

PEN NORWAY

Turkey Elections: What Does the Future Hold for Freedom of Speech?

**PEN Norway's Interview with Mustafa Yeneroğlu,
Justice and Legal Affairs Policy Chairman of the
Democracy and Progress Party (DEVA)**

Turkey Elections: What Does the Future Hold for Freedom of Speech?

Since 2020, as part of the Turkey Indictment Project, PEN Norway has examined 25 separate indictments focused on freedom of expression in Turkey and has produced reports on these indictments in cooperation with expert lawyers from different European countries. The PEN Norway Turkey Indictment Project reports of 2020 and 2021 revealed that every one of the 25 indictments in question failed to comply with Turkey's domestic legal provisions and also international provisions and contracts such as the European Convention on Human Rights and the UN Guidelines for prosecutors.

PEN Norway's in-person, recent, observations of such trials as the Gezi Park trial, the We Will Stop Femicide Platform case and trials of Turkey's chief physician Prof. Dr Şebnem Korur Fincancı, activist Pınar Selek and journalist Sedef Kabaş all demonstrate the lack of independence of the judiciary as well as serious fundamental flaws in the preparation of indictments.

Historic elections take place in Turkey on May 14th, 2023, in which the candidates for both the President and Turkey's Parliament will be determined. A month before the elections PEN Norway's Turkey Adviser travelled to Istanbul to interview representatives of the major political parties to question them about issues such as freedom of expression, the freedom of the press, the rule of law, and the right to a fair trial in Turkey.

As part of this interview series, we conducted face-to-face and written interviews with the following:

- Dr. Canan Kaftancıoğlu, the Istanbul Regional Chair of the Republican People's Party (CHP),
- Lawyer Züleyha Gülüm, Istanbul's MP for the People's Democratic Party (HDP),
- Former journalist and now MP for the Worker's Party (TİP) Ahmet Şık,
- Lawyer Bahadır Erdem, Vice Chair of the İyi Party,
- Bülent Turan, Vice Chair of the Justice and Development Party (AKP),
- Selahattin Demirtaş, imprisoned former co-chair of the People's Democratic Party (HDP),
- Serhan Yücel, Secretary-General of the Democrat Party,
- Mustafa Yeneroğlu, Justice and Legal Affairs Policy Chairman of the Democracy and Progress Party (DEVA),
- Muharrem Erkek, Vice President of the Republican People's Party (CHP)
- Zeynep Esmeray Özadikti, candidate for MP from Turkey's Worker Party (TİP)
- Bülent Kaya, Legal Affairs Chairman of the Saadet Party.

None of the content of the interviews has been altered by PEN Norway, the views expressed are those of the individual politicians.

We hope that these historic elections in Turkey will be instrumental in strengthening fundamental rights and freedoms for all.

Caroline Stockford, Turkey Adviser, PEN Norway
Şerife Ceren Uysal, Legal Adviser on Turkey, PEN Norway

PEN Norway's Interview with Mustafa Yeneroğlu, Justice and Legal Affairs Policy Chairman of the Democracy and Progress Party (DEVA)

While our observations on the current state of freedom of expression and freedom of the press in Turkey are deeply concerning, we believe that as a member of parliament and a lawyer, it is important to hear your opinion on the matter. Would you say that the right to freedom of expression and press freedom exist in Turkey today?

The current view of the country is of course very worrying for us... It is well known that there are fundamental problems regarding fundamental rights and freedoms in Turkey. In our country, fundamental rights and relevant constitutional guarantees can be easily disregarded, and people who want to exercise their rights are met with administrative or judicial sanctions.

Putting aside this overarching problem, we have long witnessed much more pressing concerns regarding freedom of expression and freedom of the press, which pose a direct threat to our democracy. Even with recent events considered, it can easily be seen that freedom of expression and press freedoms are being dismantled.

- The statistics of the Ministry of Justice reveal that between 2014, when Mr President Recep Tayyip Erdoğan was elected President for the first time, and the year 2021, a total of 194,142 investigations were launched and 44,675 lawsuits filed within the scope of the crime of insulting the President.
- If one takes a look at the agenda of the Parliament, it will be seen that for a very long time they have been making an effort to enact a draft law known as the "Disinformation Law" and they eventually managed to introduce a vague new offence called "the offence of publicly disseminating misleading information", which can easily be used to criminalise even completely legal expressions.
- With the powers granted to RTÜK, the Radio and Television Supreme Council, the institution has been transformed into an apparatus of direct suppression and censorship in both internet and television broadcasts, and that is an example of the same systematic approach.
- Public institutions such as the Anadolu Agency and state broadcaster TRT are now operated almost like the press bureaus of the ruling parties. The Directorate of Communications of the Presidency, an institution that receives heavy public funding, was established and this institution now serves to keep the press in check. It also spreads disinformation and the political propaganda of the government.



“Dolayısıyla sorunuza net bir cevap vermek gerekirse, maalesef bugünkü tabloda ülkemizde ifade ve basın özgürlüklerinden söz etmek mümkün görünmüyor.”

In fact, this is evident in the findings of international institutions and organisations as well. For example, according to the Reporters Without Borders 2022 report Turkey was ranked 149th out of 180 countries for freedom of press. In the chapter on Turkey, the report referred to the repressive attitude of the government towards the media and the criminalisation of criticism against the government. Emphasising that the government has mobilised all possible means to undermine pluralism, the report stated that internet censorship in “New Turkey” has reached unprecedented levels. Similarly, the Press Council’s 2021 Report draws attention to issues such as the fact that more than 12 thousand press workers lost their jobs, the journalists were detained, tried and convicted, and targeted by the police violence, that access to news were obstructed by law enforcement, that journalists were attacked by street thugs, and that unprecedented restrictions were imposed on freedom of expression and press freedom, depriving the public of their right to be informed and learn the truth. According to the report, 78% of journalists expressed that in an environment of repression and violence they were compelled to exercise self-censorship while reporting.

The judgements of the European Court of Human Rights serve as the clearest indicators for the extent of the crackdown on freedom of expression and freedom of the press and its situation vis-à-vis other European countries. The ECtHR statistics reveal that in 2019, 2020 and 2021, the highest number of violation judgements on freedom of expression were ruled against Turkey. Released recently, the Committee of Ministers Report stated that most of the ECtHR judgements on freedom of thought and expression and freedom of the press are not implemented in Turkey. These are all signs that a right is systematically denied.

They are also self-explanatory enough to demonstrate the validity of concerns regarding freedom of expression and press freedom. These concerns are justified as freedom to be informed, freedom of the press, freedom of assembly and demonstration and they are indispensable elements of a democratic society. Therefore, to give a clear answer to your question: Unfortunately at the present, one cannot reasonably claim that freedom of expression and freedom of the press exist in our country.

Since 2021 PEN Norway has been conducting the Turkey Indictment Project in which we have fully analysed and reported on 25 indictments written after 2016 with a particular focus on freedom of expression. We have found the outcome alarming. Because the study showed that all the indictments ignored the principles of domestic law and European Convention regulations. What do you think can be done to protect people’s freedom of expression through the law and to bring indictments in line with international legal standards? In their reports, our legal experts recommended, among others, to initiate an in-service training. What is your party’s take on this issue?

Yes, the indictments analysed within the scope of the Turkey Indictment Project are indeed striking examples and valuable as they symbolise the ongoing violations of freedom of expression. Unfortunately, new indictments are being added to the collection every day. Issuing indictments or handing down convictions against individuals solely on the basis of their statements constitutes a severe and highly disproportionate violation of rights, which by itself evidently demonstrates the depth of the problem. However, it should

“ The indictments analysed within the scope of the Turkey Indictment Project are indeed striking examples and valuable as they symbolise the ongoing violations of freedom of expression. Unfortunately, new indictments are being added to the collection every day. ”

be noted that the constant threat of investigations and detentions is the real deterrent for those who want to practice their freedom of expression. To elaborate a bit more on the topic, there is a terrible level of suppression against certain statements and methods of expression and this leads to a massive self-censorship in Turkey.

Therefore, the sword of criminal law must be completely stopped from hanging over these rights so that the freedoms of expression and of the press can be protected through the law. And the restoration of judicial independence is the primary requirement for this. It is unfortunate that the application of the concept of criminal enemy law cannot be stopped as long as the government controls the judiciary and uses it as a tool, and holds the sword of Damocles hanging over judges and prosecutors.

On the other hand, it is necessary to further reconsider certain legal regulations regarding freedom of expression, which lack any vision, and may lead arbitrary enforcement and limit this right disproportionately. The Turkish Penal Code and the Anti-Terror Law contain various provisions that are incompatible with constitutional guarantees and international standards on freedom of expression. In the Fundamental Rights Action Plan of the DEVA Party, we have worked on this issue in detail and shared our concrete proposals to solve it with the public.

Undoubtedly, the first provision to be mentioned at this point is the “offence of insulting the President” regulated under Article 299 of the Turkish Penal Code. In its *Vedat Şorli v. Turkey* judgement, the ECtHR ruled that this provision should be abolished and that insults against the President of the Republic should be treated like any other insult offence; but of course, this judgement was left unimplemented.

Apart from the offence of insulting the President, the offence of insult regulated under Article 125 of the Turkish Penal Code also constitutes a restriction on freedom of expression. As is well known, in contemporary democracies, there is a growing tendency to decriminalise and downgrade the offence of insult and to regulate it under private law as a behaviour requiring compensation or an administrative fine instead of a prison sentence. In our Action Plan, we propose to work on a redefinition of the offence of defamation and abolish the prison sentence.

Similarly, the offences of “Insulting the Turkish Nation, the State of the Republic of Turkey, the Institutions and Organs of the State” prescribed under Article 301 of the Turkish Penal Code, of “Inciting or insulting the public to hatred and hostility” prescribed under Article 216, and of “Disseminating propaganda in favour of a terrorist organisation” prescribed under Articles 6 and 7 of the Anti-Terror Law are currently arbitrarily applied to punish critical expressions or remarks that offend the power-holders. Therefore, without making the necessary amendments to the criminal law, the prospect of providing safeguards for freedom of expression will be impossible to achieve.

As set out in DEVA Party’s Fundamental Rights Action Plan, we will abolish these types of offence or make the necessary changes to prevent potential arbitrariness. We will also abolish the offence of “*openly disseminating information that will mislead the public*” prescribed by Article 217/A of the Turkish Penal Code which

“ It is unfortunate that the application of the concept of criminal enemy law cannot be stopped as long as the government controls the judiciary and uses it as a tool, and holds the sword of Damocles hanging over judges and prosecutors. ”

was introduced after the amendment known in the public as the censorship law.

In-service training is, of course, the most important part of the solution. This what the saying “*the best laws are cruel in the hands of bad enforcers, and the worst laws are just in the hands of good enforcers*” means. Alongside, and perhaps even more important than well-crafted legislation that guarantees freedom of expression, we require judges and prosecutors who have internalised respect for human rights. They should be familiar with the jurisprudence of the European Court of Human Rights and the Constitutional Court and should be able to understand the function of freedom of expression, be aware of the richness that different opinions can bring and, most importantly, we need judges and prosecutors who put the law above all private interests. As a matter of fact, today’s situation is not the result of bad laws but of a judiciary that enforces the laws badly and a government that refuses to recognise the law.

What will the Six-Party Alliance do differently? What steps, for example do you plan to take with regard to ongoing trials, files that have been decided upon by the courts and the European Court judgements left unimplemented? There is an ongoing infringement procedure that could result in Turkey’s removal from the Council of Europe. Will there be a dedicated effort to prevent this from happening?

As the Six-Party Alliance, we have worked hard on the Strengthened Parliamentary System. We had very important discussions in the meantime and as a result of the negotiations, we reached a consensus on important standards.

Currently, the judiciary is no doubt one of the biggest problems of our country. In fact, many of the problems we identify outside the judiciary are either rooted in or derived from the problems within the judiciary. It is impossible to expect the existence of fundamental rights, respect for human beings, welfare, peace, equality, or security in a system where judicial independence or impartiality is not ensured. With this in mind, we have agreed that the cornerstone of changing the present system is to guarantee the independence and impartiality of the judiciary and thus, we have formulated important proposals in this context.

As presented in our Memorandum of Understanding on the Strengthened Parliamentary System, we will first ensure the membership structures of the higher judicial bodies align with principles of impartiality and independence. Moreover, we will make arrangements to ensure that judgments of the lower courts are adopted in line with the Constitutional Court and the European Court of Human Rights case law and that the judgments handed down by these court are immediately implemented.

For example one of the fundamental criteria for the promotion of judges will be the compliance of their decisions with the Constitutional Court and the European Court of Human Rights case law; and in cases where they abuse their office and cause a Constitutional Court or an ECtHR judgement regarding a violation of rights that would lead to the sentencing of the government to pay pecuniary damages, those judges will be made responsible for the compensation and damages.

Of course, we also propose comprehensive amendments to the

“ In-service training is, of course, the most important part of the solution. This what the saying “the best laws are cruel in the hands of bad enforcers, and the worst laws are just in the hands of good enforcers” means. ”

legislation on freedom of expression, freedom of the press and freedom of assembly and demonstrations. Within the framework of the Strengthened Parliamentary System, we have agreed, in accordance with the jurisprudence of the Constitutional Court and the European Court of Human Rights, that freedom of expression should not be restricted except in cases of incitement to violence, hate speech or attacks on personal rights, and that the internet legislation should be reformed in accordance with international standards in a way that does not restrict freedom of expression and does not violate personal rights. The Six-Party Alliance will eliminate the restraints on fundamental rights and freedoms, through the changes it will introduce within judiciary, fundamental legal texts and the way the judicial decisions are implemented.

The issues raised in your question, such as ongoing judgements, files that have been decided by the courts, and unimplemented ECtHR judgements, are actually issues that will be resolved automatically with the introduction of the aforementioned amendments. Take your hands off the judiciary, stop exiling judges who do what the law requires, stop pressurising the members of the Constitutional Court and you'll see that ongoing trials will change direction, and unimplemented judgements will start to be implemented immediately.

“ Take your hands off the judiciary, stop exiling judges who do what the law requires, stop pressurising the members of the Constitutional Court and you'll see that ongoing trials will change direction, and unimplemented judgements will start to be implemented immediately. ”

Many provisions in the Penal Code, such as the offence of insulting the President, pose a significant impediment to freedom of expression. As the Six-Party Alliance, do you have a plan to reform the penal code? If so, what is being planned as part of this reform?

As I mentioned earlier, DEVA Party has prepared a comprehensive action plan on this issue. In the Memorandum of Understanding on the Strengthened Parliamentary System prepared by the Six-Party Alliance, we have reached a fully agreed in principle that the freedom of expression should not be limited except in cases of incitement to violence, hate speech or attacks on personal rights; that the internet legislation should be amended in accordance with international standards in a way that does not restrict freedom of expression and does not violate personal rights; and that the legislation on the right to assembly and demonstration should be reviewed in the light of the jurisprudence of the Constitutional Court and the European Court of Human Rights in a way to prevent the arbitrary use by the administration of the notification practice related to this right. As a matter of fact, in our Proposal for Constitutional Amendment, we have included some amendments to the articles on freedom of expression that will narrow the justifications for its restriction and expand its scope.

We have not yet carried out a dedicated work on the offences in the TPC, but we have agreed that our basic principle in these matters will be the standards of the European Court of Human Rights. This was exactly what we meant when we said, in our Memorandum of Understanding, that we will reform *“legislation that impedes or disproportionately restricts the freedom of thought and expression, assembly and demonstration, and association, and we will end all kinds of pressures on these freedoms in accordance with the requirements of a democratic society.”* Following the elections and within the scope of our Strengthened Parliamentary System study sessions, we will prioritise the work on the legislative amendments that needs to be made in order to achieve the objectives specified in the memorandum. In this context, I believe that we will make similar

amendments to the framework we have set out in our action plan, and taking into account the jurisprudence of the ECtHR and the recommendation of the Venice Commission, we will particularly remove the offence of insulting the President from the Turkish Penal Code, and ensure that insults against the President are investigated like other insult offences.

To sum up, we will make the needed revisions to the categories of offences that greatly hinder the exercise of freedom of expression, especially to the ones that the ECtHR judgments clearly and unequivocally demonstrated to be contrary to freedom of expression, and we will put an end to the criminalisation of freedom of expression.

Would you like to add anything else or send a message?

The upcoming period and especially the 2023 elections are a turning point for our country. Turkey is facing huge problems from economy to health and education. These problems are clearly rooted in the disregard for the basic requirements of democracy and the rule of law. We can overcome this situation only if we learn from the tyrannical and unlawful governments in the world, and establish a democracy that is pluralistic and libertarian. Therefore, we, as the National Alliance, and all citizens who believe in democracy have a great responsibility. Together we have to win this undemocratic election and build a democracy that is libertarian and pluralistic.■

Mustafa Yeneroğlu

Born in 1975 in Bayburt, Mustafa Yeneroğlu graduated from Cologne University Faculty of Law in 2000. Between 1987-2015, he worked actively in different NGOs abroad.

In the 2015 Parliamentary General Elections, he was elected as AK Party Istanbul MP and subsequently as a member of the Central Disciplinary Board. In the 1st and 2nd Legislative Years of the 26th Legislative Period, he served as the Chairman of the Human Rights Investigation Commission of the Grand National Assembly of Turkey. Between December 2017 and June 2018, he served as a member of the TBMM Constitutional Commission and the Turkish Group of the Parliamentary Assembly of the Council of Europe.

In the 24 June 2018 Parliamentary General Elections, Yeneroğlu was re-elected as AK Party Istanbul MP and resigned from AK Party on 30 October 2019.

On 9 March 2020, he joined the DEVA Party as a founding member, and then he was appointed as the Head of Legal and Justice Policies of the party. Yeneroğlu is among the parliamentary candidates of the National Alliance in the 14 May elections.