1. EU Democracy Promotion, Conditionality and Judicial Autonomy

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Over the past two decades, the European Union has become a central actor in the promotion of democracy in its neighbourhood and across the world. Since the 1990s the EU has explicitly established democratic change as a central goal of its development cooperation. Of the many outcomes associated with democratic change, the EU has embraced the export of the rule of law as primary objective. This study investigates the effectiveness of EU efforts to strengthen rule of law. We evaluate the link between EU conditionality attached to economic aid flows and judicial autonomy and government behaviour towards the judiciary, alongside the EU's direct investment promoting these outcomes. Using a global sample of EU aid-receiving countries for the period from 1991 to 2010, we show that economic aid from the EU appears to increase judicial autonomy through the mechanism of judicial reforms. We also find that EU conditionality does not improve government compliance with higher court orders. Rather, it is associated with an increase in ad hoc attacks of courts. These findings have implications for how the EU allocates aid and pursues the promotion of the rule of law in developing countries.

Introduction

Since the end of the Cold War, a consensus in the international donor community argues that democracy and good governance is an integral part of development efforts. Over the last decades, donor focus on bringing about free and fair elections has shifted towards a more varied embrace of democratic norms, including democratic accountability, human rights, transparency and the rule of law (Elster and Slagstad 1993, Linz and Stepan 1996, Maravall and Przeworski 2003, Baylies and Szeftel 1997, O'Donnell 1998). Efforts to promote democratic deepening have emphasised the importance of the rule of law for democratic stability and consolidation (Carothers 1998, 4), with judicial reform assuming a central place in donor efforts to democratise the justice system (Wright, Dietrich and Ariotti 2017). Examples of judicial reforms include, for instance, the democratisation of the judicial selection processes by opening the size of the selection committee to a larger number of actors that get a vote in the appointment of judges to courts (Driscoll and Nelson 2012, 2015). The EU has been the most vocal and consistent donor in support of using foreign aid to engineer institutional change in the judiciary sector of countries in its neighbourhood but also around the world. Notably, the EU has formalised its commitment to democracy and governance promotion in various treaties, as evidenced in the Treaty of Maastricht (1992) and the EU's Common Foreign and Security Policy (Lavenex and Schimmelfennig 2011). And, using its foreign aid budget, the EU has sought to advance judicial reform primarily through political conditionality.[2]

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[2] More broadly, Lavenex and Schimmelfennig (2011) discuss the multiple mechanisms through which the EU promotes democracy and governance abroad

Political conditionality as a means of engineering institutional reform uses foreign aid flows as leverage. In return for aid, the EU requires countries to pursue institutional reforms and/or policy changes as explicitly set out in conditions attached to foreign aid (Lavenex and Schimmelfennig 2011, Dietrich and Wright 2015). Although the objectives of political conditionality vary, support among members of the EU is strongest and most consistent for promoting rule of law and state administrative capacity abroad.[3] Judicial reform consistently and prominently features in conditions attached to foreign aid, as judicial autonomy is a core founding principle in the EU's legal order.[4] Simultaneously the EU directly invests in judicial autonomy in developing countries through aid activities whose goal is to promote judicial reform and capacity. These direct investments often involve EU-based experts who provide technical assistance in the implementation of judicial aid projects. To date, however, little systematic evidence exists that shows that EU efforts in promoting institutional reform are successful. This chapter sheds light on EU efforts. Specifically, it examines how economic aid from the EU may influence judicial institutions and government behaviour vis- à-vis courts through conditions. We also examine how direct investment in the judiciary sector through specific aid projects influences the same outcomes. We are particularly interested in the efficacy of EU economic or judicial aid on judicial reform. This is because, once implemented, reforms are difficult to dismantle and should therefore be a "desirable" outcome from the donors' point of view.

Using a sample of 116 EU aid-eligible countries between 1991 and 2010 we find that EU conditionality can promote judicial reform in aid-receiving countries on average. However, it appears to lack the power to persuade incumbent governments to turn against courts when it is politically expedient for them. We also find that EU conditionality works better among recipient countries whose dependency on EU aid is higher.

EU conditionality, direct investment and judicial autonomy

Among foreign aid donors, the EU has become a particularly powerful force in development cooperation. Between 1990 and 2012, foreign aid coming out of the EU budget has increased more than two-fold. Historically, the EU has paid strong attention to developments in democracy and governance when dealing with countries in its neighbourhood (Mungiu-Pippidi 2012, Balknir and Aknur 2015). In particular, the EU has insisted on the autonomy, impartiality, and efficiency of the judiciary not only for candidate countries for accession but for its aid recipients around the world. For instance, in the 2008 Accession Partnership agreement with Croatia,[5] judicial reform was a priority, and continued to feature prominently in conditions attached to economic aid as well as in direct investment in the judicial sector through EU-funded projects.[6] Outside of the Eastern European accession context, the EU has also assumed global leadership in promoting judicial autonomy in Armenia and Georgia (Kostayan 2015, 141). In Ethiopia the EU has demanded improvements in judicial autonomy via aid conditionality and also serves as the biggest contributor to the Ethiopian judiciary: in the context of the Public Sector Capacity-Building Program (PSCAP 2005–2012), a multi-donor initiative, the EU supported activities to reform the justice system and has supported a training centre for judges and prosecutors (Del Biondo 2015). In Tunisia the EU has heavily invested in the modernisation of the judicial

[3] See Wetzel and Orbie (2015) for a discussion of the "out-put" oriented nature of EU democracy promotion
[4] See e.g., Sen (2012)
[5] Council of the European Union 2008, cited on p. 89
[6] For examples and in-depth discussion of judicial reform projects in Croatia see Balknir and Aknur (2015, 101)

system in recent years (Reynaert 2015, 157). These anecdotes serve to illustrate the prominence of the judiciary sector in the EU's democracy- and governance-promotion efforts.

Among the various tactics for promoting democracy and governance abroad, the EU's most frequently employed tactic is political conditionality. In intergovernmental negotiations, the EU uses economic resources in the form of development assistance as leverage to incentivise institutional reform. The argument behind this tactic focuses on the relationship between donor and aid- receiving governments. By specifying institutional reform outcomes or behavioural changes on the part of the government through conditions attached to foreign aid packages the EU leverages its economic prowess from the outside to encourage change within countries. It requires incumbent governments to adopt the requested reforms or policies as a prerequisite to receiving economic assistance from the EU. In addition to conditionality, the EU directly invests in the judicial sector through the mechanism of technical assistance. For instance, the EU's 'technical assistance for institutional strengthening of the ministry of justice' aims to improve key legal arrangements governing relations between the judiciary, the government, businesses and citizens. It also improves the efficiency, transparency and access to justice in Jordan, for example.

The focus on judicial reform in the EU's use of conditionality stems, in part, from its centrality in the EU's legal order. It also arises from the recognition that problematic judicial systems can be obstacles to good governance, democratic accountability, human rights and transparency. They can also be obstacles to a country's economic development. As a solid body of research shows, judicial autonomy is positively associated with economic growth.[7] The link between judicial autonomy and development matters insofar as aid-receiving governments view judicial autonomy as a means to promote development. If developing countries have at least some domestic incentive to promote judicial autonomy to improve the investment climate, we would expect EU efforts to be even more successful because domestic interests and political conditionality overlap, as has been argued by Schimmelfennig, Boerzel and other scholars.

However, the pursuit of judicial autonomy is a complex area for external policy intervention. Below we present three different empirical investigations that explore different outcomes associated with judicial autonomy and the circumstances in which EU conditionality is more likely to succeed in its goals: First, we investigate whether EU conditionality is associated with any improvements in the independence of courts from government interference across EU aid-receiving countries. Second, we examine the extent to which governments comply with court orders by assessing the government's implementation of court orders. Third, we investigate whether EU conditionality discourages governments from undertaking verbal attacks and purges of courts when it is politically expedient for them.

Data and analysis

The period of our sample (1991–2010) covers the first two decades after the end of the Cold War. During this period, the EU increasingly implemented political conditionality in an effort to promote democracy and good governance abroad. Further, the EU continually increased

[7] This association could be based on enhanced property rights protection of investment or lower transaction costs of capital investment, among others. See (Haggard and Tiede, 2011) for an excellent review of the literature evaluating judicial autonomy and economic growth and development.

economic assistance both within its neighbourhood and around the rest of the world. The sample includes 116 aid eligible countries with populations over 1 million (in 2009).[8]

Data on judicial autonomy. Drawing on the Varieties of Democracy (VDem) data set (Coppedge et al., 2016), we look at the efficacy of EU economic aid and judicial aid on judicial institutions and government behaviour towards the judiciary. To measure judicial institutions we use a linear combination of the judicial reform and review indicators to test our prediction about institutional reform; we call this variable *Institutions*. To model government behaviour towards the courts, we combine information from four variables that measure direct government treatment of the courts (attack, pack and purge the courts) and whether the government complies with court decisions. We call the latter variable *Behaviour*. Higher values of these two variables indicate better outcomes, meaning progress towards more autonomous judicial institutions and less government meddling in the operation of the courts, respectively. Combining information from all six raw variables from VDem (reform, review, attack, pack, purge and compliance) yields a final variable, which we call *Aggregate*. In the main reported set of models, we test separate equations for each of the three theoretically important variables: *Institutions*, *Behaviour*, and *Aggregate*.

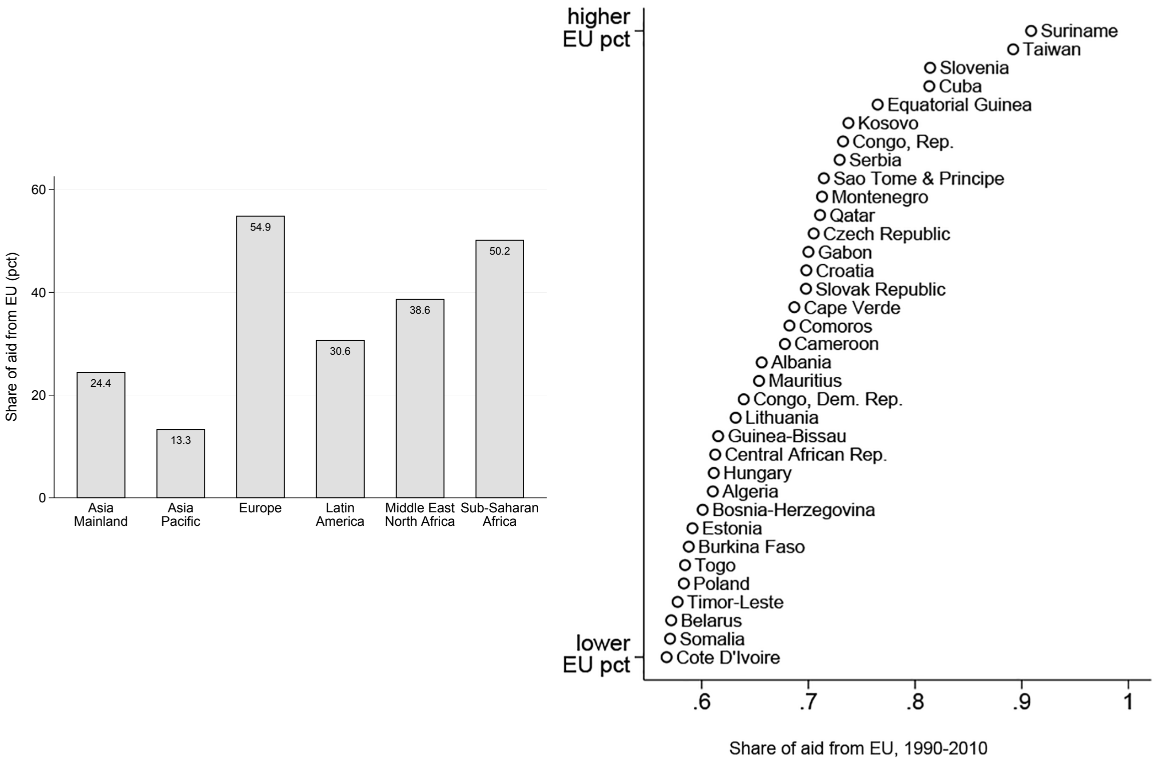
Aid data. To assess the effects of EU aid, we examine both economic assistance and democracy aid. The former captures the conditionality argument. The latter is used to invest directly in the judicial sector (Wright, Dietrich and Ariotti 2017). We estimate the conditional correlation between economic assistance and judicial outcomes while accounting for the independent effect of democracy aid. We use foreign aid commitment data from AidData 2.1.[9] We aggregate foreign aid commitments by the EU at the recipient-country-year level, and stay at the highest level of aggregation, subsuming a range of different foreign aid sectors to be captured by EU aid flows, including aid for the social sector, economic infrastructure and services, domestic production, environment, commodity aid, debt relief and budget support. These categories comprise economic assistance. Democracy and governance aid (DGA) includes projects that directly target policy planning in areas such as fiscal and monetary policy, institutional capacity building and structural reform. DGA also finances tax assessment procedures, legal and judicial development as well as constitutional development. We measure EU foreign aid as the logged value of the lagged two-year moving average of constant dollar economic assistance.[10]

[8] The sample is derived from Geddes, Wright and Frantz (2014). We exclude all cases where the country is not classified as either a democracy or a dictatorship. Therefore, this excludes cases of state failure (e.g., Somalia after the fall of Siad Barre) and foreign occupation (e.g., Lebanon before the withdrawal of Syrian troops and Afghanistan and Iraq during U.S. occupation.

[9] Data downloaded from http://aiddata.org/aiddata-research-releases on 2.27.15

[10] EU Aid is: ln $\left(\frac{(EU\,A_{t-1} + EU\,A_{t-2})}{2}\right)$ where EUA is constant dollar EU economic aid commitments per capita. The moving average specification enables us to smooth over annual variation.

Figure 1



The left panel of Figure 1 shows the EU's share of total aid, by geographic region. More than half of the aid flowing to Europe and sub-Saharan Africa during this period comes from the EU, while less than a quarter of aid goes to Asian countries. The right panel shows the recipient countries with the highest share of aid from the EU. This list is comprised mostly of European countries and countries with strong colonial ties to France (e.g., Algeria, Côte d'Ivoire, Equatorial Guinea and Gabon) as well as countries where the US has few diplomatic ties (Cuba, Somalia), or where the EU provides security assistance rather than economic aid (Qatar, Taiwan).

Control variables

In the models reported below, we include a series of control variables. We use three control variables to account for domestic political conditions that may influence the judiciary in aid-receiving countries: a binary variable of *democracy* from Geddes, Wright and Frantz (2014); a variable measuring whether there has been a successful *coup* in the observation year or the prior year, from Powell (2012); and a variable that measures how long the current political regime has been in power, *duration*, from Geddes, Wright and Frantz (2014). Further, elections can influence the receipt of aid and perceptions of judicial institutions and the government's relationship with courts. We therefore include indicators of whether a multiparty executive election (*multi-party*) occurs in a particular election and whether the election was boycotted by the opposition (*boycott*).[11] Further, we account for the time since the last constitution (*legal system*) was written to capture the fact that aid poured into countries re-writing constitutions and holding first multiparty elections in the early 1990s. Finally, we control for foreign aid from other donor countries, *non-EU aid*. We view these variables as potentially confounding the relationship between EU foreign aid and judicial outcomes. To ensure that our selection of control variables is not driving our reported results, we offer evidence from a battery of tests that exclude control variables and include additional potential confounders, such as economic growth, GDP per capita and population size.

Estimation

We begin with a random effects linear model. Importantly, the cross-sectional unit is the regime-case from Geddes, Wright and Frantz (2014). This means that the disturbances across units stem from differences in particular regimes. In many countries, such as Botswana, a stable regime-case persists across the 20-year sample period and modelling the regime-case is no different than treating the unit as the country. In other countries, however, there can be distinct regime-cases at different points during the sample period. For example, when Kabila's rebels ousted the Mobutu regime in DRC-Congo (formerly Zaire) in 1997, a new regime took power. In 2005, mass protests toppled the Akayev regime in Kyrgyzstan, and a new government took its place. And in 1994, Rwandan Patriotic Front (RPF) rebels ousted an autocratic regime in power for nearly two decades. In these instances, each country has more than one regime during the sample period.

Modelling the regime-effect is important in this application because the outcome variables are based on expert judgment. Treating the regime-case as the appropriate cross-section unit allows the model to pick up systematic differences across regimes in expert evaluations, thus anchoring subjective assessments about judicial outcomes in regime-specific contexts. While we report estimates from random-effects models, we find similar results when using fixed effects. Further, the random-effects model estimates a coefficient for *Democracy*, which is subsumed in a regime-case fixed effect. The specification is:

$$J_{i,t} = \alpha_{j[i]} + \beta_1 \text{EU Aid}_{i,t-1:t-2} + \beta_3 X_{i,t-1} + \eta_t + \varepsilon_{i,t} \quad (1)$$

where $J_{i,t}$ is one of three judicial outcome variables (*Aggregate*, *Institutions*, *Behaviour*), *EU Aidi,* $-1{:}t-2$ is the lagged two-year moving average of per capita EU aid, $X_{i,t-1}$ is a set of covariate (including EU democracy aid and non-EU economic assistance), and ηt are year fixed effects. $\varepsilon i,t$ is an error term ($\varepsilon i,t \sim N(0,\ \sigma^2)$) and $\alpha_{j[i]}$ are the random effects ($\alpha_{j[i]} \sim N(\mu\alpha,\ \infty)$). Figures report errors clustered on the aid-receiving regime-case.

Results

Figure 2 shows the results from three separate models, each with a different outcome variable. The top estimate in each cluster, shown with bullets (•), is from a model that uses the combined measure of judicial outcomes, *Aggregate*, which subsumes both institutions and government behaviour measures. While the estimate for EU *Economic aid*, capturing EU conditionality, is positive (0.014), it is not statistically significant. Similarly, the estimate for EU

[11] These variables are drawn from NELDA.

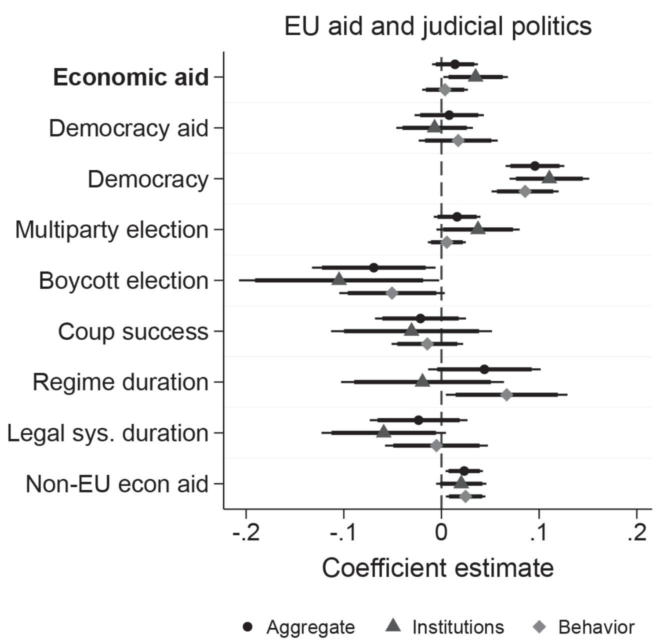
Democracy aid, capturing direct investment in the judiciary, is small and statistically insignificant. Democracies and multiparty elections are associated with better aggregate judicial outcomes, while boycotted elections and coups are associated with worse outcomes. Finally, there is a positive correlation between non-EU economic aid and aggregate judicial outcomes.

Results from the *Institutions* model are shown with bullets (•). The estimate for EU *Economic aid* is positive (0.035) and statistically significant, while the estimate for EU *Democracy aid* is negative. The positive estimate for economic aid suggests that EU conditionality is associated with institutional reform in the judicial sector. The negative estimate for democracy aid suggests a negative association between direct investments in judicial reform, though the estimate is not statistically significant. Last, estimates for both types of EU aid are statistically insignificant in the *Behaviour* model, shown with plus signs (+).

The result linking EU economic assistance to better judicial institutions in recipient countries is fairly robust. We consistently find a positive and statistically significant estimate for this variable when we: model fixed effects (0.030); drop control variables; add control variables (GDP per capita, population size and economic growth); or model the time trend in various ways (period effects, non-linear trend, decade effect). Further, the estimate remains positive and significant when we control for *Behaviour* (0.033), which ensures that the estimated effect is not due to different types of judicial outcomes being positively correlated with one another. Finally, replication files show the *Institutions* finding is mostly due to judicial reform (0.053), not judicial review (0.028).

Of course, empirical work on aid and judicial autonomy faces concerns of possible endogeneity bias because donors may send more aid to countries that have greater levels of judicial autonomy. For example, the EU's strategy may be to increase aid to recipient governments they believe are most likely to implement judicial reform. This would mean that the empirical pattern linking aid to judicial autonomy is the result of strategic selection and not the result of buying political reform.

Figure 2



While we have taken initial steps to mitigate against possible endogeneity bias in this paper we are unable to rule it out completely. However, in a related paper (Wright, Dietrich and Ariotti, 2017), we employ information about unemployment in donor countries to capture variation in economic aid. This approach relies on previous findings in the literature that difficult economic times in donor countries lead to decreases in foreign aid commitments. We find that foreign aid promotes judicial reform but is not systematically associated with changes in government behaviour toward courts.

Leverage

Results in the last section indicate that EU economic assistance is positively correlated with better judicial institutions but not improved government behaviour towards the judiciary. We believe that this differential effect of aid on the two judicial outcomes results, in part, from the fact that some outcomes are easier to monitor for donors. For instance, institutional changes are relatively easy to monitor and verify, as they are often publicly discussed in parliaments and reported by the media. Governmental behaviour towards the judiciary, on the other hand, is more difficult to monitor. For example, incumbent governments may undermine judicial autonomy by ordering politically expedient ad hoc attacks on courts. Such attacks are more difficult to monitor systematically and likely more difficult to verify. Further, we find that the statistical association between EU aid and judicial institutions runs through economic assistance and not democracy aid. Because the former does not directly fund activities related to the judiciary but the latter often does, the findings are more consistent with the conditionality mechanism than the investment mechanism.

We then turn to examine how the positive effect of EU economic aid on judicial reform varies by how much leverage the EU has over the aid-receiving country. If EU leverage over the recipient is greater we would expect the effects of EU economic aid to be stronger than when leverage is less. To measure leverage, we employ information on each recipient country's geographic distance from Europe, level of economic development and economic size.[12] These variables measure two concepts related to donor leverage over the recipient. Geographic proximity captures both a determinant of bilateral trade, namely distance, as well as the leverage that stems from being in the same region. To further capture the close proximity of European countries that are either current EU members or prospective members (excluding Russia), we log the (inverse) distance variable twice to increase the distance weight for European countries. This latter feature captures the special migration and investment connections between EU donors and governments in this region. Second, the size of the economic market (*ln*(*GDP*)) and relative economic development (*GDP pc*) are proxies for governments' vulnerability to external economic pressure: governments in countries with larger markets and higher wealth should be less vulnerable to external economic pressure in the form of aid conditionality (Levitsky and Way n.d.).

Note that this conceptualisation of leverage does not include the extent to which recipients are dependent on EU aid *relative to other Western aid*. Thus information about strategic competition between Western donors that recipients might use to subvert compliance with aid conditions is not used to measure leverage, at least as conceptualised here. We believe this is an

[12] The leverage variable is calculated as the inverse of GDP per capita multiplied by logged distance from Brussels (Belgium) and logged economic size This formula weights GDP per capita more than distance and economic size.

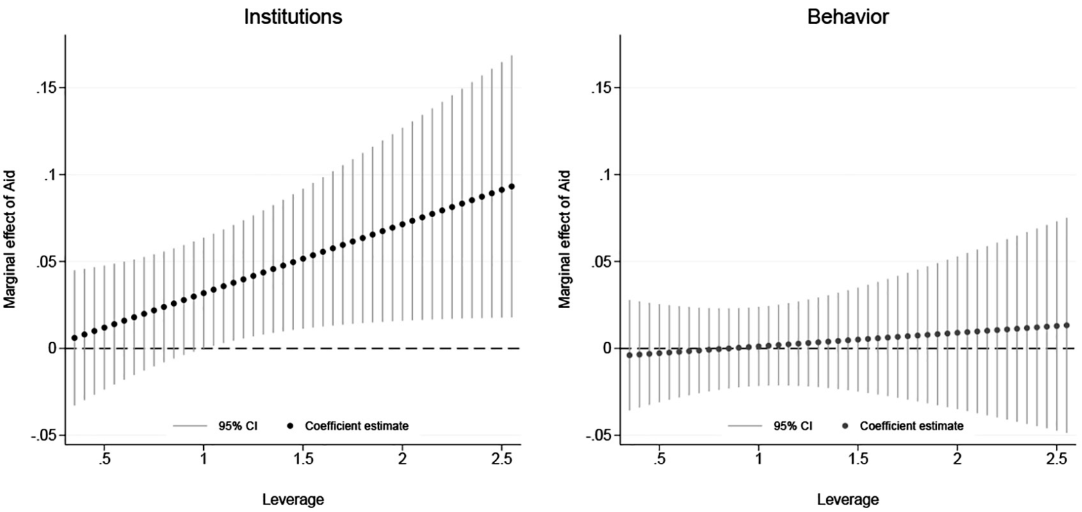
accurate assumption because substantial evidence suggests that Western donors, including EU donors, increasingly coordinate aid-related activities within recipient countries, thus undercutting the potential for recipient governments to use competition between Western donors as a wedge to avoid complying with aid conditions.

Figure 3

Figure 3 shows the average level of leverage for each recipient country in the sample, ordered from highest leverage in the left plot to lowest leverage in the right plot. Poor countries with small economies are over-represented in the high-medium leverage plot, along with smaller and poorer European countries, such as Albania, Armenia and Moldova. Oil-rich countries in the Middle East and North Africa as well as most of Latin America and the middle-income countries of East

Asia are in the medium-low leverage plot on the right. Wealthier sub-Saharan African countries, such as Botswana, Namibia and South Africa, also have low leverage levels.

Figure 4



The left panel of Figure 4 shows the result from a test of the leverage idea for *Institutions*. Recall that the average correlation – or estimated marginal effect – across all levels of leverage (from the test reported in Figure 2) is 0.035. At low levels of leverage, roughly 0.5 on the horizontal axis, the estimated marginal effect is 0.011 and not statistically significant. However, at the median level of leverage (1.2), the estimated effect is 0.041 and statistically significant, while at high leverage (2.4) the estimate is 0.089. Thus the estimated marginal effect of EU economic assistance on judicial institutions is increasing when the leverage donors have over recipients is high, at least according to this measure. The right plot shows the results from the *Behaviour* model. The estimated effect is close to zero and not statistically significant at any level of leverage, suggesting that the effect of EU conditionality on government behaviour towards courts is not conditional on the leverage of the donor.

Conclusion

Consistent with other research, this study confirms that EU foreign aid can play a role in shaping institutions in other countries. We show that economic aid from the EU is positively associated, at a statistically significant level, with judicial reform. The mechanism of EU influence on the judiciary is one of political conditionality, with donor governments exerting pressure on recipient governments to promote autonomy of courts via institutional reform. On the other hand, the EU's direct investment in the judiciary via democracy-promotion projects is not associated with systematic increases in judicial autonomy.

As we would expect, our results show that political conditionality is more successful when donors hold more leverage in aid-receiving countries. Across all EU aid-receiving countries we find that donors demands for greater judicial autonomy are more likely to be implemented when the leverage of donors on the recipient government is great, as is the case when alternative resources are relatively low. However, our results also suggest that EU economic aid is positively but not systematically associated with greater levels of compliance with court decisions by incumbent governments. This suggests that incumbent governments will act outside of expectations set out by EU conditionality when it is politically expedient. This finding is consistent with research by Wright, Dietrich and Ariotti (2017) which shows that, during election periods with uncertainty about the outcome of the election, incumbent governments will attempt purges and attacks on courts to strengthen their position. The findings also show that greater leverage of the EU over the recipient government does not translate into improved government behaviour. Even at high levels of leverage, EU economic aid fails to translate into systematic improvements according to our measures of government compliance with court orders or behaviour towards courts.

While the fate of a country's judiciary sector ultimately lies in the hands of its own citizens, this study shows that the EU still has substantive influence in bringing about judicial reform, especially when recipient government access to resources is constrained. Yet, the EU's influence appears to be more limited in ensuring that recipient governments act consistently with judicial autonomy principles when it comes to compliance towards courts. After all, an autonomous judiciary provides checks on the recipient government and may at times be threatening to the government's political survival. The effect is that, no matter the aid circumstances, recipient governments generally do maintain some interest in exerting control over the judiciary.

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