



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media**

**Report of the OSCE Representative on Freedom of the Media
on Turkey and Internet Censorship**

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Executive Summary

The following survey was commissioned by the office of the OSCE Representative on Freedom of the Media. It analyzes Law No. 5651, widely known as the Internet Law of Turkey which has served since 2007 as the basis of a mass blocking of websites in Turkey. The report offers recommendations on how to bring the law in line with international standards protecting freedom of expression. The aim of the survey is to provide a useful tool to the Turkish authorities in their current efforts to reform the much-debated legislation.

The Turkish government enacted Law No. 5651, entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication, in May 2007. The enactment of this law followed concerns about defamatory videos available on YouTube involving the founder of the Turkish Republic Mustafa Kemal Atatürk, combined with increasing concerns for the availability of child pornographic, and obscene content on the Internet, and websites which provide information about suicide, or about illegal substances deemed harmful or inappropriate for children.

Since then, up until December 2009, access to approximately 3700 websites have been blocked under Law No. 5651. This includes access to a considerable number of foreign websites- including prominent sites such as YouTube, Geocities, DailyMotion, and Google- that have been blocked in Turkey under the provisions of this law, by court orders and administrative blocking orders issued by the Telecommunications Communication Presidency (TIB). Similarly, websites in Turkish, or addressing Turkey related issues have been subjected to blocking orders since Law No. 5651 came into force. This is particularly prevalent in news sites dealing with south-eastern Turkey, such as Özgür Gündem, Keditör, and Günlük Gazetesi. However, Gabile.com and Hadigayri.com, which combine to form the largest online gay community in Turkey with approximately 225,000 users, were also blocked. Furthermore, access to popular web 2.0 based services such as Myspace.com, Last.fm, and Justin.tv have been blocked on the basis of intellectual property infringement.

This study therefore provides a review of the implementation and application of Law No. 5651, and includes an analysis of the current legal provisions under Law No. 5651, an analysis of the Law's application by the courts and by TIB, an assessment of related Internet website blocking statistics, the identification of the legal and procedural defects of Law No. 5651, and an assessment with regards to Article 10 of the European Convention on Human Rights.

The detailed study shows that the impact of the current Turkish regime and related procedural and substantive legal deficiencies are widespread, affecting not only the freedom to speak and receive information, but also the right to receive a fair trial, so far as blocked websites are concerned.

The study further shows that lack of judicial and administrative transparency, with regard to blocking orders issued by the courts and TIB, continue to be a major problem. Furthermore, the fact that TIB has not published the blocking statistics since May 2009 is a step backwards.

As this study outlines, at least 197 court ordered blocking decisions were issued outside the scope of Article 8 of Law No. 5651. As of December 2009, the extent of this breach and blocking remains unknown, as TIB did not publish the blocking decisions beginning in May 2009.

The study argues that there could be a breach of Article 10 of ECHR if blocking measures or filtering tools are used at state level to silence politically motivated speech on the Internet, or the criteria for blocking or filtering is secret, or the decisions of the administrative bodies are not publicly made available for legal challenge. Based on such concerns, and ongoing censorship of the YouTube website since May 2008, an appeal has been lodged with the European Court of Human Rights by INETD (The Society for Internet Technology). INETD challenged the YouTube blocking order issued by the Ankara 1st Criminal Court of Peace having exhausted all the possible national legal remedies.

As will be argued in this study, blocking orders issued and enforced indefinitely on certain websites could result in “prior restraint”. In this connection, it is argued that prior restraint and bans imposed on the future publication of entire newspapers, or for that matter websites such as YouTube, are incompatible with the European Convention standards.

Based on legal and procedural deficiencies related to Law No. 5651 practice, the study will conclude that the government should urgently bring Law No. 5651 in line with OSCE commitments and other international standards on freedom of expression, independence and pluralism of the media, and the free flow of information. If kept in its present form, the law should be abolished. It will be argued that the government should 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 legal Internet content.

Introduction and background to Internet Censorship in Turkey

As a right, freedom of expression is recognized and protected by the Turkish Constitution through Article 26,¹ and comprehensive human rights treaties to which Turkey is a party. Turkish law and court judgments are also subject to the European Convention on Human Rights and are bound by the judgments of the European Court on Human Rights. Turkey has been found in breach of Article 10 of the ECHR by the European Court of Human Rights several times.

In terms of Internet content regulation, 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 the general legal system regulating speech related crimes was adequate. In May 2002, the Parliament approved the Bill Amending the Supreme Board of Radio and Television and Press Code (Law No. 4676). This Law included provisions that would subject the Internet to restrictive press legislation in Turkey. Critics maintained that the rationale behind these provisions appeared to be in an effort to silence criticism of the Members of the Turkish Parliament and to silence political speech and dissent.² However, apart from a single reported case, this particular law was never used by the prosecutors, or the courts.

Turkish government enacted Law No. 5651 entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication on 4 May, 2007.³ The enactment of this law followed concerns for the availability of defamatory videos involving the founder of the Turkish Republic Mustafa Kemal Atatürk through YouTube, combined with increasing concerns for the availability of child pornographic, obscene, and Satanist content on the Internet, and websites which provide information about suicide, or about illegal substances deemed harmful or inappropriate for children. The Telecommunications Communication Presidency (TIB) was chosen as the organisation responsible for executing blocking orders issued by the courts, and has been given 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.

Since then, access to approximately 3700 websites have been blocked under Law No. 5651 by December 2009, and access to a considerable number of foreign websites including popular websites such as YouTube, Geocities, DailyMotion, Google Sites, and Farmville⁴ have been blocked from Turkey under the provisions of this law by court orders and administrative blocking orders issued by the TIB. Similarly, websites in Turkish, or addressing Turkey related issues, especially news sites dealing with south-eastern Turkey such as Özgür Gündem, Keditör, and Günlük Gazetesi, as well as gabile.com and hadigayri.com which in combination form the largest online gay community in Turkey with approximately 225,000 users have been subjected to blocking orders since Law No. 5651 came into force. Furthermore, access to popular

¹ According to Article 26 “everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively.”

² 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>.

³ Law No 5651 was published on the Turkish Official Gazette on 23.05.2007, No. 26030.

⁴ An online game developed by Zynga.com which is accessible and played through Facebook.

web 2.0 based services such as myspace.com, Last.fm, and Justin.tv have been blocked by courts and Public Prosecutors' Office with regards to intellectual property infringements subject to the Supplemental Article 4 of the Law No. 5846 on Intellectual & Artistic Works.

This report will therefore provide a review of the implementation and application of the Turkish Law No. 5651 entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication.

This review will include:

- an analysis of the current legal provisions under Law No. 5651,
- an analysis of the Law's application by the courts and by the Telecommunications Communication Presidency,
- an assessment of related Internet website blocking statistics,
- the identification of the legal and procedural defects of Law No. 5651,
- and an assessment with regards to Article 10 of the European Convention on Human Rights; and other relevant international standards.
- Finally, recommendations on how to bring legislation in line with international standards will be made.

Websites blocking practices until the enactment of Law No. 5651

There was no systematic legal approach to controlling the dissemination of content deemed illegal by Turkish law until the enactment of Law No. 5651 in May 2007. Until then the courts were able to rely on any legal measure, whether criminal or civil to issue blocking orders. In terms of its Internet censorship history, websites were taken down or blocked as early as in 2000 in Turkey, and between 2000-2007 several blocking orders were issued by courts and enforced by the then dial up Internet Service Providers (ISPs). At that time, the majority of the websites ordered to be blocked were outside the Turkish jurisdiction, and in terms of content, these websites included allegations of corruption within the Turkish government and army, anti-Turkish sentiments, terrorist propaganda, defamation, and gambling. Such content triggered court actions and blocking orders that were communicated to the Turkish 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.

More recently, in March 2007, a video clip that included defamatory statements and images about the founder of the Turkish Republic Mustafa Kemal Atatürk and scenes disparaging the Turkish Flag was published on YouTube. This resulted in the Istanbul 1st Criminal Court of Peace⁵ issuing an order to block access to YouTube at domain level, which led to a total access ban of the popular video-sharing website from Turkey. The video clip in question was deemed illegal under Law No. 5816 on Crimes Against Atatürk,⁶ and Article 300 of the Turkish Criminal Code.

The availability of defamatory videos involving Atatürk through YouTube combined with increasing concern for the availability of child pornography,⁷ as well as the

⁵ Decision of the Istanbul 1st Criminal Court of Peace 2007/384 Misc., dated 07 March, 2007.

⁶ Law on the Crimes Committed Against Atatürk (Atatürk Aleyhine İşlenen Suçlar Hakkında Kanun), No. 5816. Official Gazette No. 7872, 31.07.1951.

⁷ See "Child porn and crimes committed against Atatürk," *Turkish Daily News*, 30 March, 2007;

availability of obscene, and Satanist content on the Internet, and websites that provide information about suicide, all of which deemed harmful to children, resulted in the development of a new law regulating Internet content by the Turkish government.

Development and enactment of Law 5651

The Turkish government enacted Law No. 5651, entitled Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication, on 4 May, 2007.⁸ The law aims to combat certain online crimes and regulates procedures regarding such crimes committed on the Internet through content, hosting, and access providers. The former President of Turkey, Ahmet Necdet Sezer promulgated the law on 22 May, 2007. 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. These Regulations were prepared subject to article 11(1) of Law No. 5651. Firstly, on 24 October, 2007, the government published the *Regulations Governing the Access and Hosting Providers* which includes the principals and procedures for granting activity certificates for such providers.⁹ An amended version of these Regulations was published on 01 March, 2008.¹⁰ On 01 November, 2007 the government published the *Regulations Governing the Mass Use Providers* including the Internet cafes.¹¹ Finally, on 30 November, 2007, the government published the *Regulations Governing the Internet Publications* which included the detailed principals and procedural matters with regards to the application of Law No. 5651.¹² A further set of Regulations with regards to duties and responsibilities of TIB was published in August 2009.¹³

Specific Provisions of Law No. 5651

The explanatory note of the Law referred to article 41 of the Turkish Constitution 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

“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.

⁸ Law No 5651 was published on the Turkish Official Gazette on 23.05.2007, No. 26030.

⁹ 24.10.2007 tarih ve 26680 sayılı Resmi Gazetede yayımlanan Telekomünikasyon Kurumu Tarafından Erişim Sağlayıcılara ve Yer Sağlayıcılara Faaliyet Belgesi Verilmesine İlişkin Usul ve Esaslar Hakkında Yönetmelik.

¹⁰ 01.03.2008 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.

¹¹ 01.11.2007 tarih ve 26687 sayılı Resmi Gazetede yayımlanan İnternet Toplu Kullanım Sağlayıcıları Hakkında Yönetmelik.

¹² 30.11.2007 tarih ve 26716 sayılı Resmi Gazetede yayımlanan İnternet Ortamında Yapılan Yayınların Düzenlenmesine Dair Usul ve Esaslar Hakkında Yönetmelik.

¹³ 07.08.2009 tarih ve 27312 sayılı Resmi Gazetede yayımlanan Telekomünikasyon Yoluyla Yapılan İletişimin Tespiti, Dinlenmesi, Sinyal Bilgilerinin Değerlendirilmesi Ve Kayda Alınmasına Dair Usul Ve Esaslar İle Telekomünikasyon İletişim Başkanlığının Kuruluş, Görev ve Yetkileri Hakkında Yönetmelikte Değişiklik Yapılmasına Dair Yönetmelik.

protection of the mother and children is involved”. The Parliament essentially explained that they had a duty to protect ‘our families, children, and the youth’.

In terms of its content and regulatory requirements, 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.¹⁴ Article 3(2) provides that content, hosting, and access providers who fail to provide the required information could face an administrative fine by TIB between 2,000YTL and 10,000YTL.

Content providers are regulated through Article 4, which states that content providers are responsible for the content they create, and publish through their own websites. However, they are not liable for third party content that they provide linkage to.¹⁵ According to Article 4(2), if it can be understood from the presentation that the content provider adopts the content as its own or aims to deliberately make the content reachable, the provider can be held responsible according to the general principles.¹⁶

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 do 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 TIB, or subject to a court order with regards to Article 8 of Law No. 5651. There are, as of May 2009, 1214 commercial hosting companies, and 505 companies which provide hosting services within their own organizations which obtained the required “activity certificate”¹⁷ from the Telecommunications Communication Presidency. These 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.¹⁸

On the other hand, **access and Internet Service Providers** are regulated through Article 6, and as of November 2009, 109 ISPs obtained the required “activity certificate”.¹⁹ 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 are required to take down any illegal content published by any of their customers once made aware of the availability of the content in question through TIB, or subject to a court order. 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

¹⁴ 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.

¹⁵ See further article 6(2) of Regulations Governing the Publications on the Internet.

¹⁶ See further article 6(2) of Regulations Governing the Publications on the Internet.

¹⁷ For a list of these companies see < http://www.tib.gov.tr/dokuman/YS_listesi.html>.

¹⁸ See further Article 7 of Regulations Governing the Publications on the Internet.

¹⁹ For a list of these ISPs see < http://www.tib.gov.tr/dokuman/ES_listesi.html>. Applications can be made through <<http://faaliyet.tib.gov.tr/yetbel/>>.

actively seek facts or circumstances indicating illegal activity with regards to the transmitted data.

Article 7 regulates the **mass use providers**, including Internet cafes. 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 approved by the Telecommunications Communication Presidency to block access to illegal Internet content. Providers who operate without an official permission would face administrative fines between 3,000YTL and 15,000YTL.²⁰ Under related Regulations, they are also required to record daily the accuracy, security, and integrity of the retained data using the software provided by TIB, and to keep this information for one year.²¹

Article 8 Blocking Measures

Article 8 includes the blocking measures of Law No. 5651. Under Article 8(1) **access to websites are subject to blocking if there is sufficient suspicion that certain crimes are being committed** on a particular website. Although a broad range of crimes to be included within the ambit of Law No. 5651 were discussed by the Parliament, only a “limited number of crimes” are included within the scope of article 8. The eight specific crimes that are included in Article 8 are: encouragement of and incitement to suicide, sexual exploitation and abuse of children, facilitation of the use of drugs, provision of substances dangerous to health, obscenity, gambling, and crimes committed against Atatürk. Article 8 blocking provisions are also applicable with regards to football and other sports betting websites and websites that enable users to play games of chance through the Internet which are based outside the Turkish jurisdiction without having a valid permission.

Article 8 blocking measures will be critically assessed later in this study, but it should be noted that the law does not require these crimes to be committed on the websites, and a ‘sufficient suspicion’ is enough for a court or for TIB to issue a blocking order. **The Article 8 provisions do not clarify or establish what is meant by ‘sufficient suspicion’.**

Criminal prosecutions, and fines for ISPs

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 administrative blocking orders issued by TIB could face fines between 10,000YTL (EUR 4,735) and 100,000YTL (EUR 47,350). If an access provider fails to execute the administrative blocking order within twenty-four hours of being issued an administrative fine, the Telecommunications Authority can revoke the access provider’s official activity certificate.²²

²⁰ See Article 7(3).

²¹ Article 5(1)(e).

²² All decisions of TIB and the Authority can be challenged at administrative courts as provided under Administrative Justice Procedure Act No. 2577.

Private Law Disputes and Remedies

Article 9 of Law No. 5651 deals with private law matters and provides measures of content removal and right to reply.²³ 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 page(s) 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, **the provisions of Article 9 do not provide for “blocking orders” as a remedy for the individuals whose personal rights are infringed.** 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.²⁴ 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).²⁵ The Judge residing at the local Criminal Court of Peace would issue its decision without trial within 3 days.²⁶ An objection can be made against the decision of the Criminal Court of Peace according to the procedure provided under the Criminal Justice Act.²⁷ 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.²⁸ 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.²⁹ If the content provider or hosting provider is a legal person, the person acting as the publishing executive or director would be prosecuted.³⁰

This particular provision has been aptly criticised for being irrelevant.³¹

The Role of the Telecommunications Communication Presidency

Telecommunications Communication Presidency (“TIB”) was established within the Telecommunications Authority in August 2005,³² and became fully functional in July

²³ Article 10 of Regulations Governing the Publications on the Internet.

²⁴ Article 9(1).

²⁵ Article 9(2).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Article 9(3).

²⁹ Article 9(4).

³⁰ *Ibid.*

³¹ Akdeniz, Y., & Altıparmak, K., *Internet: Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, Ankara: İmaj Yayınevi (<http://www.imajyayinevi.com/>), November 2008. An online version is available through <http://www.cyber-rights.org.tr>.

³² 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

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. 2559,³³ No. 2803,³⁴ No. 2937,³⁵ and No. 5271.³⁶ 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.

The Presidency also has the 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 is also responsible for the co-ordination of efforts to combat crimes listed under Article 8 of Law No. 5651 in co-operation with the Ministry of Transportation, law enforcement agencies, ISPs, and related NGOs.³⁷ Power to monitor Internet content and develop preventative measures with regards to Article 8 catalogue crimes has been granted to the Presidency by Law No. 5651³⁸ With regards to this issue, the Presidency has been given powers to determine the nature, timing, and procedures concerning the content monitoring systems on the Internet,³⁹ and is responsible for establishing the minimum criteria concerning the production of hardware or software for filtering that would be used by mass use providers, screening and monitoring purposes.⁴⁰

TIB published detailed statistics about the work of its hotline (see below) as well as the blocking decisions it enforced between May 2008 and May 2009. However, TIB recently did not publish and did not reveal the detailed official blocking statistics with regards to Law No. 5651; the last monthly statistics were made publicly available in May 2009. Since then, in November 2009, TIB published its second annual report.⁴¹ However, compared to its more detailed 2008 report⁴² which included the blocking statistics for 2008, **TIB did not publish information with regards to the blocking statistics and decisions in its 2009 report.** TIB has been contacted for the purposes of this study commissioned by the OSCE, and a request has been made to obtain more recent statistics. However, TIB did not provide the more recent statistics subsequent to a freedom of information request made by the author of this study.

<<http://www.tib.gov.tr/tarihce.html>>. Law No. 5397 is available through <http://www.tib.gov.tr/kanun_detay2.html>.

³³ Law on the Duties and Powers of Police No. 2559, additional Article 7.

³⁴ Law on the Organisation, Duties and Powers of Gendarmarie No. 2803, additional Article 5. Official Gazette, 10.3.1983, No. 17985.

³⁵ Law on State Intelligence Services and National Intelligence Organisation, No. 2397, Article 6. Official Gazette, 1.11.1983, No. 18210.

³⁶ Criminal Procedural Act, No. 5271, articles 135-138.

³⁷ 07.08.2009 tarih ve 27312 sayılı Resmi Gazetede yayımlanan Yönetmelik (Regulations), Article 7(j) amending Article 17(1) of the Regulations 10/11/2005 tarihli ve 25989 sayılı Resmî Gazete’de yayımlanan Telekomünikasyon Yoluyla Yapılan İletişimin Tespiti, Dinlenmesi, Sinyal Bilgilerinin Değerlendirilmesi ve Kayda Alınmasına Dair Usul ve Esaslar ile Telekomünikasyon İletişim Başkanlığının Kuruluş, Görev ve Yetkileri Hakkında Yönetmelik.

³⁸ Article 10(4)(b).

³⁹ Article 10(4)(c).

⁴⁰ Article 10(4)(e).

⁴¹ Telekomünikasyon İletişim Başkanlığı, İnternet Dairesi 2009 Yılı Faaliyet Raporu'nu yayınladı: 25/11/2009 at <<http://www.tib.gov.tr/dokuman/23Kasim2009-IntDaireBsk.doc>>.

⁴² See <http://www.tib.gov.tr/dokuman/faaliyet_raporu.pdf>.

Therefore, the below statistical analysis with regards to the TIB hotline as well as the blocking statistics covers the period between May 2008 and May 2009.

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 hotline via e-mail, telephone or SMS address provided at the website of the hotline.⁴³

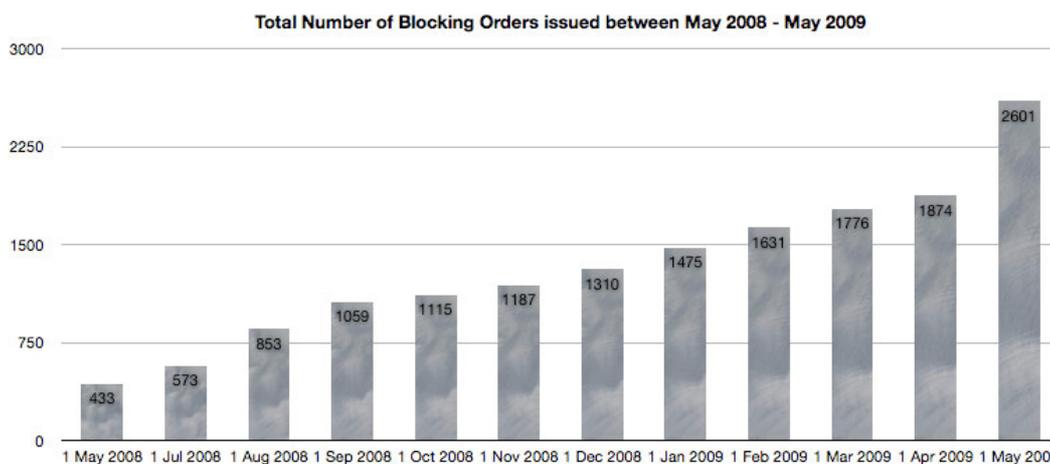
It is reported that the hotline has become popular in a very short time,⁴⁴ and the most recent statistics released on 11 May, 2009 show that a total of 81,691 calls (the number was 25,159 on 01 October, 2008) were made to the hotline.

34,294 of these notifications were considered to be actionable under Article 8. While 31,484 were repetitive reports, or previously actioned reports, 15,913 were non-actionable reports, or content deemed not to be illegal subject to Article 8 provisions. The number of domains to contain allegedly illegal content was 21,735 as of May 2009. The majority of the 34,294 actionable reports involved obscenity with 61.2% (21,016) while 4845 (14,1%) involved sexual exploitation of children, 2972 (8,6%) involved crimes committed against Atatürk, and 2861 (8,3%) involved prostitution.

As can be seen from the above hotline statistics, there seems to be major concern in Turkey about the availability of certain types of Internet content deemed to be objectionable, or allegedly illegal.

Statistics for blocked websites from Turkey

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 the blocking statistics, **it was revealed by TIB that as of 11 May, 2009, 2601 websites were blocked from Turkey under the provisions of Law No. 5651.**



⁴³ See <<http://www.ihbarweb.org.tr/index.html>>.

⁴⁴ 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. Cnnturk, “Savcıdan ‘Youtube’ Açıklaması”, 16 June, 2008.

As can be seen above, **while a total of 433 (140 of which were issued by the courts) websites were subjected to blocking in May 2008, over 2600 websites were subject to blocking a year later, in May 2009.** Therefore, approximately 2200 websites were blocked during the 12 months (May 2008 to May 2009 period) TIB regularly published the detailed blocking statistics.

While 475 (18%) of the 2601 websites are blocked by court orders, the majority, with 2126 websites (82%), were blocked via administrative blocking orders issued by TIB.

In terms of the 475 court orders issued by May 2009, 121 websites were blocked because they were deemed obscene (Article 226 of the Turkish Penal Code),⁴⁵ 54 websites were blocked because they involved sexual exploitation and abuse of children (Article 103(1) of the Turkish Penal Code),⁴⁶ 19 websites were blocked because of provision of gambling (Article 228 of the Turkish Penal Code),⁴⁷ 20 were blocked because they involved betting, and 54 websites were ordered to be blocked in relation to crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).⁴⁸ 32 of these 54 crimes committed against Atatürk related blocking orders were recurring orders involving approximately 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 requested that content and hosting providers take down these items from their servers. As a result of this co-operation, their websites were not subjected to access blocking orders. Furthermore, 5 websites were blocked in relation to prostitution (Article 227, Turkish Criminal Code),⁴⁹ 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).⁵⁰

More importantly, **while 197 websites were blocked by courts for reasons outside the scope of Law No. 5651, the detailed breakdown behind these orders was not provided by TIB in its published statistics.** It is, however, understood that TIB executed the blocking orders as it is legally obliged to even though they do not involve the catalogue crimes listed in Article 8. The number of websites blocked outside the scope of Article 8 by the courts was 69 in May 2008 but reached nearly 200 by the end of May 2009.

In terms of the 2126 administrative blocking orders issued by TIB, the majority, with 1053 blocking orders involved sexual exploitation and abuse of children (Article 103(1) of the Turkish Penal Code),⁵¹ 846 involved obscenity (Article 226 of the Turkish Penal Code),⁵² 117 involved football and other sports betting websites (Law No. 5728, article 256), 74 involved gambling sites (Article 228 of the Turkish Penal Code),⁵³ 20 involved prostitution websites (Article 227 of the Turkish Penal Code),⁵⁴

⁴⁵ Article 8(1)(a)(5).

⁴⁶ Article 8(1)(a)(2).

⁴⁷ Article 8(1)(a)(7).

⁴⁸ Article 8(1)(b).

⁴⁹ Article 8(1)(a)(6).

⁵⁰ Article 8(1)(a)(3).

⁵¹ Article 8(1)(a)(2).

⁵² Article 8(1)(a)(5).

⁵³ Article 8(1)(a)(7).

⁵⁴ Article 8(1)(a)(6).

11 involved websites facilitating the use of drugs (Article 190 of the Turkish Penal Code),⁵⁵ 2 involved crimes committed against Atatürk (Law No. 5816, dated 25/7/1951),⁵⁶ and one involved encouragement and incitement of suicide (Article 84 of the Turkish Penal Code).⁵⁷

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) by May 2009, 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 was found on websites that 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)).⁵⁸

According to the May 2009 statistics, only 54 court issued blocking orders, and 10 TIB issued administrative blocking orders were subsequently revoked (64 in total). Therefore, **as of 11 May, 2009 a total of 2537 websites were blocked from Turkey.** Furthermore, in terms of blocking orders, some sites are blocked by DNS poisoning while others are blocked by both DNS poisoning and by their IP addresses. TIB statistics revealed that 483 IP addresses were blocked in addition to 2054 unique website addresses as of May 2009 from Turkey.

It is hereby speculated by the author of this study that, based on the May 2008 – May 2009 period (averaging 180 blocked websites monthly), **access to approximately 3700 websites would have been blocked** from Turkey as of December 2009 under Law No. 5651. **Although this is a ‘speculative number’ calculated on the basis of TIB’s previous action, the Presidency’s decision to withhold the blocking statistics and other detailed information contributes to speculation that the number of blocked websites are constantly increasing rather than decreasing.**

Critical Assessment and Application of Law No. 5651

This section of the report will provide a critical assessment of the application of the Law No. 5651 since November 2007. The new law, for example, triggered persistent access restriction to YouTube, beginning in May 2008. Similarly, access to Google has been blocked within Turkey since June 2009, and Geocities remains inaccessible due to a blocking order issued in February 2008, until Yahoo decided to cease its service in October 2009.

There are a number of different legal measures that could be used to block access to websites that contain allegedly illegal content in Turkey. This assessment will predominantly concentrate on the provisions and application of Law No. 5651, and the blocking powers allowed in Article 8.

I. Blocking Orders issued by the Courts of Law under Article 8 of Law No. 5651

⁵⁵ Article 8(1)(a)(3).

⁵⁶ Article 8(1)(b).

⁵⁷ Article 8(1)(a)(1).

⁵⁸ Information obtained from TIB.

As briefly mentioned above, under Article 8(1), access to websites are subject to blocking if there is ‘**sufficient suspicion**’ that certain limited number of crimes are being committed on a particular website. The eight specific crimes that are included within the parameters of Article 8 are:

- encouragement and incitement of suicide (Article 84 of the Turkish Penal Code),⁵⁹
- sexual exploitation and abuse of children (Article 103(1) of the TPC),⁶⁰
- facilitation of the use of drugs (Article 190 of the TPC),⁶¹
- provision of dangerous substances for health (Article 194 of the TPC),⁶²
- obscenity (Article 226 of the TPC),⁶³
- prostitution (Article 227 of the TPC),⁶⁴
- gambling (Article 228 of the TPC),⁶⁵ and
- crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).⁶⁶

Article 8 blocking provisions were extended in January 2008, and are applicable in matters concerning football and other sports betting websites. Websites which enable users to play games of chance via the Internet, which are based outside the Turkish jurisdiction and lack valid permission, are also susceptible.⁶⁷ However, certain crimes such as the **dissemination of terrorist propaganda** (Articles 6 and 7 of the Turkish Anti-Terror Law No. 3713), or **crime of ‘denigrating Turkishness’**, (Article 301, Criminal Code), or **hate crimes** (Article 216 of TPC)⁶⁸ **are not included within the scope of Article 8.**⁶⁹ Therefore, neither the Courts nor TIB can block access to websites based on reasons outside the scope of Article 8.

Websites that carry content subject to Article 8 could be taken down if hosted in Turkey, or blocked and filtered through Internet access and service providers if hosted abroad.

⁵⁹ Article 8(1)(a)(1).

⁶⁰ Article 8(1)(a)(2).

⁶¹ Article 8(1)(a)(3).

⁶² Article 8(1)(a)(4).

⁶³ Article 8(1)(a)(5).

⁶⁴ Article 8(1)(a)(6).

⁶⁵ Article 8(1)(a)(7).

⁶⁶ Article 8(1)(b).

⁶⁷ Law Amending Some Acts to Harmonise Criminal Law No 5728, Article 256. Official Gazette, 23.1.2008, No. 26781.

⁶⁸ Article 216 of TPC entitled Inciting the population to breed enmity or hatred or denigration.

⁶⁹ CNNTurk, “İnternette terör propagandasına ceza yok”, at <http://www.cnnurk.com/haber_detay.asp?haberID=472228&PID=16>; Bianet, “Objectionable Atatürk Videos Keep YouTube Inaccessible”, at <<http://ww.bianet.org/english/kategori/english/107760/objectionable-ataturk-videos-keep-youtube-inaccessible?from=rss>>.

Blocking orders would be issued by a judge during a preliminary investigation and by the courts during trial.⁷⁰ 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 must take his injunction decision to a judge within 24hrs, and the judge needs to decide on the matter within 24hrs. The precautionary injunction would be 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.

Furthermore, if during preliminary investigation it is decided that no prosecution will take place, the blocking order issued through a precautionary injunction would be automatically removed.⁷¹ Similarly, if a provider is found not guilty, the blocking order issued by the court would be removed.⁷² Finally, if the content found to be illegal, and thereby subject to the blocking order, is removed from the website, the blocking order would be then removed by the Public Prosecutor during investigation and by a court during prosecution.⁷³

Subject to Article 8(2), objections to the blocking decision rendered as a precautionary measure should be brought to the Court that issued the blocking order, pursuant to the Criminal Procedure Act (Law No. 5271) by the interested parties. However, **identification of an interested party is not clearly specified by law.** Usually, an interested party would be the owner of a website, or the author of a blog but the procedure followed under Law No. 5651 does not give an opportunity to the content providers to have knowledge about the charges or the blocking orders. The law does not require the authorities to inform the accused about the Article 8(2) procedure. No other procedural guarantee to counterbalance this deficiency is envisaged either. Although an objection can be made pursuant to the Criminal Procedural Act, an interested party that wants to invoke this legal provision will not be able to know the details of such an accusation. Usually, content providers are caught by surprise when they learn that their websites are inaccessible from Turkey.

Although the court decisions with regards to the catalogue crimes in Article 8 are immediately communicated to TIB for the execution of the blocking orders,⁷⁴ they are often not communicated to the content/hosting providers, and the content/hosting providers do not necessarily know what triggered the blocking orders.

TIB, responsible for the execution of the precautionary measure, is authorised to bring objections against the precautionary orders issued by the courts.⁷⁵ However, there is no available statistical information concerning the Presidency's decisions to bring objections against court orders, and, therefore, the underlying criteria that is behind decisions to bring or not to bring forward an objection is unknown.

⁷⁰ Article 8(2).

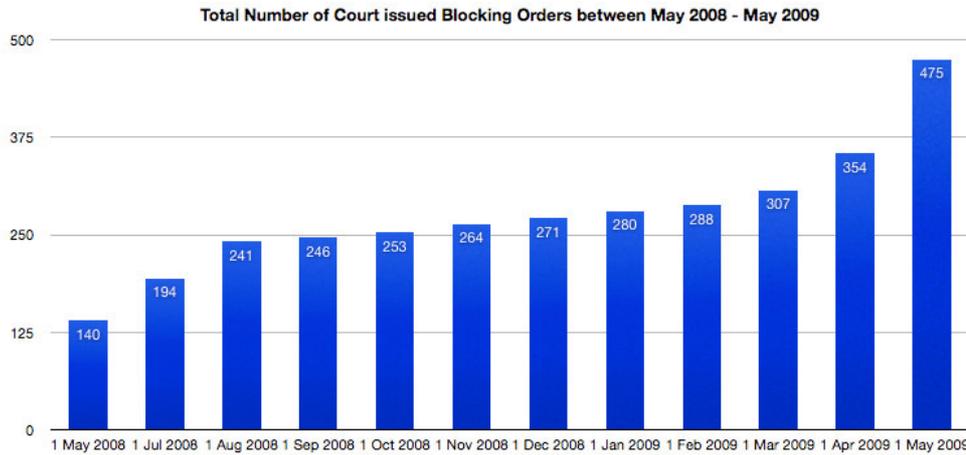
⁷¹ Article 8(7).

⁷² Article 8(8).

⁷³ Article 8(9).

⁷⁴ Article 8(3).

⁷⁵ An amendment to article 8 of Law No. 5651 was made through the Electronic Communication Law. See Law No. 5809 on Electronic Communication, Date: 5.11.2008.



As can be seen above, the total number of blocking orders issued by the courts reached 475 by May 2009, the majority of which involved blocking orders issued outside the scope of Article 8 with 197 such blocking decisions (41%). This category (which will be dealt separately below) is followed by obscenity (121 blocking decisions, 25%), and sexual exploitation and abuse of children (54 blocking decisions, 11%), and crimes committed against Atatürk (54 blocking decisions, 11%). **As TIB has not published the blocking statistics since May 2009, more recent data is not available for assessment.**

YouTube related Blocking Orders

Perhaps the most well known application of Law No. 5651 by the Courts concern the infamous blocking orders issued with regards to the Google owned popular video-sharing web 2.0 platform YouTube. Between March 2007 and June 2008, Turkish courts issued 17 blocking orders with regards to YouTube,⁷⁶ and since May 2008, access to YouTube from Turkey has been blocked constantly. Ankara's 1st Criminal Court of Peace⁷⁷ issued the final blocking order on 05 May, 2008, and this latest blocking order is still in force at the time of this writing in December 2009.

Presidential statistics dated 26 May, 2008 revealed 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.

Recently, in December 2009, INETD, the Society for Internet Technology based in Ankara, lodged an appeal with the European Court of Human Rights challenging the YouTube blocking order issued by the Ankara's 1st Criminal Court of Peace, having exhausted all the possible national legal remedies.⁷⁸ INETD claimed a review of the Turkish decision with regards to Article 10 of the European Convention on Human Rights arguing that the decision is disproportionate and infringes upon their right to

⁷⁶ Majority of the YouTube related blocking orders issued by the courts involved crimes committed against Atatürk (53%).

⁷⁷ Ankara 1st Criminal Court of Peace, Decision No. 2008/402 Misc., dated 05.05.2008.

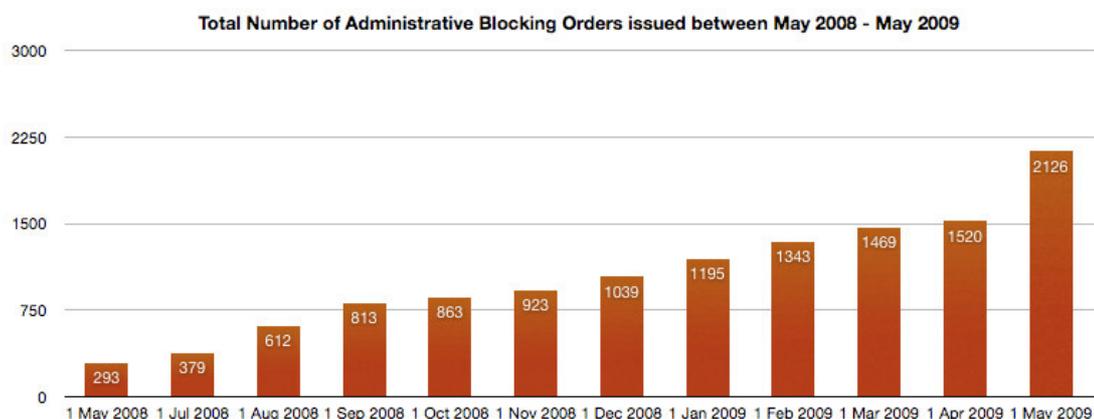
⁷⁸ Financial Times, "Turkey to face European Court on YouTube ban," 30 November, 2009.

speak freely, and express themselves, and access and receive information⁷⁹ from YouTube. It is argued that even though Article 8 and Law No. 5651 provide a legal basis for access blocking, the necessity of such a disproportionate measure (blocking access to a whole website), in a democratic society, would be the basis of such a challenge in Strasbourg.

II. Administrative Blocking Orders issued by TIB under Article 8

Law No. 5651, through Article 8(4), enables TIB to issue “administrative blocking orders” ex-officio. These orders can be issued by the Presidency with regard 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),⁸⁰ or obscenity (Article 226 of the Turkish Penal Code).⁸¹

According to the Regulations Governing the Publications on the Internet (which included the detailed principals and procedural matters of the application of Law No. 5651),⁸² if the decision involves sexual exploitation and abuse of children or obscene content hosted in Turkey, the Presidency needs to obtain an administrative blocking decision approved by a judge. A judge is then required to rule on the administrative decision within twenty-four hours.⁸³ When such an administrative blocking order is issued, the Presidency would contact the Turkish access providers to execute the blocking order within twenty-four hours.⁸⁴ If the Presidency can establish the identities of those responsible for the content subject to the blocking orders, the Presidency would request the Chief Public Prosecutor’s Office to prosecute the perpetrators.⁸⁵



⁷⁹ Note the case of *Khurshid Mustafa and Tarzibachi v. Sweden*, App. no. 23883/06, judgment of 16 December, 2008.

⁸⁰ Article 8(1)(a)(2).

⁸¹ Article 8(1)(a)(5).

⁸² 30.11.2007 tarih 26716 sayılı Resmi Gazetede yayımlanan İnternet Ortamında Yapılan Yayınların Düzenlenmesine Dair Usul ve Esaslar Hakkında Yönetmelik.

⁸³ See article 14(1) of the above Regulations.

⁸⁴ Article 8(5).

⁸⁵ Article 8(6).

As can be seen above, the total number of administrative blocking orders issued by the Presidency reached 2126 by May 2009, the majority of which involve obscenity (846 blocked websites, 40%), and sexual exploitation and abuse of children (1053 blocked websites, 50%).

TIB administrative blocking decisions can be challenged subject to Article 11 of the Turkish Code of Administrative Procedure. TIB then would have 60 days to review its decision. If no response is provided, or the objection is rejected, an interested party can then take his/her objection to an administrative court for judicial review, and request a suspension of execution order subject to Article 27 of the Code of Administrative Procedure. It should, however, be noted that according to Article 22(3) of the Turkish Constitution, decisions to interfere with the freedom of communication and right to privacy can only be given by the judiciary. 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.

Based on this constitutional argument, 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. Since 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 that the Court send 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. A decision has not been reached as of this writing.

Gabile.com, Hadigayri.com, and Shemaleturk.com incidence

There has been further criticism of the administrative blocking orders issued by TIB. In October 2009, the Presidency issued a blocking order with regards to *gabile.com*⁸⁶ and *hadigayri.com*,⁸⁷ which combine to form the largest online gay community in Turkey, at approximately 225,000 users. *Shemaleturk.com* was also blocked, as this website shared the same IP address with *gabile.com* but was not named in the blocking order. At first, there was no publicly available information as to why TIB issued the blocking order as the Presidency did not get in touch with the website operators to issue its order even though both sites are operated within Turkey and the

⁸⁶ TIB Decision No 421.02.02.2009-272446 dated 02/10/2009.

⁸⁷ *Ibid.*

content on these pages are provided in Turkish. Both sites alleged that the decision was homophobic and had no legal basis.⁸⁸

A TIB decision was challenged for the first time by these two websites' operators, and they found that 'encouragement to prostitution,' under Article 8(1)(6) of Law No. 5651, was the reason used for blocking access to the websites. TIB wrote to the website operators that the Presidency suspected encouragement to prostitution based on their technical review of the websites, subsequent to several complaints by the public. After six days, subject to major media coverage both domestically, and abroad, TIB overturned its own decision and stopped blocking access to these social networking websites without further explanation. While hadigayri.com made some changes to their website, Gabile.com announced that it did not make any amendments to its website, and asked the Ministry of Transportation, which is responsible to oversee TIB's activities to investigate the matter, to issue disciplinary sanctions for those responsible. The review is still ongoing at the time of this writing.

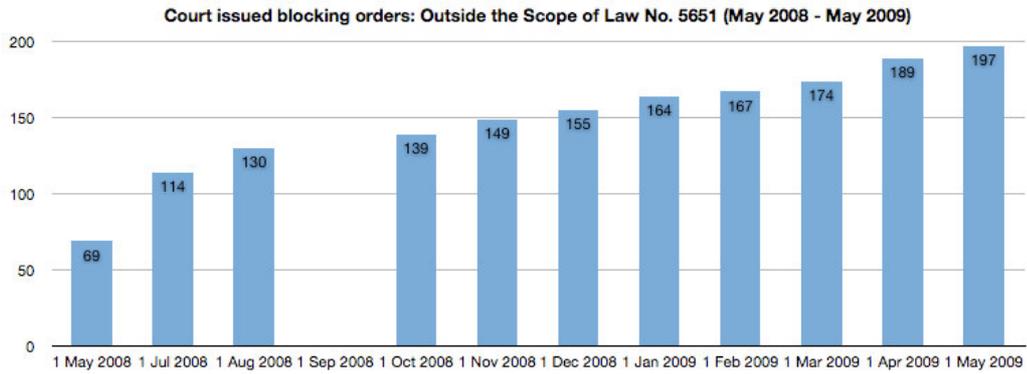
It should be noted that there could be a breach of Article 10, ECHR if blocking measures or filtering tools are used at state level to silence politically motivated speech on the Internet, or if the criteria for blocking or filtering is secret, or if the decisions of the administrative bodies are not publicly made available for legal challenge. The gabile.com and hadigayri.com blocking decisions highlighted these concerns.

III. Websites blocked for unknown reasons outside the scope of Article 8

Although the Turkish Parliament claimed that the aim of Law No. 5651 was to protect children and families from accessing harmful content, blocking orders given so far demonstrate that there are a considerable number of blocking orders issued by the courts based on reasons other than the ones included within the scope of Article 8.

Access to a considerable number of websites of a political nature are blocked by relying on Anti-Terror Law No. 3713, or crime of 'denigrating Turkishness' under Article 301 of the Turkish Criminal Code, and other laws, even though such crimes 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 of its blocking orders generally remain unknown. As of 11 May, 2009 **there were 197 blocking orders issued by the courts and executed by TIB which are outside the scope of Article 8.**

⁸⁸ Cyber-Rights.Org.TR, "From Farmville to Gayville, Internet censorship continues in Turkey, 04 October, 2009, at <<http://privacy.cyber-rights.org.tr/?p=532>>.



As TIB has not published the blocking statistics since May 2009, it is difficult to quantify the exact number and nature of blocking activity taking place outside the scope of Article 8 of Law No. 5651. **It is however speculated by the author of this study that approximately 300 such websites are blocked as of December 2009.**

The research for this report identified several websites that have been denied access by the Turkish courts outside the scope of Article 8 of Law No. 5651. By way of example, Indymedia Istanbul website at <istanbul.indymedia.org> was subjected to a blocking order during March 2008. Indymedia Istanbul has been active since January 2003 in Turkey providing independent news on its website. Access to <istanbul.indymedia.org> was blocked by a decree of General Staff Presidency Military Court⁸⁹ in March 2008⁹⁰ based on an Article 301 Criminal Code offence of insulting Turkishness.⁹¹ The decision was enforced by TIB, and Indymedia Istanbul described the blocking as an attempt to silence the organization by censorship.

Furthermore, certain leftist, pro-Kurdish news websites are blocked from Turkey. Some of the websites keep changing their domain names to overcome blocking orders rather than fighting such orders through the courts and through the legal system. For instance, the website of the daily newspaper *Gündem* blocked by different Assize Court decisions seven times since March 2008.⁹² However, their most recent domain

⁸⁹ General Staff Presidency Military Court, Decision No: 2008/7-4 z.d, dated 28.03.2008.

⁹⁰ 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," *BİA 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>>.

⁹¹ Article 301 (Insulting Turkishness, the Republic, the organs and institutions of the State - Türk Milletini, Türkiye Cumhuriyeti Devletini, Devletin kurum ve organlarını aşağılama).

⁹² <ozgurgundem.org>: Ankara 11th Assize Court, Decision No. 2008/1754, dated 20.03.2008; <gundemonline.com>: Ankara 11th Assize Court, Decision No. 2008/2902, dated 13.05.2008; <gundemonline.net>: Ankara 11th Assize Court, Decision No. 2008/4433, dated 07.08.2008; <gundemonline.org>: Beyoğlu Director of Public Prosecutors' Office, Decision No. 2008/22434, dated 31/10/2008; <www.gundem-online.com>: Ankara 11th Assize Court, decision no. 2009/6108, dated 24.09.2009. The same decision blocked access also to <jiyan-board.com>. <gundemimiz.com>, and <ozgurgundem.net> were also blocked. See further <<http://www.gundemonline.org/haber.asp?haberid=63464>>.

at <<http://www.gundem-online.net/>> is currently accessible from Turkey. Similarly, access to the website of Firat News Agency at <firatnews.eu> has been blocked since January 2008.⁹³ An alternative website at <www.firatnews.com> was also blocked on 9 May, 2008.⁹⁴ Other blocking orders outside the scope of Article 8 include the following websites; Yeni Özgür Politika,⁹⁵ and atilim.org,⁹⁶ both of which are daily news sources and newspapers; the Ankara Socialist Youth Association⁹⁷ ; Keditor.com⁹⁸ , a web based alternative media source predominantly dealing with south-eastern Turkey matters including the Kurdish issues; and Günlük Gazetesi, the website of a daily newspaper dealing with the Kurdish issues,⁹⁹ to name a few. It is believed (based on the domain names) that most of these orders have been issued subject to Articles 6 and 7 of the Turkish Anti-Terror Law No. 3713 with regards to the crime of dissemination of terrorist propaganda,¹⁰⁰ a crime currently not listed under Article 8 of Law No. 5651. A number of left wing websites including Mazgirt.Net,¹⁰¹ devrimcikarargah.com,¹⁰² and right wing and Islamist websites including hilafet.com,¹⁰³ kokludegisim.com,¹⁰⁴ hizb-ut-tahrir.org,¹⁰⁵ 19.org,¹⁰⁶ yuksel.org,¹⁰⁷ and susaningulleri.org¹⁰⁸ have also been blocked outside the scope of Article 8 of Law No. 5651.

Although clearly blocked outside the scope of Article 8, the owners or operators of these websites do not seem to challenge the blocking decisions through the courts. Similarly, blocking orders seem to be the only ‘legal action’ taken by the public prosecutors and the courts, and no prosecutions seem to take place with regards to the ‘alleged or suspicion of crimes’ taking place on these websites.

Other Blocking Measures

Although this study concentrates on the implementation and application of Law No. 5651 and the blocking decisions related to that law, it is also worth mentioning certain other legal developments, which also lead to the blocking of access to websites based in Turkey.

⁹³ 12th Assize Court, Decision no. 2008/28-29 dated 10.01.2008; Ankara 11th Assize Court, Decision 2008/858, dated 08.02.2008.

⁹⁴ Ankara 11th Assize Court, Decision no. 2008/2815, dated 09.05.2008.

⁹⁵ <yeniozgurpolitika.com>: Ankara 11th Assize Court, Decision no. 2008/2815, dated 09.05.2008.

⁹⁶ İstanbul 9th Assize Court, Decision no 2009/632, dated 04.04.2009.

⁹⁷ <www.ankarasgd.org>: Ankara 5th Criminal Court of Peace, Decision no. 2008/771, dated 29.07.2008.

⁹⁸ <www.keditor.com>: Ankara 11th Assize Court, Decision no. 2009/1593-2, dated 11/06/2009.

⁹⁹ <www.gunlukgazetesi.com>: Ankara 11th Assize Court, Decision no. 2009/7088, dated 04/11/2009.

¹⁰⁰ Reporters sans frontiers, “Illegal court ban on websites deplored” 08 April 2008, at <http://www.rsf.org/article.php3?id_article=26484>.

¹⁰¹ Ankara 11th Assize Court, Decision no. 2009/6163, dated 28.09.2009.

¹⁰² Ankara 11th Assize Court, Decision no. 2009/1029, dated 12.02.2009.

¹⁰³ Aksaray 2nd Criminal Court of Peace, Decision no. 2009/489, dated 01.07.2009.

¹⁰⁴ *Ibid.*

¹⁰⁵ Aksaray 2nd Criminal Court of Peace, Decision no. 2009/441, dated 08.06.2009.

¹⁰⁶ Ankara 9th Criminal Court of Peace, Decision no. 2009/209, dated 16.02.2009.

¹⁰⁷ *Ibid.*

¹⁰⁸ Ankara 11th Assize Court, Decision no. 2009/1043, dated 12.02.2009.

Precautionary Injunctions issued by the Civil Courts

Article 9 of Law No. 5651, detailed above, provides a new procedure for Internet content in violation of personal rights. Accordingly, the individual alleging that his/her rights have been infringed by a website is encouraged to seek the removal (take down) of the content from the website, but not the blocking of the website carrying the allegedly illegal 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 it 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, 2007.¹⁰⁹

Article 9 of Law No. 5651 has therefore rendered the provisions of the Law on Civil Procedure inapplicable concerning the Internet related violations of personal rights. Bearing in mind the clear wording of this specific provision, **courts can no longer rely upon the general provisions of the Civil Code to ban access to websites.**

Despite the new legal regime, precautionary injunctions are issued by civil courts over violation of personal rights, such as privacy and reputation. Many defamation claims resulted with the obtainment of precautionary injunctions for blocking access to websites carrying allegedly defamatory statements since 2007. Islamic creationist author Adnan Oktar has become iconic using this general civil law provision to get a considerable number of websites (over 50 between 2005-2008 including Wordpress,¹¹⁰ Google Groups,¹¹¹ and Richard Dawkins’ website¹¹²) supporting evolution theory, or websites criticizing Adnan Oktar’s views, blocked from Turkey.¹¹³

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 submitted 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), and the daily newspaper Vatan

¹⁰⁹ Note that Articles 3 and 8 were brought into force on 23.11.2007, while the rest of Law No. 5651 provisions were brought into force on 23.05.2007.

¹¹⁰ Blocking access to Wordpress.com lasted approximately 8 months between August 2007 and April 2008.

¹¹¹ Google Groups ban lasted for nearly 2 months (March-May 2008).

¹¹² Access to Richard Dawkins’ website (<<http://richarddawkins.net/>>) is blocked since September 2008. Dawkins, a British ethologist, evolutionary biologist, and popular science writer is well known for such books like *The Selfish Gene* and *The God Delusion*. Dawkins’ website was accused of containing insults against Oktar and his book entitled *Atlas of Creation*. See Bianet, “Evolutionist Dawkins’ Internet Site Banned in Turkey,” 17 September, 2008 at <<http://ww.bianet.org/english/kategori/english/109778/evolutionist-dawkins-internet-site-banned-in-turkey?from=rss>>.

¹¹³ 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. See Cyber-Rights.Org.TR, “Turkish creationist threatens to sue website for an article written by Akdeniz and Altiparmak,” 30.10.2008, at <<http://privacy.cyber-rights.org.tr/?p=212>>.

(<<http://gazetevatan.com>> October 2008), all with regards to personal rights disputes involving defamation, were illegal and should not have been issued by the courts.

Intellectual Property Law related blocking orders

Furthermore, it should be noted that apart from the Article 8 provisions of Law No. 5651, provisions of Law No. 5846 on Intellectual and Artistic Works¹¹⁴ can also be used to obtain blocking orders through the courts. Supplemental Article 4 of the Law No. 5846, introduced in March 2004, 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. This legal remedy is therefore predominantly issued with regards to websites related to piracy (e.g. The Pirate Bay), and IP infringements (e.g. Justin.TV), and media reports suggest that at least 3,000 websites are blocked under Law No. 5846 from Turkey, the majority of which are blocked indefinitely.

More recently, on 18 September, 2009, access to popular social networks Myspace.com and Last.fm were blocked from Turkey. The blocking order was issued by the Beyoğlu Chief Public Prosecutor’s Office.¹¹⁵ The blocking order was issued following a request made by Mu-yap, the Turkish Phonographic Industry Society, accusing these two sites of intellectual property infringement.

An appeal was made in this case by Dr. Yaman Akdeniz, the author of this survey, based on a ‘user argument,’ because neither Myspace nor Last.fm appealed against the decision of the Beyoğlu Chief Public Prosecutor’s Office. Akdeniz argued that Internet users’ right to access and receive information available from these websites has been denied by the blocking order, and blocking access to an entire website is a “disproportionate” response based on Article 10 of the European Convention on Human Rights and the related jurisprudence of the European Court of Human Rights. Furthermore, Akdeniz argued that the intellectual property law which was used as a legal measure to issue the blocking order was unconstitutional. It was argued that Turkish Constitution, in consistence with ECHR, requires that any suspension of the exercise of fundamental rights and freedoms can only be carried out under the rulings of a court of law, and not by a Public Prosecutor.

Akdeniz’s appeal to overturn the blocking decision was first rejected by the Chief Public Prosecutor’s Office, and then by the Beyoğlu Criminal Court of Peace. His subsequent appeal to a higher specialized court, to the Intellectual Property Court – Crime Division was also unsuccessful. The Beyoğlu Intellectual Property Court – Crime Division ruled (single judge) in October 2009, and rejected his appeal on procedural and legal grounds. As the decision of the Intellectual Property Court – Crime Division is final, and as the available national legal remedies are exhausted Akdeniz will be taking his case to the European Court of Human Rights, citing Article 10 of the European Convention on Human Rights for infringement within the next

¹¹⁴ 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>>.

¹¹⁵ Order No 2009/45, dated 26.06.2009.

few months. The blocking decision concerning Myspace.com was removed on 06 October, 2009 as the media reports suggested that Mu-yap and Myspace.com settled out of court and reached a contractual agreement.

Blocking access to any of these Web 2.0 based applications and systems have significant side effects. These kind of 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. Blogger, Blogspot, Myspace.com and Last.fm blocking orders, as in the case of the YouTube blocking, highlight the problems associated with blocking access to Web 2.0 based applications and their detrimental impact on freedom of expression.

Assessment with regards to Article 10, ECHR

The Law No. 5651 may have serious repercussions on a number of fundamental rights protected under the Turkish constitution and international human rights law. In fact, Law No. 5651 has both substantive and procedural defects. These defects and problems associated with Law No. 5651 will be assessed below.

Substantive Aspects – Freedom of Expression

As a right, freedom of expression is recognised and protected by the Turkish Constitution¹¹⁶ and comprehensive human rights treaties, to which Turkey is a party. Despite such protection, Turkey has been found in violation of international standards for suppressing alternative mass media organisations in the past.¹¹⁷ Newspapers voicing opposition views continue to face harsh penalties mostly because of the on going conflict in the South-East region of the country. While a ‘degree of control’ is still possible for traditional media outlets - including newspapers, radio and TV stations -, it has become harder for the government and government institutions to counter alternative ideas spread through various Internet communication tools and social media platforms.

Obviously, freedom of expression is not an absolute right and might be subject to limitations provided in the Turkish 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’.¹¹⁸

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

¹¹⁶ 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.

¹¹⁷ *Özgür Gündem v. Turkey*, App. no. 23144/93, 16.3.2000.

¹¹⁸ 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.

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.¹¹⁹

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 compatible with the rule of law.¹²⁰

Legal Basis (prescribed by law)

Any restriction on freedom of expression should be prescribed by law. 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 above, the Law No. 5651 has led to the blocking of over 2600 websites as of May 2009, and it is speculated by the author of this study that as of December 2009 the number is even higher. However, neither TIB nor the courts have given clear guidance on what kind of web content results in this most restrictive type of measure. 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 provide any information on which catalogue crime (Article 8 of Law No. 5651) has been committed or suspected on that website, or information on any other legal provision triggering the blocking orders.

The Strasbourg Court jurisprudence shows that the condition of legality 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.¹²¹ However, the reasons for the blocking decisions are not made public, nor declared to the content providers or website owners. For example, TIB did not communicate its blocking decision to the operators of *gabile.com*, and *hadigayri.com* even though these websites were run by Turkish citizens in Turkey. Furthermore, research conducted by Akdeniz & Altiparmak¹²² revealed that the courts often fail to provide clear reasons for the blocking decisions they issue. This lack of guidance leads to uncertainty and arbitrary application of Law No. 5651 by the courts and TIB with regards to its administrative decisions. Research conducted by Akdeniz & Altiparmak has also shown that **some**

¹¹⁹ 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.

¹²⁰ 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

¹²¹ *Kokkinakis v. Greece*, Series A no. 260-A, 25.5.1993, para. 52.

¹²² Akdeniz, Y., & Altiparmak, K., *Internet: Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, Ankara: Imaj Yayınevi (<http://www.imajyayinevi.com/>), November 2008.

blocking orders given by the Courts have no legal basis under Law No. 5651, and are issued outside the scope of the new provisions as was previously mentioned in this study. As of December 2009, the extent of this breach and blocking outside the scope of Law No. 5651 remains unknown as TIB did not reveal the blocking decisions since May 2009.¹²³

Legitimate Aims

Even if a restriction has a legal basis (e.g. Law No. 5651), the basis must be enacted to meet one of the specified legitimate aims listed in the Constitution¹²⁴ and ECHR. The catalogue crimes (taken from the Criminal Code) incorporated to Article 8 fit with the category which is “those designed to protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals).”¹²⁵

Proportionality

The requirement of proportionality is divided into three subheadings in the Turkish constitutional law,¹²⁶ 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.

These three tests will be assessed below with regards to Law No. 5651.

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

The adoption of an access blocking policy through Law No. 5651 is evidently problematic. An examination of the known blocked websites from Turkey, including YouTube and others, show that in almost all cases circumvention is possible, and the court issued blocking orders or administrative blocking orders issued by TIB are not effective. 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 the popular Apple iPhones, as YouTube uses a different server for mobile access which seems not to be blocked from Turkey. Therefore, it is argued that the restriction provided by law is not suitable for the aim pursued.

¹²³ According to the TIB statistics, Courts have given 197 blocking decisions as of May 2009 for reasons other than the ones listed under Article 8.

¹²⁴ Article 13 of the Constitution.

¹²⁵ 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).

¹²⁶ 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.

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’.¹²⁷ However, under national law, pressing social need should be satisfied with the least restrictive alternative available. Having said this, it is undoubtedly more difficult to satisfy the necessity test for Internet content, because users seldom encounter illegal content accidentally.¹²⁸ In other words, the risk of encountering undesirable or illegal content on the Internet is much lower than in traditional media. Therefore, the burden is higher for the government to prove that pressing social need exists to restrict such content on the Internet. Furthermore, a 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”.¹²⁹

Law No. 5651 does not require a stricter or compelling test of necessity for the crimes listed in the Turkish Criminal Code. It seems that, for the courts, the standard for printed material also applies to the Internet content. Research by Akdeniz & Altiparmak¹³⁰ did not come across any examples in which the Turkish courts or TIB evaluate the different nature of the Internet technology to determine whether pressing social need exists to interfere with Internet publications. Undoubtedly the Internet is substantially different than the printing press and therefore its borderless and evolving nature (for example the development of web 2.0 based technologies) should be considered accordingly by the courts.

It is argued that 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, such as various self-regulatory solutions to protect children from accessing illegal and harmful content, by filtering software on home based computers, in schools, or in Internet cafes.

Certain practices adopted by TIB, such as the issuing of warnings and notices to websites situated in Turkey¹³¹ 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 those put on notice, the criteria for this approach needs further clarification. Additionally, notice and take down as a practice is not widely used by the courts.¹³² 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, and therefore its use is recommended with caution in this report.

¹²⁷ Amongst many authorities, see *Observer and Guardian v. UK*, Series A. no. 216, 26.11.1991, para. 59.

¹²⁸ See *Reno v. ACLU*, 521 U. S. 844 (1997), 854.

¹²⁹ See *Ibid*, 874; *United States v. Playboy Entertainment Group*, (2000) 120 S.Ct. 1878.

¹³⁰ Akdeniz, Y., & Altiparmak, K., *Internet: Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, Ankara: Imaj Yayınevi (<http://www.imajyayinevi.com/>), November 2008.

¹³¹ 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 as of May 2009.

¹³² Gerger Civil Court of First Instance, Decision No. 2008/1 Misc, dated 11.01.2008.

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 or 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 somewhat questionable because circumvention is possible.¹³³ 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 be equally problematic.

An assessment of the blocking orders issued so far shows that massive over-blocking is witnessed in Turkey. In most cases, a single file, web page, blog entry, or 30 second video clip containing the alleged 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, and Google Sites, Google Pages, Myspace, Last.fm, Hadigayri, and Gabile- resulted not only in blocking the alleged illegal content, but also millions of web pages carrying perfectly legal content through those blocked domains. For example, in the cases of Hadigayri and Gabile, 225,000 users were unable to access their accounts during the six days blocking period initiated by a TIB decision that was later overturned. Reputable companies such as YouTube, Google owned Blogger, Myspace, Last.fm, Hadigayri, and Gabile are not known to promote illegal content and activity, even though their services may from time to time contain content which may be deemed undesirable or illegal by Turkish law and other state laws around the world. However, a majority of the content provided is user-driven information sharing, and such collaborative sites have a social reason to be legally accessed by millions around the world.

In these cases, the courts (as well as TIB) issued the blocking orders to address the suspected illegality on such sites. However, Akdeniz & Altiparmak's research¹³⁴ 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 (or by TIB) even though their decisions often lead into the blocking of whole domains, as in the cases of YouTube, Geocities, WordPress, Blogger, Blogspot, Google Groups, Google Sites, Myspace, Last.fm, Hadigayri, and Gabile. Access to YouTube, Geocities (even though Yahoo has terminated this service), Last.fm, and Google Sites is still blocked from Turkey as of this writing.

As mentioned previously, these sites are not known to promote illegal content. For instance, YouTube has been closed down several times 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. Despite that, many people

¹³³ Note *CDT v. Pappert*, 337 F.Supp.2d 606 (E.D. Penn. 2004).

¹³⁴ Akdeniz, Y., & Altiparmak, K., *Internet: Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, Ankara: Imaj Yayınevi (<http://www.imajyayinevi.com/>), November 2008.

might feel uncomfortable by the clips humiliating the founder of Turkey. However, the fact that society may find speech offensive, vulgar, or shocking is not a sufficient reason for suppressing that content,¹³⁵ or access to millions of other types of content in the case of YouTube. In fact, as will be further addressed in the next heading, such speech and content may be protected by Article 10, ECHR, and the related jurisprudence of the European Court of Human Rights. **The blocking policy undoubtedly has a very strong impact on freedom of expression, which is one of the founding principles of democracy.** It is also worth noting that the concerned content or suspected 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 suspected illegal content that prompted the blocking order in the first place.

It is the submission of this study that **the domain based blocking of websites that carry legal content such as YouTube could be incompatible with Article 10, and could be regarded as a serious infringement on freedom of speech, and too far-reaching than reasonably necessary in a democratic society.**¹³⁶

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 treated with indifference, but also to those that offend, shock or disturb. Such are the requirements of pluralism, tolerance and broadmindedness- without which there is no “democratic society”.¹³⁷ 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”.¹³⁸ 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.¹³⁹ This strict criterion also applies to other matters of public concern.¹⁴⁰

Obviously when certain remarks (including remarks over the Internet) incite 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. The joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve in *Sürek v. Turkey (No. 4)* stated that “it is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.”¹⁴¹

¹³⁵ *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978), 745.

¹³⁶ *Khurshid Mustafa and Tarzibachi v. Sweden*, App. no. 23883/06, judgment of 16 December, 2008.

¹³⁷ Amongst many other authorities see *Sürek v. Turkey (No. 1)*, App. no. 26682/95, 8.7.1999, para. 58.

¹³⁸ *Lingens v. Austria*, Series A no. 103, 8.7.1986, para. 42.

¹³⁹ *Castells v. Spain*, Series A no. 236, 23.4.1992, para. 46.

¹⁴⁰ *Thorgeirson v. Iceland*, Series A no. 239, 25.6.1992, para. 64.

¹⁴¹ *Ibid.*

There is, therefore, no doubt that such a decision to suppress speech calls for strict scrutiny on the part of national courts. Furthermore, the Strasbourg Court's supervision will be strict in such cases because of the importance granted to freedom of expression. While the state measures taken need not be shown to be "indispensable", the necessity for restricting the right must be convincingly established to be compatible with Article 10.¹⁴²

The ECtHR jurisprudence shows that Turkish courts failed to meet the Strasbourg disposition concerning political expression in a considerable number of cases.¹⁴³ 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,¹⁴⁴ show that more needs to be done to change the Turkish judiciary's approach. It seems that the application of Law No. 5651 is no exception to this traditional approach. Akdeniz & Altiparmak's research¹⁴⁵ found that a number of progressive and alternative websites, including gundemonline.net, anarsist.org, devrimciler.com, Indymedia Istanbul, firatnews.eu, and keditor.com are systematically faced with blocking orders. The reasons behind such blocking orders are often unknown, and no further prosecutions seem to take place against the authors' of such publications, or owners of such websites in Turkey. It is therefore difficult to distinguish whether a specific crime has been committed by these websites and the publications that appear on such sites, or if the blocking orders are issued to silence speech. **The use of the blocking orders to silence speech amounts to censorship and a violation of Article 10 of ECHR. The Turkish public should have "the right to be informed of different perspectives on the situation in south-east Turkey, however unpalatable it might be to the authorities."**¹⁴⁶ On the contrary, the Turkish government has a positive obligation to protect its citizens' right to receive information in the absence of any plausible justification, or legitimate aim based on Article 10(2) criteria.¹⁴⁷

Furthermore, banning socially useful websites such as YouTube, Google Sites, and others carries very strong implications for political expression. These sites provide a venue that is popular across the world for alternative and dissenting views. According to the Strasbourg Court, **while political and social news "might be the most important information protected by Article 10, the freedom to receive**

¹⁴² Autronic AG judgment of 22 May 1990, Series A No. 178, § 61.

¹⁴³ 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.

¹⁴⁴ 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.

¹⁴⁵ Akdeniz, Y., & Altiparmak, K., *Internet: Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, Ankara: Imaj Yayınevi (<http://www.imajyayinevi.com/>), November 2008.

¹⁴⁶ *Özgür Gündem v. Turkey*, App. no. 23144/93, 16.3. 2000.

¹⁴⁷ Note *Autronic AG v. Switzerland*, 22 May 1990, §§ 47-48, Series A no. 178, and the more recent case of *Khurshid Mustafa and Tarzibachi v. Sweden*, App. no. 23883/06, judgment of 16 December, 2008.

information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment.”¹⁴⁸

Finally, banning orders issued and enforced indefinitely on such websites result in “prior restraint”. Although the Strasbourg Court does not prohibit the imposition of prior restraints on publications, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.¹⁴⁹ This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.¹⁵⁰

The same principles also apply to new media and Internet publications. In this area, it is argued that prior restraint and other bans imposed on the future publication of entire newspapers, or for that matter websites such as YouTube, are incompatible with the Convention rights. The Strasbourg Court requires the consideration of less draconian measures such as the confiscation of particular issues of publications including newspapers, or restrictions on the publication of specific articles.¹⁵¹ It stems from the Strasbourg principles that by suspending access to websites such as Özgür Gündem, Fırat News Agency, Yeni Özgür Politika, Keditör, Günlük Gazetesi and other news sites indefinitely, “the domestic courts have largely overstepped the narrow margin afforded to them, and unjustifiably restricted the essential role of the press as a public watchdog in a democratic society”.¹⁵² The practice of banning the future publication of entire websites goes beyond “any notion of ‘necessary’ restraint in a democratic society and, instead, amounts to censorship”.¹⁵³

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 suspected under Article 8 of Law No. 5651.

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

¹⁴⁸ *Khurshid Mustafa and Tarzibachi v. Sweden*, App. no. 23883/06, judgment of 16 December, 2008.

¹⁴⁹ *Case of Ürper and Others v. Turkey*, (Applications nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07), Chamber Judgment of 20.10.2009, paras 39-45.

¹⁵⁰ *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216).

¹⁵¹ *Case of Ürper and Others v. Turkey*, (Applications nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07), Chamber Judgment of 20.10.2009, paras 39-45.

¹⁵² *Cumpănă and Mazăre v. Romania*, no. 33348/96, § 119, 10 June 2003; *Obukhova v. Russia*, no. 34736/03, § 28, 8 January 2009, and *Case of Ürper and Others v. Turkey*, (Applications nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07), Chamber Judgment of 20.10.2009, paras 39-45.

¹⁵³ *Ibid.*

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, an 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 surprised when they learn that their websites are inaccessible from Turkey because website owners are not notified of the blocking decision in due time, and they are not allowed the right to defend themselves.

Although the court decisions relating to 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.

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.¹⁵⁴ 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 May 2009, 2601 blocking orders have been issued in Turkey. **Out of the 2601 orders, only about 64 of them have been lifted.** Although no explanation is provided, it is believed that decisions to lift those orders have not been issued as a result of non-guilty verdict as required by Article 8(8) of the Law. Banning orders are usually lifted due to removal of impugned part of the blocked websites as was witnessed in the cases of Google Groups (March 2008), Eđitim Sen (September 2008), and the daily newspaper Vatan (October 2008). Furthermore, in the majority of those decisions, the perpetrators have not been given the chance to defend themselves. **In the majority of the cases, no further prosecutions seem to take place with regard to the authors' of such publications or owners of such websites in Turkey.** 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' based in most cases on 'mere suspicion,' even though the legality or illegality of content on such sites has not been established by a court of law.

Precautionary Measures Become Final Judgments

Furthermore, in practice, blocking orders issued as precautionary measures become final judgments. Precautionary measures issued under Law No. 5651 are supposed to be provisional in nature and should be used only under exceptional circumstances. By way of analogy, under both Article 109 of the Law of Civil Procedure and the Law of Criminal Procedure, precautionary measures are issued on a provisional basis. 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

¹⁵⁴ See Article 6(2).

substantial number of others cannot be ordered.”¹⁵⁵ **The current practice of banning in Turkey is in contradiction with these important principles. Precautionary measures do not seem to be provisional in practice.**

One reason for that stems from the Law. According to Article 8(6) of Law No. 5651, if TIB 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 content cannot be identified, no prosecution shall be pursued and precautionary measures that must be provisional would become permanent.

Transparency and Reasoned Decisions

With regards to the courts issued blocking orders only the state prosecutors, judges, courts, and the TIB know the reasons for the blocking orders. With regard to administrative blocking orders issued by the TIB, only the Presidency knows why the blocking orders are issued.

Furthermore, according to Akdeniz & Altiparmak’s research¹⁵⁶ and cases examined by the researchers, **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”.¹⁵⁷ **The Strasbourg Court is clear that an authority is obliged to justify its activities by giving reasons for its decisions.** It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.¹⁵⁸

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 to 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 TIB.

Administrative blocking orders issued by TIB

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

¹⁵⁵ Y.4. HD.,E. 1975/3743,K. 1975/7667,T. 16.6.1975.

¹⁵⁶ Akdeniz, Y., & Altiparmak, K., *Internet: Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, Ankara: Imaj Yayınevi (<http://www.imajyayinevi.com/>), November 2008.

¹⁵⁷ Clare Ovey & Robin C. A. White, *The European Convention on Human Rights*, (Oxford: OUP), 2006, p. 179.

¹⁵⁸ *Suominen v. Finland*, App. no. 37801/97, 1.7.2003, paras. 36-37.

Presidency can also issue administrative blocking orders regarding content and hosting companies based in Turkey if the content in question involves either sexual exploitation, abuse of children, or obscenity. **Under the Turkish Constitution, decisions that interfere with the freedom of communication and right to privacy can only be given by the judiciary.**¹⁵⁹ 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.**

Conclusion and Recommendations

As this study has shown, access to at least 3,700 websites is currently blocked under Law No. 5651 from Turkey. The impact of the current regime and related deficiencies are wide, affecting not only the freedom to speak and receive information, but also the right for blocked websites to receive a fair trial.

Turkish Law should respect OSCE commitments and other international human rights principles

Regulation of the Internet should respect OSCE commitments, especially the governmental duty to uphold independence and pluralism of the media, and the free flow of information, as defined in Decision No. 193 of the Permanent Council of the OSCE, 5 November 1997, and constantly developed ever since. It should also be in conformity with other international human rights principles, especially freedom of expression and privacy of communication. Restrictions introduced by law should be proportional and in line with the requirements of democracy as was argued in this study. Within this context, the decision of the European Court of Human Rights in the case of *Ürper and Others v. Turkey*¹⁶⁰ with regard to issues surrounding prior restraint and indefinite banning of alternative media publications, including websites, should be noted. The Turkish law should conform to the jurisprudence of the Strasbourg court, as the practice of banning future publications and access to websites such as *Özgür Gündem*, *Fırat News Agency*, *Yeni Özgür Politika*, *Keditör*, *Günlük Gazetesi* goes beyond any notion of “necessary” restraint in a democratic society.

Blocking Decisions should be made public

It should be recalled that openness, transparency, and accountability are elements of a healthy democratic system. Therefore, blocking decisions issued by the courts and TIB and the reasons for such decisions should be made public, so that the public as well as the content, and website operators are better informed about the blocking decisions.

¹⁵⁹ 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 authorized 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 authorized agency shall be submitted for the approval of the judge having jurisdiction within 24 hours.”

¹⁶⁰ *Case of Ürper and Others v. Turkey*, (Applications nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07), Chamber Judgment of 20.10.2009, paras 39-45.

TIB should inform the public about the blocking decisions and statistics

The study has shown that lack of judicial and administrative transparency with regards to the blocking orders issued by the courts and by TIB continues to be a major problem. Furthermore, TIB's decision not to reveal the blocking statistics is a step backwards, and in the absence of information, openness, and transparency it is difficult to monitor and assess the legal practices of the current regulatory regime in Turkey. Therefore, TIB, as a 'public administrative body' should continue to inform the public and publish blocking statistics on a regular basis as the administrative body did between May 2008 and May 2009.

Furthermore, it is argued that there could be a breach of Article 10 of ECHR if blocking measures or filtering tools are used at state level to silence politically motivated speech on the Internet, or if the criteria for blocking and/or filtering is secret, or if the decisions of the administrative bodies are not made publicly available for legal challenge. Administrative blocking decisions issued with regard to Gabile.com and Hadigayri.com websites confirmed these concerns.

Illegal blocking outside the scope of Law No. 5651 should be ceased

As this study outlined, at least 197 politically motivated, court ordered blocking decisions were issued outside the scope of Article 8 of Law No. 5651. As of December 2009, the extent of this breach and blocking remains unknown as TIB does not publish the blocking decisions since May 2009. The Turkish public should have "the right to be informed of different perspectives on the situation in south-east Turkey."¹⁶¹ The Turkish government has a duty to protect its citizens' right to receive information in the absence of any plausible justification, or legitimate aim based on Article 10(2) criteria.¹⁶² The practice of blocking access to websites outside the scope of Article 8 should be reviewed by the Ministry of Justice.

Censorship of web 2.0 based social networks should be avoided

It is argued in this study that banning socially useful networks such as YouTube, Google Sites, and others also has very strong implications on political expression. Those sites provide a venue that is widely used around the world for alternative and dissenting views. According to the Strasbourg Court, while political and social news "might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment."¹⁶³ If such blocking practice continues, there will be more applications against Turkey at the European Court of Human Rights level with censorship claims.

Reform or abolish Law No. 5651

Finally, based on the analysis of the Law No. 5651 practice in this study, it is argued that the state response to Internet content and publications is evidently problematic, and blocking orders issued by the courts and TIB could result in blocking access not

¹⁶¹ *Özgür Gündem v. Turkey*, App. no. 23144/93, 16.3. 2000.

¹⁶² Note *Autronic AG v. Switzerland*, 22 May 1990, §§ 47-48, Series A no. 178, and the more recent case of *Khurshid Mustafa and Tarzibachi v. Sweden*, App. no. 23883/06, judgment of 16 December, 2008.

¹⁶³ *Khurshid Mustafa and Tarzibachi v. Sweden*, App. no. 23883/06, judgment of 16 December, 2008.

only to allegedly illegal content but also to legal content and information. The necessity of such interference within a democratic society based on Article 10, ECHR and the related jurisprudence of the European Court of Human Rights is raised in this study. It is the submission of this study that the domain based blocking of websites that carry legal content could be regarded as a breach of Article 10, and as a serious infringement on freedom of speech, and more far-reaching than necessary in a democratic society.¹⁶⁴

Based on legal and procedural deficiencies identified in this study, the government should urgently bring Law No. 5651 in line with international standards on freedom of expression, or otherwise consider abolishing the law. It is also recalled that the law was designed to protect children from illegal and harmful Internet content. However, the adoption of a “web based blocking policy” does not necessarily achieve the government’s important mission of protecting its children. As proposed by Akdeniz & Altiparmak,¹⁶⁵ 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 legal Internet content.

In conclusion, it is worryingly noted that the development of a state sponsored Turkish search engine which will reflect upon ‘Turkish sensitivities’ has been announced by the Information and Communication Technologies Authority (BTK). This could be used as a tool for censorship in the near future. Furthermore, while the Turkish government and the responsible administrative bodies continue to be concerned about the availability of certain types of content on the Internet, to this point, similar attention has not been shown with regards to the availability of hate speech and racist content on the Turkish Internet sphere, or encouragement of hate crimes or discrimination through certain websites towards minority groups based in Turkey.

¹⁶⁴ *Khurshid Mustafa and Tarzibachi v. Sweden*, App. no. 23883/06, judgment of 16 December, 2008.

¹⁶⁵ Akdeniz, Y., & Altiparmak, K., *Internet: Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, Ankara: Imaj Yayınevi (<http://www.imajyayinevi.com/>), November 2008.