

Legal Basis of Internet Censorship in Turkey and Threats on European Union Path (*)

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Abstract: As far as the legal basis of internet censorship is considered in Turkey, only a specific “Law No 5651” on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications, which was adopted on May 4, 2007, is present to handle with the cases with regard to internet banning or filtering. Within the scope of the aforementioned law, there have been some efforts to seek a solution for the items posing risks for the national and miscellaneous values; however, the content of the relevant law is confined to eight items. At this point, it is clearly understood that the existing law is not comprehensive enough to cover all necessary issues and that the authorities resort to other laws, which is not acceptable and proper. Some of the censorship of noted websites with different content is contradicting with the aforementioned law and the result seems to be rather worrisome; since the excuses for banning the websites are not included in the law and this status poses risks for the freedom of expression, speech and fundamental civil and political rights. For instance, the most outstanding ones for such banning are the ones censored for their political and religious or scientific contents. Furthermore, there seems to be no criteria or any guideline to make a decision for the reported cases.

As for the EU dimension, the problem with the threats against EU relations has not been comprehended properly. Since the year 1999, Turkey has been spending much effort for the EU membership and she has been looking for full-membership after her application was approved in Helsinki Summit. Moreover, it is always claimed that Turkey has fulfilled the requirements by the authorities; but the practices in current life, particularly in internet issue, is contradicting with the basic EU requirements. To illustrate, some of the censorship attempts stand as the best examples for this claim; the ban of a newspaper website, of the Education and Scientific Workers Union website, of Prof. Richard Dawkins’ website, and of atheist movements’ website pose significant risks for the freedom of expression and speech, and they violate the fundamental rights that are aimed to be safeguarded by the Copenhagen Criteria and European Convention on Human Rights.

On the grounds of the fact that such banning practices are against the basic criteria, it is necessary to remove such contradicting and paradoxical cases in order to make pave for the membership. Otherwise, by banning the websites with scientific, religious and political contents, it would not be right to continue the negotiations. Claiming that the requirements are met legally is not enough; instead they should be put into practice as required by the conventions and agreed criteria. In this regard, it is essential for Turkey to make amendments on the existing law and the scope of the law in question should be re-discussed with the participation of scholars, non-governmental organisations and relevant bodies; and then, the gaps in the existing regulations and laws should be bridged so as to have a good practice. In addition, the contradictory infringements of political, civil and religious rights need to be removed in order to comply with the agreed criteria that we are supposed to fulfil.

Key Words: Internet Censorship, Banning, Filtering and European Union.

1. Introduction

Internet censorship has become a controversial topic in Turkish agenda recently, and it is one of the most critical issues that need special regulation at the national basis. Since the internet concept became one of the indispensable parts of our daily life, it has naturally affected our lives in both positive and negative ways. It should not be sneezed at that the positive aspect of this effect overweighs the latter one; however, the negative aspect of it cannot be disregarded. In order to take these negative effects under control and keep the public away from the potentially harmful and improper contents with the purpose of safeguarding the values, of preventing the abuses as well as misbehaviours and crimes, different authorities and states apply various means such as censoring, filtering and partial banning.

In Turkey, in order to take actions against potentially harmful and improper contents, the mere resorted option is total ban of the website to access, even though the other alternatives are technically possible to apply. Particularly with the special case of YouTube ban,¹ this fact turns out to be pretty outstanding; because following the ban of the video-sharing website, some efforts have been made to lift the ban, however, the official authorities insisted on imposing total ban despite the fact that the foreign-based website authorities stated that it was possible to remove only some of the videos and apply partial banning upon the report of abuse or provocation. The total ban of the website of a newspaper is another case that stands as a good example for such a claim, because of an item of news on the website,² the entire website of Newspaper Vatan with mass circulation ranking the third in Turkey was banned to access. Actually, these are not the extreme examples, but the case is the same with the other banning actions experienced recently.

Only a couple of authorities are entitled to render such a decision to ban access to websites; Turkish Telecommunications Administration

and Independent Courts. The first option is the right of judges to act on behalf of Public Law according to Turkish Penal Code No 5651 published on Official Gazette dated May 23, 2007 and to apply the Criminal Courts. When the claim is accepted, the judicial process commences and censorship is imposed in line with the rendered verdict. The second option is the right of Turkish Telecommunications Administration's to make decision unilaterally. It is crucial to note that the access to any website may be suspended without informing the owner or the authorities of the web site provided it is considered unilaterally by the Administration; however, this unilateral decision and banning may be overcome on the condition that the plaintiff brings a suit against the censorship.³

In addition, the only Law into effect to regulate the internet censorship-related cases is the one No 5651.⁴ So as to comprehend the details of censorship, it is necessary to have a look at the provisions of the law into effect, the legal gaps and the missing point in the relevant law and further possible additions to extent the scope of the law. Owing to the fact that the Law dates back to a recent history, it is still in its infancy and it passed the parliament without consulting to any non-governmental organisations or scholars or competent authorities. Therefore, it is not comprehensive enough to cover all aspects of internet items and possible threats; further, it does not apply to all reported abuses or misbehaviours on internet. In this regard, there is a common misapplication and this malfunctioning has been ongoing and currently in practice, which pose risks for the objectives and reputation of Turkish Republic. Besides, the banning actions that are inconsistent with the relevant Law are also present, which needs questioning. This paper hereby is going to dwell upon the threats of internet censorship-based malfunctioning and misapplication cases, and inconsistencies on European Union path, as well. To have a better understanding, the following part is going to elaborate the current legal basis.

2. Legal Basis of Internet Censorship in Turkey

As aforementioned, there is only one Law into effect in Turkey to regulate the internet censorship-based cases: the one numbered 5651 on the Regulation of Releases/Publications on Internet and Fighting against the Crimes Committed via These Releases/Publications, adopted on May 4, 2007⁵ and approximately for a couple of years, it has been into force. Within this Law, the scope of censorship, filtering on online contents and internet publications is drawn up and the possible reasons for the censorship are given by means of referring the other relevant Laws. According to the Law in question, the criminal types that are subjected to filtering are as follows:

“The article 8/1 of the law provides that it is possible to prevent the access to the publications on internet which create sufficient suspicion that these publications may be considered as provocation for suicide as per the article 84 of Turkish Criminal Code (TCC), sexual abuse of the children as per the article 77/1 of TCC, facilitation of the use of narcotics as per the article 190 of TCC, provision of substances harmful to the health as per the article 194 of TCC, obscenity as per the article 226 of TCC, prostitution as per the article 227 of TCC, facilitation of gambling as per the article 228 of TCC and the crimes against Atatürk per the law numbered 5816.”⁶

Obviously, the scope of the Law is rather limited and it covers only eight items to regulate the internet censorship cases. Here is the elaboration of the provisions and some examples related to these provisions.

2.1 Provocation for suicide as per the article 84 of Turkish Criminal Code

The first provision of the Law targets the provocation for suicide. In order to prevent the vulnerable individuals in the society from the suicide attempts and to inhibit the inclination

of sensitive persons, the authorities have been applying the Law No 84 of TCC;⁷ as per the cyber-dimension of such provocations, the first item of Law 5651 has been into effect since 2007. Since then, any website that includes online contents with provocation for suicide or any network site that lets the release of videos/pictures/ films or any means about suicide are officially censored as per this provision. The Article No 84 particularly focused on “a person” who encourages or urges someone to commit suicide, and it states “provided this crime is committed via press-publication, the person in charge is sentenced to punishment ranging between four and ten years.”⁸ This law is adjusted and included to 5651, so the new version forbids any online publications that lead to suicide attempts. For instance, the web of www.justin.tv is an example for this provision: it is marked and filtered by the competent authorities –but no detail with regard to the court verdict is available on the site–, since a boy at the age of 19, named Abraham K. Biggs, from the States committed suicide online on Justin.tv and died, which was watched by thousands of people.⁹ The nature of this crime type is for the benefit of society and aims at preventing those psychologically vulnerable to commit suicide; therefore it is possible to consider that it serves for the good of people briefly.

According to the statistics, showing the propriety of reported links, the number of websites reported for having contents provoking suicide is 257 in total;¹⁰ however only one of them has been blocked so far. The percentage of this action is only % 2, which is minor compared to the other banning reasons. When the propriety of the reported links is considered, it is rather low; as, of 257 sites, only one of them is decided to be banned. The huge gap between the reported links and the banned ones displays how much the propriety of reported links is. Furthermore, it should be noted that the aforementioned censorship has been imposed by the Turkish Telecommunications Administration

unilaterally; therefore, on the banned website screens there may not be any explanation regarding the reason of suspending the access to the web site.

2.2 Sexual abuse of the children as per the article 103/1 and 77/1 of Turkish Criminal Code

Sexual abuse of the children and child pornography is one of the issues that most nations fight against. Both the developing and developed countries are trying to act against and take measures with the purpose of keeping the vulnerable individuals of societies away from such abuses, especially on internet. Likewise in Turkey, so as to prevent the children from sexual abuse, some measures has been taken and access to any site including videos or images of child pornography has officially been banned. Because of the fact that there has been an increasing demand for child pornography and inclination in sexual abuse of minors, the competent authorities have taken this increasing curve into account and included this item within the scope of Law no 5651.

In Turkish Criminal Code, Article 77 states that perpetration of the following actions systematically in a planned way against a certain group of the society due to political, philosophical, racial or religious reasons is considered to be criminal: ... f) sexual assault, sexual abuse of the children.¹¹ Likewise, Article 103 of Code states any person abusing the child sexually is sentenced to punishment ranging between three and eight years.¹² With the enactment of 5651, the content of the relevant paragraph of Article 77 is adjusted to internet and online releases, so the second item of the law stipulates the prevention of sexual abuse of the minors via online publications and releases. The authorities are very strict and sensitive about this issue in that those who are releasing such contents online are monitored and their internet protocol addresses are recorded automatically; the next step is the judgement and punishment of

such internet users. Moreover, the relevant law also finds those downloading any video, film or publications with child pornography guilty and individuals who keep such releases in their computer, CD or discs shall be sentenced to punishment ranging between one year and three years and to TL 3000-fine.¹³

According to the statistics showing the details of censorship imposed unilaterally by the Turkish Communications Administration, the number of the links reported for the sexual abuse of the minors is the highest. In total, 1, 335 complaints have been received by the Administration and only 289 of them have been banned to access.¹⁴ As for the propriety of the complaints, it is % 21, 6. When the other decisions made by the independent courts are included to the unilateral censorship cases, the number of banned sites increases up to 451. The number of these banned sites is so high that, of 1.112 sites filtered officially, 451 of them have been censored depending upon the fact that they have contents of juvenile porn and abuse of children posing threat and risk for the minors.¹⁵ This proportion more or less corresponds to half of total number.

2.3 Facilitation of the use of narcotics as per the article 190 of Turkish Criminal Code

The third provision of 5651 focuses on the narcotics use. Use, trade, advertisement, production and sale of any narcotics is forbidden legally in Turkey, therefore it is illegal to run any business depending on this products; in this regard, the competent authorities have banned the sites publishing any information about growing narcotic products and facilitating the use of narcotics as required by the Article 190 of Turkish Criminal Code. According to Article 190, Paragraph 3, any person obviously encouraging the use of narcotics and stimulants and publishing any release with such contents are sentenced to punishment ranging between two and five years.¹⁶ Considering the potential threats of the narcotics and stimulants against

the public, the authorities included this item within the scope of internet censorship issue; by this means, it is officially illegal to have any publication via internet that encourages the use of such substances and that facilitates their use.

Dutch model concerning the narcotics within the scope of internet dimension is favoured in most of the European states, no limitation is imposed on this issue; however, the case is different in Turkey, as the facilitation of such substances is forbidden and it is included to the relevant law. Considering the nature of this type of banning, it is for the good of society and vulnerable minors and it aims at preventing the individuals from the harm caused by narcotics. So far, according to the statistics there are only two websites banned for this reason, one of which is the foreign-based Dutch website elephantos.com. It is banned as it publishes some guidelines on growing and producing narcotics and magic mushroom in Turkish language, although it is a foreign-based site; so, it has been the first website to be banned for this reason. The censorship decision was made by an Antalya-based court and is still into effect.¹⁷ According to the statistics of guvenliweb.org.tr, the number of links reported due to their possible risks of narcotics is 130 in total, yet the number of banned by the courts and Turkish Telecommunications Administration unilaterally is only one for each.¹⁸

2.4 Provision of substances harmful to the health as per the article 194 of Turkish Criminal Code

As for the fourth provision of 5651, it aims at restricting the provision of substances harmful to health. With regard to this issue, Turkish Criminal Code bears the following statement: those supplying or providing the substances that may potentially be harmful to health to the children, mentally handicapped patients and to those addicted to volatile substances are sentenced to punishment ranging between six months and a

year.¹⁹ This Article is also included to the law to control the provision of substances that are potentially harmful to human health via internet; however, this provision seems to be ineffective in practice. Because, since the enforcement of this law 101 links has been reported, but currently not any web site is banned due to this provision.²⁰ Neither the Turkish Telecommunications Administration nor the independent courts have censored any website depending on this provision of the law.

The enforcement of this law has been problematic; because it was decided to ban online provision/sale of substances harmful to health and the decree was put into force as of the date of January 1, 2006, but in February, the enforcement was stopped; therefore the provision of such substances is available online. Basically, the core of the law is for the good of public, but it was not so possible to put it into effect and abstract the substances such as tobacco, alcohol from the daily lives of people completely; particularly considering the fierce competitive market of tobacco and alcoholic products industry.

2.5 Obscenity as per the article 226 of Turkish Criminal Code

One of the most controversial parts of the Law no 5651 is the provision about obscenity. This item is included within the scope of the law as per the Article 226 of Turkish Criminal Code. The relevant article says that:

“(3) A person who broadcasts or publishes obscene images, printed or audio material or who acts as an intermediary for this purpose shall be sentenced to imprisonment for a term of six months to three years and a judicial fine of up to five thousand days.

(5) A person who broadcasts or publishes the content of the products stated in paragraphs three and four through press and media or who acts as an intermediary for this purpose or who makes children see, listen to or read

such material shall be sentenced to imprisonment for a term of six to ten years and a judicial fine of up to five thousand days.”²¹

Depending on these paragraphs of the Article 226, Mr. Umut Guner, the editor and owner the mere Turkish LGBT magazine,²² was accused of publicising the obscenity and the was judged for three years in the year 2006. The previous year, the same magazine requested the obscenity be defined clearly during the Penal Court review in 2005 and it was asked to define what is meant by “obscenity” and what constitutes obscenity. Following to this request, the head of the aforementioned periodical was accused of publicising the obscene contents;²³ then the case was brought up to the European Court of Human Rights. In spite of this crisis, the authorities did not make any changes and the same provision is adjusted to the internet controlling law.

As it is seen in the statistics received as of the date of January 1, 2009, the public is also sensitive about the issue. The number of the links reported due to obscenity is 10, 312 in total, which is extremely higher compared to the other items. Even it is five fold more than the links reported due to the crimes committed against Mr. Ataturk. This number corresponds to % 58 of the whole reported webs. Of 514 banned websites, 38 of them has been censored by the independent courts and the rest of them, 476, has been censored by the Turkish Telecommunications Administration unilaterally.²⁴ Compared to the statistics of last year, the number of banned sites has increased remarkably; there used to be 390 sites banned due to obscenity in the year 2008,²⁵ but the current statistics of January 2009 shows the number of the banned sites has increased up to 514.

The number of banned sites is rather high, but the question to be posed is not the number, but accountability of this decision. In plain words, the decision making mechanism is not known

and the bodies adopting a course of action are not officially and specially assigned persons. Moreover, both in the Article 266 and Law No 5651, not any certain criterion for obscenity is given. It is not known whether there is any level or limit of obscenity that the internet users have to comply with? When the unilateral decisions are concerned, have these decisions made according to the beliefs, customs, values or traditions of the decision-making persons, or are there any written and official report to follow for such actions? As a matter of fact, the main aim of the item is for the good of people, but it needs further clarification, elaboration and thinking, because it would not be appropriate and acceptable to go on with the decisions made by a certain group’s beliefs or values; instead it needs the inclusion of different and relevant parties to decision making process so as to be impartial.

2.6 Prostitution as per the article 227 of Turkish Criminal Code

With the aim of fighting with the prostitution, Turkish Criminal Code touches upon this issue in the Article 227. The second paragraph of the article says “One, who instigates someone to prostitution, facilitates the way of or mediates for it or guarantees the place where prostitution is practiced will be imprisoned from two years to four years and fined with Turkish liras with an equivalent worth of up to three thousand days. Benefiting partly or entirely from the gain of whom act as a prostitute, is regard as instigating to prostitution.”²⁶ Facilitation and mediation is emphasized in this article, so these words form the backbone of prostitution concept in internet censorship case. With the inclusion of Article 227 to 5651 scope, it is not allowed to enable facilitation or mediation of white slave traffic, forced sexual exploitation or online indecent exposure via internet and online contents; thus the sites targeting the afore-listed crimes are banned in accordance with the sixth provision of 5651.

Since the public is very sensitive about this issue due to religious and moral reasons, the number of websites that are reported due to their potential content of prostitution is 1,756 in total. However, it is obvious that these reporting are not proper indeed, and the propriety proportion of this high number is rather low. The number of websites banned so far due to their contents of prostitution by the Turkish Telecommunications Administration unilaterally is eleven and that by the courts is only two.²⁷

2.7 Facilitation of gambling as per the Article 228 of Turkish Criminal Code

Within the borders of Turkey, any form of gambling is forbidden and the casinos were all closed some years ago, so the authorities are cautious in not enabling the facilitation of gambling, especially on internet. Article 228 says “(1) One, who provides place and opportunity for gambling will be imprisoned up to one year and fined with judicial fine.”²⁸ Considering the fact that internet is also a place where the gamblers may find the opportunity play luck games, Turkey has blocked the online gambling sites to access as some of the states have banned such as the United States.

“As far as online gambling is concerned, most prominent was the arrest of two employees of the online sports betting website Sportingbet earlier this year, who were booked in Turkey during their vacation, as part of the government’s crackdown on Superbahis, Sportingbet’s Turkish-facing online betting business. According to reports some 37 people working for the company’s Turkish office have also been detained. Turkey passed laws in February banning “unauthorized” companies from offering gambling services to Turkish citizens, a move viewed as protectionism of the local sports betting market.”²⁹

In total, 55 online gambling websites have been banned so far. The number of the links reported by the public for facilitating or offering

opportunity to online gambling is 122, and the number of banned sites corresponds more or less the half of this number. By the independent courts, three web sites have been censored with the court order, so the rest of them have been filtered unilaterally by the Turkish Telecommunications Administration.³⁰

2.8 Crimes against Atatürk as per the law numbered 5816

The paramount reason of favourite video-sharing website YouTube censorship in Turkey: Law no 5816, Crimes against Atatürk. Turkish nation is highly sensitive about the cases with Mr. Atatürk; as he is a national hero and the founding father of modern Turkey, so not any criticism or commentary on him is welcomed. The recent criminal complaint against Mr. Can Dündar, a famous journalist, author and director, about his recent documentary-like movie titled “Mustafa” indicates how sensitive the Turkish are about their founding father.³¹ Although it is a well know fact that Mr. Atatürk smoked and drank alcohol much before he passed away, some circles attempted to make criminal complaint against the director of the movie just because of the fact that the national hero is depicted while smoking and drinking, as if it were an unrealistic reflection. The director reflected to the movie what the national hero experienced and did during his last days in line with the documents and evidences he found, so he naturally wanted his movie to be consistent with the documents, but even this documentary was reported, which displays the sensitivity at the extreme point.

Law No. 5816, enacted in 1951 soon after transition to multi-party politics in Turkey, stipulates that any one who “publicly insults or denigrates Atatürk’s memory will be punished by one to three years in prison,” and that “the punishment will be increased by half if the crime is committed in spaces open to the public or in publication.”³² The independent courts hold the right to ban web sites including

any release targeting or insulting Mr. Atatürk. According to the recent statistics, the number links reported due to their contents or releases insulting Mr. Atatürk is 1, 901. However, the propriety of these complaints is doubtful again. Of 1, 901 reported links, only 18 “different” websites have been censored. Totally, 52 decisions have been made by the Turkish Telecommunications Administration and the independent courts; two of them were made by the former and the rest was by the latter ones. Of 50 verdicts on censorship, 32 of them were for the same internet site: YouTube. Those verdicts were rendered by different courts in Turkey and they are repeated cases. It is important to note only 18 different websites have been banned to access by court order so far.³³

As well-known, the censorship of highly popular video-sharing sites YouTube.com and DailyMotion.com bases on this Law no 5816. As far as the background of the crisis is considered, the first assault was made against the Ancient Greece by some Turkish citizens and it was claimed that homosexuality came out from the Greek,³⁴ thus the Greece is the land of homosexuality,³⁵ and then the insulting assaults continued in this way. In response to this virtual assault, some extremists released several videos claiming that Mr. Atatürk is also a gay on the condition that Greece is the land of homosexuality, which caused a tension between the Website authorities, Turkey and Hellenic Republic. Following the cyber-oriented tension, an Istanbul-based court, initially, and then a number of other courts throughout Turkey rendered a verdict on banning the video-sharing site YouTube.com and the Turkish Telecommunications Authority put the verdict into force because of the content which is considered to be insulting the memory of the founding father. Naturally, the verdict and the direct banning were not welcomed at national and international platform. “After the banning of worldwide video-sharing site YouTube and dailymotion.com, Turkey has been

added to the list of “Freedom of Speech Restrictors” in which there also exist China and Saudi Arabia.”³⁶ In addition, Reporters Sans Frontières (RSF) considered the decision excessive and requested the authorities be moderate on such issues. However, the other courts in other cities also made similar decisions with regard to the case and rendered a verdict to ban the website totally, which led the process to a cul-de-sac. The international organisation of Reporters Sans Frontières “condemned the obstinacy of the Turkish authorities in continuing to censor the Google-owned video-sharing website.”³⁷

As a matter of fact, there are some alternatives for the cyber-crises caused by the videos about Mr. Atatürk; for instance it was possible for the Google authorities to block access to videos with such contents within the borders of Turkey, but Turkey chose total ban of the site, which is the best solution according to their mind even though they call it not banning but protection. In a sense, it is clear that this action aims only at banning, instead of finding a solution to a problem. On the one hand, there is foreign-based Google-owned site YouTube operated under the laws of another country who state that it is possible to block certain videos within the borders of any country provided that complaint is delivered to the authorities; but on the other hand, there stands Turkey, who expects a foreign-based website function and serve in compliance with her own laws and who resorts to total ban, which is for vain in practice, since it has been announced officially that YouTube.com ranks among the top ten sites clicked in Turkey despite the fact that it remains blocked. This figure indicates that the total ban is not working effectively and there is not point in filtering the whole site just because of few videos that can be removed by diplomatic correspondence. For sure the best example to this case is the current Turkish Prime Minister, Mr. Erdogan. Upon a question of a journalist “It is impossible to access to YouTube.com, we cannot

enter the site...” the Prime Minister responded that he could easily, and added that he recommended the way he resort, too.³⁸

3. Legal Gaps in The Law No 5651

It is a well known fact that the Law 5651 does not address to all problems concerning the internet and censorship cases. There has been much debate on this issue and the practices into effect as well as the reactions of the non-governmental organisations, citizens and scholars indicate how much controversial the Law is. So as to overcome these controversies, it is necessary to make some amendments, to extent the scope of the law, to draw line between the concepts and the terms. To be more specific, it is essential to elaborate on the outstanding characteristics and missing points of the law into effect.

3.1 Narrow Scope

At the time of the preparation of the Law no 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications, the whole scope of the law was confined to eight items and the case is currently the same. As far as the experienced problems and unexpected developments are taken into consideration, it is clearly seen that the content of the Law is not comprehensive enough to address all cases with regard to the crimes committed by means of online publications.

The existing law refers to some other Articles of Turkish Criminal Code and Laws; and the content of the Law 5651 was formed by means of including the relevant Articles and Laws. However, it is crucial to note that legally the new Law overruled the other relevant Articles and Laws. In this regard, it would not be acceptable to make any decision about internet cases depending upon the overruled provisions. Further, provided that Turkish Grand National Assembly passed a law on the regulation of publications on internet, it should cover

all cases regarding the internet publications and contents, so there should not be any extra and redundant provisions. On the condition that the Articles include any case about the publications, the internet-related content of it should be adjusted to the Law on the regulation of publications on internet.

There have been some censorship cases that are irrelevant with the Law no 5651, but still the banning is into effect. For instance, the website of ateizm.com.tr.tc³⁹ was banned and the censorship is still ongoing. The 9th Criminal Court of Peace in Ankara Province rendered the verdict for censoring the website and the Turkish Telecommunications Administration put the verdict into practice; the process may seem to be normal, but the date of the verdict is February 4, 2008. It means the court made a decision after the approval of Law no 5651. In addition, the content of the website and the provisions of the law have no relevance with each other. As the provisions of 5651 are considered one by one, there would not be any sound and valid reason to make such a decision. The publications of ateizm.com.tr.tc are not obscene, or target at Mr. Atatürk, or facilitate online gambling or provide harmful substances. Whatever the reason of censorship is, it is obvious it is not covered in the law, yet the Court made a decision in this way, despite the fact that there exists a law on regulating the publications on internet. Compared to elephantos.com case, ban of ateizm.com.tr.tc is improper. The ban of elephantos.com may be regarded as normal, since there is a provision in the Law 5651 stating that “any person ... publishing any release with such contents is sentenced to punishment ranging between two and five years.”⁴⁰ Considering this provision, the verdict of the relevant Court is proper and in line with Turkish Criminal Code; however, it is not the same with ateizm.com.tr.tc.

Even if the content of the site is against any Article or Law, it should be included to the legal scope of 5651 and then the decision should be

made accordingly. Otherwise, there arises an ambiguity and malfunctioning and there would be no point in passing a law on regulating the publications on internet as long as the courts resort to other Articles and Laws. This specific law passed the Parliament with this aim and it is necessary to cover all other relevant cases.

3.2 No criteria for obscenity

As stated in 2.5 supra, there is not any concrete criterion for the term “obscenity”. As far as the content of the Article 226 is considered in detail, it says in paragraph (a) “A person who gives or displays to a child...,” in paragraph (b) “A person who openly shows the content of such material in places accessible or visible to children, or who openly displays them, who exhibits them in a visible manner, who reads or talks about them to children, or who makes children read or talk about the content of such material,” in Part 3 “A person who exploits children...”⁴¹ In general, the Article takes measures in favour of the children and it may serve for the good of minors; however, still there is not any criterion in the above-mentioned Article concerning what “obscenity” is. As if these criteria are secret and inexplicable, they are not elaborated and given in detail, so they are left to the value judgement of the decision making mechanisms.

Owing to the fact that the mentality of individuals differs, that the value judgement of individuals depends on the person and that the perception may vary depending on the culture and society in which the individuals grow up, it is crucially necessary to set the criteria in order to make an impartial and sound decision to decide what is obscene or acceptable. If a transparent cloth showing certain parts of the body or the pictures displaying the privates is considered as obscene, these should be set forth in the relevant paragraphs. As long as these standards are not defined, the judgement will be up to the decision makers’ values, mentality and customs, which will cause inconsis-

tency between the administrations and which will be troublesome.

The relevant law aims at preventing the provision of contents, which are regarded improper for a child at a certain age-limit; however, at this point the following question needs to be asked: “Is censorship with this purpose for the children, or is it for the adults, as well? If it is for the minors, is it right to censor the whole content by disregarding the adults?”

3.3 No distinction between child pornography and adult pornography

The concepts of obscenity, pornography or erotic are closely related with each other and it is hard to draw a line between those concepts. It is not definite according to what the decision makers consider to ban or allow the publications on internet. The limits of such concepts are vague, so it makes the situation harder and controversial. Likewise, it is the same with the terms child pornography and adult pornography. So far, under the title of obscenity and child pornography a number of websites have been censored and access to those sites has been suspended by the authorities.

The Iranian model does not have any tolerance on both terms; it totally bans the websites that are unacceptable according to their beliefs and values. Whether it is child pornography or adult pornography, or whether it is erotic or obscene, they consider them all the same and impose censorship without making any distinction. However, by means of imposing such censorship, the rights of adults with adequate mental maturity is violated. On the one hand, imposing censorship on child pornography may serve for the good of minors and abuse of minors may be prevented by suspending access to such releases. On the other hand, it would not be wise to suspend access to adult pornographies, as the adults are already mature and they have adequate mental capacity to make decision and preference; further they know

what sex and sexuality is. Instead of leaving the preference to the adults, adopting a course of action on behalf of them is not acceptable considering their maturity.

3.4 No proper application of unhealthy substances

One of the ineffective provisions of the Turkish Penal Code is the one concerning the provision of substances harmful to human health. The enforcement of this provision failed just one month after it was put into force. It was aimed to prevent the online sale and provision of substances harmful to human health, yet it failed and currently it is not functioning. The provision came into force in January 1, 2006, but one month later it was withdrawn. As a matter of fact, the objective of the provision is for the good of public and minors; however, it needs further amendments. The authorities tried to ban access to products harmful to human health such as alcoholic drinks, tobacco products and other drugs; but, is there any point in censoring such online-means and cyber-markets while the sale of these products is free outside. It should not be forgotten that internet is also a branch of the producers, it functions as a shop; the only difference is that it is virtual. Instead of going to the supermarkets or shops, the consumer may resort to e-shopping, which is quite natural and ordinary in our daily life. So, when it is free to buy any tobacco or alcoholic product in a supermarket, it does not make any sense to ban buying them on internet.

3.5 Exclusion of NGOs and scholars in decision making process

When the relevant Law was prepared, it is a known fact that the non-governmental organisations and scholars or relevant figures were excluded from this process and their remarks, considerations or possible recommendations were not taken into account. Instead of drawing a conclusion unilaterally, opinions and remarks of different circles should have been considered and included to the process.

It could have made the results much healthier and sounder. Particularly, the Information Non-Governmental Organisations, who are involved in this issue, could have been included to this process. Even now, these NGOs are ready to cooperate with the governmental agencies. According to their press release, they state that "... Censorship practices do not comply with the EU, Democracy and Information Society project of Turkey. Non-governmental organisations are willing and ready to cooperate as a part of this process; we would like to be a component of this process. It is necessary for the Ministry of Justice, Bar Association and Board of Judges to ensure such structuring through cooperation."⁴²

Considering the fact that the non-governmental organisations are working for the good of public, and for the different groups of society such as children, women, youth etc, and that they are spending efforts to improve democracy, internet democracy, fundamental rights and freedoms as well as public development, they need to be involved within this process technically. With the cooperation of various organisations, the scope of the Law may be enhanced and ameliorated. For instance, the organisations concentrating on children's rights or those fighting against harmful substances, or notably, those on internet and information may act in one accord to have a good practice by means of setting forth their remarks to find a better solution.

4. Threats on European Union Path

One of the cases that may pose a risk for Turkey for the future in her relations is the one with European Union; as the strides that have been taken so far throughout the negotiation process will be put into risk on the grounds of the recent practices in internet world. As far as the objective of Turkey and what is in practice is considered, it is possible to state that there is a paradoxical situation. In other words, the

sole aim of full-membership to the union and the restrictions on some contradictory issues are contradicting with the policy in general. It is essential to comprehend the inconsistency between these two points and to take action accordingly. The most outstanding infringement issues concerning the EU-dimension are the violation of “political criterion” of Copenhagen Criteria which were adopted in June 1993 and are considered to be the basis for membership application and the violation of Article 10 of the European Convention on Human Rights, adopted under the auspices of the Council of Europe in 1950. In order to comprehend the two aforementioned violations, it is important to elaborate them in detail.

4.1 Political Criterion of Copenhagen Criteria

European Council spelt out the certain conditions for EU membership which are known as the Copenhagen Criteria. According to these criteria, the candidate state is required to have some qualifications which are divided into three groups. Of three criteria, the first one is germane to political requirements. Under the term of political criterion, several sub-titles are covered such as the fundamental rights and freedoms, violations and protections, etc. According to these pre-requisites, the candidate state is required to have “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”⁴³ As the mentality differs from state to state in terms of rights and freedoms, European Council set forth some Protocols that aim at safeguarding the standard and certain rights; thus the conventions on human rights have been ratified and they have been enhanced by amending for years. In spite of the fact that Turkey’s application for full-membership to EU was accepted in the year 1999 at Helsinki Summit, and that it is said Turkey has fulfilled the requirements, currently there are infringement cases in some of the items covered within this scope considering the practices in internet world.

In a democratic state, it would not be right to ban access to local and national newspapers just because of the political reasons, however, several websites of the newspapers have been censored so far, which is unacceptable. Most of the websites that are banned are those with pro-Kurdish contents in which Turkish government and public is very sensitive. For some years, there has been a political unrest with Kurdish problem and the authorities have been trying to take actions against it. The bianet.org says in its website that “... There are some internet sites that are banned for supporting the Kurdish cause or simply being pro-Kurdish. For example, the internet sites of the newspapers Yeni Özgür Politika (yeniozgurpolitika.org) and Özgür Gündem (ozgurgundem.org), Fırat News Agency (ANF) (firatnews.com), and rojaciwan.”⁴⁴ This is one of the censorship cases that contradict with the Copenhagen criterion concerning politics.

In addition, the third largest-selling Turkish newspaper’s website was also banned due to questioning the governmental connection and supporters of an Islamic book-delivery in state schools. In order to deliver any publication in schools, it is necessary to have written permission from the relevant ministry or educational administrations; but an Islamic creationist delivered his books supporting the creationist mentality in state schools, and upon this controversial incident the newspaper Vatan had an item of news that questions this delivery and its governmental connections. In the end, it resulted in censoring the website of the national newspaper,⁴⁵ which is against the EU policies.

Furthermore, another controversial censorship decision under the title of political reasons is the ban of Union of Education and Scientific Workers’ (Eğitim-Sen) website: egitimsen.org.tr. At international platform, this censorship is also brought up in the Country Report of the US Department of State on Democracy, Human Rights and Labour. The report says “In

May the High Court of Appeals ordered the closure of the teachers' union Egitim-Sen on the grounds that the union's bylaws violated the constitution by advocating the right of individuals to receive education in their mother tongue;"⁴⁶ this statement is the superficial excuse for the censorship, indeed the real reason of banning is an Islamic creationist – religious leader again. On the website of the Union, the financial supporters of the books delivered in state schools and the circles supporting his publications were questioned and then the website was banned officially.

3.7 European Convention on Human Rights

In order to take the fundamental rights and freedoms under guarantee, Article 10 of the European Convention on Human Rights state "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."⁴⁷

As it is set forth in the afore-cited article of the convention, any individual is of the right to freedom of speech and expression. Particularly the second sentence of the first paragraph of this article clearly states that any individual may have opinions and to receive or impart ideas without being interfered by the authorities. Considering the censorship practices into effect, it seems this provision is violated and the rights of certain groups are violated.

Article 9 of the Convention state that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."⁴⁸ Not only in national regulations, but also in in-

ternational conventions, it is always claimed that the individuals hold the right to religion and to have their prayer independently without any interference by the authorities; however, the situation in theory and in practice does not match up with each other. Legally, there is discrepancy between the Constitution and practices with regard to religious cases. With the purpose of comprehending what is meant by this discrepancy, it is necessary to have a look at the recent evaluation of religious affairs. This case is put forward clearly by the International Religious Freedom Report 2008 of US Department of States released by the Bureau of Democracy, Human Rights and Labour. The Report says:

"The Constitution provides for freedom of religion, and other laws and policies contributed to the generally free practice of religion, but constitutional provisions regarding the integrity and existence of the secular state restrict these rights. The 1982 Constitution establishes the country as a secular state and provides for freedom of belief, worship, and the private dissemination of religious ideas. The Constitution prohibits discrimination on religious grounds."⁴⁹

As far as the case with internet censorship and religious affairs are considered, the aforecited statement of International Religious Freedom Report 2008 is proved by the practices of competent authorities concerning web banning. Even though it is stipulated on written documents that religious beliefs and practices are not a reason for censoring, the following cases are relevant with this item. The actual reason of their ban bases on the fact that their content is different than their ideas and contradicting with their knowledge and belief. Otherwise, these websites do not include any releases that match the eight-criminal types defined by the Law 5156.

An example of such censorship is the ban of atheism.com and atestforum (forum.ateizm.org) one of the busiest forums for the Turkish

speaking online community over the Internet.⁵⁰ Once again, the reason of this censorship is the extreme Islamic creationist mentality, as the belief of the atheists does not accept theistic approach and theistic belief, the extremists consider this as an insult against their belief; as a result, the online webs of this movement have been censored officially. In spite of all these censorship cases, it is still claimed that there is not any violation of religious freedom. According to Article 9 of the European Convention on Human Rights, this action is against the agreed provisions and EU policies. No matter what the censoring authorities call it, this action is violating the fundamental religious rights, and it is against the internationally agreed conventions; so continuing this action for years will not have any good for Turkey, but tarnish her reputation at international platforms.

Last but not least, extremist Islamic creationist mentality censored the website of Mr. Richard Dawkins, Oxford University's Professor of the Public Understanding of Science. The censorship reason of this website is not complying with the Law 5651, but currently it is still banned. Having being claimed by a non-scientist creationist about the content of Mr. Dawkins' website as "defamatory" and "blasphemous," it was banned and still it is into effect. Not any detail has been given regarding the court verdict, its number or the decision making body of such censorship; it is possible to see it on the official website of Mr. Dawkins, richarddawkins.net.⁵¹ Is there any content about pornography, obscenity, or Atatürk or gambling? Certainly, in a scientific site, such things are not present, but what can be the reason of banning the site of a highly reputed and respected scientist? Considering the fact that British scientist is an evolutionist and there are online releases on his expertise, the very reason of this ban comes out: religion, religious thinking and belief.

No matter what the Constitution says and specific regulations on such issues stipulate or

what the international conventions on various rights set forth, the trend is the same: expecting everyone to be the same, in the same faith, on the same path. In parallel to this fact, the limit of tolerance for the "others" ranges between little and less. On the condition that there is the existence of other beliefs, or that anyone states any idea different from the generally accepted notions, the next step is a counter action as the case with Mr. Dawkins is. What makes it more and more tragic is that they do not consider it as an infringement of freedom of speech or expression, but protecting the rights of people as well as preventing the insult against their belief; as the justification of the complainant party says "We are not against freedom of speech or expression but you cannot insult people."⁵² Depending on this justification, are all the ideas contradicting with those of others going to be considered as "insult" and is it required to ban all different beliefs?

As far as the case is taken into consideration in terms of European Union dimension, it naturally poses risks. One of the British newspaper, the Guardian, "points out Turkey's restrictions on free speech are on ongoing obstacle to its attempts to join the EU and banning Dawkins's website is unlikely to do this any favours."⁵³ In addition, the banner at the top of the homepage of Richard Dawkins' website that reads "Banned in Turkey" is not good for the international opinion about Turkey.

5. Conclusion

As it may be understood from the examples and the existing cases, there is not a properly-functioning mechanism in internet control in Turkey. The censorship decisions are made as per a Law no 5651, but it does not cover all problems encountered in the country. The scope of the law into effect is very narrow and still there are ambiguous, missing and vague points that need further clarification and amendments. It is necessary to enhance the concept and scope

of this law by means of resorting to different circles and receiving their recommendations and remarks. Contribution of the non-governmental organisations or the scholar will help to prepare a comprehensive and good-functioning law. Instead of trying to take the system under control unilaterally or without depending upon a verdict, resorting to this option will serve for the good of the country and it will remove the ongoing improper practices.

So as not to risk the national objectives of Turkey in European Union process, it is important to lift some of the wrong censorship practices which are not complying with the international policies. The practices and the policies should be consistent, because just stating that required amendments have been made in the Constitution or in the relevant regulations is not enough. It is crucial to put into effect the amendments and the required actions; otherwise, they would be no more than words without meaning and sense as long as they are not in practice. Otherwise, Turkey may have problems in her relations and foreign affairs in the future on the grounds of these wrong and improper practices, even though there is not anything concrete for the time being.

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