Wikimedia Foundation, Inc. v. Turkey

Application no. 25479/19

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

pursuant to the Section Registrar's notification dated 18 October 2019 that the President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

---

22 November 2019

I. Introduction

In this intervention the ICJ will address issues related to the compliance of Turkey's Internet law and its application in practice, with rights under Article 10 ECHR to freedom of expression and to receive information. In particular it will address: international standards relating to freedom of expression on the Internet (Section II); evaluation of the Turkish Internet Law by international authorities, including bodies of the Council of Europe and United Nations (Section III); blocking of websites and other internet under Article 8/A of Law no. 5651 on Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications, and the judicial safeguards applying to such measures (Section IV); and whether remedies including the individual application to the Constitutional Court can redress the deficiencies of the law (section V). The ICJ has greatly benefited from the expertise and the data of the Freedom of Expression Association (İfade Özgürlüğü Derneği) in the preparation of this intervention and is grateful for their cooperation.

As the current case is related to the application of Article 8/A of Law no. 5651, this submission will focus on the problems arising from this provision and its implementation. However, some legal issues concerning Article 8/A of Law no. 5651 are directly connected to more general Internet freedom of expression related and/or rule of law problems in Turkey. For purposes of context, the submission will also provide information on these general points.

II. International Law and Standards on the protection of freedom of expression online

The internet's importance for freedom of expression has been consistently underlined by this Court. In *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*[1], the Court held that "[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general." The Grand Chamber stated in *Delfi As v. Estonia* that "user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression."[2]

The UN Human Rights Committee has clarified that protections for freedom of expression and opinion under article 19 ICCPR must extend to "political discourse, commentary… on public affairs, canvassing, discussion of human rights, journalism… and religious discourse", including through non-verbal means and "electronic and internet-based modes of expression".[3] It has further emphasized that "developments in internet and mobile based electronic information dissemination systems" have established "a global network" for information exchange and in this connection States must take steps to ensure that media broadcasting services can function independently and are accessible to individuals.[4] In this respect, the Committee has affirmed the crucial function of independent, uncensored media to ensure "free communication of information and ideas… between citizens, candidates and elected representatives" and to "inform public opinion".[5]

---

[1] Applications nos. 3002/03 and 23676/03, para. 27.
[2] *Delfi AS v. Estonia,* ECtHR [GC], Application no. 64569/09, para. 110.
[3] UN Human Rights Committee, *General Comment no. 34,* UN CCPR/C/GC/34, para 11.
[4] *Ibid.*, paras 15, 16.
[5] *Ibid.*, para 13.

There is no doubt that principles and legal obligations relating to freedom of expression also apply to the freedom of expression on the Internet.[6] In a Joint Declaration of UN and regional intergovernmental organisations' experts on freedom of expression, it was observed that "[f]reedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law (the 'three-part' test)".[7]

This Declaration restates the basic conditions that must obtain in order for State authorities to limit or restrict the right to freedom of expression under both the ECHR and the ICCPR: that these restrictions must strictly be provided by law and **necessary** for a legitimate purpose. Such legitimate purposes under the ECHR include only "the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Such legitimate purposes under the ICCPR includes only: (i) to ensure respect of the rights or reputations of others, or (ii) to protect national security, public order or public health or morals.

In this regard, as in other restrictions on freedom of expression, measures limiting freedom of expression on the internet must be precisely **prescribed by law**. In *Ahmet Yıldırım v. Turkey*, the Court reiterated this general principle previously developed under its case-law on prescription by law. The Court indicated that "for domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power".[8] Rather, the formulation of the law must be clear and unambiguous, in line with the principle of legality.

Filtering and blocking that does not comply with the requirements of necessity and proportionality, which will almost be the case with sweeping generic bans, are contrary to international legal obligations on freedom of expression. The UN Human Rights Committee has clarified, with regard to obligations under Article 19 of the ICCPR, that "[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [requirements that restrictions are provided by law and are necessary: *(a)* For respect of the rights or reputations of others;*(b)* For the protection of national security or of public

---

[6] The Human Rights Committee states that "[Article 19] Paragraph 2 protects all forms of expression and the means of their dissemination. […] They include all forms of audio-visual as well as electronic and internet-based modes of expression". General Comment, no. 34, CCPR/C/GC/34, para. 12.

[7] The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and Internet, para. 1 (a).

[8] Ahmet Yıldırım v. Turkey, Application no. 3111/10, 18.12.2012, para. 59.

order *(ordre public),* or of public health or morals.] Permissible **restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3.** It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government".[9]

The experts from multiple intergovernmental agencies mentioned above also issued a Joint Declaration of Experts on Fake News, Disinformation and Propaganda, which also emphasizes the exceptional nature of blanket bans. According to this Declaration, "State mandated blocking of entire websites, IP addresses, ports or network protocols is an extreme measure which can only be justified where it is provided by law and is necessary to protect a human right or other legitimate public interest, including in the sense of that it is proportionate, there are no less intrusive alternative measures which would protect the interest and it respects minimum due process guarantees".[10]

However, even partial and limited bans on Internet content must comply with the principles of necessity and proportionality, meaning they may only be used as a last resort. Particularly close scrutiny is required when the restriction is imposed for political reasons or inhibits open public debate. The Committee of Ministers, in its Internet Freedom Indicators, recommends that "[l]aws addressing hate speech or protecting public order, public morals, minors, national security or official secrecy and data protection laws are not applied in a manner which inhibits public debate. Such laws impose restrictions of freedom of expression only in response to a pressing matter of public interest, are defined as narrowly as possible to meet the public interest and include proportionate sanctions."[11]

Furthermore, Committee of Ministers Guidelines specify that in order to meet the "necessary in a democratic society" criterion, decisions on internet restrictions should be targeted and specific. An assessment of effectiveness and risk of over-blocking should be made. Authorities banning a site or URL must seek to apply "the least intrusive measure necessary" to achieve the stated legitimate aim.[12]

Procedural guarantees against Internet censorship are indispensable in preventing arbitrary measures. Effective and speedy redress mechanisms must be made available to challenge blocking orders. In *Ahmet Yıldırım* and later in *Cengiz and Others v. Turkey*, the Court held that, where prior restraints on Internet publication are contemplated, "a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power. In that regard, the judicial review of such a measure, based on a weighing-up of the competing interests at stake and designed to strike a balance between them, is inconceivable without a framework

[9] General Comment, no. 34, para. 42. See also joint declaration, supra n. 7, para. 3 (a) (emphasis added).
[10] Joint Declaration on Freedom of Expression and "Fake News" Disinformation and Propaganda, The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, FOM.GAL/3/17, 3.3.2017.
[11] Recommendation CM/Rec(2016)5[1]of the Committee of Ministers to member States on Internet freedom, para.2.3.4
[12] Committee of Ministers, Guidelines for States on actions to be taken vis-à-vis internet intermediaries with due regard to their roles and responsibilities, Appendix to Recommendation CM/Rec(2018)2, para. 1.3.1.

establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression”.[13]

The special nature of the Internet must be taken into consideration in applying the general principles of freedom of expression. As noted by the former Special Rapporteur on Freedom of Expression, “due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet”.[14] The Committee of Ministers duly observed that States’ duties relating to freedom of expression have positive aspects in addition to negative ones. As part of their obligation to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention, States should create an enabling environment for Internet freedom.[15]

III. International criticism of law No.5651 and its application

Turkey’s Internet Law has been extensively criticised by international authorities as amongst the most repressive national internet regulatory frameworks.[16] According to 2018 Transparency Report of Twitter, 1,105 court orders and 12,897 other removal demands were sent to Twitter from Turkey and 22,998 Twitter accounts were requested to be withheld/removed by those demands. Between 2012-2018, Twitter withheld/removed a total of 11,371 tweets from Turkey while the total number of tweets that were withheld/removed worldwide, except Turkey, were 8,461.[17] As the Transparency Reports of Twitter clearly illustrates, Turkey is one of the leading States in Internet censorship. Transparency reports of other social media companies also support this finding.[18]

This worrisome situation has drawn the attention and condemnation of international human rights judicial and non-judicial human rights redress mechanisms. In two separate judgments, *Ahmet Yıldırım* and *Cengiz and Others*, examining the total ban imposed on Youtube and Google Sites websites, this Court held that the interference resulting from the application of section 8 of Law no. 5651 did not satisfy the requirement of lawfulness under the Convention and did not afford the applicants the degree of protection to which they were entitled by the rule of law in a democratic society.[19] Following the *Ahmet Yıldırım* judgment, the Turkish Constitutional Court also concluded that the total bans imposed on Youtube and Twitter had violated the Turkish Constitution.[20]

When the European Court delivered the *Ahmet Yıldırım* judgment, Article 8 of Law no. 5651 provided the only legal basis for banning orders. Under this provision, a decision to block access shall be issued if there are sufficient grounds for suspicion that the content constitutes any of the crimes listed in that article. That provision was, therefore, considered as a precautionary

---

[13] Ahmet Yıldırım, para. 64; Cengiz and Others v. Turkey, no. 48226/10, 01.12.2015, para. 62.
[14] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16.5.2011, para. 27.
[15] Recommendation CM/Rec(2016)5[1] of the Committee of Ministers to member States on Internet freedom, para. 4.
[16] See, https://www.freedomonthenet.org/country/turkey/freedom-on-the-net/2019 .
[17] All figures are available at https://transparency.twitter.com.
[18] For a comparative analysis of transparancy reports of facebook, Google, wordpress, reddit and Twitter, see Engelli Web 2018, p. 23-34.
[19] Cengiz and Others, para. 65
[20] Youtube Llc Corporation Service Company and Others Judgment, no. 2014/4705, 29.5.2014 and Yaman Akdeniz and Others Judgment, no. 2014/3986, 2.4.2014.

measure[21] that could be used in criminal procedure. Further amendments were made to Law no. 5651 in 2014 and 2015. Three other bases for banning orders were provided with these amendments.[22] Four articles provide for the blocking of websites and online content: article 8 (protection of children from harmful content); article 8/A (protection of national security, public order, protection of life and property and protection of public health and prevention of crime); article 9 (violation of individual rights); and article 9/A (violation of the privacy of individuals). The Council of Europe Commissioner for Human Rights stated that the provisions in the amended texts not only fail to address the core concerns of the ECtHR in the *Ahmet Yildirim* judgment, but aggravate the situation.[23] More recently, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression urged the Government to refrain from excessive blocking and filtering of content and limit its requests for takedowns to actual cases of incitement, meeting the requirements of article 19.3 and article 20 of the International Covenant on Civil and Political Rights.[24]

The most comprehensive assessment of the impact of Law no. 5651 on freedom of expression was made by the Council of Europe's Venice Commission.[25] The report observes that, unlike the aforementioned Article 8 procedure, the procedures on access-blocking under Articles 8/A, 9 and 9/A do not concern an interlocutory or precautionary measures taken in the framework of a pending criminal or civil procedure before the domestic courts, but constitute fully-fledged, autonomous procedures through which substantive decisions on "access-blocking" are taken for a number of aims indicated in those Articles.[26] Therefore, there is no possibility of judicial review of those decisions, as happens by a trial court in Article 8 proceedings. As will be explained below, criminal peace judges have an exceedingly short period of 24 hours to examine the request on file under these provisions. No information is informed to the content provider during this short examination period. There is no appeal against the decision before a higher court.

The Venice Commission suggested two alternative ways in which fair trial could be guaranteed in access-blocking procedures. The first alternative is that as in Article 8, the procedures under Articles 8A, 9 and 9A should be made dependent on the institution of a criminal or civil procedure and the decision on access blocking under those procedures should only constitute a "precautionary measure". Or, alternatively, in case the current character of the procedures under Article 8A, 9 and 9A as autonomous procedures on access-blocking should be maintained, then the procedures should be amended extensively in order to give the Internet provider sufficient time and facilities to defend itself and the judicial authority sufficient time and possibilities to take a well-reasoned decision. In particular the courts would have competence to hold a hearing in order to make an appropriate proportionality assessment on the

[21] The Venice Commission uses the term "precautionary measure" in Venice Commission, Opinion on Law No. 5651 on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publication ("The Internet Law"), CDL-AD(2016)011, 15.6.2016. For sake of consistency, this terms will be used throughout the submission. We refer to the Venice Commission's report for more information on the use of the term. This Court used "preventive measure" in the *Ahmet Yıldırım* case (*op. cit.*).

[22] Article 9 of the Law was amended and Article 9/a was added to the Law, by Law no. 6518 on February 2014. Another ground for banning orders was added as Article 8/a with Law no. 6639, on March 2015.

[23] Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para. 103.

[24] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3, 21.6.2017, para. 80.

[25] Venice Commission, *op. cit*.

[26] *Ibid..,* para. 54.

necessity of the interference with freedom of expression.[27] This recommendation, as others made in the same report, has so far been disregarded by the Turkish authorities.

IV. Turkish national law: Article 8/A of the Law No. 5651 and its application in practice

Turkey has a comprehensive and complex control system over the Internet. Those authorised either to issue blocking orders or to request judicial authorities to issue blocking orders under different laws include criminal peace judges, public prosecutors, the President of the Information Technologies and Communication Board, the Association of Access Providers, Turkish Medicine and Medical Devices Agency, the Capital Markets Board, the Directorate of Tobacco and Alcohol, the Directorate General of National Lottery Administration, the Jockey Club of Turkey, High Board of Religious Affairs of the Directorate of Religious Affairs, the Radio and Television Supreme Council, the Supreme Election Council and the Directorate General of Consumer Protection and Market Surveillance of the Ministry of Trade.[28]

Almost 300,000 websites have been blocked under this system.[29] Close to 170,000 URLs have also been blocked according to URL based blocking orders delivered under Article 9 and 8/A of Law No. 5651 on Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications.[30]

Article 8/A of the Law no. 5651 was added to the Internet Law on March 2015. The provision envisages removal of content and/or blocking of access in order to protect the right to life or security of life and property, national security and public order, public health and for the prevention of commission of crimes (Art. 8A(1)). Therefore, unlike Article 8, this measure is not imposed as a precautionary measure in criminal procedure. It works as a preventive measure to protect public order. Under this provision, access to an Internet site may be blocked by a criminal peace judge. In circumstances where delay would entail risk, removal or blocking of such Internet content in order to protect the right to life or security of life and property, national security and protection of public order, prevention of crimes or for the protection of public health may also be requested by the President of Turkey or relevant ministries from the President of the Information and Communication Technologies Authority (ICTA).[31]

Under Article 8/A, if the decision for the removal of the content and/or blocking of access issued by the ICTA at the request of the Presidency or the relevant ministries this decision shall be submitted to the criminal peace judge within 24 hours. The judge shall announce his/her decision within 48 hours; otherwise the decision shall automatically lapse.

---

[27] Venice Commission, *op. cit.,* para. 61 and 62.
[28] For details, see İfade Özgürlüğü Derneği (2019), Engelli Web 2018, An Assesment Report on Blocked Websites, News Articles and Social Media Content From Turkey, p. 3-7.
[29] As of end of October, 2019, access to a total of **288,310** websites are currently blocked from Turkey. See İfade Özgürlüğü Derneği, UPR Report, November 2019, para. 6.
[30] Over 150,000 URLs have been blocked to protect individual rights, whilst over 11000 URLs internet addresses have been İfade Özgürlüğü Derneği, UPR Report, para. 8.
[31] In its original version, the requests were supposed to be made by the Prime Minister or a ministry concerned with the protection of national security and public order and decisions were taken by by the Presidency of Telecommunication. However, due to constitutional and legal amendments, Prime Ministry and the Presidency of Telecommunication were dissolved and powers of these institutions were transferred to the Presidency and the Information and Communication Technologies Authority.

Neither the content providers nor the general public who have the right to access to information are informed of the blocking request under the Article 8/A procedure. Thus, the criminal peace judge has only the information provided by the ICTA to impose a ban under this provision.

As noted by the İfade Özgürlüğü Derneği, Article 8A based orders typically target Kurdish and left-wing news websites, as well as social media accounts and content associated with Kurdish journalists, dissidents and activists. According to the UPR Submission of İFÖD "between 22 July 2015 and as of October 2019 363 separate 8/A decision were issued by 10 different Ankara based criminal judgeships of peace blocking access to over 11,000 Internet addresses among which approximately 2000 websites, 3000 Twitter accounts, 2200 tweets and 660 news articles. With these decisions, websites such as Dicle News Agency, Azadiya Welat, Özgür Gündem, Rudaw, RojNews, ANF, Jin News are regularly and repeatedly blocked access to from Turkey together with government opponent news websites such as Sendika.Org and SiyasiHaber.Org. Similarly, article 8/A is regularly used to block access to news and content related to Turkey's military operations."[32]

According to paragraph 3 of the Article, blocking orders shall be issued for the part or section in which the violation occurred (URL blocking). However, if the relevant part cannot be banned due to technical reasons or if the violation cannot be stopped by a partial banning order, the entire website can be banned. The President of the ICTA must inform the Public Prosecutor Office about the content providers and distributors who had committed the alleged crimes under this provision. However, the result of an investigation by the Public Prosecutor's Office does not affect the banning order. Service providers, content providers and hosting companies must comply with the order. Non-compliance can result in fines of 50,000 to 500,000 Turkish Liras. There is no official data about the application of this provision.

As the content provider is not informed during the procedure, it learns of the decision through the notification made by the President of the ICTA. The notification does not include the decision of the criminal peace judge, but the number of the decision and blocked URL or website. The decision of the criminal peace judge cannot be challenged before a higher court. Appeals are made according to the Turkish Criminal Procedural Code. According to Article 268 (3)a of the CPC, the appeal against a decision given by a peace judgeship can be made, in places where there are several peace judgeships, only to another criminal judge of the peace of the same district. If there is only one peace judgeship in a given place, the appeal should then be made to the peace judgeship which is within the competence zone of the closest assize criminal court.[33] The decision of this second criminal peace judge is final. However, interested parties may lodge an application to the Constitutional Court, under individual complaint mechanism, against this decision. The Court might decide that the blocking order violates the Constitution.

According to written records, there is no case in which a criminal peace judge has rejected the President's (formerly Prime Minister's) request for the removal of the content and/or blocking of access. No challenge brought against the decision of a criminal peace judge delivered under Article 8/A has been

[32] İfade Özgürlüğü Derneği, UPR Report, November 2019, para. 11.
[33] For further information and critique of the Criminal Peace Judgeship system see ICJ (2018), The Turkish Criminal Peace Judgeships and International Law.

accepted so far. In other words, more than 11,000 Internet addresses requested to be blocked by the execution have been ordered by criminal peace judges without an exception and not a single appeal against these decisions has been accepted.

Apart from this statistical information, the precision and quality of Article 8/A and its interpretation by criminal peace judges are questionable. General notions such as national security and public order, and public health are not precisely defined in the law. "Circumstances where delay would entail risk" is another concept that is not clearly defined in the law. As a consequence, blocking orders are mostly issued by the Presidency and then submitted to the criminal peace judge. As criminal peace judges do not assess the existence of "circumstances where delay would entail risk", the effectiveness of their review of blocking decisions of the Presidency is limited.

Statistics show that 11,000 Internet address have been blocked in 363 cases. It follows then, that on average 30 different addresses have been blocked in a single decision. These addresses include entire websites of news agencies such as Dicle News Agency, Azadiya Welat, Özgür Gündem, Rudaw, RojNews, ANF, Jin News and Sendika.org. The criminal peace judge has less than 48 hours to examine all these addresses, while also performing other crucial duties under the Criminal Procedure Code. As a consequence, criminal peace judges are ill-equipped to clarify the ambiguity created by the wording of the provision. Since the law was enacted, criminal peace judges have issued blocking orders in almost all security operations conducted by the army and police forces. Article 8/A does not directly require the criminal peace judge to make an assessment relating to requirement of necessity or proportionality, which are the lynchpins of any legal analysis on the permissibility of limitations to internet expression. Although, all judicial authorities are required to apply article 13 of the Constitution according to which "necessity in a democratic society" and "proportionality" assessment should be made, criminal peace judges have systematically failed to make such assessments.

Secondly, the nature of the decision taken under Article 8/A is unclear. As noted, blocking orders under Article 8/A are not issued in a criminal procedure. As blocking orders under Article 8/A are made under an autonomous procedure, they become permanent once finalised. Therefore, unlike Article 8 measures, Article 8/A decisions are not precautionary. Considering how swiftly and arbitrarily those ordered are issued, this carries particular risks of disproportionate interference with freedom of expression.

Thirdly, the procedure under which the order is issued is fundamentally unfair, in violation of the right to a fair hearing. News agencies, journals, newspapers are not given any opportunity to defend themselves in the procedure, much less one that meets due process requirements.[34] The Turkish Constitutional Court has observed that the media that are affected by blocking orders do not benefit from the principle of equality of arms due to the uncontentious nature of the procedure. According to the Constitutional Court, the party to the procedure whose content is blocked has no chance to provide evidence to challenge the requests of the claimant.[35] The order is issued merely according to the information provided by the ICTA, in an extremely short period. As noted

[34] Venice Commission, *op. cit.,* para. 62.
[35] *Birgün İletişim ve Yayıncılık Ticaret A.Ş. Judgment,* No: 2015/18936, 20.05.2019, para. 69.

by the Venice Commission, an appropriate notification procedure should be put in place in all the access-blocking procedures under the Law.[36]

V. Constitutional Court

The Turkish Constitutional Court in two recent judgments has considered the structural problems of the procedure under Article 8/A. In the Birgün application,[37] the Court proposed to apply "the *prima facie* doctrine" it developed in the Ali Kıdık judgment for Law no. 5651, Article 9 applications.[38] In Birgün, the Court held that blocking orders can only be issued exceptionally when delay would entail risk. This exceptional procedure may be invoked only when it is *prima facie* clear, without a further examination, that the content glorifies violence or hatred or incites people to adopt the methods of terrorist organizations, or promote violence or hatred that pose a risk to democratic society.[39] The Court listed elements to be taken into consideration to decide whether incitement or glorification of violence exists.[40] It reiterated the same principles in the recent *Baransav and Keskin Kalem Yayıncılık* judgment.[41]

It appears however, that the decision in Birgün has not alleviated the systemic internet censorship problem which stems partly from Article 8/A and partly from criminal peace judgeship mechanisms. Indeed, six months after the Birgün judgment was delivered, no criminal judgeship has so far rejected the request of the ICTA relying on the jurisprudence of the Constitutional Court. This may be because, apart from the structural problems affecting the independence of criminal peace judges, these judges have no time and overall capacity to make the assessment suggested in the Birgün judgment. Criminal peace judges, in addition to their routine work, are authorized to issue blocking orders under Article 9 of Law no. 5651. Criminal peace judges around the country have issued over 48,000 URL based blocking orders since 2014 resulting in over 150,000 URLs blocked from Turkey to protect individual rights under Article 9. Some 11,000 blocking orders issued under Article 8/a have been taken by 10 Ankara Courts, the majority of which were made by a single judge at Gölbaşı.

The systematic problem, it follows, cannot be solved with the current criminal peace judgeship mechanism. The Constitutional Court is also seriously restricted in its ability to provide a satisfactory response to this problem, due to significant delays in relevant cases being considered by the Court. First, the Court has only been able to deliver two Article 8/A decisions so far. These came four years after the blocking order, long after the blocked content will often have lost its value. Secondly, as the case selection criteria of the Court are not transparent and unforeseeable, it appears to be arbitrary and contributes to delays. For instance, the Venice Commission report states that grindr.com was blocked in Turkey in 2013. The case was brought to the Court in early 2015 but a decision has yet to be taken in that case. The order blocking the entire website of Charlie Hebdo was also taken to the Constitutional Court in early 2015. This decision is also yet to be delivered.

---

[36] Venice Commission, *op. cit.,* para. 104.
[37] *Birgün İletişim ve Yayıncılık Ticaret A.Ş. Judgment,* No: 2015/18936, 20.05.2019.
[38] *Ali Kıdık Judgment,* No: 2014/5552, 26. 10. 2017.
[39] Birgün, para. 71-72.
[40] Birgün, para. 74.
[41] Baran Tursun Uluslararası, Dünya Ölçeğinde Silahsızlanma, Yaşam Hakkı, Özgürlük, Demokrasi, Barış ve Dayanışma Vakfı (BARANSAV) and Keskin Kalem Yayıncılık ve Ticaret A.Ş judgment, no. 2015/18581, 26.9.2019, para. 44.

Furthermore, the Constitutional Court recently found an application by two academics against blocking orders taken under Article 8/A inadmissible on the ground that the applicants had not been affected by the decisions. In Kerem Altıparmak and Yaman Akdeniz (2),[42] the applicants, claimed that their right to access to information had been violated by 16 blocking orders banning 671 Internet addresses. These included websites of 171 news agencies, such as sputnik.com, sendika.org, Jin news and siyasihaber.org and 332 twitter accounts such as dokuz8haber and Azadiya Welat. Although the Court did not categorically deny the victim status of users, it did not examine addresses separately and concluded that the applicants had not been directly affected by the orders, despite the fact that entire websites of news agencies were in the list of blocked addresses. By not recognizing a wider concept of user rights, the Court reduced the possibility to review decisions of criminal peace judges. As a result, in four years, only orders on two addresses out of 11,000 were lifted by the Turkish judicial authorities.

VI. Conclusions

Statistical data and evaluation of Law no. 5651 by international human rights mechanisms demonstrate a systemic and structural problem of the compatibility of the Turkish Internet law with rights to freedom of expression and to receive information, and that the judicial system provides insufficient safeguards to remedy this defect. Hundreds of thousands of Internet content items have been blocked under this system, including under Article 8/A.

As Article 8/A envisages removal of content and/or blocking of access in order to protect the right to life or security of life and property, national security and public order, public health and for the prevention of commission of crimes (Art. 8A(1)), it is a preventive measure. Under this provision, criminal peace judges examine and decide on blocking requests of the Presidency for more than thirty Internet addresses that include entire websites of news agencies in less than 24 hours. As this measure is not imposed as a precautionary measure in a criminal case, the decision cannot be reviewed at a later stage by a judicial authority assessing the substance of the case. Particularly considering that general notions such as national security and public order, and public health are not precisely defined in the law, in practice criminal peace judges have unfettered discretion to issue blocking orders.

This ambiguity in law has led, over four years, to the blocking of around 11,000 Internet addresses under Article 8/A. The individual complaint mechanism before the Constitutional Court has been insufficient to solve this systemic problem. Although the Court has tried to develop new criteria to overcome the vagueness of the Law, there is no evidence that criminal peace judges applying this in their recent case law.

The ICJ therefore submits that as borne out by the application of Law no.5651 in practice, taking into account the weaknesses in national judicial oversight, and in light of international law and standards on regulation of the internet, Article 8/A of Law no. 5651, contains insufficient safeguards to ensure that any interference with rights to freedom of expression and to receive information under Article 10 ECHR are necessary and proportionate for the pursuit of a legitimate aim.

[42] Kerem Altıparmak and Yaman Akdeniz (2) judgment, no. 2015/15977, 12.6.2019.