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EU-Turkey Relations and the Stagnation of Turkish Democracy

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Abstract

The current stagnation of Turkish democracy goes hand in hand with the current impasse in EU-Turkey relations. A combination of domestic factors with a loss of credibility of EU conditionality led to a situation in which political reform is substantially stalled and in cases where it is realised, it is mostly conducted to serve the interests of the ruling political elite and with no real reference to the EU. The virtuous cycle of reform that characterised the 1999-2005 period has been replaced by a vicious cycle in which lack of effective conditionality feeds into political stagnation which in turn moves Turkey and the EU further away from one another.

Introduction

Back in August 2004, we published a working paper on the role of Turkey's relations with the EU in transforming Turkish democracy as part of a larger project on EU-Turkey relations conducted by the Centre for European Policy Studies (CEPS) and the Economics and Foreign Policy Forum (Aydın and Keyman 2004). The central argument of the paper was that the strengthening credibility of EU conditionality towards Turkey, coupled with favourable domestic and international dynamics resulted in substantial reforms towards the consolidation of Turkish democracy. The paper, written prior to the EU's decision to open accession negotiations with Turkey, concluded that the opening of accession talks with the country on the basis of a fair decision that rests on Turkey's achievements in its modernity and democracy would constitute a crucial step in remedying the remaining problematic aspects of Turkish democracy.

Almost eight years after writing that paper, a lot has changed in EU-Turkey relations as well as in the state of Turkish democracy. The EU opened accession negotiations with Turkey on 3 October 2005 upon the Commission's assessment that Turkey sufficiently fulfils the Copenhagen political criteria, but since then progress has been very slow. By the end of August 2012, Turkey had provisionally closed only one negotiating chapter (science and research) and opened 12 more out of a total of 35 chapters. As for the consolidation of Turkish democracy, there is general agreement that the reform process has substantially slowed down since 2005, with acute problems remaining in various areas such as minority rights, fundamental freedoms (in particular the freedom of expression) and the judicial system. In fact, as Turkey came closer to the EU with the accession talks, the Progress Reports paradoxically became longer and more critical. Even when reforms are undertaken, such as in the case of the rights of non-Muslim minorities, civil-military relations or the judicial system, they are not carried out with a view to acceding to the EU. If any external factor is mentioned in justifying reform, it is the global environment and globalisation that are viewed as the drivers of reform, not the EU.

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While the Turkish economy has tripled its size over the decade and grew close to 10% last year, with a corresponding rise in activism in its foreign policy, a mismatch has begun to be seen between its economic and foreign policy performance and the state of Turkish democracy. At the end of two more consecutive victories at the polls by the Justice and Development Party (AKP), in 2007 and 2011, attempts to consolidate Turkish democracy have begun to be replaced by steps towards a highly centralised executive democracy in which the state still holds primacy over society. It is true that the AKP took important steps in democratic reform primarily in its first term in office, moving the country towards starting accession negotiations with the EU. While some progress was achieved in areas such as civil-military relations, the AKP's second term in government also started to bear witness to growing authoritarian tendencies on the part of the governing party, resulting in restrictions on fundamental freedoms such as the freedom of expression. Questions continued on the issue of judicial independence, even among those who advocated for the "yes" campaign during the constitutional referendum that aimed to restructure the judicial system (see the section on the judicial system). Attempts to resolve the Kurdish issue were halted and replaced by Turkish nationalism, resulting in the escalation of the conflict in the southeast. To borrow Steven Cook's phrase, while the AKP was trying to "govern" through reform rather than rule in its early years in government, it is currently "ruling" but not "governing", whereby its dominance of the political system does not translate into good governance as required in a consolidated democracy (Cook 2007).

This paper first outlines the general background of the stagnation in Turkish democracy in the post-2005 period, with a particular focus on the credibility of EU conditionality and the domestic factors that hinder political reform. It then focuses on the problems and prospects that exist in consolidating Turkish democracy by paying particular attention to the role of the military, the state of human rights, the protection of minorities and the judicial system. The paper concludes that despite the currently troubled relationship between Turkey and the EU, the post-2005 trajectory of democratic reform in Turkey demonstrates that the EU remains a much needed fundamental anchor in the consolidation of Turkish democracy.

External constraints and domestic factors: the trajectory of post-2005 democratic reform in Turkey

The Europeanization literature identifies two EU-level factors as critical for successful EU conditionality in democratic consolidation - sizable and credible incentives (Schimmelfennig and Sedelmeier 2004). The EU has offered Turkey the maximum stimulus it is able to offer - full EU membership upon meeting accession requirements. Indeed, as elaborated in depth in our 2004 paper, EU incentives played an important role in Turkey's democratic reform when the credibility of conditionality was relatively high between 1999 and 2005 - a time period spanning the granting of candidacy status in 1999, followed by the promise of launching accession negotiations in 2002 (on condition that Turkey fulfils the Copenhagen political criteria) and the opening of accession negotiations in 2005. For instance, more than half of all the constitutional amendments in judicial reform undertaken since the adoption of the 1982 Constitution took place between 1999 and 2005 (Noutcheva and Aydın-Düzgüt 2012: 67). Yet, the credibility of the EU's offer has been questioned heavily after the opening of accession negotiations with Turkey in 2005.

Triggered by the rejection of the proposed Constitutional Treaty in France and the Netherlands, the EU's "absorption capacity" quickly became a key element of the debate on Turkey's accession in 2005 (Emerson et al. 2006). This concept has, in fact, been on the table since the 1993 Copenhagen Summit, which stated in its conclusions that "the Union's capacity to absorb new members, while maintaining the momentum of European integration, is [...] an important consideration in the general interest of both the Union and the candidate countries" (European Council 1993: 13). In the previous enlargement round, it was actually treated as a "consideration" that calls upon the EU itself to

reform rather than a formal criterion of accession. Applied to Turkey, however, the debate focused upon Turkey itself, and particularly its unchanging and unchangeable features: its size, population, culture, and unpopularity with the EU citizens, conveying the message that, unlike the Eastern enlargement, complying with the formal criteria alone may not be sufficient for Turkey's full accession to the Union. The concept was subsequently incorporated into the Negotiating Framework for Turkey which stated that "while having full regard to all Copenhagen criteria, including the absorption capacity of the Union, if Turkey is not in a position to assume in full all the obligations of membership it must be ensured that Turkey is fully anchored in the European structures through the strongest possible bond" (European Commission 2005b: para. 2).

This phrase invited a reflection on alternative scenarios to membership such as a "privileged partnership" proposed by German Chancellor Angela Merkel and resulted in the addition of the "absorption capacity" to the Copenhagen criteria. Furthermore, the Negotiating Framework for Croatia, adopted on the same day and drafted in almost identical language, omitted this phrase while only referring to "absorption capacity" as "an important consideration in the general interest of both the Union and Croatia" (European Commission 2005a: para. 16). In the same way, the Negotiating Framework for Turkey included other provisions that were absent from the text on Croatia, such as "permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures [...] in areas such as freedom of movement of persons, structural policies or agriculture" (European Commission 2005b: para. 12). This was the first time that permanent derogations were being introduced in the EU's enlargement policy, suggesting to the Turkish elite and public that a "second-class membership" was being envisaged for Turkey. It also coincided with the election of Nicolas Sarkozy and Angela Merkel and their wide-reaching statements on the undesirability of Turkish accession. In fact, upon Sarkozy's coming to power in 2007, the French government blocked negotiations on five chapters of the *acquis* on the grounds that the chapters were directly linked to full membership.

Another crucial factor that has hampered conditionality in the case of Turkey is the Cyprus conflict. Upon the approval of the UN sponsored Annan Plan by the Turkish Cypriots and its rejection by the Greek Cypriots in the April 2004 referenda, the Council declared that it was "determined to put an end to the isolation of the Turkish Cypriot community" (European Council 2004: 9). The comprehensive package of aid and trade measures proposed by the Commission in July 2004 was however left largely unimplemented due to strong Greek Cypriot resistance in the Council (ICG 2006: 12-13). Nevertheless, the EU continued to pressure Turkey to open its seaports and airspace to Greek Cyprus as required by Turkey's customs union agreement with the EU. Turkey, in turn, refused to comply on the grounds that no steps had been taken to end the isolation of the Turkish Cypriots. In December 2006, the Council decided not to open negotiations on eight chapters of the *acquis* relevant to the issue¹ and not to close any of the chapters provisionally until Turkey met its obligations towards Cyprus. This has, to a large extent, served to block progress in accession negotiations and substantially fed into the perceptions in Turkey that the country is being treated unfairly, with the EU using Cyprus as a tool to block Turkey's accession (Öniş 2009: 7).

This was clearly reflected in the surveys designed to gauge the attitudes of the Turkish public towards the EU and the accession process. These suggest that public support for Turkey's EU accession remained considerably high until the second half of 2005. Support for EU membership rose significantly after the Helsinki Summit from 62% in 1998 to 74% in 1999 and to 75% in 2001. Support levels stabilised at around 70% between 2002 and the second half of 2004, a period that coincided with the ascendancy of the AKP into power and the relative

¹ The suspension includes the chapters on the free movement of goods, right of establishment and freedom to provide services, financial services, agriculture and rural development, fisheries, customs union, transport policy, and external relations.

strengthening of the credibility of EU conditionality.²

Figure 1 (in the Annex) summarises the *Eurobarometer* data from 2004 to 2011.³ The data suggests that from the second half of 2004 onwards (with slight exceptions in 2006, 2009 and 2010), the Turkish public increasingly found EU membership as not necessarily a good thing. By the first half of 2011, support levels fell to 41%. The most rapid decline was from 55% in the second half of 2005 to 44% in the first half of 2006. This coincided with the period in which the absorption capacity debates became popular in Europe, the negotiating framework with its emphasis on “open ended negotiations” and “permanent derogations” was drafted and the first concrete signs that the Cyprus issue would have a substantial impact on accession negotiations appeared.⁴

Previous research found that attitudes towards EU membership in Turkish society are largely dependent on individuals’ utilitarian evaluations (hence the expected impact of EU membership on their lives) and the likelihood of Turkey becoming a member of the EU (Kentmen 2008; Çarkoğlu 2003). In relation to that, the Turkish public ranks economic welfare and the freedom to travel, work and study in the EU among the top two signifiers of EU accession (European Commission 2009a). Furthermore, in a national survey conducted in 2006, two thirds of the respondents expressed disbelief in Turkey ever becoming a member of the EU (Çarkoğlu and Kalaycıoğlu 2009: 127). Hence it can be argued that the strong possibility of imposing permanent limits on the free movement of people and on the full enjoyment of EU funds, coupled with the decreasing expectation of full membership, had a significant negative impact on levels of Turkish support for EU accession. This in turn implies that EU conditionality has for some time now been facing a lack of societal legitimacy in Turkey, whereby Turkish citizens are becoming increasingly estranged from the European project. The danger that this holds for democratic reform is that it reduces the incentive for the adoption of costly reforms to attain EU accession, ties down the hands of domestic reformers and thus also undermines the power of the Union as an effective external anchor for democratic reform in Turkey.

In the case of Turkey, the low degree of societal legitimacy also affects the democratic norms promoted through EU conditionality. The popular legitimacy of externally promoted democratic norms has been found in the past to be one of the key ingredients of successful democratic conditionality by the EU (Schimmelfennig and Sedelmeier 2004). Nonetheless, societal attitudes towards democracy in Turkey tend to display a mixed picture in terms of their conduciveness to democratic consolidation. On the one hand, a large majority of the public seems to support democracy as a regime type. A study published in 2007 found that 77% of those surveyed indicated democracy as the best regime type (Çarkoğlu and Toprak 2007: 55). However, a more recent study conducted in 2011 also found that those who agree or strongly agree with the assertion that “democracy can sometimes be compromised to restore order and security” amount in total to 44.8% of those surveyed (Kemahlioğlu and Keyman 2011: 21). The latter study also puts forward other indicators which point out that order and stability is generally valued highly, often more so than fundamental rights and freedoms or the right of representation among Turkish public opinion. For instance, 41.9% of those surveyed agree with the assertion that political parties can be shut down while 48.5% stated their preference to retain the exceptionally high 10% electoral threshold for political parties to enter into Parliament (Kemahlioğlu and Keyman 2011: 18, 20).

2 See European Commission, *Candidate Countries Eurobarometer 2001 (Autumn 2001)*, 2003.2 (Spring 2003) and 2003.4 (Autumn 2003); *Standard Eurobarometer No. 62 (Autumn 2004)* and *Turkey’s National Report in Standard Eurobarometer No. 63 (Spring 2005)*.

3 See also European Commission, *Standard Eurobarometer Nos. 71 (Spring 2009)*, 72 (Autumn 2009), 73 (Spring 2010), 74 (Autumn 2010) and 75 (Spring 2011).

4 In September 2005, just before the launch of the accession negotiations, the Council issued a declaration reminding Turkey that the EU and its member states “expect full, non-discriminatory implementation of the Additional Protocol” to all EU member states and that “[f]ailure to implement its obligations in full will affect the overall progress in the negotiations” (European Council 2005: para. 3).

Equally problematic is the level of tolerance in Turkish society, as a key element of democratic consolidation that cross-cuts almost all sub-areas of democratic reform. For instance, the same study found that 17.8% of those surveyed asserted that they would feel uncomfortable living with Kurds (Kemahlioğlu and Keyman 2011: 20). Other studies reached similar conclusions. In their study on conservatism in Turkey, Çarkoğlu and Kalaycıoğlu found that 68% of the Turkish population rank higher than 50 (where the scale runs from 0 intolerance to 100) in their political intolerance scale (Çarkoğlu and Kalaycıoğlu 2009: 50-54). Around 62% of respondents argued that minority views should not be tolerated, a similar majority supported the view that freedom of speech could be curtailed for certain political groups, an even higher majority (64%) did not tolerate peaceful demonstrations by extremist groups and 57% believed that newspapers did not have the right to publish articles that are “against national interests” (Çarkoğlu and Kalaycıoğlu 2009: 51). On specific liberties, another study found that while 43% are in favour of the abolition of the headscarf ban in universities, only 11.4% of the public seem to support the right to education in Kurdish (Çarkoğlu and Toprak 2007: 27). Read together, these and other data point at the prevailing existence of a “sectarian” understanding of democracy in Turkish society, where the rights of those that are perceived as one of “us” are upheld while the rights of those denoted as “others” are disregarded. Needless to say, this runs counter to the nature of the democratic reforms that the EU demands from Turkey, which first and foremost require the country to undertake a substantial shift from a monolithic conception of the “nation” to one that is inclusive of diversity.

One can argue that these societal trends are not new. Yet, they have recently been compounded by an increasing degree of political and societal polarisation along the axis of the Islamist-secularist divide as well as that of Turkish-Kurdish nationalism, which makes it exceedingly difficult to undertake democratic reform through societal deliberation (Çarkoğlu and Kalaycıoğlu 2009). This polarisation is acutely visible at both the public and the elite level. For instance both the 2007 and 2011 elections as well as the Constitutional Referendum in 2010 were fought in highly polarised (and personalised) political contexts (Aydın-Düzgüt 2012; Çarkoğlu 2007; Kalaycıoğlu 2011). At the societal level, public views on key issues of democratic consolidation are now largely divided along and determined by partisan lines. For instance, on a 1 to 10 scale that measures satisfaction with the functioning of democracy in Turkey, those who have voted for the AKP were found to score on average 6.6 whereas the degree of satisfaction with democracy among those who voted for the main opposition party, the Republican People’s Party (CHP) was found to be on average 2.9 (Kemahlioğlu and Keyman 2011: 14). The same study found that among those who stated that freedom of expression exists for writers and journalists, 55.6% had voted for the AKP while only 19.6% were reported to be CHP voters (Kemahlioğlu and Keyman 2011: 15).

These societal trends became more forceful hindrances to democratic consolidation when combined with another key domestic variable: the differential empowerment of political actors. The differential empowerment of political elites through EU accession incentives can account for the pace and direction of political reform in candidate countries (Schimmelfennig and Sedelmeier 2004; Vachudová 2005). In other words, where and when domestic political actors seize the opportunities arising from the EU’s conditional offer of membership in line with the predictions of rational choice institutionalism, democratic institutional change occurs. This has also been the case in the Turkish context, where the AKP, upon coming to power in 2002, successfully promoted EU accession and its democratic reform agenda to widen its support base towards the centre. The party attempted to preserve its core constituency through promise of extended religious freedoms and to guarantee its survival vis-à-vis the secularist state establishment in the judiciary and the military (Özel 2003).

Especially after its second electoral victory in 2007, the AKP became much stronger both in society and against the secularist establishment, and thus became less dependent on the EU and its democratisation

agenda (Öniş 2009: 9). The reactions of the government to the recently intensified EU criticisms of the state of democracy in Turkey are indicative of the weakened reliance on the EU. In response to the critical report of the European Parliament on Turkey published in March 2011, Prime Minister Erdoğan stated that the “Parliament is entrusted to draft the Report and we are entrusted to do as we see fit” (Milliyet Daily 2011). In addition to the increased strength and confidence of the government, the EU’s decreasing societal legitimacy as an external actor has contributed to this indifference. To a question on why the 2010 constitutional referendum was not justified in terms of Turkey’s EU accession, the Minister of EU Affairs and the Chief Negotiator Egemen Bağış replied that “the EU does not make the news anymore, the EU does not sell” (Bağış 2010).

This has had two main implications for democratic change in Turkey. First, despite the weakening EU anchor, the relative strength of the government has facilitated the pursuit of further reform in some areas, most notably in strengthening civilian control over the military, which largely stood in opposition to the government. However, the relative weakness of the opposition, the dwindling of the EU anchor and the sectarian views on democracy among the public have also made it easier to undertake more selective democratic reforms according to the government’s interests. For example, while civil-military relations are being reformed (see below), the government still chooses to retain some of the infamous remnants of the 1980 coup (and ensuing constitution), such as the High Education Board (YÖK) through which it exercises significant control over universities. A similar situation can also be found in the more specific area of judicial reform. The government, especially during its second term, has had conflictual relations with the largely oppositional Kemalist judiciary, culminating in the closure case against the AKP in March 2008. In August 2009, the government announced the Judicial Reform Strategy and put its main provisions to referendum in 2010. The amendments aimed to democratise the judiciary and make it more responsive to the demands of society by diversifying the background of the members of the Constitutional Court and widening the composition of the High Council that determines the career paths of judges and prosecutors. But the amendments were criticised mainly for retaining substantial provisions that compromise judicial independence, and a number of incidents in the years that have followed suggest that these fears were not completely unfounded (see also below).

Another domestic constraint on the post-2005 period concerns the rise of PKK violence. It is well known that the lower the political costs that are associated with compliance/rule adoption, the easier it is for EU conditionality to bear full fruit (Schimmelfennig et al. 2003). The political cost of compliance with democratic reforms, particularly regarding the Kurdish issue, was lowered at the end of the 1990s with the capture of PKK leader Abdullah Öcalan and the military defeat of the PKK. The window of opportunity that opened then allowed for significant reforms that directly aimed at improving the lives of Kurds in the country, such as the granting of the right to broadcast in Kurdish, to learn the Kurdish language and use Kurdish names. Nonetheless, largely thanks to political instability in Iraq, the PKK renewed its terrorist activities in 2005, intensifying in 2007 and pushing the government into taking military action against the PKK bases in Northern Iraq in February 2008. Violence continued up until the 2011 general elections and has been compounded since then with developments in Turkey’s southern neighbourhood, where the PKK has recently found refuge in the political vacuum opened by the Syrian civil war.

The renewal and rise of PKK terrorism enhances the nationalist fervour among the public and political parties, hindering substantial reform particularly in the field of minority rights (see also the section on minority rights). It also demonstrates the close interconnectedness between Turkish foreign policy and the state of its democracy. As its ties with the EU have weakened, Turkey’s links with the Middle East have grown. This has generally been welcomed as a positive step that could result in Turkey acting as a European power promoting democracy in its neighbourhood. However it has also displayed

the limits of Turkey’s “demonstrative effect” (Kirişçi 2011b), given the resilience of Turkey’s Kurdish issue and the need for Turkey to practice what it preaches in order to remain a credible actor and to prevent the escalation of its own ethnic conflict to the intensity of those in its immediate neighbourhood.

Against this background, the next section discusses the state of reform and the remaining problems in four key areas of democratic consolidation: the military, human rights, the protection of minorities and the judicial system.

Civil-military relations

Substantial steps were undertaken to realign civil-military relations in Turkey between 1999 and 2005 when reform zeal was at its peak. As outlined in further detail in our previous paper, reforms in this period particularly concerned those areas that were specified clearly by the EU, such as the powers of the National Security Council (NSC), the presence of military representatives on public bodies, and the transparency and control of the military budget. With the 2001 constitutional amendments, the sixth and seventh harmonisation packages, and the May 2004 constitutional amendments, a number of fundamental changes were made to the duties, functioning and composition of the NSC, as well as to the conditions relating to the monitoring of military spending.

The pace of reform declined after 2005, only to pick up after 2010 following key domestic developments. As the country approached the presidential and general elections in 2007, the military became increasingly willing to step out in protest against several EU officials’ statements and the overall policy drive to establish complete civilian control over the military. This reached a peak after the last-minute nomination of Abdullah Gül as the AKP’s candidate for the presidency. The main critique directed at the AKP and Prime Minister Erdoğan in the run-up to the presidential elections was the way in which no consensual agreement mechanisms were sought with the opposition and civil society, with the aim of selecting a candidate accepted by a large segment of Turkish society. The fact that Gül himself was a major figure of the National Outlook movement from the days of the Welfare Party and that his election would introduce the headscarf in the top public office in Turkey, via his wife, aggravated the controversy mainly among the secular elite, including the military and certain segments of civil society. On the eve of the first round of votes for election of the president held in the Turkish Grand National Assembly, the military issued a statement on its official website, highlighting the threat to secularism and hinting at a possible intervention if deemed necessary. The statement demonstrated that despite the legal amendments and institutional reforms undertaken thus far, the military still perceived itself as the guarantor of secularism as well as the territorial integrity of Turkey. The AKP responded that this was unacceptable in a democracy where the military should be subordinate to the government and proceeded with the election of Gül as the president, leading to a considerable loss of power on the part of the military vis-à-vis the civilian authority (Aydın-Düzgüt and Çarkoğlu 2009).

The reforms that followed cannot be attributed solely to the incident of the military memorandum alone. In addition to the expanding confidence and legitimacy of the AKP after the 2007 general elections, two other crucial developments triggered further reform in this area (Gürsoy 2011: 297). One concerns the split within the military on their role in politics, where there was rising disagreement on the strategies to be deployed in dealing with the government (Gürsoy 2011: 297). The second, and possibly more influential development was the launch of a comprehensive investigation into a neo-nationalist gang named *Ergenekon* in 2008, on the grounds that it was engaging in plans to stage a violent uprising against the government. The *Ergenekon* case was soon to be followed by the *Balyoz* (Sledgehammer) case that was initiated in December 2010 against around 200 officers in the Turkish military with the accusation of engaging in coup plots against the government.

The *Ergenekon* and *Balyoz* cases led to the arrest and trial of hundreds of active and retired military officers of all ranks, the most notable of which was the arrest of the former Chief of Staff İlker Başbuğ, hence fuelling the public debate on the role of the military in politics, contributing to the declining levels of societal trust toward the military and increasing the impetus for further reform in this area (Gürsoy 2011: 298).⁵ The first notable sign of reform after the long pause came in June 2009 when the Parliament passed legislation that allowed civilian courts to try military officers in peacetime, including in the event of attempted coups, and lifted the remaining powers of military courts to try civilians in peacetime. This was followed in January 2010 by the abolition of the Protocol on Cooperation for Security and Public Order (EMASYA), which granted the military the right to carry out operations against internal security threats without the consent of the civilian authority (CNNTurk 2010).

These reforms were followed by a series of constitutional amendments introduced by the constitutional referendum of September 2010 which addressed, above all, a long debated legislative/institutional issue concerning the decisions of the Supreme Military Council (SMC) that were until then immune from judicial oversight. The constitutional amendments opened dismissals of military personnel by the SMC to judicial review. Concerning judicial matters regarding the military, the 2010 constitutional amendments introduced further reforms such as lifting the constitutional restrictions on the trial of the perpetrators of the 1980 coup, allowing for the trial of the Chief of Staff and the commanders of the army, navy, the air force and the gendarmerie before a high tribunal for any offences committed during their official duties; and limiting the jurisdiction of military courts to military service and military duties. These legislative/institutional reforms on judicial matters concerning the military were combined after the constitutional referendum with those reforms that targeted the military's autonomy in the economic sphere. Although reforms carried out in the 1999-2005 period had tackled the military's economic power mainly by enhancing the transparency of defence expenditures by expanding the remit of the Court of Auditors to the military budget, there remained significant problems regarding the audit of extra budgetary resources as well as the actual implementation of the Court of Auditors' new powers due to the lack of the necessary amendments to the Law on the Court of Auditors (Gürsoy 2011: 303). This was remedied through the adoption of the Law on the Court of Auditors in December 2010 that allowed for the external ex-post audits of military expenditure and for the audits of extra budgetary resources that belong to the defence sector, including the Defence Industry Support Fund that covers military procurement (European Commission 2011: 13).

The empowerment of civilian authority vis-à-vis the military has gone beyond legislative and constitutional changes and has been reflected in actual policy practices. For instance, the military's autonomy in taking decisions on matters related to the promotion and retirement of military personnel in the SMC has started to erode. This was first demonstrated in August 2010 when the government intervened in the decisions concerning the appointment and promotion of senior level military officials.⁶ In July 2011, this loss of autonomy reached its peak publicly when the chief of staff and the commanders of the army, navy and the air forces requested their retirement prior to the annual SMC meeting in response to the government's insistence on the retirement of the military officers who were imprisoned as suspects during the *Balyoz* trials. Contrary to the SMC tradition where the civilians merely rubberstamped the military's decisions on their officers' careers, the government had not taken up the military's suggestion to postpone the decisions on the suspects' appointments and promotions until the case was resolved and presided over the SMC in which it swiftly filled the new posts, thus demonstrating its acquired control over the

⁵ Eurobarometer data shows that for the first time in 2010, the level of societal trust in the Turkish military reached the same level (70 percent) observed on average in EU member states.

⁶ Despite the wish of the military, civilians prevented the appointment of a four-star general, Hasan Işsiz, as the commander of the army because of allegations that he was involved in coup plots against the government. See *Radikal* 2010.

career decisions of top military personnel (Hürriyet 2011). The policy of retiring military officers detained under the ongoing cases was continued in the SMC meeting of August 2012.

A similar case in which civilian empowerment is evident concerns the drafting of the National Security Policy Document (*Milli Güvenlik Siyaset Belgesi*), a classified state document which lists the internal and external threats to national security. While the document was in the past prepared exclusively by the military, the government took an active part in changing the document in 2010, reportedly removing Russia, Iran, Iraq and Greece from the list of potential security threats in line with the government's "zero problems with neighbours" foreign policy maxim (Hürriyet Daily News 2010).

There are also certain changes in symbolic practices which suggest realignment in Turkish civil-military relations (Sargil 2012: 10-11). For instance, while the Prime Minister and the Chief of Staff traditionally sat together at the head of the table in SMC meetings, this changed for the first time in August 2011 when the Prime Minister chaired the meeting alone. In a similar vein, while civilians and military officers in the past sat separately on each side of the table in NSC meetings, there has been mixed seating on both sides of the table since August 2011. Another symbolic change has been the decision taken in 2011 to remove from the parliament's premises the military unit entrusted with protecting the parliament.

Box 1. Post-2005 reforms in civil-military relations

- » With the amendments to the Military Criminal Code in June 2006, civilians will not be tried in military courts in peacetime unless military personnel and civilians commit an offence together. The amendments also introduced the right of retrial in military courts in accordance with the decisions of the European Court of Human Rights (ECtHR).
- » In January 2010, the Protocol on Cooperation for Security and Public Order (EMASYA), which granted the military the right to carry out operations against internal security threats without the approval of civilian authority, was abolished.
- » With the constitutional amendments of September 2010, the expulsions of military staff by the SMC were made subject to judicial review.
- » The constitutional amendments of September 2010 lifted the constitutional immunity of the perpetrators of the 1980 coup.
- » The September 2010 constitutional amendments limited the jurisdiction of military courts to "military service and military duties", and allowed civilian courts to try military officials accused of crimes against state security, the constitutional order and its functioning.
- » The Law on the Court of Auditors adopted in December 2010 allowed for external ex-post audits of armed forces' expenditure and audits of extra budgetary resources in the defence sector.

The legislative/constitutional amendments, the ongoing trials on coup allegations, actual changes in internalised traditional practices and even changes in symbolic practices have played a considerable role in moving the 1999-2005 reforms in civil-military relations forward by substantially reducing the prerogatives of the military (most notably in the judicial and economic spheres) and empowering the civilian authority. Having said that, there are still remaining problems concerning the full civilianisation of Turkish politics.

The organisation of the defence sector remains problematic with the Chief of Staff still reporting to the Prime Minister rather than the Minister of Defence, and with the Gendarmerie - responsible for ensuring security and public order in areas that are outside the jurisdiction of the police - reporting to the Chief of Staff rather than the Minister of the Interior. Although civilians are now much more active in SMC decisions, career management decisions taken in the SMC meetings are exempt from judicial review, with the exception of those that relate to the expulsion of military personnel. Reforms enacted with a view to eroding the economic prerogatives of the military face difficulties

in implementation due to the unwillingness in practice of civilian actors to use their new powers. For instance, parliamentary oversight of military expenditure remains very limited in practice, whereby ministers from both the government and the opposition parties in the Planning and Budgeting Commission barely deliberate on the military budget or the projects of the Ministry of Defence (Akyeşilmen 2010). The military continues to retain its autonomy in intelligence-gathering, where there is still a lack of transparency and accountability regarding the powers of the gendarmerie (European Commission 2011: 13). The Internal Service Law of the armed forces is untouched in the sense that it allows substantial military intervention in politics through Article 35 and Article 85/1, which define the duties of the Turkish armed forces in protecting and preserving the Turkish Republic on the basis of the principles referred to in the preamble of the Constitution, including territorial integrity, secularism and republicanism (Turkey 1961). In a similar vein, while the functioning and organisation of the NSC have largely been changed with the first wave of EU led reforms, the Law on the National Security Council still retains a broad definition of security, which covers both domestic and foreign threats to national existence and unity (Turkey 1983).

It is important that these issues be addressed so that the military, having largely lost its Kemalist guardianship role, does not continue to be involved in politics as “a tool of a new set of elites” through old instruments (Aydınli 2012: 106). This is particularly pertinent in the current political environment in which the rising violence by the PKK heightens societal insecurity and threatens civilianisation efforts. This was recently visible in the Uludere incident of December 2011, in which the Turkish military launched a botched air raid killing 34 villagers along the Iraqi border. The incident still lacks a thorough investigation as to who initiated it and how the military mistakenly concluded that the villagers were in fact a group of PKK militants. Furthermore, the government actually expressed its support for the military in response to public outcry by claiming that the “region is a terror region” and the military did what needed to be done (Hürriyet Daily News 2012). Members of the opposition parties in the Uludere Commission, established in Parliament in January 2012 to investigate the incident, have repeatedly complained about the covert alliance between the office of the Chief of Staff, the Ministry of Defence and the Prosecutor’s Office in Diyarbakır in withholding key information from the Commission and thus hampering the parliamentary investigation (Başaran 2012).

Nevertheless, reform in civil-military relations is expected to continue, with the main opposition party, the CHP, also displaying a progressive attitude on the matter. Yet, it is also important that this transformation does not fuel the existing dividing lines within society so as to hamper democratic consolidation. This is particularly the case for the handling of the *Balyoz* and *Ergenekon* trials, where claims of sustained misconduct are found to feed into the existing polarisation along the pro-Islamist and secularist divide in Turkish society (Gürsoy 2012). In its March 2012 report, the European Parliament also made mention of these trials, expressing concern “about the allegations regarding the use of inconsistent evidence against the defendants in these cases” and called on the Commission to look into these cases in more depth and report its findings with the 2012 Progress Report (European Parliament 2012: para. 18). The *Balyoz* verdict delivered in September 2012, which resulted in the conviction of 325 defendants, met with criticism in both the media and society regarding the heavy prison sentences delivered, as well as the violations of the right to fair trial.⁷ Allegations that the government is working in tandem with the network of the Islamic Fethullah Gülen movement in the security establishment in reorganising the army through these cases shed further doubt on the adherence to the rule of law in the thorny road towards civilianisation, bolstering the mistrust primarily among the secularist segments in society. It is thus imperative for democratic consolidation that the government allows for an “honourable exit” for the military, whereby these trials (and their appeals) are conducted more rapidly, with due respect for defendants’ rights, without prolonged detention periods

⁷ The case awaits appeal at the Court of Cassation.

and with the possibility of an amnesty for those who are charged (Aydınli 2012: 106).

Human rights

In the 1999-2005 period, important steps were taken to strengthen fundamental rights and freedoms, such as the lifting of the state of emergency and the death penalty, introduction of a new Penal Code with articles broadening the freedom of expression and association, stronger protection of detainee rights along with a significant decrease in pre-trial detention periods, abolition of Art. 8 of the (previous) Anti-Terror Law (propaganda against the indivisibility of the state) and the introduction of the right to learn and broadcast in languages other than Turkish, namely Kurdish. In addition to these legislative reforms, specific measures were enacted to ensure implementation, such as intensive human rights training for public officials and the establishment of Human Rights Boards, a Human Rights Presidency and a parliamentary Human Rights Inquiry Commission.

Although human rights reforms were not entirely abandoned in the post-2005 period, they slowed down considerably, leaving problems with the legal framework as well as the implementation of the already reformed laws in the areas of the fight against torture, freedom of expression, freedom of association and minority rights (Hale 2011). As can be seen in Figure 2 (in the Annex), applications (allocated to a decision-making body) to the ECtHR have increased progressively since 2005, reaching a record high 8702 applications in 2011, more than double the average annual number of applications filed in 2005-2010.⁸ Most of these applications concerned the right to a fair trial and property rights, followed by freedom of expression and torture/ill-treatment.

The state of progress in the area of fundamental rights seems to be mixed, for instance with certain advances being made in the fight against torture while even some steps back seem to have been made with regard to freedom of expression. Overall, there has been limited *legal reform* with the exception of the new law on Foundations passed in February 2008, the (albeit insufficient) amendments to the infamous Article 301 (insulting Turkish identity and state institutions), the ratification of OPCAT (Optional Protocol to UN Convention against Torture) in September 2011 and three constitutional amendments passed with the 2010 constitutional referendum, namely the right of petition as a constitutional right which establishes an Ombudsman (Art. 74), the right to appeal to the Constitutional Court with regard to fundamental rights and freedoms (Art. 148) and the guarantee that civilians will not be tried before military courts except in times of war (Arts. 145).

Problems of institutional and administrative capacity continued, concerning for instance the functioning of new institutions such as the Human Rights Boards, established to ensure compliance on the ground, which remain dependent on the Prime Ministry and lack the necessary resources (European Commission 2011: 21). The new law establishing a Human Rights Institution finally passed in June 2012, having been on the government’s agenda since 2004. This came as a major disappointment, given its limited capabilities and its high degree of dependence on the executive.⁹ Normative constraints among the state bureaucracy and the political elite, where “state sensitivities” are internalised to the extent that they exceed the interests of society, seem to provide the biggest obstacle to the reform process, continuing to create a climate of impunity for the perpetrators of human rights violations (see also the judicial system) and preventing the emergence of a sustainable human rights regime and culture from taking root in the country.

⁸ Figures were compiled from ECtHR annual statistics.

⁹ The Institution consists of 11 members of whom 7 are appointed by the Council of Ministers, 2 by the President, 1 by the High Education Council (YÖK) and 1 by the bar associations. See Ergin 2012a.

The fight against torture and ill-treatment

It is difficult to assess the extent of progress in the field of fighting torture and ill-treatment due to a dearth of reliable official statistical data on the matter. Nonetheless, a recent Council of Europe (CoE) report recorded a downward trend in recent years in both the incidence and severity of torture and ill-treatment cases, in line with the government's zero tolerance policy against torture announced in 2003 (Council of Europe 2011b: 14). Legislation in this area was already considerably strengthened with the 1999-2005 reforms, coupled with the implementation of various projects to raise awareness in society and intensive training provided to public officials about the changes made to the legislation and regulations governing law enforcement agencies (Aydin and Keyman 2004: 23-27). Additional steps have been taken since 2005, the most notable of which are the ratification of OPCAT, providing for the establishment of one or several independent monitoring bodies entrusted with inspecting places of detention; continued training and awareness-raising for judges, prosecutors and forensic experts on the Istanbul Protocol¹⁰ and the setting up of video and audio recording systems at police quarters with the aid of EU-funded projects.¹¹ Unlike the 1990s, torture is no longer being used as a widespread measure to obtain confessions (Dođru 2012: 28).

Box 2. Post-2005 reforms undertaken to strengthen the fight against torture

- » OPCAT, which requests Turkey to establish one or more independent monitoring bodies called National Preventive Mechanisms (NPMs), was ratified in September 2011.
- » Article 145 of the Constitution was amended with the 2010 Constitutional Referendum to prevent the trial of civilians by military courts except in times of war.
- » Training for judges, prosecutors and forensic experts in line with a better implementation of the Istanbul Protocol has continued.
- » Audio- and video-recording systems continue to be set up in police and gendarmerie statement taking rooms.

Despite considerable progress, the fight against torture and ill treatment is not over. First of all, some of the current legal measures introduced by the 2006 amendments to the Anti-Terror Law have the propensity to create an environment more conducive to torture and ill-treatment, particularly in the current political environment in which rising violence and the "fight against terror" threatens individual liberties. The article which raises the risk the most is Section 10 (e) of the Anti-Terror Law, which stipulates that upon the order of a public prosecutor, a detainee may be denied access to a lawyer during the initial 24 hours of custody if suspected of committing a terrorism-related offence, even though it is mostly in the immediate aftermath of being taken into custody that torture and ill-treatment occurs. This exception needs to be revoked. In fact, the original justification for introducing the requirement of immediate access to a lawyer for all detained persons was precisely to create an effective measure to fight torture and ill-treatment in Turkey (Council of Europe 2011b: 18).

There are also other legislative obstacles raised in our earlier paper that remain untouched by the 1999-2005 reforms. For instance, forensic medical doctors, with the exception of those that operate under the Forensic Medicine Council, and thus the Ministry of Justice, are

10 The Istanbul Protocol is a set of "international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body" (UNHCHR 2004: 1).

11 The most comprehensive EU-funded training project in this field was entitled "Training Programme on the Istanbul Protocol: Enhancing the Knowledge Level of Non-Forensic Expert Physicians, Judges and Prosecutors" whereas the project on "Purchase of Machinery and Equipment for Detention and Statement Taking Rooms" set up video and audio recording systems across the country (Council of Europe 2011c: 16-17).

still not recognised by the courts, leading to a lack of independent forensic services and allegations of partiality in the delivery of medical reports. Similarly, in the absence of an independent judicial police, investigations into torture and ill-treatment continue to be commonly conducted by law enforcement officers, and in many cases by the superiors of the perpetrators, while the perpetrators commonly remain in office, thus undermining the independence, impartiality and effectiveness of the process (UN 2011: 63). Another legal impediment to a more effective fight against torture and ill-treatment concerns the statute of limitations. Although the statute of limitations was increased to 15 years for torture and 40 years for death caused by torture with the 2005 Penal Code, torture cases are still being dropped because of the huge backlog of cases in the Turkish judiciary (see the section on the judicial system). Thus the state of limitations needs to be unlimited altogether for all cases that concern torture and ill-treatment.¹² It has been reported that the draft (fourth) judicial reform package that is currently under preparation proposes to lift the statute of limitations for all torture cases (Milliyet 2012b).

Nonetheless, more than these new and remaining legislative provisions, it is the "culture of impunity" that allows the police and the gendarmerie to escape accountability for torture which continues to represent the main hindrance to further progress in this area. For instance, a report by the Human Rights Investigation Commission Report found that, between 2003 and 2008, only 2 percent of the 2140 personnel who were investigated on accusations of torture and ill-treatment were given disciplinary sentences (US Dept. of State 2009). In some cases, it is the lack of a normative shift among public officials and the political elite towards the unacceptability of torture, even in cases where the interests of the "state" are perceived to be at stake, which provides the main hindrance to the eradication of torture. The presence of law enforcement officers during medical examinations even though the legal reforms forbid this or the hasty and superficial examinations and reports of medical doctors who are not willing to deliver detailed evaluations attest to this (Council of Europe 2011b: 19).

In most cases, however, this problem of normative internalisation combines with legal loopholes to provide full effect to impunity for perpetrators of torture and ill-treatment despite the undertaken reforms. For instance in some cases, the public prosecutors choose to bring charges of torture and ill-treatment under those articles of the Turkish Penal Code (such as Article 256 - "excessive use of force" or Article 86 - "intentional injury" - rather than Article 94 - "torture" - or Article 95 - "aggravated torture due to circumstances") where relatively lighter sentences can be delivered and/or where there is an obligation to obtain prior administrative authorisation for an investigation. This is, despite the fact that the sentences for torture cases have been increased and the requirement for prior administrative authorisation for torture and ill-treatment cases has been lifted by the earlier legislative reforms (Council of Europe 2012b: para. 46). This was most recently demonstrated in the *Engin Çeber* case which attracted large media attention, where a political activist arrested for distributing a legal journal in September 2008 died of torture in October 2008. In the initial indictment, the public prosecutor brought charges under Article 96 ("maltreatment conducted by ordinary citizens") and Article 257 ("misconduct in public office") rather than Articles 94 and 95 (Atilgan and Işık 2012: 15-17).

The dovetailing of normative constraints with the legal loopholes is also demonstrated in the practice of the police officers who, accused of torture and ill-treatment, bring counter charges against the plaintiffs on the basis of (most commonly) Article 265 of the Penal Code, which concerns resistance to public officials preventing them from carrying out their duties. It has been argued that the new Police Law of June 2007 has increased the propensity to resort to this practice by expanding the powers of the police (Radikal 2007). It has also been reported that such counter charges are often dealt with

12 In fact, approximately 20 percent of all the cases in the Turkish justice system are dropped every year due to the statute of limitations (Atilgan and Işık 2012: 30-31).

more rapidly by the criminal justice system (see also the section on the judiciary) (Atılgan and Işık 2012: 15-17; Council of Europe 2012b: para. 56). Individuals thus refrain from filing complaints for torture and ill-treatment for fear of counter charges against them (Amnesty International 2010: 8). Intimidating the plaintiffs and undermining their credibility is increasingly becoming a common strategy in getting around the reforms and achieving impunity. For instance, in the *Engin Çeber* case, Çeber's claims of having been tortured before his death were not investigated by the prosecutor, whereas an investigation was launched against him on the basis of Article 265.

These findings demonstrate that, despite the reforms which have led to certain progress in the fight against torture and ill-treatment, reform resistant forces among the police and the judiciary are finding novel ways to adapt to the new legal and institutional environment. This is also bolstered by the divided nature of the commitment of the political elite to fighting torture and ill-treatment. On the one hand, there are some signs of normative internalisation among the governing elite as seen in the *Çeber* case, where the Minister of Justice gave a public apology for Çeber's death under torture. On the other hand, however, Prime Minister Erdoğan's public support for the recent appointment of a police officer whose actions caused Turkey to be fined by the ECtHR in two torture cases, as the deputy chief of the Istanbul Police Department's anti-terrorism bureau, demonstrates the limits of this internalisation and strengthens the drive for impunity, especially under the banner of the "fight against terrorism" (Radikal 2012).

It is apparent that one way to pursue reform in this area is to address the legal shortcomings highlighted above. But this, on its own, would not be sufficient given the quick adaptation shown by law enforcement officers and the members of the judiciary in pre-empting the proper implementation of legal reforms. Hence there is a need to intensify institutional reform, such as setting up an independent police complaints mechanism or rapidly expanding the number of video and audio recording systems at police quarters which still remains very low.¹³ Perhaps more importantly, however, is the need for continued intensive training for the members of the police force and the judiciary in both their formal education and also during their active careers on the implementation of the Istanbul protocol and on the primacy of individual rights and liberties over the state. Civil society institutions can also be involved in similar training programmes for informing the public of their rights relating to custody.

Freedom of expression

Freedom of expression is an area in which the progress that was made with the 1999-2005 reforms has been substantially reversed, to the extent that the curtailment of this freedom has now become one of the major sources of domestic and international criticism of the current state of Turkish democracy. The President of the Court of Cassation recently declared that problems with freedom of expression are growing in Turkey, while the issue was brought up for the first time in a European Council summit declaration on enlargement in December 2011 (Ergin 2012c). ECtHR judge, Işıl Karakaş, declared in November 2011 that Turkey has the highest number of ECtHR decisions for violations of freedom of expression among all of the Council of Europe members. Turkey, with two hundred violations of the freedom of expression, was followed by France with only ten violations (BIA 2011b).

The EU-led reform in the mid-2000s not only led to legislative changes, but was also translated into practice, resulting in a substantial decline in the number of individuals arrested for expressing their opinions (Alpay 2010). According to Human Rights Watch, as of November 2005, there were no individuals serving prison sentences for the non-violent expression of their opinions (Human Rights Watch 2006). However by June 2012, 95 journalists alone were reported to be imprisoned, 62 of which were detained in relation to their reporting on the Kurdish issue.

13 As of 2011, digital audio and video systems were set up in 63 out of more than 2000 detention centres and testimony rooms (US Dept. of State 2012: 6).

This increase has been progressive, from 15 imprisoned journalists in June 2009 to 57, 68 and 95 respectively in the three years that followed.¹⁴

The current stalemate in this area stems from the combination of a multitude of legal provisions and the mindset of the judiciary. The Constitution itself (in particular Articles 26 and 28) provides the main hindrance, given the limits that it imposes on the freedom of expression on the basis of national security, public order and national unity. In view of this, we reiterate our suggestion first set down in our 2004 paper to constitutionally guarantee the right to the freedom of press and of expression without censorship by amending Articles 26 and 28 of the Constitution as a key point of reform in the current constitutional deliberations. Besides the Constitution, the main legislative provisions that are most commonly used to restrict free speech concern the Turkish Penal Code and the Anti-Terror Law.

The main problem with the Penal Code is that, although it was passed as a part of the EU reform process in 2005, it retained key provisions of the old Penal Code that served to restrict the freedom of expression in the past. These articles are most prominently Article 215 (praising a crime or criminal), Article 216 (inciting the population to enmity or hatred and denigration), Article 301 (insulting the Turkish nation, the Turkish Republic, the Turkish Grand National Assembly, the government or the judicial organs of the state) and Article 318 (discouraging persons from doing their military service). Articles 218 and 318 further increase the punishment in those cases where these acts are committed through the press or other types of publications. Although the infamous Article 301 which was used to convict writer and journalist Hrant Dink, laying the groundwork for his assassination in 2007, was amended in 2008 (where the maximum penalty was lowered from three to two years of imprisonment, the phrase "insulting Turkishness" was replaced by "insulting the Turkish nation" and investigations under this Article was tied to the permission of the Minister of Justice for each case), the changes were largely cosmetic, only temporarily decreasing the number of proceedings brought under the Article and leaving open the possibility for its abuse in the future.

While the maintenance of these articles and their widespread use in limiting the freedom of expression testify to the effects of incomplete legal reform, the case of the Anti-Terror Law demonstrates a reversal in the sense that the amendments made to this law in 2006 actually introduced new limits to fundamental rights and freedoms, including the freedom of speech (Aytar 2006). For instance, with the 2006 amendments, the punishment for crimes under Article 6 (printing or publishing declarations or leaflets emanating from terrorist organisations) was changed from a fine to from one to three years imprisonment. The same article also allows for the suspension (by judicial order) of publications that contain propaganda of a terrorist organisation, incitement to commit a crime or praise for a crime committed for up to a month, and makes the publications' editors and owners liable for these crimes. In many cases, the Anti-Terror Law is used in combination with the Penal Code (Article 220 - propaganda in favour of a criminal organisation) to persecute even non-violent statements when they are perceived to concur with the aims of a terrorist organisation (Council of Europe 2011a: para. 27).

These legal provisions became prominent instruments in curbing the freedom of expression, particularly against the background of KCK (Koma Ciwaken Kurdistan - Kurdistan Communities Union)¹⁵ operations initiated in April 2009. Not only has no substantial progress been achieved towards the resolution of the Kurdish conflict in the post-2005 period, tensions have grown further, first with the closure of the Kurdish nationalist DTP (Demokratik Toplum Partisi, Democratic Society Party) in December 2009 (renamed BDP - Barış ve Demokrasi

14 Figures were retrieved from the annual BIA Media Monitoring Reports.

15 The KCK is an umbrella organisation of Kurdish movements in Turkey (including the PKK), Iran, Iraq and Syria and aims to form parallel alternative structures to the official organs of justice, management and politics in these countries. While its leader is reportedly Abdullah Öcalan, its Executive Council is headed by a PKK commander, Murat Karayılan.

Partisi, Peace and Democracy Party, following its 2009 closure), followed by the intensification of KCK operations in September 2010. The operations and the ensuing trials have seen the prosecution of prominent political leaders and activists of the Kurdish movement on the grounds that they constitute the political organisation of the PKK in urban centres, or of their opinions expressed in speeches, the press and other publications. This led to a sixfold rise in prosecutions from 2009 to 2010, when 150 people were prosecuted under the Anti-Terror Law for expressing opinions or reporting on subjects related to the Kurdish minority and the PKK (Freedom House 2012). As of June 2012, 62 out of 95 journalists imprisoned were being detained in relation to KCK and related trials. Between April and June 2012 alone, 61 indictments were prepared against members of the BDP regarding their statements on the Kurdish question (BIA 2012).

In addition to the KCK trials, the *Ergenekon* case has also played a prominent role in boosting the curtailment of the freedom of expression. In fact, it was the detainment of two well-known opposition journalists on the basis of Article 220 of the Penal Code within the scope of the *Ergenekon* investigation that brought the freedom of expression cases into the international spotlight in March 2011. Their detainment raised vocal criticism from the EU, the Council of Europe and international human rights organisations against the deteriorating levels of freedom of the press in the country, only to be rebuffed by the Prime Minister on the grounds that journalists were being detained due to their links with terrorist organisations and attempts to overthrow the government (Ntvmsnbc 201). Article 285 (breaching the confidentiality of criminal organisations) and Article 288 (attempting to influence judicial bodies unlawfully) also played a key role in the mounting pressure on journalists covering the *Ergenekon* case (Council of Europe 2011a: para. 20). As of January 2012, there were around 5000 ongoing investigations opened against journalists on the basis of these articles (Ergin 2012b).

These cases imply that the existing legislative provisions and the new legal measures are being used to violate the right to free speech primarily when the government's authority and/or its Kurdish policy are being challenged. In the face of growing domestic and international criticism and the cases piling up at the ECtHR, the government embarked on a legislative reform strategy (also known as the third judicial reform package) adopted in July 2012 to revise some of the legislative provisions that stand in the way of freedom of expression. Nonetheless, while including some progressive measures such as suspending offences committed via the media to 31 December 2011 for three years (and scrapping the accusation for good if the same offence is not re-committed within those three years), the third reform package leaves the main legislative provisions used in curbing free speech largely intact (Keskin 2012). The draft (fourth) reform package that is reported to contain important provisions in expanding the freedom of expression has not yet been submitted to Parliament.

Regarding legislative provisions, constraints on the freedom of expression are also imposed through laws that specifically pertain to the media sector. Although the Press Act, which was amended in 2004, was welcomed as a positive step towards expanding media freedoms, it continues to contain numerous restrictions on these freedoms by making references to "public security", "territorial integrity" and "state secrets". Although prepared with a view to aligning it with the Audiovisual Media Services Directive of the EU, the more recent Act on the Establishment of Radio and Television Enterprises and their Broadcasts, adopted in 2011, also contains numerous restrictions on the freedom of the media open to subjective interpretation, such as "protection of the family" and "public morality", which are not contained in the EU Directive. The Internet Law adopted in 2007 has been largely criticised for the wide and vague legal foundations that it introduces in denying access to websites (Kurban and Sözeri 2012: 37-38).

As also highlighted in our 2004 paper, despite the pressing need for legal reform that would involve a comprehensive review of all existing laws that restrict the freedom of expression, amending these laws has

its limits since the most important challenge for Turkey is to change the mindset of those who exercise these legal provisions. Most of Turkey's violations of Article 10 of the European Convention on Human Rights (ECHR) are found to emanate from a lack of proportionality in the interpretation and implementation of these legal provisions by judges and public prosecutors. For instance, in contrast to ECtHR case law, the Turkish judiciary is commonly found to apply a very wide interpretation of "incitement to violence" and to disregard the "defence of truth" (assessing "whether the content of journalistic reporting is true") and "defence of public interest" (assessing "whether the public has a legitimate interest in and a right to obtain the information in question") in delivering its judgements on cases relating to the freedom of expression (Council of Europe 2011a: para. 37). Hence intensive and systematic training of judges and public prosecutors on the case law of the ECtHR remains a key requirement for substantial reform in this area. It is also essential that this be supplemented by changes in the curricula of law faculties and the Turkish Academy of Justice, where the focus should be placed on specific and relevant cases from the ECtHR as well as EU member states, together with the arguments and discussions surrounding these cases.

The problem with mindsets, however, also extends to the bureaucracy that runs the media regulatory authorities, such as the Radio and Television Supreme Council (RTÜK) and the Telecommunications Communication Presidency (TIB), which is responsible for regulating the internet environment. Both institutions lack autonomy, are largely dependent on political authority and apply wide discretion in interpreting the legislative provisions for which they are competent.¹⁶ In 2011, RTÜK issued eighty-nine fines, three hundred and eighty three warnings, twenty-seven suspensions and one notice to twenty-seven radio and four hundred and eighty television channels (BIA 2011a). As of September 2012, 20,690 websites are blocked with 84.7% of the blocking decisions coming from the TIB.¹⁷ It has been argued that in cases where nationalist and conservative values clash with fundamental rights and freedoms, these regulators systematically uphold the primacy of the family, nation and state above the individual (Kurban and Sözeri 2012: 17). Thus it is crucial that, in addition to undertaking a reformist review of the acts that grant these institutions their powers, their competences also need to be restricted and their institutional composition decoupled from political processes.

The political economy of the media sector presents the final major obstacle to the freedom of expression in Turkey. While not a new phenomenon, almost all of the major media groups in the country have investments in key sectors of the economy (i.e. energy, telecommunications, finance) where they are not prevented by law from entering into public tenders. This creates a media landscape in which the public interest can be compromised by economic and political interests (Kurban and Sözeri 2012: 18). Against this background, certain policies of the strong single-party administration and its politicians can impact on editorial policies and reinforce self-censorship. For instance, the tax fine issued in 2009 against the Doğan Media Group was perceived by many as a reaction by the government to the group's criticism of it. In a similar vein, on multiple occasions the Prime Minister has warned the media conglomerates that they are responsible for the writings of their columnists and that they should exercise control over them where necessary (Ntvmsnbc 2010).

Freedom of peaceful assembly and association

The 1999-2005 reforms included considerable measures taken to expand the freedom of assembly and association, especially by easing the restrictions on organising demonstrations and by abolishing some

¹⁶ The nine members of RTÜK are selected by the Parliament from the candidates proposed by the political parties in accordance with their seat shares in the Parliament. The seven members of TIB are appointed by the Council of Ministers whereas there is one representative each from the National Intelligence Organisation, Turkish National Police and the Gendarmerie in the institution.

¹⁷ The rest of these decisions emanate from the courts, public prosecutors and the High Election Board. For figures on the blocked websites, see <http://www.engelliweb.com>.

pre-existing limitations on setting up associations, their membership requirements and the general regulations regarding their activities.

On the freedom of peaceful assembly, these reforms brought the legal framework broadly in line with EU standards which were also reflected in implementation.¹⁸ Nonetheless, loopholes in the existing and new legislation, coupled with the setbacks in implementation and the new political developments have led to the resurgence of problems in this area. Excessive use of force by the police has been observed particularly in demonstrations concerning the Kurdish issue, as well as those on students' rights, trade union rights and the environment. As with torture and ill-treatment, impunity of the security forces has remained a major concern, with investigations depending on the permission of governors that in some cases are not forthcoming or involving scarce disciplinary sanctions.¹⁹

On the legal front, especially since 2008, Articles 220 (propaganda for a terrorist organisation, committing a crime on behalf of an organisation without being a member) and 314 (membership in an armed organisation) of the Penal Code were combined with the amended Article 2 of the Anti-Terror Law (committing a crime on behalf of a terrorist organisation) to deliver an increasing number of prosecutions of protesters in the face of the rising stalemate in the Kurdish issue (Human Rights Watch 2010: 1). The mindset of the judiciary has proved instrumental once again in delivering restrictive interpretations of these vague articles, as evidenced in a precedent-setting 2008 case in which the Court of Cassation decided that joining protests publicly supported by the PKK is a crime. Human rights organisations have underlined that even when a specific appeal by the PKK is not discernable, protesters are frequently charged with acting under PKK orders (Human Rights Watch 2010: 3). Hence, as with the closely related freedom of expression, resolving the current setbacks in the freedom of peaceful assembly requires both legal reform concerning the vague legal provisions open to arbitrary jurisdiction and the ongoing training of members of the judiciary. Constitutional provisions guaranteeing the right to hold demonstrations may also be helpful in legally enshrining this right.

Turkey's legal regime on the freedom of association is broadly aligned with EU standards, in particular following the entry into force of the 2004 Law on Associations. However, important restrictions continue to remain, mainly on foreign financial support for associations and the establishment of foreign associations and foundations. Although the 2004 Law on Associations replaced the "permission" required from the Ministry of the Interior to receive funds from organisations or individuals in foreign countries by "notifications" to local government officials, the implementation of this reform has kept the "permission" system intact, particularly since notification is required prior to the receipt of funds (SGTM 2012: 14). The cumbersome bureaucratic regulations for establishing foreign associations and foundations are still in place, and permission is still needed from the Minister of the Interior following approval by the Ministry of Foreign Affairs. Their actions are still closely scrutinised, and they are required to report regularly to the governor's office and the Ministry of the Interior on their activities and publications. Civil society organisations have suggested that all associations should be subject to the same rules and that their international activities should be guaranteed through the new constitution (SGTM 2012: 14).

One of the remaining fundamental constraints on the freedom of association concerns the current political parties' regime in Turkey. Articles 68 and 69 of the current constitution contain a long list of broad provisions such as "the indivisible integrity of the territory and the nation" and the "principles of the democratic and secular republic" that can be invoked for the closure of political parties.²⁰ The Law on

Political Parties accentuates the possibility of closure by extending these criteria beyond what is specified in the Constitution. In particular, Article 80 of the Law on the "protection of the principle of unity of the state" and Article 81 on "preventing the creation of minorities" have both been invoked in the past for banning Kurdish parties (Council of Europe Venice Commission 2009). The Constitutional Court has taken several closure decisions in the past based on a strict interpretation of these principles.

The decision to close down a political party has been made more difficult with the 2001 reforms, with the decision now requiring a three-fifths majority in the Constitutional Court rather than a simple majority. In addition, alternative sanctions such as depriving the political party of state financial assistance were introduced (and were instrumental in the Constitutional Court's decision to not to close down the AKP). Nonetheless, the principles that govern political party closure still lag behind European standards and should thus be revised in view of the new constitution. This remains a pertinent issue as demonstrated in the closure case opened against the AKP in March 2008, the closure of the DTP in December 2009 and the possibility of closure that constantly lurks over the BDP. One way to reform could be to constitutionally restrict closure to those political parties that advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, in line with the Venice Commission guidelines of 1999. Racism, incitement to war and advocating hate crimes can also be considered as particular expressions of violence in this respect (Özbudun and Tarhanlı 2011: 57).

Another possibility for reform relates to the specific procedures that are adopted in pursuing closure cases. A mechanism could be envisaged for giving political parties early warning prior to the decision to open a closure case. Given the substantial political repercussions of a closure case, the sole competence granted to the Chief Public Prosecutor in opening closure cases could be shared by the Parliament, either by means of a prior parliamentary mandate for the Prosecutor to file the case or through the approval by Parliament or a special designated commission within Parliament of the Prosecutor's decision to open a case (Özbudun and Tarhanlı 2011: 57).

Protection of minorities

The phase of political reform in 1999-2005 addressed certain key issues relating to the rights of religious minorities in Turkey (mainly non-Muslim minorities), as well as of the Kurdish minority. While certain advances were made in extending the rights of non-Muslim minorities in the following period, progress has remained more limited with respect to the state of other religious minorities (mainly the Alevis) and the Kurdish minority.

Non-Muslim minorities

The Treaty of Lausanne grants non-Muslim minorities (represented by approximately 23,000 Jews, 1,700 Greeks and 65,000 Armenians) substantial negative rights as well as some positive ones, such as the right to equal protection and non-discrimination, the right to establish private schools and provide education in their own language, the conditional entitlement to receive government funding for education in their own languages at the primary level in public schools, the right to settle family law or private issues in accordance with their own customs and the right to exercise their religion freely. The reform process initiated with the prospect of EU accession aimed mainly at resolving the shortcomings in the implementation of these rights, especially regarding property rights and the status of religious/educational institutions. One of the main problems suffered by religious minorities in Turkey is the lack of legal personality and the impossibility of acquiring or selling property. Under Turkish law, religious institutions do not have legal personality and they can only be incorporated as "foundations", falling under the jurisdiction of the Foundations Law. Hence their property rights were significantly

¹⁸ See European Commission, *Turkey Progress Reports 2007 and 2008*.

¹⁹ European Commission, *Turkey 2008 Progress Report*, Brussels, 5 November 2008, p. 17.

²⁰ The remaining principles which the party statutes and programmes should not conflict with are: independence of the state; human rights; principles of equality and the rule of law; sovereignty of the nation; not aiming to protect or establish class or group dictatorship or dictatorship of any kind; not inciting citizens to crime.

limited, as only properties declared under Law No. 2762 (of 1936) were legally recognised (160 minority foundations) and all properties not listed in 1936 could be confiscated by the Turkish state.

The reform packages (specifically the third, fourth and the sixth) passed between 1999 and 2005 addressed this problem by amending the Foundations Law and allowing non-Muslim minorities to register the property they actually use as long as they can prove ownership. Nonetheless, these measures fell short of granting full property rights to non-Muslim minorities since the amended law failed to bring a just solution regarding the return of confiscated properties and did not eliminate the possibility of future confiscations (Aydin and Keyman 2012: 32). The new Law on Foundations, adopted in February 2008, largely addressed these matters. Under the new Law, the foundations can now change their scope or purpose from the one specified upon their original incorporation; apply for the return of their confiscated property that is still under Turkish state control, and own and manage property without prior permission (Box 3). While the implementation of the new Law proceeded smoothly with 200 properties returned to non-Muslim minority foundations between February 2008 and August 2011, it has also been criticised for not allowing the return of properties seized and sold to third parties or those that were merged before the adoption of the new Law (European Commission 2009b: 27). This created the background to the amendments introduced to the Law in August 2011, which widened the scope of the new Law by providing for the return of the properties that were registered in 1936 but not specifically described in the original documentation, and permitted the foundations to receive financial compensation in cases where their property was sold to a third party and could not be returned. Nonetheless, the return of the property of merged foundations still remains outside the confines of the law and the Turkish government retains the right to seize land from religious communities (US Commission on International Religious Freedom 2012: 203).

Box 3. Post-2005 reforms undertaken in the field of religious minorities

» Under the 2008 Law on Foundations, non-Muslim community foundations can establish and/or participate in companies and other commercial entities to generate income and achieve their objectives. Donations of immovable property to foundations can no longer be seized or mortgaged. Properties no longer used can be transferred to another foundation of the same community, leased or have their use changed.

» The communities indicated in the Lausanne Treaty can each have one elected representative in the General Directorate for Foundations.

» The ninth reform package passed in April 2006 revoked the requirement of having a representative of "Turkish origin" of the Ministry of Education as the deputy head of minority schools.

» A legislative amendment adopted in February 2012 enabled the newspapers run by non-Muslim communities to publish official notices.

» The Ministry of National Education approved a new regulation allowing the Armenian, Greek and Jewish minorities who are not Turkish citizens to be educated in minority schools (without receiving an official document of graduation).

Progress has been more limited on religious/educational problems encountered by non-Muslim minorities (Box 3). A regular dialogue was sustained between the government and the representatives of the non-Muslim communities which culminated for the first time in their invitation to the Parliamentary Conciliation Committee to express their views on the new Constitution. Regarding legal reform, the ninth reform package passed in April 2006 revoked the much-criticised requirement of having a representative of "Turkish origin" of the Ministry of Education as the deputy head of minority schools (Turkish Ministry for EU Affairs 2007: 279). There were also certain symbolic gestures towards non-Muslim minorities such as the realisation of the first religious service since 1915 at the Armenian Holy Church on Akdamar Island in Lake Van in 2010, which has been repeated in the following years.

Despite these steps, the major problems identified in our 2004 paper regarding the religious/educational matters of the non-Muslim communities remain largely intact. Direct state interference in the religious and educational institutions of non-Muslim communities through the Directorate General of Foundations (a government agency that must approve their operations) continues to violate the Treaty of Lausanne as it restricts the right of non-Muslim minorities to manage and control their institutions. There is still a ban on the training of Christian clergy which creates chronic shortages. Although the government has tried to address this issue by letting foreign clergy work through work permits obtained on the basis of the Bylaw to the Law on Work Permits or by granting citizenship to some foreign members of (particularly the Greek Orthodox) clergy, these measures have only served as "ad-hoc accommodations" that "fail to ensure institutional integrity and independence in intra-religious decisions" (US Commission on International Religious Freedom 2012: 205). The repeated suggestions of the EU to re-open Armenian and Greek Orthodox seminaries (both were closed in 1969) and grant these minorities the right to exercise and teach their religion have not yet been followed.

Despite such remaining issues, reforms in this field have largely been effective in increasing electoral support for the AKP among non-Muslim communities in the 2007 elections. Yet, a major fault-line arose between these communities and the AKP with the assassination of the writer and journalist Hrant Dink in 2007 (Ter-Matevosyan 2010). The lack of an effective investigation in its aftermath resulted in the impunity for key figures involved in the assassination plot. The climate of intolerance and discrimination that paved the way for this crime and underlay this impunity has been observed in other major cases of violence against non-Muslims and raised much public controversy, such as the 2007 killing of three Protestants in Malatya in a publishing house of the local protestant community. The case continues to this day, but is marred by its association with the much disputed *Ergenekon* trials.²¹ These instances of violence and their ineffective handling are preventing the building of the much needed trust of the non-Muslim communities towards the state and undermining further reform (Ulusoy 2011: 419).

The issue of religious freedoms also pertains to the Alevis which constitute the largest religious minority in Turkey, estimated at 15 to 25 percent of the total population. There are differing views within the Alevi community regarding the relationship of their faith to Islam and the policy reforms which they expect from the government. While some Alevis identify themselves as Shi'a Muslims, others reject Islam and perceive themselves as a separate culture. Despite their internal differences, there are certain common issues which they would like the government to address, in particular the abolition of compulsory religious education classes where the main focus is on Sunni Islam,²² official recognition of their houses of worship (*Cemevis*), a halt to the building of Sunni mosques in Alevi villages and the revision of the status of the Directorate General for Religious Affairs which serves the Sunni majority, either by abolishing it altogether or making it representative of the Alevi community as well. Although the government initiated an "Alevi opening" in 2009, when seven workshops were held to bridge the gap between the state and the Alevi community and certain symbolic steps were taken, such as the participation of Prime Minister Erdoğan in an Alevi fast-breaking ceremony in January 2009, these were not followed by any concrete policies to meet the Alevis' key demands. In fact, the discriminatory discourse prevalent at the societal level was exploited and thus reinforced by the Prime Minister in his 2011 election rallies, in which he made repeated references to the Alevi background of the CHP leader, Kılıçdaroğlu, to discredit him in the eyes of pious Sunni voters. For example, between April 29 and May

21 The case was included in the scope of the *Ergenekon* inquiry in March 2011 on the grounds of suspicion that the *Ergenekon* organisation was behind the crimes in Malatya.

22 The ECtHR has decided in October 2007 that these classes provide exclusive instruction in the Muslim faith and requested Turkey to bring its education system and domestic legislation into alignment with Article 2 of Protocol 1 to the ECHR.

13 2011, the Prime Minister brought this issue up in seven separate election speeches (Ergin 2011).

Ensuring the correct and full implementation of the Treaty of Lausanne for the non-Muslim minorities and respecting fully the rights of other religious minorities, such as the Alevis, should be among the key issues in the deliberations towards a new democratic constitution. The most substantial provisions in the new constitution could thus include the abolition of having to state religious affiliation on national identity cards (which already contravenes Article 24 of the present Constitution); introducing the positive obligation of the state to take the necessary measures to facilitate the practice of religious freedoms by the non-Muslim groups indicated in the Treaty of Lausanne as well as other religious groups (including the right to train their clergy); abolition of compulsory religious education classes; the abolition or changing of the composition of the Directorate General for Religious Affairs so as to represent other religious groups such as the Alevis that are outside the scope of Sunni Islam; and the granting of legal personality to the foundations of non-Muslim communities in line with the Venice Commission decisions²³ to fully resolve issues related to property rights and access to justice (Özbudun and Tarhanlı 2011: 50-52). Nonetheless, as also highlighted in our 2004 paper, a crucial aspect of reform on this front entails the gradual transformation of the concept of citizenship and the recognition of cultural and ethnic pluralism in the country, which we come back to in the next section on the Kurdish minority.

The Kurdish question

Resolution of the Kurdish issue remains the key element for Turkey's democratic consolidation. It is not possible to make Turkish modernity more multicultural, Turkish democracy more consolidated, Turkish economy more sustainable, Turkish society more tolerant and peaceful, and Turkish foreign policy more proactive, multidimensional, and effective, without resolving the Kurdish question. As detailed in our first paper, the AKP government had taken steps forward on the Kurdish issue through the EU-led reforms it carried out in the 1999-2005 period. Some of these reforms, such as the right to broadcast in Kurdish, the right to learn the Kurdish language and the right to name children in Kurdish, despite their limited nature, were directly intended to improve the lives of Kurds in the country. Other human rights related reforms of this period, including the lifting of the state of emergency, can also be considered as efforts to improve the Kurds' situation. In the words of a close observer, the EU had managed to "desecuritize the Kurdish problem" in Turkey by empowering the reformist forces in society, thus paving the way for progress on this front (Kirişçi 2011a: 338).

The virtuous cycle of reform was soon to be replaced, however, by a vicious cycle of violence and the rise of Turkish and Kurdish nationalism, which stalled any substantial progress on this front. Against the background of weakening EU conditionality, the renewal of PKK attacks on civilian and military targets in 2005 and the ensuing operations contributed to the rise of Turkish nationalism that was already underway as a response to the EU-led reform process in the country. No further reforms were undertaken until January 2009, when the state-owned Turkish Radio and Television (TRT) established a new channel to broadcast exclusively in Kurdish. This was joined by a few minor reforms to make broadcasting in Kurdish possible, such as the approval of public use of the letters "q" and "w" which are not present in the Turkish alphabet (but are widely used in Kurdish) and the public use of which had led to court cases in the past (Kirişçi 2011a: 344). The Regulation on the RTUK was amended in November 2010 to remove all restrictions on broadcasting in Kurdish (and other languages) by private and public channels at the local level, while the new Law on the Establishment and Broadcasting Principles of Radio and TV stations of March 2011 allowed for broadcasts in languages other than Turkish by all nationwide radio and television stations. A number of

universities in the southeast were allowed to offer Kurdish degrees and Kurdish began to be taught as an elective course in public schools in September 2012.

None of these steps, however, have raised hopes for a lasting solution like the "Kurdish opening" in July 2009, an initiative launched by the AKP government following the March 2009 local elections in which the AKP suffered electoral losses to the BDP in the southeast. The first and only concrete step in the opening was the return of 34 PKK rebels to Turkey in the fall of 2009. The expectation was that the PKK camps in Kandil would gradually be evacuated and a political settlement would be reached. The first group of 34 unarmed PKK rebels were questioned at the border with northern Iraq and then released. They were greeted by crowds in the southeast of Turkey. But the government then felt pressured to take steps back in view of the massive public and opposition outcry against the celebrated reception of the PKK rebels. The Kurdish initiative was quickly renamed the "democratic initiative", and later the "unity and fraternity project", and the rebels initially welcomed were soon prosecuted or fled the country. The failure of this initiative demonstrated the importance of mobilising broader political and societal support and, thus, the need for broad political preparation for substantial reforms on the Kurdish issue, the lack of which was partly responsible for the collapse of the "opening" and the rise in mistrust between the government and the Kurds. The following increase in PKK violence stalled progress even further and culminated in the closure of the DTP in December 2009, followed by the mounting numbers of prosecutions through the KCK operations. In the first quarter of 2010, 1483 members of the BDP were prosecuted under the KCK trials. By June 2011 general elections, 3200 people (the vast majority of whom were members of the BDP) were imprisoned in view of their alleged KCK affiliation (Çandar 2012: 81).

The mood only worsened with the 2011 general elections, in which the AKP's electoral strategy relied on adopting a rather conservative and nationalist approach to the Kurdish issue and placing the emphasis on religious ties and values rather than a rights-based discourse to attract Kurdish voters. In choosing to appeal to the Turkish nationalist vote and the traditional Islamist streak of Kurdish identity, the Prime Minister went so far as to declare that there no longer exists a Kurdish issue. The AKP attacked the CHP for its increasingly lenient tone on the Kurdish problem, which it presented as part of the party's allegedly larger deal with the BDP. Following the elections, the Supreme Election Board decided to strip a BDP candidate of his deputyship on the basis of his 2009 conviction for "disseminating PKK propaganda". In addition, the courts declined requests to allow the entry into parliament of five more BDP deputies who are jailed as suspects in KCK trials.²⁴ Nonetheless, the election of 36 BDP members to parliament after the elections and the conviction that the AKP would soften its nationalist rhetoric after having come to power with a solid majority created a brief phase of optimism that soon dissolved when PKK violence intensified significantly in the aftermath of the elections, accounting for 711 deaths (four times more than in 2009) by August 2012 (ICG 2012: 1).

The situation started to resemble closely the state of affairs in the 1990s, when the Kurdish issue marked by intense violence was dealt with solely as a security matter and used to restrict fundamental freedoms. The limited reform that had been achieved was overcome by the reversals in human rights reforms outlined in the previous sections, such as in the case of the 2006 amendments to the Anti-Terror Law, which imposed further restrictions on the fundamental freedoms of those who speak for expanded Kurdish rights. The State Security Courts entrusted with dealing with crimes against the state, which were abolished in 2004, were replaced by "heavy penal courts with special powers [...] bearing continuity in mandate, rules of procedure, judges, personnel, archives and case files" (Kurban and Güllalp 2013).²⁵ Although the state of emergency was lifted in 2002,

²³ The Venice Commission decided in March 2010 that the right to freedom of religion includes the possibility for religious communities to obtain legal personality.

²⁴ Two CHP deputies and one MHP deputy also remain under arrest in connection with the *Ergenekon* and *Balyoz* trials respectively.

²⁵ These courts were abolished with the third reform package adopted in July 2012

the government has repeatedly authorised the military to declare "temporary security zones" in which the military can freely conduct its operations (Kurban and Güllap 2013). The labels have changed but developments ominously hark back to the 1990s.

Thus, Turkey continues to suffer from the ongoing low-intensity war between the Turkish state and the PKK; from the growing risk of becoming an ethnically-divided, polarised, and conflict-prone society; as well as from the enduring dominance of the language of security and conflict over that of democracy and liberty. The resolution of this impasse calls for the implementation of a comprehensive strategy aimed at a durable political solution entailing constitutional and legal reforms together with their full implementation, as well as intense societal deliberation to win a critical mass of support for the initiatives to be taken. The basis of this strategy should be sought in a multicultural and differentiated understanding of citizenship as a constitutive norm of "living together in diversity". This would then make it possible to seek a feasible and effective solution to the Kurdish question, not in ethnic terms, but by exploring possible ways of articulating identity-claims to citizenship rights "with an emphasis on the practice of democracy" (İşin and Wood 1999: 4; Keyman 2012). This would also imply an enlarged understanding of citizenship including not only individual and group rights but also its "denationalisation" (Benhabib 2004: 14).

Locating the Kurdish question in the domain of equal citizenship without ignoring its "Kurdishness" enables one to rethink one's loyalties and belonging not only in terms of identity and community, but also of the rule of law and constitutionalism. The call for citizenship should thus not only be post-national and differential, meaning that it should not be reduced to legal and political membership in the nation-state and recognition of cultural as well as individual rights; but that it should also be constitutional in the sense that it should function as a common ground for the constitutional guarantee and protection of both individual and group rights (Keyman 2012). This is why the preparation of the new constitution is of the utmost importance in solving the Kurdish question democratically through the idea of equal citizenship.

The new constitution should thus not contain any references to an ethnic, religious or sectarian identity and include a comprehensive definition of citizenship that does not rest on any identity or class. It should have provisions that strengthen the role and autonomy of local government within the framework of the European Charter of Local Self-Government;²⁶ lift the restrictions on education in mother-tongue on the basis of the European Charter for Regional or Minority Languages (which still has to be signed by Turkey); contain a section on cultural rights; include an article that guarantees protection against discrimination; and introduce measures that would make it more difficult to close down political parties in line with the Venice Commission guidelines (see the section on the Freedom of Peaceful Assembly and Association).²⁷ In addition to these and as highlighted in our previous paper, the constitutional endorsement of the principle of multiculturalism would reflect a legal commitment to the preservation of Turkey's cultural heritage. Thus when interpreting and enforcing the constitution and laws, judicial, legislative and executive officials would be required to consider the preservation and enhancement of the cultural heritages of all minorities in Turkey (Kurban 2003). Constitutional reform along these lines would help to create a new social contract between state and society/individual citizens, as well as within society. This would take place through the transformation of a republican and duty-based citizenship privileging state power over individual rights and freedoms into a democratic and multicultural citizenship based on enlarged rights and freedoms.

and replaced by Anti-Terror Courts.

²⁶ Whereby Turkey's restrictions on some of its clauses would have to be lifted.

²⁷ These constitutional demands of the Kurdish minority have long been voiced by some prominent think-tanks and civil society organisations in Turkey (Kurban and Ensaroğlu 2010: 24-32; Özbudun and Tarhanlı 2011: 27-29).

Constitutional reform would have to be coupled with a comprehensive reform of the accompanying laws such as the Political Parties Law, the Penal Code and the Anti-Terror Law. As outlined in the earlier sections, the current state of these laws substantially hinders fundamental rights and freedoms under the banner of the fight against terror. An overall strategy of democratic consolidation that entails the resolution of the Kurdish issue also necessitates proper implementation of the reformed laws, which in turn requires intensive training both during the education and the careers of the members of the bureaucracy and the judiciary.

These legal efforts should be combined with the lifting of indirect restrictions on political representation in parliament, namely the electoral system. The current 10 percent threshold in parliamentary elections stands as a big obstacle for democratic representation of various political currents in parliament. All previous proposals to lower the threshold have been declined on the basis of maintaining political and economic stability. Nonetheless, a recent study by the Economic Policy Research Foundation of Turkey (TEPAV 2011) shows that both stability and fair representation can be achieved with a 4 percent threshold. Furthermore, since 2007, Kurdish nationalist parties, with a support base of approximately 5 to 6 percent of the national vote, have chosen to nominate their candidates as independents in those provinces where they have a substantial electoral base. The success of this strategy has demonstrated the obsolescence of the 10 percent threshold.

Resolution of the Kurdish issue also requires the adoption of new economic and social measures in the eastern and southeastern region including, but not limited to, the development of a long-term special incentive system that is specific to the region, intensification of infrastructural projects most notably in the energy and transport sectors, investments geared towards employment, vocational training for the employment of unqualified labour force, direct income transfers, and an action plan on education that entails measures for sustaining attendance in schools and resolving the shortage in teachers (Kurmuş et al. 2006). In line with the constitutional reform, opportunities for greater self-governance at the local level can be fostered by new measures such as the establishment of provincial administrations comprising a few provinces and a certain degree of transfer of competences and resources from the centre to these bodies in the fields of education and health. Restrictions on the use of languages besides Turkish in local administrations and in courts should be lifted. These measures may not only prove effective towards the resolution of the Kurdish issue, but also help to promote better governance at the national level.

The failure of the Kurdish opening has forcefully shown that the success of these reforms are closely tied to an intense societal deliberation in which the government needs to convince the Turks of the necessity, viability and timing of a political solution based on equal citizenship and non-discrimination. At the same time, it has to gain the trust of the Kurds on its sincere commitment to reform. In reaching out to the Turkish majority, the government needs to underline that despite the rising impasse, recent polls suggest that only 6 percent of the Kurds have separatist ambitions (Milliyet 2012a). The limited public reaction to current controversial events also shows that the political risks associated with such reforms may not be too high and that there may be grounds for hope in fostering societal support on this front. For instance, the leaked tapes of the government's negotiations with the PKK, also known as the "Oslo process", did not trigger a major backlash among the public. In a similar vein, Deputy Prime Minister Bülent Arınç's statements on the possibility of moving Öcalan to house arrest after a resolution of the conflict did not lead to a harsh public reaction (ICG 2012: 5). These show that even if the desired end has not yet been achieved, the democratic and public deliberations and discussion of the Kurdish question have nevertheless become the accepted norm in Turkey.

The judicial system

The state of the Turkish justice system is central to determining the fate of Turkey's efforts at democratic consolidation. In its current form, it poses a major hindrance to the reform process with its institutional, societal and ideological dimensions. About 32 percent of all the ECtHR judgements against Turkey in the period 1995-2010 concerned the right to a fair trial, while 23 percent related to the right of personal liberty and security (ECtHR 2010: 157). Judicial independence is impaired by institutional links with the executive and the resilient allegiance of the judiciary to the state rather than the individual and society. Societal trust in the judiciary and in the law's capacity to solve problems is also low. A study conducted in 2008 revealed that only 41 per cent of the population believed that individuals are treated fairly by the courts (Kalem, Galma and Elveriş 2008: 15).

Since 1999, Turkey has undertaken important legislative reforms regarding its judicial system and has made considerable efforts towards the training of its judges. The 1999-2005 amendments covered some of the judicial reforms long demanded by the EU, including the abolition of the infamous State Security Courts that used to deal with crimes against the state, allowing retrial in civil and criminal cases in which the ECtHR had found violations of the European Convention of Human Rights, and ending the jurisdiction of military courts over civilians. Reforms on this front were then suspended, however, until the constitutional reform package was approved by 58 percent of the electorate in the September 2010 constitutional referendum.

The government, especially during its second term, had conflictual relations with the largely oppositional Kemalist judiciary, culminating in the closure case against the AKP in March 2008. In August 2009, the government announced the Judicial Reform Strategy (later revised in September 2012) and put its main provisions to the vote in the 2010 referendum. The constitutional reform package addressed some key priorities of the Accession Partnership Document in the area of the judiciary, such as further restricting the authority of military courts, allowing judicial appeals against expulsion decisions of the Supreme Military Council, introducing individual applications to the Constitutional Court and changing the composition of the Constitutional Court and the High Council of Judges and Prosecutors. These, and other reforms introduced by the reform package were in general received positively by the EU, while they have been strongly contested within Turkey. For an overview on constitutional amendments in judicial reform between 1982 and 2012, see Figure 3 (in the Annex).

Much of the dispute concentrated on two amendments that concern the composition of the Constitutional Court and the High Council of Judges and Prosecutors (HSYK), the latter of which determines the career paths of judges and prosecutors through appointments, transfers, promotions, reprimands and other mechanisms. While these amendments aimed to democratise the judiciary and make it more responsive to the demands of society by diversifying the background of the members of the Constitutional Court and by widening the composition of the High Council, they were criticised for retaining certain provisions that compromise judicial independence (see below).

Legal reform with respect to the judicial system continued with consecutive reform packages that were mainly geared towards decreasing the workload of the judiciary and increasing the efficiency of the justice system. The first and the second judicial reform packages passed in 2011 included measures such as decriminalising certain offences which are now subject to administrative fines, introducing legal fees for applicants to Regional Courts of Appeal and to the Court of Cassation and transferring powers of issuing inheritance certificates from courts to public notaries (Turkish Ministry of Justice 2012: 43). The Laws on the Court of Cassation and the Council of State were amended to decrease their current backlog by establishing more chambers, changing their working methods and appointing a large number of

judges and prosecutors to these courts (European Commission 2011: 17). In the case of the Court of Cassation, these measures have already started to yield an improvement with its caseload of 1.12 million in July 2011 going down to 0.88 million in July 2012 (European Commission 2011: 14-15).

The third reform package passed in July 2012 abolished the much criticised heavy penal courts with special powers and replaced them with Anti-Terror Courts, which include specialised judges who are responsible solely for deciding on preventive measures during the investigation phase and who do not take part in the actual trial. This package has also introduced other measures to tackle the problem of undue and long pre-trial detention periods that have been widely criticised by the EU and the CoE, by lifting the three year limit for judicial control, introducing new measures of judicial control as an alternative to pre-trial detention and by amending Article 101 of the Criminal Procedure Code which now provides that pre-trial detention can only be introduced and sustained when there is a strong suspicion that the crime has been committed, that there are grounds for arrest and that the proportionality of arrest is explicitly documented and justified through the presentation of concrete evidence.

Box 4. Selected post-2005 reforms of the judicial system

- » The 2010 constitutional amendments increased the number of members of the Constitutional Court from 11 to 17 (where 4 are now elected by the Parliament instead of the President) and reduced their tenure from 25 to 12 years.
- » The 2010 constitutional amendments increased the number of members of the High Council from 7 to 22 and widened its composition from representatives of the High Courts to legal scholars, lawyers and representatives of the low courts, elected mostly by the judiciary itself. They also established a Secretariat for the High Council separate from the Ministry of Justice.
- » The amendments to the Constitution opened to judicial review decisions by the High Council dismissing members of the judiciary from the profession. Judicial inspectors responsible for evaluating the performance of judges and prosecutors now report to the High Council and no longer to the Ministry of Justice, to prevent political influence through the Ministry.
- » The first and second judicial reform packages adopted in 2011 included measures such as decriminalising certain offences which are now subject to administrative fines, introducing legal fees for applicants to Regional Courts of Appeal and to the Court of Cassation and transferring powers of issuing inheritance certificates from courts to public notaries.
- » A Law on Mediation that is expected to decrease the workload of the judiciary entered into force in June 2012.
- » The third judicial reform package of 2012 abolished heavy penal courts with special powers and eradicated the rights of the courts to put time limits on defendants and prosecutors in the context of judicial processes; to expel the accused or the defence from any or all future hearings on the grounds of behaviour deemed to disturb court order and discipline; to limit to one the number of defence lawyers while the suspect's statement is being taken or during custody.
- » In tackling the problem of long pre-trial detention periods, the third reform package lifted the three-year limit for judicial control, introduced new forms of judicial control and amended Article 101 of the Criminal Procedure to strengthen the obligation of giving reasoned opinions in the courts' decision for pre-trial detention.

In addition to these legal measures, there has also been considerable progress relating to the training of the members of the judiciary, as well as to the technological infrastructure of the justice system. In 2011, 2941 judges and public prosecutors received intensive in-service training including on human rights related issues (Turkish High Council for Judges and Prosecutors 2012: 83). Regarding technological progress, the EU-assisted National Judicial Network Project initiated in 2001 has turned the Turkish justice system into one of the most computerized judiciaries in Europe (Council of Europe 2010: 92-97). This

has significantly helped to ease citizens' access to justice and improve the efficiency and transparency of judicial services by accelerating administrative procedures (Van Delden 2009: 11). A study conducted by the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) attributed this to the successful combination of the "reform of codes, procedures, structure, organization [and] composition" with reforms related to Information and Communication Technology (Velicogna 2007: 15).

Despite all these steps taken, there is general agreement that reforms in this area have not delivered the expected results and that the main problems facing the Turkish judicial system remain largely intact. As we did in our 2004 paper, we classify the remaining problems with the Turkish judicial system under three broad categories: *excessive workload, insufficient independence, and lack of impartiality*.

Regarding *excessive workload*, the 2010 CEPEJ data shows us that despite the increase in the number of judges in recent years, the number of judges per 100,000 inhabitants in Turkey is 10.6, still below the 21.3 average for CoE members (Council of Europe 2012a: 145). A judge in Turkey currently faces an average number of 1078 cases each year compared to an average number of 200 cases faced annually by the judges of EU member states (Public Expenditures Monitoring Platform 2012: 20). This largely contributes to excessively long judicial proceedings and huge backlogs in the system. Turkey was the country with the highest number of violations of Article 6 of the ECHR on the "reasonable time" of judicial proceedings in 2010 (Council of Europe 2012a: 172). The problem of workload becomes particularly acute in the case of the High Courts. For instance, the backlog of the Court of Cassation increased twelvefold between 2000 and 2011.²⁸ Another demonstration of the current workload of the judiciary is the fact that approximately 50 percent of all cases result in acquittals, whereas the EU average for acquittals are estimated to amount to 6 percent of all cases (Istanbul Policy Centre 2012: 41).

One way of dealing with this problem is to increase the number of judges and prosecutors, which the government has been trying to do in recent years. Nonetheless, this measure alone seems to be insufficient in effectively tackling the problem of excessive workload. It is also important that intermediate courts of appeal, the legal framework of which was already established in 2005, start functioning with no further delay. With a few exceptions, all decisions of the general courts can be appealed to the Court of Cassation, which results in its currently enormous backlog of cases that would otherwise be dealt with by courts of appeal. The courts of appeal are expected to increase the speed and efficiency of the judiciary and constitute an important step in ensuring the right to a fair trial. They can also allow the Court of Cassation to concentrate on its function of unifying and clarifying Turkish case law.

Another challenge concerning workload is the fact that prosecutors do not fulfill their "gate-keeping function" and tend to bring a high number of unmeritorious cases to court. This is partly due to their fear of judicial inspectors, particularly when cases concern the security of the state. On top of this, they do not always have the necessary resources to conduct high-quality pre-trial investigations and have to rely on ordinary police or gendarmerie officers under their supervision who lack specialised competences in judicial matters. In this respect, the establishment of a separate judicial police organisation may result in higher quality investigations and shorter trial periods. Other measures to decrease the workload, such as introducing reasonable time limits for the gathering of evidence and the presentation of indictments to courts, ensuring that trials continue with fewer interruptions and establishing a separate authority to exercise supervisory jurisdiction over courts to accelerate proceedings could also be adopted (Council of Europe 2012b: para. 15-26).

Substantial improvements in the *independence of the judiciary* have

²⁸ Statistics pertaining to the Court of Cassation are available at <http://www.yargitay.gov.tr/index2.php?pgid=21>.

been made through the 2010 constitutional referendum that changed the powers and the composition of the High Council considerably. The constitutional amendments increased the number of its members from 7 to 22, which was largely necessary given the size of the Turkish judiciary; established a High Council secretariat separate from the Ministry of Justice; and widened its composition from representatives of the High Courts to legal scholars, lawyers and representatives of the low courts, elected mostly by the judiciary itself. This created a Council that is much more representative of the judicial sphere than the previous one. The fact that judges and prosecutors are now evaluated by inspectors appointed by the Council and not by the Ministry as before has remedied an important source of judicial dependence on the executive, which was much criticised in the past by the EU and scholars alike.

Nevertheless, despite these developments, there is still considerable cause for concern regarding the independence of the judiciary in Turkey. One crucial element of the 1982 constitution concerned the presence of the Minister of Justice in the High Council. The new constitutional amendments abolish the right of the Minister to attend the meetings. Yet, he still has the task of "representing" and "administering" the Council, can still decide on the Secretary General, must still approve inspections against judges and prosecutors and his Undersecretary is still present in the Council meetings. While for some observers the current presence of the Minister and his Undersecretary are rather symbolic in nature and thus does not have a bearing on judicial independence, there is a wider consensus that the voting system used to determine the members of the High Council is problematic. Under the system established after the referendum, each judge and prosecutor has the right to elect ten (out of 22) High Council members by voting for each post to be filled rather than voting for only one representative. The Venice Commission had already warned in its interim opinion on the draft law on the High Council that this system would entail "the possibility of informal electoral majority agreements aimed at avoiding the election of candidates who are the expression of minority orientations, which should, in any case, be present in the body if the HSYK is to be representative of the entire judiciary" (Council of Europe Venice Commission 2010: para. 37). In fact, the first elections to the High Council under the new rules were tarnished by the election of all the names in a list allegedly prepared by the government (Ergin 2010; Insel 2010).

Hence it is important that the voting rules to the High Council be changed to increase the representativeness of the institution and to strengthen its independence from the executive. The transparency of the High Council's decisions would also be enhanced by annual reports that communicate its decisions to society (Istanbul Policy Centre 2012: 35-36). While the transfer of the powers of inspection and supervision of judges and prosecutors from the Ministry to the Council under the new rules is welcome, the fact that the Minister has to authorise investigations by virtue of Article 159 of the Constitution compromises judicial independence; as a result, this veto right should be revoked (Council of Europe 2012b: para. 108). Strengthening judicial independence also requires that all of the decisions of the High Council should be subject to judicial review and that the criteria relating to the inspection, performance appraisals, disciplining and dismissal of judges and prosecutors need to be more "precisely" and "narrowly" defined (Giegerich 2011: 26-28). The new constitution should also more precisely define the derogations to judicial guarantees in line with the Siracusa Principles²⁹ and clearly state "geographic guarantees", among others, against the use of geographic reassignment as an arbitrary source of punishment for judges and prosecutors (Istanbul Policy Centre 2012: 33-34).

Limitations to judicial independence, however, are not restricted to matters concerning the High Council, but are also observed at the

²⁹ Siracusa Principles (also known as the Draft Principles on the Independence of the Judiciary) were formulated by a committee of experts organised by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers in May 1981. Text is available at <http://cristidanilet.ro/docs/Siracusa%20Principles.pdf>.

point of entry into the judicial profession, where the Ministry of Justice is strongly involved. The Justice Academy at which the candidate judges and prosecutors receive their pre-service training is run by a general assembly whose members include the Minister and his Undersecretary. The written exams taken upon completion of the two year pre-service training are followed by an oral exam conducted by a board that is composed of five members from the Ministry and two from the Justice Academy. Hence to ensure full independence at entry level, the Justice Academy's autonomy from the executive should be guaranteed and recruitment should be performed solely by the reformed Justice Academy.

While a judiciary fully independent from the executive or any other external locus of power is essential for a consolidated democracy, it may not be sufficient in attaining *impartiality* among the cadres of the judiciary. As Özbudun highlights, "achieving impartiality of the judiciary is much more difficult than achieving independence since independence is an institutional matter whereas impartiality is a psychological disposition [...] even if a judge is fully independent *vis-à-vis* the legislative and the executive, he can be susceptible to certain ideological pressures and relations of interest" (Özbudun 2007).

In the Turkish judicial system, both judicial independence and impartiality are compromised by the relationship between judges and prosecutors. As also highlighted in our 2004 paper, judges and prosecutors continue to take the same exams to enter their professions, have their careers determined by the High Council, attend the same school for pre-service training, earn the same salaries throughout their careers and even live in the same residences. Even in courts, certain symbolic actions such as entering the court through the same doors and sitting side by side on an elevated platform reinforce the link between the two. Such symbolic actions also distort the balance between the prosecution and the defence, as lawyers use different doors to enter the court, sit at a table below the judges and prosecutors at the ground level and remain in court when the prosecutors retire with the judges to the same chamber during the course of the proceedings. Hence, legal, institutional and functional linkages between the judges and the office of the prosecutor (including the existence of a single, common High Council for both) should be abolished in order to achieve the full independence and impartiality of judges, and defence and prosecution should be placed in equal positions. Reform on this front is particularly necessary considering that "the prosecutors' symbolically privileged standing in criminal proceedings, as the guardian of state interests, could reinforce the perception according to which the Turkish judicial system has a strong in-built bias for the interests of the state and projects an appearance of partiality to defendants and to the public" (Council of Europe 2012b: para. 123).

Indeed, previous sections detailing the current state of the reform process in various areas demonstrate this "strong built-in bias" and the way in which it leads to inconsistent interpretation of the law and impedes political reform. While there is a need to refine certain laws to make them less vague and less open to interpretation, this is insufficient. Previous research suggests that there is an even more pressing need for a change in the mentality of judges and prosecutors who often consider their first and foremost job to protect the interests of the state rather than individual rights and freedoms and to grant a fair trial (Sancar and Ümit Atılğan 2011). State sensitivities as the dominant ideology is in-built from the very early stages of the careers of judges and prosecutors who, when serving in small provinces, socialise mainly with the other members of the provincial bureaucracy and are under both peer and societal pressure to act as a "representative of the state" (Sancar and Ümit Atılğan 2011: 14-16).

This is reinforced by the system of appraisals, which engender a widespread fear among both prosecutors and judges that "not considering the necessary balances" (that is, between state interests and justice) in their investigations and decisions can result in punishment such as involuntary transfers.

The crucial issue here is to change the mindsets of the judges and prosecutors, not only to attain interpretations that expand fundamental rights and freedoms, but also to ensure they take allegations of human rights abuses seriously. The most important tool to achieve this end is primarily the education system itself. Although there have been certain improvements in legal education in the recent years, legal training in most universities is still far from satisfactory with over-crowded faculties relying excessively on simple memorising rather than analytical reasoning. This calls for a more comprehensive reform of education laws with a heavy emphasis on human rights education, inspired by practices in other European countries. Similarly, the training of candidate judges and prosecutors should also be reformed in such a way that they have significant experience before starting the profession. In-service training on matters such as EU law and international human rights law also needs to be continued in an intensive and systematic fashion and to reach out to a wide segment of the judiciary. These efforts at education need to be coupled with a comprehensive reform of the system of inspection and appraisals of judges' and prosecutors' performance where, as argued earlier, the criteria for career related decisions are more clearly and narrowly spelt out, and thus can act as "natural incentives for judges and prosecutors towards effectively embedding the ECHR and the case-law of the ECtHR into their daily work" (Council of Europe 2012b: para. 161).

The prime embodiment in the Turkish justice system of judicial partiality toward the state were the State Security Courts and later the heavy penal courts with special powers, which were both associated with upholding state interests over those of the individual in the name of "securing the state". Although the third reform package has recently replaced the heavy penal courts with Anti-Terror Courts and has introduced improvements in the rights of the defence, the problem of entrenched mindsets is difficult to eradicate in the short run and may continue to impede the rule of law. Hence it is also important for the sake of impartiality that all kinds of special courts be abolished in the Turkish justice system.

Conclusion

This report shows that the current stagnation of Turkish democracy goes hand in hand with the current impasse in EU-Turkey relations. Domestic factors have combined with a loss of credibility of EU conditionality to create a situation in which political reform is substantially stalled and, in the cases in which it has continued, has mostly served the interests of the ruling political elite, with no particular reference to the EU. The virtuous cycle of reform that characterised the 1999-2005 period has been replaced by a vicious cycle in which lack of conditionality feeds into political stagnation which in turn moves Turkey and the EU further away from one another.

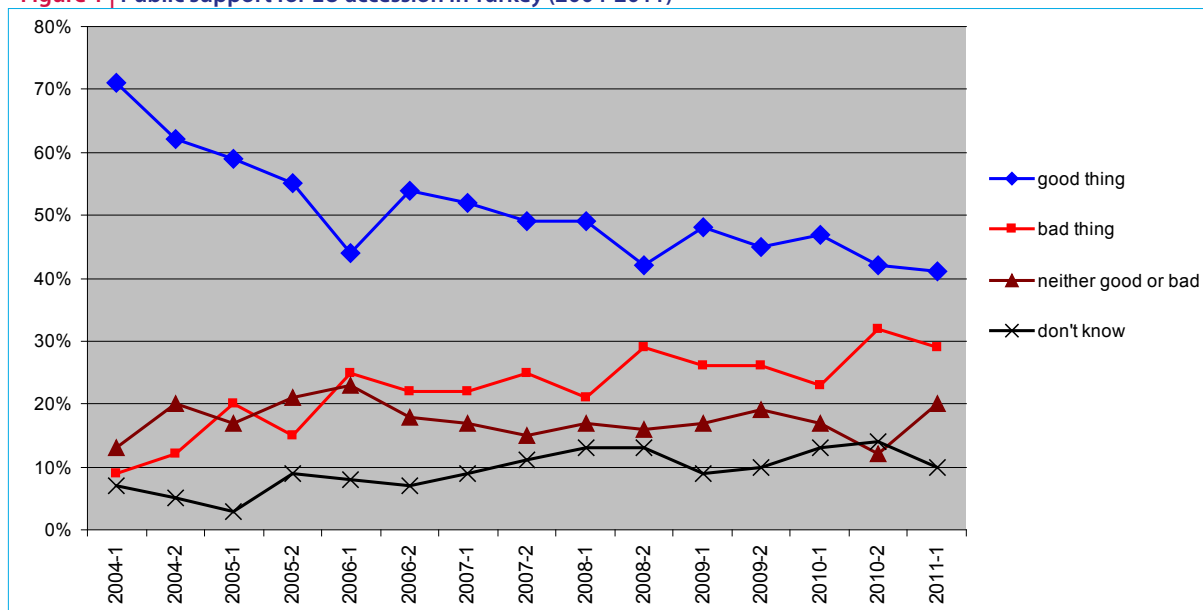
The post-2005 trajectory of democratic reform in Turkey hence demonstrates that the EU is still a fundamental anchor in the consolidation of Turkish democracy. It is an external anchor needed to keep the country on the *path to democracy and stability*, to ensure that Turkey pursues *a consistent path of reform with a view to joining the EU and to provide solutions to the immediate and pressing problems facing Turkish politics and society*. The presence of an EU anchor on the path to democracy and stability would mean minimising the risk of substantial reversals to the reform process, as observed in the recent debates initiated by Prime Minister Erdoğan on the merits of reintroducing the death penalty. Pursuing a consistent path of reform with a view to EU accession would entail undertaking systematic reforms rather than ad hoc steps (as in the case of the judicial system) which strengthen the perception that only those reforms that empower the ruling political elite are undertaken. Resorting to a strong EU anchor in searching for answers to key political challenges would help to weaken the forces opposed to reform in society who act as stumbling blocks in the resolution of key political conflicts such as the Kurdish issue.

In spite of the importance of this anchor, the future prospects for Turkey-EU relations seem to be mired on the EU side by the euro crisis,

short-term political calculations of political leaders and the dominant exclusionary rhetoric towards Turkey, and on the Turkish side by the shift in interest among the political parties and in society at large from Turkish membership in the EU towards a more active global and regional role for Turkey. A lack of vision, trust and commitment on both sides seems to have brought relations to a standstill. To overcome this impasse, both short- and long-term measures need to be envisaged. In the shorter run, the recommendations put forward in 2011 by the Commissioner for Enlargement and Neighbourhood Policy, Stefan Füle, are noteworthy. They include enhanced cooperation between Turkey and the EU on political reform, continued attempts on the part of Turkey to bring its legislation into closer alignment with the EU, maximising the potential benefits of economic relations between the

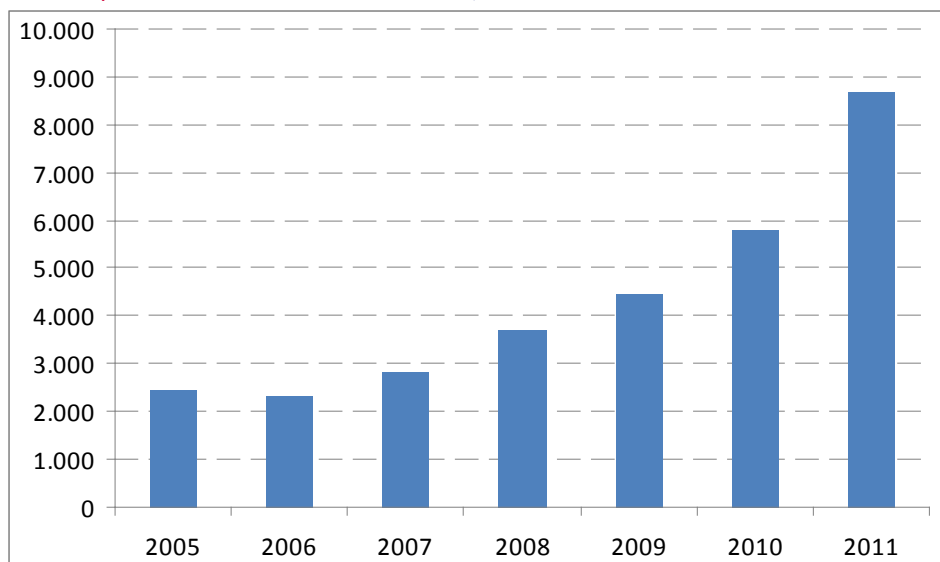
two sides, a stronger dialogue on foreign policy in the light of the Arab Spring and visa facilitation (Füle 2011). Nonetheless, reinvigorating relations and building them on more solid grounds where the EU can act as a long-term anchor for Turkish democracy requires a debate that is based on a stronger commitment and a broader vision. This may necessitate a reconceptualisation of Turkey-EU relations from the perspective of mutual benefits in a globalised world, where debates on more flexible modes of membership are not excluded. While this could prove to be crucial for the fate of Turkish democracy, the demand for democracy in the southern neighbourhood, where Turkey and its relations with the EU are closely watched, extends the importance of this democratic journey and the role the EU plays in it beyond Turkey.

• **Figure 1 | Public support for EU accession in Turkey (2004-2011)**



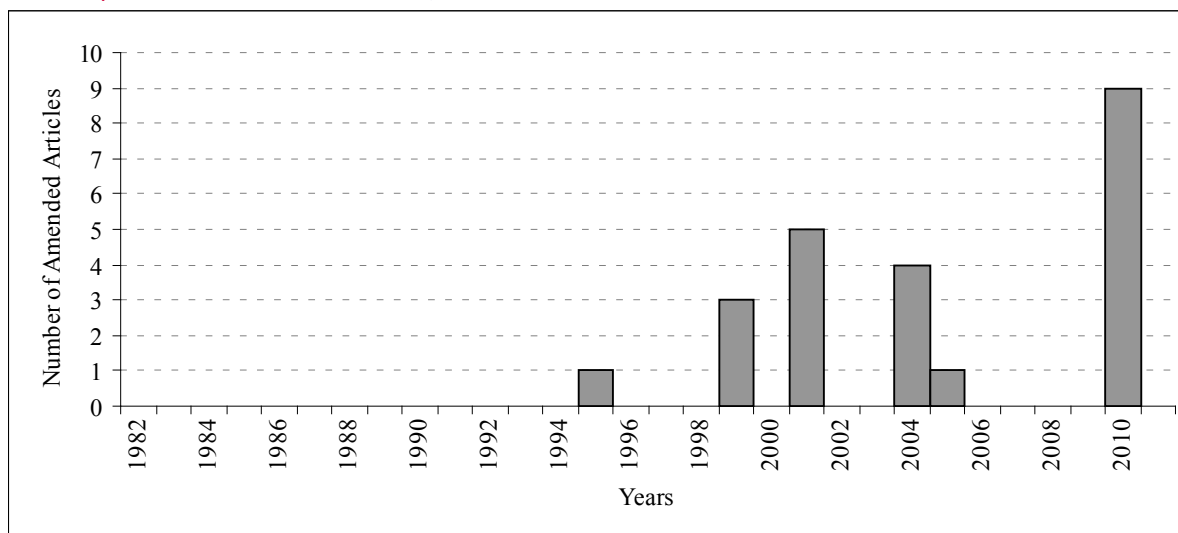
Source: European Commission, Standard Eurobarometer, 2004-2011

• **Figure 2 | Number of applications from Turkey to the EctHR* (2005-2011)**



Source: ECtHR annual statistics (* allocated to a decision-making body)

• **Figure 3 | Constitutional amendments in judicial reform (1982-2012)**



Source: Grand National Assembly of Turkey, Türkiye Cumhuriyeti Anayasası (The Constitution of the Republic of Turkey), 2011, <http://www.tbmm.gov.tr/anayasa.htm>.

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