Why the Turkish Constitutional Court's Wikipedia Decision is No Reason to Celebrate

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Wikipedia had been blocked in Turkey ever since April 29, 2017, allegedly because of content in which Turkey was described as a state sponsoring terrorism. The Turkish Constitutional Court (TCC) recently lifted the ban on Wikipedia and a surge of, in my view, unwarranted optimism has now sprung out of nowhere both among international and Turkish circles following the case closely. I fail to share this optimism. Even Gönenç Gürkaynak, the attorney representing Wikimedia Foundation, the chief complainant in the individual application case against the Turkish government alleging a violation of its right to free speech, was guarded in his tweet about the outcome of the Court's decision. "I should not have needed to go to the Constitutional Court nor the ECtHR in a matter like this," Mr. Gürkaynak tweeted.

By all means, the lifting of the ban on Wikipedia is something to be happy about. But the timing and content of the TCC's decision, when especially read through the political context in which it was handed down, do not give much reason to celebrate. In this blogpost, I flesh out the reasons why the TCC's decision lifting the ban on Wikipedia must not occasion much optimism, but should rather provide an opportunity for strategic reflection for those committed to the daunting task of bettering the state of fundamental rights, and particularly speech-related rights, in Turkey. Here are 4 salient reasons for caution.

1. The ruling was not unanimous, with 6 justices dissenting

The Court currently has 16 members, which is a temporary anomaly. After Serdar Özgüldür, who was a military court judge prior to his appointment – the practice of which has ended with the 2017 amendments to the Constitution – retires, the vacancy left by his retirement will not be filled. That will stabilize the composition of the Court to having 15 members. But until then, the Court will continue to deliberate sensitive cases like this as a panel of 16. And out of that 16, 6 have dissented, reasoning that the blanket ban on Wikipedia was consistent with the requirement that infringements on fundamental rights be "necessary in a democratic society". 6 out of 16 is not a numeric figure to be dismissed briskly.

What is more, 5 of the 6 dissenters are President Erdogan appointees to the Court. Erdogan appointees cannot be said to have a shared and robust constitutional vision. However, with the exception of Prof. Dr. Yusuf Şevki Hakyemez, a constitutional law scholar appointed to the Court by Erdogan who sides with the "liberal half" of the Court, other Erdogan appointees virtually always tend to side with the government in cases with heightened political significance to the government and its critics.

In an earlier post, I suggested that the opposition could find some solace in the fact that Erdogan may not be considered to have packed the court for at least two reasons. First, he does not have the numbers yet. Only 6 out of the 16 (soon 15) members are his appointees. Second, and far more important, Erdogan appointees do not appear to have a written-in-stone kind of constitutional vision that enables them to side with the executive all the time. Some of his appointees, as frequently in the case of Justice Hakyemez for example, join many of the "liberal" decisions of the Court. Thus, I still stand by my initial proposition. The accuracy of my argument will ultimately be tested if and when Erdogan loses an upcoming election, because only under a new executive (and also legislature) with a different political ideology will we have the opportunity to see if the Court upholds most

policy decisions taken by that new executive (in which case it will not be possible to speak of an "Erdogan capture of the Court").

In the end, packed or not packed, 6 members of the Court have disagreed with their colleagues lifting the ban. Unsurprisingly, the same 6 members were all among the 8 dissenters in the recent TCC case ruling that the government violated petitioners' freedom of expression by prosecuting and penalizing members of the Turkish academia who signed the "Peace for Academics" declaration for allegedly spreading terrorist propaganda.

All of these 6 members of the Court have been recently appointed. Under current law, of the 6 dissenters in the Wikipedia decision, the most senior is expected to retire in 2024, others in 2026, 2027, 2028, 2031 and 2031, respectively.

2. The content of the joint dissenting opinion cowritten by the dissenters raises concerns

Legal arguments are countered with legal arguments, regardless of the fact that one's legal arguments can be (and, in my opinion, inevitably are) reflective of one's own political ideology. Perhaps most frustratingly, the dissenting opinion in the Wikipedia case does not read as a legal opinion. In other words, as I tried to articulate under (1), that there are dissents in this case, 6 of them to be precise, is alarming in and of itself. To add insult to injury, the *content* of the jointly-authored dissenting opinion is equally alarming.

Conspicuously, there is not even a single precedent invoked in the dissenting opinion. While the majority opinion references and, to a large extent, meaningfully discusses Turkish and European Court of Human Rights (ECtHR) precedents, the dissent fails to mention any. That, in turn, raises concerns as to whether the dissenters have succeeded in articulating their disagreement with their colleagues in the majority *on legal terms*.

Substantively, the dissent keeps repeating two points in aid of the government: (i) that Wikipedia was initially contacted by the government to remove specific content, and was given time (4 hours) to do so, and that the government banned the entire website only after Wikipedia remained silent about the government's initial request. The dissent seems to want to argue that because the government gave Wikipedia some time, it had been gracious enough… The opinion dodges the actual and more relevant question of whether the government's request to Wikipedia to remove certain, however specific, content from the website was a violation of Wikipedia's right to free expression in the first place. (ii) Second, the dissenting justices state that *at the time of the government's request* back in 2017, it might have been reasonable to ban Wikipedia, because content in Wikipedia alleging the Turkish government to have been involved in the Syrian war by allegedly supporting terrorist forces such as ISIS spinoffs might have been especially dangerous for Turkish national security *at that specific time*. For one, the idea that the government and Turkish national security might have been especially susceptible to such content on Wikipedia in 2017 is mere speculation for which the dissent fails to provide any concrete and factual support. For another, even if the dissent's speculation were accepted, the relevant question it still dodges is whether the Turkish government has *remained* equally susceptible to the content on Wikipedia since 2017. In other words, the dissent fails to speak on the issue of whether the ban which was perhaps once a necessity from a Turkish national security perspective (again, mere speculation unless grounded in evidence) remained as such through the end of 2019.

3. The TCC's decision came very late

The Wikimedia Foundation applied to the TCC on May 9, 2017. The decision of the Court was announced on December 26, 2019. Critics have reasonably asserted that the timing of the decision was noteworthy. Indeed, Wikipedia had already applied to the ECtHR in May 2019, obviously frustrated by the TCC's unwillingness to take up the case.

For better or worse, Wikipedia's application to the Strasbourg Court seems to have expedited the Turkish Court's handling of the matter. Skeptics would argue, fearing a declaration by the ECtHR that the TCC has even partially lost its ability to act as an effective

domestic remedy, the TCC, upon learning that the petitioners had applied to the ECtHR, decided to consider Wikipedia's case which had been before the TCC for more than 2 years. Put in other words, if the case would have indeed been considered by the Strasbourg Court, which would undoubtedly have issued a judgment finding a violation of Article 10 of the European Convention on Human Rights on freedom of expression, the ECtHR would also have had occasion to comment on the TCC's failure to timely adjudicate the matter. And that could have potentially resulted in a declaration finding the TCC's failure to timely adjudicate the case an indication of its deficiency to act as an effective domestic remedy for alleged violations of the Convention. Perhaps The TCC, realizing that this had become a possibility with Wikipedia's taking the matter before the ECtHR, expedited the process and finally adjudicated the matter. I must stress that I do not and cannot confirm the factual accuracy of this narrative, but I feel obliged to report it as a not implausible explanation for the TCC's delayed decision. It is not impossible that the delay was occasioned by more mundane reasons having to do with, for instance, workload.

If the motivation to preserve the TCC's institutional reputation as an effective domestic remedy for Convention violations played any role in pushing the TCC to finally consider Wikipedia's individual application, which it indeed might have, this points to an awkward position in which the TCC may find itself in the near future (if it already hasn't): to avoid retribution from the Turkish government, the TCC strategically delays consideration of politically salient cases such as Wikipedia's, but when confronted with potential "retribution" from the Strasbourg Court in the form of a possible declaration on its effectiveness as a domestic remedy within the Turkish legal system, the TCC finally gives in and considers the case. Perhaps for the TCC, the Wikipedia decision is a win-win after all: it avoids harsh political backlash by delaying, but ultimately rendering, a government-unfriendly decision and it also avoids judicial rebuke from the ECtHR by considering the delayed case when it appears that the ECtHR might start taking a look at it.

For Turkish citizens though, the TCC's reputational calculus has a dire cost, in this particular case, a ban on one of the world's most frequented websites for more than 2 years. This is, above all, why the TCC's decision is no cause for celebration.

4. The TCC's decision was implemented with a significant delay

The TCC announced its decision to lift the ban on Wikipedia on December 26, 2019. But the block was lifted by Turkish authorities only on January 15, 2020. Why the nearly 3-week delay? The answer is that the Turkish bureaucracy, backed up by the government, is using what can only be described as "legalistic" defenses to delay as much as possible what they consider to be unwelcome decisions by the TCC. Their argument is that for the Court's decision to have effect, the actual judgment (as opposed to the mere announcement) must be issued, which happened in this case via the publication of the Court's judgment in the Official Gazette.

To be sure there is a legal argument to be made in the government's defense. After all, Article 153/4 of the Constitution provides: "Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies." It is not implausible to infer from the text that the Constitution presupposes publication in the Official Gazette as a prerequisite for a Constitutional Court decision to have binding effect. At the end of the day, though, it is a choice to interpret the quoted provision in this way. Not delaying execution of TCC judgments by implementing them as soon as the TCC announces them, without waiting the reasoning behind the decision to be published, is also a choice, and arguably a choice that bespeaks respect for the authority of the TCC. Alas, the Turkish bureaucracy and politicians have been adamant in their legalistic interpretation and consequent delay of implementing TCC decisions for some time.

The Turkish government surely did not and should not emerge with an unsullied reputation from the

Wikipedia saga that has played out in the Turkish legal and political scene since 2017. But nor should the Turkish Constitutional Court, which has delayed consideration of the case for too long. Instead, the Turkish people who have denounced the ban from the very beginning and condemned it in the court of public opinion should – not to mention many who had been circumnavigating the block using mirror URLs anyway (myself included)!

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