**The Turkish Constitutional Court, Wikimedia Foundation INC. and Others (General Assembly), 2017/22355, no. 26.12.2019**

**I. Summary and Outcome**

The Constitutional Court concluded that a court order blocking all language editions of the Wikipedia website in Turkey violated the right to freedom of expression guaranteed under Article 26 of the Constitution. Access to Wikipedia was blocked on April 28, 2017 by the Information and Communication Technologies Authority by a request from the Prime Ministry on the grounds of maintaining national security and public order under article 8/A of the Law no. 5651. The administration decision was then reviewed and approved by the Ankara 1. Criminal Judgeship of Peace. The blocking decision was issued after Wikipedia refused to remove two articles in English that claimed the Turkish Government was sponsoring terrorist organizations in Syria, which the Government believed tarnished its reputation. The Constitutional Court found the interpretation of the grounds for the interference as overly broad, making the legal basis unforeseeable and could have a substantial chilling effect. The Court concluded that the blanket ban did not meet a pressing social need and constituted a disproportionate interference with Wikipedia’s right to impart information and ideas, and with the right to access information and ideas of two Wikipedia users from Turkey who lodged user based applications but refusing another user based application by a civil society association on the grounds that this amounted to actio popularis.

**II. Facts**

On April 28, 2017, upon the request of the Prime Ministry Directorate General for Security Affairs, the Information and Communication Technologies Authority (*Bilgi Teknolojileri ve İletişim Kurumu-BTK*) issued an administrative order blocking all language editions of the Wikipedia website in Turkey based on Article 8/A of the Law no. 5651. At issue were a series of articles in English that claimed that the Turkish Government was in part responsible for the civil war in Syria, sponsored terrorist organizations, including ISIS by providing weapons and through oil trading. The government believed it was the victim of an international “smear” campaign and that Wikipedia refused to remove the impugned content despite repeated requests.

Article 8/A entitles the head of BTK to order the removal of, or the restricting of access to, online content upon the request of a judge. Under urgent circumstances, the President of the Republic (at the time of the Wikipedia request, the Prime Ministry) or relevant ministries, may also request restrictions which are considered necessary for the protection of the right to life, security of life, private property, national security and public order, public health or the prevention of crime. Any orders from the presidency must be submitted to a criminal judgeship of peace (a magistrate judge) for approval within twenty-four hours. The judge must declare a decision within forty-eight hours, in the absence of which the decision becomes null. According to the law, access blocking can only be granted for the URL that contains the offensive content but if the URL-based access blocking is technically impossible, the Judge can decide to block access to the entire website.

Based on the urgency clause provided under Article 8/A, the Prime Ministry requested the head of BTK to block access to the entire Wikipedia site, as Wikipedia refused to remove the impugned content within 14 hours despite an official warning. BTK argued that a URL-based partial blocking was technically impossible. The Ankara 1st Criminal Judgeship of Peace approved the decision the same day. The Judge found that the content at issue warranted the restriction on the ground that it could damage the reputation and respectability of the Turkish Republic by falsely portraying it as a state supporting terrorism. The appeals by Wikipedia and the applicants acting as Internet users were rejected by the Ankara 2nd Criminal Judgeship of Peace. As the decision become final, both the Wikimedia Foundation as well as the users lodged separate individual applications before the Constitutional Court.

**III. Decision Overview**

The main issue before the Court was whether a full blocking of access to the Wikipedia platform pursuant to Article 8/A of the Law no. 5651 violated freedom of expression guaranteed under Article 26 of the Constitution.

The applicants, including Wikipedia, an NGO specialized in the right to access information and two academics working on internet and human rights, argued that Wikipedia was an open access resource containing information drafted and edited by countless volunteers all over the world and its content was protected by freedom of expression and of press under Article 26 of the Constitution and Article 10 of the European Convention on Human Rights. A general blocking of access to the website is, according to the applicants, an unnecessary and disproportionate interference in a democratic society. The applicants claimed that the reasoning of the Judgeship did not precisely indicate which parts of the impugned articles on Wikipedia were unlawful and for which reasons and therefore, the judicial decision was unsubstantiated to order a full blocking of access to a website containing billions of information. A complete blocking of access to Wikipedia severely restricted freedom of expression and the right to access information of Internet users in Turkey. [para. 37-39]

The Ministry of Justice countered that Wikipedia refused to remove the impugned content and that they were notified that a full and general blocking was issued due to the non-compliance of the Foundation and the technical impossibility of blocking the encrypted URL links. Arguing that the content of the blocked entries constituted an unjustified offense and included wrong information easily accessible by a large number of people on the Internet, the Ministry submitted that the potential impact of the content made the measure of blocking necessary in a democratic society. The Ministry further added that the interference was proportionate on the ground that the judicial authorities decided the blocking order to be lifted in case of the removal of the offensive content from the website [para. 40].

Note: The Constitutional Court first discusses the issue of “admissibility” which is crucially important to the issue of “user based applications”. In fact the Court rejects the application lodged by the NGO but finds the application lodged by Akdeniz & Altıparmak, the two academics admissible. The discussion on the admissibility is missing from this review and should be part of it as it is important.

Beginning by examining whether the interference was prescribed by law, the Court observed that BTK did not clearly specify in its decision the legal basis for interfering with the freedom of expression of the applicants. Furthermore, “the reputation of the state”, a reason not provided under Article 8/A was relied on as the lawful ground for the interference. Therefore, the Court concluded that the law was interpreted in very broad terms, which created an impression of arbitrariness. Nevertheless, taking into account the strong relation between the legality and the necessity of the interference in a democratic society, the Court decided to examine the merits of the case under the clause of “necessary in a democratic society”. [para. 61-62] The Court equally noted that the legitimate aim of the interference as stated by the authorities was difficult to identify. In fact, BTK did not specify in its decision on which concrete legal ground it relied on for blocking the website. The Court further found problematic the legitimate ground adopted by the Ankara 1st Criminal Judgeship of Peace in its reasoning, according to which the content constituted an unjustified offense that might damage the reputation and respectability of the Turkish Republic by falsely portraying it as a state supporting terrorism. However, the Court further went on examining the case in terms of the necessity of the interference in a democratic society.

As to whether the interference was necessary in a democratic society, the Court first reiterated that due to the Internet’s important function for receiving and imparting information, it is protected under Article 26 of the Constitution which guarantees freedom of expression. The Internet facilities the public’s right to access information by enabling citizens to actively participate in public debate. Therefore, the State and public authorities must carefully assess regulations and measures related to social media platforms. [para. 67-69]. Consequently, the Court emphasized that the removal of content or an immediate ban on access to the Internet by a decision of the Head of BTK under Article 8/A of the law is an exceptional means to be applied only in case of urgent necessity. Therefore, the authorities must carefully consider the social consequences before resorting to this procedure. If the necessity of the interference is not *prima facie* and the assessment of whether online content poses a threat to democratic order requires a detailed examination, a judicial decision must be adopted rather than a blocking order by an administrative authority, which would constitute an exceptional measure. [74-76]

The Court noted that while access to Wikipedia was blocked pursuant to Article 8/A, neither the administrative authorities, nor the inferior courts, in this case, the Ankara 1st Criminal Judgeship of Peace as well as the Ankara 2nd Criminal Judgeship of Peace which rejected the appeals, adequately considered the relevant provision of the law. According to the Court, the causal link between the impugned content and the legal reason underlying the restriction was not established and the existence of the urgent necessity was also not demonstrated. [para. 87]

Furthermore, the Court noted that the interpretation of legal grounds such as ‘maintaining of national security and public order, prevention of the offenses,” in a broad sense, might lead to arbitrary practices and violate freedom of expression. In the present case, there was no concrete basis for the interference, as the administrative order to block access based on a need for “maintaining national security and public order” was not *prima facie*. The Court also observed that the appeal of the applicants against the blocking order was rejected on the ground that the impugned content “had tarnished the reputation of the state”, a ground that could not be considered, according to the Court, under the terms of “maintaining national security and public order”. The Court found that such a broad interpretation of the grounds for interference prescribed by the law without establishing concrete links left individuals in a state of uncertainty and made the legal rule unforeseeable. The chilling effect created by this situation would cause a severe restriction on the freedom of expression of a broad base of the population. [para. 88-89]

The Court also highlighted that after the blocking decision, independent and volunteer editors on Wikipedia had extensively modified the entries, tried to reformulate them in a more impartial and objective manner. Consequently, a range of unverifiable content was removed from the website. In the present case, blocking access to Wikipedia from Turkey not only constituted an interference with the right of the Wikipedia Foundation, in its capacity as a content provider, to impart information and ideas of but also with the right to access to information and ideas of Wikipedia users from Turkey. Furthermore, blocking access removed any opportunity for debate about the impugned content among Turkish users and hindered editors from revising, updating or contributing to the content of the relevant articles. [para. 91-92]

In light of the foregoing, the Constitutional Court held that the restriction in the form of a complete blocking of access to the Wikipedia website was not justified by a pressing need and, as a blanket ban on access to the entire website, constituted a highly disproportionate interference with freedom of expression. Accordingly, the blocking of access to Wikipedia violated freedom of expression guaranteed under Article 26 of the Constitution. [para. 95-97]

**IV. Decision Direction**

Expands expression

The judgment of the Constitutional Court expanded freedom of expression as it strongly affirmed the public’s right to access information on the Internet. The Court clearly established that legal grounds for limitations, such as maintaining national security and public order, cannot be broadly interpreted in an attempt to arbitrarily restrict the right to access information. The Wikipedia website is finally accessible in Turkey after 33 months of blocking and a 3 weeks delay after the publication of the Court’s decision. While celebrating the outcome of the judgment, legal circles have also [severally criticized](https://verfassungsblog.de/why-the-turkish-constitutional-courts-wikipedia-decision-is-no-reason-to-celebrate/) the Court for delaying hearing the case for more than two and a half years, and have pointed out that the Court likely rendered this decision out of fear of a potential declaration of violation by the ECtHR – which recently asked for the Government’s defense on a related pending case.

**V. Global Perspective**

Related International and/or regional laws

Law. No. 5651, Article 8/A

Constitution of Turkey, Article 26

ECHR, Article 10

Declaration CM(2005)56 final  of the Committee of Ministers on human rights and the rule of law in the Information Society

Recommendation CM/Rec(2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet

Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom

UN Human Rights Committee, General Comment No. 34

ECtHR, Handyside/United Kingdom, App. No: 5493/72 (1976)

Von Hannover/Germany (No. 2), App. No: 40660/08, 60641/08 (2012)

Ahmet Yıldırım/Turkey, App. No: 3111/10 (2012)

Times Newspapers Ltd/United Kingdom, App. No. 1 and 2, No. 3002/03, 23676/03 (2009)

Turkish Constitutional Court, Tahir Canan, App. No: 2012/969 (2013)

Bekir Coşkun [GC], B. No: 2014/12151, (2015)

Tansel Çölaşan, App. No: 2014/6128, (2015)

Emin Aydın, App. No: 2013/2602 (2014)

Medya Gündem Dijital Yayıncılık Ticaret A.Ş. [GC], App. No: 2013/2623 (2015)

Youtube Llc Corporation Service Company and Others, App. No: 2014/4705 (2014)

Birgün İletişim ve Yayıncılık Ticaret A. Ş. [GC], App. No: 2015/18936 (2019)

Ali Kıdık, App. No: 2014/5552 (2017)