

# Exploring New Frontiers in the Interface between Free Speech and Access Bans: The European Court of Human Rights' Case of *Ahmet Yıldırım v. Turkey*

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## 1. INTRODUCTION

For the first time in its history, the European Court of Human Rights ("ECHR" or "Court") decided [\[4\]](#) on December 18, 2012 that Article 10 [\[5\]](#) of the European Convention on Human Rights ("Convention") was violated by the access ban decisions given by a Turkish court, the Denizli Criminal Court of Peace on June 23 and 24, 2009, with respect to Google Sites [\[6\]](#) for the reason that the content broadcasted on a website created on Google Sites violated Turkish laws (altogether, the "Case"). [\[7\]](#)

As the crossroads of freedom of expression and internet law become ever more intertwined, the limits to protecting inherent rights may be susceptible to being trusted by governments and regulators intending to protect the interests of the individuals in lieu of free flow of information over the internet. In the backdrop of contemporary discussions on freedom of expression, this paper delves into exploring the legal implications of the Court's case by initially outlining the events that lead to the ECHR and the Court's analyses of the subject matter. The paper will thereafter delve into the significance and prevalence of the Case, and how access ban decisions given over websites should be evaluated in light of the pertinent provisions of the Convention regulating freedom of speech and access to information.

## 2. FACTS AND ANALYSES ON THE DECISION OF AHMET YILMAZ V. TURKEY

### 2.1. FACTS AND BACKGROUND INFORMATION ON THE GOOGLE SITES CASE

#### 2.1.1. THE PROCEDURAL BACKGROUND ON ACCESS BAN DECISIONS IN TURKEY

Access ban decisions in Turkey may mainly be granted based on the crimes listed in Article 8/1 of Law No.5651 [\[8\]](#). The access to a broadcast on the internet may be banned if there is sufficient suspicion that the content constitutes i) provocation for committing suicide, ii) sexual harassment of

children, iii) to ease the usage of drugs, iv) supplying drugs which are dangerous for health, v) obscenity, vi) prostitution, vii) to provide place and opportunity for gambling, or viii) crimes mentioned in the Law on Crimes Against Atatürk with number 5816.

Under the Article 8/2 [9] of Law No.5651, access ban decision shall be granted by a judge during the investigation period and by a court during the prosecution period. A public prosecutor may also give access ban decision during the investigation period, if failure to do so might result in delay and cause irreparable damages, provided that he submits such decision to a judge for approval within 24 hours. The judge must grant a decision within the following 24 hours. If the judge does not approve the access ban decision, the precaution decision shall immediately be eliminated by the public prosecutor.

A copy of the access ban decision given by a judge, a court or a public prosecutor shall be sent to the Telecommunications Communications Presidency ("TCP") under Information and Communications Technologies Authority, for execution. The TCP is also entitled to ex officio decide for access ban under certain circumstances set out in Article 8/4 [10] of the Law No. 5651. The TCP sends its access ban decision directly to the access provider and the access provider is required to execute the decision within 24 hours as of its notification. There is no notice-and-take down process and the authorities do not serve the access ban decision to the hosting or content provider of the website.

The hosting and/or the content provider of the relevant website may object to the access ban decision, which is originally given as a protective precaution, merely after the website has been access banned. In practice the oppositions against the access ban decisions are submitted to the public prosecutor's file. The public prosecutor, on its own initiative, decides to reinstate access to the website or to take no action on the matter, without providing with a written reasoning to the opposing party. This arbitrary procedure leads to a point where there is no appeal right and grants to the public prosecutor a limitless, beyond control and discretionary power.

### **2.1.2. A BRIEF HISTORY OF ACCESS BAN DECISIONS IN CONNECTION WITH THE CASE**

On April 10, 2009, the Press Bureau of the Ankara Chief Public Prosecutor's Office requested from the Computer Crimes Department of the Ankara Police Department's Information Technologies Branch Office the place and the address of where the URL <http://sites.google.com/site/kemalizminkarinagrisi/Home> was broadcasting its content. Pursuant to the complaint that was made to the Ankara Public Prosecutor's Press Office on April 7, 2009, the URL <http://sites.google.com/site/kemalizminkarinagrisi/Home> appeared among Google's search results when the words "KEMALİZMİN KARIN AĞRISI" ("KEMALİZM'S STOMACHACHE", in English) were typed in Google's search bar, and the content was allegedly defaming Mustafa Kemal Atatürk [11], and demeaning his honor. The Ankara Police Department's Information Technologies Branch Office [12] stated that the URL <http://sites.google.com/site/kemalizminkarinagrisi/Home> was registered under Google.com and to the address of Mountain View CA 94043, and that the IP number was provided by Google.com (i.e. IP information kept in foreign servers); accordingly, the official letter indicated that since it is not

possible to obtain information from the company or persons that operate outside of Turkey, the identity and address information of the suspects could not be determined.

In connection with the same URL, on June 9, 2009, the Burdur Municipality Provincial Directorate of Security requested the address information of the owner of the URL

<http://sites.google.com/site/kemalizminkarinagrisi/Home> and the relevant IP number. [13] The correspondence requested that the foregoing information be directly sent to the Anti-Terrorism Branch Office. The Burdur Chief Public Prosecutor's Office requested from the managers of the foregoing website (i.e. Google) to remove the relevant page from broadcast based on the access ban decision given by the Burdur Criminal Court of Peace. [14] The Burdur Criminal Court of Peace gave its access ban decision pursuant to Article 8(1)(b) [15] and Article 8(2) of the Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed Through Such Broadcasts ("Law No. 5651) as it was determined that the content broadcasted on the relevant website explicitly and publicly defamed Mustafa Kemal Atatürk and was consequently in violation of Law No. 5816 on Crimes Committed Against Atatürk.

Objections to the access ban decision of the Burdur Court of Peace were rejected. [16] The Burdur Chief Public Prosecutor's Office [17] requested that access to the website <http://sites.google.com> be banned on the grounds that content broadcasted on this website defamed Mustafa Kemal Atatürk and was consequently in violation of Law No. 5816. Upon this request, the Burdur Criminal Court of Peace decided to access ban the website, <http://sites.google.com> on the grounds that defamatory content was explicitly and publicly broadcasted from the said website. [18]

In Denizli, a separate complaint was made to the Denizli Chief Public Prosecutor's Office on June 19, 2009, with respect to <http://sites.google.com/site/kemalizminkarinagrisi/Home>, in which it was requested that an investigation be initiated on grounds that the said website was violating the laws with broadcasting content that defamed Mustafa Kemal Atatürk. Upon the access ban request made by the Denizli Chief Public Prosecutor's Office to the Denizli 2<sup>nd</sup> Criminal Court of Peace regarding the website [http://sites.google.com/site/kemalizminkarinagrisi/benim-hikayem/atauerk-koeseesi/at ...](http://sites.google.com/site/kemalizminkarinagrisi/benim-hikayem/atauerk-koeseesi/at...) ("litigious site"), [19] access ban was imposed upon [http://sites.google.com/site/kemalizminkarinagrisi/benim-hikayem/atauerk-koeseesi/at ...](http://sites.google.com/site/kemalizminkarinagrisi/benim-hikayem/atauerk-koeseesi/at...) [20] As per the request of the Telecommunications Communications Presidency ("TCP"), [21] the access ban decision of the Denizli 2<sup>nd</sup> Criminal Court of Peace could not be implemented over the respective website, and as such, its access ban decision should be amended so as to access ban the domain name of <http://sites.google.com> or an access ban based on an IP address should be instituted. The Denizli 2<sup>nd</sup> Criminal Court of Peace amended its access ban decision that was given on June 23, 2009, and decided to ban access to the entire website <http://sites.google.com> pursuant to Article 8 of Law No. 5651, on the grounds that access could not be banned on [http://sites.google.com/site/kemalizminkarinagrisi/benim-hikayem/atauerk-koeseesi/at ...](http://sites.google.com/site/kemalizminkarinagrisi/benim-hikayem/atauerk-koeseesi/at...) As per the TCP's correspondence, an access ban could be implemented upon the website <http://sites.google.com>. [22]

Ahmet Yıldırım, along with other persons, objected to the access ban decision given by the Denizli 2<sup>nd</sup> Criminal Court of Peace on June 23, 2009, and his request was dismissed by the Denizli 4<sup>th</sup> Criminal Court of First Instance since access could be banned for <http://sites.google.com> on which the respective broadcast was made. [23]

### 2.1.3. THE NON-PROSECUTION DECISION OF THE İZMİR CHIEF PUBLIC PROSECUTOR'S OFFICE

The files in Denizli and Burdur were joined at the İzmir Chief Public Prosecutor's Office, as a result of the Burdur Public Prosecutor's decision that it lacked jurisdiction to prosecute the case on February 26, 2010, and the Denizli Public Prosecutor's decision to prevent re-investigation of the case file.

Following this joinder, on March 25, 2011, the İzmir Chief Public Prosecutor's Office gave a non-prosecution decision [24] with respect to the investigation that was conducted over the website <http://sites.google.com/site/kemalizminkarinagrisi/Home>, on the ground that the contact information of individual(s) who had uploaded the content of the respective URL could not be identified as they were in the United States. The non-prosecution decision clearly stated that access was banned to the respective website, that the contents were broadcasted from the United States, and that the request for judicial assistance by the Istanbul Chief Public Prosecutor's Office from the judicial authorities in the United States was rejected on grounds that Istanbul Chief Public Prosecutor's Office's request required a defamation investigation, which was protected under free expression in the United States. As such, the İzmir Chief Public Prosecutor's Office indicated that since local judicial assistance requests could not be fulfilled by foreign authorities, the identity and address information of the suspects responsible for the content broadcasted on the aforementioned website could not be determined, and hence a written investigation could not be conducted as per the relevant Turkish criminal procedure provisions. [25]

Despite the non-prosecution decision, the İzmir Chief Public Prosecutor's Office did not reinstate access to <http://sites.google.com>.

### 2.1.4. THE ROAD TO THE ECHR

The petitioner, Ahmet Yıldırım, is an active user of Google Sites and he publishes his academic works and evaluations on different matters on <http://sites.google.com/a/ahmetyildirim.com.tr/academic/>. The access ban decision of the Denizli Criminal Court of Peace (which was later amended by the decision of the Denizli Criminal Court of First Instance so as to cover the entire Google Sites webpage), upon being implemented by the TCP, banned full access to Google Sites, which resulted in the petitioner not having access to his own page on Google Sites. Among the petitioner's objections to the access ban over the entire Google Sites was that in order to prevent other websites from being affected by such measure, a method should have been used to make only the litigious site inaccessible (e.g. a URL access ban measure).

The Denizli Criminal Court of Peace dismissed the petitioner's objections, reasoning that the only way to block access to the litigious site, in compliance with the access ban decision, was to block the access to the page <http://sites.google.com>.

The petitioner complained about the impossibility to gain access to his website, due to a measure ordered within the framework of a criminal case which was irrelevant from his website. He reasoned that the access ban measure was a violation of his right of freedom to receive and communicate information and ideas, guaranteed by Article 10 of the Convention. Ahmet Yıldırım lodged his application on January 12, 2010 before the ECHR.

#### 2.1.5. ECHR STAGE

The Court found that the access ban decision and its legal basis, i.e. Law No 5651, constituted an "interference of public authorities" in the right of the concerned person to freedom of expression, of which the freedom to receive and communicate information or ideas forms an integral part, [26] which violated Article 10 if it is not "provided by the law," inspired by one or several legitimate objectives with regards to Article 10§2 and "necessary in a democratic society" to reach this or these objectives. [27] By determining that the national law did not provide any guarantee to avoid a access ban measure for a specific site to be used as a means of general access ban, [28] the Court concluded that Article 10 of the Convention was violated, [29] ordering the defendant state, Turkey, to pay 7,500 EUR (plus any amount due as tax, for moral compensation) and 1,000 EUR (plus any amount due as tax by the petitioner, as expenses and fees).

While analysing the Case, the Court referred to comparative case-law on the issue of limiting freedom on the Internet. When doing so, it specifically referred [30] to French Constitutional Council's decision of Jun 10, 2009, asserting that freedom of expression must today be understood as including the right of access to the Internet. [31] The French Constitutional Council laid down the fundamental principles in terms of restriction of access to the Internet: the restriction of the right of free access to services of communication to the public online can be ordered only by a judge, at the end of a fair lawsuit, and by imposing a commensurate sanction. According to the Constitutional Council, "*Regarding the nature of the freedom guaranteed by Article 11 of the Declaration of 1879, the legislator could not [...] entrust an administrative authority with powers (to restrain or impede access to the Internet) in order to protect the rights of holders of copyrights and neighbouring rights.*"

In evaluating the possible measures that could be imposed on illicit content broadcasted over the Internet, the Court stated that [32] there were a variety of approaches utilized by member states, ranging from individualized Internet access suspension to the prohibition of access to the specific site, passing by the deletion of the illicit content.

The concurring opinion of the Judge Pinto de Albuquerque agreed with the Court's general reasoning that the petitioner's site, like many others hosted on Google Sites, had no link with the site where the unlawful content has been broadcasted. Judge Albuquerque particularly highlights and draws attention to the minimum criteria that needs to be met by a legislation concerning Internet access ban measures to be compatible with the Convention as being the follows:

1. *A definition of categories of persons and institutions likely to have their publications blocked*, such as national or foreign owners of illicit contents, sites or platforms, users of these sites or platforms or those who set hyperlinks with illicit sites or platforms, and who agree with the content; [33]

2. *A definition of categories of access ban orders, for instance those aimed at blocking sites, IP address, ports, network protocols, or the access ban of types of use, such as social networks;* [34]
3. *A disposition on the territorial field of application of the access ban order, which can have a regional, national, even worldwide coverage;* [35]
4. *A limit to the term of such a access ban order;* [36]
5. *The indication of interests, in the sense of those which are indicated in article 10 § 2 of the Convention, which can justify a access ban order ;*
6. *The compliance with a proportionality criteria, which provides a just equilibrium between the freedom of expression and the concurring interests followed up, while ensuring the compliance with the essence (or hardcore) of the freedom of expression;* [37]
7. *The compliance with the necessity principle, which allows appreciating whether the interference in the freedom of expression promotes adequately the interests followed up and does not go beyond what is necessary to realize the said "social need";* [38]
8. *The determination of competent authorities to issue a motivated access ban order;* [39]
9. *A procedure to follow for the issuance of this order, including the examination by the competent authority of the file, supported by the request of order and the audition of the prejudiced person or institution, except if this audition is impossible or clashes with the pursued "interests";* [40]
10. *The notification of the access ban order and its motivation to the prejudiced person or institution; and*
11. *A judicial appeal proceedings against the access ban decision.* [41]

### 3. ANALYSES ON THE CASE

#### 3.1. SCOPE OF ARTICLE 10 OF THE CONVENTION, FREEDOM OF EXPRESSION

International agreements covering fundamental human rights mostly cover the rights to guarantee the freedom of expression as well. These international sources indicate that freedom of expression may not be restrained based on unjust reasons. Such provisions of international treaties consist of two main focuses. First prong is that protecting freedom of expression is the main aim. Second focus of such provisions regarding freedom of expression is the exceptional cases where the freedom of expression may be restrained. These exceptions are principally limited in number. For example, Paragraph 2 of Article 10 of the Convention stipulates the legitimate aims that may justify the restriction of freedom of expression on a limited basis. [42]

Before delving into details of the analyses of the case at hand, this section will scrutinize how the freedom of expression is assessed by the Court in the light of the case law. Freedom of expression regulated under Article 10 of the Convention includes the freedom to hold opinions, and to receive and impart information and ideas.

To begin with, there is a common system followed for the Article 8 and Article 11 of the Convention. As the steps will be explained in detail below, in general the first step of the system in detecting an Article 10 violation is the evaluation regarding whether the situation at hand is within the scope of the right and if it is, whether interference has occurred. If the answers are



yes, the Court utilizes its established criteria stipulated by Article 10/2 whether there are any (i) legal basis (ii) legitimate aim (iii) it is necessary in a democratic society.

Furthermore, in consideration for whether the reason for the violation is prescribed by law, the Court evaluates whether there are any safeguards in the law or whether the legislation leads to an arbitrary procedure. In this regard, rule of law, accessibility of law and foreseeability is considered. In evaluation of the necessity criteria in a democratic society the Court consider whether there are any (i) pressing social need (ii) whether it is proportionate whether there are (iii) any alternatives or effects or (iv) relevant and sufficient reasons. [\[43\]](#) The latter concepts have been developed through the case law of the Court and require the State to justify the restriction as pursuing a 'pressing social need', as not imposing an excessive burden on any individual and as being supported by relevant and sufficient reasoning.

As highlighted by the Court through well-known *Lingens v. Austria* *Observer and Guardian v. the United Kingdom* judgments, the right of freedom of expression constitutes one of the essential foundations of a democratic society. Freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb. Freedom of expression is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established. [\[44\]](#)

The contracting states have a certain margin of appreciation in assessing whether such a pressing social need exists, but this is subject to supervision by the Court, in respect of both the legislation and the decisions applying it. The Court looks at the interference complained of in the light of the case as a whole and determines whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether the measures are "proportionate to the legitimate aim pursued". In doing so, the Court must satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they relied on an acceptable assessment of the relevant facts. [\[45\]](#)

Freedom of expression covers a dual right; (i) freedom of expression as a social right and (ii) as an individual right. First aspect of the freedom of expression serves mainly for free debate and right to be informed of opposing ideas within society which is mandatory for the establishment of the democracy. Second aspect of the freedom of expression covered under Article 10 of the Convention includes the guarantee to receive information and right to hold opinion as an individual. The decisions of the Turkish courts subject to the case at hand injure both protected aspects of freedom of expression.

### 3.2. THE 'PRESCRIBED BY LAW' CRITERIA UNDER ARTICLE 10 OF THE CONVENTION

As regards 'prescribed by law', the law must be sufficiently clear and precise for it to be 'foreseeable'; individuals must be able to regulate their conduct to comply with the law. [\[46\]](#)

Article 8 of the Law No. 5651 provides that, where the broadcasts that constitute the crimes are "removed", the access ban decision shall be

'eliminated'. This was previously interpreted by the Turkish courts as meaning that where a hosting provider had restricted access to the offending content from Turkey it had 'removed' the relevant content, such that the access ban had to be lifted. [\[47\]](#)

In Turkey in order for the access ban to be lifted, the respective party must remove the content globally so that it cannot be accessed from anywhere in the world; thus, imposing a global access ban on the content. This interpretation of the Law No. 5651 is inconsistent with the generally accepted principle that laws have territorial effect (at least in the absence of very clear words to the contrary) and provides a good argument that the decision of the public prosecutor is not prescribed by law in the sense that the law itself was not sufficiently precise and foreseeable. [\[48\]](#)

This point is reinforced by the comparable Turkish legislation relating to print media and radio and television, which has been consistently interpreted by the Turkish courts as having effect only within the borders of the Turkish state.

### 3.3. THE 'LEGITIMATE AIM' CRITERIA UNDER ARTICLE 10 OF THE CONVENTION

Insofar as legitimate aim is concerned, although the right to freedom of expression is a qualified right, the permitted restrictions which a state may seek to impose all relate to expression within its territory. Thus the closing words of Article 10/1 relating to licensing have been held to refer to licensing within the territory of the state. [\[49\]](#) Similarly, certain of the aims identified in Article 10/2 such as national security and territorial integrity are necessarily restricted to matters within the state.

It follows, in our view, that the aim of preventing crime identified in Article 10/2 must be interpreted as preventing crime within the state - it cannot be a legitimate aim to prevent the accessing anywhere in the world of content which would amount to a crime in Turkey.

### 3.4. THE 'NECESSARY AND PROPORTIONATE' CRITERIA UNDER ARTICLE 10 OF THE CONVENTION

Regarding the 'necessity and proportionality' criteria used in assessing the violation, the access ban, insofar as it can be said to have pursued a legitimate aim, was unnecessary and disproportionate to such an aim in circumstances where Google Sites had taken measures to prevent access to the content from Turkey.

The requirement of global removal of content would affect Google Sites users across the world. The absolute access ban on Google Sites for all those based in Turkey is a very severe restriction indeed and can hardly be justified on the basis of the need to prevent a limited number of Turkish users gaining access to the offending content through foreign DNS servers; alternative measures with lesser effects could have been used. [\[50\]](#)

### 3.5. ANALYSES WITH RESPECT TO ARTICLE 10

As explained above, the evaluation on the interference of the freedom of expression will be determined by whether the breach of freedom is prescribed by law, has a legitimate aim [\[51\]](#) or necessary in a democratic



society. Before determination of the established criteria, the Court has underlined the role of the use of Internet in freedom of expression. The court has noted that " *Google sites is a module of Google allowing to facilitate the creation and sharing of a website within a group and constitutes also a means of exercising freedom of expression*".

That said, the Court further distinct the importance of not only content of such information in the website but also " *publication and thus, the right to receive and communicate information*". From this perspective, when the Court has considered the case at hand, by following the determination criteria of the interference of freedom of expression, the Court has first delved into the legitimate aim of Turkish republic against blocking the Google Sites.

As stated above, access ban decisions under Turkish law are mainly regulated under Article 8 of the Law No. 5651, where it is stipulated that access to broadcast on the Internet can be banned if there is sufficient suspicion that the content constitutes one of the crimes listed under this provision and other relevant legal provisions under Turkish law. [52] According to the Law No. 5651, access ban decisions must be given by a judge during the investigation phase of a case, and by a public prosecutor during the prosecution phase of a case. The only instance where a public prosecutor can give an access ban decision during the investigation phase of a case is regulated under Article 8/2 of the Law No. 5651, in the event where a failure to give an access ban decision then would result in irreparable damage and delay. The Turkish provision, however, allows for a cross-check mechanism whereby the public prosecutor's decision to access ban broadcast to content on the Internet will have to be submitted to the approval of the relevant judge within 24 hours, and the judge must give its decision on this request within 24 hours.

Law No. 5651 takes this decision-making power from the courts and the prosecutors and bestows it upon TCP in the event where the hosting provider or the content provider, as understood within the scope of the Law No. 5651, broadcast content that commits the crimes stipulates earlier under Article 8, [53] and where the hosting provider or the content provider resides outside of Turkey. This power is executed by the TCP *ex officio*.

Under Article 8/9 of the Law No. 5651, if the broadcasts that constitute the catalogue crimes under Article 8/1 of the Law No. 5651 (which include the crimes under the Law No. 5816) are "removed", the "access ban decision shall be eliminated".

Considering the vague scope of the access ban decision that can be given under Article 8 of the Law No. 5651, a critical point of debate arises as to the legality of access ban decisions that block access to the entire website, instead of only to the illegal content that is broadcasted on a specific URL address by a certain website. Access ban decisions blocking access to entire websites, such as the access ban decision in the Case, are likely to constitute an unlawful interference of particularly the freedom of expression rights as enshrined and protected under Article 10 of the Convention.

As has been indicated by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of expression, " *states restrict, control, manipulate and censor content disseminated via the Internet without any legal basis, or on the basis of broad and ambiguous laws, without justifying the purpose of such actions; and/or in a manner that is clearly unnecessary and/or disproportionate to achieving the intended aim (...). Such*

*actions are clearly incompatible with States' obligations under international human rights law, and often create a broader "chilling effect" on the right to freedom of opinion and expression.* " (emphasis added) [\[54\]](#)

To that end, the Court has observed that the total blockage of the Google Sites, has effected a third party; the petitioner who is the user of Google Sites and the owner of a page therein. Importantly, the Court has stated that "*Internet became today one of the main means of exercise by individuals of their freedom of expression and information: we find it essential tools of participation to activities and debates related to political issues or public interest.*" Thus, from this opinion it is clearly seen that the Court gives high importance for the individuals in a society to be able to participate actively to political debates and public interest and this participation is a sub-title of enjoying the right of freedom of expression. Moreover, the Court clearly highlighted Internet as a mandatory mean to maintain freedom of expression and information.

Article 10 comprises the right to impart and receive information and ideas, including on the Internet. [\[55\]](#) It would undoubtedly cover Google's right to impart information as well as individuals' rights to receive that information and use Google as a platform for imparting information. The "expression" which is protected by Article 10 of the Convention is not limited to the verbal or written statements, but it also involves pictures, videos or actions that aim at expressing an idea or providing information. No discretion is provided to the States on evaluating the content of the expression, i.e. whether the expression is moral-immoral, appropriate-inappropriate, shocking, etc. Article 10 of the Convention not only protects the content of the idea or information but also the way of expressing them. Therefore, the means used for the production, transmission, communication and distribution of information and ideas themselves altogether fall within the scope of this article.

Furthermore, the Court recognizes the "*provided by law*" criteria and evaluates whether the said law satisfies the legitimacy. The aim could only be legitimate if it was to prevent crimes in Turkey. This limited objective is important when assessing proportionality. The most that Turkey could argue is that its 'legitimate aim' was to prevent access to content in Turkey to meet societal needs; the question then becomes whether it was necessary and proportionate to that aim in a democratic society for it to require global removal of the offending content.

Provided that Turkey can show that the prohibition on the content pursued a legitimate aim, it must then show that the access ban to the website (and the requirement of global removal of the content before the access ban would be lifted) was necessary and proportionate to the achievement of that legitimate aim. That would require it to show a 'pressing social need' for the measure and that the measure was 'proportionate' in the sense that it struck a fair balance between the competing needs and interests involved.

In this case that would include not only Google Site's interests, but the interests of the public generally in having access to Google Sites. Similarly, the Court would be concerned to determine whether the absolute access ban to the website (the measure used to achieve the aim) resulted in Google Sites and/or members of the public who wanted access to Google Sites bearing an 'excessive burden' in meeting the 'pressing social need' pursued by the content ban, the precise nature of which Turkey would have to articulate.

In parallel, the Court states that besides that the measure shall have a basis in national law, it should also have an "accessibility for the concerned person who, moreover, must foresee the consequence for itself and its compatibility with the supremacy of the right" which in summary, means that the legal restriction shall be predictable. When looking at the case at hand, petitioner has claimed that the accessibility and prediction criteria are not met. As per the case law, the Court indicated that the requirement in order to meet such criteria is to look whether the country in question has provided a protection against the "arbitrary violation by the public power". It is also underlined that not only the exercising public power within the limits and sufficient clarity is one of the essentials of the democratic society.

Moreover, according to case law and the view adopted by the Court in the relevant case, the predictability and accessibility will be established through the individuals' shoes, whether if the individual may clearly understand the legislated prohibition and "adjust his behaviour" in order to avoid the questionable breach. When the case at hand is evaluated from this perspective and the Law No. 5651, the Court has found that the law which stipulates that the content of the publications made on the internet will be prohibited if there is sufficient doubt that their content constitutes violations, is not applicable at the present case as the content of the petitioners' website does not constitute any violations. Indeed, as the Court mentions, that the petitioners' own website was not subject to any criminal proceedings before the Turkish courts. Therefore, the Court has concluded that the judicial control measures adopted by the Turkish courts do not balance the interest between public power and the individuals' right of freedom of expression as the legal framework opens a door for the authorities to "enjoy extended power".

The "prescribed by law" criteria may be deemed to be covered by the Law No. 5651 in Turkish law with respect to the access ban decisions. However, the vague principles and procedures designated under the Law No. 5651 need to be re-regulated in line with the Convention, and the Law No. 5651 should be amended in accordance with the current needs of the Internet society. The provisions of the Law No. 5651 give the Turkish judicial bodies an absolute authority with respect to access ban to a website. Judicial discretions of the courts should be evaluated and narrowed based on the principles of freedom of expression and the legitimate aim criteria. Moreover, current Turkish internet legislation considers access ban decisions against a website preliminary injunction. Decisions of the Turkish courts, such as the courts that granted Google Sites decision, extend beyond the limits of an interim decision and generally become the punishment itself.

#### 4. CONCLUDING REMARKS

To recite the words of the Court's referral of the case *Banatan Books, Inc.* any preliminary restriction to expression on the Internet is related to a heavy presumption of incompatibility with the Convention [56]. In the Case, the Court's finding that Turkey did not meet the proof requirement for justifying such a restriction begs the legal validity of access bans decision under Turkish law, and the possible legal lacunae that arises from blocking access to entire websites, instead of a URL address, for broadcasting content which commit crimes that are listed out under Law No. 5651.

The Court expressly states in its decision that when an access ban decision is adopted, access to not only the site subject to legal proceedings, but also to

all content of the Internet domain can be blocked in accordance with the applicable Turkish law, and it critically expresses that prior cases involving domains such as "Blogspot.com," "Blogger.com," "Google Groups," "Myspace.com" or "YouTube.com" were also made subject to measures of access ban during long periods of time due to the specific websites they hosted. [57]

While the judgments of the Court have a binding force and their execution must be duly carried out by the states party to the Convention as per Article 46 of the Convention, [58] Turkey may need more than a revision of the law to align its legal landscape with international conventions; the arbitrary effects of such an encapsulating access ban decision and the insufficient means of judicial review to prevent abuses of this access ban mechanism calls for a more stringent evaluation of the current state of play regarding the interplay between protecting freedom of speech and balancing the powers and duties bestowed upon courts and public prosecutors to ensure correct implementation of the law.

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[4] *Ahmet Yıldırım v. Turkey*, No. 3111/10, December 18, 2012.

[5] Article 10, European Convention on Human Rights: "*Freedom of expression*": "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in 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."

[6] The Google Sites service is a component of the application, Google Apps, and a module for the creation and hosting of individual websites (available at <http://sites.google.com>).

[7] Pursuant to Articles 43 and 44 of the Convention, the ECHR decision is not final as of the date when this paper was published. Parties may request that the case be referred to the Grand Chamber of the Court within three-months as of the date when the Court decided the case (i.e. until March 18, 2013) (Article 44 (2): "*The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.*" (emphasis added)). As soon as a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution.

[\[8\]](#) " (1) Access to a broadcast on the Internet may be blocked if there is sufficient suspicion that the content constitutes one of the crimes mentioned below herein:

a) Crimes set forth under Turkish Criminal Code dated 26.09.2004 and numbered 5237:

- 1) Provocation for committing suicide (Article 84);
- 2) Sexual harassment of children (Article 103, paragraph 1);
- 3) To ease the usage of drugs (Article 190);
- 4) Supplying drugs which are dangerous for health (Article 194);
- 5) Obscenity (Article 226);
- 6) Prostitution (Article 227);
- 7) To provide place and opportunity for gambling (Article 228);

b) Crimes mentioned in the Law on Crimes against Atatürk dated 25.07.1951 and numbered 5816."

[\[9\]](#) " (2 ) Access ban decision shall be granted by a judge during the investigation period and by a court during the prosecution period. A public prosecutor may also give access ban decision during the investigation period, if failure to do so might result in delay and cause irreparable damages. However, public prosecutor shall submit such decision to a judge for approval within 24 hours, and the judge should grant a decision within the following 24 hours. If the access ban decision is not approved by the judge, the precaution decision shall immediately be eliminated by the public prosecutor. Access ban decision given as a protective precaution may be objected pursuant to provisions of Criminal Procedural Law dated 04.12.2004 and with number 5271."

[\[10\]](#) " ( 4) If the Hosting Provider or the Content Provider of a broadcast which constitutes the crimes set forth in paragraph (1) resides outside of Turkey, or although the Hosting Provider or the Content Provider resides in Turkey the content constitutes the crimes mentioned in sub-paragraphs (2) and (5) of sub section (a) of paragraph 1, the Presidency shall ex officio decide for access blocking. Such decision shall be notified to the Access Provider and the Access Provider is required to execute the decision."

[\[11\]](#) The first president and the founder of the Republic of Turkey.

[\[12\]](#) The letter of Ankara Police Department's Information Technologies Branch Office, dated April 30, 2009, numbered B.05.1.EGM.4.06.00.77.04/1210.

[\[13\]](#) Official warrant of the Republic of Turkey Burdur Municipality Provincial Directorate of Security dated June 9, 2009, numbered B.05.1.EGM.4.15.00.14.01/1403/62455.

[\[14\]](#) Access ban decision of the Burdur Court of Peace, dated June 9, 2009, miscellaneous numbered 2009/298.

[\[15\]](#) " (1) Access to a broadcast on the Internet may be blocked if there is sufficient suspicion that the content constitutes one of the crimes mentioned below herein: (...) (b) crimes mentioned in the Law on Crimes against Atatürk dated 25.07.1951 and numbered 5816. "

[16] Decision of the Burdur Criminal Court of First Instance, dated July 6, 2009, miscellaneous numbered 2009/245.

[17] Correspondence of the Burdur Chief Public Prosecutor's Office, dated November 17, 2009, numbered 2009/2383 T.İ.

[18] Access ban decision of the Burdur Court of Peace, dated November 17, 2009, miscellaneous numbered 2009/629.

[19] Official warrant of the Denizli Chief Public Prosecutor's Office, dated June 23, 2009, numbered 2009/14683.

[20] Access ban decision of the Denizli Second Court of Peace, dated June 23, 2009, miscellaneous numbered 2009/377.

[21] The Telecommunications Communications Presidency was established with Law No. 5397, as an administrative body in charge of registering and controlling the information spread by telecommunication means.

[22] Access ban decision of the Denizli Second Court of Peace, dated June 24, 2009, miscellaneous numbered 2009/392.

[23] Decision of the Denizli 4th Criminal Court of First Instance, dated July 13, 2009, miscellaneous numbered 2009/78.

[24] Decision of the İzmir Chief Public Prosecutor's Office, dated March 25, 2011, numbered 2011/14673.

[25] Article 172, Turkish Criminal Procedure Law No. 5271 (regulating non-prosecution decisions).

[26] Cf. *mutatis mutandis*, Ayşe Öztürk vs. Turkey, No. 24914/94, § 42, October 15, 2002.

[27] Paras. 55, 56, *Ahmet Yıldırım v. Turkey*.

[28] ¶ 68, *Ahmet Yıldırım v. Turkey*.

[29] ¶ 69, *Ahmet Yıldırım v. Turkey*.

[30] ¶ 32, *Ahmet Yıldırım v. Turkey*.

[31] Decision of the French Constitutional Council, dated 10 June 2009, Decision No. 2009-580 DC.

[32] 33, *Ahmet Yıldırım v. Turkey*.

[33] It is not always easy to distinguish a content provider from service provider. For instance, when the service provider interferes in the content provided by a third person, it becomes itself a content provider. The legislator must define clearly the two notions at the legal level, given that their responsibilities are also different.

[34] Possibilities range from more sophisticated access ban orders targeting IP addresses, number of ports, URLs or content data to less sophisticated orders which, for instance, will block certain domain names on corresponding servers or specific entries on the list of search engines.

[35] Regarding the right of trans-border access to information, cf. *Khurshid Mustafa and Tarzibachi vs. Sweden*, No. 23883/06, §§ 44-50, 16 December 2008,



and principle 3 of the Declaration on the freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003.

[36] Internet access ban orders which are permanent or of an undetermined duration are in themselves unnecessary interferences in the right to the freedom of expression.

[37] For instance, the access ban of a site supporting denial of the Holocaust is proportionate (Cf. the decision of the French Court of Appeal No. 707, dated 19 June 2008, 07-12244).

[38] It has already been decided in the case *Ürper and other vs. Turkey* (Nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, and 50371/07, § 43, 20 October 2009) that less draconian measures should be considered, such as the seizure of special copies of newspapers or restrictions to the publication of specific articles. The same principle can be applied to the access ban of publications, for instance by applying a "notice and take down" policy prior to the issuance of a access ban order. In the field of Internet, an additional factor to be considered is the fact that certain access ban measures can be easily bypassed, which makes the necessity of the measure doubtful.

[39] The fact that numerous institutions, bodies and persons can issue access ban orders appears to be prejudicial to judicial security. The concentration of access ban powers in the hands of a unique authority facilitates the uniform application of the law and an increased control of the practice.

[40] Regarding the issue of pertinence to ensure an audition of the prejudiced persons, cf. the decision of the Constitutional Council No. 2009-580 DC dated 10 June 2009, paragraph 38.

[41] Regarding the issue of the importance of similar guarantees of notification and appeal, cf. the decision of the Constitutional Council No. 2011-625 DC dated 10 March 2011, paragraph 8.

[42] Article 10 of the Convention reads as follows: "*Freedom of expression:*

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in 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."*

[43] See for example *Aslan v. Turkey*, 08.06.1999, 23462/94, para. 44(iii)

[44] See amongst countless authorities *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24; *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103; *Oberschlick v. Austria*, (no. 1), judgment of 23 May 1991, Series A no. 204; and *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216

[45] See, among many authorities, *Lindon, Otchakovsky-Laurens and July v France*, Applications nos. 21279/02 and 36448/02, judgment 22 October 2007, §§45-46, citing other authorities to the same effect

[46] *Sunday Times v. the United Kingdom* (no. 1), judgment of 26 April 1979, Series A no. 30 §49.

[47] See for example access ban decision of Sivas 2<sup>nd</sup> Criminal Court of Peace dated 16.1.08 (No. 2008/11), Ankara 5<sup>th</sup> Criminal Court of Peace dated 30.4.08 (No. 2008/599) (in both cases, YouTube prevented access to the relevant content from Turkey in the same way as it did in this case and the access bans were accordingly lifted.).

[48] Compare *Karademirci v Turkey* App. No. 37096/97 and 3710/97 judgment of 25 January 2005 §§41-42 where previous inconsistent court decisions on the effect of a Turkish statute meant that the restriction on freedom of expression was not prescribed by law and therefore in breach of Article 10 of the Convention

[49] *Groppera Radio AG v Switzerland* App. No. 10890/84 judgment 28 March 1990 paras. 61-2.

[50] Measures taken by the Turkish authorities banning IP addresses potentially affect access in Turkey to many third party websites and certain fundamental Google products, such as Google Maps.

[51] *Handyside v. United Kingdom*, "Freedom of expression is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (Para. 49 of the judgment)

[52] These crimes are crimes set forth under the Turkish Criminal Code No. 5237 ((1) Provocation for committing suicide (Article 84); (2) sexual harassment of children (Article 103, paragraph 1); (3) to ease the usage of drugs (Article 190); (4) supplying drugs which are dangerous for health (Article 194); (5) obscenity (Article 226); (6) prostitution (Article 227); (7) to provide place and opportunity for gambling (Article 228), and crimes regulated under the Law No. 5816. Also cf. Article 5 of Law No. 7258 on the Regulation of Betting and Gambling in Football and Other Sports Matches ("Law No. 7258), which provides that the access ban provisions of the Law No. 5651 are also applicable to crimes stipulated under Article 5 of Law No. 7258.

[53] Cf. Article 5 of Law No. 7258.

[54] Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human Rights Council, Seventeenth Session, Agenda item 3, A/HRC/17/27, 16 May 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) .

[55] *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom* (Applications 3002/03 and 23676/03), judgment 10 June 2009 (Final), §27

[56] *Banatan Books, Inc. vs. Sullivan*, 372 U.S. 70 (1963): " Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. " (emphasis added)

[57] 17, *Ahmet Yıldırım v. Turkey*.

[58] Article 46(1), Convention: " *The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.* "  
" (emphasis added)

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