

Yaman Akdeniz • Kerem Altıparmak

# Internet: Restricted Access

A Critical Assessment  
of Internet Content Regulation  
and Censorship in Turkey



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## **A Critical Assessment of Internet Content Regulation and Censorship in Turkey**

**Dr. Yaman AKDENIZ & Dr. Kerem ALTIPARMAK**

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## INTRODUCTION

The Internet is a social, cultural, commercial, educational and entertainment global communications system whose legitimate purpose is to benefit and empower online users, lowering the barriers for the creation and the distribution of content throughout the world. Although it resembles traditional methods of communication, it differs from many. The Internet, as the largest communication network in the world, is undoubtedly global, and completely decentralized with invisible national boundaries. Nobody owns the Internet, and there is no single entity, no single government governing the Internet.<sup>1</sup> It is universally accepted that information and communication technologies can, on the one hand, significantly enhance the exercise of human rights and fundamental freedoms, such as the right to freedom of expression, access to information, right to communication, and the right to assembly, while, on the other hand, “they may adversely affect these rights and other rights, freedoms and values, such as the respect for private life and secrecy of correspondence, and the dignity of human beings.”<sup>2</sup>

Since the Internet became popular and widely accessible in the mid 1990s, the availability of certain types of content defined broadly as illegal, and harmful, has become the focus of many governments, regulatory agencies, and international organizations. States around the globe try to resolve Internet content related problems by means of introducing new laws or amending existing laws as many governments believe mistakenly that the Internet “is just another new device, from the governance perspective, no different to its predecessors”<sup>3</sup> such as the telegraph, the telephone, radio, or satellite systems. However, in almost all instances extraterritoriality remains as a major problem with regards to the availability of Internet content hosted or distributed from outside the jurisdiction which is deemed illegal and/or harmful. Analogies have been made between broadcasting and the Internet on the one hand, the press and the Internet on the other. However, time has shown that the Internet is unique and should be governed separately. Nevertheless, time has also shown that States’ concerns on the availability of certain types of content on the Internet go hand with hand with their traditional approach to content regulation and freedom of expression. In other words, States tend to adopt their traditional restrictions to the Internet based on their historical, cultural, political, religious, constitutional, and moral values. Therefore, it would be wrong to assume that the impact of new communication technologies on nation-states will be a “dramatic” shift towards democratisation and openness.

Thus, it is not surprising to see that there are different approaches to the growth of the Internet in different societies and the impact of the Internet on different nation-states may have different results. Different nation-states present a different level of economic development, respect for rights, trans-nationality, technological sophistication, and e-readiness. While Turkey may be considered at a developing stage with respect to the Internet, other western societies may be far more sophisticated with regards to Internet access, use, and penetration. Inevitably, this will be reflected in the policy making process and approaches to the governance of the Internet adopted by an individual nation-states. Because of cultural, legal, moral, religious, historical and socio-political diversity, there will inevitably be divergent

<sup>1</sup> Note though arguments in relation to the governance of domain names and the role played by ICANN, the Internet Corporation for Assigned Names and Numbers (<<http://www.icann.org/>>).

<sup>2</sup> Recommendation CM/Rec(2007)16 of the CoE Committee of Ministers to member states on measures to promote the public service value of the Internet, adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers’ Deputies.

<sup>3</sup> Eduardo Gelbstein and Jovan Kurbalija, *Internet Governance: Issues, Actors, and Divide*, DIPLO report, 2005, at <<http://www.diplomacy.edu/isl/ig/>>, p. 16.

approaches to the growth and governance of the Internet in different European societies. For example, while the German and French governments have political fears and sensitivities about the use of the Internet by Neo-Nazis, the United Kingdom takes a more relaxed attitude to the dangers of racism but conversely has a long cultural tradition of repression towards the availability of sexually explicit material. On the other hand, the Turkish government, may be more concerned about defamatory statements made in relation to state officials and politicians, other values related to the State and the dissemination of racist and terrorist propaganda. No doubt, such legitimate state level concerns must not lead to the violation of international standards for the protection of freedom of expression in democratic societies.

As this brief comparison shows, a study on the legal regulation of the Internet at a national level should adhere to the general principles of freedom of speech and be aware of the new challenges brought by the Internet. It is considered that the regulation of the free flow of ideas and information via the Internet is not just a technical matter, but on the contrary is one of the leading challenges faced by civil liberties in recent history.

With this in mind, this study will assess the nature of Internet content regulation and censorship in Turkey by providing an overview of the current legislative regime from a critical perspective. This will include legislative attempts to regulate Internet content in Turkey as well as a critical assessment of the recently enacted Law No. 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications (“Law No. 5651”) and its related regulations. This will also include an analysis of the legal responsibilities of various actors including content providers, hosting companies, access providers (ISPs), and Internet cafes. The study will assess how the current regulatory systems work and how websites, predominantly situated outside the Turkish jurisdiction are blocked by court and administrative blocking orders by giving examples. It will therefore assess the establishment and the work of the Telecommunications Communication Presidency and its Internet Hotline for reporting illegal activity so far as it relates to the application of Law No. 5651. The study will also assess the nature and validity of blocking orders which fall outside the scope of the new legislation.

Freedom of expression has been one of the key issues in Turkey’s democratisation process. The European Court of Human Rights has found Turkey in violation of the European Convention on Human Rights (“ECHR”) in a number of article 10 cases. The new Turkish law on Internet contains provisions that have potential to cause similar violations. Thus, this study will examine the new regulations bearing this situation in mind.

The first chapter of this book will detail the history of Internet content regulation in Turkey including censorship practices prior to the enactment of Law No. 5651, the development and enactment of Law No. 5651, its critical assessment, and application. The first chapter will also outline and assess the main reasons for website closures and blocking in Turkey. European Convention on Human Rights and constitutional law considerations and safeguards will then be provided in chapter two of this book. The second chapter of the book will also provide an assessment of the effectiveness of blocking decisions and administrative orders and the availability and assessment of circumvention technologies that are used by Turkish users to access blocked and filtered websites. The study will further provide in chapter three an overview of international developments with regards to Internet content regulation at the European Union, and Council of Europe levels. The final chapter of this book will include several recommendations for the future.

## **Chapter I: Internet Content Regulation in Turkey**

The history of Internet content regulation in Turkey including censorship practices prior to the enactment of Law No. 5651, the development and enactment of Law No. 5651, its critical assessment and application will be detailed in this first chapter. The first chapter will also outline and assess the main reasons for website closures and blocking in Turkey.

### **The History of Internet Content Regulation in Turkey**

New media historically face suspicion and are liable to excessive regulation as they spark fear of potential detrimental effects on society. This has proved true of the publication and transmission of content deemed to be illegal and harmful through the printing press, the telegraph, telephone, post, cinema, theatre, radio, television, satellite, and video. During the 1990s, as attention turned to the Internet, the widespread availability of sexually explicit content stirred up a moral panic<sup>4</sup> shared by law enforcement agencies and large sections of the media. Since then the regulation of illegal and harmful Internet content became a key focus of governments, supranational bodies and international organisations.

Unlike many other countries, the Turkish government adopted a hands-off approach to the regulation of the Internet until 2001. At that time there were no specific laws regulating the Internet. It was thought that general legal regime regulating speech related crimes was adequate. Indeed, a couple of widely publicised prosecutions took place under the Turkish Criminal Code. Each case centred on article 159(1) of the previous Turkish Criminal Code<sup>5</sup> which stated that:

“Whoever overtly insults or vilifies the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government, the ministries or the military or security forces of the State or the moral personality of the judicial authorities shall be punished by a term of imprisonment of one to six years.”

In a highly publicised case, Emre Ersöz, 18 years old, received a 10-month suspended sentence for “publicly insulting state security forces” after comments he made in an online forum operated by one of Turkey’s Internet Service Providers (“ISPs”) in June 1998.<sup>6</sup> Ersöz was taking part in a debate over allegations of rough police treatment of a group of blind protesters who were complaining about potholes in the nation’s capital, Ankara. Believing that the national police had beaten the protesters, Ersöz repeated the allegation in a posting on a current events forum provided through Turknet, an ISP. As it turned out, Ersöz was mistaken and the protesters had been beaten by municipal officers, not by the national police whom he specifically criticized in his posting. The public prosecutor of the Beyoğlu municipality in Istanbul brought the charges and demanded a sentence of one to four years. Ersöz pleaded not guilty, claiming his writings were not in the public domain. During the trial, he testified that his online comments could not be construed as public because the forum was open only to Internet users. Ersöz’ 10-month prison sentence was suspended on the condition that he would not be convicted of similar charges during the next five years.

<sup>4</sup> Cohen, S., *Folk Devils and Moral Panics: Creation of Mods and Rockers*, Routledge: 30<sup>th</sup> Anniversary edition, 2002; Jenkins, P., *Intimate Enemies: Moral Panics in Contemporary Great Britain*, Aldine De Gruyter, 1992.

<sup>5</sup> This provision was slightly changed and became the infamous article 301 of the New Turkish Criminal Code.

<sup>6</sup> See further Akdeniz, Y., “Turkish teen convicted for Web postings,” *Freedom Forum*, 08 June, 1998, at <<http://www.freedomforum.org/templates/document.asp?documentID=11277>>. Note also Altintas, K., Aydin, T., Akman, V., “Censoring the Internet: The Situation in Turkey,” *First Monday*, May 2002, at <[http://www.firstmonday.dk/issues/issue7\\_6/altinta/](http://www.firstmonday.dk/issues/issue7_6/altinta/)>.

Another well-known case also demonstrated that the judiciary had treated Internet related criminal cases like ordinary mass media cases. Coşkun Ak, a former moderator of various forums operated by Superonline, one of the largest ISPs in Turkey was sentenced to 40 months in prison due to a particular message about human rights abuses in Turkey sent to a Superonline forum by an anonymous poster. The message that triggered his prosecution under article 159 of the Turkish Criminal Code was sent anonymously in May 1999. Mr. Ak was asked by a member to remove the message from the forum as it allegedly constituted a crime. Mr. Ak rejected this claim. Although the public prosecutor admitted that there was no legislation comprising crimes committed on the Internet, he claimed that Mr. Ak's position was similar to the editor of a newspaper. Thus, existing rules of the time were applicable by analogy. The defence counsel opposed reminding the principle *nullum crimen nulla poena sine lege*, with no vain. The court decided to sentence Ak for insulting and weakening the Republic of Turkey, the Military Forces, the Security Forces, and the Ministry of Justice, to one year in prison for each insult separately, totalling four years. His good conduct in court was taken into account and his sentence was reduced to 10 months for each insult, totalling 40 months. On 14 November, 2001, the 9<sup>th</sup> Criminal Chamber of the Court Cessation reversed this ruling.<sup>7</sup> It was decided that Ak's case should be reconsidered, once experts selected from universities decide whether Mr. Ak or another person could be held responsible for the criminal content. On 12 March, 2002, the 4<sup>th</sup> Istanbul Assize Court passed a second verdict against Coşkun Ak. The sentence of 40 months' imprisonment was commuted to a fine of TL 6 million (app. \$4). On 24 April, 2003, this second sentence was also quashed by the Plenary of Criminal Chambers of the Court of Cessation, thanks to an amendment made to article 159, but not because of the claims put forward by the defence counsel.<sup>8</sup>

However, during the same period, the Court of Cessation, in some civil law cases, decided that since there was no law governing the Internet, claims made to get web pages taken-down or blocked should be rejected. According to the Court, decisions to that effect were destined to be inapplicable.<sup>9</sup>

## **Supreme Board of Radio and Television (RTUK) Bill (No 4676)**

Originally, the judiciary's approach to Internet regulation seems to have been shared by the government and Parliament. During 2001, the Turkish government introduced a parliamentary bill with the intention of regulating Internet publications according to the same rules that govern the mass media.<sup>10</sup> This prompted strong protests from the civil society and ISPs,<sup>11</sup> and it was thought that

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<sup>7</sup> Court of Cessation 9<sup>th</sup> Criminal Chamber (Yargıtay 9. Ceza Dairesi), k.t. 25.10.2001, E. 2001/1854, K. 2001/2649.

<sup>8</sup> Court of Cessation Plenary of Criminal Chamber (Yargıtay CGK), k.t. 15.10.2002, E. 2002/9-172, K. 2002/360

<sup>9</sup> Court of Cessation 4<sup>th</sup> Civil Chamber (Yargıtay 4. Hukuk Dairesi), k.t. 8.2.2001, E. 2001/755, K. 2001/1157.

<sup>10</sup> Section 27 of the proposed legislation would bring the Internet within the ambit of the 5680 numbered Press Law. Radyo ve Televizyonların Kurulus ve Yayınları Hakkında Kanun, Basın Kanunu, Gelir Vergisi Kanunu ile Kurumlar Vergisi Kanununda Degişiklik Yapılmasına Dair Kanun Tasarısı, T.B.M.M. (S. Sayısı: 682), Dönem : 21 Yasama Yılı: 3.

<sup>11</sup> The bill was so thoroughly ridiculed that no agency admitted drafting or introducing it and no member of parliament acknowledged voting for it: "Turkey in a Tangle Over Control of Web; President Vetoes Bill Curbing Internet As Concern About Free Speech Grows," *The Washington Post*, 21 June, 2001.

“the bill was aimed at stifling the independence of a few aggressive Internet news portals, which have been publishing stories about corruption and politics that the mainstream media -- firmly tied to the establishment -- consider too hot to handle.”<sup>12</sup>

The Bill was vetoed by Ahmet Necdet Sezer, the former President of Turkey in June 2001. Sezer stated that<sup>13</sup>

“The most important aspect of Internet broadcasting, which is like a revolution in communication technology, is that it is the most effective area for freely expressing and spreading ideas and for forming original opinions..... Leaving the regulation of the Internet to public authorities completely and linking it to the Press Law does not fit with the characteristics of Internet broadcasting.”<sup>14</sup>

This however proved a Pyrrhic victory for the opponents as the sponsors of the Bill were successful the following year. In May 2002, the Parliament approved the Bill Amending the Supreme Board of Radio and Television (“RTUK”) and Press Code (Law No. 4676). The Bill regulated the establishment and broadcasting principles of private radio and television stations and made amendments to the Turkish Press Code. It included provisions that would subject the Internet to restrictive press legislation in Turkey. Accordingly, provisions of the Press Code concerning pecuniary and non-pecuniary damages arising from publishing lies, defamatory statements and similar acts would apply to the Internet. Although, MPs representing the governing parties claimed that the mere target of the amendments were the prevention of defamation and false news,<sup>15</sup> it was obvious that the phrase “similar acts” was open to interpretation. Critics maintained that the rationale behind these provisions appeared to be the silencing of criticism of the Members of the Turkish Parliament and to silence political speech and dissent.<sup>16</sup> Broadly speaking strong criticism is acceptable in Turkey. However, as noted by a Human Rights Watch report:

“Such freedom, however, ends at the border of a number of sensitive topics. Alongside the arena of free discussion there is a danger zone where many who criticize accepted state policy face possible state persecution. Risky areas include the role of Islam in politics and society, Turkey’s ethnic Kurdish minority and the conflict in south eastern Turkey, the nature of the state, and the proper role of the military.”<sup>17</sup>

Amid these debates, Amasya 2<sup>nd</sup> Civil Court of First Instance ordered a hosting company owner to pay 5 billion TL (€2500) to the governor of Şanlıurfa, for the alleged defamatory comments made on the sanliurfa.com website by an unidentified blogger.<sup>18</sup> It is safe to say that this was a major blunder and this particular law should have never been enacted.

<sup>12</sup> *Ibid.*

<sup>13</sup> Presidential Statement in relation to proposal to amend the Press Law, 18 June, 2001, at <<http://www.cankaya.gov.tr/ACIKLAMALAR/18.06.2001-1159.html>>. See further Anderson, J.W., “Turkey in a Tangle Over Control of Web,” *Washington Post*, 21 June, 2001.

<sup>14</sup> *Ibid.* See further “Turks Face Strict Censor In Internet Crackdown,” *The Times Higher Education Supplement*, 31 August, 2001.

<sup>15</sup> See MP Emrehan Yazıcı’s comments in the Parliamentary debate, Tutanak Dergisi no. 95, Dönem: 21, Yıl: 4, 99. Birleşim.

<sup>16</sup> See further Statement by Dr. Yaman Akdeniz in relation to the Internet related provisions of the Turkish Supreme Board of Radio and Television (RTUK) Bill (No 4676 ), 15 May, 2002, at <[http://www.cyber-rights.org/press/tr\\_rtuk.htm](http://www.cyber-rights.org/press/tr_rtuk.htm)>. Note also “Press group slams Turkish moves on the media,” *Agence France Presse*, 05 June, 2001.

<sup>17</sup> But note that even when writing on sensitive topics, wide latitude holds sway, and different realities exist for different individuals. See further Human Rights Watch, *Violations of Free Expression in Turkey*, February 1999, at <<http://www.hrw.org/reports/1999/turkey/>>.

<sup>18</sup> Gökhan Ahi, “Internet’e yasal darbe ayıkla pirincin taşımı”, *Hürriyet*, 08 May, 2004, at <<http://www.ivhp.net/2004/05/internete-yasal-darbe-aykla-pirincin.html>>.

## **Website blocking practices prior to the enactment of Law 5651**

Obviously, traditional administrative and criminal measures to control freedom of speech proved inadequate to control Internet speech in Turkey. Along with the press rules targeting individuals responsible for websites, blocking orders were also given without clear legal grounds.

As will be discussed below the Turkish government enacted the Law No. 5651 entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication on 4 May, 2007.<sup>19</sup> While some provisions (article 9) came into force immediately, other provisions such as those related to article 8 came into force on 23 November, 2007. Subsequently access to a considerable number of foreign websites including popular websites such as YouTube, Geocities, and WordPress would be blocked from Turkey under the provisions of this law. At the time the Law No. 5651 was enacted, it was thought that website blocking was a new concept previously not relied upon by Turkish authorities. On the contrary our research reveals that blocking and filtering of websites prior to 2007 was common. Several websites were taken down or blocked as early as in 2000 in Turkey, and there were several blocking orders issued by courts and enforced by the then dial up ISPs.

For example, the closure of Subay.Net, a web site critical of the administration of the Turkish Armed Forces ("TSK") was widely covered in the media. This particular website which invited members of the Turkish army to air complaints about the military was taken down in February 2001, after rousing the ire of the powerful Chief of General Staff according to Turkish Daily News.<sup>20</sup> The site which was thought to be established in September 2000 had a forum entitled "Free Fire" for soldiers to sound off on army life and share jokes about superiors. Some of the visitors of the forum defended the TSK while others criticised it, trading insults with one another as they left notes on the site.<sup>21</sup> More than 18,000 Internet users visited the website within four days of a story about the website was published in Milliyet, a Turkish daily newspaper.<sup>22</sup> The website was threatened with a prosecution under article 159 of the Turkish Criminal Code as the pages were thought to be insulting the military.<sup>23</sup>

Similarly, in December 2001, a court in Istanbul ordered the closure of the web site ideapolitika.com (site of a journal called Idea Politika) for insulting and degrading the armed forces under article 159 of the Turkish Criminal Code.<sup>24</sup> However, despite various court cases, ideapolitika.com continued to be available on the Internet through a foreign server outside Turkey carrying the banned issues of the journal. At that time no blocking order was issued by the courts and it was possible to access ideapolitika.com from Turkey. The website was however subjected to a blocking order in or around 2004. Another blocking order was given with regards to the <www.ekmekveadalet.com> website on 21 May, 2003 for containing

<sup>19</sup> Law No 5651 was published on the Turkish Official Gazette on 23.05.2007, No. 26030.

<sup>20</sup> "February: Political Row Sparks Unprecedented Economic Crisis, TL Floated Against \$," *Turkish Daily News*, 5 March, 2001.

<sup>21</sup> "Turkish Press Scanner : Big Fight Over Subay.Net," *Turkish Daily News*, 10 February, 2001. See further "Turkish Website Takes Jabs At Powerful Military: Subay.Net Includes A Forum Called "Free Fire", Where Soldiers Sound Off On Life In The Army And Share Jokes About The Top Brass," *Turkish Daily News*, 08 February, 2001.

<sup>22</sup> "Turkish Press Scanner : Big Fight Over Subay.Net," *Turkish Daily News*, 10 February, 2001. See further "New Website - Topic of the Day At The General Staff," *IPR Strategic Business Information Database*, 14 March, 2001.

<sup>23</sup> "Website Under Fire," *The Independent* (London), 18 February, 2001.

<sup>24</sup> Bianet, "İdeaPolitika Sitesine Yayın Durdurma Kararı", 12 December, 2001; BBC News, "Turkey: RSF Deplores 'Repressive' Amendments of Media Law," 17 May, 2002.

material “insulting and making fun of the armed forces.” A court also blocked the website of the pro-Kurdish weekly *Özgür Politika*, <[www.ozgurpolitika.org](http://www.ozgurpolitika.org)>, on the same day, for an infringement under article 159.<sup>25</sup>

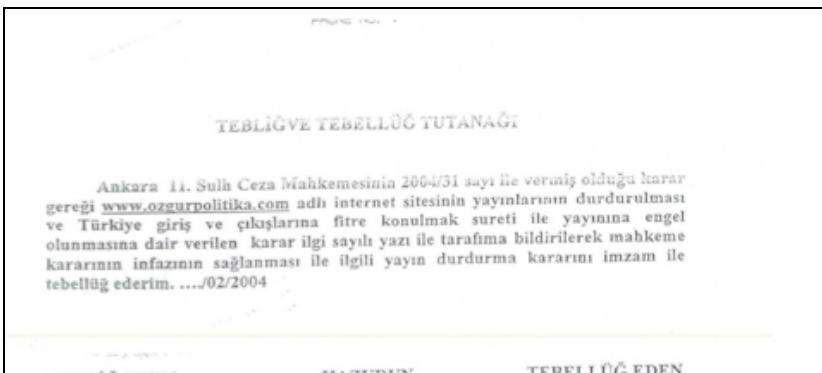


Figure 1: Ozgurpolitika.com Court Blocking Order

In addition to these highly publicised cases, several blocking orders were issued by Turkish courts with regards to a number of websites hosted outside Turkey. Websites such as yolsuzluklar.org, yolsuzluk.com, yolsuzluk.org, altin-sayfalar.com, soygun.com, turkbet.com, pkk.org, superbahis.com, bahismerkezi.com, cjb.net, hizb-ut-tahrir.org, al-ummah.org, akademya.org, cunta.org, ucbucuk.com, akparti.gen.tr, altinrehber.com, otuken.net, soyguncular.com, dindusmanlari.com, otuken.org, aloihbar.org were all subjected to blocking and were inaccessible from Turkey between 2001-2004.

In terms of content, these websites included allegations of corruption within the Turkish government and army, anti-Turkish sentiments, terrorist propaganda, defamation, and gambling which triggered court actions and blocking orders which were communicated to the ISPs via the State Prosecutors Office. Currently some of these websites no longer exist, some of them are still blocked and not accessible from Turkey, and a few are no longer subject to blocking orders.

During mid 2005, MÜYAP, the Turkish Phonographic Industry Society<sup>26</sup> started to obtain court orders to block access to websites which contain pirated music, and videos involving Turkish artists which the Society represents.<sup>27</sup> According to a research conducted by Turk.Internet.Com this had a huge impact upon the number of blocking orders, claimed to be 153 in 2005, 886 in 2006, and 549 in 2007.<sup>28</sup>

More recently, in March 2007 a video clip which included defamatory statements about the founder of the Turkish Republic Mustafa Kemal Atatürk and scenes disparaging the Turkish Flag resulted with a court order of the Istanbul 1<sup>st</sup> Criminal Court of Peace<sup>29</sup> for blocking

<sup>25</sup> Reporters Sans Frontières, “Two websites blocked”, at <[http://www.rsf.org/article.php3?id\\_article=10683](http://www.rsf.org/article.php3?id_article=10683)>.

<sup>26</sup> See <<http://www.mu-yap.org/>>.

<sup>27</sup> Currently the society has 92 members and is representing nearly 80% of the music industry in Turkey. The Society also represents the Turkish music industry at the International Federation of the Phonographic Industry (IFPI) level. See further <<http://www.ifpi.org/>>.

<sup>28</sup> See Turk.Internet.Com, “Müyap Kapatmalarındaki Kötü Alışkanlık, 5651 Dışı Site Erişim Kapatmalarında Kural Haline Dönüşmüşt,” 06 May, 2008, at <<http://turk.internet.com/haber/yazigoster.php3?yaziid=20882>>; and Turk.Internet.Com, “Türkiye’de Site Erişime Kapatmalarının Tarihçesi,” 08 May, 2008, at <<http://turk.internet.com/haber/yazigoster.php3?yaziid=20909>>.

<sup>29</sup> Decision of the Istanbul 1<sup>st</sup> Criminal Court of Peace 2007/384 Misc., dated 07 March, 2007.

access to YouTube at domain level in Turkey. The video clip in question was deemed illegal under Law No. 5816 on Crimes Against Atatürk,<sup>30</sup> and article 300 of Turkish Criminal Code.

**Bu siteye erişim mahkeme kararıyla engellenmiştir !...**

[www.youtube.com](http://www.youtube.com) sitesine erişim İstanbul 1. Suh Ceza Mahkemesi'nin 2007/384 sayılı ve 06.03.2007 tarihli kararı gereği engellenmiştir.

Access to [www.youtube.com](http://www.youtube.com) site has been suspended in accordance with decision no. 2007/384 dated 06.03.2007 of Istanbul First Criminal Peace Court.

**Figure 2: The blocking order notice which appears on the computer screens when users tried to access <[www.youtube.com](http://www.youtube.com)>.**

The availability of defamatory YouTube videos involving Atatürk combined with increasing concern for the availability of child pornographic content<sup>31</sup> as well as the availability of indecent and obscene content, Satanist content and websites which provided information about suicide, all of which deemed harmful to children, resulted with the development of a new parliamentary Bill on Internet content regulation.

## **Development and enactment of Law 5651**

The Ministry of Justice announced that it was working on a draft Bill to combat Internet crime in August 2006.<sup>32</sup> The proposal was claimed to have been sent to over 100 bodies, including universities, courts, relevant ministries and bar associations for comments. However, there were also critics alleging that the Commission preparing the draft had not shared its opinions with the public.<sup>33</sup> The Draft Bill can be separated into two parts:

1. Provisions envisaging institutional responsibilities for content providers, hosting companies, ISPs; and
2. Provisions concerning individual criminal responsibility.

The latter caused a serious debate, because when the new Turkish Criminal Code was enacted, it was proclaimed that the Criminal Code comprised all crimes, previously scattered in different legislation. It was also pledged that no special criminal law would be enacted subsequently. Nevertheless, despite the existence of information crimes in articles 243-246 of the new Criminal Code (TCK), some of these provisions were rewritten in the proposed Draft Bill along with additional new crimes. It was proposed that article 32 of the Draft Bill would repeal articles 243-246 of the Criminal Code. The content of the Bill was broad and included

<sup>30</sup> Law on the Crimes Committed Against Atatürk (Atatürk Aleyhine İşlenen Suçlar Hakkında Kanun), No. 5816. Official Gazette No. 7872, 31.07.1951.

<sup>31</sup> See “Child porn and crimes committed against Atatürk,” *Turkish Daily News*, 30 March, 2007; “Turkey mulling crackdown on child pornography,” *Turkish Daily News*, 15 December, 2006; “Turkish police crack down on online child pornography,” *Turkish Daily News*, 16 December, 2006; “Child porn in Turkey: fact or overstatement?” *Turkish Daily News*, 16 January, 2007; “Minding the gap in child porn laws,” *Turkish Daily News*, 16 January, 2007.

<sup>32</sup> “Tough penalties set for Internet crimes,” *Turkish Daily News*, 11 August, 2006.

<sup>33</sup> “B.A.H.D.B.S.H.K.” Toplantısı Yapıldı, available at <[http://www.ivhp.net/2006\\_12\\_01\\_archive.html](http://www.ivhp.net/2006_12_01_archive.html)>; Fikret İlkiz, “Bilişime İki Ayrı Tasarı”, *Bianet*, 5 February, 2007, at <<http://www.bianet.org/bianet/kategori/medya/91224/bilisime-iki-ayri-tasari>>.

provisions on hacking, information and identity fraud, child pornography, gambling, and state security. It was reported in December 2006 that Turkey would “for the first time be regulating information crimes outside the scope of the Turkish Criminal Code with a bill on information crimes under consideration that would impose harsh penalties for cyber-criminals and which would double the sentences for online threats, blackmail, insult and slander already addressed under the TCK.”<sup>34</sup> The draft Bill entitled Regulation of Information Network Services and Information Crimes included provisions on illegal data monitoring, unauthorized damaging, and forgery in addition to the above mentioned provisions. The proposed Bill included some draconian provisions. If become law, it would have increased by 50% the sentencing for criminal defamation and insults, along with many crimes,<sup>35</sup> if committed online. For instance, convicts of the infamous article 301 of the new Criminal Code would receive up to one year more imprisonment for the crimes committed online. Additionally, eight to 12 years imprisonment were provided for producing real or manipulated child pornography in the draft Bill, and the Bill would also regulate the legal responsibilities of ISPs with regards to log keeping and data retention for law enforcement purposes in relation to cybercrimes. The Turkish police welcomed the proposals “pointing out that the number of online child pornography-related arrests peaked in 2006 and that gaps in the law have yet to be eliminated.”<sup>36</sup> A group of experts, including judges, academics, solicitors recommended to bring these provisions into the Criminal Code.<sup>37</sup>

In short, the Ministry of Justice’s draft was pure criminal law.<sup>38</sup> Although there were also administrative law provisions regarding the duties of ISPs, hosting companies and Internet cafes as well as administrative sanctions that would be imposed upon them,<sup>39</sup> the main purpose of the drafters was to create new crimes to regulate the Internet, not to impose blocking orders or censor websites.<sup>40</sup> In line with this methodology and unlike the Law No. 5651, the proposed draft law did not give blocking powers to administrative bodies.

## **Law No. 5651 and Justice Commission Discussions**

Another draft Bill prepared by the Ministry of Transportation was sent to the Turkish Parliament for discussion on 15 January, 2007.<sup>41</sup> A Parliamentary Commission approved the draft proposal in April 2007.<sup>42</sup> It is not clear whether the drafters of the two different texts were aware of the other one. Neither it is clear why the government preferred the one prepared by the Ministry of Transportation. Another draft proposed by Gülseren Topuz, MP, was dropped in favour of the Ministry of Transportation draft as there were similarities between the two drafts.<sup>43</sup>

<sup>34</sup> “Heavy penalties to be introduced for computer crimes,” *Turkish Daily News*, 04 December, 2006.

<sup>35</sup> See article 24 of the Draft Bill. Explanation note proclaims that this provision was needed on the ground that commission of these crimes on the Internet is easier, while their prosecution is more difficult.

<sup>36</sup> “Minding the gap in child porn laws,” *Turkish Daily News*, 16 January, 2007.

<sup>37</sup> *Bilişim Ağı Hizmetlerinin Düzenlenmesi ve Bilişim Suçları Hakkında Kanun Tasarısı Görüşleri*, at <[http://www.tbd.org.tr/genel/bizden\\_detay.php?kod=188&tipi=5&sube](http://www.tbd.org.tr/genel/bizden_detay.php?kod=188&tipi=5&sube)>

<sup>38</sup> The Draft’s explanation note refers to the Council of Europe’s Convention on Cybercrime, CETS No. 185, as one of the main motivating factors of the text. See <<http://bt-stk.org.tr/bilisim-hizmetler-suclari.html>>.

<sup>39</sup> See article 28 of the Draft Bill.

<sup>40</sup> According to article 29 of the Draft Bill, blocking orders could be given exceptionally by a judge or by a prosecutor in cases where delay is prejudicial, whose decision must be submitted to the judge for the approval within 24 hours.

<sup>41</sup> “Informatics crimes,” *Turkish Daily News*, 17 January, 2007.

<sup>42</sup> Bianet, “Draft Legislation on Cyber Crimes Approved,” 09 April, 2007, at <<http://www.bianet.org/bianet/kategori/english/94350/draft-legislation-on-cyber-crimes-approved>>.

<sup>43</sup> See Justice Commission Report, at <<http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1397m.htm>>.

The Ministry of Transportation draft Bill had eight articles, two of which concerned the execution of the law. 14 amendments were proposed when the Bill reached the Commission for debate. Subsequently, the final draft had 14 articles. The Justice Commission of the Parliament published its report on the draft Bill on 12 April, 2007.<sup>44</sup>

The proposed law through article 8 aims to combat some specific content and conduct crimes committed through the Internet by requiring websites hosted in Turkey to remove such content and by banning access to such websites hosted outside the Turkish jurisdiction. The crimes covered within the draft Bill were already criminalized through the Turkish Penal Code. The draft Bill also attempted to regulate the responsibilities of content, location and access providers.

During the discussions at the Sub-Commission, MPs from the opposition Party, Republican People's Party ("CHP") proposed to widen the scope of the law to include crimes committed against the principles of the secular system<sup>45</sup> or the unity of the Turkish state.<sup>46</sup> That would have obviously affected a number of pro-Kurdish and Islamist web-sites. However, during discussions this was not agreed upon despite protests by a number of MPs who are members of CHP.

During the debates at Sub-Commission two completely new provisions were added to the draft Bill. A new provision on "information requirement" is added to the draft Bill through article 3 which imposed a duty on a person providing an information society service to make available to the recipient of that service certain information. A right to reply provision was added to the draft Bill through article 9 with regards to protection of personal rights.

## **Parliamentary Discussions on the Draft Bill**

The Parliament discussed the draft Bill on 04 May, 2007. It was a very short discussion which lasted 105 minutes including the reading of the Bill. The discussions concentrated on what types of Internet content should be included within article 8 of the draft Bill and should be subject to take down if hosted in Turkey or subject to blocking if hosted abroad. A member of the Parliament was critical of YouTube's hosting of defamatory videos of Atatürk as well as Google Earth naming Diyarbakır as the capital of Northern Kurdistan.<sup>47</sup> The opposition MPs called for the inclusion of crimes under article 302 of the Turkish Penal Code (activities aimed at destroying the unity of the state and territorial integrity of the country) within the ambit of this legislation. The opposition also called for safeguards for Internet content involving the protection of values and reform laws as covered in article 174 of the Turkish Constitution.<sup>48</sup> However, the expansion of article 8 provisions were rejected by the Parliament.<sup>49</sup>

<sup>44</sup> Justice Commission Report, TBMM, No. 1/1305, 2/958: Elektronik Ortamda İşlenen Suçların Önlenmesi ile 2559 ve 2937 Sayılı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı ve İstanbul Milletvekili Gülder Topuz'un Bilişim Sistemi Üzerinden Suç teşkil Eden Zararlı Yayınlarla Mücadele Hakkında Kanun Teklifi ile Adalet Komisyonu Raporu, at <<http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1397m.htm>>.

<sup>45</sup> With reference to revolution laws enumarated under article 174 of the Constitution, see note 48.

<sup>46</sup> With reference to article 302 of the Criminal Code, note the Dissenting opinion of CHP members at the Justice Commission (Feridun Ayvazoğlu and others), available through <<http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1397m.htm>>

<sup>47</sup> See MP Feridun Ayvazoğlu's speech at TBMM Genel Kurul Tutanlığı, 22. Dönem, 5. Yasama Yılı, 99. Birleşim, s. 68.

<sup>48</sup> Turkish Constitution article 174: No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilisation and to safeguard the secular character of the Republic, and which were in

During the discussions, an opposition MP, Osman Coşkunoğlu, warned the Parliament on two critical points. The Bill's article 8(4) enabled the Telecommunication Communications Presidency to block a website *proprio motu*. He criticised the Bill for not offering alternative ways to reach that result. Referring to the YouTube example, he claimed that instead of blocking websites, removal (take down) of the inappropriate material should have been sought. Coşkunoğlu also raised his concerns about article 8(6). Pursuant to this provision, the Presidency will notify the Public Prosecutor, if the Presidency can identify the perpetrators. Reminding that, those who are outside the Turkish jurisdiction would be generally unreachable, Coşkunoğlu implied that this would limit defence rights of the interested parties.<sup>50</sup> Although CHP asked for additional types of content crimes to be included in the ambit of article 8 they also raised concern that too much regulation and restrictions can lead into censorship. It was, however, pointed out by Coşkunoğlu, that circumvention is always possible regardless of the nature of the restrictions. He was critical of government pushing forward this Bill just prior to the general elections despite the fact that a more comprehensive draft law was prepared by the Ministry of Justice during 2006, and was subject to broader support following several months of consultation.

CHP proposed to establish a new Internet Board within the Transportation Ministry which would set policy among other things with regards to monitoring, filtering and blocking of objectionable Internet content. The establishment of the Board was supported by the Parliament following voting and the rules governing the Board were added to article 10(5) of the Act. The Board would include representatives from the Ministry of Transport, Ministry of Justice, Ministry of Interior Business, Ministry of Family Affairs, other relevant ministries and public bodies, non governmental organizations and ISPs. The Internet Board would conduct its policy work in co-ordination with the Telecommunication Communication Presidency established under the Telecommunications Authority.

The Transportation Minister Binali Yıldırım stated that this new law does not intend to punish the Internet, but intends to prevent crimes that could be committed through the Internet. He stated that the Parliament had a duty to protect our families, children and youth and that the Turkish Constitution through articles 41 (Protection of Family)<sup>51</sup> and 58 (Protection of the Youth)<sup>52</sup> gave the government the authority to do so.<sup>53</sup>

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force on the date of the adoption by referendum of the Constitution of Turkey.

1. Act No. 430 of 3 March 1924 (1924) on the Unification of the Educational System;

2. Act No. 671 of 25 November 1925 (1925) on the Wearing of Hats;

3. Act No. 677 of 30 November 1925 (1925) on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles;

4. The principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official, adopted with the Turkish Civil Code No. 743 of 17 February 1926, and Article 110 of the Code;

5. Act No. 1288 of 20 May 1928 on the Adoption of International Numerals;

6. Act No. 1353 of 1 November 1928 on the Adoption and Application of the Turkish Alphabet;

7. Act No 2590 of 26 November 1934 on the Abolition of Titles and Appellations such as Efendi, Bey or Pasa;

8. Act No. 2596 of 3 December 1934 on the Prohibition of the Wearing of Certain Garments.

<sup>49</sup> The amendment proposal was made by a group of CHP MPs. TBMM Genel Kurul Tutanağı, 22. Dönem, 5. Yasama Yılı, 99. Birleşim, s. 79-80.

<sup>50</sup> See MP Osman Coşkunoğlu's speech at TBMM Genel Kurul Tutanağı, 22. Dönem, 5. Yasama Yılı, 99. Birleşim, s. 78-79.

<sup>51</sup> Article 41 of the Turkish Constitution (as amended on 17 October, 2001): The family is the foundation of the Turkish society and based on the equality between the spouses.

## **Developments after the Enactment of Law No. 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications**

Law No. 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication aims to combat certain online crimes and regulates procedures regarding such crimes committed on the Internet through content, hosting, and access providers. It was enacted on 04 May, 2007, and the former President of Turkey, Ahmet Necdet Sezer promulgated the law on 22 May, 2007.<sup>54</sup> Certain parts of the law came into force immediately on 23 May, 2007 while articles 3 and 8 came into force on 23 November, 2007.

The Prime Ministry prepared and published three related by-laws to coincide with the law coming into force. On 24 October, 2007 the government published the Regulations governing the access and hosting providers which includes the principals and procedures for assigning activity certificates for such providers (“Regulations 1”).<sup>55</sup> An amended version of these Regulations was published on 01 March, 2008.<sup>56</sup> On 01 November, 2007 the government published the Regulations governing the mass use providers, the so called Internet cafes (“Regulations 2”).<sup>57</sup> On 30 November, 2007, the government published the Regulations Governing the Publications on the Internet which included the detailed principals and procedural matters with regards to the application of Law No. 5651 (“Regulations 3”).<sup>58</sup> These three Regulations were prepared subject to article 11(1) of Law No. 5651 and the Ministry of Transportation, Ministry of Interior Affairs, and Ministry of Justice were all consulted during the drafting stage.

### **Framework of Law No. 5651**

The explanatory note of the Law refers to article 41 of the Constitution, which states that

“the state shall take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family, especially where the protection of the mother and children is involved” and article 58 which provides that “the state shall take measures to ensure the training and development of the youth into whose keeping our state, independence, and our Republic are entrusted, in the light of contemporary science, in line

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The state shall take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family, especially where the protection of the mother and children is involved, and recognizing the need for education in the practical application of family planning.

<sup>52</sup> Article 58 of the Turkish Constitution: The state shall take measures to ensure the training and development of the youth into whose keeping our state, independence, and our Republic are entrusted, in the light of contemporary science, in line with the principles and reforms of Atatürk, and in opposition to ideas aiming at the destruction of the indivisible integrity of the state with its territory and nation.

The state shall take necessary measures to protect the youth from addiction to alcohol, drug addiction, crime, gambling, and similar vices, and ignorance.

<sup>53</sup> See further the explanatory memorandum for Law No 5651.

<sup>54</sup> The Law No. 5651 is also available online through <<http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.5.5651&MevzuatIliski=0&sourceXmlSearch>>.

<sup>55</sup> 24 Ekim 2007 tarih ve 26680 sayılı Resmi Gazetede yayımlanan Telekomünikasyon Kurumu Tarafından Erişim Sağlayıcılara ve Yer Sağlayıcılara Faaliyet Belgesi Verilmesine İlişkin Usul ve Esaslar Hakkında Yönetmelik.

<sup>56</sup> 01 Mart 2008 tarih ve 26803 Resmi Gazetede yayımlanan Telekomünikasyon Kurumu Tarafından Erişim Sağlayıcılara ve Yer Sağlayıcılara Faaliyet Belgesi Verilmesine İlişkin Usul ve Esaslar Hakkında Yönetmelikte Değişiklik Yapılmasına Dair Yönetmelik.

<sup>57</sup> 01 Kasım 2007 tarih ve 26687 sayılı Resmi Gazetede yayımlanan İnternet Toplu Kullanım Sağlayıcıları Hakkında Yönetmelik.

<sup>58</sup> 30 Kasım 2007 tarih 26716 sayılı Resmi Gazetede yayımlanan İnternet Ortamında Yapılan Yayınların Düzenlenmesine Dair Usul ve Esaslar Hakkında Yönetmelik.

with the principles and reforms of Atatürk, and in opposition to ideas aiming at the destruction of the indivisible integrity of the state with its territory and nation.”

The Report of the Justice Commission stated that Council of Europe’s Cybercrime Convention<sup>59</sup> and German Tele Services Law (*Gesetz über die Nutzung von Telediensten – Teledienstegesetz*) were taken into consideration in the preparatory stages of Law No. 5651. Nevertheless, their impact seems to be limited. Unlike the proposal put forward by the Ministry of Justice, Law No. 5651 is not a cybercrime law. It does not create new crimes. It involves a mixture of criminal procedure and administrative law provisions. It also includes a civil law provision in article 9 on the right to reply with regards to disputes arising in private law. *Prima facie*, this law’s main purpose seems to be making criminal procedures more effective. Close examination proves that the law’s real purpose is to cease the continuing effects of the crimes listed under article 8.

Administrative rules in the Law regulate the responsibilities of content providers, hosting companies, mass use providers and ISPs. The administrative structure of the Telecommunications Communication Presidency and its powers are also provided in the Law. However, all other provisions are connected to article 8. According to this provision, orders to block websites are given by a judge at the prosecution stage, and by the Court during trial. This is a rule similar to other precautionary measures enumerated under the Criminal Procedure Act.<sup>60</sup> Indeed, Law No. 5651 states in article 8(2) that objections to the blocking decision rendered as a precautionary measure should be brought pursuant to the Act of Criminal Procedure. However, the nature of the measure taken under Law No. 5651 is different from other measures described under the Criminal Procedure Act. Precautionary measures listed in the latter; such as arrest, detention, search and seizure, monitoring of communications, are provisional precautions which aim to secure the prosecution of criminals as well as the execution of the final judgments. They intend to keep the accused present and to reach the evidence or keep the evidence intact during prosecution and/or trial. Powers of the prosecutors and judges concerning precautionary measures cannot be transferred to the executive branch.

On the other hand, the measure envisaged under Law No. 5651 is rather different. Blocking a website does not prevent the removal of evidence. Neither does it secure the presence of the accused. Instead, on the ground that there is adequate suspicion that the website contains material that constitutes one of the crimes listed in the Law, it aims to cease that particular violation. In other words, the measure envisaged under Law No. 5651 aims to prevent the continuous effects of a particular violation. Moreover, Law No. 5651 through article 8(4) enables the Telecommunications Communication Presidency to issue “administrative blocking orders” ex-officio. Therefore, blocking measure is not a precautionary measure as understood in the Criminal Procedure Act.

This measure also resembles to the police powers provided under the Police Powers and Responsibilities Act.<sup>61</sup> Under this Law, for instance, police might stop people to prevent the perpetration of a crime<sup>62</sup> or arrest those who are acting against the legal measures taken by the police.<sup>63</sup> However, those measures continue for a very short while. If the impugned act also constitutes a crime under criminal law, the prosecutor usually investigates the allegations.

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<sup>59</sup> Convention on Cybercrime, ETS No. 185, entry into force 1.7.2004.

<sup>60</sup> See Law No. 5271, Official Gazette, 17.12.2004, No. 25673, articles 90-140.

<sup>61</sup> Law No 2559, Official Gazette, 14.7.1934, No. 2751.

<sup>62</sup> Article 4/A of Law No 2559.

<sup>63</sup> Article 13(A) of Law No 2559.

Blocking measure provided under Law No. 5651 seems to be different from these powers as well. First, even if it is provisional, the measure adopted pursuant to article 8 applies for a very long time, in some cases indefinitely as will be seen later in this chapter and throughout this book. More importantly, some administrative blocking orders (with regards to foreign websites) issued by the Presidency are never brought to the attention of the Public Prosecutor.<sup>64</sup>

Therefore, the power utilised under Law No. 5651 is *sui generis*. Although this does not automatically lead to the conclusion that the entire Law is in conflict with the Constitution and international norms, it requires the close examination of all provisions and their application. The compliance of the Law with the Constitution and international norms will be examined in chapter 2 in detail. Nevertheless, an example would be helpful at this stage to demonstrate how atypical character of the law might render its powers illegal.

Separation of powers is one of the founding principles of the Constitution.<sup>65</sup> Accordingly, “no person or agency shall exercise any state authority which does not emanate from the Constitution”.<sup>66</sup> Article 9 of the Constitution also provides that “judicial power shall be exercised by independent courts on behalf of the Turkish Nation”.<sup>67</sup> It, therefore, follows that administrative bodies cannot take judicial decisions. This would also be against international rules concerning fair trial, as both the European Convention on Human Rights (“ECHR” - article 6) and International Covenant on Civil and Political Rights (“ICCPR” - article 14) guarantee trial by an independent and impartial tribunal established by law. However, the Law enables the Telecommunications Communication Presidency to determine whether there exists sufficient suspicion that the content of an impugned website constitutes a listed crime subject to article 8. Such a determination is a judicial activity and cannot be transferred to an administrative body. However, as the decisions of the Constitutional Court<sup>68</sup> establish, as long as judicial review is available against actions and acts of the administration,<sup>69</sup> administrative bodies can take quasi-judicial measures. Although under Regulations 3, this decision shall be taken to a judge for approval for the websites located in Turkey, no such requirement is envisaged for the websites based outside the Turkish jurisdiction.<sup>70</sup> No doubt, recourse to judiciary is available upon blocking decisions according to article 8(12) of the Law. The law also provides that if the Presidency can establish the identities of those who are responsible for the content subject to the blocking orders the Presidency would request the Chief Public Prosecutor’s Office to prosecute the perpetrators.<sup>71</sup> However, considering that the Presidency does not inform the websites located outside the Turkish jurisdiction about its blocking decision and that generally websites located outside the jurisdiction have no legal representation in Turkey, the chances of getting a fair trial against the decisions of the

<sup>64</sup> If the Publisher of the website, about which the Presidency gives a blocking order, cannot be identified, the Public Prosecutor shall not be notified. See article 8(6) of Law No. 5651.

<sup>65</sup> See the Preamble of the Constitution, Law No. 2709, Official Gazette, 20.10.1982, No. 17844.

<sup>66</sup> Article 6 of the Constitution.

<sup>67</sup> The Constitutional Court decided that arbitration committees established to solve disputes between lawyers and clients are not independent courts. Since no appeal can be made against their decisions before Courts, the rule that provides their powers breaches the Constitution. Constitutional Court decision, E. 2003/98, K. 2004/31, kt. 3.3.2004.

<sup>68</sup> See for example Constitutional Court decision, E. 1997/19, K. 1997/66, kt. 23.10.1997, AMKD S. 35, s. 107.

<sup>69</sup> In the same line see *Öztürk v. Germany* judgment of 21 February 1984, Series A no. 73, para. 56, where the ECtHR stated that “conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.”

<sup>70</sup> Article 14(1) of Regulations 3.

<sup>71</sup> See note 103 below and the related text.

Presidency is dim. Therefore, this particular framework of the law should be kept in mind when the specific rules are examined.

## **Specific Provisions of Law No. 5651**

Article 3 introduced an “information requirement” which imposes a duty on content, hosting, and access providers to make available to the recipient of that service certain information through their websites. Regulations 3 provide further details. According to article 5 of the Regulations 3, content providers acting with commercial and economic purposes as well as hosting and access providers must provide information including name, tax number, trade record number, residence, e-mail address and telephone number on the front page of their websites. Article 3(2) provides that content, hosting, and access providers who fail to provide the required information could face an administrative fine by the Telecommunications Communication Presidency between 2,000YTL and 10,000YTL.

Content providers are regulated through article 4, and this provides that content providers are responsible for the content they generate through their websites. However, they are not liable for third party content that they link to.<sup>72</sup> According to article 4(2), if it can be understood from the presentation that the content provider adopts the content as its own or it aims to deliberately make the content reachable, the provider can be held responsible according to the general principles.<sup>73</sup> It remains to be seen how this provision will be interpreted but “linking” in certain scenarios could trigger liability for content providers.

So far, 397 commercial hosting companies, and 146 companies which provide hosting services within their own organizations obtained the required “activity certificate”.<sup>74</sup> In terms of hosting providers liability, article 5 introduced a notice-based liability system and the provision states that there is no general obligation to monitor the information which the hosting companies store, nor they have a general obligation to actively seek facts or circumstances indicating illegal activity. This provision is consistent with article 15 of the EU E-Commerce Directive. However, through article 5(2) the hosting companies are obliged to take down illegal or infringing content once served with a notice through the Telecommunications Communication Presidency, or subject to a court order with regards to article 8 of Law No. 5651 so far as it is technically possible. Hosting companies may be prosecuted under article 5(2) if they do not remove the notified content consistent with the terms of the EU E-Commerce Directive.<sup>75</sup>

Access and Internet Service Providers are regulated through article 6, and so far 92 ISPs obtained the required “activity certificate”.<sup>76</sup> This provision is similar to that of hosting companies and is in line with the EU E-Commerce Directive provisions. Under article 6(1)(a) the access providers would be required to take down any illegal content published by any of its customers once made aware of the availability of the content in question through the Telecommunications Communication Presidency, or subject to a court order so far as it is technically possible.

The access providers are required under article 6(1)(b) to retain all communications (traffic) data for a period of six months minimum and two years maximum from the date of the

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<sup>72</sup> See further article 6(2) of Regulations 3.

<sup>73</sup> See further article 6(2) of Regulations 3.

<sup>74</sup> For a list of these companies see <[http://www.tib.gov.tr/YS\\_listesi.html](http://www.tib.gov.tr/YS_listesi.html)>.

<sup>75</sup> See further article 7 of Regulations 3.

<sup>76</sup> For a list of these ISPs see <[http://www.tib.gov.tr/ES\\_listesi.html](http://www.tib.gov.tr/ES_listesi.html)>. Applications can be made through <<http://faaliyet.tib.gov.tr/yetbel/>>.

communication. More specifically, Regulations 3 require the traffic data to be retained for a year.<sup>77</sup> Access providers are also obliged to maintain the accuracy, security, and integrity of the retained data. Article 6(1)(c) provides that the access providers who decide to cease their commercial activities are obliged to hand over the retained communications data to the Telecommunications Authority<sup>78</sup> subject to the provisions of the related regulations and notify the Authority, content providers and their clients three months prior to ceasing their commercial activity. Administrative fines between 10,000YTL and 50,000YTL could be imposed upon access providers if they do not comply with the requirements of article 6(1)(b) and (c) subject to article 6(3).

Article 6(2) provides that access providers do not need to monitor the information that goes through their networks, nor do they have a general obligation to actively seek facts or circumstances indicating illegal activity with regards to the transmitted data.

Regulations 1 provide that those who have convictions under Anti-Terrorism law and Criminal Code concerning crimes committed against the State cannot have more than %5 shares in ISP companies. They cannot be managers or representatives of these companies either.<sup>79</sup> There is no legal basis for this restriction under Law No. 5651. Furthermore, such a restriction is irrelevant and disproportionate in our view. According to article 13 of the Constitution, fundamental rights and freedoms can only be restricted by law, such a limitation brought by a Regulation is therefore unacceptable.

Article 7 regulates the mass use providers, the so called Internet cafes, and the providers can only operate subject to being granted an official activity certificate obtained from a local authority representing the central administration. The providers are required under article 7(2) to deploy and use filtering tools to block access to illegal Internet content. Providers which operate without an official permission would face administrative fines between 3,000YTL and 15,000YTL.<sup>80</sup> Under Regulations 2, they are also required to record daily the accuracy, security, and integrity of the retained data using the software provided by the Presidency and to keep this information for one year.<sup>81</sup> Further detailed procedural regulations governing the mass use providers were published in November 2007 in Regulations 2.

Article 8 includes the infamous blocking provisions. Under article 8(1) access to websites will be blocked if there is sufficient suspicion that certain crimes are being committed on that website. The crimes that are included within the ambit of article 8 are encouragement and incitement of suicide (article 84 of the Turkish Criminal Code),<sup>82</sup> sexual exploitation and abuse of children (article 103(1) of the Turkish Penal Code),<sup>83</sup> facilitation of the use of drugs (article 190 of the Turkish Penal Code),<sup>84</sup> provision of dangerous substances for health (article 194 of the Turkish Penal Code),<sup>85</sup> obscenity (article 226 of the Turkish Penal Code),<sup>86</sup> prostitution

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<sup>77</sup> Article 8(b).

<sup>78</sup> Telecommunications Authority has been established on 27 January, 2000 according to Law No. 4502. Official Gazette, 29.1.2000, no. 23948.

<sup>79</sup> Article 8 (1).

<sup>80</sup> See article 7(3).

<sup>81</sup> See article 5 (1) (e).

<sup>82</sup> Article 8(1)(a)(1).

<sup>83</sup> Article 8(1)(a)(2).

<sup>84</sup> Article 8(1)(a)(3).

<sup>85</sup> Article 8(1)(a)(4).

<sup>86</sup> Article 8(1)(a)(5).

(article 227 of the Turkish Penal Code),<sup>87</sup> gambling (article 228 of the Turkish Penal Code),<sup>88</sup> and crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).<sup>89</sup> Article 8 blocking provisions are also applicable since January 2008 with regards to football and other sports betting websites and websites which enable users to play games of chance through the Internet which are based outside the Turkish jurisdiction without obtaining a valid permission.<sup>90</sup> Websites that carry such content could be taken down if hosted in Turkey or blocked and filtered through access providers if hosted abroad. Furthermore, it has been recently reported that the Head of the Telecommunication Authority, Tayfun Acarer announced to the press that the Authority is working on expanding the catalogue crimes provided in article 8 by adding new crimes to the list such as insults and defamation.<sup>91</sup> It has been also reported that some prosecutors desire new crimes to be included in the law, including terrorism related offences.<sup>92</sup> The expansion of the catalogue crimes provided in article 8 is undesirable and the law's main purpose of "protection of children" is often forgotten. Inclusion of certain content crimes such as defamation within the ambit of article 8 would therefore be not justified.

Blocking orders would be issued by a judge during preliminary investigation, and by the courts during trial.<sup>93</sup> During preliminary investigation the Public Prosecutor can issue a blocking order through a precautionary injunction if a delay could be prejudicial to the investigation. Article 8(2) states that the Public Prosecutor need to take his injunction decision to a judge within 24hrs, and the judge needs to decide on the matter within 24hrs. The precautionary injunction is immediately lifted by the Public Prosecutor and access to the website in question restored if the decision is not approved within the said time period. Additionally, under article 8(2) objections to the blocking decision rendered as a precautionary measure should be brought pursuant to the Criminal Procedure Act (Law No. 5271) by the interested parties. However, as will be explained below who can be deemed as an interested party is not clearly specified by law. Additionally, if a preliminary investigation does not result in a prosecution, the blocking order issued through a precautionary injunction would be automatically removed.<sup>94</sup> Under article 13(2) of Regulations 3, the Presidency is also authorised to bring objections against the precautionary measures issued by the courts. Considering that regulations concerning fundamental rights can only be provided by an act of Parliament under Turkish law, a guarantee not envisaged by a legal provision but through a Regulation is problematic. Indeed, the Government realised this irregularity and made an amendment to article 8 of Law No. 5651 through the recently introduced Electronic Communication Law. Accordingly, the Presidency responsible for the execution of the precautionary measure would be able to bring an objection against the court orders issued.<sup>95</sup> This provision is brought into force by Law No. 5809 on 05

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<sup>87</sup> Article 8(1)(a)(6).

<sup>88</sup> Article 8(1)(a)(7).

<sup>89</sup> Article 8(1)(b).

<sup>90</sup> Law Amending Some Acts to Harmonise Criminal Law No 5728, Article 256. Temel Ceza Kanunlarına Uyum Amacıyla Çeşitli Kanunlarda ve Diğer Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun: Kanun No. 5728, Official Gazette, 23.1.2008, no. 26781.

<sup>91</sup> "5651'e Kişisel Hakaret ve Zombie Suçları Ekleniyor", at <<http://turk.internet.com/haber/yazigoster.php?yaziid=21370>>.

<sup>92</sup> Cnnturk, "İnternette terör propagandasına ceza yok", at <[http://www.cnnturk.com/haber\\_detay.asp?haberID=472228&PID=16](http://www.cnnturk.com/haber_detay.asp?haberID=472228&PID=16)>; Bianet, "Objectionable Atatürk Videos Keep YouTube Inaccessible", at <<http://www.bianet.org/english/kategori/english/107760/objectionable-ataturk-videos-keep-youtube-inaccessible?from=rss>>.

<sup>93</sup> Article 8(2).

<sup>94</sup> Article 8(7).

<sup>95</sup> See Law No. 5809 on Electronic Communication, Date: 5.11.2008.

November, 2008, and the amendment supports our view that objections made by the Presidency under Regulation 3 were illegal.

Similarly, if a prosecution fails and a not guilty verdict is returned, the blocking order issued by the court would be removed.<sup>96</sup> Finally, if the content deemed to be illegal and subject to the blocking order is removed from the Internet, then the blocking order would be removed by the Public Prosecutor during investigation and by a court during prosecution.<sup>97</sup> Blocking orders issued by judges, courts, or Public Prosecutors would be sent to the Telecommunications Communication Presidency for execution.<sup>98</sup> The Regulations 3 through article 15(1) require certain information to be communicated to the Presidency with regards to precautionary injunctions issued by Public Prosecutors, judges, or courts in relation to the blocking orders. These are the name of the decision maker, date of decision, investigation number, trial case number, the reasons for the precautionary injunction, the adequate evidence, full web address for the location of the crime committed (e.g. <http://www.abcd.com/abcdefg.htm>), domain name against which the measure will be imposed (e.g. <www.abcd.com>), IP address owned by the hosting company against which the precautionary measure will be applied, and the method of blocking (domain name or IP address blocking).

The law through article 8(4) enables the Telecommunications Communication Presidency to issue “administrative blocking orders” ex-officio. These orders can be issued by the Presidency with regards to the crimes listed in article 8(1) when the content and hosting providers are situated outside the Turkish jurisdiction. The Presidency can also issue administrative blocking orders with regards to content and hosting companies based in Turkey if the content in question involves sexual exploitation and abuse of children (article 103(1) of the Turkish Penal Code),<sup>99</sup> and obscenity (article 226 of the Turkish Penal Code).<sup>100</sup> According to Regulations 3, the Presidency needs to get its decision approved by a judge if the decision involves sexual exploitation and abuse of children or obscene content hosted in Turkey. A judge is required to rule on the administrative decision within 24hrs.<sup>101</sup> When such an administrative blocking order is issued, the Presidency would contact the Turkish access providers to execute the blocking order within 24hrs.<sup>102</sup> If the Presidency can establish the identities of those who are responsible for the content subject to the blocking orders the Presidency would request the Chief Public Prosecutor’s Office to prosecute the perpetrators.<sup>103</sup> This approach is evidently problematic, because all criminal allegations should be brought to the attention of Public Prosecutor’s Office. It is not the duty of the Presidency to identify criminals. Furthermore, as explained above since the decision taken by the Presidency is quasi-judicial, all of them should be subject to judicial scrutiny.

The directors of hosting and access providers who do not comply with the blocking orders issued through a precautionary injunction by a Public Prosecutor, judge, or a court could face criminal prosecution and could be imprisoned between 6 months to 2 years under article 8(10). Furthermore, article 8(11) states that access providers who do not comply with the blocking orders (administrative injunctions) issued by the Presidency could face administrative fines

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<sup>96</sup> Article 8(8).

<sup>97</sup> Article 8(9).

<sup>98</sup> Article 8(3).

<sup>99</sup> Article 8(1)(a)(2).

<sup>100</sup> Article 8(1)(a)(5).

<sup>101</sup> See further article 14(1) of the Regulations 3.

<sup>102</sup> Article 8(5).

<sup>103</sup> Article 8(6).

between 10,000YTL and 100,000YTL. If an access provider fails to execute the administrative blocking order within 24hrs of being issued an administrative fine, the Telecommunications Authority can revoke the access provider's official activity certificate. All decisions of the Presidency and the Authority can be brought to administrative courts as provided under Administrative Justice Procedure Act No. 2577.

Article 9 deals with private law matters and provides measures on content removal and right to reply.<sup>104</sup> Under this provision individuals who claim their personal rights are infringed through content on the Internet may contact the content provider, or the hosting company, if the content provider cannot be contacted and ask them to remove the infringing or contested material. The individuals are also provided with a right to reply under article 9(1) and can ask the content or hosting provider to publish their reply on the same pages the infringing or contested article was published in order for it to reach the same public and with the same impact for up to a week. However, unlike article 8, article 9 provisions do not provide for "blocking orders" as a remedy for the individuals whose personal rights are infringed. The words "blocking order" do not appear in article 9 and the possibility of issuing "blocking orders" were explicitly left outside the scope of article 9 as a remedy by the legislators and by the Parliament. Therefore, the courts can only order the removal or take-down of the infringing content from a website rather than access blocking.

The content or hosting providers are required to comply with a 'removal (take down) order' within 48hrs of receipt of request.<sup>105</sup> If the request is rejected or no compliance occurs, the individual can take his case to a local Criminal Court of Peace within 15 days and request the court to issue a take down order and enforce his right to reply as provided under article 9(1).<sup>106</sup> The Judge residing at the local Criminal Court of Peace would issue its decision without trial within 3 days.<sup>107</sup> An objection can be made against the decision of the Criminal Court of Peace according to the procedure provided under the Criminal Justice Act.<sup>108</sup> If the court decides in favour of the individual applicant, the content or hosting providers would be required to comply with the decision within two days of notification.<sup>109</sup> No compliance could result in a criminal prosecution and the individuals who act as the content providers or individuals who run the hosting companies could face imprisonment between 6 months to 2 years.<sup>110</sup> If the content provider or hosting provider is a legal person, the person acting as the publishing executive or director would be prosecuted.<sup>111</sup>

This provision has been aptly criticised for being irrelevant. Indeed, the law is related to suppression of certain crimes committed via the Internet and this particular provision has no place in such a legislation.<sup>112</sup> If this is deemed a criminal law measure, other procedures need to be followed. However, the Law No. 5651 does not give any clue about the further procedures to be followed. No further steps are defined following the implementation of the take down decisions. On the other hand, assuming this measure as a civil law measure does not solve the problem either, some issues still need further clarification. Why would the removal

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<sup>104</sup> See further article 10 of Regulations 3.

<sup>105</sup> Article 9(1).

<sup>106</sup> Article 9(2).

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Article 9(3).

<sup>110</sup> Article 9(4).

<sup>111</sup> *Ibid.*

<sup>112</sup> See MP Osman Coşkunoğlu's speech at TBMM Genel Kurul Tutanağı, 22. Dönem, 5. Yasama Yılı, 99. Birleşim, s. 81.

decision be taken by a criminal court? Why would the objections to these decisions be made pursuant to the Criminal Procedure Act? Why would the civil courts continue to impose injunction orders based on the Civil Procedure Act, while a new rule is provided under article 9 of Law No. 5651?<sup>113</sup> As will be argued in detail in chapter 2 the courts should not be issuing injunction orders to block access to websites in relation to civil law matters and personal rights disputes following the enactment of Law No. 5651.

## The Role of the Telecommunications Communication Presidency

Telecommunications Communication Presidency (“TIB”) was established within the Telecommunications Authority in August 2005,<sup>114</sup> and become fully functional in July 2006. The main purpose of its formation was to centralize from a single unit the surveillance of communications and execution of interception of communications warrants subject to laws No. 2559,<sup>115</sup> No. 2803,<sup>116</sup> No. 2937,<sup>117</sup> and No. 5271.<sup>118</sup> Under Law No. 5651, the Presidency was chosen as the organisation responsible for monitoring Internet content and executing blocking orders issued by judges, courts, and public prosecutors. As mentioned previously the Presidency has also authority to issue administrative blocking orders with regards to certain Internet content hosted in Turkey and with regards to websites hosted abroad in terms of crimes listed in article 8. The Presidency will also determine the nature, timing, and procedures concerning the content monitoring systems on the Internet,<sup>119</sup> and will determine the minimum criteria concerning the production of hardware or software for filtering, screening and monitoring purposes.<sup>120</sup> Article 10(5) also requires the Presidency to co-operate with the newly established Internet Board within the Ministry of Transportation with regards to the determination of blocking and filtering policies.

### TIB Hotline

Article 10(4)(d) of the Law No. 5651 required the Presidency to establish a hotline to report potentially illegal content and activity subject to article 8(1). The hotline was established by the Presidency. Any allegation to the effect that the Law is violated can be brought to the attention of the Presidency via e-mail, telephone or SMS address provided at the website of the hotline.<sup>121</sup> It is reported that the hotline has become popular in a very short time,<sup>122</sup> and as of 01 October, 2008, 25.159 unique notifications were made to the Hotline. 12.515 of these (11.740

<sup>113</sup> See for further details in Chapter 2.

<sup>114</sup> 3 Temmuz 2005 tarihinde TBMM'de kabul edilen 2559, 2803 ve 2937 sayılı yasalarda değişiklik yapan Telekomünikasyon Kurumuna doğrudan bağlı İletişim Başkanlığı kurulmasına ilişkin 5397 sayılı kanun 23.07.2005 tarihinde Resmi Gazetede yayımlanarak yürürlüğe girdi. See <<http://www.tib.gov.tr/tarihce.html>>. Law No. 5397 is available through <[http://www.tib.gov.tr/kanun\\_detay2.html](http://www.tib.gov.tr/kanun_detay2.html)>.

<sup>115</sup> Law on the Duties and Powers of Police No. 2559, additional article 7. (2559 Sayılı Polis Vazife ve Salahiyet Kanunu, ek 7 nci maddesi)

<sup>116</sup> Law on the Organisation, Duties and Powers of Gendarmerie No. 2803, additional article 5. Official Gazette, 10.3.1983, no. 17985. (2803 Sayılı Jandarma Teşkilat, Görev ve Yetkileri Kanunu, ek 5 inci maddesi.)

<sup>117</sup> Law on State Intelligence Services and National Intelligence Organisation, No. 2397, article 6. Official Gazette, 1.11.1983, no. 18210 (2937 Sayılı Devlet İstihbarat Hizmetleri Vemilli İstihbarat Teşkilatı Kanunu, 6 nci maddesi)

<sup>118</sup> Criminal Procedural Act, No. 5271, articles 135-138 (5271 Sayılı Ceza Muhakemesi Kanunu'nun 135-138 inci maddeleri).

<sup>119</sup> Article 10(4)(c).

<sup>120</sup> Article 10(4)(e).

<sup>121</sup> See <<http://www.ihbarweb.org.tr/index.html>>.

<sup>122</sup> Hotline received 4185 applications in the first four months. See “Sanal Alemin RTÜK’ü”, *Sabah*, 29.03.2008. As of 16 June, 2008, 10,103 applications were made. Cnntruk, “Savcidan ‘Youtube’ Açıklaması”, 16 June, 2008.

through the web form, 467 via email, and 308 by telephone) were considered to be valid notifications and processed by the hotline operators.<sup>123</sup> 5761 notifications were repetitive reports and 6.883 were considered not to be valid. A total of 6566 domain names were involved within the 12.515 investigated notifications.

The majority (55%), with 6911 notifications were about obscenity.<sup>124</sup> 1499 (11%) about crimes committed against Atatürk,<sup>125</sup> 1498 (11%) were about the sexual exploitation and abuse of children,<sup>126</sup> 1335 (10.7%) were about prostitution,<sup>127</sup> 668 were about gambling,<sup>128</sup> 279 about encouragement and incitement of suicide,<sup>129</sup> 84 about the facilitation of the use of classified drugs,<sup>130</sup> 69 were about football and other sports betting,<sup>131</sup> and 60 were about the provision of dangerous substances for health.<sup>132</sup> The nature of the remaining 112 notifications were not specified by the Hotline.

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<sup>123</sup> See the Hotline statistics through <<http://www.guvenliweb.org.tr/istatistik.html>>.

<sup>124</sup> Article 8(1)(a)(5): obscenity (article 226 of the Turkish Penal Code).

<sup>125</sup> Article 8(1)(b): crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).

<sup>126</sup> Article 8(1)(a)(2): sexual exploitation and abuse of children (article 103(1) of the Turkish Penal Code).

<sup>127</sup> Article 8(1)(a)(6): prostitution (article 227 of the Turkish Penal Code).

<sup>128</sup> Article 8(1)(a)(7): gambling (article 228 of the Turkish Penal Code).

<sup>129</sup> Article 8(1)(a)(1): encouragement and incitement of suicide (article 84 of the Turkish Penal Code).

<sup>130</sup> Article 8(1)(a)(3): facilitation of the use of drugs (article 190 of the Turkish Penal Code).

<sup>131</sup> Football and other sports betting (Law No. 5728, article 256).

<sup>132</sup> Article 8(1)(a)(4): provision of dangerous substances for health (article 194 of the Turkish Penal Code).

# Critical Assessment and Application of Law No. 5651

## Blocking of Websites in Turkey

There are a number of different methods that could be used to block access to websites that contain allegedly illegal content in Turkey. This book will predominantly concentrate on the provisions and application of Law No. 5651, and the blocking powers provided through article 8.

Apart from the article 8 provisions of Law No. 5651, provisions of Law No. 5846 on Intellectual and Artistic Works<sup>133</sup> can also be used to obtain blocking orders through the courts as witnessed recently in October 2008 with the blocking of the popular blogging services Blogger and Blogspot. The blocking order was obtained by Digitürk as some individual blogs provided information on how to access pirate live transmission of LigTV football matches.<sup>134</sup> Since the Law No. 5651 provisions came into force in November 2007, the above mentioned two provisions form the basis of access blocking orders in Turkey, and access to websites can only be blocked subject to these provisions.

However, despite the new legal regime, our research revealed that precautionary injunctions are also issued by civil courts<sup>135</sup> with regards to the violation of personal rights such as privacy and reputation. As will be explained in chapter 2,<sup>136</sup> it is considered that article 9 of Law No. 5651 has rendered the provisions of the Law on Civil Procedure inapplicable concerning the Internet related violations of personal rights. However, our research has shown that civil courts continue to issue blocking orders by relying on the Civil Code. Islamic creationist author Adnan Oktar has become iconic using this general Civil Code provision to get a considerable number of websites supporting evolution theory, or websites criticising Adnan Oktar's views banned<sup>137</sup> including richarddawkins.net, egitimsen.org.tr, and turan-dursun.com. Oktar's lawyers also threatened to take legal action in late October 2008 against Bianet which published an article written by Akdeniz & Altiparmak which discussed the legality of the blocking orders with regards to defamation claims issued by civil courts since the Law No. 5651 came into force.<sup>138</sup>

Furthermore, a considerable number of websites of a political nature seem to be blocked by relying on anti-terrorism legislation, article 301 of the Turkish Criminal Code, and other laws even though these legal provisions are not part of the catalogue crimes provided under article 8 of Law No. 5651. As the court decisions remain secret and unpublished, the courts' reasoning

<sup>133</sup> 5846 sayılı Fikir ve Sanat Eserleri Kanunu, Ek Madde 4 – (Ek: 21/2/2001 - 4630/37 md.). See <<http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.3.5846&MevzuatIliski=0&sourceXmlSearch>>.

<sup>134</sup> See Cyberlaw Blog, “Access to Blogger.com banned in Turkey,” 24 October, 2008, at <<http://cyberlaw.org.uk/2008/10/24/access-to-bloggercom-banned-in-turkey/>>; “Live football streaming piracy seems to be the cause of access blocking to blogger.com in Turkey,” 26 October, 2008, at <<http://cyberlaw.org.uk/2008/10/26/live-football-streaming-piracy-seems-to-be-the-cause-of-access-blocking-to-bloggercom-in-turkey/>>; “Blogger and Blogspot blocking orders removed by the Turkish court,” 28 October, 2008, at <<http://cyberlaw.org.uk/2008/10/28/blogger-and-blogspot-blocking-orders-removed-by-the-turkish-court/>>.

<sup>135</sup> Law no 1086 on Civil Procedure (1086 Sayılı Hukuku Usulü Muhakemeleri Kanunu), Articles 101 et seq. Official Gazette 02, 03, 04/07/1927: 622-624), 101 vd. maddeler.

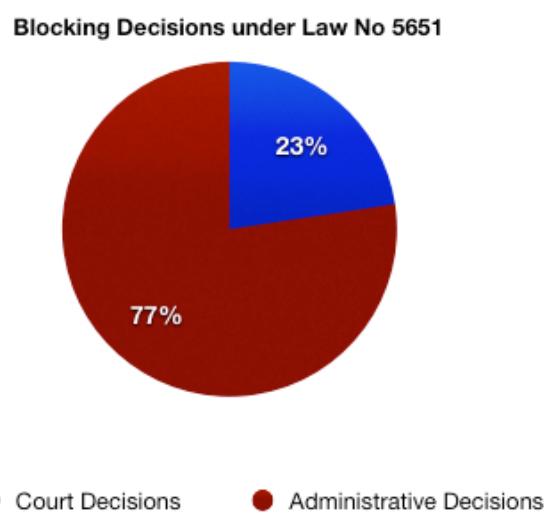
<sup>136</sup> See Section **Error! Reference source not found.** in Chapter 2

<sup>137</sup> See section Defamation Claims below in this Chapter.

<sup>138</sup> See Cyber-Rights.Org.TR, “Turkish creationist threatens to sue website for an article written by Yaman Akdeniz and Kerem Altiparmak,” 30 October, 2008, at <<http://privacy.cyber-rights.org.tr/?p=212>>.

of blocking orders generally remain unknown. However, as will be seen by the statistics provided below, as of 01 October, 2008 there are 139 blocking orders issued by the courts and executed by TIB which are outside the scope of article 8. TIB does not maintain a full database and there are also other court issued blocking orders which are executed directly by the ISPs and by Turk Telekom. Therefore it is difficult to quantify the number and nature of blocking activity taking place outside the scope of article 8 of Law No. 5651 but the validity of these orders will be evaluated further in this book.

Since the Law No. 5651 came into force in November 2007, several websites were blocked by court orders and administrative blocking orders issued by TIB. In terms of statistics, it was revealed by TIB that as of 01 October, 2008, 1115 websites are blocked in Turkey under the provisions of Law No. 5651.<sup>139</sup> 252 (23%) of these websites are blocked by court orders, while majority, 863 (77%) are blocked via administrative blocking orders issued by TIB.



**Figure 3: Blocking decisions under Law No. 5651**

In terms of the 252 court orders so far, 38 websites were blocked because they were deemed obscene (article 226 of the Turkish Penal Code),<sup>140</sup> 4 websites were blocked because they involved sexual exploitation and abuse of children (article 103(1) of the Turkish Penal Code),<sup>141</sup> 17 websites were blocked because of gambling (article 228 of the Turkish Penal Code),<sup>142</sup> 2 were blocked because they involved betting, and 49 websites were ordered to be blocked in relation to crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).<sup>143</sup> 32 of these 49 blocking orders were recurring orders involving 17 websites (majority involved YouTube) issued by different courts around the country. With regards to 158 illegal items containing crimes committed against Atatürk TIB successfully asked content and hosting providers to take down these items from their servers. As a result of such co-operation their websites were not subjected to access blocking orders.

<sup>139</sup> A more recent statistic reports that access to 1112 websites is banned since November 2007. This news has not been confirmed by the TIB yet. See Ntvmsnbc.com, “Aradığınız 1112 siteye erişilemedi!”, at <<http://www.ntvmsnbc.com/news/460394.asp>>.

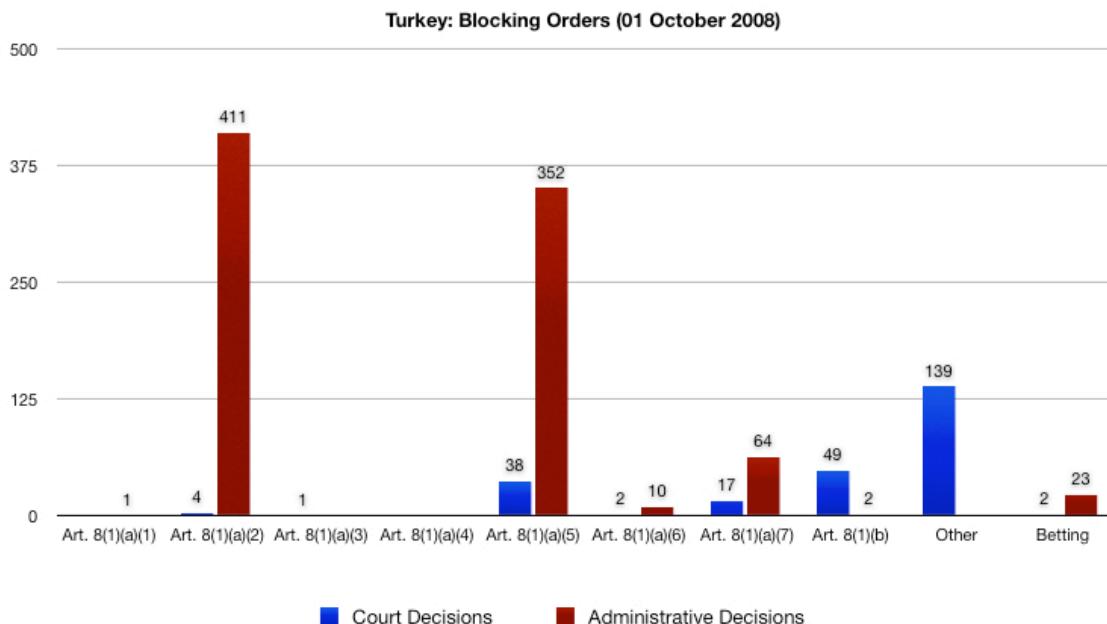
<sup>140</sup> Article 8(1)(a)(5).

<sup>141</sup> Article 8(1)(a)(2).

<sup>142</sup> Article 8(1)(a)(7).

<sup>143</sup> Article 8(1)(b).

Furthermore, 2 websites were blocked in relation to prostitution (article 227, Turkish Criminal Code),<sup>144</sup> and one website was ordered to be blocked in relation to the facilitation of the use of drugs (article 190 of the Turkish Penal Code).<sup>145</sup> 139 websites were blocked by courts for reasons outside the scope of Law No. 5651 but the detailed breakdown for these orders was not provided by TIB. It is however understood that TIB executed the blocking orders even though they do not involve the catalogue crimes listed in article 8.



**Figure 4: Turkish Blocking Orders as of October 2008**

Article 8(1)(a)(1): encouragement and incitement of suicide (article 84 of the Turkish Penal Code); article 8(1)(a)(2): sexual exploitation and abuse of children (article 103(1) of the Turkish Penal Code); article 8(1)(a)(3): facilitation of the use of drugs (article 190 of the Turkish Penal Code); article 8(1)(a)(4): provision of dangerous substances for health (article 194 of the Turkish Penal Code); article 8(1)(a)(5): obscenity (article 226 of the Turkish Penal Code); article 8(1)(a)(6): prostitution (article 227 of the Turkish Penal Code); article 8(1)(a)(7): gambling (article 228 of the Turkish Penal Code); article 8(1)(b): crimes committed against Atatürk (Law No. 5816, dated 25/7/1951); and football and other sports betting (Law No. 5728, article 256).

In terms of the 863 administrative blocking orders issued by TIB, the majority, with 411 (47%) blocking orders issued as of 01 October, 2008 involved sexual exploitation and abuse of children (article 103(1) of the Turkish Penal Code),<sup>146</sup> 352 (40%) involved obscenity (article 226 of the Turkish Penal Code),<sup>147</sup> 64 (7%) involved gambling sites (article 228 of the Turkish Penal Code),<sup>148</sup> 23 involved football and other sports betting websites (Law No. 5728, article 256), 10 involved prostitution websites (article 227 of the Turkish Penal Code),<sup>149</sup> 2 involved crimes committed against Atatürk (Law No. 5816, dated 25/7/1951),<sup>150</sup> and one involved encouragement and incitement of suicide (article 84 of the Turkish Penal Code).<sup>151</sup>

<sup>144</sup> Article 8(1)(a)(6).

<sup>145</sup> Article 8(1)(a)(3).

<sup>146</sup> Article 8(1)(a)(2).

<sup>147</sup> Article 8(1)(a)(5).

<sup>148</sup> Article 8(1)(a)(7).

<sup>149</sup> Article 8(1)(a)(6).

<sup>150</sup> Article 8(1)(b).

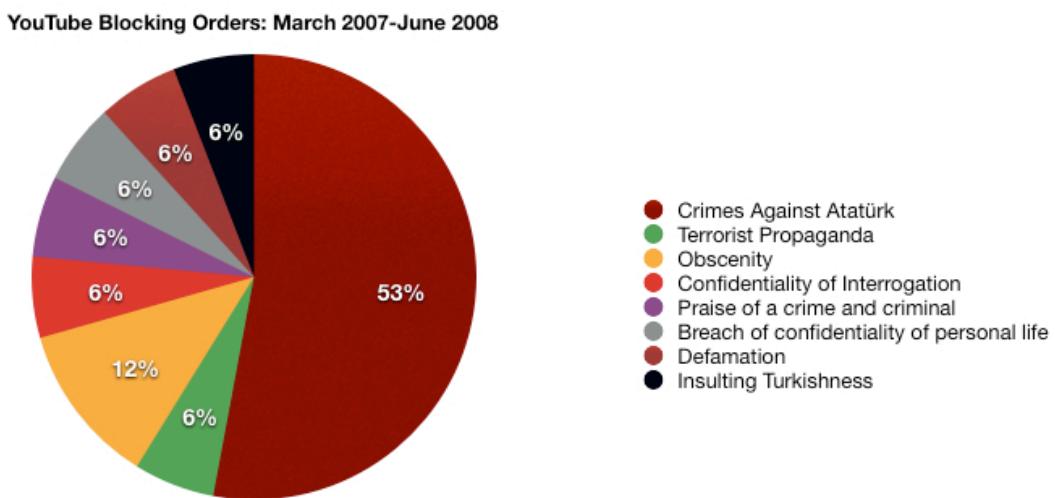
<sup>151</sup> Article 8(1)(a)(1).

According to the data provided by the TIB, 25 websites were issued a written warning (mainly pornographic websites situated in Turkey which provided free access to everyone including adults and children) and subsequently their compliance with Law No. 5651 was insured. Furthermore, 380 notices were issued for taking down specific content deemed illegal under article 8 which were found on websites which were not deemed illegal as a whole. 300 of these notices related to crimes committed against Atatürk (article 8(1)(b)), and the majority of these were with regards to video clips on YouTube. The remaining 80 notices were related to obscenity (article 8(1)(a)(5)).<sup>152</sup>

The court and or administrative blocking orders for 40 websites were subsequently revoked according to the statistics. In terms of blocking orders, some sites are blocked by DNS while others are blocked by both DNS and IP addresses. TIB statistics revealed that 222 IP addresses were blocked in addition to 893 unique website addresses as of 01 October, 2008 from Turkey.

## **YouTube related Blocking Orders**

Between March 2007 and June 2008 Turkish courts issued 17 blocking orders with regards to YouTube. TIB statistics dated 26 May, 2008 reveal that 67 out of 111 videos which were deemed illegal by the blocking orders were removed by YouTube. As mentioned previously YouTube was subject to highly publicised court ordered blockings in Turkey prior to the enactment of Law No. 5651 and the availability of certain videos involving crimes committed against Atatürk (Law No. 5816, dated 25/7/1951) was one of the main reasons triggering the blocking approach adopted in Law No. 5651.



**Figure 5: YouTube Blocking Orders (March 2007 - June 2008)**

As can be seen above, the majority of the blocking orders issued by the courts involved crimes committed against Atatürk (53%). However, there were also video clips allegedly involving terrorist propaganda, defamation and obscenity which resulted in YouTube being blocked in Turkey. An assessment of these decisions is provided here.

<sup>152</sup> Information obtained from TIB. See further “5651 Yürürlüğe Girmesinden Beri TİB 197, Mahkemeler 124 Erişime Kapatma Verdi – 1,” *Turk.Internet.Com*, 18.04.2008, at <<http://turk.internet.com/haber/yazigoster.php?yaziid=20751>>.

## Before the Law No. 5651 came into force

Although there was no legal basis, the courts ordered to block access to YouTube in five different cases before the article 8 provisions of Law No. 5651 came into force in November 2007. Those decisions can be categorised into three different groups: (a) Insult to Atatürk and other sacred values; (b) Violence related expression; (c) Criminal procedure related blockings.

**(a) Insult to Atatürk and other sacred values:** The first and the most talked ban came in March 2007 when the Istanbul 1<sup>st</sup> Criminal Court of Peace<sup>153</sup> ordered the blocking of access to the whole of <[www.youtube.com](http://www.youtube.com)> because of a single video involving defamatory statements about Atatürk and scenes disparaging the Turkish Flag, acts which are considered illegal under Law No. 5816, dated 25/7/1951, and against article 300 of the Turkish Criminal Code.

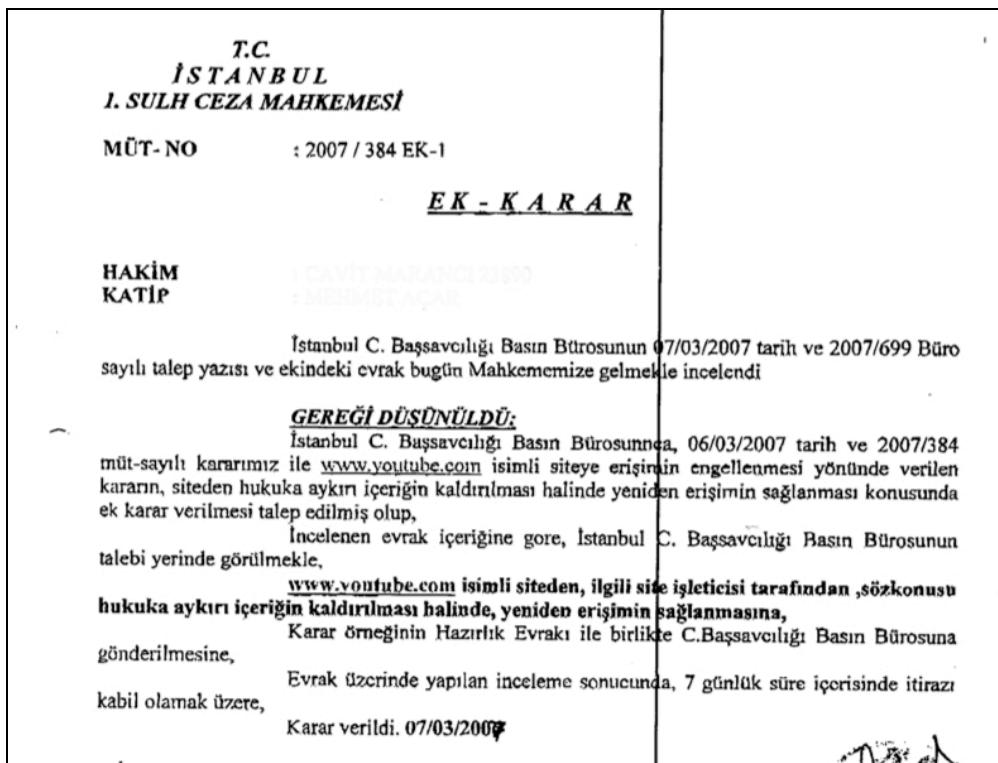
<b>T.C. İSTANBUL 1. SÜLH CEZA MAHKEMESİ</b>	
<b>MUT-KARAR NO: 2007/384</b>	
<b>MÜTEFERRİK KARAR</b>	
<b>HAKİM :</b>	
<b>KATİP :</b>	
İstanbul C. Başsavcılığı Basın Bürosunun 06/03/2007 tarih ve 2007/699 Büro sayılı talebini İhtiyaç eden yazı ve ekindeki evraklar inceletti;	
<b>GEKEÇİ DÜŞÜNÜLDÜ:</b>	
Emniyet Güvenlik Şube Müdürlüğü'nce gönderilen ve dörtlü nitelikinde bir adet CD'ye, el koyma keramânı onanması ve <a href="http://www.youtube.com">www.youtube.com</a> isimli siteye erişimin engellenmesi talep edilmiş olup,	
İncelenen evrak içeriğine göre, Emniyet Güvenlik Şube Müdürlüğü'nden tarihinde 040529 sayısı yazılı ekinde gonderilen tekrîret evrakında, Cumhuriyetimizin kurucusu Mustafa Kemal Atatürk'ün, fotoğrafı, Türk Bayrağı, üzerinde İngilizce kâğıt üzerine yazılı makamlı aşığından işlenip indirildi;	
İstanbul C. Başsavcılığı Basın istihresem talibi yerinde görülmekle,	
1- Emniyet Güvenlik Şube Müdürlüğü'nce gönderilen ve dörtlü nitelikinde bir adet CD'ye, el koyma keramânı <b>ÜNALMASINA</b> ,	
2- <a href="http://www.youtube.com">www.youtube.com</a> , isimli siteye erişimin <b>ENGELLENMESİNE</b> ,	
Keramân geçerli için evrak ile birlikte İstanbul C. Başsavcılığı Basın Bürosunu, gonderilmesine,	
İkinci kez el koymak üzere evrak üzerinde yapılan inceleze sonunda karar verildi.	
06/03/2007	

Figure 6: First YouTube Blocking Order of March 2007

Istanbul 1<sup>st</sup> Criminal Court of Peace issued a supplementary decision<sup>154</sup> 24hrs after its initial decision which held that the access ban to the <[www.youtube.com](http://www.youtube.com)> website would be lifted provided that the infringing content would be removed from the servers of YouTube.

<sup>153</sup> Istanbul 1<sup>st</sup> Criminal Court of Peace, Decision No. 2007/384 Misc., dated 06.03.2007.

<sup>154</sup> Istanbul 1<sup>st</sup> Criminal Court of Peace, Supplementary Decision No. 2007/384-1 Misc., dated 07.03.2007.



**Figure 7: Supplemental YouTube Blocking Order of March 2007**

Following the international media coverage of the access ban, YouTube removed the illegal video clip from its servers, and the initial access ban which was issued on 06 March, 2007 was lifted on 09 March 2007 lasting only 3 days.<sup>155</sup>

Another Atatürk related blocking order was issued in October 2007 by the Ankara 5<sup>th</sup> Criminal Court of Peace<sup>156</sup> with regards to 66 video clips involving defamatory statements about Atatürk, the Turkish Army, the Prime Minister and the President of Turkey.<sup>157</sup> The court blocking order required a complete access ban to <[www.youtube.com](http://www.youtube.com)>.

<sup>155</sup> See NTV-MSNBC, “YouTube yasağı kalktı,” 10 March, 2007, at <<http://www.ntvmsnbc.com/news/402283.asp>>.

<sup>156</sup> Ankara 5<sup>th</sup> Criminal Court of Peace, Decision No. 2007/1478 Misc., dated 24.10.2007.

<sup>157</sup> All such actions are criminalized by Articles 301 (Insulting Turkishness, the Republic, the organs and institutions of the State - Türk Milletini, Türkiye Cumhuriyeti Devletini, Devletin kurum ve organlarını aşağılama), and 299 (Aspersion against the President - Cumhurbaşkanına Hakaret) of the Turkish Criminal Code; and the Law on crimes committed against Atatürk.

Ankara Cumhuriyet Başsavcılığı 22/10/2007 tarih ve 2007/2905 sayılı yazısıyla ”[www.youtube.com](http://www.youtube.com)” internet sitesinin youtube inc .adlı firmanın 208.65.153.238 IP internet protokol adresinden yayınlanan görentülerin ; Ulu önder Mustafa Kemal Atatürk'e Türk silahlı kuvvetlerine ,Cumhurbaşkanı ve Başbakana hakaret içerdigi anlaşılmakla ;

5816 sayılı yasaya .5237 sayılı Türk Ceza Kanununun 301/2,299/2,125/3-a,4 maddelerine aykırılıktan dolayı söz konusu internet sitesinin suç konusu oluşturan bölümne ilişkin erişimin CMK 162 maddesi gereğince durdurulmasına karar verilmesi talep edilmiş olmakla ;

Evrak incelendi.

**GEREĞİ DÜŞÜNÜLDÜ :**

5816 sayılı yasaya .5237 sayılı Türk Ceza Kanununun 301/2,299/2,125/3-a,4 maddelerine aykırılıktan dolayı söz konusu internet sitesinin suç konusu oluşturan bölümne ilişkin erişimin CMK 162 maddesi gereğince DURDURULMASINA .

Evrakin C.Savcılığına iadesine,

7 gün içinde Asliye ceza mahkemesine itiraz yolu açık olmak üzere karar verildi.24/10/2007

Figure 8: YouTube Blocking Order of 24/10/2007

**b. Violence related expression:** Subsequent to the first YouTube access ban of March 2007, the first violence related blocking access order was issued by the Istanbul 11<sup>th</sup> Assize Court<sup>158</sup> in April 2007. The blocking order involved 67 videos depicting terrorist propaganda and attacks by PKK, and the order triggered URL based access ban to YouTube pages as such actions are criminalized under articles 6 and 7 of the Turkish Anti-Terror Law No. 3713.<sup>159</sup>

İnternet adreslerinde halen yasadışı silahlı PKK/KONGRA-GEL terör örgütüne ait yayınların yer aldığı, yayınlar içeriğinin 3713 sayılı yasanın 7/2 maddesinde anlamını bulan propaganda niteliğinde olduğu ve bu görüntülerin 5287 sayılı Basın Kanununun 25/2-3 maddeleri uyarınca yayın durdurmayı gerektiren bir suç olduğu tespit edilmekle;

İlgili evraklar Cumhuriyet Başsavcılığı yazısı ekinde gönderilmiş olmakla;  
Evrak tetkik edildi.

**GEREĞİ DÜŞÜNÜLDÜ :**

T.C. Anayasasının 26/2, 28/2 maddeleri ve 3713 sayılı Terörle Mücadele Kanununun 6/2-son, 7/2-son maddeleri uyarınca yukarıda listede yazılı 67 adet paylaşım altında görüntünün [www.youtube.com](http://www.youtube.com) internet adresindeki yayınların SÜRESİZ OLARAK KALDIRILMASINA ve BİR DAHA YAYINLANMAMASINA karar verildi.03.04.2007

Figure 9: Istanbul 11<sup>th</sup> Assize Court, Decision No. 2007/842 Misc., dated 03.04.2007

As this was a URL based ban there was no complete access ban to YouTube from Turkey and this court order is not widely known nor was reported in the media. It is believed that YouTube removed the 67 videos deemed to be illegal from its servers. It is, however, interesting to note that the Court decided that the videos amounted to a crime which necessitates broadcast banning pursuant to articles 25(2) and 25(3) of the Press Code. However, the decision referred to articles 26(2) and 28(2) of the Constitution, and articles 6(2), and 7(2) of the Anti-Terror Law. If articles 26 and 28 of the Constitution, provisions protecting freedom of expression and press respectively, can constitute legal basis for the access banning order, it is the submission of this book that any website can be banned without the need to seek any other legal basis. However, pursuant to article 13 of the Constitution, fundamental rights and freedoms can only

<sup>158</sup> İstanbul 11<sup>th</sup> Assize Court, Decision No. 2007/842 Misc., dated 03.04.2007. Other attempts were also reported. “Bölticülerin Internet siteleri Karartılıyor”, *Yeni Şafak*, 25.10.2007.

<sup>159</sup> Anti-Terror Law (Terörle Mücadele Kanunu), No. 3713, Official Gazette: 12.4.1991, no. 20843 Mük.

be restricted by law and in conformity with the reasons mentioned in the relevant articles of the Constitution. International human rights law also requires such restrictions to be “prescribed by law”.<sup>160</sup> The European Court of Human Rights case law shows that a three-fold test should be met to determine whether the restriction is provided by law. As will be explained in detail in chapter 2, first, the interference with the European Convention right must have some basis in national law. Secondly, the law must be accessible. Thirdly, the law must be formulated in such a way that a person can foresee its consequences for him, and be compatible with the rule of law.<sup>161</sup> It is obvious that articles 26 and 28, which enumerate legitimate aims to restrict rights in general words, like national security, public order and public safety are far from meeting this three-fold test.

The Istanbul 1<sup>st</sup> Criminal Court of Peace also issued a blocking order (URL access ban) in September 2007<sup>162</sup> with regards to 9 video clips which praised the murder and the murderers of Hrant Dink.<sup>163</sup> Despite the URL access ban, at least one of the videos named by the Court is still accessible as of 22 September, 2008 through YouTube.

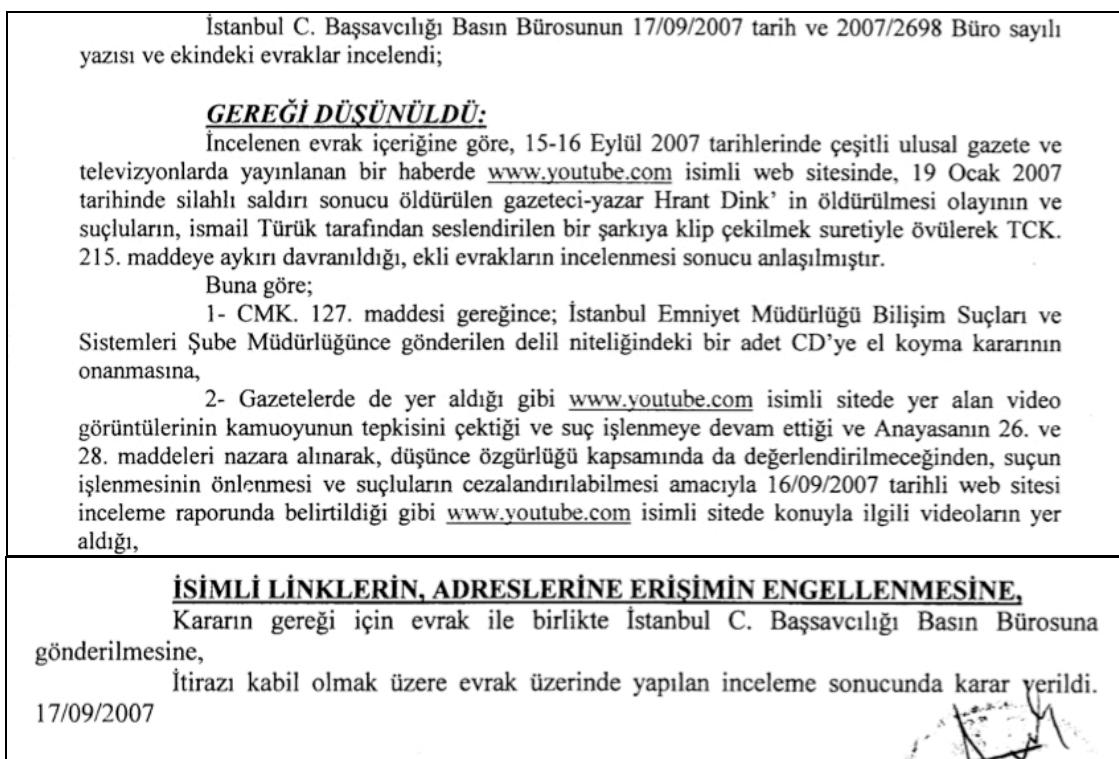


Figure 10: Istanbul 1<sup>st</sup> Criminal Court of Peace, Decision No: 2007/1350 Misc., dated 17.09.2007

**c. Criminal procedure Related Blockings:** The Ankara 11<sup>th</sup> Assize Court<sup>164</sup> issued a URL access blocking order in June 2007 with regards to YouTube and two video clips involving a

<sup>160</sup> See for instance Article 10 of the ECHR and 19 (3) of the ICCPR.

<sup>161</sup> Amongst many other authorities see *Kruslin v. France*, 24.4.1990, Series A. no. 176-A, para. 27; *Huvig v. France*, 24.4.1990, Series A. no. 176-B, para. 26.

<sup>162</sup> Istanbul 1<sup>st</sup> Criminal Court of Peace, Decision No: 2007/1350 Misc., dated 17.09.2007.

<sup>163</sup> Praising of a crime or the offender is criminalized by article 215 of the Turkish Criminal Code: Suçu ve suçluyu övme: Madde 215(1): İşlenmiş olan bir suçu veya işlemiş olduğu suçtan dolayı bir kişiyi alenen öven kimse, iki yıla kadar hapis cezası ile cezalandırılır. Article 215(1) (Praising the offense or the offender): Any person who openly praises an offense or the person committing the offenses is punished with imprisonment up to two years. This decision also refers to Articles 26 and 28 of the Constitution.

<sup>164</sup> Ankara 11<sup>th</sup> Assize Court, Decision No. 2007/2882 Misc., dated 01.06.2007.

suspect who was under custody for interrogation. It was alleged that the clips had been broadcasted by other media institutions and their availability on YouTube were prejudicial to the Public Prosecutor's case and were in breach of article 157 (Confidentiality of interrogation) of the Turkish Criminal Procedure Law,<sup>165</sup> and Regulation on Arrest, Custody and Questioning.<sup>166</sup> The Court, however, did not discuss whether there was legal basis to restrict freedom of expression.

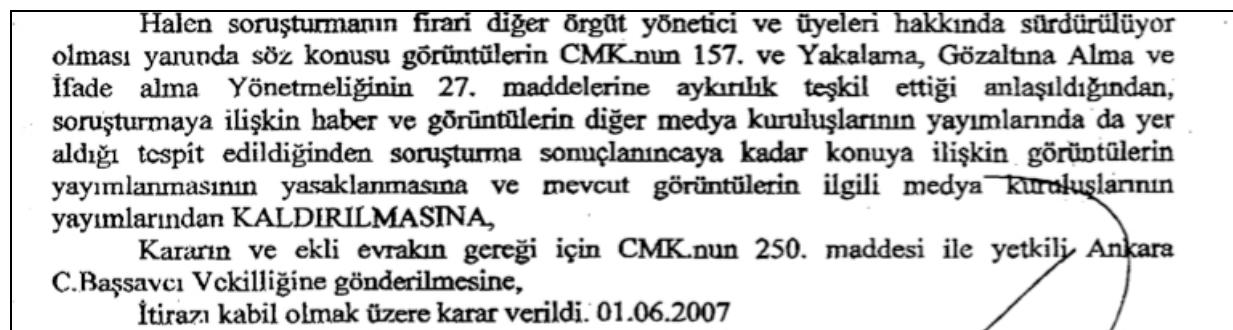


Figure 11: Ankara 11<sup>th</sup> Assize Court, Decision No. 2007/2882 Misc., dated 01.06.2007

### **After the Law No. 5651 came into force**

Nothing has much changed with regards to YouTube's troubles in Turkey subsequent to the article 8 provisions of Law No. 5651 coming into force in November 2007 as the Turkish courts continued to issue blocking orders with regards to several allegedly criminal content. In terms of procedure, Telecommunications Communication Presidency started to enforce the court orders issued in relation to crimes specified in article 8 of Law No. 5651. However, crimes other than the ones listed in Law No. 5651 are also referred to the Presidency for execution. Furthermore, in some cases neither the reason nor the legal basis for the banning orders are provided by the courts.<sup>167</sup> Even in cases involving the catalogue crimes listed in article 8 of Law No. 5651, the Courts do not always make it clear which paragraph of article 8 is breached.<sup>168</sup>

#### **a. Insult to Atatürk and other sacred values:**

The Ankara 11<sup>th</sup> Criminal Court of Peace<sup>169</sup> was the first court to issue an order to block access to certain YouTube pages (URL access ban) in December 2007. The blocking order was issued because YouTube contained 8 videos involving defamatory statements about Atatürk contrary to article 8(1)(b) of Law No. 5651 and Law on crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).

<sup>165</sup> Criminal Procedure Act, Article 157(1).

<sup>166</sup> Yakalama, Gözaltına Alma ve İfade Alma Yönetmeliği, Official Gazette: 01.06.2005, 25832.

<sup>167</sup> İzmir 7<sup>th</sup> Criminal Court of Peace, Decision No. 2008/100 Misc., dated 29.01.2008.

<sup>168</sup> Ankara 7<sup>th</sup> Criminal Court of Peace, Decision No. 2008/5 Misc., dated 03.01.2008. The decision only states that the YouTube would be blocked under Article 8 (5) of Law No. 5651.

<sup>169</sup> Ankara 11<sup>th</sup> Criminal Court of Peace, Decision No. 2007/1431 Misc., dated 17.12.2007.

Ankara Cumhuriyet Başsavcılığının 13/12/2007 tarih ve 2007/2969 sayılı yazıları ile/5816 Sayılı Atatürk'e karşı işlenen suçlar hakkında kanuna aykırılık, halkın bir kısmının benimsediği dini değerleri aşağılama, hakaret suçunun kişinin mensup olduğu dine göre kutsal sayılan değerler aleyhine işlenmesi, Cumhurbaşkanına alenen hakaret, Devletin egemenlik alametlerini aşağılama, Türkluğu alenen aşağılama suçları ile ilgili olarak yürütülmekte olan soruşturma kapsamında www.youtube.com adlı internet sitesinin ara yüzlerinde yayınlanan yazı, resim ve karikatürler hakkında erişimlerinin engellenmesine karar verilmesi talep edilmiş olmakla;

Evrak incelendi

**GEREĞİ DÜŞÜNÜLDÜ:**

Talebin kabulu ile;

<http://www.youtube.com/watch?v=dc/avm...> yazılardan  
yapılan yayınlara 5651 Sayılı Kanunun 8/1-b,2,3 ve CMK 162. maddeleri  
gereğince erişimin engellenmesine,

Evrakin ikmali için C.Başsavcılığına gönderilmesine.

Karara karşı 7 gün içerisinde Mahkememize verilecek dilekçe veya tutanağa geçirilmek koşulu ile zabıt katileye yapılacak beyanla itiraz olunabileceğine,

İlişkin evrak üzerinde yapılan inceleme sonucunda karar verildi.17/12/2007

Figure 12: Ankara 11<sup>th</sup> Criminal Court of Peace, Decision No: 2007/1431 Misc., dated 17.12.2007

The videos further contained humiliation of religious assets adopted by some part of the society, defamation crime against sacred assets of a religion to which a person belongs, obvious defamation of President of Turkish Republic, humiliation of sovereignty symbols of the Turkish government, and insulting Turkishness.<sup>170</sup> Access blocking was requested by the Public Prosecutor under article 162 of the Turkish Code of Criminal Procedure and article 8 of Law No. 5651.

On 16 January, 2008, the Sivas 2<sup>nd</sup> Criminal Court of Peace<sup>171</sup> ordered an IP address based access ban to YouTube.com as the website contained two further videos containing defamatory statements about Atatürk contrary to article 8(1)(b) of the Law No. 5651 and Law on crimes committed against Atatürk (Law No. 5816, dated 25/7/1951), and content contrary to article 301 (Insulting Turkishness, the Republic, the organs and institutions of the State) of the Turkish Criminal Code.

<sup>170</sup> The Court does not differentiate insult to Atatürk from other claims. It follows then the Court believes that a website can be blocked for an unlisted crime.

<sup>171</sup> Sivas 2<sup>nd</sup> Criminal Court of Peace, Decision No. 2008/11 Misc., dated 16.01.2008.

Sivas C.Başsavcılığının 16/01/2008 gün ve 2008/ 817 HZ Sayılı Yazıları ile Atatürk'e Türkiye Cumhuriyeti Devletine,Türkçülüğe Hakaret suçlarına ilişkin olmak üzere başlatılan soruşturmayla esas olmak üzere atlı suçlara ilişkin görüntülerin ,iceriklerin yayınlanıldığı [www.youtube.com](http://www.youtube.com) adresi ile bu adresle ulaşım sağlayan 208.65.153.238 IP 208.65.153.251 IP ; 208.65.153.253 IP numaralarına erişimin engellenmesine karar verilmesi talep edilmiş olmakla;

Evrak incelendi.

**GEREĞİ DÜŞÜNÜLDÜ :**

Sivas C.Başsavcılığının 16/01/2008 gün ve 2008/ 817 HZ Sayılı Yazıları ile Atatürk'e Türkiye Cumhuriyeti Devletine,Türkçülüğe Hakaret suçlarına ilişkin olmak üzere başlatılan soruşturmayla esas olmak üzere atlı suçlara ilişkin görüntülerin ,iceriklerin yayınlanıldığı [www.youtube.com](http://www.youtube.com) adresi ile bu adresle ulaşım sağlayan 208.65.153.238 IP 208.65.153.251 IP ; 208.65.153.253 IP numaralarına erişimin engellenmesine karar vermek gerekmiş ve aşağıdaki ve aşağıdaki şekilde hüküm kurulmuştur.

**H Ü K Ü M**

TALEBİN KABULÜNE ;

Atlı suçlara ilişkin görüntülerin ,iceriklerin yayınlanıldığı [www.youtube.com](http://www.youtube.com) adresi ile bu adresle ulaşım sağlayan 208.65.153.238 IP 208.65.153.251 IP ; 208.65.153.253 IP numaralarına erişimin 5651 Sayılı yasanın 8/1-b maddesi gereğince ENGELLENMESİNE.

Kararın gereği için C.Başsavcılığına tevdiine;

Evrak üzerinde itirazı kabil olmak üzere karar verildi.16/01/2008

Figure 13: Sivas 2<sup>nd</sup> Criminal Court of Peace, Decision No: 2008/11 Misc., dated 16.01.2008

A similar ban, for the same reasons provided by the Sivas 2<sup>nd</sup> Criminal Court of Peace, was issued on 17 January, 2008 by the Ankara 12<sup>th</sup> Criminal Court of Peace<sup>172</sup> with regards to a single video clip containing defamatory statements about Atatürk. The Ankara Court also requested the total blocking of <[www.youtube.com](http://www.youtube.com)>. Yet another similar court blocking order (access ban to <[www.youtube.com](http://www.youtube.com)>) was issued on 29 January, 2008 by the Izmir 7<sup>th</sup> Criminal Court of Peace<sup>173</sup> with regards to a single video clip containing defamatory statements about Atatürk.

İzmir C.Başsavcılığının 29.01.2008 tarih 2008/8820 SORUŞTURMA sayılı yazıları ile, yapılmakta olan soruşturmayla esas olmak üzere; Internet ortamında yayın yapan <http://www.youtube.com/watch> isimli site hakkında erişimin engellenmesine karar verilmesi istenilmiş olmakla;

Evrak incelendi.

**GEREĞİ DÜŞÜNÜLDÜ:**

Evrak içeriğine göre; CMK. 162. maddesi uyarınca talep yerinde görülmekle;

Internet ortamında yayın yapan <http://www.youtube.com/watch> isimli sitesinde ERIŞİMİN ENGELLENİLMESİNE ,

Evrakin gereği yapılmak üzere C.Başsavcılığına gönderilmesine karar verildi.

29.01.2008

Figure 14: Izmir 7<sup>th</sup> Criminal Court of Peace, Decision No: 2008/100 Misc., dated 29.01.2008

<sup>172</sup> Ankara 12<sup>th</sup> Criminal Court of Peace, Decision No. 2008/55 Misc., dated 17.01.2008.

<sup>173</sup> Izmir 7<sup>th</sup> Criminal Court of Peace, Decision No. 2008/100 Misc., dated 29.01.2008.

In March 2008, access to YouTube website was blocked (IP and DNS access) once again following a decision of the Ankara 1<sup>st</sup> Criminal Court of Peace<sup>174</sup> enforced by the Telecommunications Communication Presidency. The Ankara 11<sup>th</sup> Criminal Court of Peace<sup>175</sup> issued another ban on 24 April, 2008 with regards to video clips containing defamatory statements about Atatürk. Similarly the Ankara 5<sup>th</sup> Criminal Court of Peace<sup>176</sup> issued a blocking order on 30 April, 2008 and the Ankara 1<sup>st</sup> Criminal Court of Peace<sup>177</sup> issued a further blocking order on 05 May, 2008, and this latest blocking order is still in force at the time of this writing in November 2008.

**b. Obscenity:** There have also been blocking orders against YouTube based on article 8(1)(a)(5), for containing obscenity. However, it is doubtful whether the real intention was to prevent the circulation of allegedly obscene content as no explanation has been made about the concept of obscenity in the blocking decisions. For instance, an Ankara court, the 7<sup>th</sup> Criminal Court of Peace<sup>178</sup> issued an access ban to YouTube on 03 January, 2008 on the basis of a single video clip featuring manufactured images of the head of Prime Minister's wife imposed on a female body in a bikini.

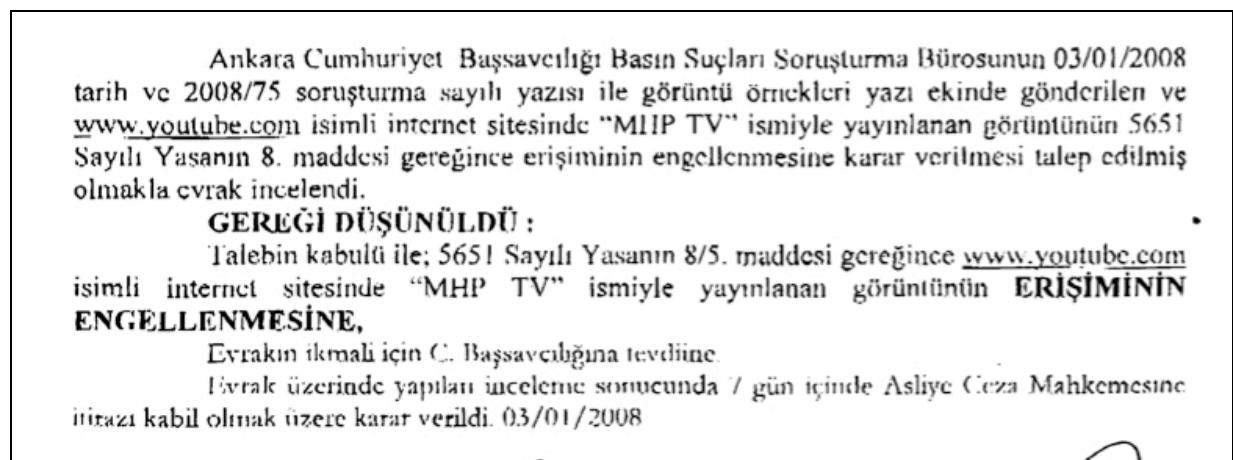


Figure 15: Ankara 7<sup>th</sup> Criminal Court of Peace, Decision No: 2008/5 Misc., dated 03.01.2008

This computer generated pseudo-image which featured on a YouTube video clip was deemed as obscene and contrary to article 8(1)(a)(5) of Law No. 5651. In another case, the availability of 3 video clips broadcasted on YouTube without the individual's (appearing on the video clip) consent triggered a URL access ban by the Elazığ Criminal Court of Peace on 08 January, 2008<sup>179</sup> following the individual's complaint. The complainant claimed that there were obscene words in the video clips. The Court without discussing the meaning of obscenity and whether this crime could be committed merely by words concluded that the video clips were contrary to article 8 of the Law No. 5651.

<sup>174</sup> Ankara 1<sup>st</sup> Criminal Court of Peace, Decision No. 2008/251 Misc., dated 12.03.2008.

<sup>175</sup> Ankara 11<sup>th</sup> Criminal Court of Peace, dated 24.04.2008.

<sup>176</sup> Ankara 5<sup>th</sup> Criminal Court of Peace, Decision No. 2008/599 Misc., dated 30.04.2008.

<sup>177</sup> Ankara 1<sup>st</sup> Criminal Court of Peace, Decision No. 2008/402 Misc., dated 05.05.2008.

<sup>178</sup> Ankara 7<sup>th</sup> Criminal Court of Peace, Decision No. 2008/5 Misc., dated 03.01.2008.

<sup>179</sup> Elazığ Criminal Court of Peace, Decision No. 2008/25 Misc., dated 08.01.2008.



Figure 16: A typical banning order notice on YouTube.com when tried to access from Turkey.

**c. Bans based on Civil Code:** The Kadıköy 2<sup>nd</sup> Civil Court of First Instance<sup>180</sup> issued a URL access ban with regards to a single video containing defamatory statements about the dean of University of Marmara in Istanbul in breach of articles 24 and 25 of the Turkish Civil Code in January 2008. The legality of blocking orders with regards to this kind of personal rights disputes since the article 9 provisions of Law No. 5651 came into force in May 2007 will be disputed in chapter 2 of this book.

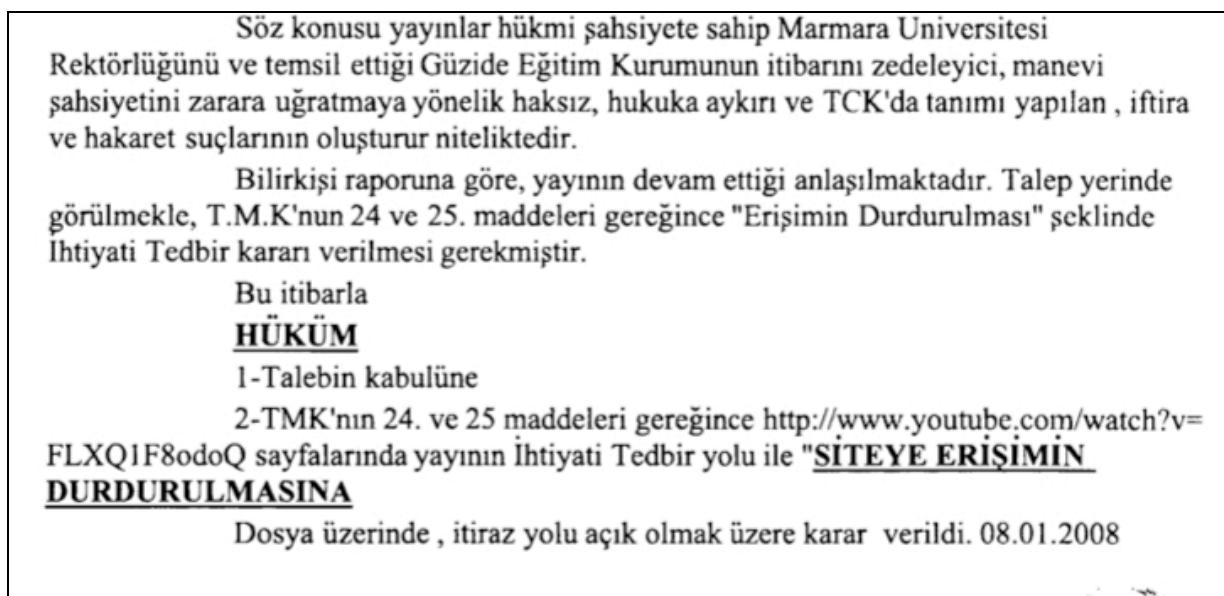


Figure 17: Kadıköy 2<sup>nd</sup> Civil Court of First Instance, Decision No: 2008/1 Misc., dated 08.01.2008

Gerger Civil Court of First Instance issued the first known notice & takedown order in the 5651 era, but in a civil code based order.<sup>181</sup> As mentioned previously, administrative notice and takedown orders are usually issued by the Telecommunication Communications Presidency. The Gerger Court decided for the removal of two news articles from the websites of <www.gergerim.com> and <www.bianet.org>, on the ground that they had insulted the Public Prosecutor, but the Court did not order the blocking of the websites. The decision also prohibited the transfer or the re-publication of the news articles on to other websites and to the press.

<sup>180</sup> Kadıköy 2<sup>nd</sup> Civil Court of First Instance, Decision No. 2008/1 Misc., dated 08.01.2008.

<sup>181</sup> Gerger Civil Court of First Instance, Decision No. 2008/1 Misc, dated 11.01.2008.

**d. Bans based on unlisted crimes:** On 04 January, 2008 Eskişehir 2<sup>nd</sup> Criminal Court of Peace<sup>182</sup> issued a URL access ban with regards to 4 video clips involving an individual's audio and video recordings without his/her consent. Such an action is regarded as a breach of confidentiality of private life under article 134 of the Turkish Criminal Code. However, it should be noted that, the decision did not involve a catalogue crime listed under article 8 of Law No. 5651, and the legality of such an order issued outside the scope of Law No. 5651 will be disputed in chapter 2.

With the latest blocking orders of May 2008<sup>183</sup> YouTube was blocked at both DNS and IP level in Turkey for over 6 months (still blocked as of 12.11.2008). According to the provisional article 1(3) of Regulations 2, hosting companies must get their activity certificate through an application made to the Presidency within 9 months from the Regulations' entry into force. Hosting companies' websites that fail to obtain this license shall be blocked by the Presidency.<sup>184</sup> This licensing period for hosting companies came to an end on 24 July, 2008. Despite calls for a license application YouTube has not made such an application, and decided not to be subject to Turkish law. Therefore, it has been suggested that YouTube would be blocked forever in Turkey due to its failure to obtain this license.

## Other Blocking Orders

As mentioned previously there have been 1115 blocking orders as of 01 October, 2008 and it is impossible to cover each and every case in this book. The list of blocked websites is also unavailable and not made public by the Telecommunications Communication Presidency even though some remarkable efforts have been made by individuals to catalogue the list of blocked websites.<sup>185</sup> The book will however highlight important blocking cases known to the authors other than YouTube in this section.

Although the drafters of Law No. 5651 claimed that their aim was to protect children and families from accessing harmful content, blocking orders given so far demonstrate that there were also 139 courts issued blocking orders rendered based on reasons other the ones listed in Law No. 5651 as of 01 October, 2008. Unlike what has been reported, political discomfort is one of the leading reasons for blocking access to certain websites.

## Blocking orders issued within the scope of Law No. 5651

### Insulting to Atatürk

Geocities.com which provides free websites and tools to build websites for Internet users has been blocked since 04 February, 2008 by an order of the Ankara 9<sup>th</sup> Criminal Court of Peace.<sup>186</sup> According to information obtained from TIB, a website hosted on geocities.com contained defamatory statements about Atatürk contrary to article 8(1)(b) of the Law No. 5651 and Law on crimes committed against Atatürk (Law No. 5816, dated 25/7/1951). Some other websites other than YouTube and Geocities.com had also been banned for insulting Atatürk. For

<sup>182</sup> Eskişehir 2<sup>nd</sup> Criminal Court of Peace, Decision No. 2008/44 Misc., dated 04.01.2008.

<sup>183</sup> Ankara 5<sup>th</sup> Criminal Court of Peace, Decision No. 2008/599 Misc., dated 30.04.2008; Ankara 1<sup>st</sup> Criminal Court of Peace, Decision No. 2008/402 Misc., dated 05.05.2008.

<sup>184</sup> Article 4 (3) of Regulations 2.

<sup>185</sup> However note the <<http://engelliweb.com/>> website which provides the names of almost 63% of the 1115 blocked websites, and is the most comprehensive list currently available. Another comprehensive list which currently lists 701 blocked websites is maintained at <<http://mindtrick.net/blockedinturkey/list.php>>.

<sup>186</sup> Ankara 9<sup>th</sup> Criminal Court of Peace, Decision No. 2008/140 Misc., dated 04.02.2008. See Şık, Ahmet, "Geocities de internet erişimine kapatıldı: Telekomünikasyon Kurumu'nun verilerine göre mahkeme kararıyla engellenen site sayısı 300'e yaklaşıyor," 17/04/08, at <<http://www.medyakronik.com/haber/508/>>.

example, photo-sharing site Slide as well as Tagged.com were blocked by a decision of the Çivril Court of Peace.<sup>187</sup>

## **Obscenity**

According to the statistical data provided by TIB, obscenity has become the leading reason for blocking access to websites. 352 sites were banned through administrative blocking orders issued by the Telecommunications Communication Presidency, whereas Courts have ordered bans in 38 cases as of 01 October, 2008. A sexually explicit website hosted in Turkey with a Turkish domain name (devletim.com.tr)<sup>188</sup> was the first website to receive an administrative blocking order issued by TIB in November 2007 for carrying obscene materials. The website was subsequently taken down.<sup>189</sup> Access bans for reasons of obscenity include popular websites such as youporn.com,<sup>190</sup> redtube.com,<sup>191</sup> and pornotube.com.<sup>192</sup>

## **Blocking orders issued outside the scope of Law No. 5651**

As mentioned previously several websites were subjected to blocking orders outside the scope of Law No. 5651. Majority of these are issued with regards to intellectual property infringements. However, more importantly, as will be outlined below, defamation claims and politically motivated access banning orders are also issued by the courts in Turkey even after the Law No. 5651 came into force. As will be discussed in detail in chapter 2 of this book, courts are no longer empowered to issue blocking orders outside the scope of article 8 of Law No. 5651 and provisions of Law No. 5846 on Intellectual and Artistic Works.<sup>193</sup>

## **Intellectual Property Infringements**

Access to well known websites providing access to pirated content including music, and movie files such as the piratebay.org, megaupload.com, and torrentturk.com<sup>194</sup> are currently blocked in Turkey. Ironically, the Ankara 1<sup>st</sup> Criminal Court of Peace attempted to block access to the popular movie database site <www.imdb.com> because of an alleged intellectual property infringement in December 2007 but a typo resulted in the blocking of <www.imbd.com>, a non-existing website and as of November 2008 access to this non-existing website is still blocked in Turkey while users can access the Internet Movie Database website.<sup>195</sup>

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<sup>187</sup> Çivril Criminal Court of Peace, Decision No. 2008/22, dated 24/01/2008.

<sup>188</sup> Access to this web site is banned by "Telekomünikasyon İletişim Başkanlığı" according to the order of: Telekomünikasyon İletişim Başkanlığı, 23-11-2007 of 2007/261190.

<sup>189</sup> See Yilmaz, M., "Yeni Kanunun İlk Uygulaması Porno Devletim.com.tr'a Yapıldı," Turk.Internet.Com, 27 November, 2007, at <<http://turk.internet.com/haber/yazigoster.php?yaziid=19635>>.

<sup>190</sup> Access to this web site is banned by "Telekomünikasyon İletişim Başkanlığı" according to the order of: T.C Eskişehir 2. Criminal Court of Peace, Decision No. 2007/1705, dated 23.11.2007.

<sup>191</sup> Access to this web site is banned by "Telekomünikasyon İletişim Başkanlığı" according to the order of: Telekomünikasyon İletişim Başkanlığı, 30/01/2008 of 410.01.02.2008-028105.

<sup>192</sup> Access to this web site is banned by "Telekomünikasyon İletişim Başkanlığı" according to the order of: Telekomünikasyon İletişim Başkanlığı, 25/02/2008 of 410.01.02.2008-054003. Other examples include, brazzers.com, bangbros.com, 18yearsold.com.

<sup>193</sup> 5846 sayılı Fikir ve Sanat Eserleri Kanunu, Ek Madde 4 – (Ek: 21/2/2001 - 4630/37 md.). See <<http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=1.3.5846&Mevzuatlisci=0&sourceXmlSearch>>.

<sup>194</sup> Access to this web site is banned by "Telekomünikasyon İletişim Başkanlığı" according to the order of: İstanbul 1<sup>st</sup> Court of Peace, Decision no. 2007/1715, 04.12.2007 of 2007/1715. This order also blocked access to the domains frmdivx.com, divxcity.org, forumefsane.org, and turkdivx.net.

<sup>195</sup> Ankara 1<sup>st</sup> Criminal Court of Peace, Decision No. 2007/1715, dated 04.12.2007. Note Ahi, G., "İnternetin En Büyük Film Veritabanı Yanlış Harf Sonucu Erişime Açık Kalmış," Turk.Internet.Com, 04.03.2008, at <<http://turk.internet.com/haber/yazigoster.php?yaziid=20372>>.

Access blocking is a legal remedy for intellectual property infringements provided under supplemental article 4 of the Law No. 5846 on Intellectual & Artistic Works. This provision was introduced in March 2004 and provides a two-stage approach. Initially the law requires the hosting companies, content providers, or access providers to take down the infringing article from their servers upon “notice” given to them by the right holders. The providers need to take action within 72hrs. If the allegedly infringing content is not taken down or there is no response from the providers, the right holders can ask the Public Prosecutor to provide for a blocking order, and the blocking order is executed within 72hrs.

The most significant intellectual property related access blocking order was obtained by Digitürk on 20 October, 2008, and with the order of the Diyarbakır First Criminal Court of Peace<sup>196</sup> access to popular Google owned blogging services Blogger and Blogspot were banned.<sup>197</sup> Digitürk, a subscription based digital TV platform in Turkey which owns the right to transmit the live coverage of the Turkish football league games, obtained the blocking order as Digitürk identified blog entries through Blogger and Blogspot providing information and links to known websites which show pirated transmission of the live football league games transmitted through its LigTV channel. According to the news reports Digitürk contacted Blogger.com and requested the blog entries to be taken down but no action was taken by Blogger, and Digitürk had no other option than requesting the Diyarbakır court to block access to the two domains and their IP addresses. Access blocking is allowed under supplemental article 4 of the Law No. 5846 on Intellectual & Artistic Works and Digitürk previously obtained similar access blocking orders for JustinTV, MyP2P TV, and sporlig.com.<sup>198</sup> The Court lifted its blocking order on 28 October, 2008 with regards to Blogger.com and Blogspot. It is understood that the ban is lifted until Digitürk provides to the court further evidence with regards to its claims for football streaming piracy.

As the Blogger and Blogspot services are not predominantly used for illegal activity and a considerable number of people in Turkey have personal blogs on these websites, the blocking action resulted in angry protests through websites, forums and through Facebook groups. This particular blocking order, as in the case of YouTube blocking orders highlighted the problems associated with blocking access to web 2.0 based applications and their detrimental impact upon the Turkish society.

## Defamation Claims

As mentioned above precautionary injunctions are also issued by civil courts<sup>199</sup> with regards to the violation of personal rights such as privacy and reputation. As will be explained in chapter 2,<sup>200</sup> it is considered that article 9 of Law No. 5651 has rendered the provisions of the Law on Civil Procedure inapplicable concerning the Internet related violations of personal rights.

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<sup>196</sup> Diyarbakır 1<sup>st</sup> Criminal Court of Peace, Decision No. 2008/2761, dated 20.10.2008.

<sup>197</sup> See Cyberlaw Blog, “Access to Blogger.com banned in Turkey,” 24 October, 2008, at <<http://cyberlaw.org.uk/2008/10/24/access-to-bloggercom-banned-in-turkey/>>; “Live football streaming piracy seems to be the cause of access blocking to blogger.com in Turkey,” 26 October, 2008, at <<http://cyberlaw.org.uk/2008/10/26/live-football-streaming-piracy-seems-to-be-the-cause-of-access-blocking-to-bloggercom-in-turkey/>>; “Blogger and Blogspot blocking orders removed by the Turkish court,” 28 October, 2008, at <<http://cyberlaw.org.uk/2008/10/28/blogger-and-blogspot-blocking-orders-removed-by-the-turkish-court/>>.

<sup>198</sup> İstanbul Küçükçekmece 2<sup>nd</sup> Criminal Court of Peace, Decision No. 2008/114, dated 23.01.2008.

<sup>199</sup> Law No. 1086 on Civil Procedure (1086 Sayılı Hukuku Usulü Muhakemeleri Kanunu), Articles 101 et seq. Official Gazette 02, 03, 04/07/1927: 622-624), 101 vd. maddeler.

<sup>200</sup> See the section entitled **Error! Reference source not found.** in chapter 2 of this book.

However, our research has shown that civil courts continue to issue blocking orders by relying on the Civil Code.

Islamic creationist author Adnan Oktar obtained approximately 60 blocking orders through the courts almost exclusively by relying on the general Civil Code provisions to block access to websites which support the evolution theory, or forums, and blogs which are critical of Oktar and his writings and theories. His efforts resulted in access to wordpress.com, Google Groups, richarddawkins.net, egitimsen.org.tr, turan-dursun.com, and the website of Vatan, a popular daily newspaper to be blocked among others.

Two injunction relief decisions involving defamation claims by Adnan Oktar (known as Adnan Hoca) resulted in the blocking of well known socially useful websites Wordpress.com and Google groups in Turkey. Access to the WordPress.com website which features over 3 million blogs was blocked by a decision of the Fatih (Istanbul) 2<sup>nd</sup> Civil Court of First Instance decision in August 2007 after the article 9 provisions of Law No. 5651 came into force in May 2007.<sup>201</sup> It was claimed by Adnan Oktar's lawyers that they contacted Wordpress.com and asked them to remove the pages containing the defamatory statements but their request was ignored. The lawyers argued that that is why they requested the court to block access to the pages.<sup>202</sup> The illegal access ban to wordpress.com lasted until 9 April, 2008, approximately 8 months.

Similarly, access to Google Groups was illegally blocked by an order of the Silivri 2<sup>nd</sup> Civil Court of First Instance on 14 March, 2008.<sup>203</sup> Adnan Oktar's lawyers alleged that defamatory comments about their client was made on <<http://groups.google.com>>.

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<sup>201</sup> Fatih (Istanbul) 2<sup>nd</sup> Civil Court of First Instance, Decision No. 2007/195, dated 17 August, 2007. This was not the first time a defamation claim was made by Adnan Oktar. His lawyers obtained blocking orders in the past with regards to several other websites: Gaziosmanpasa Civil Court of First Instance, Decision No. 2007/130 D. Is, dated 06.04.2007. Note EDRI-Gram, Wordpress.com blocked in Turkey, Number 5.16, 29 August 2007, at <<http://www.edri.org/edrigram/number5.16/wordpress-turkey>>.

<sup>202</sup> Some URLs at wordpress.com claimed to be insulting Adnan Oktar are still blocked. However, those decisions are rendered before Law No. 5651 came into force. See for example:  
<<http://adnancilar.wordpress.com/>>; <<http://whoisharunyahya.wordpress.com/>>;  
<<http://adnanoktar.wordpress.com/>>.

<sup>203</sup> Silivri 2<sup>nd</sup> Civil Court of First Instance, Decision No: 2008/15, dated 14.03.2008.

**GEREĞİ DÜŞÜNÜLDÜ:**

İhtiyati tedbir isteyen vekili tarafından 13.03.2008 tarihinde Mahkememize verdiği dilekçesi ile; <http://groups.google.com> adlı internet sitesinde, sitenin hazırlayıcısı olan karşı tarafça yapılan yayında, tedbirin talep eden Adnan Oktar'ın kişilik haklarına ağır şekilde saldırı da bulunulduğu ve hakaret edildiği ileri sürülerek ihtiyati tedbir yoluyla yayının durdurulmasına karar verilmesi istenilmiştir.

İhtiyati Tedbir talep eden vokilinin dilekçesi ve ekleri incelenmekte;

Dilekçeye ekli deliller ve özellikle söz konusu internet yayınına ilişkin bilgisayar çıktıları ve tüm dosya kapsamının birlikte değerlendirilmesi sonunda; Kişilik haklarının korunmasına ilişkin ihtiyati tedbir kararı verilmesi için öngörülen risk ve yasal şartların gerçekleşmiş olduğu kanaatine varlığından kişilik hakları yönünden mahiyeti açılacak esas hakkında davada belli olacak saldırının önlenmesi amacıyla ihtiyati tedbir kararı verilmesi yasal bağlamda uygun görüldüğünden talebin kabulüne ilişkin aşağıdaki şekilde karar verilmiştir.

**K A R A R:**

1-)İhtiyati tedbir isteyen vekilinin talebenin takdiren teminatsız **KABULÜ** ile;

HUMK 101 ve devam maddeleri uyarınca **209.85.135.99 IP** numaralı <http://groups.google.com> adlı internet sitesinin yayınının **İHTİYATI TEDBİR YOLU İLE DURDURULMASINA**,

2-)**209.85.135.99 IP** numaralı <http://groups.google.com> adlı internet sitesinin yayınının filtreleme yöntemiyle bloke edilmesi için kararın **Türk Telekomünikasyon A.Ş'**ye gönderilmesine,

3-)Tedbir kararının bir örneğinin **209.85.135.99 IP** numaralı <http://groups.google.com> adlı internet sitesi **hazırlayıcısına** tebliğine,

4-)**209.85.135.99 IP** numaralı <http://groups.google.com> adlı internet sitesinin yayınının filtreleme yöntemi ile bloke edilmesinin Türk Telekom dışındaki diğer internet servis sağlayıcısı firmalar tarafından da yerine getirilmesi için kararın **Telekomünikasyon İletişim Dairesi Başkanlığına Gönderilmesine**,

5-)Harç peşin alındığından başkaca harç alınmasına yer olmadığına.

6-)Tedbir isteyen tarafından yatırılan 36,70YTL yargılama giderinin karşı taraftan alınarak ihtiyati tedbir isteyene verilmesine,

7-) A.A.Ü.T göre Davacı taraf için takdir edilen 125,00YTL avukatlık ücretinin karşı taraftan alınarak ihtiyati tedbir isteyene verilmesine,

Dosya üzerinde yapılan inceleme ile itirazı kabul olmak üzere karar verildi. 14.03.2008

Figure 18: Silivri 2<sup>nd</sup> Civil Court of First Instance, Decision No: 2008/15, dated 14.03.2008

The Silivri Court, upon reviewing the available evidence decided to issue the blocking order which was deemed to be necessary to prevent the risk of violation of personal rights, nature of which is to be determined within the lawsuit to be initiated by the applicant to this end. There was however no indication that a subsequent lawsuit would take place. The Court order requested access ban to 209.85.135.99 IP numbered <<http://groups.google.com>> website and required Türk Telekomünikasyon A.Ş. to be notified in order to execute the blocking order. The order further required the Telecommunications Communication Presidency to be notified in order for ISPs other than Türk Telekom to block access to 209.85.135.99 IP numbered <<http://groups.google.com>> website. Access ban on Google Groups was lifted on 15 May, 2008, nearly two months later.

More recently, on 03 September, 2008 defamation claims by Adnan Oktar resulted in the website of Richard Dawkins (<<http://richarddawkins.net/>>) being blocked by a court order issued in Istanbul by the Şişli 2<sup>nd</sup> Civil Court of First Instance and executed through Turk Telekom.<sup>204</sup> Dawkins, a British ethologist, evolutionary biologist, and popular science writer is well known for such books like *The Selfish Gene* and *The God Delusion*. Previously Oktar's lawyers has attempted to have Dawkins' book *The God Delusion* banned in Turkey on the basis that it was insulting religion but a Turkish court threw the case out. On this occasion, Dawkins' website was accused of containing insults against Oktar's book entitled *Atlas of*

<sup>204</sup> See The Guardian, "Turkish court bans Richard Dawkins website," 18 September, 2008 at <<http://www.guardian.co.uk/world/2008/sep/18/turkey>>.

*Creation*.<sup>205</sup> His press officer explained that they are not against freedom of speech or expression but “you cannot insult people. We found the comments hurtful. It was not a scientific discussion. There was a line and the limit has been passed. We have used all the legal means to stop this site. We asked them to remove the comments but they did not.”<sup>206</sup> A lawsuit is filed for the damages of mental anguish against Richard Dawkins in the amount of 8000 YTL (about 4000 Euro). However, although there are some strong criticism of Oktar’s work on Dawkins’ website, our examination of Dawkins’ website did not reveal any insults and Dawkins does not insult Oktar in any of his work, and his writings can only be described as “fair criticism”.<sup>207</sup> The illegal access ban to Dawkins’ website is still active as of writing of this book in November 2008. The <turandursun.com> website supporting Dawkins’ views against of that Oktar’s has also been blocked recently.<sup>208</sup> However, since the court decisions are not notified, nobody, including the content provider of the relevant website is sure whether the blocking is the result of Mr. Oktar’s application as of writing of this book. It is believed that <www.anarsist.org> is also banned for a similar reason.

Furthermore, Eğitim-Sen (the Turkish Union of Scientific and Education Workers), a trade union representing teachers, has recently found out that their website was the subject matter of a blocking order obtained by Adnan Oktar. The trade union was critical of Oktar’s *Atlas of Creation* being sent free of charge to universities, biology and philosophy teachers. The trade union has also criticised the government for providing a list of teachers and their contact details to the Oktar’s organisation for such a distribution.<sup>209</sup> Although the trade union is located in Çankaya (Ankara) and Oktar in Kadıköy (İstanbul), Mr. Oktar applied to a Court in Gebze (İzmit) to obtain the blocking decision on the grounds that Eğitim-Sen insulted him in its press statement.<sup>210</sup> In our view, the court should not have issued a blocking order as Oktar’s defamation claim is politically motivated to silence critical speech.

On 15 October, 2008 Oktar’s lawyers obtained a court order from the Silivri First Civil Court of First Instance to block access to the website of Vatan (<<http://www.gazetevatan.com/>>), a daily newspaper, claiming defamatory comments about Oktar were published on the website by some users in Vatan’s ‘user feedback section’.<sup>211</sup> This was the first time such a court order was issued to block access to the website of a mainstream daily newspaper. Oktar’s media spokeswoman claimed that “the comments included obscenities” and that “the paper had ignored requests by his lawyers to remove them.”<sup>212</sup> The spokeswoman also stated that “Vatan newspaper is always propagating against Mr Oktar, and constantly publishes allegations about him. When people read these allegations, they are provoked into using these words and insults against him.”<sup>213</sup> The court order was lifted when Vatan removed the allegedly defamatory statements from its website.

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<sup>205</sup> See BiaNet, “Evolutionist Dawkins’ Internet Site Banned in Turkey,” 17 September, 2008 at <<http://www.bianet.org/english/kategori/english/109778/evolutionist-dawkins-internet-site-banned-in-turkey?from=rss>>.

<sup>206</sup> See further <<http://blog.newhumanist.org.uk/2008/09/richard-dawkins-website-banned-in.html>>.

<sup>207</sup> See <<http://privacy.cyber-rights.org.tr/?p=121>>.

<sup>208</sup> See <<http://www.turandursun.com>>.

<sup>209</sup> This statement is available at <http://privacy.cyber-rights.org.tr/?p=131>.

<sup>210</sup> Eğitim-Sen, “İnternet Sitemizin Kapatılmasını, Bilime ve Bilimsel Düşünçeye Karşı Yapılmış Bir Müdafale Olarak Değerlendiriyoruz!”, <<http://www.egitimsen.org.tr/index.php?yazi=1692>>

<sup>211</sup> See Reuters, “Liberal Turkish paper has website blocked by authorities,” 16 October, 2008, at <<http://privacy.cyber-rights.org.tr/?p=166>>.

<sup>212</sup> The Guardian, “Turkish newspaper website blocked after creationist’s complaint,” 16 october, 2008, at <http://privacy.cyber-rights.org.tr/?p=173>.

<sup>213</sup> *Ibid.*

Subsequently, Oktar's lawyers also threatened to take legal action in late October 2008 against Bianet which published an article written by Akdeniz & Altıparmak which discussed the legality of the blocking orders with regards to defamation claims issued by civil courts since the Law No. 5651 came into force.<sup>214</sup> Bianet is a progressive media website which acts as the countrywide network for monitoring and covering media freedom and independent journalism decided not to “give in to Oktar's threats”<sup>215</sup> and continued to publish the allegedly “defamatory article”. Claiming he was insulted and slandered through our article criticizing the Internet related blocking orders with regards to defamation claims from a legal perspective, Oktar's lawyers reminded that they had managed to get sites such as wordpress.com, richarddawkins.net, egitimsen.org.tr, groups.google and gazetevatan.com banned previously. As of this writing Bianet continues to publish the article and no blocking order has been obtained by Oktar's lawyers. Currently thanks to the anti-censorship movement SansureSansur, the infamous article is being spread on a considerable number of Turkish blogs like a virus.<sup>216</sup>

## Political Bans

Indymedia Istanbul<sup>217</sup> has been active since January 2003 providing independent news on its website <[istanbul.indymedia.org](http://istanbul.indymedia.org)> with a mission to represent the truth as the “mainstream and dominant media tools and/or the cartels provide false/incorrect or imperfect information/knowledge/data by distorting many realities according to the status quo which the sovereigns of the world and the countries are adherent”.<sup>218</sup> Access to <[istanbul.indymedia.org](http://istanbul.indymedia.org)> was blocked by a court order in March 2008<sup>219</sup> with regards to an article 301 Criminal Code offence of insulting Turkishness.<sup>220</sup> Originally it was thought that the blocking order was issued by the Gaziantep Araban Criminal Court of Peace on 21 March, 2008. However an investigation by Indymedia revealed that the blocking order was issued by a decree of General Staff Presidency Military Court.<sup>221</sup> The decision was enforced by TIB. It is not clear why access to the website has been blocked, but Indymedia Istanbul described the blocking as an attempt to silence the organization by censorship.

Furthermore, certain leftist and pro-Kurdish news websites are constantly blocked in Turkey. Some of the websites keep changing their names to overcome blocking orders. For instance, the websites of the daily newspaper Gündem, namely <[ozgurgundem.org](http://ozgurgundem.org)>,<sup>222</sup>

<sup>214</sup> See Cyber-Rights.Org.TR, “Turkish creationist threatens to sue website for an article written by Yaman Akdeniz and Kerem Altıparmak,” 30 October, 2008, at <<http://privacy.cyber-rights.org.tr/?p=212>>.

<sup>215</sup> Bianet, “We Will Not Give In To Adnan Oktar's Threats!”, 29 October, 2008, at <http://privacy.cyber-rights.org.tr/?p=211>.

<sup>216</sup> See <<http://sansuresansur.blogspot.com/2008/10/hocam-sen-virs-nasl-yaylr-bilir-misin-4.html>>.

<sup>217</sup> Independent Media Center – Istanbul.

<sup>218</sup> <See <http://istanbul.indymedia.org/features/english/?l=en>>.

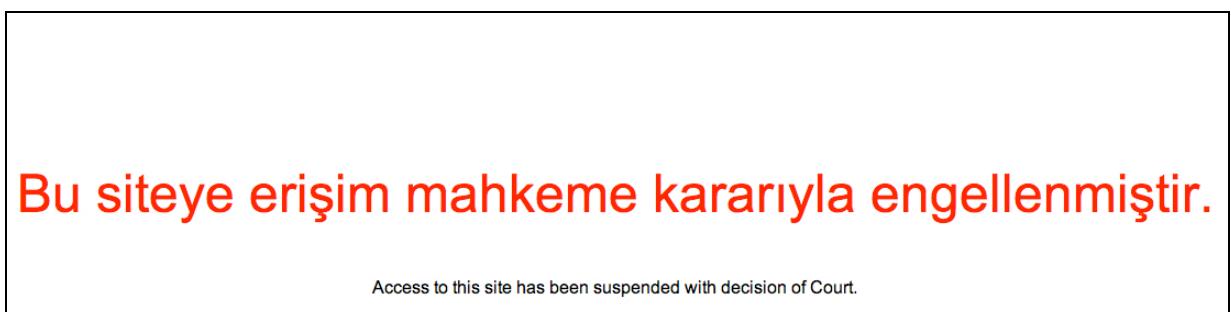
<sup>219</sup> Canada NewsWire, “Turkey - Another website blocked in latest of measures that threaten Web 2.0,” 01 April, 2008. See further Önderoğlu, E., “Yargı, Indymedia - İstanbul'un Sitesini Yasakladı,” *BIA Haber Merkezi*, 26 March, 2008 at <<http://www.bianet.org/bianet/kategori/bianet/105892/yargi-indymedia-istanbulun-sitesini-yasakladi>>; and Önderoğlu, E., “Access to Another Website Banned,” *Bia News Centre*, 27 March, 2008, at <<http://www.bianet.org/bianet/kategori/english/105906/access-to-another-website-banned>>.

<sup>220</sup> Article 301 (Insulting Turkishness, the Republic, the organs and institutions of the State - Türk Milletini, Türkiye Cumhuriyeti Devletini, Devletin kurum ve organlarını aşağılama).

<sup>221</sup> General Staff Presidency Military Court, Decision No: 2008/418-171, dated 21.03.2008.

<sup>222</sup> Access to this web site is banned by “Telekomünikasyon İletişim Başkanlığı” according to the order of Ankara 11<sup>th</sup> Assize Court, Decision No. 2008/1754, dated 20.03.2008.

<gundemonline.com><sup>223</sup>, <gundemimiz.com>, <ozgurgundem.net>, and more recently <gundemonline.net><sup>224</sup> and <gundemonline.org><sup>225</sup> were blocked by different Assize Court decisions. However, their most recent domain at <www.gundem-online.com> is currently accessible from Turkey but we believe it will be subjected to yet another blocking order by the time this book is published. Similarly, access to the website of Fırat News Agency at <firatnews.eu> was blocked since January 2008.<sup>226</sup> An alternative website at <www.firatnews.com> was also blocked on 9 May 2008.<sup>227</sup> More recently a revolutionist website, <www.devrimciler.com>, has been blocked by a decision of the Ankara 11<sup>th</sup> Assize Court.<sup>228</sup> Other politically motivated bans include Yeni Özgür Politika at <yeniozgurpolitika.com><sup>229</sup> and Ankara Socialist Youth Association at <www.ankarasgd.org>.<sup>230</sup>



**Figure 19: Another example of a banning order notice. This version does not include the order number or the name of the Court which issued the order.**

As mentioned previously, the reasons of court decisions are not provided on the blocking notice websites. However, it is widely believed that most of the orders have been issued for containing propaganda in favour of the Kurdistan Workers Party (PKK),<sup>231</sup> a crime currently not listed in Law No. 5651.

It has also been claimed that some other news websites, including bianet.org, alinteri.org and atilim.org, are being blocked at various Internet cafes due to certain police authorities compiling their own ‘forbidden websites’ lists and databases. Although it is against the law to compile such lists, Yusuf Andıç of the All Internet Cafes association (TieV) said that district officials and police units had these lists.<sup>232</sup> According to the news website Bianet, address of their website was included in a filtering program prepared by a private company, My Yazılım. However, the managers of the company claimed that Bianet was included in the filter list due

<sup>223</sup> Access to this web site is banned by 'Telekomünikasyon İletişim Başkanlığı' according to the order of: Ankara 11<sup>th</sup> Assize Court, Decision No. 2008/2902, dated 13.05.2008.

<sup>224</sup> Ankara 11<sup>th</sup> Assize Court, Decision No. 2008/4433, dated 07.08.2008.

<sup>225</sup> Beyoğlu Director of Public Prosecutors’ Office, Decision No. 2008/22434, dated 31/10/2008. (Beyoğlu Baş Savcılığı, 31/10/2008 tarih ve 2008/22434) See further <http://www.gundemonline.org/haber.asp?haberid=63464>.

<sup>226</sup> 12<sup>th</sup> Assize Court, Decision no. 2008/28-29 dated 10.01.2008; Ankara 11<sup>th</sup> Assize Court, Decision 2008/858, dated 08.02.2008.

<sup>227</sup> Ankara 11<sup>th</sup> Assize Court, Decision no. 2008/2815, dated 09.05.2008.

<sup>228</sup> Ankara 11<sup>th</sup> Assize Court, Decision no. 2008/4687, dated 21.08.2008.

<sup>229</sup> Ankara 11<sup>th</sup> Assize Court, Decision no. 2008/2815, dated 09.05.2008.

<sup>230</sup> Ankara 5<sup>th</sup> Criminal Court of Peace, Decision no. 2008/771, dated 29.07.2008.

<sup>231</sup> Reporters sans frontiers, “Illegal court ban on websites deplored” 08 April 2008, at <http://www.rsf.org/article.php3?id\_article=26484>.

<sup>232</sup> BIA 2007 Media Monitoring Report – Full Text, at <http://www.bianet.org/bianet/kategori/english/104719/bia%C2%B2-2007-media-monitoring-report-%E2%80%93-full-text>.

to demands from security forces.<sup>233</sup> It was also claimed that fines are imposed on Internet cafes that do not filter websites enumerated in these police lists.<sup>234</sup> My Yazılım's program is not listed in the TIB's recent approved filtering software list<sup>235</sup> subject to Regulations 2.

### **Unknown reasons**

Some other sites that were blocked before Law No. 5651 came into force are still unreachable. Blocking reasons are, however, not known. These include <www.ateizm.org>; <www.ateizm1.org>; <www.islamiyetgercekleri.org>; <bilimvedin.blogspot.com>; <bilim-din.blogspot.com>; <kisiselgoruslerim.blogspot.com>; <www.mfipb.com>; <www.yahyaharun.com>; <19.org> among others.

In August 2008, access to another global video hosting website service, the <dailymotion.com> has been blocked by a Court decision. However, unlike the YouTube decisions, this particular blocking order is not based on Law No. 5651 and not executed by the TIB. Neither the reason nor the name of the Court ordering the decision is known. The message on the blocked page stated that "Access to this website is banned by Court decision", without further information.<sup>236</sup> However, we suspect that the blocking order was associated with an intellectual property infringement with regards to a pirated video clip. Some websites have claimed that the website was blocked for terrorism related content. The access ban on <dailymotion.com> was lifted later in August 2008.

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<sup>233</sup> Bianet, "Para Kazanmak İçin bianeti Yasaklayan Şirket", 26 June, 2007, at <<http://www.bianet.org/bianet/kategori/bianet/98342/para-kazanmak-icin-bianeti-yasaklayan-sirket>>.

<sup>234</sup> Bianet, "Filtrelemeci Şirkete Göre Sorumluluk Polisin", 27 June, 2007, at <<http://www.bianet.org/bianet/kategori/bianet/98363/filtrelemeci-sirkete-gore-sorumluluk-polisin>>.

<sup>235</sup> See <[http://www.tib.gov.tr/onayli\\_filtreleme\\_yazilimlari.html](http://www.tib.gov.tr/onayli_filtreleme_yazilimlari.html)>.

<sup>236</sup> "Dailymotion.com'a da erişim yasağı geldi", 01 August, 2008, at <<http://www.anahaber.com/haber-Dailymotioncoma-da-erisim-yasagi-geldi-19064.html>>; "Dailymotion.com da Yasaklandı", 31 July, 2008, <[http://www.haber3.com/haber.php?haber\\_id=396287](http://www.haber3.com/haber.php?haber_id=396287)>.

## **Chapter II: Legal Analysis of Law No. 5651**

The law on Internet publications and content may have serious repercussions on a number of fundamental rights protected under the Turkish constitution and international human rights law. These include civil and political rights as well as economic and social rights. However, this book will only examine the direct effects of Law No. 5651 on some fundamental rights. As will be explained below, three crucial rights are directly affected since the enactment of Law No. 5651. Some other indirect effects, however, might also arise. For instance, all access blocking decisions inevitably have financial and commercial side-effects which are quite important to sustain certain activities. Nevertheless, limitation on the right to property will not be studied in a separate part in this book since the analysis on freedom of expression also applies to the limitations on this right. It should also be emphasised that restrictions based on legal grounds other than Law No. 5651 will not be examined in this chapter. Thus, this book confines its examination to the rights directly affected by the application of Law No. 5651. However, the enactment of Law No. 5651 has also affected the application of other legislation, which will be noted in this study.

We believe that the Law No. 5651 has both substantive and procedural defects. Although these defects will be examined in two separate sections, needless to say they complement each other. For instance, court judgments issued without a reason makes the application of the law unforeseeable, which in turn violates the substantive law requirement of “prescribed by law” principle under the European Convention on Human Rights and the related jurisprudence of the European Court of Human Rights. Therefore, it is considered that procedural defects analysed in the second subsection of this chapter strengthen our observations about the substantive rules in the first subsection.

### **Substantive Aspects**

#### **Freedom of Expression**

##### **General Principles**

Different aspects of freedom of expression are affected by Law No. 5651. As a right, freedom of expression is recognised and protected by the Turkish Constitution<sup>237</sup> and comprehensive human rights treaties, to which Turkey is a party. In summary, freedom of expression is composed of three essential parts:

- a. freedom to hold opinions,
- b. freedom to seek and receive information and ideas,
- c. freedom to impart information and ideas.<sup>238</sup>

This three element structure is even more important as far as the Internet publications are concerned. The public’s right to receive information provided by mass media is widely accepted in international law. Indeed the European Court of Human Rights (“ECtHR”) established that:

“Not only does the press have the task of imparting such information and ideas, the public also has a right to receive them.”<sup>239</sup>

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<sup>237</sup> Special uses of the freedom, like freedom of science and the arts (art. 27), freedom of press (art. 28-32) are separately provided under the Constitution.

<sup>238</sup> ICCPR, article 19; ECHR, article 10.

<sup>239</sup> *Lingens*, Series A no. 123, 8.7.1996, para. 26.

This right has been strengthened by the novelties provided by the new Internet technologies. The Internet provides more information and ideas than any other existing medium so far. Moreover, it is much easier and cheaper to reach and access Internet based publications. This last point cannot be overestimated as the alternative news sources are accessed and set up much easily through the Internet. This, in turn, has led many to believe that cyber democracy creates the real open market for different views and ideas. If as the ECtHR established, freedom of expression is “one of the basic conditions for the progress of democratic societies and for the development of each individual,”<sup>240</sup> the Internet is probably the best venue to realise democracy and development of each individual.

Considering that the States usually do not interfere with the ideas supportive of its policies, freedom of expression usually means the protection of opposite views and ideas. In a frequently cited decision the ECtHR stated that:

“Subject to paragraph 2 of article 10 (art. 10-2), it [freedom of expression] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”<sup>241</sup>

Indeed, many political web sites and blogs criticising various government policies broadcast their ideas around the globe. It might become too difficult to access these alternative information sources and views through traditional media when those alternative websites are persistently blocked by the States. This is why the UN Special Rapporteur on freedom of expression sees the Internet as a component of the “information revolution” which plays an influential role in bringing out dissenting voices and shaping the political and cultural debate.<sup>242</sup> The Special Rapporteur also believes that

“action by States to impose excessive regulations on the use of these technologies and, again, particularly the Internet - on the grounds that control, regulation and denial of access are necessary to preserve the moral fabric and cultural identity of societies - is paternalistic. These regulations presume to protect people from themselves and as such, are inherently incompatible with the principles of the worth and dignity of each individual.”<sup>243</sup>

Turkey has been found in violation of international standards for suppressing alternative mass media organisations in the past.<sup>244</sup> Newspapers voicing opposition views faced harsh penalties, even death threats in Turkey, mostly because of the on going conflict in the South-East of the country. Since those who published such newspapers faced harsh penalties and death threats, options for opposition view were undoubtedly limited. However, thanks to the borderless structure of the Internet it has become harder for the governments to encounter alternative ideas spread through the various Internet communication tools.

Bearing in mind that alternative views could find a more open platform on the Internet, the second element of the right to freedom of expression, namely, freedom to seek and receive information and ideas, should especially be underlined as the burden on the receivers will be

<sup>240</sup> *Handyside v. The United Kingdom*, Series A no. 24, 7.12.1976, para. 49.

<sup>241</sup> *Handyside*, para. 49.

<sup>242</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, E/CN.4/2000/63, 18 January, 2000, para. 55.

<sup>243</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, E/CN.4/1998/40, para. 45.

<sup>244</sup> *Özgür Gündem v. Turkey*, App. no. 23144/93, 16.3.2000.

higher than ever if Law No. 5651 is applied to silence anti-government websites, or alternative views on public affairs. The arbitrary application of the Law No. 5651 so far raises serious doubts about the government's intention to that effect as discussed in the first chapter of this book.

The third element of the right to freedom of expression, namely, freedom to impart information and ideas, also bears different meanings on the Internet. Explanations made by the TIB concerning the blocking of YouTube shows that the authorities consider the problem to be only between YouTube and Turkish authorities which blame YouTube for not understanding the Turkish sensitivities.<sup>245</sup> However, apart from hundreds of millions people accessing the video sharing web sites, hundreds of thousands of bloggers, webmasters, web publishers are also affected by the decision to block websites like YouTube, Geocities, Wordpress.com, Google groups, and Blogger. In other words, unlike banning and confiscating newspapers published on a particular date, blocking of websites affects thousands of people imparting their ideas, in some instances indefinitely, and in the case of YouTube over 6 months as of this writing. Therefore, any legal assessment made on Law No. 5651 should bear the serious impact of blocking orders on the large Turkish population in mind.

### **3 Part Test**

Freedom of expression is not an absolute right and might be subject to limitations provided in the Constitution and international treaties. Both the Constitution and international jurisprudence require a strict 3-part test to which any content based restriction must adhere, and these are:

- (a) whether the interference is prescribed by law;
- (b) whether the aim of the limitation is legitimate;
- (c) whether the limitation is “necessary in a democratic society”<sup>246</sup>.

The Turkish Constitution is even more comprehensive in this field. Pursuant to article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality. The limitations prescribed by the Turkish Constitution have also been developed in the case-law of the European Court.<sup>247</sup>

### **Legal Basis (prescribed by law)**

Any restriction on freedom of expression should be prescribed by law. As was stated previously the Strasbourg case law requires that a three-fold test should be met to determine whether the restriction is provided by law. First, the interference with the Convention right must have some basis in national law. Secondly, the law must be accessible. Thirdly, the law must be formulated in such a way that a person can foresee its consequences for him, and be

<sup>245</sup> “YouTube Türkiye’nin Hassasiyetlerini Anlamamakta Israrlı”, *Sabah*, 26.03.2008; Telekomünikasyon Kurumu Başkanı Tayfun Acarer'in Açıklaması. “Internette Özgürlik ve Suç Karışması”, *Sabah*, 29.01.2008.

<sup>246</sup> See *Sunday Times v. UK* (no.2), Series A no. 217, 26.11.1991, para. 50; *Okçuoğlu v. Turkey*, App. no. 24246/94, 8.7.1999, para. 43.

<sup>247</sup> The ECtHR uses the term essence of the right relating to various rights protected under the Convention. See for instance, Prince Hans-Adam II of *Liechtenstein v. Germany*, App. No. 42527/98, 12.7.2001. Proportionality test is frequently applied in Article 10 cases: e.g. *Tolstoy Miloslavsky v. UK*, Series A. 316-B, 13.7.1995, para. 55.

compatible with the rule of law.<sup>248</sup> In Turkish law only a law enacted by the Parliament can be invoked to restrict freedom of expression. Although Law No. 5651 meets this requirement and it is accessible, it is questionable whether the text and the implementation of the Law comply with the foreseeability condition.

As was outlined in chapter one, the Law No. 5651 has led to the blocking of over 1000 websites so far. However, neither the TIB nor the courts have given clear guidance on what kind of web content results in this most restrictive measure.



Figure 20: Various blocking order notices used in Turkey

As can be seen above, those visiting blocked websites in Turkey could only see that the website is blocked due to a court order or TIB decision. The notices provided on the blocked pages do not even include any information on which catalogue crime (article 8 of Law No. 5651) has been committed, or information on any other legal provision triggering the blocking orders.

The ECtHR's jurisprudence shows that legality condition is satisfied when an individual has access to the provisions of the law and, if need be, can understand the law with the assistance of the national courts' interpretation of it with regards to what acts or omissions will result in legal liability.<sup>249</sup> However, the reasons for the blocking decisions are not made public nor declared to the content providers or website owners. Our research revealed that the courts often fail to provide clear reasons for the blocking decisions they issue, and lack of guidance leads into uncertainty, and arbitrary application of Law No. 5651.

Furthermore, content related crimes are often associated with definitional problems, and their limitations are often disputed on freedom of expression grounds. Lack of clarity with regards to the catalogue crimes can therefore lead into uncertainty and arbitrary application of the law by the courts as well as by TIB with regards to its administrative decisions. For instance, the

<sup>248</sup> Amongst many other authorities see *Kruslin v. France*, 24.4.1990, Series A. no. 176-A, para. 27; *Huvig v. France*, 24.4.1990, Series A. no. 176-B, para. 26

<sup>249</sup> *Kokkinakis v. Greece*, Series A no. 260-A, 25.5.1993, para. 52.

meaning of obscene is not crystal clear in Turkish criminal law, which enables the TIB to apply its own criteria.<sup>250</sup> Indeed, the Criminal Code does not define the term “obscene”. The interpretation of the Court of Cessation remains to be seen following the enactment of the new Turkish Criminal Code.<sup>251</sup> The explanation of the law states that the dominant values of the society and explanations made about indecent conduct in article 225 should be taken into consideration in the determination of obscene content.<sup>252</sup> Considering that article 225 provides exhibitionism and explicit sexual intercourse as indecent conduct, almost all websites containing sexually explicit content can fall within the obscene category.

Our research has also showed that some blocking orders given by the Courts have no legal basis under Law No. 5651, and are issued outside the scope of the new provisions. According to the TIB statistics, Courts have given 139 blocking decisions (as of 01 October, 2008) for reasons other than the ones listed under article 8.<sup>253</sup> A number of court decisions issued before Law No. 5651 entered into force are still in effect.<sup>254</sup> Article 8 of Law No. 5651 provides an exhaustive list of crimes and analogy is not allowed in criminal law. However, it became obvious that some courts are rendering orders to block websites for violating Anti-Terror Law,<sup>255</sup> or for violating article 301 of the Turkish Criminal Code. The TIB claims that it has submitted objections against some court orders issued outside the scope of article 8, and some of these objections have been accepted.<sup>256</sup> Nevertheless, it seems that the general trend is that the Courts continue to issue blocking orders for the crimes not enumerated by law. Since the reasons for the Court orders are not made public as explained below, how could the Courts justify such a flagrant breach of law remains to be explained.

### **Article 9 of Law No. 5651 and Legal Basis**

As described in the first chapter of this book, apart from the reasons prescribed in Law No. 5651, courts in Turkey continue to block access to websites based on civil code. Courts issue precautionary injunctions with regards to the violation of personal rights. However, it is submitted that subsequent to Law No. 5651 coming into force the issuing of this type of blocking order become illegal. Article 9 of Law No. 5651, details of which has been described above, provides a new procedure for Internet content violating personal rights. Accordingly, the person alleging that his/her rights have been infringed by a website should seek the removal (take down) of the content from the website, but not the blocking of the website carrying the allegedly infringing content. Article 9 does not contain any provisions on “blocking” and private law matters can only result in “removal” (take down of the particular infringing article) together with the publication of an “apology” if the courts deem necessary. Therefore, the courts are not empowered by law to issue blocking orders since article 9 provisions have been brought into force on 23 May, 2007.<sup>257</sup> When two legal provisions at the

<sup>250</sup> See Füsün S. Nabil's comments in the same line, “İnternet sitelerine erişim engeli tartışılıyor,” at <[http://www.cnnturk.com/haber\\_detay.asp?haberID=472030&PID=16](http://www.cnnturk.com/haber_detay.asp?haberID=472030&PID=16)>.

<sup>251</sup> İlker Atamer argues that article 426 of the former Criminal Code (Law No. 726) with the interpretation of the Court of Cessation at least provided more reliable definition. İlker Atamer, “İnternet'te Müstehcenlik ve Erişim Engellemeye Kararı”, at <<http://turk.internet.com/haber/yazigoster.php3?yaziid=20213>>.

<sup>252</sup> Explanation to the Articles of New Turkish Criminal Code, Article 226 (Türk Ceza Kanunu Madde Gerekçeleri, TBMM Adalet Komisyonu tarafından Kabul edilen madde gerekçeleri, Madde 226).

<sup>253</sup> See <<http://www.guvenliweb.org.tr/istatistik.html>>.

<sup>254</sup> See Website blocking practices prior to the enactment of Law 5651 in Chapter 1.

<sup>255</sup> See the section entitled *Political Bans* in chapter 1.

<sup>256</sup> Information provided by TIB: the authors visited and interviewed TIB officials in Ankara on 27 May, 2008, and on 28 August, 2008. Additional information was provided in writing to the authors subsequently.

<sup>257</sup> Note that articles 3 and 8 were brought into force on 23 November, 2007, while the rest of Law No. 5651 provisions were brought into force on 23 May, 2007.

same quality conflict, principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali* apply. Law No. 5651, which was enacted after the Civil Code came into force, explicitly requires a new way for the protection of personal rights. Bearing in mind the clear wording of this specific provision, courts cannot rely upon the general provisions of the Civil Code to ban access to websites.

Therefore, it is suggested that Law No. 5651, through its article 9, has removed the possibility for blocking access to websites from the Turkish legal system with regards to disputes on personal rights apart from intellectual property disputes. Based on this view, it is the submission of this book that the blocking orders issued in high profile cases such as WordPress (August 2007 – April 2008), Google Groups (March 2008), Richard Dawkins' website (<<http://richarddawkins.net>> September 2008), and more recently the blocking order involving <<http://egitimsen.org.tr>> (September 2008),<sup>258</sup> and the daily newspaper Vatan (<<http://gazetevatan.com>> October 2008), all with regards to personal rights disputes involving defamation, are illegal and should not have been issued by the courts. As such orders are illegal the injunctions should be lifted by the courts which issued them in the first instance.

### **Bans issued before Law No. 5651 came into force and their Legal Basis**

As explained in Chapter one, a considerable number of websites had been banned in Turkey before Law No. 5651 came into force.<sup>259</sup> Some of those court issued blocking orders relied on the Civil Code as explained above whereas others were issued with analogy to other precautionary measures. No doubt, civil rights cannot be restricted by analogy. However, even if the prior blocking orders could be deemed valid, they became null and void once Law No. 5651 came into force, as far as bans stemming from reasons other than the ones enumerated under article 8 are concerned.

Law No. 5651 regards the blocking orders given by judges as precautionary measures. It is impossible to invoke these precautionary measures for the crimes not listed in article 8 (e.g. article 301 of the Criminal Code or Anti-Terror Law provisions). Needless to say, as in the treatment of other crimes, the law which is in favour of the accused applies as far as precautionary measures are concerned. For instance, article 100 of the Law on Criminal Procedure provides a catalogue of crimes about which the reason for detention presumed to be present when there is serious suspicion of committing one of those crimes. When a crime is removed from that list mere suspicion would not be enough to detain a person under article 100 and the person detained as a result of such suspicion for committing a crime should be released. The same principle applies to the other precautionary measures, and crimes not listed in Law No. 5651 can no longer be used as a reason for banning access to websites. Therefore, all blocking decisions based on unlisted crimes issued before article 8 provisions of Law No. 5651 came into force must be lifted. The lawmakers provided a restricted number of acts (*numerus clauses*) as reason for banning.

Therefore, it is the submission of the authors' of this book that all court blocking orders issued outside the scope of article 8 of Law No. 5651 and supplemental article 4 of the Law No. 5846 on Intellectual & Artistic Works are illegal since article 8 provisions of Law No. 5651 came into force in November 2007. Therefore such blocking orders issued outside the scope of these

<sup>258</sup> See Atilim.Org, “Sansür bu kez Eğitim-Sen’i buldu,” 24 September, 2008, at <[http://www.atilim.org/haberler/2008/09/24/Sansur\\_bu\\_kez\\_Egitim-Sen\\_i\\_buldu.html](http://www.atilim.org/haberler/2008/09/24/Sansur_bu_kez_Egitim-Sen_i_buldu.html)>. See further Cyber-Rights.Org.tr, “Egitimsen.org.tr’yi kapattıran yazı,” 24 September, 2008, at <<http://privacy.cyber-rights.org.tr/?p=131>>.

<sup>259</sup> See the section entitled Website blocking practices prior to the enactment of Law 5651 in chapter 1.

provisions should be lifted without a detailed examination by the courts which issued the orders in the first place. Furthermore, all blocking orders issued by the courts prior to article 8 provisions coming into force should also be lifted as currently websites can only be blocked with regards to the catalogue crimes listed in article 8, and with regards to intellectual property infringements.

### **Legitimate Aims**

Even if any restriction has a legal basis, it must have been enacted to meet one of the specified legitimate aims listed in the Constitution<sup>260</sup> and ECHR. These aims fall into three categories:

- those designed to protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals),<sup>261</sup>
- those designed to protect other individual rights (protection of the reputation or rights of others, prevention of the disclosure of information received in confidence),<sup>262</sup>
- those that are necessary for maintaining the authority and impartiality of the judiciary.

The catalogue crimes incorporated to article 8 taken from the Criminal Code perfectly fit with the first category. Crimes committed against Atatürk, however, do not necessarily fall within this category. Although there have been claims that historical personalities should not be protected by criminal law,<sup>263</sup> in *Odabaşı and Koçak* case, the ECtHR has proclaimed that Law No. 5816 concerning crimes committed against Atatürk pursue a legitimate aim, namely protection of the reputation or rights of others.<sup>264</sup>

### **Limits of Restrictions Brought under Law No. 5651**

Article 13 of the Turkish Constitution provides that “fundamental rights and freedoms may be restricted [...] without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.” Same principles have been developed by the ECtHR jurisprudence, despite the fact that the ECHR only includes necessity in a democracy test.

### **Proportionality**

The requirement of proportionality is divided into three subheadings in the Turkish constitutional law,<sup>265</sup> which are also enshrined under the Strasbourg jurisprudence:

- suitability test: The means used to restrict fundamental rights must be suitable to realize the legitimate aim.
- Necessity test: There should be a pressing social need to interfere with the fundamental rights.
- Proportionality test: The interference must be proportionate to the legitimate objective pursued.

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<sup>260</sup> Article 13 of the Constitution.

<sup>261</sup> The Turkish Constitution’s list is slightly different: protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret. See article 26(2).

<sup>262</sup> The Constitution also slightly differs in this: protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law.

<sup>263</sup> Antoon De Baets, “Defamation Cases Against Historians”, (2002) 41 *History and Theory* 346. The author examines the Law on Crimes Committed Against Atatürk at p. 349.

<sup>264</sup> *Odabaşı et Koçak c. Turquie*, App. no. 50959/99, 21.2.2006, para. 18.

<sup>265</sup> See. Constitutional Court decisions in E. 1985/8, K. 1986/27, kt. 26.11.2986, AYMKD 22, s. 366; E. 1988/50, K. 1989/27, k.t. 23.6.1989, AYMKD 25, s. 312.

In our view, Law No. 5651 fails all these tests as will be explained below.

### **Suitability Test - Circumvention is possible: Law No. 5651 is not effective**

The adoption of an access blocking policy through the Law No. 5651 can only be described as state sponsored censorship. An examination of the known blocked websites in Turkey including the currently blocked YouTube and Geocities shows that in almost all cases circumvention is possible and the court issued blocking orders or administrative blocking orders issued by TIB are not effective. Therefore, the restriction provided by law is not suitable for the aim pursued.

There are several tools the Internet users based in Turkey can use to circumvent the blocking orders issued and access the banned websites. Internet users in Turkey use alternative DNS addresses to circumvent DNS blocking and tampering while several anonymous proxy servers (such as <anonymizer.com>, the Electronic Frontier Foundation's TOR network,<sup>266</sup> and onion routers) and other systems are used to bypass IP address blocking. This is to the extent that recent Alexa.com statistics suggest that a number of known "blocked" pages are constantly accessed by a considerable number of users from Turkey despite the blocking orders.<sup>267</sup> In fact, in mid June 2008, while the YouTube ban was in force, YouTube.com was the 5<sup>th</sup> most accessed website from Turkey following Google Turkey, Windows Live, Facebook, and Google Global. In fact several blocked websites regularly appear in Alexa.com's top 50 websites accessed from Turkey. Anonymous proxy services such as Ktunnel.com and Vtunnel.com started to make it into the top 50 alexa.com ranking as these services are increasingly used to circumvent the Turkish blocking and censorship. OpenDNS which is also used to circumvent DNS poisoning was ranked at number 54, and access to the blocked pages of dailymotion.com was ranked on number 55, and youporn.com on 48 on 18.08.2008.

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<sup>266</sup> See <<http://tor.eff.org/>>.

<sup>267</sup> Despite the restrictions, Youtube.com is still the 17<sup>th</sup> most accessed website in Turkey, according to Alexa data. Zaman, "İşte internet yasaklılık ligi", <<http://www.zaman.com.tr/haber.do?haberno=728737>>. Another source informs that after the blocking decision, YouTube is visited by 1.5 million person from Turkey everyday. See cnnturk.com, "Türkler, Yotube yasağını deliyor", at <[http://www.cnnturk.com/haber\\_detay.asp?haberID=471134&PID=16](http://www.cnnturk.com/haber_detay.asp?haberID=471134&PID=16)>.

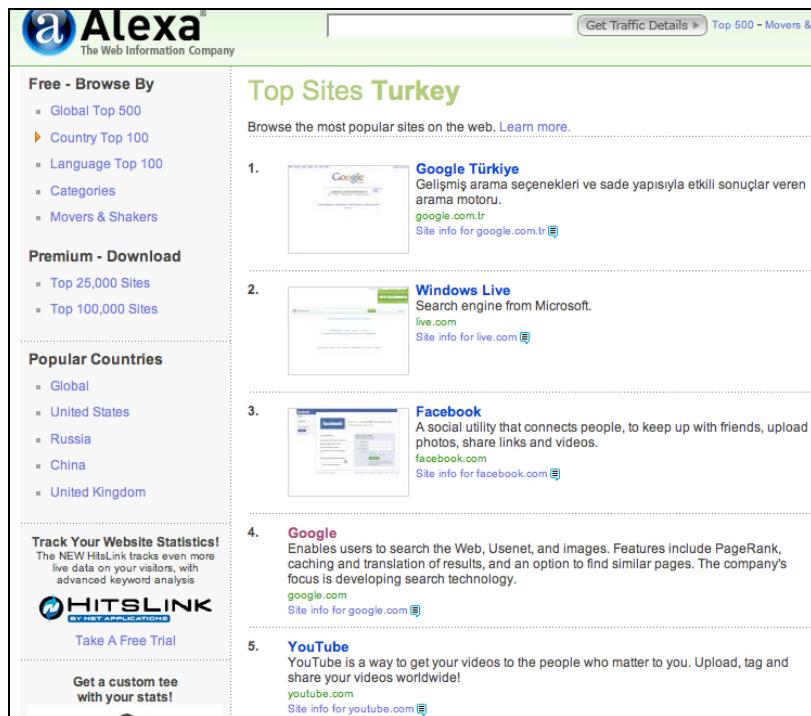


Figure 21: Alexa.Com as of 17.06.2008

Furthermore, it is also a known fact that the YouTube ban is not effective nor enforced when YouTube is accessed from certain mobile devices in Turkey. These include the BlackBerry handheld sets as well as Apple iPhones as YouTube uses a different server for mobile access which seems not to be blocked from Turkey.

Although it is assumed that only experienced Internet users know or learn how to use such circumvention tools, there are several websites, and newspaper articles that explain inexperienced users including children how to use these tools to circumvent the access blocking orders. There are also more complex circumvention tools that can be used by experienced users such as the Peacefire.org's Circumventor, a tool specifically designed to help Internet users to access banned websites, which bypasses any content-blocking attempts including filtering software installed on individual computers.<sup>268</sup> Circumventor, accessed through an unknown IP address (or one known to a limited number of users), provides better success in circumvention (especially when the filters start blocking well-known proxy servers) and avoids possible unintended risks associated with circumvention technologies.<sup>269</sup>

No doubt restrictions have serious impacts on civil liberties. However, this impact is more effective on those who do not have the opportunity to reach the means and knowledge explained above because of various reasons. In other words, weakest part of the society is the most affected by the restrictions more than some who are more experienced and capable to use such circumvention tools. This makes the restrictions even more unacceptable.

<sup>268</sup> For further information about Peacefire.Org's Circumventor, see <<http://www.peacefire.org/circumventor/simple-circumventor-instructions.html>>.

<sup>269</sup> See further OpenNet Initiative, *Unintended Risks and Consequences of Circumvention Technologies: The IBB's Anonymizer Service in Iran*, May 2004, at <<http://www.opennetinitiative.net/advisories/001/>>.

## **Necessity Test: No other options are invoked**

According to the ECtHR, ‘necessity’ within the meaning of article 10(2), implies the existence of a ‘pressing social need’.<sup>270</sup> However, under national law, pressing social needs should be satisfied with the least restrictive alternative available.

Having said that, it is undoubtedly more difficult to satisfy the necessity test for Internet content as users seldom encounter illegal content accidentally.<sup>271</sup> In other words, the risk of encountering undesirable or illegal content is much lower than in traditional media. Therefore, the burden is higher for the government to prove that pressing social need exists to restrict Internet publications. Furthermore, necessity test is not satisfied, if as the US Supreme Court has stated “less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve”.<sup>272</sup>

Law No. 5651 does not require a stricter or compelling test of necessity for the crimes listed in the Criminal Code. It seems that, for the courts, the standard for printed material also applies to the Internet content. We have not yet encountered an example where a court evaluates the different nature of the Internet technology to conclude whether pressing social need exists to interfere with Internet publications.

We believe even if a pressing social need exists a less restrictive option other than access blocking can be invoked to satisfy such need. However, it is pertinent to note that no alternative options for content regulation were considered by the legislators while drafting Law No. 5651 including various self-regulatory solutions to protect children from accessing illegal and harmful content such as the use of filtering software on home based computers or in schools.

Certain practices adopted by the TIB such as the issuing of warnings and notices to websites situated in Turkey<sup>273</sup> for subsequent take down of infringing content (rather than issuing a blocking order for the whole website) could be seen as an example of a less restrictive alternative approach in addressing a pressing social need. However, considering that the amount of blocked websites outnumbers the ones put on notice, criteria for this approach needs further clarification. Additionally, notice & take down as a practice is not widely used by the courts and we have only come across one example.<sup>274</sup> Courts usually issue blocking orders without considering this less restrictive procedure. Without a doubt the practice known as notice and take down has its own procedural problems and can be used as a tool for censorship. However, we will not address those concerns in this book, and those concerns would be the scope of another study.

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<sup>270</sup> Amongst many authorities, see *Observer and Guardian v. UK*, Series A. no. 216, 26.11.1991, para. 59.

<sup>271</sup> See *Reno v. ACLU*, 521 U. S. 844 (1997), 854.

<sup>272</sup> See *Reno v. ACLU*, 521 U. S. 844 (1997), 874; *United States v. Playboy Entertainment Group*, (2000) 120 S.Ct. 1878.

<sup>273</sup> See Regulations 3, Article 7. According to the TIB’s own statistics, 158 warnings have been issued to the hosting providers to remove content violating the Law on Crimes committed against Atatürk, whereas 25 websites have been warned to remove to take down inappropriate content. See Statistics at <http://www.guvenliweb.org.tr/istatistik.html>.

<sup>274</sup> Gerger Civil Court of First Instance, Decision No. 2008/1 Misc, dated 11.01.2008. See the discussion about this case in Chapter 1, section Bans Based on Civil Code.

## Proportionality Test: Over-blocking

The courts or public prosecutors do not always require domain based blocking but the current technical infrastructure for Internet connection in Turkey is not designed for censorship nor blocking. The DNS blocking/tampering and IP address blocking methods currently used in Turkey for the execution of blocking orders result in massive over-blocking as all the content on a specific server is blocked. These methods are easy to deploy and their maintenance is cheap compared to other more complicated proxy based blocking systems. The effect of these blocking methods is somehow questionable as circumvention is possible as mentioned above.<sup>275</sup> There are currently no perfect technical solutions available and the deployment and use of cost intensive proxy based blocking systems or hybrid systems such as Cleanfeed would equally be problematic.

An assessment of the blocking orders outlined in this book lead us to conclude that massive over-blocking is witnessed in Turkey. In most cases a single file, web page, blog entry, or 30 seconds video clip containing the allegedly illegal content results in domain/IP based blocking of domains and web servers as a whole. This, as in the cases of YouTube, Geocities, WordPress, and more recently in the cases of Blogger and Blogspot resulted in not only blocking the allegedly illegal content, but also millions of web pages carrying perfectly legal content through those blocked domains. Reputable companies such as YouTube, Geocities, WordPress, and Google owned Blogger are not known to promote illegal content and activity even though their services may contain content which may be deemed undesirable or illegal by Turkish law and any other state laws around the world. However, majority of the content provided in this user-driven information sharing, and collaboration sites are socially useful and legal accessed by millions around the world. YouTube,<sup>276</sup> Geocities,<sup>277</sup> and Blogger<sup>278</sup> have all developed acceptable use policies and community guidelines to deal with inappropriate content. Such policies and guidelines trigger these companies to remove or block access to content if the content in question is in breach of such guidelines. For example, in the case of YouTube, users can flag inappropriate content or they can comment on the video files on the pages they are published. With such a self-regulatory mechanism in place for dealing with inappropriate content, the blocking of such sites is unacceptable.

As noted by experts,<sup>279</sup> the current implementation of Law No. 5651 resembles the closure of the US Federal Library for a single allegedly illegal publication. Our research has revealed that the Turkish courts have not struck down a balance between the alleged damage caused by the content and the interference. We have not come across any case in which consideration for freedom of expression has been given, or the constitutionality of a blocking order has been questioned by the courts even though their decisions often lead into the blocking of a whole domain as in the cases of YouTube, Geocities, WordPress, and Blogger. As mentioned previously such sites are not known to promote illegality. For instance, YouTube has been closed down several times as shown in chapter one for movie clips insulting Atatürk. However, along with other useful information, hundreds of videos approving Atatürk and his reforms could also find place on YouTube. No doubt, many people might feel uncomfortable by the clips humiliating the founder of the country. However, the fact that society may find speech offensive is not a sufficient reason for suppressing it.<sup>280</sup> Whereas clips that hurt some part of

<sup>275</sup> For a detailed legal evaluation of these methods see *CDT v. Pappert*, 337 F.Supp.2d 606 (E.D. Penn. 2004).

<sup>276</sup> See YouTube Community Guidelines at <[http://youtube.com/t/community\\_guidelines](http://youtube.com/t/community_guidelines)>.

<sup>277</sup> See GeoCities Community Guidelines at <<http://info.yahoo.com/guidelines/us/>>.

<sup>278</sup> See Blogger Report Abuse pages at <<http://help.blogger.com/bin/topic.py?topic=12468>>.

<sup>279</sup> Mustafa Akgül, “İnternette Yasaklar: Türkiye’nin İnternette Sınavı”, (2008), 5-53 *Güncel Hukuk* 15.

<sup>280</sup> *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978), 745.

society do not cause an irreparable damage to anyone, the blocking policy has a very strong impact on freedom of expression, which is one of the founding principles of democracy. The concerned content or illegality does not vanish as a result of blocking access to websites. Those who live outside Turkey or those who know how to access YouTube and other banned websites from within Turkey can still access the allegedly illegal content which triggers the blocking orders in the first instance.

Based on current Law No. 5651 practice, it can only be concluded that the state response in Turkey amounts to censorship of legal content and information available through such websites like YouTube, and Geocities and the manifestly disproportionate interference with freedom of expression is not justified. Necessity of such an interference within a democratic society with regards to article 10, ECHR and the jurisprudence of the European Court of Human Rights is seriously questioned and it is the submission of this study that the domain based blocking of websites that carry legal content is a clear breach of article 10, and a serious infringement on freedom of speech.

### **Democratic society**

The European Court of Human Rights held in numerous decisions that freedom of expression constitutes one of the essential foundations of a democratic society. That is why article 10 is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.<sup>281</sup> The Court has also made clear that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”.<sup>282</sup> This leads to the conclusion that the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.<sup>283</sup> This strict criterion also applies to other matters of public concern.<sup>284</sup>

Obviously when certain remarks (including through the Internet) incite to violence against an individual, a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression. However, there is absolutely no doubt that such a decision calls for a strict scrutiny on the part of national courts.

The ECtHR jurisprudence shows that Turkish courts failed in meeting the Strasbourg test concerning political expression cases in a considerable number of cases.<sup>285</sup> Although serious measures have been taken to improve the situation, the prosecution and conviction for the expression of non-violent opinions under certain provisions of the Turkish Criminal Code show<sup>286</sup> that more need to be done to change the Turkish judiciary’s approach.

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<sup>281</sup> Amongst many other authorities see *Sürek v. Turkey* (No. 1), App. no. 26682/95, 8.7.1999, para. 58.

<sup>282</sup> *Lingens v. Austria*, Series A no. 103, 8.7.1986, para. 42.

<sup>283</sup> *Castells v. Spain*, Series A no. 236, 23.4.1992, para. 46.

<sup>284</sup> *Thorgeirson v. Iceland*, Series A no. 239, 25.6.1992, para. 64.

<sup>285</sup> Amongst many authorities see, *İncal v. Turkey*, App. no. 22678/93, 9.6.1998; *Ceylan v. Turkey*, App. no. 23556/94, 8.7.1999; *Arslan v. Turkey*, App. no. 23642/94, 8.7.1999; *Yağmurdereli v. Turkey*, App. No. 29590/96, 4.6.2002; *Gökçeli v. Turkey*, App. no. 27215/95, 4.3.2003. More recently, *Saygılı and Others v. Turkey*, App. no. 19353/03, 8.1.2008; *Yurdatapan v. Turkey*, App. no. 70355/01, 8.1.2008; *Yalçın Küçük v. Turkey* (No. 3), App. no. 71353/01, 22.4.2008.

<sup>286</sup> The European Commission claims that those prosecutions are a cause of serious concern. Commission of the European Communities, Turkey 2007 Progress Report {COM(2007) 663}, p. 14.

It seems that the application of Law No. 5651 is no exception to this traditional approach. Our research found that a number of progressive and alternative websites, including gundemonline.net, anarsist.org, devrimciler.com, Indymedia Istanbul, firatnews.eu<sup>287</sup> are systematically faced with blocking orders. The reasons behind such blocking orders are often unknown, and no further prosecutions seem to take place with regards to the authors' of such publications or owners of such websites in Turkey. It is not therefore clear whether a specific crime has been committed by these websites or the publications that appear on such sites, or whether the blocking orders are politically motivated to silence what can only be described as "political speech". The use of the blocking orders to silence speech amounts to censorship and a violation of article 10 of ECHR as the Turkish public should be allowed to enjoy "the right to be informed of different perspectives on the situation in south-east Turkey, however unpalatable they might be to the authorities."<sup>288</sup>

Furthermore, banning socially useful websites such as Geocities, YouTube, WordPress, and Blogger has also very strong implications on political expression. Those sites provide a venue, which is popular all around the world, for alternative and dissenting views. The blocking orders rendered against those sites should have also taken this factor into account. Indeed, it has been claimed that video and file sharing websites and services like YouTube have faced blocking orders due to their open platform provided for dissenters.<sup>289</sup>

## **Right to Privacy: Paternalism in Regulation**

According to the recent data provided by the TIB, 390 websites have been banned for containing obscene content, 352 of which were banned by administrative blocking orders as of 01 October, 2008. As noted above<sup>290</sup> obscenity has not been clearly defined in Turkish law.<sup>291</sup> The list of blocking orders issued under this particular heading show that no difference has been made between pornographic (legal) and obscene content (illegal). The lack of clarification will provoke uncertainty. No doubt that it is legitimate for the government to take measures to protect minors from accessing pornographic content. However, as a former President of Constitutional Court stated, subjecting adults to the rules envisaged for minors means depriving the former of their constitutional rights.<sup>292</sup> It is pertinent to note that years later the US Supreme Court ruled similarly in *Reno v. ACLU*<sup>293</sup> arguing that although the Government has an interest in protecting children from potentially harmful materials, the Communications Decency Act 1996 pursued that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive. While the Supreme Court found the blocking access to harmful content provisions unconstitutional, it argued that the

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<sup>287</sup> See the section entitled *Political Bans* in chapter 1.

<sup>288</sup> *Özgür Gündem v. Turkey*, App. no. 23144/93, 16.3. 2000.

<sup>289</sup> Kerem Kaya argues that there is a direct connection between the attempts by the Turkish authorities to restrict access to the Internet and the growing political crisis in the country. He notes that the latest ban on Internet sites came just a few days after the brutal suppression of May Day demonstrations by the Turkish riot police in Istanbul, to hide the videos of this assault. Kerem Kaya, "Turkish Courts Impose Ban on YouTube", at <<http://www.wsws.org/cgi-bin/birdcast.cgi>>.

<sup>290</sup> See supra the section entitled Legal Basis (prescribed by law) in this chapter.

<sup>291</sup> Other relevant concepts have not been clarified in Turkish law either. In an early case before the Constitutional Court, the applicant party claimed that the term "*muzir*" (content that damage the health of children) had not been clarified in Law no. 1117 Concerning Protecting Children from Harmful (*muzir*) Publications. The Court rejected this claim without giving a definition. AYM, E. 1986/12, K. 1987/4, kt. 11.2.1987. RG. 21.11.1987, S. 19641.

<sup>292</sup> See Yekta Güngör Özden's dissenting opinion in AYM, E. 1986/12, K. 1987/4, kt. 11.2.1987. RG. 21.11.1987, S. 19641.

<sup>293</sup> (96-511) 521 U.S. 844 (1997).

law's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the law's legitimate purposes.<sup>294</sup> Therefore, the US Supreme Court does not allow content based restrictions which would "reduc[e] the adult population . . . to reading or viewing only what is fit for children."<sup>295</sup>

The odd result of Law No. 5651 is that a group of lawyers at the TIB decides what is not suitable for minors, but their arbitrary decision also results in blocking adults' access to those websites as well, and the access blocking orders do not differentiate between the adult and child population.

A person's decision to visit websites containing sexual content concerns a most intimate aspect of his/her private life. The ECtHR has ruled that there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of article 8(2) of the ECHR with regards to privacy in this field.<sup>296</sup> The Turkish legislators have claimed that the main purpose of the Law No. 5651 was to protect children from accessing harmful content. Nevertheless, the Law now protects adults against their own desires, which is not acceptable in a democratic society. The Law is paternalistic in its approach as it does not leave the decision of whether to access such sites to the adult citizens. It has been reported that the TIB investigations are mainly based on complaints received by the TIB hotline. However, this procedure carries the risk of imposing moral values of someone on others.<sup>297</sup>

A feasible regulation of the Internet should intend to prohibit minors from accessing harmful-to-minors material, while allowing adults unburdened access to such material.<sup>298</sup> Currently available user based filtering software suggests that a reasonably effective method exists to achieve the state's goal of protecting children from accessing such content by providing parents the tools to use on home computers. The state can also provide such tools to elementary schools and to Internet cafes. Therefore, least restrictive methods are available to prevent children from accessing material which the parents or the State believe is inappropriate for children. However, State's interest in protecting children from such content does not justify an unnecessarily broad suppression of speech addressed to the adult population in Turkey.

## Procedural Aspects

### Defence Rights and Procedural Equality

Law No. 5651 is about suppression of content crimes committed through the Internet. So far as the legal procedural issues are concerned, the public authorities bring a charge against the web authors, or content providers if they believe that a content crime is committed under article 8 of Law No. 5651.

The right to have a fair trial in criminal cases is recognised both in the Constitution (article 36) and international human rights treaties (ECHR, article 6; ICCPR, article 14). Equality of arms, which is one of the fundamental elements of fair trial, implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a

<sup>294</sup> Note *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), 492 U. S., at 126.

<sup>295</sup> *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U. S. 727 (1996).

<sup>296</sup> *Dudgeon v. United Kingdom*, Series A no. 142, 22.10.1981, para. 52.

<sup>297</sup> According to the most recent data, the TIB has received 6411 complaints about obscene websites, which make 55% of all complaints. See <<http://www.guvenliweb.org.tr/istatistik.html>>.

<sup>298</sup> Dawn C. Nunziato, "Technology and Pornography", [2007] *Brigham Young University Law Review* 1535.

substantial disadvantage vis-à-vis his opponent.<sup>299</sup> In criminal cases the right to have an adversarial trial becomes even more important. An adversarial trial means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and have the opportunity to comment on the observations filed and the evidence adduced by the other party.<sup>300</sup> According to the ECtHR:

“In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.”<sup>301</sup>

Article 6(3)(b) of the ECHR provides a specific provision about criminal procedure which states that everyone charged with a criminal offence shall have adequate time and the facilities for the preparation of his defence.

Against this legal background, the procedure followed under Law No. 5651 does not give an opportunity to the content providers to have knowledge about the charge. According to article 8(2), blocking orders would be issued by a judge during preliminary investigation, and by the courts during trial. During preliminary investigation the Public Prosecutor can issue a blocking order through a precautionary injunction if a delay could be prejudicial to the investigation. The law does not require the authorities to inform the accused about this procedure. No other procedural guarantee to counterbalance this deficiency is envisaged either. Although, an objection can be made pursuant to the Criminal Procedural Act, interested party who wants to invoke this legal provision will not be able to know the details of such an accusation.

Usually, content providers are caught in surprise when they learn that their websites are inaccessible from Turkey. In decisions relying on the Civil Code, they do not even know which Court issued the decision. In one recent example, one content provider has complained that “access to their website has been blocked by an unknown court decision for an unknown reason”.<sup>302</sup> Because neither the right to defence is given to them in the procedure nor the decision is notified subsequently. Although the court decisions with regards to the catalogue crimes in article 8 are immediately communicated to the TIB for the execution of the blocking orders, they are often not communicated to the content/hosting providers and the content/hosting providers do not necessarily know what triggered the blocking orders. It should also be noted that some of the blocking orders issued by the courts outside the scope of article 8 catalogue crimes and the ones based on the Civil Code are not necessarily communicated to TIB for execution. As a response, our interviews and research have shown that websites located outside the Turkish jurisdiction prefer to change their domain names or obtain new ones as they have no hope to get a positive response from the courts under such conditions.

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<sup>299</sup> *Dombo Heher BV v. Netherlands*, Series A no. 274-A, 27.10.1993, para. 33.

<sup>300</sup> *Rowe and Davis v. United Kingdom*, App. no. 28901/95, 16.2.2000, para. 60; *Brandstetter v. Austria*, Series A no. 211, 28.8.1991, para. 66-67; *Ruiz-Mateos v. Spain*, Series A. no. 262, 23.6.1993, para. 63.

<sup>301</sup> *Van Mechelen and Others v. the Netherlands*, Reports 1997-III, 23.4.1997, para. 58; *Rowe and Davis*, para. 61.

<sup>302</sup> See the explanation of the content provider of the Turan Dursun website at <<http://www.turan-dursun.com/>>.

No doubt, as the Strasbourg jurisprudence shows the entitlement to disclosure of relevant evidence is not an absolute right and might be limited under certain conditions.<sup>303</sup> However, the lack of information and transparency in the procedure is not exceptional in the implementation of Law No. 5651. The drafters of the law might remind the difficulty of reaching the owners of content providers located outside the Turkish jurisdiction. However, the opportunity to have the knowledge of an accusation and the alleged illegality is not provided to websites located in Turkey either. Furthermore, the law does not provide any alternative to this procedural defect for the websites located outside of Turkey. As explained in the introduction of this chapter, not only the owners of websites but also millions of people accessing the video sharing web sites, hundreds of thousands of bloggers, webmasters, web publishers etc. are affected by decisions to block websites like YouTube, Geocities, WordPress, Google Groups, and Blogger. More transparent procedures might at least give users the possibility to object and challenge the court or administrative decisions.

### **Presumption of innocence**

It is one of the fundamental principles of international human rights law that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.<sup>304</sup> Therefore, precautionary measures should be exceptional and more importantly temporary. Indeed, criminal procedural law limits the implementation of all precautionary measures and burdens the State to solve the criminal cases in the shortest time possible.

As of 01 October, 2008, less than a year of application of article 8 measures, 1115 blocking orders have been issued in Turkey. Out of the 1115 orders, only about 40 of them have been lifted so far.<sup>305</sup> Although no explanation is provided, it is believed that decisions to lift those orders have not been issued as a result of verdict of not guilty as required by article 8(8) of the Law. Banning orders are usually lifted due to removal of impugned part of the blocked websites. Furthermore, in the majority of those decisions, the perpetrators have not been given the chance to defend themselves as explained above. We have no knowledge whatsoever whether the TIB or the prosecutors investigate persons that create the allegedly illegal websites and content. In the majority of the cases, no further prosecutions seem to take place with regards to the authors' of such publications or owners of websites in Turkey either. In other words, although Law No. 5651 labels these as precautionary measures, blocking decisions seem to become permanent, and in some instances remain indefinitely. Therefore, websites and content are blocked and 'presumed guilty' even though the legality or illegality of such sites and content has not been established by a court of law. In other words, such a practice can only be described as totalitarian censorship.

Furthermore, as a result of foregoing practice, the implementation of Law No. 5651 seems to reverse the burden of proof and require the defendant to prove his/her innocence. However, as a matter of general rule the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence.<sup>306</sup> Only in exceptional circumstances this could be reversed. It is pertinent to recall the ECtHR's condition for such a scenario:

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<sup>303</sup> Rowe and Davis, para. 61.

<sup>304</sup> See article 6(2).

<sup>305</sup> See <<http://www.guvenliweb.org.tr/istatistik.html>>.

<sup>306</sup> *John Murray v. the United Kingdom*, RJD 1996-I, 8. 2. 1996, para. 54

“Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law.”<sup>307</sup>

These certain limits are shown in other cases examined by the ECtHR. In *Telfner*, the ECtHR made it clear that the authorities must establish a convincing *prima facie* case against the accused to shift the burden of proof from the prosecution to the defence.<sup>308</sup> We do not however believe that the reversal of the burden of proof is necessary or justified with regards to content based crimes and it should be, as a matter of principle, the duty of the prosecutors to establish guilt, and it is not acceptable to shift the burden to the accused to prove innocence.

That brings us to the clarity of the criminal charges and the quality and transparency of court decisions.

## **Precautionary Measures Become Final Judgments**

Even more flagrant violation of presumption of innocence is arising from the fact that in practice blocking orders issued as precautionary measures become final judgments. Precautionary measures issued both under Law No. 5651 and Law of Civil Procedure are supposed to be provisional in nature and should be used only under exceptional circumstances. Indeed, article 109 of the Law of Civil Procedure provides that precautionary measures ordered before a lawsuit is filed expire in 10 days unless a case is brought to the court. Similarly, precautionary measures ordered under the Law of Criminal Procedure are provisional. As explained above precautionary measures aim to secure the prosecution of criminals as well as the execution of the final judgments. They intend to keep the accused present and to reach the evidence or keep the evidence intact during prosecution and/or trial. They should come to an end once this aim is reached.<sup>309</sup>

This principle becomes even more important if the precautionary measure affects third parties. According to the Court of Cessation:

“Precautionary measures which solve the substance of the case cannot be ordered. The measure must be ordered to prevent a considerable damage. A measure meeting one party’s needs while damaging substantial number of others cannot be ordered.”<sup>310</sup>

The current banning practice in Turkey is in contradiction with these important principles. Precautionary measures do not seem to be provisional in practice. To our knowledge, only 40 orders have been lifted so far out of 1115 known blocking orders as of 01 October, 2008. Although it is not clear, it is believed that the decision to lift the restriction is taken after the impugned content is removed as was witnessed in the cases of Google Groups (March 2008), Eğitim Sen (September 2008), and the daily newspaper Vatan (October 2008).

One reason for that stems from the Law. According to article 8(6) of Law No. 5651 if the Presidency can establish the identities of those who are responsible for the content subject to the blocking orders the Presidency would request the Chief Public Prosecutor’s Office to prosecute the perpetrators. It follows then, if the identities of those who are responsible for the

<sup>307</sup> *Salabiauku v. France*, Series A. no. 141-A, 07.10.1988, para. 28.

<sup>308</sup> *Telfner v. Austria*, App. no. 33501/96, 20.3.2001, para. 18.

<sup>309</sup> Bahri Öztürk- Mustafa Ruhan Erdem (2007), Uygulamalı Ceza Muhakemesi Hukuku, (Ankara: Seçkin) s. 530.

<sup>310</sup> Y.4. HD.,E. 1975/3743,K. 1975/7667,T. 16.6.1975.

content cannot be identified no prosecution shall be pursued and precautionary measure, which must be provisional, will become permanent.

However, there are more serious problems associated with the application of the Law with regards to blocking orders which rely on the Civil Code. In such blocking cases, it is not known whether a legal action has been taken, whether personal rights have been found to be breached at the end of trial, or whether the parties have appealed against the judgment of first instance court. However, as noted above the party who applies for the precautionary measure should bring a case in 10 days starting from the notification of the measure. Courts should make it clear in their decisions that the blocking order issued as a precautionary measure is provisional in nature. Blocking orders involving such as that of Richard Dawkins' website (September 2008) show that such websites can be blocked indefinitely despite no subsequent legal action taken by the individuals who asked for the precautionary measure. In any case, as was mentioned previously in this book, the courts should follow the procedure set out by article 9 of Law No. 5651 with regards to personal rights claims such as defamation and the Civil Code provisions should not be relied upon for issuing blocking orders as "blocking" is not a remedy provided by article 9.

Similarly, under Law No. 5651 if a prosecution fails and a not guilty verdict is returned, the blocking order issued by the court would be removed (See article 8(7-9)). So far, we have not come across a single application of these provisions. In practice, banning ordered by the Court of Peace becomes final, as no criminal prosecution takes place subsequently.

## **Transparency and Reasoned Decisions**

Apart from the state prosecutors, judges, the courts, and the TIB no one exactly knows why a "blocking order" has been issued in Turkey. With regards to administrative blocking orders issued by the TIB, no one apart from the Presidency knows why the blocking orders are issued. Furthermore, the limited number of decisions seen by the authors have showed that decisions rendered by the Courts do not discuss the allegations in detail, nor the constitutional principles to strike a balance between pressing social need and fundamental freedoms. For instance, a decision only states that the court accepts the request of the public prosecutor to block access to "the video named 'X' published on the website <www.youtube.com> pursuant to article 8(5) of Law No. 5651", while in another decision it was declared that as a consequence of the inspection of the documents submitted, the court decided to accept the demand and to issue a blocking order with regards to the named website.

Therefore, reasoned decisions seem to be rare and exceptional. However, this is against the principle of reasoned decision, which is protected under article 141(3) of the Constitution which states that:

"The decisions of all courts shall be made in writing with a statement of justification."

As the Constitution does not differ between final decisions and precautionary measures, all Law No. 5651 decisions fail to satisfy this important constitutional requirement. The Strasbourg organs have long held that where a convicted person has the possibility of an appeal, the lower court must state in detail the reasons for its decision, so that on appeal from that decision the accused's rights may be properly safeguarded".<sup>311</sup> The Strasbourg Court is clear that an authority is obliged to justify its activities by giving reasons for its decisions. It is

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<sup>311</sup> Clare Ovey & Robin C. A. White, *The European Convention on Human Rights*, (Oxford: OUP), 2006, p. 179.

only by giving a reasoned decision that there can be public scrutiny of the administration of justice.<sup>312</sup>

Law No. 5651's system based on secrecy often raises suspicion. Although it is undesirable to publish the exact location of the allegedly illegal content (web address or URL), the notices published on the blocked pages should lay down the reasons for blocking. The public has a right to know, and transparency would lead into a better understanding of why a blocking order has been issued. Transparency would also make it possible to challenge decisions taken by public prosecutors, the courts, and by the TIB.

## **Administrative blocking orders issued by TIB**

Our observations about procedural problems so far apply both to court and administrative blocking decisions. However, powers of the TIB under Law No. 5651 double the concerns. As explained in chapter one, the law through article 8(4) enables the Telecommunications Communication Presidency to issue "administrative blocking orders" ex-officio. These orders can be issued by the Presidency with regards to the crimes listed in article 8(1) when the content and hosting providers are situated outside the Turkish jurisdiction. The Presidency can also issue administrative blocking orders with regards to content and hosting companies based in Turkey if the content in question involves sexual exploitation and abuse of children, and obscenity. Under the Turkish Constitution, decisions to interfere with the freedom of communication and right to privacy can only be given by the judiciary.<sup>313</sup> This embodies one of the leading principles of fundamental rights system of the Turkish Constitution. The possibility to appeal to the administrative courts does not rectify this deficiency. So far, our research has not revealed a single appeal case concerning an administrative blocking order issued by the TIB at the administrative courts level.

The TIB is also charged to determine the minimum criteria for filtering programs and the procedure that will be followed by Internet cafes to install filtering programs.<sup>314</sup> According Regulations 2, all the mass use providers are required to use one of the filtering programs approved by the Presidency.<sup>315</sup> Approved programs are published at the TIB's website.<sup>316</sup> However, criteria for the approval are not known nor publicly made available. It is also not clear whether the approved programs filter websites other than the ones blocked by the Courts and the TIB. Since the procedure is not transparent and open to abuse, the TIB's approval system is unacceptable and could lead into systematic censorship of certain websites which are not ordered to be blocked by the courts or by the Presidency itself.

Two associations, namely, the All Internet Association ("TID") and the Turkish Informatics Association ("TBD") have brought cases to the Council of State, to annul all the Regulations based on Law No. 5651 claiming that powers given to the TIB are unconstitutional.<sup>317</sup> Since

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<sup>312</sup> *Suominen v. Finland*, App. no. 37801/97, 1.7.2003, paras. 36-37.

<sup>313</sup> Article 22(3), as to the right to communication states "Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime commitment, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorised by law in cases where delay is prejudicial, again on the above-mentioned grounds, communication shall not be impeded nor its secrecy be violated. The decision of the authorised agency shall be submitted for the approval of the judge having jurisdiction within 24 hours."

<sup>314</sup> See Law No. 5651, article 10 (4)(ç) and (e).

<sup>315</sup> Regulations 2, article 5(1)(c).

<sup>316</sup> See <[http://www.tib.gov.tr/onayli\\_filtreleme\\_yazilimlari.html](http://www.tib.gov.tr/onayli_filtreleme_yazilimlari.html)>.

<sup>317</sup> Turk.internet.com, "TİD ; 5651 ile İlk Defa Anayasal Bir Özgürlik olan 'Haberleşme Özgürlüğü' Bir İdari Birimin Kararına Bıraklıyor – 2", at <<http://turk.internet.com/haber/yazigoster.php3?yaziid=21811>>.

constitutional complaint is not recognised under the Turkish Constitution, the two associations could not assert the unconstitutionality of the Law No. 5651 before the Constitutional Court. However, the two associations have a right to claim the annulment of the Regulations before administrative courts. In such a case, the claimant can also demand from the Court to send the constitutionality claims to the Constitutional Court for review. In its application the TID relied upon article 22 of the Constitution, which provides for freedom of communication. Pursuant to this provision, unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorised by law in cases where delay is prejudicial, based on the above-mentioned grounds, communication shall not be impeded nor its secrecy be violated. The TID has claimed that the Regulations and Law No. 5651 breach this provision by giving the TIB the authority to block access to websites without a court order through the process of issuing administrative blocking orders.<sup>318</sup>

The formation of the TIB with regards to Law No. 5651 suffers from the same drawbacks associated with Internet hotlines to report illegal content in other countries. Hotlines may not always be in a position to judge the suitability or illegality of Internet content, and they are in fact often criticised as serious concerns remain about the policing role that such organizations inevitably play. Same can be said about a public administrative authority such as the TIB which assumes such a policing role and given by law the power to issue administrative blocking orders. Many experts maintain that decisions involving illegality should be decided only by courts of law rather than hotline operators, Internet boards, or by public authorities such as the TIB as these type of organisations lack judicial authority. It has been argued that an administrative decision making process would “violate due process concepts that are also enshrined in international, regional, and national guarantees around the world”<sup>319</sup> While it may be tempting to identify and attempt to block access to content devoted to illegality on the Internet, such measures could set dangerous precedents if hotlines or public authorities assume the role of the courts.

### **Compensation of Damages as a Result of Blocking Decision**

Law No. 5651 is silent about the issue of damages which could arise from the misapplication of the law. It is obvious that blocking decisions might cause substantial financial results. Compensation arising from precautionary measures is prescribed under article 141 of the Criminal Procedure Act. However, article 141 exhaustively lists measures about which compensation can be ordered. Since blocking decisions are not amongst those measures, this provision cannot apply to Law No. 5651. It has been suggested that a claim through full compensation action can be brought to administrative courts.<sup>320</sup> Although, the authors also believe that full compensation way should also be open for precautionary measures rendered by judiciary, jurisprudence of the Turkish Council of State illustrates that administrative courts reject claims made against court decisions.<sup>321</sup>

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<sup>318</sup> *Ibid.*

<sup>319</sup> American Civil Liberties Union, Press Release, “ACLU Joins International Protest Against Global Internet Censorship Plans,” 9 September ,1999, at <<http://www.aclu.org/news/1999/n090999a.html>>.

<sup>320</sup> İlker Atamer, “5651 Sayılı Kanun Çerçevesinde Erişim Engellemeye Kararları”, at <<http://turk.internet.com/haber/yazigoster.php3?yaziid=20078>>.

<sup>321</sup> For more information see Kerem Altıparmak, “Büyük Biraderin Gözetiminden Çıkış: Telefonların İzlenmesinde Devletin Sorumluluğu”, (2006) 63 *Türkiye Barolar Birliği Dergisi*, Mart-Nisan, p. 29-66.

It is considered that in order to overcome this problem, an effective domestic remedy against judicial decisions breaching civil liberties should be established. The ECtHR, since *Kudla v. Poland*,<sup>322</sup> decided that violation of article 6 of the ECHR might require the State to provide effective remedy whereby individuals can obtain relief. Doubtless, a website loosing all of its readers or business because of a wrong ordered measure should have a right to claim damages.

## **Retention of Traffic Data and Implications for Privacy**

A final point should be made with regards to the retention of traffic data provisions of Law No. 5651 and its implications for privacy of communications. As mentioned in chapter one, the access providers are required under article 6(1)(b) of Law No. 5651 to retain all communications (traffic) data for a period of six months minimum and two years maximum from the date of the communication. More specifically, Regulations 3 require the traffic data to be retained for a year.<sup>323</sup> This procedural provision with major implications for privacy of communications in Turkey was not discussed at all during the Parliamentary debates, nor during the preparatory stages of the Bill. We are therefore concerned that such a provision was added to the Law No. 5651 without prior discussion. Currently, in the absence of a specific Data Protection law in Turkey the risk of intrusions into privacy of communications are even higher. Despite strong opposition, the EU through the Data Retention Directive<sup>324</sup> have similar provisions in place. However, the EU provisions are subject to certain conditions based on data protection, and article 8, ECHR privacy principles, as well as subject to the necessity and proportionality requirements of the ECtHR. Moreover, Member States of the EU shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. Hence the Law No. 5651 approach is rather simplistic and introduces the data retention provisions to Turkish law without any safeguards or oversight mechanism. Without a trusted, effective and open regime for oversight, there is concern that mass surveillance (or arbitrary surveillance) of the population will take place unchallenged. Furthermore, the ECtHR established that the indiscriminate storing of information relating to the private lives of individuals in terms of pursuing a legitimate Convention concern is evidently problematic.<sup>325</sup> Member States of both the EU and CoE do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.<sup>326</sup> Undoubtedly, Law No. 5651 data retention provisions need to be revisited.

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<sup>322</sup> *Kudla v. Poland* [GC], App. no. 30210/96, ECHR 2000-XI.

<sup>323</sup> Article 8 (b).

<sup>324</sup> The Directive is available at <<http://register.consilium.eu.int/pdf/en/05/st03/st03677.en05.pdf>>.

<sup>325</sup> *Rotaru v Romania*, App. No. 28341/95, judgment of 4 May, 2000

<sup>326</sup> *Klass v. Federal Republic of Germany*, App. No. 5029/71 judgment of 18 November ,1977, Series A No 28.

## CHAPTER 3: International Developments

The third chapter of this book will provide an overview of pan-European developments so far as they relate to Turkey. Therefore, this chapter refers to developments within the European Union, and Council of Europe with regards to Internet content regulation.

It has been the intention of the Turkish government to align its strategies and regulatory system with the EU following its recognition as a candidate country to EU membership in December 1999. The current regulatory differences that are the result of the membership/non membership to the European Union may be less significant the closer Turkey gets to the European Union. An eventual membership to the EU will force Turkey or any other EU candidate state to align its policies including those related to the Internet to EU policy. Furthermore, there will inevitably be future aligning of policies with the international organisations of which Turkey is a member such as the Council of Europe. An important policy development at the Council of Europe level has been provided with the drafting of the Cybercrime Convention in 2001, and the Additional Protocol to the Cybercrime Convention concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems in 2003. The development of such policies on the international stage will undoubtedly have an impact upon shaping the member states' policies at the national level as well as bridging the gap between different states through pan-European harmonisation.

However, harmonisation efforts to combat illegal Internet content, even for universally condemned content such as child pornography, have been protracted and are ongoing.<sup>327</sup> Efforts to harmonise laws to combat racist content on the Internet have proved to be even more problematic.<sup>328</sup> Despite significant efforts to combat the problem of racist content on the Internet at the European Union, Council of Europe, OSCE, and the United Nations levels there has not been any debate or policy initiatives to address this problem in Turkey. Although the media raised concern about the availability of such content on the Internet during the Hrant Dink murder coverage,<sup>329</sup> the Parliament so far ignored this issue. The availability of glorification of violence and terrorist propaganda on the Internet, and content which may encourage<sup>330</sup> terrorist activities such as bomb-making instructions also triggered policy action at the international level, and new laws are being developed to combat the availability of such content on the Internet. Therefore, Turkey is not alone in terms of reacting to the availability and dissemination of certain types of content through the Internet. The subsequent sub-headings will assess the significant developments at the pan-European level.

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<sup>327</sup> Rights of the Child: Report submitted by Mr. Juan Miguel Petit, Special Rapporteur on the sale of children, child prostitution and child pornography, E/CN.4/2005/78, 23 December, 2004. Note also the Addendum to this report: E/CN.4/2005/78/Add.3, 8 March, 2005. Note further Akdeniz, Y., *Internet Child Pornography and the Law: National and International Responses*, 2008, Ashgate.

<sup>328</sup> Akdeniz, Y., "Governing Racist Content on the Internet: National and International Responses," (2007) *University of New Brunswick Law Journal* (Canada), Vol. 56, Spring, 103-161.

<sup>329</sup> The İstanbul Public Prosecutor launched an investigation against Turkish singer İsmail Türüt and song writer Ozan Arif for glorifying those who had killed Hrant Dink in a video clip aired in YouTube. Human Rights NGOs İHD and Mazlum-Der also applied to the Public Prosecutor. Presidents of İzmir and Erzurum Bar Associations supported Türüt and Arif. See "İzmir Baro Başkanı'dan sonra Erzurum Baro Başkanı da suçu övdü: Bu ülkede Oğün'ler, Yasin'ler bitmez", available at <<http://www.nethaber.com/Toplum/38495/Izmir-Baro-Baskanindan-sonra-Erzurum-Baro-Baskani>>. There have been other similar but less known cases. See for instance: "Bir suikast klifi de üniversitelilerden!", *Milliyet*, 16 Eylül 2007, at <[www.milliyet.com.tr/2007/09/16/son/sontur13.asp](http://www.milliyet.com.tr/2007/09/16/son/sontur13.asp)>.

<sup>330</sup> Publications such as *Mujahideen Explosive Handbook* and the *Encyclopaedia of the Afghan Jihad* are examples of some of the publications disseminated and distributed through the Internet.

## **European Union perspectives on content regulation**

In addition to being concerned with telecommunications liberalization, the creation of a European Information Society,<sup>331</sup> the development of electronic commerce; and data protection and privacy, the EU is also committed to steering co-operation in fighting crime within the Member States in relation to the exploitation of women, the sexual exploitation of children, racism and xenophobia, terrorism, and high-tech crime.<sup>332</sup>

Content related problems have been largely identified and categorised as illegal and harmful content by the European Commission ever since 1996. The European Commission in its October 1996 communication on *Illegal and Harmful Content on the Internet* stated that:

“These different categories of content pose radically different issues of principle, and call for very different legal and technological responses. It would be dangerous to amalgamate separate issues such as children accessing pornographic content for adults, and adults accessing pornography about children”<sup>333</sup>

Following these concerns, the European Commission developed an Action Plan for a safer use of the Internet in 1998,<sup>334</sup> and suggested that “harmful content needs to be treated differently from illegal content”, but these categories have never been clearly defined by the Commission in its Action Plan or by regulators elsewhere.

### **Illegal Content**

#### **Is Blocking a Potential Option for Combating Illegal Content at the EU level?**

With regards to illegal Internet activity, the EU developed a separate policy on combating child pornography through a Council Framework decision,<sup>335</sup> and addressed the conduct related criminal activity through the Council Framework Decision on Attacks against Information Systems.<sup>336</sup> The EU addressed the liability of Internet Service Providers with regards to carrying or providing access to illegal content through its E-Commerce Directive.<sup>337</sup> Furthermore, the EU started work on a draft Framework Decision on combating racism and xenophobia designed to ensure that racism and xenophobia are punishable in all member states by effective, proportionate and dissuasive criminal penalties. The draft Framework Decision

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<sup>331</sup> See EC, eEurope- An Information Society for all - Progress report for the Special European Council on Employment, Economic reforms and social cohesion towards a Europe based on innovation and knowledge (March 2000); EC, eEurope 2002 - An Information society for all - Draft Action Plan (June 2000); EC - The eEurope 2002 update (December 2000); EC - eEurope 2002: Impact and Priorities A communication to the Spring European Council in Stockholm (March 2001); and EC, Opinion of the Economic and Social Committee on ‘eEurope 2002 - An information society for all - Draft Action Plan’ [2001] O.J. C 123/36.

<sup>332</sup> At its Tampere meeting in October 1999, the Council of the European Union stated that the fight against cybercrime is a priority in developing the Union as an area of freedom, security and justice (article 2 of the EU Treaty); see EC, *Presidency Conclusions* (October 1999) at para. 48, at <[http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)>. See further EC, *Joint Action 97/154/JHA concerning action to combat trafficking in human beings and sexual exploitation of children* [1997] O.J. L 63/2.

<sup>333</sup> European Commission Communication on Illegal and Harmful Content on the Internet (1996), p, 10.

<sup>334</sup> Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, December 1998.

<sup>335</sup> Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (see OJ L 013 20.01.2004, p. 0044-0048), at <<http://register.consilium.europa.eu/pdf/en/03/st10/st10748en03.pdf>>.

<sup>336</sup> Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, at <[http://eur-lex.europa.eu/LexUriServ/site/en/05/1\\_069/1\\_06920050316en00670071.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/05/1_069/1_06920050316en00670071.pdf)>.

<sup>337</sup> This issue will be discussed later in the book.

deals with such crimes as incitement to hatred and violence<sup>338</sup> and publicly condoning, denying or grossly trivializing crimes of genocide,<sup>339</sup> crimes against humanity and war crimes.<sup>340</sup> The crimes covered within the draft Framework Decision will also apply to the Internet when finalized. Finally, the European Union's May 2006 revised Action Plan on Terrorism<sup>341</sup> includes the development of policies and measures to detect misuse of the Internet by extremist websites, and to enhance co-operation of States against terrorist use of the Internet. This initiative involves the development of a new strategy for combating radicalisation as it is believed that increasingly more terrorist propaganda and information which could be useful for terrorist use will be produced and distributed over the Internet.<sup>342</sup> Within this context the EU considered "adopting legal measures obliging Internet service providers to remove or disable access to the dissemination of terrorist propaganda they host"<sup>343</sup> but this policy option has been ruled out during the Impact Assessment work done by the European Commission with regards to the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism.<sup>344</sup> The Commission also ruled out "encouraging blocking through the industry's self-regulation or through agreements with industry, without the previous adoption of legal measures outlawing the dissemination of terrorist propaganda and terrorist expertise."<sup>345</sup>

The European Commission cited "the issue of the speedy re-appearance of websites that have been closed down" as the main reason for not recommending a blocking policy. The Commission argued that blocking policies are ineffective as in most cases blocked websites reappear under another name outside the jurisdiction of the European Union in order to avoid the eventuality of being closed down or blocked once more.<sup>346</sup> The Commission also acknowledged that existing methods of filtering can be circumvented,<sup>347</sup> and they are designed specifically for websites and are not capable of blocking the distribution of objectionable content through other Internet services such as P2P networks. The Commission within this context concluded that "the removal or disablement of access to terrorist propaganda or terrorist expertise by Internet service providers hosting such information, without the possibility to open an investigation and prosecute the one responsible behind such content, appears inefficient."<sup>348</sup> The Commission reached the conclusion that the dissemination of such content would only be hindered rather than eliminated.<sup>349</sup> The Commission expressed that

<sup>338</sup> See subsections 1(a) and 1(b) of article 1 entitled *Offences concerning racism and xenophobia* of the Draft Framework Decision: Council of the European Union, Proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, Document No: 11522/07, 19 July, 2007.

<sup>339</sup> *Ibid.*, section 1(c).

<sup>340</sup> *Ibid.*, section 1(d).

<sup>341</sup> Council of the European Union, *Revised Action Plan on Terrorism*, 10043/06, Brussels, 31 May, 2006.

<sup>342</sup> Note the Communication from the European Commission to the European Parliament and the Council concerning Terrorist recruitment: addressing the factors contributing to violent radicalisation, Brussels, 21.9.2005, COM(2005) 313 final.

<sup>343</sup> European Commission Staff Working Document, Accompanying document to the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism: Impact Assessment, 14960/07 ADD1, Brussels, 13 November, 2007, para 4.2, pp 29-30.

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> See *ibid.* See further Communication from the Commission to the European Parliament, the Council and the Committee of the Regions "Towards a general policy on the fight against cyber crime" of 22 May, 2007 - COM(2007) 267.

<sup>347</sup> *Ibid.*, p 41.

<sup>348</sup> *Ibid.*

<sup>349</sup> See further *Ibid.*, section 5.2, pp 41-42.

“the adoption of blocking measures necessarily implies a restriction of human rights, in particular the freedom of expression and therefore, it can only be imposed by law, subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, excluding any form of arbitrariness or discriminatory or racist treatment.”<sup>350</sup>

The Commission also expressed concern with regards to the cost of implementing blocking and filtering systems by ISPs and concluded that the implementation of such a system would have direct economic impact not only on ISPs but also on consumers.<sup>351</sup> Therefore, unlike the Turkish approach, blocking access to websites is not a common policy adopted in Europe, and there are no EU policies encouraging blocking access to websites.<sup>352</sup>

While a general monitoring obligation cannot be imposed upon ISPs this does not stop states issuing “blocking orders”. During 2002, North Rhine Westphalia, Germany’s most populous state, issued a blocking-order to prevent German-based ISPs from providing access to Web sites based outside Germany (mainly in the US) if those sites host racist and neo-Nazi content.<sup>353</sup> The blocking-order affected approximately 76 ISPs within that region.<sup>354</sup> Although there have been legal cases and appeals surrounding the blocking-orders, a number of administrative courts have ruled that German authorities can continue to ask ISPs to block such websites. Prior to the issuing of the blocking-order, the Dusseldorf District Authority President Jurgen Bussow wrote to four US ISPs in August 2000 requesting that they prevent access to four websites containing racist neo-Nazi material. As this action was unsuccessful Bussow issued the blocking-order to German ISPs within the North Rhine Westphalia region.<sup>355</sup> Between 2002 and 2004 the Duesseldorf District Administration issued 90 ordinances against Internet providers in North Rhine—Westphalia, forcing them to block access to certain websites with rightwing extremist content. More recent statistics are not available but the German authorities continue to issue blocking orders, however as highlighted above, the effectiveness of such orders is questioned by the European Commission.

Furthermore, the German authorities through the Jugendschutz.net hotline monitor the extent of the criminal Internet activity with regards to propaganda crimes (section 86, German Criminal Code). Jugendschutz.Net’s activities resulted in action against 184 illegal extreme right-wing websites in 2003.<sup>356</sup> In 154 instances, websites were blocked by German ISPs or

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<sup>350</sup> *Ibid.*, p 29.

<sup>351</sup> *Ibid*, p 42-45.

<sup>352</sup> The Commission, however, proposed to criminalize the public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism by amending the Framework Decision on combating terrorism. It is expected that the amendments will take place during 2008. See Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, 2007/0236 (CNS), COM(2007) 650 final, Brussels, 6 November, 2007, at <[http://ec.europa.eu/commission\\_barroso/frattini/archive/COM\(2007\)650%20EN.pdf](http://ec.europa.eu/commission_barroso/frattini/archive/COM(2007)650%20EN.pdf)>.

<sup>353</sup> National Journal’s Technology Daily, “Ban On Neo-Nazi Web Content In German State; Upheld,” 22 December, 2004.

<sup>354</sup> See US Bureau of Democracy, Human Rights, and Labor, *Report on Global Anti-Semitism*, January 2005, at <<http://www.state.gov/g/drl/rls/40258.htm>>. Note also Combating racism, racial discrimination, xenophobia and related intolerance and comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action Note by the UN Secretary-General, A/59/330, 4 October, 2004.

<sup>355</sup> See generally Eberwine, E.T., “Note & Comment: Sound and Fury Signifying Nothing?: Jurgen Bussow’s Battle Against Hate-speech on the Internet,” (2004) 49 *N.Y.L. Sch. L. Rev.* 353; and Van Blarcum, C.D., “Internet Hate Speech: The European Framework and the Emerging American Haven,” (2005) 62 *Wash & Lee L. Rev.* 781.

<sup>356</sup> Jugendschutz.Net, *Annual Report 2003: Right-Wing Extremism on the Internet*, at <<http://www.inach.net/content/annual-report-jugendschutznet-2003.pdf>>.

relevant parts removed from the Internet in cases where they were hosted within Germany, and 107 of these were considered to be illegal websites based in Germany, while 47 were based in foreign servers.<sup>357</sup> During 2004, the hotline asked German hosting companies and service providers to block access or remove 131 further websites.<sup>358</sup> During 2007 Jugendschutz.net contacted service and content providers 252 times and was successful in the closure of websites and take down of content in 232 occasions.<sup>359</sup>

## **Notice Based Liability System**

So far as hosting companies and access providers are concerned the EU adopted a notice based liability system through the European Union Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”).<sup>360</sup> The Directive suggested that “it is in the interest of all parties involved in the provision of information society services to adopt and implement procedures,”<sup>361</sup> to remove and disable access to illegal information. As far as hosting issues by ISPs or information society service providers are concerned, article 14(1) of the E-Commerce Directive requires Member States to “ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”

Therefore, there is no absolute protection provided within the Directive for ISPs and the ISPs are required to act expeditiously “upon obtaining actual knowledge” of illegal activity or content “to remove or to disable access to the information concerned.”<sup>362</sup> Such removal or disabling of access “has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level”<sup>363</sup> according to the Directive. Termination or prevention of an infringement is also possible by a court or administrative authority order. Article 14(3) also states that the provisions of article 14 do not “affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.” It was decided that the notice and take down procedures would not be regulated in the Directive itself.<sup>364</sup> Rather, the Directive, through Recital 40 and

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<sup>357</sup> See further Jugendschutz.Net, *Chart of illegal and blocked websites containing right-wing extremism 01.01.-31.12.2003*, 2003, at <<http://www.inach.net/content/jugendschutz figures 2003.pdf>>.

<sup>358</sup> Jugendschutz.Net, ‘Right-wing Extremism on the Internet’ - successful strategies against Online-Hate, 2004 Annual Report, at <<http://www.inach.net/content/jgs-annual-report2004.pdf>>.

<sup>359</sup> Jugendschutz.net Annual Report 2007, *Right-wing extremism on the Internet*, 15 June, 2008.

<sup>360</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal of the European Communities, v. 43, OJ L 178 17 July, 2000 p.1. Note also Common Position (EC) No 22/2000 of 28 February 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive on electronic commerce, Official Journal C 128 , 08/05/2000 p. 0032 – 0050.

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*, para. 46.

<sup>363</sup> *Ibid.*

<sup>364</sup> See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – "First report on the application of Directive 2000/31/EC on electronic commerce), COM(2003) 702 final, Brussels, 21 November, 2003, at <[http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003\\_0702en01.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0702en01.pdf)>, section 4.7.

article 16, encourages self-regulatory solutions and procedures to be developed by the Internet industry to implement and bring into action notice and takedown procedures.<sup>365</sup>

In addition to the notice based limited liability exceptions, the Directive prevents member states from imposing a monitoring obligation on service providers only with respect to obligations of a general nature but “this does not concern monitoring obligations in a specific case, and in particular, does not affect orders by national authorities in accordance with national legislation.”<sup>366</sup> Under article 15, the Directive specifically requires Member States not to “impose a general obligation on providers, when providing the services covered by articles 12, 13 and 14, to monitor the information which they transmit or store, nor impose a general obligation actively to seek facts or circumstances indicating illegal activity.” However, Member States “may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request.”<sup>367</sup>

Overall, the E-Commerce Directive provides limited and notice based liability with take down procedures for illegal content and requires member states and the Commission to encourage the development of codes of conduct.<sup>368</sup>

## Harmful Content

With regards to harmful Internet content, the EU Action Plan on safer use of the Internet encourages self-regulatory initiatives to deal with illegal and harmful Internet content including the creation of a European network of hotlines for Internet users to report illegal content such as child pornography; the development of self-regulatory and content-monitoring schemes by access and content providers; and the development of internationally compatible and interoperable rating and filtering schemes to protect users. Furthermore, the EU Action Plan advocates measures to increase awareness among parents, teachers, children and other consumers of available options to help these groups use the networks safely by choosing the right control tools. Although originally established as a three year Action Plan, in 2002<sup>369</sup> the European Commission prolonged the work in this field for another two years, expanding the Action Plan related work and projects to cover the EU candidate countries.<sup>370</sup> One of the main reasons for this expansion was the fact that illegal and harmful content on the Internet remained as a continuing concern for lawmakers, the private sector, and parents. The coverage of the Action Plan was extended to new online technologies:

including mobile and broadband content, online games, peer-to-peer file transfer, and all forms of real-time communications such as chat rooms and instant messages. Action will

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<sup>365</sup> Out of those Member States which have transposed the Directive, only Finland has included a legal provision setting out a notice and take down procedure concerning copyright infringements only: This information has been taken from the above mentioned Commission Report: COM(2003) 702 final.

<sup>366</sup> *Ibid.* para. 47.

<sup>367</sup> Article 14(2)

<sup>368</sup> *Ibid.* para. 49.

<sup>369</sup> See EC, Follow-up to the Multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks: Proposal for a decision of the European Parliament and of the Council amending Decision No 276/1999/EC adopting a Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, COM (2002) 152, Brussels.

<sup>370</sup> *Ibid.* at para. 3.1.2. (Interface to candidate countries).

be taken to ensure that a broader range of areas of illegal and harmful content and conduct of concern are covered, including racism and violence.<sup>371</sup>

In May 2005, the EU extended the Action Plan work for the period of 2005-2008 to continue to promote safer use of the Internet and new online technologies, by strengthening the fight against illegal content such as child pornography and racist material, content that is potentially harmful to children and content unwanted by the end-user. It is suggested by the extended Safer Internet Plus Action Plan that:

practical measures are still needed to encourage reporting of illegal content to those in a position to deal with it, to encourage assessment of the performance of filter technologies and the benchmarking of those technologies, to spread best practice for codes of conduct embodying generally agreed canons of behaviour, and to inform and educate parents and children on the best way to benefit from the potential of new online technologies in a safe way.<sup>372</sup>

The four year program have a budget of EUR 45 million and it focuses more closely on end-users; namely parents, educators and children. The indicated budget breakdown suggests that almost half of the available budget will be spent on raising awareness (47-51%). Fighting against illegal content will receive 25-30%, tackling unwanted and harmful content 10-17%, and promoting a safer environment 8-12% of the budget.<sup>373</sup> In October 2008, the European Commission's Safer Internet programme was extended for the 2009-2013 period with an aim to improve safety for children surfing the Internet, promote public awareness, and create national centres for reporting illegal online content with a EUR 55million budget.<sup>374</sup>

Despite these significant policy initiatives with regards to harmful Internet content, developing common approaches remains problematic in the face of cultural, moral and legal diversity at the EU level, which has been shaped by historical, political and social experiences of wartime conflict. The individual EU member states are in a much better position to decide how best to protect minors within their own society based upon the values, morality and religion to which that particular society subscribes to. If there is a "pressing social need"<sup>375</sup> to protect minors from harmful content, it should fall to the national authorities to make the initial assessment of whether that protection is best achieved through state regulation or if other non regulatory alternatives should be considered. The advisory role of the EU through the Safer Use of the Internet programme with regards to non-regulatory solutions is therefore significantly important. With regards to content based restrictions, the state response should be proportionate and compatible with article 10 of the European Convention on Human Rights

<sup>371</sup> See *Safer Internet Action Plan: Work Programme 2003-2004* at 3, online: EC <[http://ec.europa.eu/information\\_society/activities/sip/docs/pdf/programmes/workprgm/work\\_programme\\_2003\\_04\\_en.pdf](http://ec.europa.eu/information_society/activities/sip/docs/pdf/programmes/workprgm/work_programme_2003_04_en.pdf)>.

<sup>372</sup> EC, Decision No 854/2005/EC of the European Parliament and of the Council establishing a Multiannual Community Programme on promoting safer use of the internet and new online technologies, [2005] O.J. L 149/1 at para. 7, online: EC <[http://ec.europa.eu/information\\_society/activities/sip/docs/prog\\_decision\\_2005/sip\\_decision\\_2005\\_en.pdf](http://ec.europa.eu/information_society/activities/sip/docs/prog_decision_2005/sip_decision_2005_en.pdf)>.

<sup>373</sup> See also in this context the EU Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, currently under consideration by the European Parliament.

<sup>374</sup> European Parliament legislative resolution of 22 October, 2008 on the proposal for a decision of the European Parliament and of the Council establishing a multiannual Community programme on protecting children using the Internet and other communication technologies (COM(2008)0106 – C6-0092/2008 – 2008/0047(COD)).

<sup>375</sup> See especially *Handyside v. United Kingdom*, Series A no. 24, 12.7.1976.

and the jurisprudence of the European Court of Human Rights. However, the member states' margin of appreciation in assessing whether such a need exists goes hand in hand with European supervision through the European Court of Human Rights. The European Court is therefore empowered to give the final ruling on whether a "restriction" based on a "pressing social need" is reconcilable with freedom of expression as protected by article 10.<sup>376</sup>

## Council of Europe perspectives on content regulation

### Scope of Regulation

The CoE's Cybercrime Convention 2001<sup>377</sup> is the first international treaty to address criminal law and procedural aspects of various types of offensive behaviour directed against computer systems, networks or data in addition to content related crimes such as child pornography. In general, the Convention aims to harmonise national legislation in this field, facilitate investigations, and allow efficient levels of co-operation between the authorities of different Member States of the CoE and other third party states who would be party to the Convention following a ratification process at the national level.

Following the first five ratifications, the Cybercrime Convention came into force on July 1, 2004. The signing and ratification process for the Cybercrime Convention resulted with 39 Member States (plus the external supporters United States, Canada, South Africa, and Japan and Montenegro) signing and 23 countries (Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Hungary, Iceland, Italy, Latvia, Lithuania, Netherlands, Norway, Romania, Slovakia, Slovenia, Ukraine, United States of America,<sup>378</sup> and the former Yugoslav Republic of Macedonia) ratifying the Convention as of November 2008 out of the potential 50 countries (45 CoE Member States plus the above mentioned external supporters).<sup>379</sup>

At the same time since the finalisation of the Cybercrime Convention the CoE also developed the first additional protocol to the Cybercrime Convention on the criminalisation of acts of a racist or xenophobic nature committed through computer systems (ETS No. 189). 32 Member States (including the external supporters Canada, and South Africa) have signed the Additional Protocol (AP) since it was opened to signature in January 2003, only 13 Member States (Albania, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, France,<sup>380</sup> Latvia, Lithuania, Norway, Slovenia, Ukraine, and the former Yugoslav Republic of Macedonia) have ratified the Additional Protocol as of November 2008. Following the initial five ratifications the Additional Protocol came into force on 1 March, 2006.

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<sup>376</sup> See Chapter 2 for details.

<sup>377</sup> The text of the CyberCrime Convention can be found at <<http://conventions.coe.int/treaty/en/projects/cybercrime.htm>>.

<sup>378</sup> The US Senate approved the ratification of the CyberCrime Convention on 3 August, 2006. See CNet News, 5 August, 2006, at <[http://news.com.com/Senate+ratifies+controversial+cybercrime+treaty/2100-7348\\_3-6102354.html](http://news.com.com/Senate+ratifies+controversial+cybercrime+treaty/2100-7348_3-6102354.html)>.

<sup>379</sup> See generally See further Akdeniz, Y., *An Advocacy Handbook for the Non Governmental Organizations: The Council of Europe's Cyber-Crime Convention 2001 and the additional protocol on the criminalisation of acts of a racist or xenophobic nature committed through computer systems*, Cyber-Rights & Cyber-Liberties, 2003, (revised May 2008), at <[http://www.cyber-rights.org/cybercrime/coe\\_handbook\\_crcl.pdf](http://www.cyber-rights.org/cybercrime/coe_handbook_crcl.pdf)>.

<sup>380</sup> France ratified the Additional Protocol on 10 January, 2006, and the provisions came into force on 1 May, 2006.

This Additional Protocol entails an extension of the Cybercrime Convention's scope, including its substantive, procedural and international cooperation provisions, so as to cover offences of racist or xenophobic propaganda. Thus, apart from harmonising the substantive law elements of such behaviour, the Protocol aims at improving the ability of the State Parties to make use of the means and avenues of international cooperation set out in the Convention in this area. The Additional Protocol requires states to criminalise the dissemination of racist and xenophobic material through computer systems, as well as racist and xenophobic-motivated threat and insult including the denial, gross minimisation, approval or justification of genocide or crimes against humanity, particularly those that occurred during the period 1940-45. It also defines the notion of this category of material and establishes the extent to which its dissemination violates the rights of others and criminalises certain conduct accordingly.

Furthermore, the Council of Europe Convention on the Prevention of Terrorism (CETS 196) which came into force in June 2007 provides for a harmonized legal basis to fight the use of the Internet as a means for public provocation to commit terrorist offences,<sup>381</sup> recruitment for terrorism,<sup>382</sup> and training for terrorism<sup>383</sup> including through the Internet. Therefore, if signed and ratified by the member states, the distribution and publication of certain types of content deemed to be related to terrorist activity could be criminalized.

Turkey so far did not sign nor ratify the Cybercrime Convention and its Additional Protocol, signed but not ratified the Convention on the Prevention of Terrorism. The content specific crimes within the Cybercrime Convention and the Additional Protocol, namely, the offences related to child pornography (article 9), and the dissemination of racist and xenophobic material through computer systems (AP, article 3) do not involve any blocking provisions. Similarly the provisions of the Convention on the Prevention of Terrorism do not provide for blocking, and concentrate on the criminal activity of dissemination and publication. More recently, Turkey signed but not ratified yet the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No: 201). This CoE Convention which includes offences concerning child pornography (article 20) does not include any blocking measures in relation to such offences.

Access and hosting providers are also protected and it "is not sufficient, for example, for a service provider to be held criminally liable under this provision, that such a service provider served as a conduit for, or hosted a website or newsroom containing such material, without the required intent under domestic law in the particular case"<sup>384</sup> under the CoE provisions. Moreover, as provided within the EU E-Commerce Directive, a service provider is not required to monitor conduct to avoid criminal liability.

## **Blocking and Filtering Systems**

With regards to the deployment and use of blocking and filtering systems CoE Cybercrime Convention Committee (T-CY) recognized the legal difficulties which could arise when

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<sup>381</sup> Article 5 of the Council of Europe Convention on the prevention of terrorism (CETS 196).

<sup>382</sup> *Ibid.*, article 6.

<sup>383</sup> *Ibid.*, article 7.

<sup>384</sup> Council of Europe, Committee of Ministers, Explanatory Report of the Additional Protocol to the Convention on CyberCrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, (2002) at para. 25, at <<http://conventions.coe.int/Treaty/en/Reports/Html/189.htm>>.

attempting to block certain sites with illegal content.<sup>385</sup> More importantly, a CoE Committee of Ministers Recommendation, CM/Rec(2007)16 of November, 2007 called upon the member states to promote freedom of communication and creation on the Internet regardless of frontiers, in particular by not subjecting individuals to any licensing or other requirements having a similar effect, nor any general blocking or filtering measures by public authorities, or restrictions that go further than those applied to other means of content delivery.<sup>386</sup> More recently, the Committee of Ministers in Recommendation CM/Rec(2008)6 of March 2008<sup>387</sup> recalled the Declaration of the Committee of Ministers on freedom of communication on the Internet of 28 May, 2003,<sup>388</sup> which stressed that public authorities should not, through general blocking or filtering measures, deny access to the public information and other communication on the Internet regardless of frontiers.<sup>389</sup> The Committee of Ministers stated that “there is a tendency to block access to the population to content on certain foreign or domestic web sites for political reasons. This and similar practices of prior State control should be strongly condemned.” Equally, the 2003 Declaration emphasized that exceptions must be allowed for the protection of minors, and states can consider the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries, or Internet cafes within the Turkish context.

Furthermore, Recommendation CM/Rec(2008)6 of March 2008 stated that any intervention by member states that forbids access to specific Internet content may constitute a restriction on freedom of expression and access to information in the online environment and that such a restriction would have to fulfill the conditions in article 10(2) of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights. The Recommendation noted that the voluntary and responsible use of Internet filters (products, systems and measures to block or filter Internet content) can promote confidence and security on the Internet for users, in particular children and young people, while also noting that the use of such filters can impact on the right to freedom of expression and information as protected by article 10 of the ECHR.

The March 2008 Guidelines provided within Recommendation CM/Rec(2008)6<sup>390</sup> stated that the Internet users should have the possibility to challenge the blocking decisions or filtering of content and be able to seek clarifications and remedies.<sup>391</sup> The Guidelines called upon the member states to refrain from filtering Internet content in electronic communications networks operated by public actors for reasons other than those laid down in article 10(2) of the ECHR as interpreted by the European Court of Human Rights. The Guidelines, further, called upon the member states to guarantee that nationwide general blocking or filtering measures are only introduced by the states if the conditions of article 10(2) of the ECHR are fulfilled. According

<sup>385</sup> CoE Cybercrime Convention Committee (T-CY), 2nd Multilateral Consultation of the Parties, Strasbourg, 13 and 14 June, 2007, Strasbourg, 15 June, 2007, T-CY (2007) 03, para. 29.

<sup>386</sup> Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet: Adopted by the Committee of Ministers on 7 November, 2007 at the 1010<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>387</sup> Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters: Adopted by the Committee of Ministers on 26 March, 2008 at the 1022<sup>nd</sup> meeting of the Ministers’ Deputies.

<sup>388</sup> Freedom of communication on the Internet, Declaration adopted by the Council of Europe Committee of Ministers on 28 May, 2003 at the 840<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>389</sup> *Ibid*, Principle 3.

<sup>390</sup> Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters: Adopted by the Committee of Ministers on 26 March, 2008 at the 1022<sup>nd</sup> meeting of the Ministers’ Deputies.

<sup>391</sup> *Ibid*, Guideline I.

to the Guidelines such action by the state should only be taken if the filtering concerns specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body in accordance with the requirements of article 6 of the ECHR. The Guidelines also called upon the member states to ensure that all filters are assessed both before and during their implementation to ensure that the effects of the filtering are proportionate to the purpose of the restriction and thus necessary in a democratic society, in order to avoid unreasonable blocking of content. According to the Guidelines the universal and general blocking of offensive or harmful content for users who are not part of a specific vulnerable group (such as children) which a filter has been activated to protect should be avoided. Based on these principles the Turkish policy on blocking access to pornographic content with the intention of protecting children from accessing such content is incompatible with the March 2008 guidelines as the Turkish blocking orders and apply to children and adults indiscriminately.

## **Conclusion to Chapter III**

It is argued that the Turkish blocking policy adopted through Law No. 5651 is not compatible with the policies and guidelines adopted both at the European Union and at the Council of Europe levels. Although the criminalisation of certain types of content is encouraged through the policies of both organizations, as highlighted above neither the EU nor the CoE encourage blocking access to websites as a feasible solution to encounter criminal use of the Internet. In fact, serious concerns have been raised with regards to adopting such a blocking policy and explicitly dismissed by the European Union. Furthermore, the Council of Europe through the Cybercrime Convention and its Additional Protocol, as well as through the Convention on the Prevention of Terrorism did not adopt any policy which encourages or recommends blocking as a feasible way of combating illegal content disseminated through the Internet. However, blocking and filtering policies are discussed within certain declarations and recommendations issued by the CoE Committee of Ministers and it has been concluded that public authorities should not deploy general blocking or filtering measures to combat illegal content.

With regards to the availability of harmful content (which falls short of illegality) both organizations encourage self-regulatory measures for the protection of vulnerable groups such as children rather than offering legislative solutions. Within this context both organizations strongly emphasize the adoption of policies which do not result in adult citizens being prevented from accessing legal content which may be deemed inappropriate for children to access. Therefore, while member states should encourage the use of filtering software on home computers, in schools and in Internet cafes, the deployment of state level filtering systems should be avoided at all costs. Otherwise, there is a real danger that the use of filtering systems at state level may transform the Internet into a “family friendly” medium, no more adventurous than the likes of TRT.

## CHAPTER IV: Conclusion and Recommendations

In the final chapter of this book we will outline our final conclusions as well as make some recommendations.

### Rushed Law No. 5651 has No Broad Public Support

As we explained in chapter one, the Law No. 5651 was rushed through the Parliament just before the Parliament was dissolved for the 2007 general elections. Possible implications of the law were not discussed with the stakeholders. Universities and other expert bodies including bar associations, were not consulted either.

In time, increasing number of blocking decisions has triggered an organised opposition against the censorship atmosphere created by the law. A number of protest websites were set up subsequently including <[www.sansuresansur.org](http://www.sansuresansur.org)>, and <[www.dilekce.kampanya.org.tr](http://www.dilekce.kampanya.org.tr)>. Sansuresansur.org organized a campaign in which approximately 400 websites and blogs including the Turkish-English dictionary site, <[zargan.com](http://zargan.com)> blocked access to their homepages.



Figure 22: Self-censorship notice portrayed on the campaigning websites.

Users trying to access the campaigning websites were greeted by a message which stated that “The access to this site is denied by its own decision.” This was a reference to the official banning order message greeting those trying to access banned websites in Turkey. There are many others including several protest groups on Facebook. Furthermore, as mentioned in chapter two, the All Internet Association (“TID”) and the Turkish Informatics Association (“TBD”) have brought cases to the Council of State to annul all the Regulations based on Law No. 5651 claiming that powers given to the TIB are unconstitutional.<sup>392</sup>

### Flaws in the application of Law No. 5651 and the current regime

This study has identified several problems with the application of the Law No. 5651. As has been shown in this book, blocking orders or precautionary injunctions were issued by judges, and courts to block access to websites allegedly carrying illegal content prior to the enactment of Law No. 5651. Such orders or injunctions were also issued with regards to private law matters such as claims for defamation or increasingly with regards to intellectual property infringements. In fact it was revealed by MÜ-YAP that access to about 2,800 websites have been blocked with court orders with regards to intellectual property infringements prior to 2008.<sup>393</sup>

<sup>392</sup> Turk.internet.com, “TİD ; 5651 ile İlk Defa Anayasal Bir Özgürlik olan 'Haberleşme Özgürlüğü' Bir İdari Birimin Kararına Bırakılıyor – 2”, at <<http://turk.internet.com/haber/yazigoster.php3?yaziid=21811>>.

<sup>393</sup> See <<http://www.haberler.com/muzik-endustrisi-korsan-la-internette-savasacak-haberi/>>.

However, since the Law No. 5651 came into force in November 2007, blocking orders can only be issued with regards to the catalogue crimes listed under article 8 of Law No. 5651. Blocking may also be provided as a measure in other laws such as through the supplemental article 4 of the Law No. 5846 on Intellectual & Artistic Works. We therefore conclude that it is unlawful for the Courts, Judges, and the Public Prosecutors to issue blocking orders, and precautionary injunctions outside the scope of these two provisions. Based on this view, blocking orders issued outside the scope of these provisions should be lifted by the courts which issued the orders in the first place. Furthermore, the courts will also be required to lift all blocking orders issued prior to article 8 provisions coming into force as currently websites can only be blocked with regards to the catalogue crimes listed in article 8, and with regards to intellectual property infringements.

### **Article 9 provisions should be followed with regards to private law matters**

With regards to private law matters such as claims for defamation, and privacy invasion, the notice and takedown, and right to reply provisions of article 9 of Law No. 5651 should be followed. As was explained previously in this book, unlike article 8, article 9 does not contain “blocking” measures. The Parliament decided to provide the “blocking measures” with regards to the catalogue crimes listed in article 8 only.

Therefore, since the Law No. 5651 came into force, and based on the *lex specialis derogat generali* doctrine, it would be unlawful for the courts, or public prosecutors which are empowered to decide on claims with regards to private law matters to issue “blocking orders” or precautionary injunctions. Currently, the specific governing law is Law No. 5651 and article 9 provisions are not overridden by laws which govern general matters within the Turkish law.

Furthermore, article 8 and article 9 provisions are clearly distinct from each other. While article 8 regulates serious content crimes committed on websites located both in and outside the Turkish jurisdiction, and provides for blocking measures, article 9 regulates private law disputes between individuals and involves notice and takedown, and right to reply provisions. The exclusion of blocking measures from article 9 shows that the main concern of the legislators was the tackling of the serious crimes listed in article 8 and blocking is not provided as a preventative measure for the less serious private law disputes.

Having said that, it should also be emphasized that we do not necessarily agree with the forced “right of reply” provisions of article 9 or its inclusion in a specific law which regulates criminal Internet content. Private law matters should have been kept outside the scope of Law No. 5651. Furthermore, we are also puzzled with regards to the empowerment of Criminal Courts of Peace within the decision making process in relation to article 9 private law matters. In any case, a Criminal Court of Peace can only request the infringing content in question to be removed or taken down, but article 9 does not empower the courts to issue blocking orders.

Based on this view, it is the submission of this book that the blocking orders issued in high profile cases such as WordPress, Google Groups, Richard Dawkins’ website, the website of Eğitim-Sen and the daily newspaper Vatan are illegal and should not have been issued by the courts. As such orders are illegal they should be lifted by the courts. Furthermore, blocking orders issued with regards to personal rights claims prior to article 9 provisions coming into force should also be lifted as they have no legal basis under the current law.

## **Blocking is an inadequate method to combat illegal content**

As was explained in chapters two and three blocking is an inadequate method to combat illegal content and its effectiveness has been questioned by both the European Union and the Council of Europe. Blocking as a preventative policy measure has been explicitly dismissed within the context of terrorist use of the Internet at the European Union level. Furthermore, only a few states within the European region rely on blocking and filtering to encounter specific types of illegal content. Often these involve child pornography and racist content, and results vary.

## **Circumvention is Possible**

Furthermore, as was highlighted in chapter two circumvention technologies are widely available, and the filtering and blocking mechanisms and methods currently used in Turkey are easy to circumvent even for inexperienced Internet users. Several Turkish websites inform users on how to circumvent the currently used blocking mechanisms. We noticed that each time a new blocking order is issued and a popular website is blocked, more and more such articles are published educating users on how to access the banned websites. The futility of the currently used blocking measures is evidenced by the fact that YouTube.com was the 16<sup>th</sup> most accessed site in Turkey according to the alexa.com website on 18 August, 2008, almost after three months of the latest blocking order was issued.

## **Filtering is an inadequate method to combat harmful content**

Furthermore, it should be noted that none of the currently available filtering methods or tools offer a suitable solution for blocking access to allegedly illegal content or content which may be regarded as undesirable or unsuitable for children. Therefore, no filtering system should be deployed at the country access level (whether index based,<sup>394</sup> analysis based filtering,<sup>395</sup> or both) or used by individual ISPs. It is submitted that filters should only be used by individuals on their home computers if their use is deemed necessary.

Originally promoted as technological alternatives that would prevent the enactment of national laws regulating Internet speech, filtering systems have been shown to pose their own significant threats to free expression. When closely scrutinised, these systems should be viewed more realistically as fundamental architectural changes that may, in fact, facilitate the suppression of speech far more effectively than national laws alone ever could.<sup>396</sup> Therefore, the deployment and use of filtering tools is unacceptable at state level. Filters are limited, defective, ineffective, and easy to circumvent.<sup>397</sup> Filters do not offer full protection to concerned citizens. As a result of various defects massive over-blocking is usually witnessed in filtering software. Apart from over-blocking, under-blocking is also witnessed with certain filtering software which raise further questions marks about the reliability of such tools as stand-alone solutions.

## **Filtering is Limited in Functionality**

Furthermore, filtering software (including ISP level filtering products) offer limited functionality as they are designed to filter out web sites while by design exclude other Internet-related communication systems such as chat environments, file transfer protocol servers (FTP),

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<sup>394</sup> Blacklists prepared by government bodies or by commercial organizations.

<sup>395</sup> Developed to meet a set of criteria intended to determine the acceptability of content.

<sup>396</sup> Global Internet Liberty Campaign, 1999.

<sup>397</sup> Schulz, W., *Regulating the Code? Using ISPs to block banned web-sites in Germany*, 14th Computers, Freedom & Privacy Conference, 22 April, 2004, at <<http://www.cfp2004.org/program/materials/c7-schulz.ppt>>.

peer-to-peer networks (P2P), Usenet discussion groups, and VOIP systems. Users, for example, increasingly obtain content through P2P systems such as BitTorrent. Furthermore, users increasingly exchange files through the Internet chat protocol (MSN, etc.) as well as through popular VOIP systems such as Skype and Gizmo. Therefore, the assumption that filtering systems would make the Internet a “safer environment” especially for children is false as World Wide Web content represents only a fraction of the whole of the Internet.

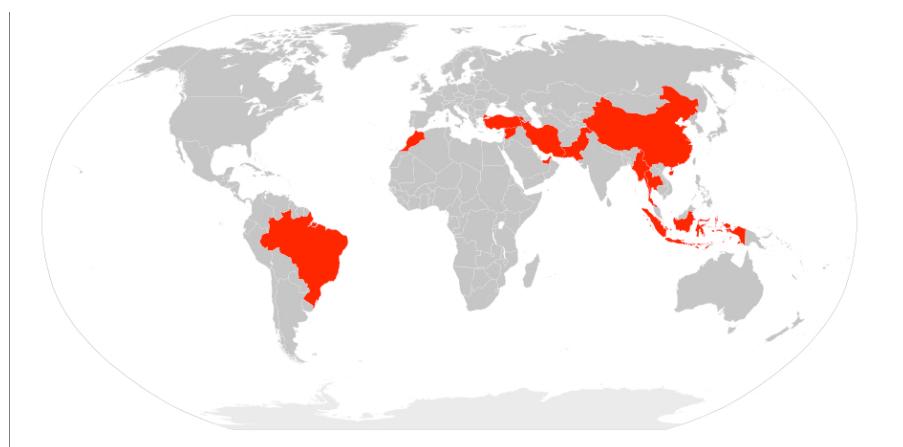
It should also be noted that ISP level filter products can also cause performance degradation, and have a detrimental impact upon Internet speed.

### **Collateral Damage of blocking and filtering policies**

Due to technical limitations, the law in its application so far proved to be incapable of dealing with Web 2.0 technologies which are designed with the intention of enhancing information sharing and collaboration among users with interactivity taking centre stage.

Web 2.0 based communities and hosted services such as the popular social networking sites Facebook and Myspace, video-sharing application YouTube, photo-sharing application Flickr, extremely popular blogging sites and communities such as WordPress and Blogger, and user-driven multilingual, web-based, free content encyclopaedia project, the Wikipedia, and tag and share web pages using social bookmarking services such as del.icio.us and Digg become extremely popular in the last few years. Blocking access to any of these Web 2.0 based applications and systems have extreme side effects as witnessed in the blocking of YouTube, WordPress, Geocities, DailyMotion, Blogger, and others in Turkey. Blocking orders not only result in the blocking of access to the allegedly illegal content (usually a single file or page) but they also result in the blocking of millions of legitimate pages, files, and content under the single domain that these systems operate.

Therefore, Law No. 5651 and its implementation do not meet necessity and proportionality tests envisaged under the Constitution and developed by the ECtHR. No alternative options for content regulation were considered by the legislators while drafting Law No. 5651. Furthermore, we have not yet come across an example where a court evaluates the different nature of the Internet technology to conclude whether pressing social need exists to interfere with Internet publications. As a result, the courts do not seek for a less restrictive sanction but in almost all cases block access to the whole domain for a violation of Law No. 5651.



**Figure 23: Countries that block[ed] access to YouTube**

As mentioned previously reputable companies such as YouTube, Geocities, WordPress, and Blogger are not known to promote illegal content and activity even though their services may contain content which may be deemed undesirable or illegal by Turkish law and any other state laws around the world. The courts, the judges, and the public prosecutors therefore should not issue “domain based blocking orders” and there is no need to “burn the house to roast the pig” as was established by the US Supreme Court in *Reno v. ACLU*.<sup>398</sup>

## **Democracy**

Political speech has been strongly affected by the implementation of Law No. 5651. In addition to a number of opposition news websites, blocking socially useful websites such as Geocities.com, YouTube and WordPress.com has closed the way to reach alternative views. More importantly, since the banning reasons of political websites are not known, we reach the conclusion that the blocking orders are often politically motivated to silence speech on the Internet.

## **Procedural Defects and Administrative Blocking Orders**

As explained in chapter 2, banning orders issued under Law No. 5651 lack fundamental guarantees envisaged under Constitutional and international human rights law. Content providers are not given any possibility to discuss the legality of their websites. The whole process is carried out in secrecy and reasons are not made public. In few number of cases we could examine, we observed that the Courts do not discuss the allegations in detail, nor the constitutional principles to strike a balance between pressing social need and fundamental freedoms.

Administrative bodies such as the TIB and private Internet hotlines set up in Europe may not always be in a position to judge the suitability or illegality of Internet content, and they are in fact often criticized as serious concerns remain about the policing role that such organizations inevitably play. Many maintain that decisions involving illegality should be decided by the courts of law only rather than hotline operators. It has been argued that “these hotlines violate due process concepts that are also enshrined in international, regional, and national guarantees around the world”.<sup>399</sup>

While it may be tempting to identify and attempt to block content posted to particular websites, or other Internet forums that seems devoted to illegality, such measures could set dangerous precedents if hotlines or administrative bodies such as the TIB assume the role of the courts. Over time, such an approach could result in a form of privatized censorship with no limit on its application. Although hotlines and certain administrative bodies could play an important role in regulating illegal Internet content, there remain significant questions about their operation. As the Martabit report to the UN stated “while encouraging these initiatives, States should ensure that the due process of law is respected and effective remedies remain available in relation to measures enforced.”<sup>400</sup>

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<sup>398</sup> U.S. Supreme Court majority decision, *Reno v. ACLU* (26 June, 1997).

<sup>399</sup> American Civil Liberties Union, Press Release, “ACLU Joins International Protest Against Global Internet Censorship Plans” (9 September 1999), online: ACLU <<http://www.aclu.org/news/1999/n090999a.html>>.

<sup>400</sup> See *Report of the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action on its fourth session*, UN ESCOR, 62d Sess., UN Doc. E/CN.4/2006/18 (2006), at <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/119/23/PDF/G0611923.pdf>>, para. 47.

## **Implementation and application of Law No. 5651 amounts to censorship**

Access to over a 1000 websites are currently blocked from Turkey through court decisions and administrative blocking orders. The majority of these are associated with the problematic Law No. 5651. Hundreds of other websites are blocked outside the scope of Law No. 5651. Clearly, the current regime, through its procedural and substantive deficiencies, is designed to censor and silence speech. Its impacts are wide, affecting not only the freedom of speech but also the right to privacy and fair trial. It has been reported that prosecutors had even demanded from politicians to widen the scope of the Law to include insults, defamation and terrorism. This antiquated approach remains unacceptable in a democratic society.

## **Recommendations**

### **Abolish Law No. 5651**

The Law No. 5651 was designed to protect children from illegal and harmful Internet content. However, as shown in this book, the adoption of a blocking policy does not even come close to achieving the government's goal of protecting its children. The Internet is ubiquitous and does not consist only of websites as mentioned previously. Content is distributed and accessed on the Internet through a variety of systems based on different protocols. The Law No. 5651, and its provisions are completely futile in terms of addressing the government's goal of protecting children with regards to such technologies.

Furthermore, the content of Law No. 5651 is not in line with the declared intentions of the government. Although it was proclaimed that the law was designed to protect children from illegal and harmful Internet content its broad application resulted in restricting adults' access to content which is not illegal to access, view, download, or possess. Not all the crimes listed under article 8 can be connected to the protection of children and a considerable number of the banning orders have nothing to do with protecting children. More importantly, apart from the crimes described in article 226 paragraphs 3 and 4 of the Criminal Code, none of the crimes listed in article 8 of Law No. 5651 are content crimes. In other words, the storing of images, videos and text containing child pornography and sexual intercourse involving violence, bestiality or necrophilia is a crime punished by the Criminal Code. However, this is not true for the other conduct crimes enumerated in article 8. The current Criminal Code provisions criminalize certain conduct associated with the encouragement or assisting of crimes listed in article 8, or crimes committed against Atatürk (Law No. 5816). These crimes, unlike article 226 paragraphs 3 and 4 provisions do not criminalize the possession, reading, or viewing of content covered in such provisions. Therefore, Turkish citizens by accessing websites which may contain such information do not commit any crimes. It is submitted that the government response through Law No. 5651 is disproportionate and amounts to censorship.

Therefore, we believe that the Law No. 5651 should be abolished. The government should instead commission a major public inquiry to develop a new policy which is truly designed to protect children from harmful Internet content while respecting freedom of speech, and the rights of Turkish adults to access and consume any type of Internet content.

No doubt, the new initiative should be carried out in a transparent, open, and pluralist way. However, four basic substantive principles should also be taken into consideration:

- Regulation of the Internet should respect international human rights principles, especially freedom of expression, and privacy of communications;

- Restrictions brought by law should be proportional and in line with the requirements of democracy;
- Conduct crimes should not be the subject of Internet content regulation;
- As the European Commission noted “[illegal and harmful contents] pose radically different issues of principle, and call for very different legal and technological responses. It would be dangerous to amalgamate separate issues such as children accessing pornographic content for adults, and adults accessing pornography about children [child pornography]”.<sup>401</sup> A new initiative should definitely take this significant difference into account.

## **Training and Detailed Guidelines for the Courts, Judges, and Prosecutors**

In terms of avoiding some of the side effects including the illegal, and arbitrary application of the current legal provisions, the Law and its Regulations should be clear, detailed and its implications should be foreseeable. Training would also be necessary to avoid the wrong application of Law No. 5651 provisions. For example, training and detailed guidelines could help to avoid the courts issuing blocking orders with regards to private law matters and instead force them to adopt the procedures under article 9.

## **Transparency and Openness of Court and TIB decisions**

Finally, it should be recalled that openness, transparency, and accountability are elements of a healthy democratic system. Therefore, without a doubt, court issued blocking decisions and the reasons for the decisions should be made public so that the public as well as the content, and website operators are better informed about the blocking decisions. Such decisions can then be disputed or challenged if necessary. Obviously any decision taken by the Courts and the TIB should be well-reasoned to be challenged. Basically we believe that “censorship decisions” could not remain in “secret”. More importantly, this also applies to administrative blocking decisions issued by the TIB as its decisions could be challenged through the administrative courts. Otherwise, in the absence of transparency, we are required to become like the *Three Wise Monkeys* and abide by the proverbial principle to see no evil, hear no evil, and speak no evil and trust the government and its administrative organs with regards to what is suitable for us to view, read, and access on the Internet.

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<sup>401</sup> European Commission Communication on Illegal and Harmful Content on the Internet (1996), p, 10.