1.581,4 | 624,9 | 14% | 4.453,9 |
| 2014 | 355,1 | 388,9 | 16% | 620,4 |
| 2015 | 196,6 | | | 626,4 |
| 2016 | 240,3 | | | 630,8 |
| 2017 | 137,2 | | | 636,4 |
| 2018-2020 | 652,2 | 236 | 12% | 1.940 |

³⁵ See European Commission (2011a) and European Commission (2014).

7. References

Ademmer, E. and Börzel, T. A. (2013) 'Migration, Energy and Good Governance in the EU's Eastern Neighborhood', *Europe-Asia Studies* 65(4): 581-608.

Aydın-Düzgit, S. and Gürsoy, Y. (2015) 'The Rule of Law and Judicial Reforms in Turkey between 2002 and 2013', in Erozan, B. (ed.) *Siyasetin Bilimi: İltar Turan'a Armağan, Nihal İncioğlu, Pınar Uyan-Semerci*, İstanbul Bilgi Üniversitesi Yayınları, pp. 327-341.

Börzel, T. A. and Risse, T. (2000) 'When Europe Hits Home: Europeanization and Domestic Change', *European Integration online Papers* 4(15).

Börzel, T. A. and Risse, T. (2012) 'From Europeanization to Diffusion: Introduction', *West European Politics* 35(1): 1-19.

Börzel, T. A. and Soyaltın, D. (2012) 'Europeanisation in Turkey. Stretching a Concept to its Limits?', *KFG Working Papers No. 36*, Research College 'The Transformative Power of Europe', Berlin: Freie Universität Berlin.

Council of the European Union (2001) 'Council Decision of 8 March 2001 on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with the Republic of Turkey', 2001/235/EC.

Council of the European Union (2008) 'Council Decision of 18 February 2008 on the Principles, Priorities and Conditions Contained in the Accession Partnership with the Republic of Turkey and Repealing Decision 2006/35/EC', 2008/157/EC.

European Commission (2008) 'Turkey 2008 Progress Report', SEC(2008) 2699.

European Commission (2011a) 'Multi-Annual Indicative Planning Document (MIPD) 2011-2013 for Turkey', C(2011) 4490 final.

European Commission (2011b) 'Turkey 2011 Progress Report', SEC(2011) 1201 final.

European Commission (2013) 'Turkey 2013 Progress Report', SWD(2013) 417 final.

European Commission (2014) 'Indicative Strategy Paper for Turkey (2014-2020)', available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140919-csp-turkey.pdf, accessed 23 April 2015.

Gürsoy, Y. (2012) 'The Changing Role of the Military in Turkish Politics. Democratization through Coup Plots', *Democratization* 19(4): 735-760.

Hazama, Y. (2011) 'Hegemonic Preservation or Horizontal Accountability. Constitutional Review in Turkey', *International Political Science Review* 33(4): 421-440.

Keyman, F. (2013) *Turkey's Transformation and Democratic Consolidation*, London: Palgrave.

Kubicek, P. (2011) 'Political Conditionality and EU's Cultivation of Democracy in Turkey', *Democratization* 18(4): 910-931.

Müftüler-Baç, M. (1997) *Turkey's Relations with a Changing Europe*, Manchester: Manchester University Press.

Müftüler-Baç, M. (2005) 'Turkey's Political Reforms and the Impact of the European Union', *South European Society and Politics* 10(1): 16-30.

Müftüler-Baç, M. (2008) 'Turkey's Accession to the European Union: The Impact of the EU's Internal Dynamics', *International Studies Perspectives* 9(2): 201-219.

Müftüler-Baç, M. and Keyman, F. (2012) 'The Era of Dominant-Party Politics', *Journal of Democracy* 23(1): 85-99.

Nas, Ç. and Özer, Y. (2012) *Turkey and the European Union: Processes of Europeanisation*, Aldershot: Ashgate.

Neppi Modona, G. (2012) 'External and Internal Aspects of the Independence of the Judiciary', available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282012%29049-e>, accessed 23 April 2015.

Noutcheva, G. and Aydın-Düzgit, S. (2012) 'Lost in Europeanization: The Western Balkans and Turkey', *West European Politics* 35(1): 59-78.

Öniş, Z. (2007) 'Conservative Globalists versus Defensive Nationalists; Political Parties and Paradoxes of Europeanization in Turkey', *Journal of Southern Europe and the Balkans* 9(3): 247-261.

Özbudun, E. (2007) 'Democratization Reforms in Turkey, 1993-2004', *Turkish Studies* 8(2): 179-196.

Özbudun, E. (2014) 'AKP at the Crossroads: Erdoğan's Majoritarian Drift', *South European Society and Politics* 19(2): 155-167.

Sancar, M. (2007) *Yargıda Algı ve Zihniyet Kalıpları [Perceptions and Predispositions in the Judiciary]*, Istanbul: TESEV.

Schimmelfennig, F. (2009) 'Entrapped Again: The Way to EU Membership Negotiations with Turkey', *International Politics* 46: 413-431.

Schimmelfennig, F.; Engert, S. and Knobel, H. (2003) 'Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey', *Journal of Common Market Studies* 41(3): 495-518.

Schimmelfennig, F. and Sedelmeier, U. (2005) *The Europeanization of Central and Eastern Europe*, Ithaca: Cornell University Press.

Shambayati, H. and Kirdiş, E. (2009) 'In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey', *Political Research Quarterly* 62(4): 767-780.

Tezcür, G. (2009) 'Judicial Activism in Perilous Times: The Turkish Case', *Law and Society Review* 43(2): 305-336.

Ugur, M. (2010) 'Open-Ended Membership Prospect and Commitment Credibility', *Journal of Common Market Studies* 48(4): 967-991.



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