

Right to Information and Communication between Government and Citizens: Identifying Continuities and Discontinuities in the Practices of Turkey at the 10th Anniversary of the Law on Right to Information*

Bilgi Edinme Hakkı ve Devlet ile Yurttaşlar Arasındaki İletişim: Onuncu Yıl Dönümünde Türkiye’de Bilgi Edinme Hakkı Uygulamalarında Süreklilikleri ve Kopuşları Tanılamak

Tuğba ASRAK HASDEMİR, Prof. Dr., Gazi Üniversitesi İletişim Fakültesi, E-posta: tubahasdemir@gmail.com

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Right to Information, Publicity of Governmental Acts and Actions, Accountability of Administration, Political Public Sphere, Communication Between Government and Citizens.

Abstract

The 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 the freedom of thought and expression as well as citizens’ right to ask their administration to be accountable. In Turkey, the practices related with the right to information, as the instrument of making the acts and actions of the government “public”, came to the agenda on the eve of 2000s, became part of the national legislation, and as of 2015, we commemorated its 10th anniversary.

In the article, the right to information practices will be analyzed by considering the first ten-year period of the practices in Turkey, and also regarding the worldwide experiences and discussions around the issue. The main aim of the study is to elaborate certain practices of the right to information, regulated in the legislation related with the Right to Information in Turkey, and problems encountered in the application process. Also this article will focus on the applications to the Council of Cassation of Right to Information in Turkey 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. The last part of the article is reserved for the evaluations and recommendations on how the practices of right to information contributes to the interaction between citizens and the government and to revive public sphere in the case of Turkey.

Anahtar Kelimeler:

Bilgi Edinme Hakkı, Yönetimin Eylem ve İşlemlerinin Açıklığı, Yönetimin Hesap Verebilirliği, Siyasal Kamusal Alan, Devlet ile Yurttaşlar Arasında İletişim.

Öz

Dilekçe hakkının bir biçimi olarak bilgi edinme hakkı, modern anayasal devletin biçimlenmesi sürecinde köşe taşlarından biridir ve düşünceyi açıklama özgürlüğüyle olduğu gibi yurttaşın yönetimden hesap istemesi hakkıyla da yakından ilgilidir. Türkiye’de kamusal otoritenin eylem ve işlemlerini “kamu”ya açmasının bir aracı olarak bilgi edinme hakkı uygulamaları, 2000’li yılların başında gündeme geldi ve ulusal mevzuatın bir parçası oldu; 2015 yılı itibarıyla de onuncu yılını kutladık.

Makalede, Türkiye’de bilgi edinme hakkı uygulamaları, ilk on yıllık dönem ve dünyada bu konudaki deneyimler ve tartışmalar gözönüne alınarak incelenecektir. Çalışmanın temel amacı, Bilgi Edinme Hakkı mevzuatı çerçevesinde yapılan düzenlenmelerin ve uygulama sürecinde karşılaşılan sorunların ele alınmasıdır. Bilgi edinme hakkı kapsamındaki veri ve istatistiklerin yanı sıra, bilgi edinme hakkının uygulanmasına içtihatlarıyla yön verici bir kurul olan Bilgi Edinme Değerlendirme Kurulu’nun kararlarına da odaklanılacaktır. Çünkü kurul, tıpkı Avrupa Ombudsmanı gibi bilgiye erişme isteğinin kısmen veya tamamen reddedilmesi durumunda, sözkonusu kararı denetleyen son merci konumundadır. Makalenin son bölümü ise, Türkiye örneğinde, bilgi edinme hakkı uygulamalarının, yurttaş ile devlet arasındaki etkileşime ve kamusal alanın yeniden canlanmasına nasıl katkı sağlayacağına ilişkin değerlendirme ve önerilere ayrılmıştır.

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Introduction

The nature and features of government-citizen communication in the modern state structure have been subjects of many studies. Right to information resembles right to petition to some extent and has important ties with the freedom of thought and expression. On the other hand, it is closely related with the accountability of administration and citizens' right to ask their administration to be accountable. Right to information comes to the fore with the aim to serve publicity of acts and actions of government as a public body and to make available the transformation of these acts and actions by the governed.

In Turkey, the law on right to information, was enforced in 2004, and as of 2015, we commemorated its 10th anniversary. In the article, the right to information practices will be firstly analyzed by considering the statistical data on the first ten years' practices. The main aim of the study is to handle certain practices of the right to information, regulated in the Law on Right to Information in Turkey, and problems encountered in the application process. This study will also elaborate the decisions of the Council of Cassation of Right to Information, as a final authority, which reviews the decisions related with partial or full refusal of the access to the information and documents by regarding the limitations specified in the legislation.

This article elaborates certain practices of right to information being 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 examined 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.

Rights of the Citizens and Right to Information

Historically, the classical liberal thought and practice have provided some principles and mechanisms to secure the abolition of 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. According to Anderson (1986) the relationship between the state and its subjects became to change and was "modeled 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' was increased by free market and minimal state involvement in the economy"(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 asserted that “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” (77-78). We can say that absolutism gave birth to the liberal state and its theory, in that sense there was 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. In the 18th and 19th centuries the wave of constitutionalism provided notions and mechanism 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 the officials are always subject to the law, never above the law. In that sense the state becomes the association of the law.

As one of the important thinkers contributing to the theoretical foundation as well as factual elaboration of the public sphere, J. Habermas (1989) stressed importance of 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. At political public sphere, throughout different mechanisms/procedures/principles, citizens can control, criticize political power’s acts/actions and force public authorities to revise and change their policies/applications. Right to information is one of the categories of individual rights and liberties, which serves to these ends.

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. 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 the other 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 follows:

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. all, 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'état*. It favors publicity to 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 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 right to access to 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 has contained an article about the principle of public access to the European Parliament, the Council and 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 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

Turkey introduced with right to information at the end of 2003, with the Law No:4298 (promulgated in the October of 2003; came into force in the beginning of 2004). Beside this law, laws of the country is composed of the Regulation on the right to information and Circular Letter of the Prime Ministry (promulgated in the Official Gazette 24.1.2004). Although the practices and legal regulations of the right to information was evaluated by the public as the part of the process of the contribution to the European Union in 2000s, 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. Since Motherland Party had important difficulties to govern the legitimacy crisis coming into the political scene as a result of Susurluk accident¹ and also with the cases of corruption. At that time, Prime Minister Mesut Yılmaz pointed out that

1 In the early evening of November 3, 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, a wanted Mafia hitman 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 were found in the trunk of the Mercedes.

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 enlargen the scope of the freedoms of press (Ekşi, 2003).

At the eve of 2000s, 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 are as follows :

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

In the parliamentary discussion, the speaker of the party in power, Justice and Development Party-JDP (Adalet ve Kalkınma Partisi-AKP), stressed on accountability of acts & 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 persons can ask to have information without stating their interest with the issue in this system. Principle called as ‘right to know’ rather than ‘need to know’ becomes effectuated in the sytem of right to information in Turkey like the system of European Community. Both system granted right of access to all natural and legal persons. In other words these persons do not have to justify their applications (Yasa [Law] No:4982,

EC Regulation No:1049/2001). This is one of the important characteristics of right to information in Turkey, which differentiates this right from the right to petition and make available for every citizens 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.

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 & 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 for making easier for citizens to search the documents. 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 boundaries of right to information have similar heading with that of right of access to documents at the European level. In Turkey, main limits to right to information can be listed as follows:

- Secrecy of state, public security, harm national economic interests,
- Secrecy of communication,
- Protection of institutional data (except persons 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 persons whose career and prestige affected negatively). The applications within the process are as follows:

Table 1. Data on the applications to access information across 2004-2008

Year	2004	2005	2006	2007	2008
Total applications	385.557	626.789	864.616	939.920	1.099.133
Applications replied positively	347.959	542.364	746.999	751.089	947.428
Applications replied partially positive/partially negative (partial refusal)	13.648	21.712	38.092	108.530	51.730
Total refusal	20.474	54.234	69.199	70.378	81.466
Applications accessing information after extracting the secret/confidential information	3.571	5.979	9.617	8.151	5.424
Applications being directed to the other institutions to be replied	9.695	31.172	58.093	58.522	78.227
In default of unpaid admission fee the applications supposed to be desisted	210	2.189	No data	No data	No data
Appeals to the court on the case of refusal	No data	311	539	554	424

Source: Annual reports on right to information 2004-2015, tbmm.gov.tr

There were some increases in the applications in the history of right to information in Turkey.

Table 2. Data on applications to access information across 2009-2015

Year	2009	2010	2011	2012	2013	2014	2015
Total applications	1.091.589	1.353.620	1.423.636	2.092.463	2.784.444	3.298.465	1.190.325
Applications replied positively to be accessed to the information	947.637	1.098.870	1.244.995	1.924.603	2.583.506	3.118.864	1.019.466
Applications replied partially positive/partially negative (partial refusal)	53.300	75.925	86.507	79.014	101.814	71.964	81.994
Total refusal	84.723	89.749	87.500	82.814	94.298	99.166	84.115
Applications accessing to the information after extracting the secret/confidential information	3.504	8.427	4.606	6.032	4.826	8.471	4.750
Applications being directed to the other institutions to be replied	72.080	93.203	102.219	163.257	-----	-----	-----
In default of unpaid admission fee the applications supposed to be desisted	No data	No data	No data	No data	-----	-----	-----
Appeals to the court on the case of refusal	745	716	720	840	603	746	622

Source: Annual reports on right to information 2004-2015, tbmm.gov.tr

Appeal Procedure for the Right to Information

We have mentioned similar characteristics of the system in Turkey and at European level. However, in the case of refusal, these systems have different structures and bodies. On the side of European system, there is a second administrative appeal in the case of total or partial refusal. At that sequence, the institution/organization must re-examine the application for access, reasons must be given. And then, if the applicant is not satisfied with the result of this re-examination process, she/he can make 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 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, Council of Cassation for 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 in law, a member from public professional organization of lawyers, a member from Ministry of Justice, members from officials at the higher level of the administrative bodies. The figures reveals some data related with appeal process are as follows:

Table 3. Data on the Appeals to the Council of Cassation for Right to Information 2006-2010

Year	2006	2007	2008	2009	2010
Total numbers of appeals	1.164	1.119	1.305	1.229	1.731
Appeals accepted	354	-----	397	382	422
Appeals partially accepted	215	-----	203	241	314
Appeals rejected	480	-----	542	449	671
Appeals not need to be decided	-----	-----	88	74	110
Appeals not processed (undue appeals; withdrawal of appeals; appeals duplicated)	-----	-----	63	44	73
Appeals reviewed but not decided	49	-----	8	39	5
Applications of public organizations and institutions to have information about the functioning process	36	23	19	15	13

Source: Annual reports on right to information 2004-2015, tbmm.gov.tr

Table 4. Data on the Appeals to the Council of Cassation for Right to Information 2011-2015

Year	2011	2012	2013	2014	2015
Total numbers of appeals	1569	1860	34	24	13
Appeals accepted	431	No Data	13	4	1
Appeals partially accepted	275	No Data	4	4	---
Appeals rejected	726	No Data	17	16	12
Appeals not need to be decided	72	No Data	---	---	---
Appeals not processed (undue appeals; withdrawal of appeals; appeals duplicated)	63	No Data	---	---	---
Appeals reviewed but not decided	2	No Data	---	---	---
Applications of public organizations and institutions to have information about the functioning process	No Data	No Data	---	---	---

Source: Annual reports on right to information 2004-2015, tbmm.gov.tr

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, report of investigation hold important portion of the applications to public institutions and organizations. Before the application of right to information, as a standard, the results and justifications of the report of qualification is not open to the public official interested. In that way, some acts and actions of the state towards its officials remained unchecked. Within the application, the Council favors 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 Center regulating exams for election of students to universities, foreign language exams for public officials, entrance exam to public posts etc. make available results, content and correct answers of the exams and to be known by the public.
- Decisions making available to check and control some public policies and practices: Local governments have important authority to decide on land appropriation, expropriation, construction. With its precedent, the Council favors citizens’ right to know the local policies and decisions, the citizens had opportunity to check and control the practices of local government especially related with the issues specified above. Applications made by organizations of civil society, labour unions, 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 held small proportion of the whole applications to the Council. However, with the number of the year 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 fetus 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 Right to Information

Turkey introduced with the practices of right to information at the mid of 2000s in parallel with the development in the process of membership to EU, but, as we have mentioned before, the history of this right is going back to end of 1990s, if we disregard its relative, right to petition taking place in the text of 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 2000s, growing number of applications of 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 and one step further, it reached to the number 2.092.463 in 2012, 2.784.444 in 2013 and 3.298. 465 in the year 2014 (Bilgi Edinme Değerlendirme Kurulu, 2005, 2008, 2013a, 2013b,2014).

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 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 refers to the requests for the reports of qualification, report of investigation by the public officials. Through right to information, these documents became directly accessible. Right to information realizes its aims if the integrity of human rights and freedoms is respected: freedom of thought and expression, freedom of press, freedom of communication as well as social and economic rights and political rights. As we have said before, 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/practices in the public sphere.

Regarding the appeals to the Council of Cassation for the Right to Information, the Council’s decision was/is so important since the Council formed the frame which made available the proper application of rules and procedure related with the right to information in Turkey. At the beginning, we can see limited number of appeals to the

Council. But in time, this number has increased 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.

In Turkey, the practices related with the right to information, as the instrument of making the acts and actions of the government “public”, came to the agenda on the eve of 2000s, became part of the national legislation, and was enforced in 2004, and as of 2015, we commemorated its 10th anniversary. This right may provide the publicity of administrative acts and actions in conformity with the principles of “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. Considering the total number of citizens having recourse within the context of right to information in Turkey, the number of the 2012 is approximately is fivefold of the number of 2004. It seems that there is an increase in the number of people exercising this right. However, it can be said that these people constitute small portions of the population in Turkey when regarding the total number of the population over 18 years old: only 3% of the population exercised the right to information in according to the records taken in 2012 and reached to 5% in 2014.

By way of conclusion, small number of the citizens exercised the right to information which is commemorated its 10th anniversary in Turkey, and some efforts should be made and necessary actions should be taken for making this right country-wide in scope and application.

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