Third Party Intervention

In the Cases of Bircan ALAN v. Turkey and Sait ALAN v. Turkey (App. Nos. 43710/19 and 43712/19)

by

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I. Introduction

1. İFÖD will address in its intervention in the cases of **Bircan Alan v. Turkey and Sait Alan v. Turkey (App. Nos. 43710/19 and 43712/19)** the issue of systematic problems caused by article 9 Law No. 5651 (The Law on Regulation of Publications on The Internet and Combating Crimes Committed by Means of Such Publication -"The Internet Law") and its discriminatory effect on both freedom of expression and the right to respect the private life of opposition or critical voices.

2. It is understood from the Court's communication that the applicants' request under Law No. 5651 to block access to certain pages of news websites containing articles which presented them as members of an illegal organization providing aid to another unlawful organization was rejected by two separate criminal judgeships of peace. The judgeships, in rejecting the applicants' request, considered that the dismissal and acquittal decisions subsequently rendered in respect of the applicants did not detract from the current public interest in the publication of the disputed press articles which they considered to be covered by freedom of the press.

3. Relying on articles 6 § 1, 8 and 13 of the Convention, the applicants allege that the rejection of their request to block access to pages of the websites in question infringes their rights to a fair trial and to respect their privacy and to fail to provide an effective remedy. The Court asked to the parties whether there was interference with the applicants' right to respect for their private life, within the meaning of Article 8 § 1 of the Convention[1] having regard to the content of the articles published on the websites in question, and if so whether the interference with the exercise of this right was prescribed by law and necessary within the meaning of Article 8 § 2?

4. İFÖD, firstly, will summarize the caselaw of the Court on balancing between the right to reputation enshrined in Article 8 and freedom of expression protected by Article 10 of the Convention. Jurisprudence of the Court on the right to presumption of innocence will also be provided. İFÖD will then submit to the Court information about systematic problems caused by article 9 of Law No. 5651 and its discriminatory effect both on freedom of expression and right to respect for private life of opposition or critical voices. IFÖD will argue that the legal nature of the measure of blocking access to Internet content provided by article 9 of Law No. 5651 is ambiguous and it is applied in practice by the criminal judgeships of peace in an arbitrary and discriminatory fashion. İFÖD will also argue that the Constitutional Court's approach to the applications with regard to right to private life in cases of rejection of requests to block access to certain Internet content allegedly violating personal rights also leads to discriminatory consequences. İFÖD will provide to the Court that "prima facie violation" doctrine developed by the Constitutional Court, in

[1] *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004 VI; *Sanchez Cardenas v. Norway*, no. 12148/03, § 38, 4.10.2007; *Pfeifer v. Austria*, no. 12556/03, § 35, 15.11.2007; *A. v. Norway*, no. 28070/06, § 64 , 09.04.2009; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21.09.2010; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 07.02.2012; *Petrie v. Italy*, no. 25322 / 12, § 39, 18.05.2017.

its *Ali Kıdık* decision[2] with regards to the article 9 blocking decisions, has been systematically disregarded by the criminal judgeships of peace. It will also be argued that the "prima facie violation" doctrine has not clarified the legal ambiguities surrounding the legal nature of access blocking measure under article 9 of Law No. 5651. Considering that hundreds of thousands of content have been blocked under this provision, the unfettered discretion left to the criminal peace judges has led to a total arbitrariness regardless of the principles adopted by the Constitutional Court which are systematically ignored by the judges. Such an approach, especially, creates discriminatory effects for those whose personal rights were infringed by the government-controlled media.

European Standards on Balancing Between the Right to Reputation and Freedom of Expression

5. According to the established caselaw of the Court the right to the protection of one's reputation is a right which falls under Article 8 of the Convention. The Court ruled that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her private life.[3] However, in order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and must have been made in such a manner as to cause prejudice to personal enjoyment of the right to respect for private life.[4]

6. As for the nature and extent of the contracting States' obligations under Article 8, the Court indicates that, although the object of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. However, the same principles are applicable for State's positive and negative obligations under Article 8; in both instances regard must be had to the fair balance which has to be struck between the competing interests.[5]

7. The Court recognizes margin of appreciation to the Contracting States in choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is in issue. Where a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly

[2] App. No: 2014/5552, 26.10.2017.

[3] *Pfeifer v. Austria*, no. 12556/03, 15.11.2007, § 35; *Petrie v. Italy*, no. 25322/12, 18.05.2017, § 39.

[4] *A. v. Norway*, no. § 64; *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012, § 83.

[5] *Dickson v. the United Kingdom* [GC], no. 44362/04, 04.12.2007, § 70; *Odièvre v. France* [GC], no. 42326/98, 13.02.2003, § 40; *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, 15.11.2016, § 164-65.

narrowed.[6] In particular, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires the States to ensure that efficient criminal-law provisions are in place.[7] Concerning such serious acts, the State's positive obligation under Article 8 to safeguard the individual's physical or moral integrity may also extend to questions relating to the effectiveness of the criminal investigation.[8]

8. In case of a conflict between the right to protection of one's reputation enshrined in Article 8 on the one hand, and freedom of expression of the press protected by Article 10 on the other hand, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention. The Court emphasizes that the rights under these Articles deserve equal respect and when it is called upon to adjudicate on a conflict between two rights, the Court must weigh up the competing interests. The outcome of the application should not vary depending on whether it was lodged under Article 8 by the person who was the subject of the impugned press article or under Article 10 by the author of the same article.[9] Accordingly, the margin of appreciation should in theory be the same in both cases.[10]

9. When weighing up the right to freedom of expression against the right to respect for private life the relevant criteria are as follows: **first,** the contribution to a debate of general interest; **second,** the degree of notoriety of the person affected and the subject matter of the news report; **third,** the prior conduct of the person affected; **fourth**, the way in which the information was obtained and its veracity; **fifth**, the content, form and consequences of the publication; and **sixth**, the severity of the sanction imposed.[11]

10. Regarding with the role of the press, the Court emphasizes that the freedom of the press fulfils a fundamental and essential function in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to the administration of justice. Thus, the national authorities' margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its

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6 *Söderman v. Sweden*, no. 5786/08, 12.11.2013, § 79.

7 *X and Y v. the Netherlands*, no. 8978/80, 26.03.1985, §§ 23-24 and 27; *M.C. v. Bulgaria*, no. 39272/98, 04.12.2003, § 150; *K.U. v. Finland*, no. 2872/02, 02.12.2008, § 43; *A, B and C v. Latvia*, no. 30808/11, 31.03.2016, § 148; *M.S. v. Ukraine*, no. 2091/13, 11.07.2017, § 62.

8 *M.C. v. Bulgaria*, § 152; *C.A.S. and C.S. v. Romania*, no. 26692/05, 20.03.2012, § 72; *M.P. and Others v. Bulgaria*, no. 22457/08, 15.11.2011, § 109-10.

9 *Hachette Filipacchi Associés (*ICI PARIS*) v. France*, no. 12268/03, 23.07.2009, § 41; *Timciuc v. Romania* (dec.), no. 28999/03, 12.10.2010, § 144; *Mosley v. the United Kingdom*, no. 48009/08, 10.05.2011, § 111; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10.11.2015 (extracts) § 91.

10 *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, 07.02.2012, § 106, *Axel Springer AG*, no. 39954/08, 07.02.2012, § 87; *Couderc and Hachette Filipacchi Associés*, § 91.

11 *Axel Springer AG*, §§ 83 and 89 to 95; *Von Hannover v. Germany* (no. 2) [GC], §§ 108 et seq.; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10.11.2015, § 93; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, 27.06.2017, § 88.

vital role of "public watchdog".[12] Nevertheless, journalists must act in good faith in order to provide "accurate and reliable" information in accordance with the ethics of journalism.[13] That having been said, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[14]

11. The Court nevertheless acknowledges that distorting the truth, in bad faith, can sometimes overstep the bounds of acceptable criticism: a correct statement can be qualified by additional remarks, by value judgments, by suppositions or even insinuations, which are liable to create a false image in the public mind.[15] Thus the task of imparting information necessarily includes duties and responsibilities, as well as limits which the press must impose on itself spontaneously. That is especially so where a media report attributes very serious actions to named persons, as such "allegations" comprise the risk of exposing the latter to public contempt.[16]

12. The Court also draws a distinction between facts and value judgments.[17] The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof, and in that case a requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention.[18] However, in the case of a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement: otherwise, that value judgment may itself be excessive.[19] In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact.[20]

13. Domestic courts should strike a fair balance between conflicting interests considering all these factors. Failure in this balancing may result in violation of convention rights. The Court, for example, ruled in *Khadija İsmayilova (3)*[21] case that the domestic courts failed to conduct an adequate balancing exercise between the applicants' Article 8 rights and the newspaper's right to freedom of expression and that the responded state did not comply

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12 *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20.05.1999, § 59; *Thoma v. Luxembourg*, no. 38432/97, 29.03.*2001*, § 45; *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, no. 37840/10, 03.04.2014, § 25.

13 *Fressoz and Roire v. France* [GC], no. 29183/95, 21.01.1999, § 54; *Radio France and Others v. France*, no. 53984/00, 30.03.2004, § 37; *July and Sarl Libération v. France*, no. 20893/03, 14.02.2008, § 69.

14 *Fressoz and Roire*, § 45; *Mamère v. France*, no. 12697/03, 07.11.2006, § 25.

15 *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, 27.05.2004, § 45.

16 *Falakaoğlu and Saygılı v. Turkey*, no. 11461/03, 19.12.2006, § 27.

17 *Lingens v. Austria*, no. 9815/82, *0*8.07.1986, § 46; *Oberschlick v. Austria* (no. 1), no. 11662/85, 23.05.1991, § 63.

18 *De Haes and Gijsels v. Belgium*, no. 19983/92, 24.02.1997, § 42.

19 *De* Haes *and Gijsels*, § 47; *Oberschlick v. Austria* (no. 2), no 20834/92. 01.07.1997, § 33; *Brasilier v. France*, no. 71343/01, 11.04.2006, § 36; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, 22.10.2007, § 55.

20 *Paturel v. France*, no. 54968/00, 22.12.2005, § 37.

21 *Khadija İsmayilova v. Azerbaijan (3)*, no. 35283/14, 07.05.2020, §§ 77, 78.

with its positive obligation to take adequate measures to secure protection of the applicant's right to respect for her private life and her reputation.

The Right to Presumption of Innocence

14. In cases of reporting which includes allegations of commission of a crime the right to presumption of innocence enshrined in Article 6/2 of the Convention may come into play. Everyone has the right to be presumed innocent. Anyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. Thus, this principle requires the prosecution to prove the guilt of a criminal defendant and relieves the defendant of any burden to prove his or her innocence. This principle imposes to the members of a court not to start with a preconception that the suspect or the accused committed the offence, the prosecution the duty to prove anything, and the accused benefitting from the doubt. Article 6 § 2 the Convention governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge.[22]

15. The presumption of innocence also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence with which they have been charged. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.[23] The Court indicated that following discontinuation of criminal proceedings the presumption of innocence requires that the lack of a person's criminal conviction be preserved in any other proceedings of whatever nature.[24] It has also indicated that the operative part of an acquittal judgment must be respected by any authority referring directly or indirectly to the criminal responsibility of the interested party.[25]

16. The Court reiterated in a number of cases that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and, consequently, jurors called upon to decide the guilt of an accused.[26] At the same time, the Court notes that press coverage of current events is an exercise of freedom of expression, guaranteed by Article 10 of the Convention. If there is a virulent press campaign surrounding a trial, what is decisive is not the subjective apprehensions of the suspect concerning the absence of

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22 *Poncelet v. Belgium*, no. 44418/07, 30.03.2010, § 50; *Minelli v. Switzerland*, no. 8660/79, 25.03.1983, § 30; *Garycki v. Poland*, no. 14348/02, 06.02.2007, § 68.

23 *Allen v. the United Kingdom* [GC], no. 25424/09, 12.07.2013, § 94.

24 *Vanjak* v. Croatia, no. 29889/04, 14.01.2010, § 41; *Šikić* v. Croatia, no. 9143/08, 15.07.2010, § 47.

25 *Vassilios Stavropoulos v. Greece*, no. 35522/04, 27.09.2007, § 39; *Tendam v. Spain*, no. 25720/05, 13.07.2010, § 37; *Lorenzetti v Italy*, no 32075/09. 10.04.2012, § 46.

26 *Akay v. Turkey* (dec.), no. 34501/97, 19.02.2002; *Wloch v. Poland* (dec.), no. 27785/95, 30.03.2000; *Priebke v. Italy* (dec.), no. 48799/99, 05.04.2001; *G.C.P. v. Romania*, no. 20899/03, 20.12.2011, § 46.

prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified.[27]

17. The Court also stated that to a certain extent, the protection afforded under Article 6 § 2 in this respect may overlap with the protection afforded by Article 8.[28] İFÖD is of the opinion that responsible journalism requires the press to respect acquittal judgments and to refrain to continue reporting as if the acquittal judgment does not exit. It is therefore inevitable that the domestic courts deciding about such a case should evaluate whether the right to presumption of innocence of an acquitted person was respected by the press.

18. In respect of exhaustion of domestic remedies, the Court held that an award of damages cannot fully remedy an infringement of the right to presumption of innocence and thus civil lawsuit for compensation cannot constitute an effective remedy for the purpose of Article 35 § 1 of the Convention.[29]

19. The Court ruled in A v. Norway[30] that since the applicant was not charged with a criminal offence by any public authority Article 6 § 2 of the Convention was not applicable and found the application inadmissible as being incompatible *ratione materiae*. However, the Court indicated that the conclusion above did not prevent the Court from taking into account the interests sought to be protected by Article 6 § 2 in the balancing exercise carried out in terms of Article 8.

20. İFÖD is of the opinion that the Court should take into account the right to presumption of innocence of the applicants when evaluating admissibility of and merits of the applications at hand.

Access Blocking Subject to Article 9 of Law No. 5651 in Turkey

21. Law No. 5651, which was enacted on 04.05.2007 came into force on 23.05.2007. The Law's initial aim was to protect children from harmful content by way of blocking access to certain types of content.[31] Following the 17-25 December, 2013 corruption investigations, several amendments to the Law No. 5651 were made by Law No. 6518, in February 2014. With the new amendments, two other access-blocking measures were included in the Law No. 5651. Article 9, entitled "Removal of content from publication and blocking of access," of the Law No. 5651 made it possible to block access to content to prevent "violation of personal rights" while article 9/A made it possible to block access to content "to protect the privacy of life." Subsequently, article 9 was amended once again

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27 *Castillo Algar v. Spain*, no. 28194/95, 28.10.1998, § 45.

28 *Zollmann v. the United Kingdom* (dec.), no. 62902/00, 27.11.2003; *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, 16.10.2008, §§ 27 and 56-59.

29 *Daktaras v. Lithuania*, no. 42095/98, 10.10.2000, § 29*; Konstas v. Greece*, no. 53466/0, 24.05.2011*; Paulikas v. Lithuania*, no. 57435/09, 24.01.2017, § 41.

30 *A v. Norway*, no. 28070/06, 09.04.2009, §§ 46, 47*; Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65; *Allenet de Ribemont*, §§ 34-37; *Kyriakides v. Cyprus*, no. 39058/05, 16.10.2008, § 35.

31 See generally *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012 and *Cengiz and Others*, nos. 48226/10 14027/11, 01.12.2015.

in July 2020 and the current version includes “removal of content” and “right to be forgotten” measures in addition to the access blocking measure.

22. Article 9 provides for a procedure for access-blocking/removal of content for the violation of “personal rights” as a result of information published on the Internet. According to paragraph 1, real persons, legal entities and institutions and organisations may, if they assert that their “personal rights” have been violated ask the relevant content provider or hosting provider to remove such content, or as in common practice, apply directly to a judge to request access blocking to such content. The judge shall make a decision within 24 hours without holding a hearing and issue an order blocking access to a specific publication/section (in the form of URL etc.) in relation to the alleged personal rights violation.[32] According to the Constitutional Court, the blocking orders issued by the judges subject to article 9 are technically precautionary measures[33] even though the law does not provide a time limit on these supposedly precautionary measures. In practice, such content can be indefinitely blocked if no appeals are lodged against the blocking orders.

23. Appeals against the blocking decisions of the criminal judgeships of peace are over seen by the subsequent judgeships of peace in places where there are several judgeships. The decision given by a peace judgeship in the appeal procedure is final and an appeal before a higher court is not possible, apart from the possibility to lodge an individual application before the Constitutional Court.

24. The procedure under article 9, as it currently stands, does not require the institution of any civil or criminal procedures and the applicants who are successfully granted access blocking under article 9 are not obliged to pursue their violation claims with a civil case or criminal complaint. Therefore, as indicated by the Venice Commission, the procedure under article 9 does not concern an interim or precautionary measure taken in the framework of a pending criminal or civil procedure before domestic courts but constitute an independent procedure on “access-blocking”[34] resulting with a specific remedy for the applicants and in turn becoming an indefinite sanction for the content providers. As a result, there is no possibility of review of those decisions by a trial court and there is no possibility for the content providers to defend themselves.

25. Considering the short time allowed to the judgeships of peace to take their decisions on access blocking (24 hours), without holding a hearing and without any possibility of appeal before a higher court against the decision on access-blocking, the Venice Commission criticized the provision on the grounds that it does not provide the necessary procedural guarantees in order to protect the right to freedom of expression on the

[32] In exceptional cases and when necessary, judges may also decide to issue a blocking order for the whole website if the URL based restriction is not sufficient to remedy the alleged individual violation.

[33] See Ali Kıdık, App. No: 2014/5552, 26.10.2017.

[34] Venice Commission, Opinion On Law No. 5651 on Regulation of Publications on The Internet and Combating Crimes Committed by Means of Such Publication (“THE INTERNET LAW”), Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), para. 59.

Internet.[35] The Venice Commission recommended that the procedure under article 9 should be made dependent on the institution of a subsequent criminal or civil procedure and the decision on access blocking under this procedure should only constitute a "precautionary measure" which can be taken in anticipation of the substantive criminal or civil proceedings when there is a reasonable suspicion of a violation of the law and the danger of an irreparable damage. The trial judge, in the subsequent criminal or civil proceedings, should be able to review the necessity of maintaining the precautionary measure on access-blocking or to lift this measure immediately if he/she considers that there are no elements supporting the reasonable suspicion or that the danger has been averted.[36]

26. Nevertheless, recommendation of the Venice Commission has not been followed by the Turkish authorities, on the contrary, the extent of the provision widened by enabling the criminal judgeships of peace to decide on removal of content alongside the access blocking measure with the amendments made by Law No. 7253 which entered into force on 31.07.2020.

27. It should be noted that the procedure under article 9 of the Law No. 5651 does not provide any procedural safeguard for the content providers. The request of access blocking and/or removal of content are not notified to the content providers to allow them to submit their defence. Generally, the access blocking orders are not notified to content providers, therefore they do not know that access to a news page has been blocked by a judge order and they cannot appeal against those orders. Nevertheless, such a provision clearly contradicts with the case-law of the Court. The Court recently elaborated its case-law about procedural safeguards to be observed by contracting states when interfering with freedom of expression through online access blocking measures.[37] The Court has enumerated a set of procedural safeguards which include (*i*) advance notification of the blocking measures to the affected parties to ensure the involvement of the website owners in the blocking proceedings, (*ii*) authorities' obligation to carry out an impact assessment of the blocking measures prior to their implementation or justify the urgency if an immediate implementation is necessary, (*iii*) giving the opportunity to websites owners to remove the illegal content, and (*iv*) providing a forum, such as a court or other independent adjudicatory body, for affected parties to be heard and to challenge the measure.[38]

28. Article 9 of Law No. 5651 has been extensively used to block access to Internet content. As of end of 2017, 48.665 such decisions were issued by the judges with the result of

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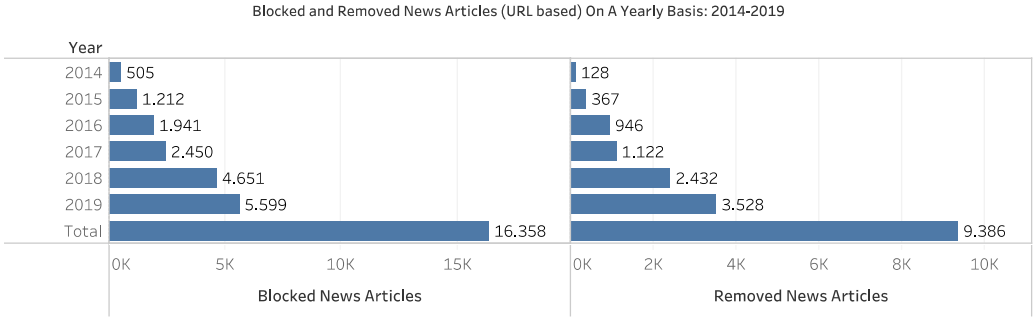
35 *Ibid*, para. 60.

36 Venice Commission, ibid, para. 61.

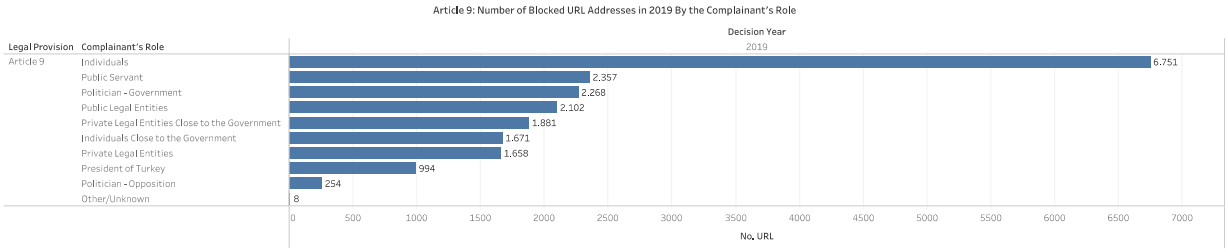
37 *OOO Flavus and Others v. Russia*, no. 12468/15 23489/15 19074/16, 23.06.2020; *Bulgakov v. Russia*, no. 20159/15, 23.06.2020; *Engels v. Russia*, no. 61919/16, 23.06.2020; *Vladimir Kharitonov v. Russia*, no. 10795/14, 23.06.2020.

38 Güngördü, A., The Strasbourg Court Establishes Standards on Blocking Access to Websites, Strasbourg Observer, at https://strasbourgobservers.com/2020/08/26/the-strasbourg-court-establishes-standards-on-blocking-access-to-websites/

blocking access to a total of 99.952 Internet addresses as well removal of 50.186 separate Internet addresses. İFÖD, as part of its EngelliWeb project, assessed the blocking practice with regards to the media and news articles and determined that, until the end of 2019, 16.358 specific news articles (URL addresses) were blocked (9.386 of these were removed) in accordance with article 9 by 4.158 separate orders issued by 408 separate criminal judgeships of peace.[39]



29. Moreover, as part of its EngelliWeb research, İFÖD identified in total 1138 article 9 decisions issued in 2019 and a total of 19.044 URL addresses that have been blocked with these decisions including not only news articles but also social media content. When these are categorised and assessed by the complainant's role, it can be seen below that majority of the content blocked are requested by public servants, politicians associated with the government, public legal entities and authorities, individuals and private legal entities close to the government as well as by the President of Turkey.



Constitutional Court Jurisprudence on Article 9 of the Law No 5651

30. The Constitutional Court, in October 2017, in its Ali Kıdık judgment[40] stated, in contrary to Venice Commission's view, that **access-blocking orders** subject to article 9 of Law No. 5651 **are not penal or administrative sanctions, but protection measures** and stressed that the access-blocking procedure prescribed by article 9 is not a legal remedy for all kinds of articles or news articles, but it must be an exceptional legal remedy. In this context, the Constitutional Court stated that the access-blocking orders subject to article 9 of Law No. 5651 may be issued by criminal judgeships of peace only in circumstances where violations of personal rights can be recognized at first sight without the need for

39 Akdeniz, Y. & Güven, O., EngelliWeb 2019: An Iceberg of Unseen Internet Censorship in Turkey, İFÖD, August 2020, p.24.

40 Ali Kıdık Application, No: 2014/5552, 26.10.2017.

further investigation. The Constitutional Court recognized the obligation to make a prima facie violation assessment as a prerequisite for maintaining a fair balance between the need to quickly protect personal rights and freedom of expression and freedom of the press.[41]

31. It should be noted that in spite of the Constitutional Court's definition of the procedure under article 9 as a protection measure, the impugned provision does not support this approach. Because as it was rightly determined by the Venice Commission the Law No. 5651 does not require initiation of a civil or criminal case following the issuance of access blocking order by a criminal judgeship of peace and more worryingly access blocking decisions of the criminal judgeships of peace are considered as final decisions.

32. The Constitutional Court has so far referred to the Ali Kıdık judgment and the principle of prima facie violation in 15 different applications.[42] The Ali Kıdık judgment of the Constitutional Court is binding on the lower courts including the criminal judgeships of peace. It is therefore required for the criminal judgeships of peace to make a prima facie violation assessment when evaluating the requests made under article 9 of the Law No. 5651 and prior to issuing access blocking related decisions. Nevertheless, İFÖD found out, as part of the EngelliWeb project, that approximately 6.200 access-blocking orders were issued in 2019 subject to article 9 of Law No. 5651 by nearly 690 criminal judgeships of peace across Turkey. Among those 6.200 decisions, only in 69 decisions a reference was made to the Ali Kıdık judgment of the Constitutional Court and only in 22 of those decisions a "prima facie violation" assessment was made, remaining 47 decisions only referred to the application number of the Ali Kıdık judgment.[43]

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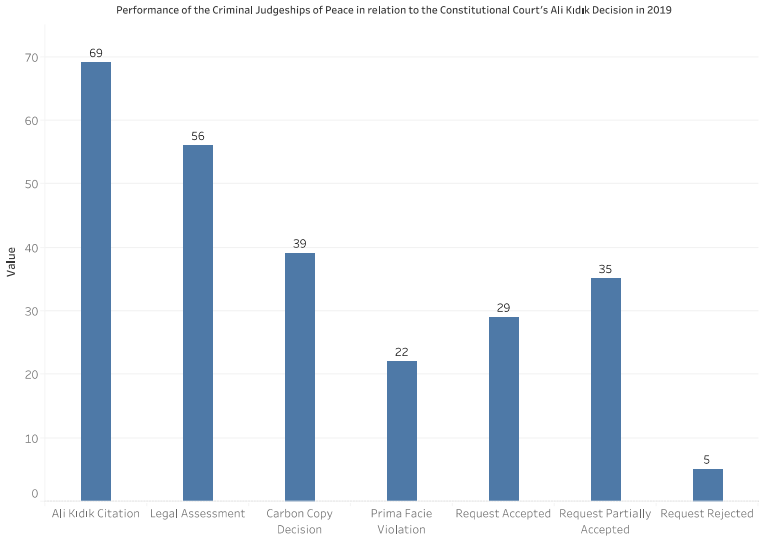
41 EngelliWeb 2019, p.38.

42 Kemal Gözler Application, (No: 2014/5232, 19.04.2018); Miyase İlknur and Others Application (No: 2015/15242, 18.07.2018); A.A. Application, (No: 2014/7244, 12.09.2018); Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş. Application, (No: 2015/6313, 13.09.2018); IPS Communication Foundation Application (No: 2015/14758, 30.10.2018); Özgen Acar Application, (No: 2015/15241, 31.10.2018); IPS Communication Foundation Application (2) (No: 2015/15873, 07.03.2019); Barış Yarkadaş Application (No: 2015/4821, 17.04.2019); Medya Gündem Dijital Yayıncılık Ticaret A.Ş (3) Application (No: 2015/16499, 3.07.2019); Education and Science Workers' Union (Eğitim-SEN) Application (No: 2015/11131, 4.07.2019); Kemalettin Bulamacı Application (No: 2016/14830, 4.07.2019); Kerem Altıparmak and Yaman Akdeniz Application (3) (No: 2015/17387, 20.11.2019); Kerem Altıparmak Application (No: 2015/8193, 27.11.2019); Kemal Gözler Application (2) (No: 2015/5612, 10.12.2019); Aykut Küçükkaya Application (No: 2014/15916, 09.01.2020).

43 EngelliWeb 2019, p.39.



33. These figures show that article 9 jurisprudence of the Constitutional Court is systematically disregarded by the criminal judgeships of peace. As can be seen from the examples assessed by İFÖD, as part of the EngelliWeb project, access to news articles on matters of public interests are systematically blocked by criminal judgeships of peace upon the request of political figures subject to article 9 of the Law No 5651 without making any proper balancing test or applying the "prima facie violation" test developed by the Constitutional Court. On the other hand, requests of access blocking to the websites of pro-government media which includes smear campaign against opposition politicians or individuals are systematically rejected by the criminal judgeships of peace with freedom of expression and freedom of the press arguments. Although some news articles of pro-government press have been blocked, these are primarily related to magazine articles rather than involving political content. As indicated above (see para. 29 and accompanying graphics) most of the blocking requests accepted by the criminal judgeships of peace were made by public servants, politicians associated with the government, public legal entities and authorities, individuals and private legal entities close to the government as well as by the President of Turkey. Such a double standard in application of the provision creates discriminatory effects.

34. To add insult to injury, the Constitutional Court rejects applications brought by individuals whose request of access blocking were rejected by the criminal judgeships of peace on the ground that remedy of civil lawsuit has not been exhausted by the applicants. The result is odd at best. If an individual, regardless of the severity of the insult, does not bring a civil case, cannot apply to the Constitutional Court and then subsequently to the European Court. However, almost all the news reports critical of the government or politicians are blocked or even removed within hours by the orders of the criminal judgeships of peace. The media, as content providers must instead file an individual application with the Constitutional Court and wait the judgment of the Court for approximately five years to revoke unlawful access ban on their blocked news article.

35. Considering the problems relating to the independence of judiciary, it is the submission of İFÖD that this approach of the Constitutional Court creates inequality between the politicians in power as well as state institutions compared to anyone else trying to protect their reputation and individual rights. While complaints of opposition politicians or dissidents against pro-government media are almost never accepted and their publications are never removed or access blocked, the complaints by ruling party politicians are generally accepted and access to opposition media are blocked and content is removed.

Conclusion

36. As İFÖD tried to illustrate, article 9 of the Law No. 5651 has been predominantly used to censor critical journalism and to provide privileged protection to politicians in power which stifles the public debate in Turkey, contrary to well established case-law of the Strasbourg Court. The problems associated with this "one way ticket" mechanism has not been resolved with the principled approach adopted by the Constitutional Court as the Court has become part of the problem while its decisions are almost completely ignored by the criminal judgeships of peace.

37. IFÖD kindly invites the Court to take into the consideration that article 9 of the Law No 5651 is in contradiction with the Convention standards and Turkish judicial practices creates discriminatory effect on opposition politicians and dissidents.

18.11.2020

İfade Özgürlüğü Derneği – İFÖD (Turkey)

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.