**The Turkish Constitutional Court, (GC), The Case of Keskin Kalem Yayıncılık ve Ticaret A.Ş. and others, App. No: 2018/14884, 27.10.2021**

**I. Case summary and outcome**

The Constitutional Court decided that blocking access to news websites on account of violation of the reputation and personal rights under Article 9 of the Law on Internet publications violated freedom of expression guaranteed under Article 26 of the Constitution of Turkey. In the present case, The Court held that domestic law lacked procedural safeguards against excessive and arbitrary Internet blocking measures and that Article 9 was the source of systematic violation of the right to freedom of expression online and of media freedom in Turkey. Furthermore, the Court concluded to a violation of the right to an effective remedy under Article 40 of the Constitution on the grounds of the absence of an effective right to appeal against blocking. The judgment of the Court was notified to the legislature with a view to amending the law in order to prevent future violations of freedom of expression on Internet.

**II. Facts:**

The applicants are the companies owning five nationally broadcast news websites, namely *Diken*, *Sol*, *GazeteDuvar*, *Arti Gerçek, Birgun, Tarimdanhaber* that published news articles related to the critical political issues in Turkey alongside a journalist who authored an article in the website of the newspaper *Cumhuriyet* about the extrajudicial killing of a journalist in 1993. The access to a total of 129 URL addresses provided by these websites were blocked by decisions of criminal judgeships of peace pursuant to Article 9 of the Law no. 5651 on Regulating Internet Publications and Combating Crimes Committed by Means of Such Publications. The access blocking decisions were all grounded on the protection of the reputation and personal rights of the individuals who were subjects of the news articles among whom were politicians, public officials and a former military commander.

After the courts of instance rejected their objections, the applicants lodged individual applications before the Constitutional Court, arguing that their rights to freedom of expression and to an effective remedy were violated by the access blocking decisions.

**III. Decision Overview**

The Constitutional Court joined the nine individual applications on account of their legal connection, finding that all of the applications concerned access blocking to the content of the URLs by the criminal judges of peace upon request of the individuals who argued that the news articles contained statements that unlawfully harmed their reputations and good names.

The Court first identified Article 9 of the Law no. 5671 as the legal basis of the interference and examined whether the article satisfied the conditions of legal security and legal certainty. According to Article 9, real persons, legal entities and institutions who claim that their “personal rights” have been violated by the content published on Internet may apply for removal of that content by directly addressing the content/hosting provider or may also apply directly to the judge of the peace for blocking access to the relevant content. The judge shall decide whether to block access within a period of 24 hours without holding a hearing. Access-blocking decisions may be appealed to the judge of the peace bearing the next number. This decision is final and cannot be appealed to higher courts.

The Court recalled that Article 1 of the Law no. 5671 conditioned access blocking to the online content upon existence of a “suspicion of crime”, which meant that for having recourse to access blocking on the grounds of an attack against personal rights, there must be suspicion that the content constitutes a crime under criminal laws. However, the Court pointed out that despite the wording of Article 1, Article 9 of the Law did not explicitly mention that the scope of the access blocking measure be confined to the content constituting a crime. Furthermore, the article did not set a criterion or determined a threshold of severity of the wrongful act against personal rights, which would justify the recourse to access blocking.

The Court thus acknowledged the shortcomings of Article 9 as to the legality of the interference, considering the scope, aim and limits of the restriction on freedom of expression it set forth. However, the Court was of the view that, in the circumstances of the present case, its evaluation as to the legality clause could not be dissociated from the conformity of the decisions of the courts of instance to the requirements of democratic society. After having identified that the legitimate aim of the interference was the protection of the reputation and the rights of the others, it went further on examining the case in terms of the necessity of the interference in a democratic society.

In its examination of the case, the Constitutional Court extensively relied on its existent case-law related to the Law on Regulating Internet Publications and Combating Crimes Committed by Means of Such Publications, in which the Court laid down the general rules with regard to access blocking procedure under Article 9. The Court reiterated that the procedure in question did not include the procedural safeguards for the media outlets to be affected by access blocking and that consequently it would be difficult to strike a fair balance between the competing interests. Therefore, access blocking should only be decided in cases of *prima facie* violations. The procedure under Article 9 is thus an exceptional remedy that should be only implemented in cases where the violation can be determined *prima facie,* i.e. where an online content blatantly violates personal rights, such as the case of publication of the naked pictures or videos on the Internet.

Accordingly, the courts of instance must substantiate the need to promptly put an end to the attack that allegedly violates the reputation and honour of the complainant without conducting an adversarial proceeding. The Constitutional Court further emphasized the necessity to strike a fair balance between the freedom of expression of the applicant and the reputation and personal rights of the complainant in the application of the *prima facie* doctrine. In this regard, the Court assessed in its earlier decisions on the similar cases whether the publication contributed to a debate of public interest, had a factual basis and was newsworthy. The Court similarly took into consideration the identity of the complainant, the circumstances in which the content was published, the impact of the publication on the life of the complainant and whether the content on the Internet attracted public attention.

In the light of these principles, the Constitutional Court in *Keskin Kalem and others*concluded that in none of the present cases, the judges of the peace who issued access blocking orders had established the need to promptly put an end to the interference they deemed to violate the personal rights of the complainants without conducting an adversarial proceeding. According to the Court, the judges did not strike either a fair balance between the competing rights of the interested parties.

Furthermore, the Court observed that the decisions of rejection of the judges who reviewed the access blocking orders were not reasoned. In fact, the judicial review neither assessed the conformity of the original decisions to the *prima facie* doctrine in the present cases, nor examined the claims and objections of the applicants with regard to the legality of access-blocking decisions.

As to the content that was subject to access-blocking, the Court observed that some of the news in question aimed at raising public awareness for social issues, some facilitated the participation of the citizens in the decision making processes by reporting on the activities of and statements by the politicians and others intended to subject the activities of public figures and institutions to public scrutiny. As such, the news in question fell, according to the Court, within the scope of the duty and responsibility of the press to report.

Emphasizing lastly that the access blocking to the news was of an indefinite duration, the Court concluded that in the absence of any relevant and sufficient grounds, the decision of blocking access in the form of a measure of indefinite duration was a disproportionate interference with the freedom of expression and press.

In light of the foregoing, the Constitutional Court held that the access-blocking decisions complained of did not correspond to a pressing social need and violated freedom of expression and of press guaranteed under Article 26 and 28 of the Constitution.

Most crucially, the Court held that the violation of freedom of expression in the present case directly resulted from Article 9 of the Law, which failed to provide with the procedural safeguards capable of protecting the owners of online media against the arbitrary interferences of the public authorities. Concluding that the shortcomings of the legal framework constituted a systematic problem, the Court pointed out to the need of readjusting the existent system governing restrictions of Internet freedom.

Consequently, the Court urged the legislature to take into account the following suggestions with regard to the minimum safeguards for preventing violations of Article 26 of the Constitution:

- Article 9 should be rendered more foreseeable, the scope and legal nature of the procedure of access blocking must be reformulated in sufficiently clear and precise legal terms.

- Article 9 should be harmonized with Article 1 of the Law that declares the aim and scope of the Law.

-Article 9 should determine with a certain degree of clarity what legal consequences will arise from which behaviour and what competences the public authorities will be attributed to in specific cases. Accordingly, Article 9 should determine the limits of the protection granted for the personal rights and should set criteria or a threshold of minimum severity the wrongful act must attain to justify access blocking.

- If the access blocking decision is considered to be a provisional measure, the related proceedings should be in conformity with the code of Criminal Procedure. Hence, whether to uphold or end access blocking must be decided in an adversarial proceeding that allows involvement of the parties.

- When access to content is blocked upon request by individuals arguing that their personal rights has been violated and in case of appeal against this decision by those likely to be affected by it, it is incumbent on the state to establish a judicial mechanism whereby the content providers/online media owners will have the opportunity to defend themselves, including *inter alia* by bringing forward their counter-evidence and will be provided a forum in which they can be heard in an adversarial proceeding. The Court emphasized that the lack of an adversarial trial before the court that issued the original access blocking decision must be absolutely alleviated by the appeal instance. Since in this setting, the merits of the objection are to be examined for the first time before the appeal instance, it is of utmost importance to subject this decision to the oversight of a court of appeal or of cassation for preventing future violations of freedom of expression and press.

- Regard must be had to the severity of the interference of access blocking. The law should therefore provide the judges of peace with the guidelines of application and should emphasize that blocking access to online media is an exceptional provisional measure, which can only be decided as a measure of last resort unless less intrusive means are not effective for combatting harmful content on the Internet.

-Finally, the law must require the judges to justify the urgency of immediate enforcement of the blocking measure and to strike a fair balance between the mean of interference and the legitimate aim pursued. It must also include alternative means of combatting harmful content on the Internet other than access blocking.

Apart from finding a violation of the right to freedom of expression, the Court equally held that there had been a violation of the right to an effective remedy under Article 40 of the Constitution taken in conjunction with Article 26. The Court found that the remedy, which Article 9 provided for, had no prospect of success in the practice and was not effective in the circumstances of the applicants’ case. Although the applicants were able to bring proceedings seeking a review of the blocking measure, the court of appeal did not examine the merits of their grievance, undertake an assessment of necessity of the blocking measure in a democratic society and strike a fair balance between the competing interests.

Applying the pilot judgment procedure under Article 75 of the Rules of the Court, the Constitutional Court decided to send a copy of its judgment to the legislature, as a result of its finding that the afore mentioned violations directly resulted from the law.

**4. Expands expression**

The judgment of the Constitutional Court expanded freedom of expression as it condemned the systematic and widespread practice of access blocking to Internet content for being unconstitutional. The Court identified the Law no. 5651 on Regulating Internet Publications and Combating Crimes Committed by Means of Such Publications as the primary source of violation of the right to freedom of expression and press in the present case and as the source of a systematic problem. Hence, the Court urged the legislature to amend the law within one year in order to provide the Internet media providers with the sufficient safeguards against arbitrary access blocking. The judgment acquires further importance, as it is the first pilot judgment with regard to media and Internet freedom.

**5. Global perspective**

**Related International and/or regional law**

* [ECHR, art. 10](https://www.echr.coe.int/Documents/Convention_ENG.pdf)
* [CoE, Recommendation of the Committee of Ministers to member States on Internet freedom, CM/Rec(2016)5 (13 April 2016)](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa)
* Coe, Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe Following his visit to Turkey, CommDH(2011)25 (12 July 2011)
* Coe, Commissioner for Human Rights Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5 (15 February 2017)
* Coe, the Venice Commission, Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law") adopted by the Venice Commission at its 107th Plenary Session, CDL-AD(2016)011-e (10-11 June 2016)
* [ECtHR, Handyside v. United Kingdom, App. No. 5493/72 (1976)](https://globalfreedomofexpression.columbia.edu/cases/handyside-v-uk/)
* [ECtHR, Von Hannover v. Germany (No. 2), App. No. 40660/08 & 60641/08 (2012)](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)
* [ECtHR, Ahmet Yildirim v. Turkey, App. No. 3111/10 (2012)](http://hudoc.echr.coe.int/eng?i=001-115705)
* ECtHR, Times Newspapers Ltd v. United Kingdom, App. Nos. 3002/03 and 23676/03 (2009)
* ECtHR *, Cengiz and others v. Turkey,* App. Nos: 48226/10, 14027 (2015)
* ECtHR*, Bulgakov v. Russia*, App. No: 20159/15 (2020)
* ECtHR*, Engels v. Russia*, App. No: 61919/16 (2020)
* ECtHR*, OOO Flavus and others v. Russia*, App. Nos: 12468/15, 23489/15, 19074/16 (2020)
* ECtHR*, Vladimir Kharitonov v. Russia*, App. No: 10795/14 (2020)
* ECtHR *, Castells v. Spain,* App. No: 11798/85(1992)
* ECtHR*, Colombani and others v. France,* App. No: 51279/99 (2002)

**National standards, law or jurisprudence**

* Turk., Law No. 5651 on Regulating Internet Publications and Combating Crimes Committed by Means of Such Publications, Art. 9
* Turk., Constitution of Turkey (1982), Art. 26, 40
* Turk., The Case of Tahir Canan, TCC App. No: 2012/969 (2013)
* Turk., The Case of Tansel Çölaşan, TCC App. No: 2014/6128 (2015)
* Turk., The Case of Emin Aydın, TCC App. No: 2013/2602 (2014)
* Turk., The Case of Medya Gündem Dijital Yayıncılık Ticaret A.Ş. [GC], TCC App. No: 2013/2623 (2015)
* Turk., The Case of *Önder Balıkçı,* TCC App. No: 2014/6009 (2017)
* Turk., The Case of *Orhan Pala,* TCC App. No: 2014/2983 (2017)
* Turk., The Case of *Wikimedia Foundation Inc. and others* [GC], TCC App. No: 2017/22355 (2019)
* Turk., The Case of *İlhan Cihaner (2)*, TCC App. No: 2013/5574 (2014)
* Turk., The Case of *Halk Radyo ve Televizyon Yayıncılık A.Ş.* [GC], TCC App. No: 2014/19270 (2019)
* Turk., The Case of Bekir Coşkun [GC], TCC App. No: 2014/12151 (2015)
* Turk., The Case of *Miyase İlknur and others*, TCC App. Nos: 2015/15242 (2018)
* Turk., The Case of *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş.*, TCC App. Nos: 2015/6313 (2018)
* Turk., The Case of *IPS İletişim Vakfı*, TCC App. No: 2015/14758 (2018)
* Turk., The Case of *Kemal Gözler*, TCC App. No: 2014/5232 (2018)
* Turk., The Case of *Barış Yarkadaş*, TCC App. No: 2015/4821 (2019)
* Turk., The Case of *Kemalettin Bulamacı*, TCC App. Nos: 2016/14830 (2019)
* Turk., The Case of *Aykut Küçükkaya,* TCC App. No: 2014/15916, (2020)
* Turk., The Case of Ali Kıdık, TCC App. No: 2014/5552 (2017)