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To Europe and Back: The Law and Politics of Turkey's Kurdish Question

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March 2013

POLICY BRIEF 07



Stiftung
Mercator



IPC

ISTANBUL POLICY CENTER
SABANCI UNIVERSITY
STIFTUNG MERCATOR INITIATIVE

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Executive Summary

Europe has been a primary actor in Turkey's democratization process and for the Kurdish political struggle carried out simultaneously by the PKK and civilian actors since the late 1980s. The European Union and the European Court of Human Rights have had an indispensable role in raising awareness and documenting the plight of the Kurds on the one hand and inducing Turkey to embark on political reform on the other. Since the mid-2000s, however, the dynamics between Europe, the Turkish government and the Kurdish political movement have drastically changed, diminishing the role, legitimacy and significance of European institutions in Turkey and forcing the Turkish state and the Kurds to develop a "home grown" solution to the conflict. While the "peace process" launched by the government in late 2012 raises hopes for a peaceful settlement, the mismatch between the parties' expectations render it extremely fragile.

The Kurdish fight for rights and the role of Europe

Since the early 1990s, the Kurdish question has been a permanent agenda item in Turkey's political relations with Europe. What had triggered the initial European attention to the issue were the atrocities committed against Kurdish civilians in Turkey's south-east, under State of Emergency rule, as conveyed through news stories. What turned sporadic media coverage into long term political engagement in Europe, however, was the Kurdish human rights activists' persistence and ability to make use of the political and legal mechanisms of various European institutions for documenting the truth, litigating for justice and lobbying for political change in Turkey.

From the beginning, the "Europe" to which Kurdish activists reached out was not limited to the European Union (EU). Perhaps the most crucial, and often overlooked, role in galvanizing the international community was played by the European Court of Human Rights (ECtHR), the legal organ of the Council of Europe. At a time when national courts chose to turn a blind eye to the human rights abuses committed by the security forces and paramilitary groups, the ECtHR provided Kurdish victims with the sole platform for justice. With the

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legal support of British human rights lawyers and the assistance of the diaspora in Europe, human rights lawyers in Diyarbakır successfully petitioned the Strasbourg Court. The ECtHR's judgments against Turkey documented the state of terror reigning on civilians in the Kurdish region and displayed the regime of impunity shielding perpetrators against accountability.

Although the facts established by the ECtHR served to discredit Turkey's official narrative on the Kurdish question (that its security forces did not engage in wrongful conduct but merely fought terrorists), the democratization and reform processes have only started after the initiation of the EU accession process. It was the prospect of joining the Union, not a fundamental shift in the Turkish state's approach or the Turkish society's thinking vis-à-vis the Kurds and the Kurdish question, that triggered the transition. Just like in the post-World War II era when Turkey became one of the early members of the United Nations and the Council of Europe and ratified their human rights treaties in an effort to be part of the "civilized world" or in the late 1980s when the Turgut Özal government granted Turkish citizens the right to petition the ECtHR in a diplomatic move to enhance Turkey's chances for EU membership, the advancement of democracy and the protection of human rights were perceived by the society at large as bitter pills that needed to be swallowed for achieving economic prosperity and international recognition. It had become increasingly clear that the state's oppression against the Kurds stood in the way of EU membership, which would bring economic growth, social development and a better quality of life. For the Turkish mindset, granting Kurds "a few rights" was a concession worth making in the name of being accepted into the club of developed nations.

It would become increasingly apparent, however, that the Kurds would not settle for little. Certainly, up until the early 2000s, when select provinces in Turkey's eastern and southeastern region were governed by a discriminatory legal regime based on a state of emergency, the Kurds' demands were by and large limited to the protection of their first generation rights. At a time when acts of torture, political disappearances, forced displacements and extrajudicial killings by state security officials and paramilitary groups were virtually daily incidents, the priority for the Kurdish activists and the pro-PKK political movement was the cessation of human rights violations and the return to normalcy. For European institutions, these were legitimate and rightful demands that Turkey was obliged to meet in order to enter the EU and to abide by its commitments undertaken in the Council of Europe. For the Justice and Development Party (*Adalet ve Kalkınma Partisi-AKP*) government which was elected to office in November 2002 on a pro-EU agenda, the political cost of meeting the Kurds' demands for the abolishment of state security courts, the adoption of procedural safeguards for the prevention of torture, and

the removal of the restrictions on freedom of expression, association and press was tolerable when weighed against the gains it would bring. Bringing an end to the systematic human rights abuses in the Kurdish region would not only facilitate the initiation of accession talks with the EU and decrease the number of ECtHR judgments against Turkey, but would also strengthen and legitimize the government's position at home vis-à-vis the military which still perceived itself as the primary repository of political power.

During its first term in office, the AKP government adopted a number of reforms to grant the Kurds their long denied rights. In addition to general human rights reforms called for by the ECtHR, the government granted the Kurds limited language rights to fulfill the EU's accession criteria. And it was one of these criteria, "respect for and protection of minorities", that gave Kurdish activists inspiration for the next phase of their struggle. By the mid-2000s, a mere guarantee of their first generation rights was no longer adequate for the Kurds. They now demanded group rights and cultural rights – the right to mother tongue education, the right to change the forcefully Turkified names of geographical places back to their Kurdish names, the right to name their children Kurdish names entailing q, x and w, letters lacking in the Turkish alphabet. The Council of Europe's little known legal instruments, the Framework Convention for National Minorities and the European Charter for Regional or Minority Languages, which the EU asked the candidate countries to ratify before accession, provided new opportunities for mobilization. Kurdish activists followed a multi-tier approach, bringing before the ECtHR cases raising novel issues, calling on the EU to pressure the government to grant Kurds their cultural rights, and raising societal awareness on minority rights.

By the 2000s, however, mobilizing the European public opinion around the Kurdish cause proved to be much more difficult compared to the 1990s. The past decade had witnessed drastic political changes at the national and international level. Though human rights violations continued and Turkey was far from being a genuine democracy, there was an undeniably significant progress in the democratization of the regime. Europe, too, had changed. The sudden expansion of the Council of Europe with the entry of the formerly communist Central and Eastern European countries resulted in an exponential increase in the workload of the ECtHR, rendering the Court much less accessible. Among the reforms introduced to ease the ECtHR's case load was the pilot judgment procedure, a form of power sharing between the Court and governments.¹ In view of its docket crisis and in recognition of the reform process in Turkey, the ECtHR became more deferential to the government in its choice of the domestic remedies needed to execute the Court's judgments and to prevent future violations. The new global legal and political order of the post- September 11th period, too, had consequences for Turkey's and the Kurds' relations with the EU. Preoccupied with their own "war on terror", the EU and its member states became much less tolerant of an armed "national liberation movement", as evident in their inclusion of the PKK among the list of terrorist organizations and frequent declarations of support for Turkey in its fight against the PKK. Finally, the lack of a common standard in the member states' policies on minority protection made the EU increasingly reluctant to support the Kurdish movements' demands for cultural and group rights.

The implication of these developments for Kurdish activists has been drastic. They no longer had an easily accessible Strasbourg which would tolerate procedural errors and make exceptions to the rule of the exhaustion of domestic remedies.² Their attempts to win

1 According to the pilot judgment procedure, the ECtHR no longer decides on the merits of each admissible case; rather, as far as structural problems raising identical issues are concerned, the Court issues judgment in one application, rejects remaining similar petitions and leaves it to the national government at issue to decide on the kinds of legislative reforms needed to solve the problem. This new approach was based on the new mandate granted to the Court by the Committee of Ministers (CoM) of the Council of Europe. See Committee of Ministers, *Recommendation on the improvement of domestic remedies* (Rec(2004)6), 12 May 2004, <https://wcd.coe.int/ViewDoc.jsp?id=743317>.

2 Dilek Kurban and Haldun Güllalp, "A Complicated Affair: Turkey's Kurds and the European Court of Human Rights", in Dia Anagnostou (ed.), *The European Court of*



judgments on the novel issues they brought before the ECtHR also failed. Asking the Court to condemn extrajudicial killings was one thing, winning a judgment against Turkey's high electoral threshold and ban on the use of the Kurdish alphabet was another.³ Kurdish lawyers failed in their efforts to push the boundaries of the individual rights protected under the European Convention to have their group rights and cultural rights recognized. It has also become increasingly clear that there was a substantive limit to the support the Kurds could realistically expect from the EU and that they were fast approaching it.

Redirecting the struggle to the national arena

By the late 2000s, the growing mismatch between Kurdish demands and European institutions' ability and/or willingness to support them has led the Kurds to channel their resources to the national level. In contrast to their legal mobilization in the 1990s, the Kurdish struggle in the 2000s focused predominantly on politics. The change also owed to a growing realization that the AKP-led democratization process in Turkey would not, in the short term, bring structural legislative and constitutional reforms to the benefit of the Kurds. It was clear that the national electoral threshold would remain at 10 percent during the next few elections and the old Kurdish names of places would not be restored. The Kurds developed political strategies to circumvent the legal framework on the one hand and to engage in civil disobedience on the other. In 2007, the Kurdish political movement for the first time sent deputies to the parliament by participating in national elections with individual candidates, to whom the electoral threshold does not apply. The pursuit of the same strategy in the 2011 elections increased the number of independent deputies supported by the pro-Kurdish Peace and Democracy Party (*Barış ve Demokrasi Partisi-BDP*) led bloc. Also increasing its votes in the 2009 local elections, the BDP enhanced its hold on the administration of key provincial and district municipalities in the Kurdish region, strengthening its position as the AKP's sole rival for Kurdish votes.

Making use of its growing political power, the Kurdish movement pushed the boundaries of the democratization process. The government's attempts to solely define and limit the contours of the reforms were rendered futile by the BDP's civil disobedience campaigns at the local and national level. The BDP-run municipalities pursued bilingual and multilingual policies, in blatant violation of the laws, through restoring the old Kurdish names of places, providing municipal services in Kurdish and other minority languages and

Human Rights. Implementing Strasbourg's Judgments on Domestic Policy, Edinburgh, Edinburgh University Press, 2013.

3 While the ECtHR acknowledged that the 10 percent electoral threshold in Turkey was the highest in Europe, it held that member states have a wide margin of appreciation on this matter owing to the lack of common practice in European countries and the political nature of electoral rights. ECtHR, Judgment of the Grand Chamber on the case of *Yumak and Sadak v. Turkey* (Application No. 10226/03), 8 July 2008, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87363>. In another case concerning Turkey's ban on the use of x, q and w, letters not present in the Turkish alphabet, the Court also ruled in favour of the government. ECtHR, Judgment on the case of *Kemal Taşkın and Others v. Turkey* (Applications Nos. 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 and 45609/05), 2 February 2010, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97088>.

requiring fluency in the Kurdish language in recruitment for public service. In protest against the Directorate of Religious Affairs' (*Diyanet İşleri Başkanlığı*) refusal to provide religious services in Kurdish in the region, the BDP organized mass Friday prayers in public squares. The steps taken by the government as part of the "Kurdish opening" launched by the Prime Minister in 2009 proved to be too little, too late. The launch of TRT Şeş, a public television channel with 24 hours exclusive Kurdish broadcasting, meant little for the Kurds who have for years been following the world in Kurdish through the Europe-based *Roj TV*. The opening of Kurdish language departments at universities, likewise, was perceived as an insufficient measure in light of the Kurds' expectation for mother tongue education starting from pre-school. The most significant step taken by the government as part of the "Kurdish opening" was to allow the return to Turkey of eight PKK militants⁴ from Iraqi Kurdistan through crossing the Habur border gate on 19 October 2009. The welcoming of the group by tens of thousands of Kurds on the Turkish side of the border caused a nationalist backlash on the part of the CHP and MHP, which accused the government of "giving in to terrorism" and allowing the BDP to "propagate terrorism." Amid these protests, the AKP stepped back and effectively brought the Kurdish opening to an end.

What has consumed the AKP government's credibility and trustworthiness in the eyes of the Kurds, however, was not its belatedness in granting linguistic rights. Rather, it was the detention on remand of thousands of Kurdish politicians, mayors, activists, lawyers and journalists under the pretext of preventing the PKK's domination of civil politics in the Kurdish region. Suspects were accused of being leaders or members of the Kurdistan Communities Union (*Koma Ciwakên Kurdistan-KCK*), the alleged urban branch of the PKK. In 2011, the number of defendants reached thousands, many of whom were held in pretrial detention for periods ranging from 15 months to two years.⁵ The timing of the first arrests, two weeks after the March 2009 municipal elections, was interpreted by the Kurds as the proof of the AKP's intention to penalize the Kurds for having voted for the BDP. Virtually every active member of the Kurdish political movement, with the exception of parliamentarians shielded with political immunity, was placed behind bars in the name of anti-terrorism. The draconian provisions of the Anti-Terror Law and Penal Law, as "reformed" by the government in 2005 and 2006, provided the legal basis for the witch hunt conducted by the police intelligence under the disguise of court-ordered investigations. The PKK militants and Kurdish refugees who had returned to Turkey in a gesture of good will to support the government's "opening" also fell victim to Turkey's expansive anti-terror laws. In 2010, only months after their return, four PKK militants and six refugees were detained on remand on charges of "acting on behalf of a terrorist organization". The remaining 24 individuals subsequently crossed the border back and returned to Iraqi Kurdistan.⁶

The AKP government's mishaps have led the BDP-led Kurdish political movement to increase the stakes for a democratic solution. Mother tongue education, the revision of the Anti-Terror Law and the Penal Code, the lowering of the 10 percent electoral threshold, a fairer distribution of the Treasury's assistance to political parties and constitutional guarantees for cultural rights were no longer sufficient; all KCK prisoners should be immediately released and the Kurds

should be granted "democratic autonomy" as an assurance of self-rule in virtually all spheres of public life, with the exception of foreign policy, economy and national defence. The AKP's categorical refusal to negotiate over these demands led the BDP bloc to vote against the constitutional reform package submitted to parliament in March 2010, which failed to receive the requisite two-thirds majority and was therefore submitted to popular referendum on 12 September 2010. To show its weight as a political partner, the BDP called on its constituencies to boycott the referendum. Though the package was approved by 57 per cent of the votes, a significant portion of the electorate in the predominantly Kurdish provinces did not participate in the ballot.⁷

Encouraged by the support it received in the 2010 referendum, the AKP entered the general elections of June 2011 with a promise to adopt a new constitution based on inter-party consensus. The AKP's reelection with 47 percent of the vote was a clear signal that Turkey was ready for its first civil and democratic constitution. The AKP's establishment of a special commission with the equal representation of four political parties represented in parliament provided the BDP with the historic opportunity to play a key role in Turkey's democratization. The various political factions within the Kurdish liberation movement and Kurdish civil society were for the first time unequivocally united around the same constitutional demands and behind the BDP. Taking the constitutional process seriously, various Kurdish groups and parties presented to the parliamentary commission their common demands for mother tongue education, decentralization and the redefinition of citizenship. While these demands had a divisive effect on the commission, it was the proposal the AKP introduced in late 2012 for changing Turkey's regime from a parliamentary democracy to a presidential system that caused a political crisis within the commission (and in the parliament). The centre left and secularist Republican People's Party (*Cumhuriyet Halk Partisi-CHP*) and the right-wing nationalist Nationalist Movement Party (*Milliyetçi Halk Partisi-MHP*) staunchly opposed the proposal on the grounds that it was tailored to cater to Prime Minister Erdoğan's personal career and would lead to an authoritarian regime. The BDP, instead, signaled its support for a presidential system in exchange for the AKP's backing of their political demands.

In the meantime, the Kurdish political movement started a new civil disobedience campaign in protest against the deadlock in the KCK cases due to the courts' refusal to allow the defendants to conduct their legal defence in Kurdish. In one of the largest hunger strikes in Turkish history initiated on 12 September 2012 by 63 prisoners, the number of participants reached 682 prisoners⁸ by early November. The strikers had three demands: the alleviation of Öcalan's prison conditions, the right to education in Kurdish and the right to use Kurdish in courts.⁹ The duration of the strike and the participation of BDP deputies and leaders in it increased its public profile, forcing the government to acknowledge the problem and take action. Soon after the Minister of Justice announced that the government was preparing a new law granting the use of Kurdish in courts, Öcalan made a call from his prison cell for an immediate end to the strikes. In response to this call, the strikes abruptly ended on 18 November. The incident was interpreted by many as a sign of the strength of the Kurdish political movement and Öcalan's omnipotence over it.

The "peace process"

It was against this background that the AKP initiated the ongoing "peace process" to end the nearly 30 years of war with the PKK. Soon

4 Accompanying the PKK militants were 26 Kurdish civilians who had been living at the Mahmour refugee camp since their forced displacement in the 1990s.

5 In reality, there are a number of interrelated Kurdistan Communities Union (*Koma Ciwakên Kurdistan-KCK*) cases. The prosecutorial investigation against the suspects started in May 2007. The first police operation was carried out on 14 April 2009, followed by others in 2009 and early 2010, resulting in the apprehension of thousands of suspects and the detention of hundreds. It was only on 9 June 2010, when the indictment was issued, that defendants were formally informed of the charges against them. As of October 2010, there were ten separate but related KCK cases in the following provinces: Diyarbakır (hosting the principal KCK case), Batman (hosting two separate cases), Şırnak, Mardin, Van, Adana (hosting two separate cases), Mersin and Gaziantep. Information based on the legal brief presented by defendants' counsel to the Diyarbakır Sixth Heavy Penal Court with Special Powers, 18 October 2010.

6 Cengiz Çandar, *Leaving the Mountain: How may the PKK Lay Down Arms? Freeing the Kurdish Question from Violence*, Istanbul, TESEV, 2012, <http://www.tesev.org.tr/en/publications/1/1>.

7 The turnout rate in some of the Kurdish cities was: Hakkari, 9,1 percent; Diyarbakır, 35,2 percent; Batman, 40,3 percent; Şırnak, 22,5 percent; Van, 43,6 percent. The nationwide turnout average was 77,4 percent.

8 The number is based on the announcement made by the Ministry of Justice on 2 November 2012.

9 The law was eventually adopted on 24 January 2013, granting defendants a limited right of oral defence in "another language" other than Turkish during the reading of the indictment and in response to the substantive allegations. Defendants are required to bear the costs themselves. The law entered into effect with its publication in the Official Gazette on 31 January 2013.

after Öcalan's call to end the strikes, in December 2012, Prime Minister Erdoğan disclosed that the National Intelligence Organization had reinitiated talks with the PKK's imprisoned leader Abdullah Öcalan. What brought the government back to the dialogue with Öcalan was a combination of multiple factors. First was a growing realization of the futility of an exclusive "law and order" approach to the Kurdish question, particularly since the PKK had escalated the war in recent years and launched fatal attacks targeting soldiers, police, public servants and civilians. Second was the inadequacy of the AKP's parliamentary representation for submitting a draft constitution to popular referendum in the likelihood of the collapse of the inter-party process. Third and related was the threat that a dragging Kurdish question would pose for Erdoğan's personal career plans of being elected as president with increased powers. Finally was the critical role played by the Syrian Kurds and the PKK's Syrian faction in the war in Syria, where the establishment of an autonomous Kurdish region looks highly probable.

This time, to share the potential political costs of another failed peace attempt or to enhance its chances of success, the AKP government included the BDP into the talks with Öcalan by permitting two consecutive delegations of BDP deputies to visit Öcalan in the island prison of İmralı within a matter of two months. The inclusion of the BDP into the process stood in sharp contrast to 2009, when the talks with Öcalan were exclusively carried out by the Intelligence and the government refused the demands of the Kurdish political movement to be involved.

The government and the Kurdish political movement have divergent expectations from the ongoing process. For the government, the ultimate aim is the cessation of armed conflict, and the PKK's withdrawal beyond Turkey's borders and laying down arms. For the Kurdish political movement, the goal is to find a democratic solution to the Kurdish question based on structural constitutional and legislative reforms to grant the Kurds political status and equal rights. The leaked minutes of the meeting between Öcalan and the BDP delegation on 23 February 2013 make clear that Öcalan has no intention to immediately and unconditionally call on its troops to lay down their arms. Rather, he envisions a long term process where the two parties will gradually take coordinated and consecutive steps towards an eventual peace settlement. As a first step, Öcalan, through letters delivered by the BDP delegation to the PKK leadership in Europe and the Kandil Mountain in Iraqi Kurdistan, called on the PKK to release the soldiers and public servants it holds in captivity.¹⁰ It also appears that Öcalan has asked the PKK to announce a ceasefire on Newroz, the Kurdish New Year celebrated on March 21st, as a gesture of good will and sign of support for the new process. He also made clear, however, that any further positive step on the part of the PKK will be contingent on the ways in which the government will respond to the ceasefire.

In this respect, the long delayed "fourth judicial package", which is expected to introduce significant improvements for the protection of political freedoms, bears particular importance. It is the expectation of the Kurdish political movement and the Kurdish society at large that the package will facilitate the release of KCK defendant  While the courts, seemingly instructed by the Ministry of Justice, released in early

10 At the time of the writing of this brief, preparations were under way for the captives' handover to a delegation of human rights activists and BDP deputies.

11 While the courts, seemingly instructed by the Ministry of Justice, released in early March 2013 a few Kurdish mayors, thousands of other KCK defendants remain in prison.

March 2013 a few Kurdish mayors, thousands of other KCK defendants remain in prison. However, the fourth judicial reform package the government introduced to the parliament after the second BDP-Öcalan meeting fell far short of meeting these expectations.¹² At the time of writing of this brief, it remains uncertain whether and how the government will respond to the criticisms concerning the content of the package.

Certainly, the AKP government and the Prime Minister took an extremely high risk in initiating new talks with Öcalan and tasking the BDP with facilitating the dialogue. However, there is a fundamental problem in the way in which the government frames the expected outcomes of the process. The limitation of the "success" of the talks to the PKK's withdrawal beyond the borders and laying down arms shows that the government's approach to the essence of the problem is not fundamentally different than that of the military. The PKK and the armed conflict are certainly part of the Kurdish problem, but not all of it. After 30 years of struggle, the armed and civilian factions of the Kurdish movement expect much more than a government assurance that the military will cease its activities if/when PKK militants leave Turkish territories. Perhaps the most telling indication of this reality is Öcalan's urge on the BDP deputies to continue to push for democratic autonomy, mother tongue education and collective rights as part of their work in the parliamentary commission on the new constitution. It is clear that the Kurdish political movement sees the realization of these goals as a precondition for a peace settlement with the state.

After decades of oppression, intimidation, exclusion and dismissal, the Kurdish political movement has become a key political player in Turkey's democratization and peace process. What replaced the Kurdish political movement from the periphery to the centre of politics in Turkey were not only its decades of political, legal and armed struggle, but also an unanticipated turn of events. The strong societal support and demand for peace, the AKP's absence of an alternative viable partner in peace, the indispensable role of the BDP in the constitution making process and the instability and transition in the Middle East have served to strengthen this position. Whether the "process" will actually lead to peace will depend on the willingness and ability of the Turkish government, media and society to come to terms with this new phenomenon and to accept the Kurds as equal partners in dialogue.

The transition of the Kurdish political movement from an outcast to the facilitator of peace stands in sharp contrast to the change in the role, perception and significance of Europe, which, within a matter of one decade, has lost its pivotal role in Turkey's democratization process and the solution of the Kurdish question. Having lost its soft power over the Turkish government and legitimacy in the eyes of the Kurds, the European political and legal institutions are virtually sidelined from the process where the parties are searching for a "home grown" peaceful settlement. While the EU is caught up in an existential crisis and the ECtHR is preoccupied with easing its workload, the Kurds and the Turks are writing a new history. It looks like this time Europe will be an onlooker rather than an agent of political change.

12 While introducing a number of positive changes in the name of executing the ECtHR judgments, the draft package does not include any amendments to the definition of "membership or leadership of terrorist organizations", which are the principal crimes that the KCK defendants are charged with.