REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2014/4705

Date of Decision: 29/5/2014

GENERAL ASSEMBLY

DECISION

President : Haşim KILIÇ
Deputy President : Serruh KALELİ
Deputy President : Alparslan ALTAN
Members : Serdar ÖZGÜLDÜR
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Celal Mümtaz AKINCI
Erdal TERCAN
Muammer TOPAL
Zühtü ARSLAN
M. Emin KUZ
Hasan Tahsin GÖKCAN
Rapporteur : Esat Caner YILMAZOĞLU
1. Applicant : Youtube LLC Corporation Service Company
(App.No:2014/4705, App.No:2014/4737)
Representative :John Kent WALKER
Counsel : Att. Gönenç GÜRKAYNAK
2. Applicant : Kerem ALTIPARMAK
(App.No:2014/4767, App.No:2014/5543)
Counsel : Att. Çiğdem DURKAN
3. Applicant : Yaman AKDENİZ
(App.No:2014/4769, App.No:2014/5542)
Counsel : Att. Çiğdem DURKAN
4. Applicant : Mustafa Sezgin TANRIKULU
Counsel : Att. Berk BAŞARA

5. Applicant : Metin FEYZİOĞLU

6. Applicant : Erol ERGİN

Counsel : Att. Serkan ŞAHİN

7. Applicant : Mahmut TANAL

8. Applicant : Mesut BEDİRHANOĞLU

Counsel : Att. Ferit ALGAN

I. SUBJECT OF APPLICATON

1. The applicants alleged that articles 22, 26, 27, 40, 48 and 67 of the Constitution were violated due to the action of the Presidency of Telecommunication and Communication (PoTC) dated 27/3/2014 regarding the blocking of access to the video-sharing website named youtube.com.

http://www.youtube.com

II. APPLICATION PROCESS

2. The applications were lodged directly at the Constitutional Court on the dates of 4/4/2014, 7/4/2014, 8/4/2014, 14/4/2014 and 24/4/2014. As a result of the preliminary administrative examination of the petitions and their annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. Due to the fact that the applications numbered 2014/4717, 2014/4737, 2014/4767, 2014/4769, 2014/4817, 2014/4853, 2014/4883, 2014/5137, 2014/5542 and 2014/5543 are of the same quality as regards the subject, it was decided that they be joined with the application numbered 2014/4705 and that the examination be carried out based on this file.

4. The First Section decided that the examination of admissibility and merits of the application be carried out together and that a copy of it be sent to the Ministry of Justice, that it be examined without waiting for the response of the Ministry by finding it necessary that the decision be immediately delivered regarding the applications in accordance with paragraph (2) of Article 71 of the Internal Regulation of the Constitutional Court and that it be referred to the General Assembly for deliberations in accordance with paragraph (3) of Article 28 of the Internal Regulation of the Constitutional Court as it deemed it necessary for the application to be concluded by the General Assembly due to the quality of the application.

5. In order to be able to elucidate certain technical matters in the incident that is the subject of the application, officials of the PoTC were invited to the General Assembly to provide information, explanations were made by the President of the PoTC Ahmet Cemalettin Çelik, the President of the Legal Department Ali Erten and IT and Internet Specialist Mustafa Küçükali on 29/5/2014.

III. FACT AND CASES

A. Facts

6. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

7. Of the applicants,

a) The first applicant, Youtube LLC Corporation Service Company, is the owner and user of the website named youtube.com.

b) The other applicants use the website youtube.com to obtain information and to share information in its capacity as content provider.

8. The PoTC blocked access to the website named youtube.com on 27/3/2014 and published the announcement "*As a result of the technical examination and legal assessment conducted as per the Code numbered 5651, based upon the decision of the Presidency of Telecommunication and Communication dated 27/3/2014 and numbered 490.05.01.2014-48125 regarding this website (youtube.com), an administrative measure is applied by the Presidency of Telecommunication and Communication*." on this address, intended for users.

9. Against the PoTC's action of blocking access, Youtube LCC filed an action for annulment with a stay of execution request at the Presidency of the Administrative Court on Duty of Ankara.

10. Upon the request of the Public Prosecutor's Office of Gölbaşı (Ankara) dated 27/3/2014 and numbered 2014/1051, with the decision of the Criminal Court of Peace of Gölbaşı dated 27/3/2014 and numbered Miscellaneous Action 2014/358, it was decided that access to 15 URL-based youtube.com accounts be blocked. It was also decided in the decision that access to the entirety of the broadcast on the website be blocked through IP (Internet Protocol Address) and domain name in the event that the requirement of the decision of the PoTC to the effect that access to the content in question be blocked was not fulfilled within the notified period, that the blocking of access continue until the contents in question and other contents of the same quality be definitively removed, that the decision be sent to the Office of the Chief Public Prosecutor for the execution of the judgment and the required action.

11. PoTC changed the announcement at the entry of the website in question on 28/3/2014 to read "*A PROTECTION MEASURE is applied regarding this website (youtube.com) by the Presidency of Telecommunication based on the decision of the Criminal Court of Peace of Gölbaşı dated 27/3/2014 and numbered 2014/358 and as per paragraph 1/b of article 8 of the Code numbered 5651."*

12. On 2/4/2014, the Presidency of the Union of Turkish Bar Associations requested the review and lifting of the decision of the Court in question to block access by applying to the Criminal Court of Peace of Gölbaşı. The Criminal Court of Peace of Gölbaşı reviewed its first decision with its decision dated 4/4/2014 and numbered Miscellaneous Action 2014/381 and decided on the continuation as is of the decision regarding the blocking of access to 15 URL-based youtube.com accounts, that however, since the blocking of access to the website named *"youtube.com"* violated the the freedom of expression, guaranteed under article 26 of the Constitution, of all of its users, the decision regarding the blocking of access to all broadcast be lifted.

13. It was understood that the decision of the Criminal Court of Peace of Gölbaşı dated 4/4/2014 and numbered Miscellaneous Action 2014/381 regarding the lifting of the blocking of access to the website " *youtube.com*" was notified to the PoTC on the same date with the document registration number 2014/175774, that however, the website was not opened to access.

14. An objection was filed by the Presidency of Telecommunication and Communication at the Criminal Court of First Instance of Gölbaşı against the decision of the Criminal Court of Peace of Gölbaşı dated 4/4/2014 and numbered Miscellaneous Action 2014/381.

15. It was decided with the decision of the Criminal Court of First Instance of Gölbaşı dated 4/4/2014 and numbered Miscellaneous Action 2014/81 that the decision regarding the blocking of access to 15 URL-based (Uniform Resource Locator) "youtube" accounts be continued as is, that access to the entirety of the broadcast of the website in question be blocked in the event that the required action was not taken by the concerned despite the notification of the blocking of access by the PoTC to the contents (links) written above to "youtube.com" and that the blocking of access be continued until the contents, which are the subject of the crime, were definitively removed.

16. As of the date of 7/4/2014, the announcement "*A PROTECTION MEASURE is applied regarding this website (youtube.com) by the Presidency of Telecommunication and Communication based on the decision of the Criminal Court of Peace of Gölbaşı dated 27/3/2014 and numbered 2014/358 and the decision of the Criminal Court of First Instance of Gölbaşı dated 4/4/2014 and numbered 2014/81 and also as per paragraph 1/b of article 8 of the Code numbered 5651.*" by the PoTC appears at the entry of this address as the justification of the blocking of access to the website named youtube.com.

17. Upon the objection of the Office of Chief Public Prosecutor of Gölbaşı to the effect that the decision delivered by the Criminal Court of First Instance of Gölbaşı on 4/4/2014 was against the article 268 of the Code of Criminal Procedure numbered 5271 and that the delivered decision should be considered null and void, it was decided in finalized fashion with the decision of the Criminal Court of First Instance of Gölbaşı dated 9/4/2014 and numbered Miscellaneous Action 2014/91 that the previously issued decision numbered M. Action 2014/81 be considered null and void due to a clear violation of procedure and venue as per paragraphs (1) and (2) of article 268 of the mentioned Code, that the decision pertaining to the blocking of access to the 15 links stipulated in the decision of the Criminal Court of Peace of Gölbaşı dated 4/4/2014 and numbered M. Action 2014/381 regarding the lifting of the decision as to the blocking of access to the entirety of the content on the website youtube.com be continued as is and that the website www.youtube.com in question remain open to access in this manner, that a copy of the decision be sent to the PoTC, the Information and Communication Technologies Authority (ICTA) and the Ministry of Transport, Maritime Affairs and Communications.

18. Despite the decision of the Criminal Court of First Instance of Gölbaşı dated 9/4/2014 and numbered 2014/91, the video-sharing website named "youtube.com" was not opened to access. The justification for the decision not to open the website to access was announced to the public opinion in this manner:

"As it is known, based upon the Decision of the Criminal Court of Peace of Gölbaşı dated 27/03/2014 and numbered Miscellaneous Action 2014/358 with the purpose of preventing the disclosure of state secrets and also due to contents that amount to insult to Veteran Mustafa Kemal Atatürk, as per the provisions of subparagraph (b) of paragraph (1) and of paragraph (4) of article 8 of the Code numbered 5651, the implementation of a measure to block access was initiated by the Presidency of Telecommunication and Communication.

With the decision of the Criminal Court of Peace of Gölbaşı dated 04/04/2014 and numbered 2014/381, the decision as to the blocking of access to the entirety of the broadcast on the concerned website (youtube.com) indicated in the decision numbered Miscellaneous Action 2014/358 was lifted. Upon the objection of the Office of Chief Public Prosecutor of Gölbaşı, with the decision of the Criminal Court of First Instance of Gölbaşı dated 04/04/2014 and numbered Miscellaneous Action 2014/81, it was ruled upon that the access to the entirety of the broadcast of the website youtube.com be blocked and that the blocking of access be continued until the removal of the contents that are the subject of crime in the event that the concerned website does not take the required action. It was decided to continue as is the decision regarding the blocking of access to 15 links indicated in the decisions of the Criminal Court of First Instance of Gölbaşı dated 09/04/2014 and numbered Miscellaneous Action 2014/91 and numbered Miscellaneous Action 2014/381 and to open the website youtube.com to access in this manner. It was determined that some of the contents at the 15 links included in the decision numbered Miscellaneous Action 2014/381 and that at some of the links the content was not definitively removed but access from Turkey was blocked by Youtube,but that access from abroad was still possible. Since the date of 27/03/2014, a total of 151 links carrying the same content were determined on the concerned website, a notification was made to Youtube for the removal of these contents. It was determined that some of these contents were removed by Youtube, that in some other links only access to the content from Turkey was blocked, but that access from abroad was possible. Moreover, it is observed that some links carrying the same content are still being broadcast. On the other hand, warning messages were sent to youtube due to the contents that amount to insult to Veteran Mustafa Kemal Atatürk, and since the contents in question were not removed, a measure to block access was implemented as of the date of 27/03/2014 as per the provisions of paragraph (b) of clause (1) and of clause (4) of article 8 of the Code numbered 5651. Due to the fact that some of the contents in question are still being broadcast on the concerned website, the measure to block access to the website youtube.com is being pursued."

19. In the meantime, in the case filed by Youtube LCC against the decision to block access, the 4th Administrative Court of Ankara ruled on the stay of execution with its decision dated 2/5/2014 and numbered M. 2014/655, the mentioned decision was notified to the PoTC on 7/5/2014.

B. Relevant Law

20. Paragraph four of article 138 of the Constitution is as follows:

"Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter the court decisions in any way whatsoever nor delay the execution thereof."

21. Sentence one of clause two of article 27 of the Code of Administrative Procedure numbered 2577 is as follows:

"In cases where both conditions; arise of damages which are difficult or impossible to compensate for as a result of the implementation of the administrative action and explicit contrariety to law of the administrative action, materialize together, the Council of State or the administrative courts can render a judgment on the stay of execution by indicating the justification after the defense

statement of the administration standing as defendant is taken or after the duration for defense has expired. The execution of administrative actions the effectiveness of which will exhaust upon the execution thereof can be stayed without taking the defense statement of the administration in a way to be decided again after the defense is taken."

22. Sentence one of paragraph one of article 28, titled "*Consequences of decisions"*, of the Code on Administrative Jurisdiction Procedure Numbered 2577 is as follows:

"As to the requirements of the decisions of the Council of State, the regional administrative courts, the administrative and tax courts on the merits of the case and on the stay of execution, the administration shall be obliged to establish an act or take an action without delay. Under no circumstances can the duration for this exceed thirty days starting from the notification of the decision to the administration."

23. Article 8 of the Code dated 4/5/2007 and numbered 5651 on the Regulation of Publications on the Internet and Fight Against Crimes Committed by Means of Such Publications is as follows:

"(1) A decision of blocking of access shall be issued concerning publications, which are made on the Internet and regarding which there is sufficient reason for suspicion that their content constitute the following crimes:

a) The following crimes stipulated in Turkish Criminal Code dated 26/9/2004 and numbered 5237;

1) Inducing to suicide(article 84),

2) Sexual abuse of children (article 103, paragraph one),

3) Facilitating the use of drugs or stimulant substances (article190),

4) Procurement of substances that are hazardous for health (article 194),

5) Obscenity (article 226),

6) Prostitution (article 227),

7) Providing a place and means for gambling (article 228),

b) Crimes stipulated by the Code on Crimes Committed Against Atatürk dated 25/7/1951 and numbered 5816.

(2) The decision of blocking of access shall be issued by the judge at the investigation stage, by the court at the prosecution stage. During the investigation phase, in circumstances where delay would be inconvenient, the blocking of access can also be decided by the Public prosecutor. In this case, the Public prosecutor shall present his/her decision to the judge's approval within twenty-four hours and the judge shall make a ruling within twenty four hours at the latest. In the event that the decision is not approved within this period, the measure shall be immediately lifted by the Public prosecutor. The decision of blocking of access can be issued in a limited manner for a certain period if it is considered to be of the quality to fulfill the aim. An objection can be filed against the decision regarding the blocking of access issued as a protection measure according to the provisions of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271.

(3) A copy of each of the decision of blocking of access issued by the judge, the court or the Public prosecutor shall be sent to the Presidency in order for the required action to be performed.

(4) The decision of blocking of access shall be issued ex officio by the Presidency in the event that the content or hosting provider of the publications whose content constitute the crimes stipulated

under clause one is located abroad or regarding publications whose content constitute the crimes stipulated under subparagraphs (2), (5) and (6) of paragraph (a) of clause one even if their content or hosting provider is located within the country. This decision shall be notified to the access provider and it shall be requested that it fulfill the required action.

(5) The required action for the decision of blocking of access shall be fulfilled immediately and within twenty-four hours starting from the moment of notification of the decision at the latest.

(6) In the event that the identities of those who have made the publications, which constitute the subject of the decision of blocking of access issued by the Presidency, a criminal complaint shall be filed by the Presidency at the Office of the Chief Public Prosecutor.

(7) In the event that a decision to the effect that there are no grounds for prosecution is issued at the end of the investigation, the decision of blocking of access shall automatically remain null and void. In this case, the Public prosecutor shall send a copy of the decision to the effect that there are no grounds for prosecution to the Presidency.

(8) In the event that a decision of acquittal is issued at the prosecution phase, the decision of blocking of access shall automatically remain null and void. In this case, a copy of the decision of acquittal shall be sent to the Presidency by the court.

(9) In the event that the content whose subject constitutes the crimes stipulated under clause one is removed from broadcast, the decision of blocking of access shall be lifted by the Public prosecutor at the investigation phase, by the court at the prosecution phase.

(10) The officials of hosting or access providers that do not fulfill the required action for the decision of blocking of access issued as a protection measure shall be sentenced to five hundred to three thousand days of judicial fine in the event that the action does not constitute another crime that requires a more severe punishment.

(11) In the event that the decision of blocking of access issued as an administrative measure is not fulfilled, an administrative fine of ten thousand New Turkish Liras to a hundred thousand New Turkish Liras shall be imposed by the Presidency on the access provider. In the event that the decision is not fulfilled within twenty-four hours starting from the moment when the administrative fine is imposed, a decision can be issued by the Institution to cancel the authorization upon the request of the Presidency.

(12) The legal remedy can be seized as per the provisions of the Code of Administrative Procedure dated 6/1/1982 and numbered 2577 against the decisions regarding administrative fines imposed by the Presidency or the Institution due to misdemeanors defined in this Code.

(13) An objection can be filed by the Presidency as per the provisions of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 against the judge and court decisions sent to the Presidency to carry out the actions.

(14) (Additional: 12/7/2013-6495/47 Art.) In the event that the institutions and organizations defined under paragraph (ç) of clause one of article 3 of the Code on the Regulation of Taxes, Funds and Shares Collected from Proceeds of Games of Chance dated 14/3/2007 and numbered 5602 determine that crimes, which fall within their field of duty, are committed on the Internet, they can issue a decision of blocking of access regarding these publications. The decisions of blocking of access shall be sent to the Presidency of Telecommunication and Communication in order to be implemented.

(15) The judge's decision issued during the stage of investigation as per this article and the judge's decision issued as per articles 9 and 9/A shall be issued by the criminal courts of peace determined by the High Council of Judges and Prosecutors in places where there are more than one criminal court of peace."

IV. EXAMINATION AND JUSTIFICATION

24. The application file was examined during the session of the court on 29/5/2014 and the following were ordered and adjudged:

A. Claims of the Applicants

25. The claims brought forward by Youtube LLC Corporation Service Company, one of the applicants, are summarized as follows: The applicant indicated that;

a) In addition to being the owner of the website named youtube.com, he was also a user of the mentioned site, and therefore, the blocking of access to the site violated his rights,

b) It was not demonstrated in the decision of the Criminal Court of Peace of Gölbaşı numbered 2014/358 based on content under which URL addresses the access was blocked, that although it was indicated in the mentioned court decision that within the framework of the investigation dated 27/3/2014 and numbered 2014/1051 conducted by the Office of the Chief Public Prosecutor of Gölbaşı regarding political and military espionage and the crime of declaring information that needed to remain confidential, conversations between high level civilian and military state officials, which needed to remain confidential with a view to the security and domestic or foreign political interests of the state, were recorded and published on the Internet, that, in order to halt the continuation of the crime being committed, a decision was delivered to block the access to the URLs, which are the subject of the decision, as per clause one of article 22 of the Constitution and clause one of article 328 and clause one of article 330 of the Turkish Criminal Code and to continue the blocking of access until these URLs and contents of the same quality were definitively removed, the expression “similar content” was not sufficiently explicit,

c) The decision of blocking of access could not be delivered as per the above mentioned article 22 of the Constitution and articles 328/1 and 330/1 of the Turkish Criminal Code, that the decision of blocking access to the entirety of the website based on the indicated justifications was disproportionate; that the blocking of access continued despite the fact that the decision regarding the blocking of access to the entire broadcast was lifted with the decision of the Criminal Court of Peace of Gölbaşı dated 4/4/2014 and numbered 2014/381 and it was decided to block access to 15 URL addresses only,

ç) Although the access was finally blocked ex officio by the PoTC with the justification that paragraph (b) of clause one of article 8 of the Code numbered 5651 was violated, no authority was bestowed upon the administration to block the entirety of the access to the site, that, moreover, it was not indicated under which URL address the content that caused the violation was located and that the element of reason of the administrative action was explicitly stated and that the intervention was disproportionate and that the blocking of the entire access to the site was restrictive of the company's commercial freedom,

and alleged that his rights defined under articles 26 and 48 of the Constitution were violated.

26. The claims brought forward by the applicants Kerem Altıparmak, Yaman Akdeniz, Mustafa Sezgin Tanrıkulu, Metin Feyzioğlu, Erol Ergin, Mahmut Tanal and Mesut Bedirhanoğlu are summarized as follows: The applicants indicated that:

a) Internet broadcasting was evaluated by the European Court of Human Rights within the framework of the freedom of expression, that the website named youtube.com was widely

used by individuals for purposes of independent journalism and democratic communication within the framework of the concept of “citizen journalism” in our country and across the world and that the mentioned site was one of the platforms where the freedom of expression was exercised in the most efficient manner;

b) Despite the fact that the blocking of access imposed regarding the entirety of the mentioned site was lifted with a court decision, the access to the site was still blocked based on administrative decisions of arbitrary nature;

c) The blocking of access to this site, where all sorts of artistic and scientific content can be shared, was of negative quality in terms of the freedom of expression and bore severe consequences, that the access of individuals to information and documents over the mentioned website was also a matter of relevance to the private lives of these individuals, that the right to privacy and protection of private life defined under article 20 of the Constitution was also violated with the imposition of blocking of access to the entire site;

ç) The fundamental rights stipulated under the relevant articles of the Constitution could only be restricted with a judge's decision, not by an administrative institution, that even in circumstances where delay would be problematic, it was envisaged that decisions delivered within the framework of the authority of restriction to instances except for a judge's decision needed to be submitted to the approval of a judge within 24 hours and that there was no exception to this rule;

d) A similar regulation was also included under article 8 of the Code numbered 5651, that by indicating that granting the authority to the administration to deliver a decision of blocking of access in certain circumstances as per clause four of article 8 was against the Preamble as well as articles 6 and 9 of the Constitution, that the fact that the administration issued a judicial decision by replacing the judicial instance amounted to grab of function;

e) The expression “*in the event that the content and hosting provider of the publications whose content constitute the crimes stipulated under clause one is located abroad*”, which is included under article 8 of the mentioned Code, was conditional on the existence of a crime and referred to the measures to be taken with regard to this crime, that therefore, the authority granted here was clearly a judicial law enforcement authority and that the decisions in this matter could only be delivered by judicial instances, that the administration could play a role only in the implementation of the decision;

f) The systematic interpretation of the Constitution demonstrated that the mentioned rule was against the Constitution; that the relevant judgment concerned the decisions of blocking of access to a website, which falls within the scope of private life, that article 20 of the Constitution regulated that decisions, which amount to intervention in private life, could only be delivered with judicial decisions and that the same system was also envisaged in international conventions on human rights, that, seen from this perspective, the opposite situation, that is, leaving the decision of restriction to administrative institutions instead of judicial organs, was clearly against the fundamental rights and freedoms regime of the Constitution and the criterion of conformity to the wording and spirit of the Constitution, which is considered by article 13 of the Constitution to be one of the conditions of restriction.

g) Although the PoTC relied on the justification of ex officio blocking of access as per the Code on Crimes Committed Against Atatürk numbered 5816, that an ill-intentioned individual uploading a content that insults Atatürk to Youtube could lead to the consequence

of millions of users not being able to access billions of content, that this situation was against article 13 of the Constitution due to the fact that it amounted to a disproportionate restriction;

ğ) It was indicated in the decision of the Criminal Court of Peace of Gölbaşı numbered 2014/358 that within the framework of the investigation dated 27/3/2014 and numbered 2014/1051 conducted by the Office of the Chief Public Prosecutor of Gölbaşı regarding political and military espionage and the crime of declaring information that needed to remain confidential, conversations between high level civilian and military state officials, which needed to remain confidential with a view to the security and domestic or foreign political interests of the state, were recorded and published on the Internet, that although, in order to halt the continuation of the crime being committed, a decision was delivered to block the access to the URLs, which are the subject of the decision, as per article 22/2 of the Constitution and clause (1) of article 328 and clause (1) of article 330 of the Turkish Criminal Code and to continue the blocking of access until these URLs and contents of the same quality were definitively removed, the decision of blocking of access, which can be issued as a protection measure within the framework of the Code numbered 5651, was an exceptional situation envisaged only for catalog crimes; that due to the fact that the crime types under article 8 are listed in a restrictive manner, the protection measure could not be resorted to with regards to, for instance, crimes pertaining to political or military espionage regulated under clause (1) of article 328 of the TCC or crimes pertaining to declaring information that needs to remain confidential regulated under clause (1) of article 330, that otherwise, a conclusion could be drawn to the effect that this mechanism could be envisaged for all crimes without opting for a restricted enumeration by the law maker, that, in turn, would be against the principle that the law maker does not conduct an exercise in futility;

h) It was also not possible to block access as per paragraph 1/b of article 8 of the Code numbered 5651, which was demonstrated by the PoTC as the justification for the decision of blocking, that the definition of crime referred to by the mentioned provision of the article and defined by the Code numbered 5816 and the justification for the blocking were different, that the restriction with a view to the blocking of access was against the criteria pertaining to the restriction of fundamental rights and freedoms;

and alleged that their rights defined under articles 22, 26, 27, 40, 48 and 67 of the Constitution were violated.

B. Evaluation

1. In Terms of Admissibility

27. The applicants Yaman Akdeniz, Kerem Altıparmak and Metin Feyzioğlu work as members of faculty at various universities. These applicants stated that they carried out scientific studies in the field of human rights and criminal law, that they share these studies through their accounts on the website named youtube.com, that they also accessed United Nations and Council of Europe texts and images, which are of relevance to their fields of study, over the site. The applicants Mustafa Sezgin Tanrıkulu and Mahmut Tanal currently serve as members of the parliament from Istanbul, they indicated that they share their speeches and activities at the legislative organ via the mentioned site, that furthermore, they benefited from the site in matters pertaining to human rights law, which is their field of study. The applicant Mesut Bedirhanoğlu stated that, in addition to being an active user of the site, he also shared footage of seminars, conferences and television programs related to his field of expertise over the mentioned website due to the fact that he was doing a doctorate in international human rights law. The applicant Erol Ergin stated that he had a membership to

the mentioned site, that he regularly followed channels of his choosing and individuals who shared content via the profile he organized on the site according to himself, that in addition to writing opinions about these, there were also civil society organizations and professional organizations whose activities he regularly followed. The applicant Youtube LLC stated that in addition to being the owner of the mentioned site, due to the fact that it was a commercial company, of which he was a user, the site was effectively used in promoting its commercial activities.

28. In light of these explanations, it is understood that the applicants were directly affected by the administrative action pertaining to the blocking of access to the entirety of the website named youtube.com.

29. The applicants alleged that the judicial remedies against the mentioned action of the PoTCwere exhausted, that moreover, applying to the administrative judicial instance was not an effective remedy, that therefore, this remedy did not need to be exhausted, that the legal remedies were exhausted due to the fact that the decision of the Criminal Court of First Instance of Gölbaşı dated 4/4/2014 and numbered Miscellaneous Action 2014/81 regarding the acceptance of objection was final.

30. Clause three of article 148 of the Constitution is as follows:

"In order to make an application, ordinary legal remedies must be exhausted."

31. Clause (2) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading "Right to individual application"is as follows:

"All administrative and judicial remedies stipulated in the code in relation to the act, action or neglect, which is claimed to have caused the violation, must be exhausted before the individual application is lodged."

32. According to the mentioned provisions of the Constitution and the Code, in order to be able to apply to the Constitutional Court via individual application, the ordinary legal remedies must be exhausted. The respect to fundamental rights and freedoms is a constitutional assignment of all state organs, the correction of rights violations that emerge as a result of neglecting this assignment is the duty of administrative and judicial instances. For this reason, it is essential that claims to the effect that fundamental rights and freedoms have been violated be brought forward first before courts of instance, that they be evaluated and resolved by these instances (App. No: 2012/403, 26/3/2013, § 16).

33. For this reason, individual application to the Constitutional Court is a legal remedy of secondary nature to be seized in the event that the alleged rights violations are not rectified by courts of instance. Due to the secondary nature of the individual application remedy, the ordinary legal remedies must be exhausted in order for an individual application be lodged at the Constitutional Court. In accordance with this principle, the applicant needs to primarily convey the complaint, which he files before the Constitutional Court, to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the information and evidence that he has regarding this subject within due period and to pay required attention to following his case and application in this process (App. No: 2012/403, 26/3/2013, § 17).

34. In addition to being accessible, the application remedies that must be exhausted must also have the capacity of compensation and offer a reasonable chance of resolving the

complaints of the applicant when exhausted. As a result, including these remedies in the legislation is not sufficient per se, it should also be demonstrated that they are effective in implementation (App. No: 2012/239, 2/7/2013, § 29). Moreover, the rule pertaining to the exhaustion of application remedies does not have an absolute quality, when it is evaluated whether this condition has been fulfilled or not, the specific conditions of each concrete application must also be taken into consideration. Therefore, not just the existence of a number of application remedies in the legal system but also the conditions for the implementation thereof and the individual circumstances of the applicant must be taken into account in a realistic manner. As a result, the liabilities of the applicant in terms of the exhaustion of application remedies need to be determined by taking the characteristics of the application into account.

35. In the incident that is the subject of the application, it is understood that against the decision of the Criminal Court of Peace of Gölbaşı to block access, a request was made by the Union of Turkish Bar Associations to re-evaluate this decision, that the decision regarding the blocking of access to the entirety of the site was lifted upon the acceptance of the request, that the access ban continued upon the acceptance of the objection made against the mentioned decision by the Criminal Court of First Instance, that finally upon the objection to the effect that the decision numbered 2014/81 delivered by the Criminal Court of First Instance was *"against article 268 of the Code numbered 5271 and that the decision that was delivered needed to be considered null and void"*, it was decided in finalized fashion that *" that the decision pertaining to the blocking of access to the 15 links be continued as is and that the website www.youtube.com in question be opened to access in this manner, that a copy of the decision be sent to the Information and Communication Technologies Authority, the Presidency of Telecommunication and Communication and the Ministry of Transport, Maritime Affairs and Communications"*

36. On the other hand, it is understood that in the case filed by Youtube LLC on 4/4/2014 against the action of the PoTC with a request of stay of execution, it was decided with the decision of the 4th Administrative Court of Ankara dated 2/5/2014 and numbered M.2014/655 to stay the execution and that the mentioned decision was notified to the PoTC on 7/5/2014.

37. In this case, it is understood that multiple application remedies that are considered to potentially exist were resorted to; that despite the decision of finalized nature of the Criminal Court of First Instance of Gölbaşı and the stay of execution decision of the Administrative Court of Ankara, the access to the website in question continued to be blocked. However, the implementation of a judicial decision in a state of law requires not only an execution in form but also the elimination of the identified unlawfulness under objective conditions and within the shortest duration possible (App. No: 2014/3986, 2/4/2014, § 24).

38. The freedom of expression is one of the foundations of a democratic society and it is among the indispensable conditions for the self-improvement of the society and the individual. Social pluralism can only be achieved in an environment of free discussion where all kinds of ideas can be freely expressed. In this context, establishing social and political pluralism is dependent on expression of all kinds of thoughts in a peaceful fashion and freely. In the same manner, an individual can realize his/her unique personality in an environment where he/she can freely express his/her thoughts and engage in discussion (App. No: 2013/2602, 23/1/2014, § 41).

39. Taking into consideration the restrictive impact of the blockage of access to a social media website, which is intensively and effectively used in our country, on the freedom

of expression of the users, which is one of the foundations of a democratic society, it is an obligation emanating from the principle of the state of law that the conformity of such restrictions to law be checked within the shortest amount of time possible and, in the case of identifying a contrariety to law, that the said restrictions be immediately abolished. It is observed that despite the court decisions stated above in relation to the decision to block access that is in question (§37) , access to the website named youtube.com, which is the subject of the violation claim of the applicants, is still not possible. It is apparent that the information and thoughts shared on social media in relation to certain incidents and cases may become outdated and lose their effect and value as time passes. Within the framework of the concrete incident, it is observed that neither is there a connection between the content upheld as the justification for the blocking of access to the mentioned site and the applicant, who have the quality of being individual users, nor is there any claim to the effect that there is a content in the sites of which they are users that is the subject of blocking of access.

40. Social media, which Youtube is a part of, is a transparent platform where mutual communication takes place and which allows individual participation in the form of creating, publishing and commenting on media content. Today websites such as these have become an important realm whereby all users of social media across the world can jointly engage in communication, comments, messages, information, criticism, sales and promotions take place. The social media platform provided by internet is indispensable in terms of the individuals' announcing, mutually sharing and disseminating their information and opinions and communicating, it is clear that interventions to these sorts of websites affect millions of individual users. Even though it has the quality of a measure, in the event that the access to the entirety of the website is blocked due to a content shared by a user, it becomes impossible for all individual users to benefit from the site. That the action required by the decision has not been fulfilled until today despite the fact that a decision of stay of execution was delivered in the case filed by Youtube LLC, one of the applicants, in administrative justice with a request of the stay of execution and that the uncertainty as to when the access to the site would be restored persists indicate that the application remedy is not effective.Moreover, since opening the access to the site in its entirety as a result of the implementation of the decision of stay of execution will bear consequence with regard to the other applicants, who are understood to be users of the blocked site, due to the nature of the affair, expecting each individual user to resort to legal remedies again is not congruous with the objectives of the principle of exhausting application remedies, which is part of the individual application procedure. In this case, it has been concluded that the application remedy in question is not an effective remedy that needs to be exhausted with a view to resolving the fundamental right violation.

41. Since the complaints of the applicants in relation to article 26 of the Constitution are not explicitly devoid of grounds and since no other reason of inadmissibility has been found, it should be decided that the applications are admissible.

2. In Terms of Merits

42. The applicants indicated, in summary, that the ex officio blocking of access by the PoTC to the video sharing site named youtube.com with an administrative decision was unlawful, that despite the fact that an ex officio decision of blocking of access could be delivered in connection with a limited number of allegations of crime enumerated under clause one of article 8 of the Code numbered 5651 as per clause (4) of the same article, the blocking of access to the site youtube.com with a justification that does not conform to the mentioned type of crime severely restricted the right to access information in addition to

restricting the possibility of accessing videos published on the mentioned site, that this blocking blocked access not only to the information that currently exists on the mentioned site but also to information to be shared in the future; that the request of the Office of the Chief Public Prosecutor of Gölbaşı and the decision of the Criminal Court of Peace of Gölbaşı dated 27/3/2014 and numbered 2014/358 indicated above were also unlawful, that it was not possible to block access due to the crimes defined under articles 328 and 330 of the Turkish Criminal Code that were put forward as the grounds for the decision of blocking of access; that the restriction regarding the blocking of access was contrary to the criteria pertaining to the restriction of fundamental rights and freedoms and that the blocking of the entirety of access to the mentioned video sharing site was not in conformity with the constitutional criteria pertaining to the restriction of fundamental rights and freedoms and that the principle of proportionality was not abided by (§§ 25, 26) .

43. It was indicated by the PoTC officials, who were invited to provide information regarding technical matters in the incident that is the subject of the application, in summary that with a view to implementing the decision of blocking of access, first a notification was made to the content provider to remove the URL-based content by utilizing the warn-remove procedure, that in the event that this did not yield results, an effort was made to block access on a URL-basis in “http” type sites, that it was possible to overcome this blocking of access by using VPN (Encrypted Virtual Link) and TOR (Anonymity Network), that in addition, the blocking of access to “https” type sites was not technically possible, that with the establishment of the Union of Access Providers, institutional work was carried out with access providers with a view to URL-based blocking of content and that this work was still ongoing.

44. Even though the applicants alleged that their rights defined under articles 22, 26, 27, 40, 48 and 67 of the Constitution were violated, the Constitutional Court, which is not bound by the judicial characterization of the incidents made by the applicants, evaluated the claims of the applicants within the framework of the freedom of expression.

45. Article 13 of the Constitution with the side heading “Restriction of Fundamental Rights and Freedoms” is as follows:

“Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by law without prejudice to their essence. These restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality.”

46. Article 26 of the Constitution with the side heading of "Freedom of expression and dissemination of thought' ' is as follows:

“Everyone has the right to express and disseminate their thoughts and convictions orally, in writing, in pictures or through other means individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities.

…

The exercise of these freedoms may be restricted for the purposes of national security, public order, public security, protecting the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crimes/, punishing offenders, not revealing information duly classified as a State secret, protecting the reputation or rights and private and family lives of others or protecting professional secrets set forth in the law or duly performing the duty of hearing cases.

Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts on the condition that the transmission of information and thoughts is not prevented.

Forms, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought are regulated by law."

47. As per the said regulations, the freedom of expression covers not only the freedom to "*have a thought and conviction*" but also the existing freedom to "*express and disseminate thought and conviction (opinion)" and the associated freedom to "receive and give information or opinion*". In this framework, freedom of expression means that individuals can freely access news and information and other's thoughts, that they cannot be condemned for the thoughts and convictions they have and that they can freely express, tell, defend, convey and disseminate to others these through various methods by themselves or together with others (App. No: 2013/2602, 23/1/2014, § 40).

48. As stated frequently by the ECtHR in its judgments pertaining to the freedom of expression, in order for the freedom of expression to fulfill its social and individual function, not only the "information" and "thoughts" which are considered to be positive, accurate or not harmful by the society and the state but also the information and thoughts which are considered to be negative or inaccurate by the state or a segment of the society and are disturbing for them should be freely expressed and the individuals should be sure that they will not be subject to any sanctions due to these expressions. The freedom of expression is the basis of pluralism, tolerance and open-mindedness and without this freedom, "*a democratic society*" cannot be mentioned (Handyside v. the United Kingdom, App. No: 5493/72, 7/12/1976, § 49).

49. The means that can be resorted to in the exercise of the freedom of expression and dissemination of thought are listed in article 26 of the Constitution as "orally, in writing, in pictures or through other means" and with the expression "other means" , it is demonstrated that all kinds of means of expression are under constitutional protection (App. No:2013/2602, 23/1/2014, §43).

50. In this context, the freedom of expression is directly related to a significant portion of other rights and freedoms guaranteed by the Constitution. The freedom of the press which guarantees the dissemination of ideas, thoughts and information by means of visual and printed media tools is also one of the tools to be used in the exercise of the freedom of expression and dissemination of thought. The freedom of the press is protected within the scope of Article 10 on the freedom of expression of the ECHR and is also specially regulated in articles 28 to 32 of the Constitution (App. No: 2013/2602, 23/1/2014, §44).

51. In a democratic system, in terms of ensuring that those who possess the public powers exercise their authorities within the limits of the law, the press scrutiny and the public scrutiny play a role just as effective and are equally important as the administrative scrutiny and the judicial scrutiny. Since the functioning of the press which acts as a public observer on behalf of the society is dependent on its being free, the freedom of the press is a freedom which is valid and vital for everyone (see CC, M.1997/19, D.1997/66, D.D. 23/10/1997), (for judgments of the ECtHR in the same vein see Lingens v. Avusturya, App. No: 9815/82, 8/7/1986, § 41; Özgür Radyo-Audio Radio Television Production and Promotion Co. v. Turkey, App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006 § 78).

52. The Internet has significant importance in modern democracies in terms of the exercise of fundamental rights and freedoms, specifically of the freedom of expression.

Social media is a media channel that is a transparent platform where mutual communication takes place and which allows individual participation in the form of creating, publishing and commenting on media content. The social media platform that the Internet provides is of an indispensable quality for individuals to express, mutually share and disseminate their information and thoughts. Thus, it is clear that the state and administrative instances need to behave very sensitively in regulations and practices to be issued in relation to social media tools, which have become one of the most effective and widespread methods of not just expressing thoughts but also obtaining information in our day.

53. The state has both positive and negative liabilities in relation to the freedom of expression. Within the scope of negative liabilities, public instances should not ban the expression and dissemination of thought as long as this is not compulsory within the framework of articles 13 and 26 of the Constitution; within the scope of positive liabilities, they should take the measures necessary for the actual and effective protection of the freedom of expression (for a similar opinion of the ECtHR, seeÖzgür Gündem v. Turkey , App. No: 23144/93, 16/3/2000, § 43). While striking this balance, through the limited reasons and legitimate objectives prescribed in the code within the scope of articles 13 and 26 of the Constitution, it is necessary to observe a proportional balance between the objective and tool of restriction and the essence of the right should not be infringed upon by taking into consideration the requirements of the democratic order of the society (App. No: 2013/2602, 23/1/2014, § 56). The Constitutional Court will determine, according to the unique character of each case, whether an intervention is required in a democratic society, whether the essence of the rights has been infringed upon during the intervention and whether the intervention has been proportional or not (App. No: 2013/2602, 23/1/2014, § 61).

54. On the other hand, the freedom of expression and dissemination of thought is not absolute and unlimited. In this context, while exercising the freedom of expression and dissemination of thought, attitudes and behaviors violating the rights and freedoms of individuals should be refrained from. As a matter of fact, the freedom of expression and dissemination of thought as guaranteed by articles 26 and 28 of the Constitution can be restricted due to the reasons stated in these articles in accordance with the conditions in article 13 of the Constitution. As per article 13 of the Constitution, the restrictions on fundamental rights and freedoms can only be imposed by code and they can neither be contrary to the requirements of the democratic order of the society and the principle of proportionality nor infringe upon the essences of rights and freedoms.

55. The criterion of restricting rights and freedoms with codes has an important place in constitutional law. When there is an intervention to a right or freedom, the first matter that needs to be determined is whether or not there is a legal provision that authorizes the intervention, that is, a legal foundation of the intervention (App.No: 2013/2187, 19/12/2013, § 36). As a result, the intervention to the freedom of expression, which is protected under article 26 of the Constitution, needs to be envisaged with a code that has the qualities required by the principle of lawfulness. It will be concluded that an intervention, which does not carry the element of lawfulness, violates a constitutional right or freedom without examining whether or not it is in line with the other guarantees such as bearing no prejudice to the essence, being one of the requirements of the democratic societal order and the proportionality.

56. It is not sufficient for interventions to constitutional rights to be based on a code, this code also needs to bear such qualities as certainty and predictability. In other words, in order for the relevant individual to determine his/her behavior, the code needs to be easily

accessed, understood by him/her albeit by receiving professional assistance when necessary and be explicit, clear and sufficiently distinctive (for decisions of the ECtHR in the same vein see Altuğ Taner Akçam v. Turkey , App.No: 27520/07, 25.10.2011, § 87; Yıldırım v. Turkey , App.No: 3111/10, 18.12.2012, § 57).

57. In circumstances where a decision is delivered to block access to a website, it is compulsory that the principles of legal security and legal certainty, which are among the preconditions of a state of law, be taken into consideration. The principle of legal security, which aims to ensure the legal security of individuals, requires legal norms to be predictable, individuals to be able to have confidence in the state in all of their acts and actions, and the state to avoid methods that would tarnish this feeling of confidence in its legal regulations. Moreover, the principle of certainty refers to legal regulations being explicit, clear, understandable and implementable in a way that will not give rise to any interruption and doubt in terms of both individuals and the administration, moreover, to them including protective guarantees against arbitrary practices of public authorities. In this respect, the text of a code should be drawn up at a level that will allow individuals to foresee in a certain clarity and accuracy which legal sanction or consequence is attributed to which concrete action and case by way of receiving legal aid when necessary. As a result, the potential effects and consequences of the code need to be sufficiently predictable prior to its implementation (CC, M.2013/39, D.2013/65, 22/5/2013).

58. Websites with large numbers of users such as youtube.com, access to which was blocked, significantly contribute to forming the society's agenda and facilitating the pursuit of the agenda and the exchange of information due to their capacity of storing and publishing lager quantities of data and the accessibility thereof (for judgments of the ECtHR in this matter see Times Newspaper Ltd. v. United Kingdom, App. No: 23676/03, 10/6/2009, § 27).

59. For this reason, in circumstances where a means of restriction (ex officio blocking of access) regarding this matter is imposed by the public power to the rights enshrined in the Constitution and the European Convention on Human Rights, the scope and procedures pertaining to the utilization of this kind of an authority need to be defined in a sufficiently explicit manner in the relevant Code (see Yıldırım v. Turkey, App .No: 3111/10, 18.12.2012, § 59).

60. In the incident that is the subject of the application, it is understood that the PoTC first blocked the access to the website named youtube.com with the expression "*As a result of the technical examination and legal assessment conducted as per the Code numbered 5651, based upon the decision of the Presidency of Telecommunication and Communication dated 27/3/2014 and numbered 490.05.01.2014-48125 regarding youtube.com, an administrative measure is applied by the Presidency of Telecommunication and Communication*", that despite the fact that following the mentioned blocking decision, as a result of the judicial process that is described above in detail, with the decision of the Criminal Court of First Instance of Gölbaşı dated 9/4/2014 and numbered 2014/91 it was decided in finalized fashion that the blocking of access regarding the 15 URL-based addresses of the site named youtube.com be continued, that however, the site be opened to access by removing the blocking of access pertaining to the entirety of the site and that it was decided to stay the execution by the 4th Administrative Court of Ankara with the decision dated 2/5/2014 and numbered M.2014/655 and that the mentioned decision was notified to the PoTC on 7/5/2014, the action required by the decisions of the judiciary was not taken and that the ex officio blocking of access to the mentioned site was continued by bringing forward paragraph (b) of clause (1) of article 8 of the Code numbered 5651 as the justification.

61. When the incident that is the subject of the application is viewed in light of these phenomena and principles, the fact that the PoTC applied administrative measures that need to be established on a URL basis in the form of a general ban geared towards the broadcast at an incomparably high number of URL addresses that are not related with the content that is the subject of the measure without exploring the existence of an intervention measure that could be implemented merely towards the content the unlawfulness of which was established and was of a less severe nature, lead to the consequence of expanding the decision of measure in such a way as to block the access of users who are not the content or hosting providers of the content that is brought forward as the justification of the delivery of this decision (in the same vein see Yıldırım v. Turkey, App. No: 3111/10, 18.12.2012, § 63).

62. It is understood that it was decided ex officio by the PoTC to block the access to the entirety of the site named youtube.com by bringing forward paragraph (b) of clause (1) of article 8 of the Code numbered 5651 as the grounds and as per clause(4) of the same article. It is seen that under articles 8, 9 and 9/A of the Code numbered 5651 it is regulated that the measure of blocking access be decided upon by judges or courts, that, in the event that a decision is delivered by authorities other than courts, the decision be immediately submitted to court approval, that the decision to block access be principally delivered within the framework of the principle of blocking the access (on URL basis) to the harmful content. The blocking of access due to catalog crimes is regulated under article 8 and it is adjudged under clause (2) of the article that the decision to block access shall be delivered by the judge during the investigation stage, by the court during the prosecution stage, that in circumstances during the investigation stage where delay would be problematic, it can also be decided by the Public prosecutor to block access, that in this case the decision shall be submitted to the approval of the judge within 24 hours and that the judge shall need to decide within 24 hours.

63. It is stated under clause (4) of the article that "*The decision of blocking of access shall be issued ex officio by the Presidency in the event that the content or hosting provider of the publications whose content constitute the crimes stipulated under paragraph one is located abroad or regarding publications whose content constitute the crimes stipulated under subparagraphs (2), (5) and (6) of paragraph (a) of clause one even if their content or hosting provider is located within the country. This decision shall be notified to the access provider and it shall be requested that it fulfill the required action.*" It is understood that a regulation to the effect that the blocking via administrative action could be done in the form of blocking the access to the entirety of the site instead of on a URL basis is not included in any provision of the Code, that moreover, the restriction tools (blocking the access to the domain name, blocking the access via the IP address, blocking the access to the content and blocking the access via similar methods) with which the authority in this matter would be used to block the access to the content was not indicated by the administration with full clarity, that therefore, the scope and limits of the authority granted to the administration were unpredictable. Furthermore, it is not clear whether or not an authority similar to the authority granted to the judge under clause (4) of article 9 of the Code to gradually block the access is also applicable with regard to the public administration. For this reason, it is seen that the scope and limits of the authority granted to the PoTC with a view to blocking access are unclear due to the fact that its legal grounds do not fulfill the minimum condition for the principle of lawfulness, which is the obligation for the code to be understandable, clear and explicit.

64. It is understood from the explanations made above that the intervention regarding the blocking of the entirety of access to the site youtube.com did not have sufficiently clear and distinct legal grounds and that, from this aspect, it was not found the quality of being

predictable from the point of view of the applicants. For this reason, it should be decided that the administrative action in question, which has the quality of being a severe intervention to the freedom of expression of all the users that benefit from the site, violated the freedom of expression of the applicants, which is guaranteed under article 26 of the Constitution.

65. Deputy President Serruh KALELİ and member Engin YILDIRIM agreed with this opinion with different justification.

66. Members Hicabi DURSUN and Celal Mümtaz AKINCI did not agree with this opinion.

V. JUDGMENT

In the light of the reasons explained: it was decided on 29/5/2014;

That the application is **ADMISSIBLE**,

That the freedom of expression of the applicants guaranteed under article 26 of the Constitution is**VIOLATED**,

C. That 1.912,20 TL, which is the total of 412,20 TL individual application fee due to its two applications and 1.500,00 TL counsel's fee, be **PAID** to Youtube LLC Corporation Service Company of the applicants; 412,20 TL individual application fee separately for their applications and 1.500,00 TL jointly as the counsel's fee to Kerem Altıparmak and Yaman Akdeniz; 1.706,10 TL, which is the total of 206,10 TL individual application fee and 1.500,00 TL counsel's fee, to Mustafa Sezgin Tanrıkulu; 1.706,10 TL, which is the total of 206,10 TL individual application fee and 1.500,00 TL counsel's fee, to Erol Ergin; 1.706,10 TL, which is the total of 206,10 TL individual application fee and 1.500,00 TL counsel's fee, to Mesut Bedirhanoğlu; 206,10 TL of application fee to Metin Feyzioğlu and 206,10 TL of application fee to Mahmut Tanal as trial expense,

D. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment,

E. That a copy of the decision be sent to each of the Presidency of Telecommunication, the Information and Communication Technologies Authority and the Ministry of Transport, Maritime Affairs and Communications in order for the **VIOLATION AND THE CONSEQUENCES THEREOF** to be removed as per clauses (1) and (2) of article 50 of the Code numbered 6216,

with the dissenting vote of the members Hicabi DURSUN and Celal Mümtaz AKINCI and **BY MAJORITY OF VOTES**.

President	Deputy President	Deputy President
Haşim KILIÇ	Serruh KALELİ	Alparslan ALTAN

Member	Member	Member
Serdar ÖZGÜLDÜR	Osman Alifeyyaz PAKSÜT	Zehra Ayla PERKTAŞ
Member	Member	Member
Recep KÖMÜRCÜ	Engin YILDIRIM	Nuri NECİPOĞLU
Member	Member	Member
Hicabi DURSUN	Celal Mümtaz AKINCI	Erdal TERCAN
Member	Member	Member
Muammer TOPAL	Zühtü ARSLAN	M. Emin KUZ

Member

Hasan Tahsin GÖKCAN

DIFFERENT JUSTIFICATION

It is not possible to say that the freedom to explain and disseminate opinions and convictions, which serves to freely receive and give information without intervention, included under article 26 of the Constitution is separate from the freedom of communication tackled under article 22 of the Constitution.

Since social media is also an environment of communication in addition to being an area in which information and opinions are shared, there is no doubt that a restriction to be imposed upon social media will constitute an intervention to the freedom of communication. In this case, it is an obligation that restrictions in relation to social media be in conformity with the principles contained under article 22 of the Constitution. Within this framework, it is clear that the existence of legal grounds for interventions to be made to rights and freedoms will be sought.

It is concluded that rights guaranteed by the Constitution are violated even without examining the conformity of interventions, which do not carry the element of lawfulness, with such other test guarantees as bearing no prejudice to the essence, being one of the requirements of the democratic societal order and proportionality.

It is seen that it is stated that the condition of lawfulness will be sought in exceptional reasons that authorize the restriction regarding the utilization of the freedom of expression guaranteed under article 26 of the Constitution, that it is possible only with a judge's decision or a decision of a competent instance approved by the judge to prevent the utilization or to bear prejudice to the confidentiality of the freedom of communication included under article 22 of the Constitution.

This being the case, the Presidency of Telecommunication and Communication declared on 28/03/2014 that it imposed a protection measure in the form of closing the site to access with the though that it automatically received authority also from paragraph 1/b of article 8 of the Code numbered 5651 by exceeding the mentioned justification with a view to the judgment contained within the decision of the Criminal Court of Peace of Gölbaşı numbered 2014/358 that the access to 15 URL-based youtube.com accounts be blocked, that the access to the entirety of broadcast be blocked via IP and domain name in the event that the required action was not fulfilled.

Faced with objections raised subsequently and decisions to lift the blocking of access in relation to the entirety of the website named youtube.com, it announced this time that it continued the measure of blocking access only in connection with paragraph 1/b of article 8 of the Code numbered 5652, based on clause (4) of the same article, it did not enforce the decision of stay of execution delivered by the 4th Administrative Court of Ankara against this decision despite the fact that it was notified to it.

Nevertheless, article 8/1-b of the code numbered 5651, which serves as the grounds for the expression dated 28/03/2014 out of the expressions included in the justifications pertaining to the implementation of the decision of administrative measure by the Presidency of Telecommunication and Communication, is related to the crimes contained within the Code on Crimes Committed Against Atatürk numbered 5816. Given that the subject of the decision of the Criminal Court of Peace of Gölbaşı numbered miscellaneous action 2014/358 delivered upon the application of the Office of the Public Prosecutor of Gölbaşı is “the prevention of recorded conversations, which need to remain confidential and are of relevance for the security of the state, from being published on the internet within the framework of the investigation it is conducting in relation to political and military espionage and the crime of declaring information that needed to remain confidential”, since it is understood that this matter is not related from a content point of view with the article of the code from which authority was allegedly derived, and moreover that it does not conform to the other types of crime listed under article 8 and that for these reasons a protection measure could not be resorted to, it cannot be said that the public power utilized by the administration possessed legal grounds from this point of view. This intervention, which does not bear the element of lawfulness, has the characteristics of a violation.

On the other hand, it is understood that despite the decision of the Criminal Court of First Instance of Gölbaşı dated 9/4/2014 and numbered 2014/91 to lift the blocking of the entirety of access to the website named youtube.com and the decision of the 4th Administrative Court of Ankara dated 2/5/2014 and numbered 2014/655 to stay the execution, the Presidency of Telecommunication and Communication continued its intervention this time as per clause (4) of paragraph 1-b of article 8 of the Code numbered 5651, by considering itself to be authorized ex officio in spite of the ambiguity contained within the article.

It is an obligation for an intervention towards constitutional rights to have legal grounds. The requirement of the grounds to possess other qualities such as being certain and predictable first necessitates the existence of legal grounds and also its conformity with the

Constitution. Principles such as the comprehensibility, certainty and clarity of the existence of legal grounds render judicial legislation compulsory.

It cannot be said that the justifications of the decisions of the Presidency of Telecommunication and Communication pertaining to the implementation of administrative measure constitute legal foundation in this sense per se, nor do they carry constitutional guarantees. Especially given the obligation for restrictions pertaining to the freedom of communication guaranteed under article 22 of the Constitution to be based on judge's decision, it is clear that the approach to the effect that the administration can implement the measure of blocking access in an unlimited fashion by relying upon clause (4) of article 8 of the Code numbered 5651 with the justification that the crimes listed under this article occurred is unacceptable. In order to be able to talk about the conformity of this authority with the Constitution, it must be utilized in emergency circumstances and be submitted to a judge's approval within 24 hours. Otherwise, the guarantees stipulated under article 22 of the Constitution will be violated.

Due to the explained reasons; since it is understood that the justifications for the measure decision implemented by the Presidency of Telecommunication and Communication do not conform to the crime type justifications contained within the court decision that is taken as the basis for the implementation, and that clause(4) of paragraph 1/b of article 8 of the Code numbered 5651, that is used ex officio in the decision to impose a measure, lacked legal foundation in addition to the principle of uncertainty included in the majority opinion, that therefore, the restriction imposed upon the freedom of expression enshrined under article 26 of the Constitution does not bear the Constitutional criteria contained under clause two of article 22 of the Constitution, while it was necessary to decide that article 22 of the Constitution was also violated in addition to article 26, the majority decision that contended merely with uncertainty and relied upon the violation of article 26 was agreed with, with a different justification with the belief that the freedom of communication guaranteed under article 22 was also violated.

Deputy President	Member
Serruh KALELİ	Engin YILDIRIM

DISSENTING VOTE JUSTIFICATION

I believe that a decision of inadmissibility needs to be delivered regarding the application due to the fact that the applicants did not exhaust legal remedies against the action of the PoTC to block the access to the website youtube.com in the concrete application.

Paragraph three of article 148 of the Constitution:

Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force. ***In order to lodge an application, ordinary legal remedies must be exhausted****.*

Paragraph (2) of article 45 of the Code numbered 6216 with the side heading "The right of individual application" :

All administrative and judicial remedies stipulated in the code in relation to the act, action or neglect, which is claimed to have caused the violation, must be exhausted before the individual application is lodged.

According to the mentioned provisions of the Constitution and the Code, in order to be able to apply to the Constitutional Court via individual application, the usual legal remedies must be exhausted. The Constitutional Court has explained the purpose of the rule of exhausting application remedies in its numerous decisions. The reason of existence of the condition to exhaust application remedies is to give the opportunity to prevent and correct the violation of Constitutional rights to courts of first instance, regional courts and courts of appeal prior to the lodging of individual application. This condition demonstrates that the primary protectors of fundamental rights and freedoms are administrative instances and courts of instance, that individual application to the Constitutional Court is a secondary/complementary protection mechanism.

As expressed in previous decisions of the Constitutional Court, the respect to fundamental rights and freedoms is a constitutional obligation of all state organs, the correction of rights violations that emerge as a result of neglecting this obligation is the duty of administrative and judicial instances. For this reason, it is essential that claims to the effect that fundamental rights and freedoms have been violated be brought forward first before courts of instance, that they be evaluated and resolved by these instances. In accordance with this principle, the applicant needs to primarily convey the complaint, which he files before the Constitutional Court, to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the information and evidence that he has regarding this subject within due period and to pay required attention to following his case and application in this process (Amongst numerous decisions see App. No: 2012/403, 26/3/2013, § 16 and 17; App. No: 2013/850, 19/12/2013, § 19; App. No: 2013/5028, 14/1/2014, § 23, 24; App. No: 2012/254, 6/2/2014 § 31.)

On the other hand, if the exhaustion of application remedies does not have an effect in terms of the removal of the violation regarding the right of the applicant, in other words, if the remedy to be resorted to is ineffective or if a serious and irreversible danger towards the rights of the applicant will emerge in the event that the exhaustion of the application remedy is waited for, the principle of respect for constitutional rights can require the Court to examine these applications (see App. No: 2013/1582, 7/11/2013, § 20).

In the concrete incident, officials of the website Youtube.com applied to the Administrative Justice remedy, the decision of the 4th Administrative Court of Ankara to stay the execution was notified to the PoTC on 7.5.2014, the institution submitted its objections to this decision to the Court of First Instance. At the time when a decision regarding the concrete file was delivered by the Constitutional Court, the objection of the institution was not yet concluded. On the other hand, taking into consideration the fact that a week remains until the expiry of the thirty day period within which the PoTC must implement the decision of stay of execution as per the code of Administrative Procedure, the legal remedy is not yet exhausted.

Given the PoTC's obligation to implement the decisions of administrative justice, there is no uncertainty regarding the matter of when the access to the site is to be established by means of fulfilling the decision of the judiciary. In the concrete event, since the legal period provided to the PoTC for the implementation of the decisions of the judiciary has not yet

expired, it cannot be said that the decisions of administrative justice and especially the decisions of stay of execution do not provide an effective and accessible protection in terms of removing the violation and the negative consequences thereof. Had the court decision not been implemented despite the expiry of the period envisaged in the code, it could have been concluded that the application of the applicants to the administrative court was not an effective remedy.

The thought, which is included in the majority opinion, that the decisions of administrative justice and especially the decisions of stay of execution do not provide an effective and accessible protection carries within itself the danger of creating a chaos in the Turkish judicial system. This would pave the way for individuals, who obtain decisions of stay of execution from instances of administrative justice, to lodge individual applications to the Constitutional Court without waiting for the expiry of the periods, which are provided to the administration for the implementation of the decisions and envisaged in codes.

Finally, the administrative justice system has been functioning generally effectively for a very long time in our country. Of course it cannot be stated that some structural problems do not exist. Nevertheless, it is not possible to refer to such a structural problem in the concrete incident. Ignoring the fact that the primary protector of fundamental rights and freedoms are administrative instances and courts of instance and that individual application to the Constitutional Court is a secondary protection mechanism will amount to depriving the administration, courts of first instance, regional courts and courts of appeal of the opportunity to prevent and correct the violation of Constitutional rights. This kind of an approach bears, first and foremost, the danger of increasing the workload of the Constitutional Court to such a high degree with which the Court would not be able to cope.

Even more importantly, it is stated under article 6 of the Constitution that "…*Nobody or no organ can exercise a State authority that does not take its source from the Constitution*". This would convey the image that the Constitutional Court pursues an activist policy by expanding the Constitutional authorities granted to it for the detriment of administrative and judicial instances, and even by utilizing the authorities of other Constitutional organs, which exercise sovereignty.

Since I am of the opinion that it should be decided that the individual applications are inadmissible due to the fact that the legal remedy was not exhausted in the application that the applicants lodged to the Constitutional Court without exhausting the administrative legal remedy for the explained reasons, I do not agree with the majority opinion.

Member

Hicabi DURSUN

DISSENTING VOTE JUSTIFICATION

It was rendered in the Twitter decision of our Court with the application number 2014/3986 that; "*Although it is understood in the case which is the subject of the application that the PoTC blocked access to the website twitter.com on the basis of some court judgments, it is also understood upon the examination of the judgments submitted as basis that the said judgments only block access to certain URL addresses and that no judgment is rendered by courts of instance in relation to (completely) blocking access to the website twitter.com.* " (§46) and by indicating in paragraph 48 of the same decision that " ...*In the concrete case, it is observed that the action of blocking access is not performed on the basis of URL but by*

means of blocking access to the entirety of the website.Taking into consideration the regulations present in the Code numbered 5651, it is obvious that the action which goes beyond the court judgments indicated to be the basis of the decision of PoTC and which brings along the complete blockage of access ... does not have any legal basisand that the blockage of access to this social sharing website without a legal basis and by means of a decision of prohibition whose borders are not definite constitutes a severe intervention to the freedom of expression, which is one of the most basic values of democratic societies. " it is finally decided that the blocking of access to the website by the PoTC violated the freedom of expressionenshrined under article 26 of the Constitution ***due to the fact that " it lacks legal grounds.****"*

In other words, there was no legal grounds to the PoTC's blocking of access to the entirety of twittereven though there was not a court decision regarding the blocking of access in its entirety . This prerogative, which is devoid of legal grounds, was a clearly unlawful and "arbitrary" action. The fact that the decision of stay of execution of the 15th Administrative Court of Ankara delivered against this administrative action/act, which lacked legal grounds and thus was very clearly unlawful, was not implemented by the PoTC resulted in the delivery of the violation decision, to which I also participated.

In the individual application numbered 2014/4705, which is the subject of the decision pertaining to the blocking of access to Youtube, Youtube LLC Corporation Service Company of the applicants is the owner of the website youtube.com, the other applicants are its users.

Upon the request of the Ministry of Foreign Affairs dated 27.3.2014 regarding the " *blocking of access to 15 links, which are found on youtube and threaten national security in the first degree, and other addresses with similar content* " , the PoTC contacted the representatives of the mentioned site in Turkey, indicated the URL addresses of the content in question and requested them to discontinue the broadcasting. When a result could not be obtained in this manner, an application was lodged on the same day to the Office of the Public Prosecutor and the Criminal Court of Peace of Gölbaşı, the blocking of access to the site was initiated by means of placing the announcement " *A PROTECTION DECISION is applied regarding this website by the Presidency of Telecommunication and Communication based on the decision of the Criminal Court of Peace of Gölbaşı dated 27.3.2014 and numbered 2014/358 and as per paragraph 1/b of article 8 of the Code numbered 5651 . "* at the entry of the mentioned website as per the decision delivered by the court of first instance As a result of the objections made to the Criminal Court of Peace and Criminal Court of First Instance of Gölbaşı against this decision, it was decided in finalized fashion by the Criminal Court of First Instance of Gölbaşı " *that the decision pertaining to the blocking of access to the 15 links be continued as is and that the website www.youtube.com in question be opened to access in this manner . "*

In spite of these decisions, the blocking of access to the website youtube.com was not lifted. Because the PoTC indicates that paragraph 1/b of article 8 of the Code numbered 5651 provides the authority to impose a blocking of access without requiring a decision of the judiciary and that it imposed and continued the blocking of access as per this legal authority. The aforementioned paragraph of the Code pertains to the crimes committed via internet against Atatürk.

The PoTC states that a total of 215 URL addresses amounting to insults to Atatürk were determined on the website named youtube.com until the date of 9.5.2014, that despite the fact that messages were sent and notifications were made to youtube pertaining to the removal of the content in question from the site, none of the contents contained within the 215

URL addresses were removed from broadcast on a global scale, that only the access to 134 was blocked from Turkey, that it is still possible to access 81 both from Turkey and from abroad.

Article 13 of the Constitution orders that " Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by code without prejudice to their essence." According to the explanation of the officials of the PoTC, it is seen that the site Youtube.com did not completely fulfill the PoTC's request to block the broadcasts, which contain insults to Atatürk. Whether or not the site youtube.com was indifferent in the face of the PoTC's request to block the entirety of the access to the broadcasts containing insults whether or not it fulfilled its due responsibility, whether or not it displayed an effort regarding the matter of removing ongoing rights violations, on the other hand, whether or not the PoTC utilized an authority stemming from code, whether or not it brought prejudice to the essence of fundamental rights and freedoms while utilizing the authority, indeed whether or not the utilization was proportionate are matters that need to be evaluated and discussed in the legal remedy first.

There are allegations to the effect that the mentioned company engaged in an indifferent and arbitrary attitude in the face of our country's requests while immediately fulfilling the demands and requests coming from the USA, that it remained unmoved vis-a-vis phenomena other than the country where it is established and its commercial concerns. Fundamental rights and freedoms need of course be protected; however, it should not be forgotten that almost no right and freedom is absolute and other rights and freedoms constitute the boundaries thereof. Moreover, it is stated under article 14 of the Constitution with the heading "Prohibition of abuse of fundamental rights and freedoms" that; "None of the provisions of the Constitution can be exercised in the form of activities aiming to impair the indivisible integrity of the State with its territory and nation and to abolish the democratic and secular Republic, which is based on human rights. These cannot be interpreted in a way that enables the State or individuals to engage in an activity to abolish the fundamental rights and freedoms recognized by the Constitution or to restrict them more comprehensively than that specified in the Constitution."

It is stated under paragraph two of article 26 of the Constitution with the heading "Freedom of expression and dissemination of thought" that; "The exercise of these freedoms may be restricted for the purposes of national security, public order, public security, protecting the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing offending, punishing offenders, not revealing information duly classified as a State secret, protecting the reputation or rights and private and family lives of others or protecting professional secrets set forth in the law or duly performing the duty of hearing cases." Within the framework of these provisions and all other legislation, whether or not the acts and actions of the PoTC and youtube.com along with it are in conformity with the law also needs to be evaluated in the legal remedy prior to individual application.

Websites with large numbers of users such as youtube.com, access to which was blocked, significantly contribute to forming the society's agenda and facilitating the pursuit of the agenda and the exchange of information due to their capacity of storing and publishing lager quantities of data and the accessibility thereof. This matter is really very important. However, as the service is provided, should this domain be open to the occurrence of attacks and insults to leaders and sacred values of nations, endangering a country's national security, the confidentiality of private life, dissemination of prostitution and obscenity, trampling on

the moral values of the society, the exposure of state secrets? Should this and similar sensitivities not exist? Even if they do, should these be sacrificed for the sake of the freedom of expression and dissemination of thought? Or is it that these sensitivities, which are displayed for certain countries, may as well not be displayed for Turkey? I am of the opinion that this and many other similar matters are matters that need first be evaluated in the legal remedy and by the public conscience.

According to the explanations that are made, it can be assessed that the blocking of access to the site youtube.com has legal grounds at this stage, that the blocking was not entirely unlawful and arbitrary. In the event that there is a claim that the authority granted to the Institution by Code is utilized in violation of the code, in an irregular fashion, first an application needs to be lodged to administrative instances, courts of instance prior to lodging an application, if a result cannot be obtained in this manner after the exhaustion of application remedies, an individual application needs to be lodged. (c.n. 6216 art. 45/2)

Although some applicants qualified the granting of the authority to the administration to deliver a decision of blocking of access in certain circumstances as per paragraph four of article 8 as being against the Preamble as well as articles 6 and 9 of the Constitution, that the fact that the administration issued a judicial decision by replacing the judicial instance amounted to usurpation of function, the venue to evaluate these claims is not the individual application. It is not legally possible to conduct an abstract review of norms during individual application. Besides, it is not quite possible to say in our incident that the institution engaged in usurpation of function by means of replacing the court of instance. Because the PoTC alleges that it utilized the authority granted to itself by the Code numbered 5651. If the applicants allege that the act or action of the institution cause a violation, they should first exhaust the legal remedies envisaged for this matter.

"*The reason of existence of the condition to exhaust application remedies is to give the opportunity to prevent and correct the violation of Constitutional rights to administrative instances, courts of instance (courts of first instance, regional courts and courts of appeal) prior to the lodging of individual application. This condition demonstrates that the primary protectors of fundamental rights and freedoms are administrative instances and courts of degree, that individual application to the Constitutional Court is a secondary/complementary protection mechanism."*(Guide Book on Individual Application to the Constitutional Court. Prof. Osman Doğru. Page: 102)

When it comes to assessing the claim that the administrative justice remedy was seized by the officials of the website youtube.com, that a decision of stay of execution was delivered by the court, that despite this the blocking of access was not lifted; the decision of stay of execution of the 4th Administrative Court of Ankara was notified to the institution on 7.5.2014, the institution used its legal right of objection against this decision and the objection of the institution was not concluded at the time when a decision was delivered by our court. The possibility of the objection being accepted exists.

Since I am of the opinion that it should be decided that the individual applications are inadmissible due to the fact that "the legal remedy was not exhausted" in the applications that the applicants lodged without exhausting the legal remedy for the explained reasons, I do not agree with the majority opinion.

Member

Celal Mümtaz AKINCI