RIGHT TO INFORMATION AND PUBLIC SPHERE: AN OLD HISTORY OR A NEW OPPORTUNITY, OR...?

TUĞBA ASRAK HASDEMIR
GAZI UNIVERSITY - FACULTY OF COMMUNICATION

Abstract:

Right to information as a form of right to petition is one of the cornerstones in the formation of the modern constitutional state and has important ties with freedom of thought and expression. Some practices related with right to information in Turkey as well as within the system of European Union make available transformation of these acts and actions by the citizens. The main aim of the study is to elaborate certain practices of right to information, regulated in the Law on Right to Information in Turkey, and problems encountered in the application process. Since this Council, like European Ombudsman, is the final authority to review the decisions related with partial or full refusal of the access to the information and documents because of the limitations specified in the legislation, the study will focus on the applications to the Council of Cassation of Right to Information in Turkey. The decisions of this Council will be analyzed in accordance with the main aim to elaborate how the practices of right to information contribute to the interaction between citizens and the state and to revive public sphere in the case of Turkey.

Keywords

Right to Information; Political Public Sphere; Interaction Between State and Citizens; Community Communication.

Right to information comes into fore with the aim to serve publicity of acts and actions of political power as a public body. Some practices related with right to information in Turkey as well as within the system of the European Union make available transformation of these acts and actions by the citizens. In this context, this right can be one of the cornerstones of democratic governance in the relation between citizens and state and also provide opportunities to revive the European political public sphere beside the political public sphere in Turkey.

The main aim of the article is to elaborate certain practices of right to information, regulated in the Law on Right to Information, which came into force in Turkey after

2004, and problems encountered in the application process. Since the system established for practicing right to information in Turkey, has certain resemblances with the related system in EU, the system in Turkey will be treated in reference with the system in EU, without disregarding the differences between these systems, especially related with being a part of different levels as national or supranational level.

Right to information has important ties with the first level of rights and freedoms. On the one hand, it is not a new form of rights and freedoms, with an inseparable relation with freedom of thought and expression, but on the other hand, it is closely related with the rights to question the practices of political power, and in this sense it takes place within third level, in other word "new" rights and freedoms. In the first part of the article, main axis of the relation between liberal state and society is tried to be described in reference to the principle of rule of law, the position of individual rights and freedoms in general, the importance of the right to information/to access to documents in particular. This part is followed by the history of right to information in a country case, case of Turkey.

The focus of the last part is the applications to the Council of Cassation of Right to Information. This council, like the European Ombudsman, is the final authority to review the decisions related with the partial or full refusal of the access to the information and documents in accordance with the limitations specified in the legislation. The decisions of this Council will be analyzed to elaborate how the practices of right to information contribute to the interaction between citizens and the state and to revive public sphere in the case of Turkey.

Liberal State, Rights of the Citizens and Right to Information

The interaction between politics and law as a constitutive feature of the liberal state, i.e., modern state, began to crystallize in the classical liberal thought of the 17th and 18th centuries. Historically, the classical liberal thought and practice have provided some principles and mechanisms to secure the abolition of the monolithic power structure of the absolutist state.

The capitalist mode of production with its exchange relation in the market makes available the governance of the economy by its own rules, in other words, without necessitating the political intervention to the market. In that model, the function of the state is to secure the operation of the mechanism of the market. Law becomes a

mediator between two distinct spheres, state and civil society, but it is assumed that law also has its own autonomy. The understanding of "rule of law" creates a norm, as all acts of political authority should be in conformity with the law. In other words, the rule of law purported that the law conditions all "acts of government". As we can see the best example of this understanding in German Rechstaat, the state becomes identified with the law.

According to Anderson (1986) the relationship between the state and its subjects began to change and was "modelled on the business contract in commercial life. The rising bourgeoisie created the 'contractual state' in its own image, bolstered by economic doctrine of *laissez faire* which held the 'wealth nations' were increased by free market and minimal state involvement in the economy" (Anderson, 1986: 6). The main role of the liberal state was to guarantee the 'liberties' of the individuals who created, in theory, its own state by the contract among them. This change was pictured by some liberal thinkers like Locke who was the most eminent and a primary liberal theorist (see Skinner, 1978, Vol.2, p.239). He is also taking guide by the contemporary liberal thinkers.

Vincent purported that "absolutism established the centralized and territorially unified political order on which constitutional theories developed (1994: 77). According to him, "the central feature of the constitutional theory... is that it is a theory first and foremost of limitation". But he additionally remarked that constitutionalism and limits on the State are not "something 'attached' to a State... A constitution is not an addendum *to* a State. The limitations are intrinsically part of and identifying features of that [liberal] theory" (1994: 77-78). We can say that absolutism gave birth to the liberal state and its theory, in that sense there was a transition from the absolutist state to the liberal one. However, the liberal state is qualitatively different from the absolutist one. It did not exist as a result of the quantitative changes in the absolutist state, but it is outcome of great transformation in the society and of changes in the class relation, in the state-society relation within the society. The society was no more an object of political management by the state; the state became more and more an instrumentality of the society's autonomous development. The activities of the state should be directed to find the ways through which this development was beginning to unfold according to its own logic rather than being directed by the state's own ends. The reversal of the relationship between state and society required that the state power should be constrained. In the 18th and 19th centuries the wave of constitutionalism provided notions and mechanisms to characterize and manage this new relationship.

The movement of constitutionalism has also marked certain principles like rule of law, separation of powers, checks and balances. In connection with the rule of law, the concept of limited state can be expressed in another way: political power must obey the law; government should be conducted according to constitutional principles. Government and its officers are always subject to the law, never above the law. In that sense the state becomes the association of the law. Ionescu purported that

> *"The initial purpose of the American and French Revolutions was to ensure the people's freedom through a constitution – and already the dominant preoccupation was with rights, namely, how to 'protect' or 'guarantee' them by law. As the constitutional pattern gradually established itself, it became evident that the 'guarantee' of the sphere of autonomy of the citizen was its principal object; and that the means of fulfilling this essential condition consisted, on the one hand, of the structures and functions of political representation of individuals, and, on the other, of the separation of powers between the legislative, the executive and the judiciary" (Ionescu, 1988:35).*

As one of the important thinkers contributing to the theoretical foundation as well as factual elaboration of the public sphere, J. Habermas (1989) stressed the importance of the wave of constitutionalism, constitutional state in the formation of public sphere. In this respect, he dealt with individual rights and freedom and particularly freedom of thought and expression which is the vital part of rational-critical debate evolving into public opinion. More specifically, alongside other rights and freedoms, and institutions and mechanisms of the constitutional state, freedom of thought and expression establish the bases for development of political public sphere, and in relation with this, it contributes to process of democracy. In the political public sphere, throughout different mechanisms, procedures and principles, citizens can control and criticize acts and actions of political power and sometimes force public authorities to revise and change their policies and implementations. Habermas analyzed the constitutional state, the rights and freedoms of the citizens and the public sphere, and the relations among them as historical facts. Beside this factual analysis, he asserted that the constitutional state and certain categories of individual rights and freedoms could be taken as norms in the formation of the public sphere in general. Right to information is one of the categories of individual rights and liberties, which serves these ends.

Right to information has important ties with the first level of rights and freedoms.

On the one hand, it is not a new form of rights and freedoms, with an inseparable relation with freedoms of thought and expression, but on the other hand, it is closely related with the rights to question the practices of political power, and in this sense it takes place within third level, in other words, a "new" level of rights and freedoms. Right to information as a form of right to petition is one of the cornerstones in the formation of the modern constitutional state and has important ties with freedom of thought and expression. The main aims of the practices related with this right is to serve publicity of acts and actions of political power, and in this way, strengthen the relation between state and civil society. Beside other fundamental rights and freedoms like freedom of thought and expression, right to assembly and union, freedom of press, the right to information contributes to the practices of political participation and also to the notion of democratic legitimacy, strengthens the communication between citizens and state, and it takes place within the regional and the universal documents of human rights.

In a report titled *"Global Network and Local Values"*, it is stated that freedom of information as the basis of right to information has two dimensions: in one sense, it is a "right" regulated and applied by law, "it is an individual right". But in another sense, it is a "right" with political and social implications. In other words, "…in the social and political sense, it is a measure of the openness of the society". In the report, "the value involved" in the right of access to information is specified as below:

> *"Access to information gives citizens a sense of ownership of their society, and it creates confidence in the legitimacy and appropriateness of government administration. Freedom of information is a tool for engaging citizens in the work of government, alerting them to any excesses of government, and providing them with the basis to exercise their rights and obligations more knowledgeably. In Thomas Jefferson's words, The best protection of a democratic society is an informed public" (Keller et al., 2001: 156-157).*

In this way, freedom of information has certain norms about transparency, accountability and publicity of administrative acts and actions. It could be taken as a tool against certain characteristics of the absolutist state like *raison d'etat*. It favours publicity over secrecy.

Nowadays, right to information comes to fore as one of the important rights establishing new forms of interaction between citizens and state worldwide as well as in the European region. It has close ties with the principles of European governance, like

openness, participation, accountability, effectiveness and coherence, which were lately stated by the European Commission in the document named as "White Paper on European Governance" (White Paper, 2001). According to the result of public consultation running up until the end of March 2002 about that White Paper, it is stated that "efficient transparency requires a proactive approach and can not be limited to access to documents". However, it is added that the right to access documents is one of the cornerstones of the information and communication policy of the European Union (Commission of the European Communities, 2003:8, 11-18).

Specifically, right to information has been in the agenda of the European Community since May 1999, the date on which the Treaty of Amsterdam came into force. This treaty contained an article about the principle of public access to the European Parliament, the Council and the Commission documents. Rules related with this right were laid down in the Regulation No. 1049/2001 under the name of "right to public access to documents". Beside this regional development, some member states have national regulations related with the right to information/documents individually. In the case of Turkey, as a candidate country, the scope, limits and arrangements for exercising right to information were laid down in a law and then in a regulation which came into force in 2004.

History of Right to Information in Turkey

Legally, Turkey introduced with right to information at the end of 2003, with the Law No. 4298 (promulgated in October, 2003; came into force in the beginning of 2004). Beside this law, laws of the country are composed of the Regulation on the right to information and Circular Letter of the Prime Ministry (promulgated in the Official Gazette, January 1st, 2004). Although the practices and legal regulations of the right to information were evaluated by the public as the part of the process of the contribution to the European Union in 2000, the draft form of the law was prepared by the party in power, Motherland Party-MP (Anavatan Partisi-ANAP) as a part of the important reform [image] program of the party at the end of 1990s. The Motherland Party had considerable difficulties to govern with the legitimacy crisis coming into the political scene as a result of Susurluk accident[1] and also with the cases of corruption. At that time,

1. In the early evening of November 3rd, 1996, a truck pulled out of a gas station into the path of a speeding Mercedes just outside the town of Susurluk in western Anatolia. Three of the four passengers in the car were killed instantly and the fourth seriously injured. These passengers were a prominent police chief,

Prime Minister Mesut Yılmaz pointed out that the organized crime groups aimed at seizing the control of the state administration, adding that "several public employees who involved in these crime organizations also involved in drug trafficking and other illegal affairs.'' Yılmaz stated that,

> *"Just before the Susurluk accident, the target of the organized crime organizations have been the state administration, the gangs collected members who were working at important positions of the state and started to be institutionalized by increasing their power within the state. There is a direct connection between terrorism, unemployment, ethical corruption and organized crime movements" (https://www.hri.org/news/turkey/anadolu/1998/98-09-19.anadolu*, 24.5.2008).

In relation to this political atmosphere, the accent regarding the regulations about the right to information in Turkey was on "illegal affairs" of public officials and problem of corruption. On the one hand, the right to information was treated as a tool to overcome these problems, with the aims of openness, accountability of public administration. On the other hand, it was an important component of the image program of Motherland Party at the end of 1990s. The draft form of the law was prepared by officials of the Prime Ministry, in collaboration with academicians as well as representatives of press. As an important figure in the media, Oktay Ekşi (head of the Council of Press) defended right to information in his different articles in the newspapers. In these articles, he proposed a term, "public right to know" to enlarge the scope of the freedoms of press (Ekşi, 2003). According to him, the freedom of press provides certain guarantees to media members, employees especially. In fact, the public is influenced by the enforcement of this right, but as a "right to communicate" with its border perspective; also **the public's right to know** completed the picture.

At the eve of 2000, the regulations of this right came into scene with the agenda of participation of Turkey to EU. In that context, in the statement of the reasons (law), the main aims of the laws were as follows:

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a wanted Mafia hit man and convicted heroin smuggler who was carrying six different sets of identity documents issued by the Turkish authorities; and his mistress, a former beauty queen. The injured passenger was Sedat Bucak, a member of parliament for the ruling True Path Party (Doğru Yol Partisi-DYP) and the leader of a Kurdish clan which was one of the main contributors to the pro-state militia known as "Village Guards," used by the government in its war against the PKK. A small arsenal of weapons, including several handguns fitted with silencers was found in the trunk of the Mercedes.

- Instead of secrecy, transparency and publicity are main objectives of the regulation;
- Administrative acts and actions should be accountable to the public,

In the parliamentary discussion, the speaker of the party in power, Justice and Development Party (Adalet ve Kalkınma Partisi-AKP), stressed on accountability of acts and actions of the executive as a major aim to which the regulation of right to information directed to achieve. When we deal with the basic features of the system of right to information, public institutions & organizations and public professional organizations are included, but private institutions and organizations are not within the boundaries of this system. The question posed "who has this right?" can be responded as follows:

- Right to information to all legal and natural persons being citizens;
- "Citizens of other countries" in Turkey (in the related issues with their occupation and in accordance with "rule of reciprocity").

Not only "interested" persons or bodies but also "all" legal/natural persons being citizens has right to information. This important feature of the system of this right since every person can ask to have information without stating their interest with the issue in this system. A principle called the "right to know", rather than the "need to know", becomes effectuated in the system of the right to information in Turkey, in the image of the system used by the European Community. Both system granted right of access to all natural and legal persons. In other words these people do not have to justify their applications (Yasa [Law] No. 4982, EC Regulation No. 1049/2001). This is one of the important characteristics of the right to information in Turkey, which differentiates this right from the right to petition and makes it possible for every citizen to question different issues and control the ongoing practices of public authorities as well as public policies.

In the application of right to information in Turkey, public administrative bodies have some specific responsibilities for direct and easy accessibility of information. Main responsibilities regarding this issue could be given as follows:

Each public institution and organization has responsibility

- To classify the documents.
- To prepare specific sites of their institutions or organizations and to keep the main documents in electronic form and provide the documents open to public.

- To establish and organize "right to information" units.

In the European system similar constitutive principles and practices are valid. According to the report prepared by the European Commission, "public registers" were established to ease the search for documents by the citizens. Beside it, there is direct access to the full text of the documents mentioned in the registers. Also server like EUROPA or services like EuropeDirect provided to citizens information directly and easily. Each institution or organization has responsibility to set up information services for the public, etc. (Commission of the European Communities, 2004: 40).

Also, the boundaries of the right to information have similar headings as those about the right of access to documents at the European level. In Turkey, the main limits to the right to information can be listed as follows:

- Secrecy of state, public security, the harm of national economic interests,
- Secrecy of communication,
- Protection of institutional data (except people employed in this institution and affected by the applications),
- Legal advice and opinion,
- Protection of inspections,
- Court proceedings,
- Information and documents related with civil and military intelligence (except people whose career and prestige may be affected negatively).

The Council of Cassation for the Right to Information as a Constitutive Body

The system of right to information in Turkey, like the system of right of access to documents at the European level, can be characterized by its broad scope and limited number of exceptions. But some requests could be refused totally or partially. In this sequence, respondents may apply to the Council of Cassation for Right to Information as well as to the courts.

We have mentioned similar characteristics of the system in Turkey and at the European level. However, in the case of refusal, these systems have different structures and entities. On the side of European system, there is a second administrative appeal

in the case of total or partial refusal. Following that, the institution/organization must re-examine the application for access, and reasons must be given. And then, if the applicant is not satisfied with the result of this re-examination process, she/he can make a complaint to the European ombudsman, or institute court proceedings.

In the context of Turkey, in the draft form of the Law No. 4982, there is a Council of Cassation for Secrecy. The duty of this Council was to re-examine the applications if it was rejected on the ground of secrecy of state and harming national interests. But then, its scope was extended to all complaints. Nowadays, the Council of Cassation for the Right to Information is responsible to re-examine partial or total refusal of the applications on any grounds within the limits of the right to know. This Council is composed of members from the Council of State & the High Court of Appeals, from professors of Law, a member from a public professional organization of lawyers, a member from the Ministry of Justice, and some officials at the higher level of the administrative bodies. At the beginning, a limited number of applications were recoursed to the Council. But with time, this number has increased and the Council has become a major actor in the application of legal regulations related with right to information. The "case law" on the right to information was established by the decisions and precedent of the Council as a final and also vanguard authority. In that sense, any attempts to evaluate the application of right to information in Turkey should take its decisions into consideration.

The Council has given important decisions affecting the relationship between citizens and state as well as changing the notion of state as a public authority in Turkey to some extent:

- In relation between state and public officials: report of qualification, report of investigation etc. The requests made by public officials to have information about her/his report of qualification, the report of investigation holds important portion of the applications to public institutions and organizations. Before the application of the right to information, as a standard, the results and justifications of the report of qualification were not open to the public official interested. In the case of report of investigation, the interested public officials did not have any information about the justifications of the report without recurring to the court. In that way, some acts and actions of the state towards its officials remained unchecked. In the context of this use of the law, the Council favours the rights of the officials to know the content of the report affecting

her/his "work life and professional dignity", and then, this unchecked area becomes open to the interested party.

- As an example the effect on the existing policy, decisions of the Council related with the practices of Public Centre regulating exams for election of students to universities, foreign language exams for public officials, entrance exam to public posts etc. make the results available, with the content and correct answers of the exams known to the public.
- Decision-making is made available to check and control some public policies and practices: Local governments have important authority to decide on land appropriation, expropriation and construction. The Council favours citizens' right to know the local policies and decisions, giving the citizens an opportunity to check and control the practices of local government especially related with the issues mentioned above. This mechanism to check and control is very important since certain cases of corruption at the local level is closely related with such issues.
- Applications made by organizations from the civil society, labour unions and political parties to the Council also have certain effects on the publicity of administrative acts and actions. According to our findings, at the beginning, these applications represented only a small proportion of the whole of the applications to the Council. However, in 2007, 10% of the total application to the Council is from civil society organizations, labour unions and political parties.
- Applications to the Council, regarding relatively "new" rights – right to healthy environment, rights of the foetus, etc. – can be taken as a sign, applications of right to information are not restricted to the issues within the first and second level of the categories of human rights and freedoms, they also issued third and fourth levels of human rights and contributed to enlarge the scope of the decisions of the Council as well as the scope of the practices of right to information in Turkey.

As a Conclusion: Some Remarks on the Practices of the Right to Information

Turkey introduced the practice of the right to information at the mid of the first decade of the 21st century in parallel with the development in the process of membership

to EU, but, as we have mentioned before, the history of this right dates back to end of the 19990s, if we disregard the related right to petition, already present in the text of the 1961 Constitution, with important discussions on the relation between citizens and state. Right to information as a young relative of right to petition, aims at re-forming this relation, contributing to democratic participation as well as providing publicity of acts and actions of political authority.

At the end of this decade, a growing number of applications from the citizens to exercise right to information signifies that this right is accepted by the citizens to some extent. Whereas the number of total requests in 2004, in the first year of this practice, was 395,557; nowadays, in the report of last year, 2007, this number becomes 939.920 (Bilgi Edinme Değerlendirme Kurulu, 2005: 2008). One of the aims of the law regulating right to information in Turkey is to make the work of public institutions and organizations more transparent and publicly known. Of course transparency or a more informed public is not an aim in itself. However, they may contribute to increase public participation to the decision-making process and strengthen the relation of confidence between state and citizens. With the number of 2004, approximately one-third of the initial applications refer to the requests for the reports of qualification and reports of investigation by the public officials. Through the right to information, these documents became directly accessible. As we have said before, an informed public is not an aim in itself, but it is an important element in the formation of public opinion which is sensitive to ongoing policies and practices in the public sphere.

The right to information fulfils its aims if the integrity of human rights and freedoms is respected. The rights of individual like freedom of thought and expression, freedom of press, freedom of communication as well as other categories of rights, such as social, economic and political ones. For example, Oktay Ekşi, as a journalist and also the head of the Council of Press in Turkey insisted on public access to information to enlarge the scope of freedom of press towards more freedom of communication. This is one side of the coin. On the other side, applicability of the right to know is closely related with citizens' possibilities to exercise this right. Notwithstanding its validity for other "e" practices, like "e-state", the citizens' abilities and material conditions are important factors in fulfilling the aims of these practices. As a whole, it can be said that the right to know is a tool to limit political authority with the rights of the individuals, who are also citizens, in accordance with the premises of the liberal state. Beside it, this right may provide the publicity of administrative acts and actions in conformity with the principles of the "rule of law". Accessibility of administrative acts and

actions also contributes to the process of checking the practices of public authorities by the informed public.

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