STATE SECRET AS AN INSTRUMENT TO MAINTAIN STATE SECURITY

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Özet

Devlet sırrı, açıklandığında, devletin birliğini, bağımsızlığını, anayasal düzenini, iç ve dış güvenliğini ve uluslararası ilişkilerini tehlikeye düşürecek bilgi ve belgeler olarak tanımlanır. Bu kavram devletin güvenliğine ve nihayetinde toplumun ve bireylerin güvenliğine hizmet eder. Her devlet bir şekilde bu çeşit gizliliğe sahiptir. Modern demokratik devlet, aynı zamanda, devlet sırrı istisnası hariç, idarenin sahip olduğu bilgi ve belgelere erişim sağlama yükümlülüğü altındadır. Bu nedenle, bilgiye erişim hakkının etkin bir şekilde kullanılabilmesi için devlet sırrı kavramı açık bir şekilde tanımlanmalıdır. Bilgi edinme hakkı ve devlet sırları arasında gerçek bir denge sağlanmalıdır.

Bu makale devlet güvenliğini sağlamanın bir aracı olarak, devlet sırrı kavramını, unusrlarıylarıyla içeriğini tanımlamaya çalışmaktadır. Makalede, konuyla ilgili olarak yürürlükteki Türk mevzuatı ve karşılaştırmalı hukukun iki önemli örneği olarak İngiltere ve Amerika uyugulaması incelenmektedir. Makale, devlet sırrı konusunun özel bir kanunla düzenlenmesi gerektiği, ancak Türkiye'de bu konuda bir kanun tasarısı hazırlanmasına rağmen henüz kanunlaşmadığı sonucuna varmaktadır.

Anahtar Sözcükler: Devlet Sırrı, Devlet Güvenliği, Ulusal Güvenlik, Casusluk, Terörizm

Abstract

State secret is defined as information and documents which endanger a state's unity, sovereignty, constitutional order, internal and external security and international relations when disclosed. This serves for the security of the state and ultimately of the society and individuals. Every state has this kind of secrets in one way or another. Modern democratic state is also under an obligation to give access to information held by state organs (freedom of information), with the exception of state secrets. Therefore for right to access to information to be effective state secret must be defined clearly. A right balance must be struck between freedom of information and state secrets.

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State Secret As An Instrument To Maintain State Security

This article attempts to define the term state secret and its contents with its elements as an instrument to maintain state security. It examines the current Turkish legislation on the matter and the US and UK experiences as two important examples of the comparative law. It concludes that state secrets have to be regulated by a specific law on the subject and this is not the case in Turkey where a draft bill is introduced but not enacted as law yet.

Keywords: State Secret, State Security, National Security, Espionage, Terrorism

INTRODUCTION

In today's world people demand to be aware of the activities of their governments and participate in the administrative process in one way or another. Democratic state tradition acknowledges their right to access information on state activities. Governments are forced to share information with their citizens as a result of dramatic advancements in the information technologies of the 21st century. Information technologies not only make it easier to compile, produce, classify and store information but also provide easy and cheap access to information which became publicly available.

People prefer to live in a "democratic" state where information on its activities is available. At the same time, as a result of human nature they are in need of living in a "secure" state. Unlimited access to all information held by a government sometimes might cause harm to an individual by making public his privacy of individual life and sometimes might cause harm to state security and public order. 11 September 2001 terror events in the US have led the whole world to redefine terrorism, to develop new tactics in combat against terrorism and to accept that the prime threat to the world which is in the age of information and technology is terrorism. For this respect, states do not allow their legislation to be used against themselves and take all the measures necessary to this end. Measures include the essential legislation in penal, state civil servant, procedure, freedom of information acts to maintain state security. The legislation maintaining state security is often formulized in the "state secret" term.

In fact state secret is an information which belongs to society but, for a variety of reasons, the society should not have access to it. Public interest in keeping this kind of information unaccessible is higher than making it available. On the other hand, there is a threat that governments might avoid providing information to their citizens in the name of state secret. In short, state security approach should not endanger democratic society and its development. For this reason it is very important to find out what makes state secret, who decides this, how it is held and how long it is regarded as state secret.

I. STATE SECRET

A. In General

State secret is a secrecy field which is accepted almost by all countries and referred sometimes as state's security, state's high interests and official secret. Information and documents which are state secret are kept unavailable because of risking the security of state. Some information and documents are regarded state secret because this protects state's national security, its defense policy, international interests and relations[1]. It could be stated that the information which endanger state's security and interests when become available must be kept secret. It is also obvious that a free exchange of informations is vital for democracies. But this should not make state secrets available[2].

Governments in democratic societies are accountable both in their foreign affairs and national security issues to the electorate[3]. Foreign affairs and

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1 **Akıllıoğlu**, Tekin, Yönetimde Açıklık – Gizlilik ve Bilgi Alma Hakkı (Openness – Secrecy in Administration and Freedom of Information), I. Ulusal İdare Hukuku Kongresi (1-4 Mayıs 1990), İkinci Kitap, Kamu Yönetimi, Ankara 1990, p. 808.

2 **White**, Laura A., The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withold Information in the Interest of National Security, VJIL, vol. 43, no. 4, 2003, pp. 1084-1085, 1089.

3 The term national security is many sided political, economical and legal term. **Akgüner**, Tayfun, 1961 Anayasasına Göre Milli Güvenlik Kavramı ve Milli Güvenlik Kurulu (National Security and National Security Council Under 1961 Constitution), İstanbul University Publishing, İstanbul 1983, pp. 9, 43, 231; **Akgüner**, Tayfun, Some Thoughts on National Security Concept, İdare Hukuku ve İlimleri Dergisi, Vakur Versan'a Armağan Özel Sayısı, Year 6, Dec. 1985, no. 1-3, p. 6. *Akgüner* defines national security as protecting and securing state independence and unity as well as national sovereignty when they are under a real or imminet threat at international or national arena by the authorized organ or organs in accordance with the constitution. **Akgüner**, Milli Güvenlik (National Security), pp. 96, 231. National security is also defined by *Yayla* as protecting the statae and country from internal and external dangers at peace and war. **Yayla**, Yıldızhan, İdare Hukuku I (Administrative Law I), Filiz Kitabevi, İstanbul 1990, pp. 37-38. According to *Duran*, national security also includes the protection not only from external but also from internal threats. **Duran**, Lûtfi, İdare Hukuku Ders Notları (Course Notes on Administrative Law),

national security are especially vital for a state's survival. This is historical as well as a rational fact[4]. It is reasonal that there should be a difference between a state's relations with its citizens and a state's relations with other states[5].

Despite the democratic advancements in international community, governments still advance four arguments for keeping secret their international relations and security issues[6]: 1) There is not a general acceptance of open diplomacy in international relations, 2) Every government is responsible for the national security of its country. This includes secrecy of defence forces, defence plans and espionage, 3) An information made available to a citizen might be accessible by other governments and might endanger the national security for which a state is responsible, 4) Only a government can reasonable decide whether the information in its possession is state secret or not. Because it is the only one with adequate experience.

B. Problem of Definition

A secret is something that is known to only a small number of people and is not disclosed[7]. State secret, to some, cannot be defined easily[8] or sometimes at all[9]. State secret is a means to mark the boundaries of two fields: a field an individual is "allowed to know" and a field an individual is "banned from knowing"[10]. *Akıllıoğlu* argues for the exceptionality of state secrets and that it should be defined in a single legislation on freedom of information[11].

İstanbul 1982, p. 129. For national security challanges of openness see **Mendel**, Toby, National Security v. Openness, in Campbell Public Affairs Institute, National Security and Open Government: Striking the Right Balance, New York 2003, pp. 1-30.

4 James I stated in the 17th century that "No-one shall persume henceforth to meddle with anything concerning our government or deep matters of State". **Bok**, p. 172. Mentioned in **Marsh**, Norman S., Access to Government-Held Information: An Introduction, in Ed. Norman S. Marsh, Public Access to Government-Held Information: A Comparative Symposium, Steven & Son Ltd. London 1987, p. 8, fn. 20.

5 **Marsh**, An Introduction, p. 8.

6 **Marsh**, An Introduction, p. 9.

7 **Collins Cobuild Dictionary**, Oxford 1990, p. 715.

8 **Akıllıoğlu**, p. 808.

9 **Savaş**, Vural – **Mollamahmutoğlu**, S., Türk Ceza Kanunu Yorumu (Interpretation of Turkish Penal Code), v. II, Ankara 1995, p. 1439.

10 **Özek**, Çetin, Basın Özgürlüğünden Bilgilenme Hakkına (From Freedom of Press to Right to Information), İstanbul 1999, p. 70.

11 **Akıllıoğlu**, p. 814, fn. 13.

Yıldırım, too, points out that state secret should be defined in a way to cover all of its elements and to exclude everything which is not connected to it and also, according to him, an exhaustive list of what information and documents make state secret should be given in the legislation[12].

German Penal Code (Strafgesetzbuch – StGB) defines state secret in its Article 93 as[13]: "(1) State secrets are facts, objects or knowledge which are only accessible to a limited category of persons and must be kept secret from foreign powers in order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany. (2) Facts which constitute violations of the independent, democratic constitutional order or of international arms control agreements by virtue of having been kept secret from the treaty partners of the Federal Republic of Germany, are not state secrets".

It could be put forward that state secret is information and documents which endanger a state's unity, sovereignty, constitutional order, internal and external security and international relations when disclosed.

C. Problem of Content

Another problem associated the definition is the content of state secret. Because a most effective means to maintain state security is state secret and it might involve almost everything. Therefore, first of all its content must be clarified. In so doing, due to democratic rules it seems useful that a number of things included by state secret must be reduced[14] and they must be regarded as state secrets only for a limited time.

Özek lists criteria and limitations with regard to the clarification of the nature and content of the state secret as: a. state secret is an information which must be kept secret due to its nature. Information on national defence, international relations, protection of democratic order are examples as such. b. State secret as determined by the administrative power is acceptable only if it aims to protect democratic constitutional order and if it is necessary to be kept secret. c. "Power" and "procedure" must be clarified before an information is regarded secret, for both due to its nature and administrative authority. It should not be possible to make an information secret by means of personal power. d. Clarification of power and procedure in determining state secrets is not enough

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12 **Yıldırım**, Ramazan, İdare Hukuku Açısından Bilgi Edinme Hak ve Özgürlüğü (Right to and Freedom of Access to Information in Administrative Law), T.C. Başbakanlık İdari Usul Kanunu Hazırlığı Uluslararası Sempozyumu, (17-18 Jan. 1998), pp. 236-237.

13 Available at http://www.iuscomp.org/gla/index.html

14 **Özek**, p. 62.

for freedom of information and transparent administration. Power to determine should be limited. Its reason must be made clear. e. There must be a correlation between national defence and state secret. Disclosure of a secret must result in a breach of national defence[15].

Akıllıoğlu points out that the most important point in state secret is substance: as a matter of substance it is state secret[16]. He argues that it cannot be acceptable if the administration in using its discretionary power extends the limits of state secrets by including some other information in state secret form[17].

In general, most of the information regarding armed forces and intelligence activities that are responsible for the security of a country and information on policies towards foreign governments are regarded within the meaning of state secret[18]. The extend of the meaning of state secret are rather wide in some countries like Italy and narrow in some other countries like Germany and Spain[19]. In Spain, issues that may harm security and defence of the state are regarded as state secrets under a law of 7 October 1978[20].

Bayraktar, whose point of departure is comparative law, is of the opinion that only information regarding national defence could be considered state secret[21]. It may be argued that all the information and documents regarding a state's unity, sovereignty, constitutional order, internal and external security and international relations must be accepted as state secrets. These terms themselves are also vague but it must be acknowledged that the term state secret cannot be defined in absolute terms and it is always subject to doubt. A reasonable way is the enactment of a state secrets law and enumerate all state

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15 **Özek**, pp. 66-67.

16 **Akıllıoğlu**, p. 809. Otherwise, it would be possible for administration to regard whatever information it deems necessary as state secret. **Özek**, p. 215.

17 **Akıllıoğlu**, p. 808.

18 **Eken**, Musa, Kamu Yönetiminde Açıklık ve Bilgi Edinme Hakkı (Openness and Freedom of Information in Public Administration), Unpublished PhD Thesis, İzmir 1993, p. 16; **Eken**, Musa, Kamu Yönetiminde Gizlilik Geleneği ve Açıklık İhtiyacı (The Tradition of Secrecy and Need for Openness in Public Administration), Amme İdaresi Dergisi, v. 27, June 1994, no. 2, p. 29.

19 **Bayraktar**, Köksal, İdare ve Ceza Hukuku Açısından Bilgi Edinme Hakkı (Freedom of Information in Administrative and Criminal Law), Bilgi Edinme Hakkı Paneli (5 Mayıs 2004), Türkiye Barolar Birliği Yayınları, No: 63, Ankara 2004, p. 114.

20 **Bayraktar**, p. 114.

21 **Bayraktar**, pp. 115, 117.

secrets. Depending on the importance of interests protected state secrets law must determine maximum durations for the information to be kept secret.

II. STATE SECRETS IN TURKISH LAW

A. Law in Force

There are a great number of provisions with regard to state security and secrets in Turkish law. No doubt it is not possible to examine all of them here. Only the most important ones that characterize the Turkish law on the subject will be touched upon. In article 26 of the Constitution which deals with freedom of expression and dissemination of thought there is a reference to state secrets. Under this provision one exception, among others, to this freedom is "withholding information duly classified as a state secret". Similarly article 28 of the Constitution states with regard to freedom of the press that "Anyone who writes or prints any news or articles which threaten the internal or external security of the state or the indivisible integrity of the state with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets and anyone who prints or transmits such news or articles to others for the above purposes, shall be held responsible under the law relevant to these offences".

Apart from these articles of the Constitution there are also various acts and statutory instruments containing provisions on state secrets. Turkish Penal Code (No. 5237)[22] prevails among others. Its Chapter Four Part Seven (articles 326-339) is entitled as "Crimes against State Secrets and Espionage". Anyone who terminates, harms, frauds or uses, even temporarily, for purposes other than prescribed, or steals in part or whole, documents regarding state's security or internal and external interests (Art. 326), who obtains the information which is supposed to be kept secret as a matter of its nature for state's security and internal and external interests (Art. 327), who obtains for the purposes of political and military espionage (Art. 328), who discloses (Art 329), who discloses for the purposes of political and military espionage (Art. 330) is sentenced to prison. Similarly a Turkish citizens or a foreigner in Turkey who obtains the information which is supposed to be kept secret as a matter of its nature for a foreign state's security and internal and external interests for the purposes of political and military espionage for another foreign state is sentenced to prison (Art. 331). Under Turkish criminal law, anyone who uses or allows to be used for his or others interest scientific or industrial innovations or inventions which are supposed to be kept secrets for the security of the state is sentenced both to prison and monetary sentence (Art. 333). Anyone who obtains the information whose disclosure is forbidden by the authorized administration

[22] Official Gazette, 12.10.2004, No. 25611.

in accordance with acts and statutory instruments and which is supposed to be kept secret as a matter of its nature (Art. 334), who obtains for the purposes of political and military espionage (Art. 335), who discloses (Art 336) or obtains for the purposes of political and military espionage (Art 337) is subject to prison sentence. Anyone who holds, without a reasonable explanation, the information which is supposed to be kept secret for state's security and internal and external interests or the information whose disclosure is forbidden by the authorized administration and which is supposed to be kept secret as a matter of its nature might face prison sentence (Art. 339). When the above mentioned crimes are committed in time of war there is a heavier sentences.

State secret carries an importance in procedure of justice acts as well. Code of Criminal Procedure (No: 5271)[23] in its Article 47 which is entitled "Witnesship with regard to information on state secrets" in principle acknowledges that when the information is relevant to a crime it cannot be kept secret in a court of law. The same article defines state secret as the information whose disclosure may harm state's foreign relations, national defence and national security, or constitutional order. Second paragraph of the article provides that if the information concerning witnesship is state secret, the witness is questioned by only the judge or the judges board. Judge or the president of the court allows only the information which is necessary for the relevant crime to be solved to be recorded in memorandum. This provision is applicable only for crimes which are sentenced by a minimum 5 year or more prison. (Art. 47 (3). In cases where the witness is the President of the Republic the nature of the secret will be determined by his discreation. (Art. 47 (4).

The Code of Civil Procedure (No: 1086)[24], by its article 249, regulated the witnesship on information which is of the nature of state secrets. It is sets forth by the article that the persons who worked for the state cannot be called to testimony before a court of law as witnesses provided that there is a permission of official authorities. The official authorities are the Turkish Grand National Assembly for the members of parliament, the President of the Republic for the Members of the Council of Ministers and the relevant minister for other public employees. The official authorities cannot abstain from giving their permission with the exception of state interests. The permission can be asked in written form upon a court decision. Only after these procedural requirements are met the witness can testimony in a court of law.

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23 Official Gazette, 17.12.2004, No. 25673.

24 Official Gazette, 1.7.1927, No. 622.

Article 20 of the Procedure of Administrative Justice Act (No: 2577)[25] states that the Council of State, administrative and tax courts carry out all examinations about the actions before them, of their own motion and they may ask the parties and other persons and authorities to send documents they deem necessary and to present all kind of information within a determined period. The fulfillment of this is compulsory. However, if the information and documents asked for concern the State's security or high interests or concern a foreign government along with the State's security and high interests, the Prime Minister or the Minister concerned may refuse to give the information and documents to the courts. But it is under an obligation to notify the reasons.

The Rules of Procedure of the Turkish Grand National Assembly contain provisions on state secrets, too[26]. Its article 70 (4) entitled "closed sessions" provides that no one who has a right to participate in the closed sessions of the Assembly can make a public comment and the sessions are kept as state secrets. Article 105, its title reads "Parliamentary Inquiry Commission and its Powers", of the rules of procedure exempts state secrets and trade secrets from parliamentary inquiries. This exception gives the government in power to block a parliamentary inquiry by classifying the information which could be essential for inquiry as state secrets. Therefore diminishes the power of the parliament to make inquiry.

It is provided by article 16 of the Freedom of Information Act (No: 4982)[27] state secrets are the exceptions to access to information and documents. The article's title is "the Information and Documents Pertaining the State Secrets" and it is as follows: "The information and documents which qualify as state secrets which their disclosure clearly cause harm to the security of the state or foreign affairs[28] or national defence[29] and national security are out of the

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25 Official Gazette, 20.1.1982, No. 17580.

26 Official Gazette, 13.4.1973, No. 14506.

27 Official Gazette, 24.10.2003, No. 25269.

28 'Causing harm to state's foreign relations' criterion must be noted. The criteria like 'security', 'national defence' and 'national security' mentioned in the same article are defined by the constitution. But there no criterion of 'Causing harm to state's foreign relations' in the constitution. There is a problem of the consistencicy with the constitution since the new criterion is based on the act but has not a constitutional basis. Furthermore its vaguaness is also open to disscussion. **Gemalmaz**, Mehmet Semih – **Gemalmaz**, Haydar Burak, Ulusalüstü İnsan Hakları Standartları Işığında Türkiye'de Bilgi Edinme Düşünce – İfade ve İletişim Mevzuatı (In the Light of Supra-National Human Rights Standarts Freedom of Information, Thought – Expression and

scope of the right to information provided herein". It could be argued on the basis of the words "clearly cause harm" contained in the text of the article 16 the information and documents with a "potential" to cause harm to the national security of the state are exempted. Besides, it is obvious that the administration has a very broad discretionary power in telling what qualifies as the security of the state, its foreign affairs and national defence and security.

In Turkish law there is a special procedure for the trial of public employees. This procedure makes the trial of public employees for offences relating their jobs more difficult. The Act on the Trial of Public Servants and other Public Employees (No: 4483)[30] regulates the procedure. The Declaration of Assests and Fight against Bribery Act (No: 3628)[31], by its article 17, provides that the procedure for the trial of public employees, with the exception of undersecretaries, province and district governors, is not applicable to offences regarding to disclosure of state secrets and to participation in disclosure.

There are also some specific sanctions introduced to those who endanger the security of the state by disclosing state secrets in Turkish law. For instance, anyone who is sentenced for the disclosure of state secrets cannot be admitted to civil service[32], cannot become a member of political parties[33], cannot carry goods and persons by air transport[34], cannot be free accountants and financial counsels[35], cannot open private employment agencies[36]. Sometimes under certain circumstances state pardons cannot be applied to the public employees who, as a result of disciplinary action, were sent away from their jobs[37].

Communication Legislation in Turkey, Yazıhane Yayınları, İstanbul 2004, p. 256.

29 Information on national defence is regarded as state secrets, too. CE 2 Octobre 1963, Coulon, Rec. p. 468. Mentioned in **Akıllıoğlu**, p. 815.

30 Official Gazette, 4.12.1999, No. 23896.

31 Official Gazette, 4.5.1990, No. 20508.

32 State Servants Act (No: 657). Art. 48/A-5.

33 Political Parties Act (No: 2820). Art. 11/2.

34 Turkish Civil Aviation Act (No: 2920). Art. 18.

35 Free Accountants, Free Accountant Financial Advisor and Oathed Financial Advisors Act (No: 3568). Art. 4/d.

36 Turkish Labour Council Act (No: 4904). Art. 17.

37 Civil Servants and Other Public Employees Pardon Act (No: 4455) Art. 1.

B. Draft Bill on State Secrets

As could be seen there is no an official or state secrets act in Turkey today. It seems necessary to have such an act to make it clear what kinds of documents and information are state secrets especially after the Freedom of Information Act came to in force. This is because if Turkey would not have such an act a state employee can abstain from providing an information in the name of state secrets due to heavy penalties imposed on those who discloses state secrets as mentioned in the previous section, thereby Freedom of Information Act could not be made useful, or, on the other hand, if all the information would be released the information to which access is granted could risk the security of the state. This is an extremely important and fragile issue. Furthermore, the current legislation contains inadequate and sometimes contradictory provisions on state secrets.

For all the reasons explained, the Ministry of Justice prepared a draft on the subject in May 2004. The draft attracted fierce criticism and a 13 article new draft was prepared on consultations with civil society organizations and academics. Then the new draft was submitted to the Prime Ministry on 24 November 2005. Its official title is the "Draft Bill on State Secret". Article 1 of the bill sets forth its aim as to regulate how secret information and documents on state secrets will be protected, disclosed and to regulate the obligations with this respect. Under its article 2 the bill would be applicable to all public establishments, councils and institutions as well as natural and legal persons who are related to documents and information on state secrets. It could be said that only official secrets are within the scope of the bill.

Article 3 defines the general characteristics of documents which are considered state secrets. Under this article state secret is documents and information which access to or disclosure of might harm the state's foreign relations, national defence or national security; might imperil constitutional order or foreign relations and therefore they are to be kept secrets as a matter of their nature. Article 3(2) prohibits the interpretation of this provision in a manner against the requirements of the democratic order of the society and the rule of law.

Apart from state secrets there is also another category of information covered by the bill, namely "other secret information and documents" which contains documents and information to which access can imperil the economical interests of the State, the State intelligence, military services, administrative investigation and judicial investigation and prosecution and the information and documents regarding the activities of authorized administrations prescribed as

such[38]. In addition the bill is subject to provisions on secrecy of the bilateral and multilateral international treaties to which Turkey is a party[39]. A State Secret Council whose function is to determine state secret would be established in accordance with the draft bill[40]. The bill also sets the time limits for state secrets[41]. It is accepted by the bill that the procedure and principles with regard to its application would be set forward by a by-law to be enacted by the Prime Ministry[42].

III. STATE SECRETS IN COMPARATIVE LAW

Apart from Turkish law, maintaining state security is an agenda item which is among the ones at the top in comparative law. Especially international terrorism led many states particularly the USA and EU countries to take serious measures with regard to national security. These measures are closely linked to the notion of state secret. The USA and UK will be examined with that regard as examples.

A. United States

The need for secrecy of certain information goes back to the Founding Fathers[43]. The Founders kept secret the diplomatic, military and intelligence sensitive information, not only from enemy states but also from the American people if that information was to maintain its vitality[44].

In the aftermath of the 11 September 2001 terrorist attacks the secrecy debate took on a new importance in the USA. The USA has a tradition of openness. The terror attacks have compelled a reappraisal of the balance between openness and national security in the USA like in many countries all over the world.

Currently, there is no Official Secrets Act in the USA. A proposal to create a criminal violation for the unauthorized release of classified information

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38 Art. 4.

39 Art. 5.

40 Art. 6.

41 Art. 7.

42 Art. 11.

43 In contrast T. Jefforson wrote that: "If a nation expects to be ignorant and free, in a state of civilization, it expetcs what never was and never will be." Mentioned in **Dycus**, Stephen, et. al., National Security Law, Aspen Publishers, Third ed., New York 2002, p. 911.

44 **Turner**, Robert F, War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility, 34 VA. J. Int'l L. 903, 922 (1994). Mentioned by **White**, p. 1073.

was vetoed by President Clinton in 2000. The then President stated "There is a serious risk that this legislation would tend to have a chilling effect on those who engage in legitimate activities"[45].

The Espionage Act of 1917 was a United States federal law passed shortly after entering World War I. It was made a crime for a person to convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies. The crime was punishable by a maximum $10,000 fine and 20 years in prison. At the moment, two former employees of the American Israel Public Affairs Committee are being prosecuted under the Espionage Act for receiving classified information. The prosecution has generated considerable controversy and interest in the USA[46].

The Espionage Act and the Sedition Act were used in some prosecutions during and after World War I that would be considered constitutionally unacceptable in the USA. While many of the laws were repealed in 1921, major portions of the Espionage Act remain part of United States law[47]. The United States Congress has also enacted other acts to protect specific types of information.

Standards for the classification and declassification of information are set by the Executive Order on Classified National Security Information which is issued by President Clinton in 20 April 1995 and amended by President Bush in 2003 to further restrict release[48]. Under the Order there are three sets of categories of classification; namely: Top secret, secret and confidential. The Order also requires that all information 25 years and older that has permanent historical value must be automatically declassified within five years unless it is exempted. Decisions to retain classification are subject to the Interagency Security Classification Appeals Panel[49].

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45 See Statement by the President to the House of Representatives. 4 November 2000.

46 http://www.irc-online.org/rightweb/profile/1432

47 18 USC 793, 794.

48 Executive Order 12958, as amended by Executive Order 13292, 68 Federal Register 15315 (28 March 2003). See **Hammitt**, Harry A. – **Zaid**, Mark S., National Security Information, in Eds. Harry A. Hammitt – David L. Sobel – Mark S. Zaid, Litigation Under the Federal Open Government Laws 2002, EPIC Publications, Twenty-first Edition 2002, p. 35.

49 Executive Order 12958.

The state secrets doctrine and the closely related Totten doctrine goes back to the American Civil War. *Totten v. United States* is an infamous case in this respect[50]. It was a case brought by the heir of a spy for President Lincoln. The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President. He was to be paid $200 a month for these services. The Court of Claims found that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President; and that, upon the close of the war, he was only reimbursed his expenses, not the $200 per month that President Lincoln allegedly promised him. The Supreme Court dismissed Totten's claim to preserve national security interests.

The President was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.

The Court held that it was against public policy for a court to hear a case in which the trial would inevitably lead to the disclosure of confidential information. The Court also noted: "Both employer and agent must have understood that the lips of other were to be for ever (*sic*) sealed respecting the relation of either to the matter". The Totten doctrine did not provide for in camera review of allegedly secret evidence and thus has been a useful tool for the government to dismiss litigation brought by contractors for the development of military technology, as well as in other types of cases involving classified information[51].

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and

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50 92 U.S. 105 (1875). **Silverman**, Matthew, National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information, ILJ, vol. 78, 2003, p. 1103.

51 See **Flynn**, Sean C., The Totten Doctrine and Its Poisoned Progeny, 25 VT. L. REV. 793, 797 (2001). Mention in Silverman, p. 1103.

respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences.

The Totten doctrine was used to dismiss lawsuits brought by South Vietnamese commandos hired by the CIA during the Vietnam War. In a case called *Guong v. United States*, one of these commandos eventually escaped from a Vietnamese prison in 1980 and arrived in the United States to sue the government for nearly half a million dollars in back-pay. The case was dismissed by the Federal Circuit, which relied on Totten's rationale that no case can be brought to enforce a contract that was secret or covert at the time of its creation[52].

The state secrets privilege was more fully developed in the landmark case of *United States v. Reynolds*[53]. In Reynolds, a military aircraft on a secret surveillance mission crashed, killing civilian observes who were on board. Certain widows of the victims sued the government for compensation under the Federal Tort Claims Act and moved for discovery of Air Force accident investigation reports. The Secretary of the Air Force lodged a formal claim of privilege against revealing military secrets. The Court held that courts must determine whether the "circumstances are appropriate fort he claim of privilege, and yet do so without forcing a disclosure of the (information that) the privilege is designed to protect".

The US Freedom of Information Act specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order. The current US Administration has engaged in a general policy of restricting access to information. The Bush Administration has also refused to release information about the secret meetings of the energy policy task force; ordered federal websites to remove much of the information that they had that could be sensitive; issued a controversial memo limiting access to records under the Presidential Records Act in November 2001 which allows former Presidents and Vice-Presidents to prevent Access to records[54]; and refused to disclose information on the Patriot Act and the names of those arrested September 11. For these reasons, the Bush administration and especially

52 **Silverman**, p. 1103.

53 345 U.S. 1 (1953). **Silverman**, p. 1104.

54 Executive Order 13233 of 1 November 2001.

its Executive Order created in the name of national security is criticized[55]. In the USA state secrecy is viewed from the point of view of countering terrorism[56].

B. United Kingdom

Legal regulation of state security matters in the UK is relatively recent. Although the original Official Secrets Act dates back to 1889, it has only been in the past two decades that statute has regulated the interception of communications[57], and the security and intelligence services, MI5 and MI6, and the government's signals intelligence organization, Government Communication Headquarters (GCHQ)[58]. Incorporation of Convention rights under the Human Rights Act 1998 necessitated further clarity in the law, provided by the Regulation of Investigatory Powers Act 2000, the main purpose of which is to ensure that relevant investigatory powers are used in accordance with human rights.

The first Official Secrets Act arrived on the statute book in 1889. The latest Act is that of 1989. The 1911 Act was passed through Parliament with one hour's debate and within 24 hours. Motivation for the 1911 Act lay in alleged enemy agent activities in the country.

The UK has a strong tradition of state secrets culture[59]. The state secrets culture[60] in the UK administration is supported by the criminal sanctions of the

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55 **Barker**, Anne, Executive Order No: 13233: A Threat to Government Accountability, Government Information Quarterly, vol. 22, 2005, pp. 5-15.

56 See **Blanton**, Thomas, National Security and Open Government in the United States: Beyond the Balancing Test, in Campbell Public Affairs Institute, National Security and Open Government: Striking the Right Balance, New York 2003, pp. 33-45.

57 Interception of Communication Act 1985, State Security Act 1989, Intelligence Services Act 1994.

58 See **Kaya**, İbrahim, İngiltere'de Silahlı Kuvvetlerin Anayasal Konumu ve Askeri Hukuk (Constitutional Status of Armed Forces in Britain and Military Law), AYİM Dergisi, 2000, no. 14, p. 139.

59 **Mason**, Anthony, The Relationship Between Freedom of Expression and Freedom of Information, in Eds. Jack Beatson – Yvonne Cripps, Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams, Oxford University Press, Oxford 2000, p. 233.

60 Preface to the White Paper on Freedom of Information by Prime Minister Tony Blair reads that: "The traditional culture of secrecy will only be broken down by givingpeople in the United Kingdom the legal right to know." Mentioned in **Wadham**, John and **Modi**, Kavita, National Security and Open Government in

Official Secrets Act 1911. The Bill that became the Official Secrets Act 1911 was introduced into the House of Lords after the Agadir crisis almost with no debate[61]. The Act is the main basis of state secrets in the UK administration.

The Act protects all official information without taking into account their importance and the public interest. Section 2 of the Act was written to include more than 2000 different categories of crime with regard to the misuse of official information[62].

Section 1 of the 1911 Act provides penalties for spies. It is an offence to enter into top secret establishments or to collect, publish or communicate any official document or information, which might be useful to an enemy, if the actions are carried out "for any purpose prejudicial to the safety or interest of the state". The accused has no "right to silence" and a trial may be held in secret, or partly in secret. Section 2 of the Act reverses the normal burden of proofs from the prosecution to the defence. It is not necessary for the prosecution to prove that the accused is guilty of any particular act "tending to show a purpose prejudicial to the safety or interest of the state". Guilt may be established if "from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interest of the state". Moreover, any information or document handed over to another person, without lawful authority, shall "be deemed to have been made, obtained, collected, recorded or communicated for a purpose prejudicial to the safety or interests of the state unless the contrary is proved"[63]. Penalties for espionage are extremely heavy. George Blake, a former MI6 officer convicted of espionage, was sentenced to 42 years' imprisonment. In 1985, Michael Bettany, a former MI5 officer, was convicted of attempting to pass official information to the Russians and sentenced to 23 years' imprisonment. Geoffrey

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the United Kingdom in in Campbell Public Affairs Institute, National Security and Open Government: Striking the Right Balance, New York 2003, p. 75.

61 Germany's action in sending a gunboat to the port of Agadir, with a promise to assist the Moroccans against France, nearly precipitated a European war. **Jackson**, Paul, – **Leopold**, Patricia, O. Hood Phillips & Jackson: Constitutional and Administrative Law, Sweet & Maxwell, Eighth Edition, London 2001, p. 599, fn. 2.

62 For the act see **Thompson**, Donald, The Committee of 100 and The Official Secrets Act, 1911, Public Law, Summer 1963, pp. 201-226; **Palmer**, Stephanie, Tightening Secrecy Law: The Official Secrets Act 1989, Public Law, Summer 1990, p. 243.

63 **Barnett**, p. 814.

Prime was sentenced to 35 years for disclosing material whilst employed at GCHQ[64].

The main features of the criminal liability arising under section 2 of the Official Secrets Act 1911 may be summarized as follows[65]:

1) Those who may be liable: persons who hold or have held Office under the Crown; those who have received information in confidence from such persons; past or present government contractors and those in their employ; and the willing recipients of information passed to them in contravention of the Act.

2) Information in respect of which liability may arise: information obtained, or to which a person has had access, owing to his position as one holding, or who has held, office under the Crown or who is or has been a government contractor or someone in his employ.

3) Circumstances giving rise to liability: communication of information to anyone other than someone authorized to receive it or someone "to whom it is in the interest of the State his duty to communicate it"; and the willing receipt of information by anyone which he knows or has reasonable grounds for believing was passed to him in contravention Act.

4) Penalties: The maximum penalty for a breach of section 2 is on indictment two years imprisonment with the alternative or addition of a fine of unlimited amount. In summary proceedings the maximum sentence of imprisonment which can be imposed is three months and the maximum permissible fine, as an alternative or as an addition, is £ 2000.

In 1988 a Member of Parliament, Richard Shepherd taking into account the cases of Tisdall[66] and Ponting[67] prepared a bill to reform section to 2 of the

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64 **Barnett**, pp. 814-815. For British secret services and law see **Kaya**, İbrahim, Devlet Güvenliği ve İngiliz Gizli Servisleri: Anayasa ve İdare Hukuku Açısından Yaklaşım (State Security and British Secret Services: A Constitutional and Administrative Law Approach), Eds. Laçiner, Sedat, Bir Başka Açıdan İngiltere, ASAM, Ankara 2001, p. 323.

65 **Marsh**, Norman S., Public Access to Government – Held Information in the United Kingdom: Attempts at Reform, in Public Access to Government – Held Information: A Comparative Symposium, Stevens & Son Ltd., London 1987, p. 250.

66 The young Foreign Office clerk Sarah Tisdall leaked to The Guardian newspaper details of when controversial American cruise missiles would be arriving on British soil. She was found guilty and sentenced to six months, although she only served three. Secretary of State for Defence v. Guardian Newspapers Ltd [1985] AC 339.

Official Secrets Act 1911. However, this was not welcomed by the Conservative government. But, a year later in 1989 section 2 was annulled by the Official Secrets Act 1989. Its title is: An Act to replace section 2 of the Official Secrets Act 1911 by provisions protecting more limited classes of official information.

The motives behind the 1989 Act were formed largely from the failure of the earlier Act. The catch-all nature of section 2 of the Official Secrets Act 1911 has thus been reformed. Section 2 of the Official Secrets Act 1911 is repealed and replaced by the 1989 Act[68]. Rather than the catch-all section 2 of the 1911 Act, the 1989 Act creates offences directed to specific groups of people and information[69]. In relation to most areas, the prosecution must prove both that the information has been unlawfully transmitted and the disclosure or the information is "damaging"[70]. However, the concept of "damaging disclosure" has not been incorporated into section 1 which relates to security and intelligence matters. With the exception, there is a presumption of harm built into the Act. A further exception relates to those who are not Crown servants or government contractors in relation to whom the prosecution will have to prove – in addition to the harm test – that the defendant knew or had good reasons to know that the specific harm was likely to have been caused. In relation to such information, the disclosure in itself is an offence. There is no longer a defence of "public good" which applied under section 2 of the 1911 Act[71].

Penalties in the 1989 Act: are as follows A person convicted of an offence under the Act, other than under section 8(1), (4), (5), shall, on indictment, be liable to imprisonment for a two year term, or a fine, or both. On summary conviction, a person is liable to up to a six month's term of imprisonment, or a fine, or both. A person convicted under section 8(1), (4) or

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67 The 1985 Ponting case was in some ways the landmark Official Secrets case. Clive Ponting, who had worked at the Ministry of Defence, walked free from court after a jury cleared him of breaking the Official Secrets Act. It was hailed as a victory for the jury system. The judge had indicated that the jury should convict him. Ponting had been charged with leaking an internal MoD document concerning the General Belgrano, the Argentinian cruiser which British forces sank during the 1982 Falklands War, killing 360 people. The government line had been that the Belgrano was threatening British lives when it was sunk. But the document leaked by Ponting indicated it was sailing out of the exclusion zone. R. v. Ponting [1985] Crim. LR. 318.

68 For the criticism of this act see. **Palmer**, p. 243.

69 **Barnett**, p. 815.

70 **Barnett**, pp. 815-816.

71 **Barnett**, p. 816.

(5) is liable, on summary conviction, to a term of imprisonment up to the three months or a fine, or both.

The Official Secrets Act, which still includes provisions originally adopted in 1911, criminalizes the unauthorized release of government information relating to national security[72]. It has been frequently used against government whistleblowers and the media for printing information relating to the security services.

Under Section 24 of the Freedom of Information Act national security is an exemption, among others. Under the Act disclosure of an information which is not supplied by, or relating to, bodies dealing with security matters are exempted.

CONCLUSION

States take measures to provide a secure and safe environment for individuals to live in. State activities to this end are sometimes "preventive" like police patrolling on the streets. Some activities are "punititative" like catching the criminals and sending them in prison. In short, state maintains and restores order. For this respect states regard some documents and information as "official secrets". Because disclosure of them may endanger public order and state security. Therefore, states take necessary measures to prevent them from being made public (preventive measures) and, on the other hand, if they are disclosed states take measures to prosecute the criminals (punititative measures). By maintaining state security states provide a secure and free environment for individuals and society.

Even it is referred to by different notions, state secret is a universal term applied in every country in the world. The term state secret is also vague and there is no consensus on its definition. State secret has to be treated in a modern and new way in accordance with recent understandings in the era we live in. For this purpose, a state secrets law is a must. The law must put forward the elements of state secrets and list documents and information to be considered as state secrets at least. In doing so a balance between fundamental rights and freedoms of individuals and state security must be struck. This could be the basis for legality and also for legitimacy.

Currently there is no single law with regard to state secrets in Turkey. Yet Turkey has a bill which is a step forward even it has some shortcomings. A possible enactment of the bill would help the implementation of the Freedom of Information Act and people would have a chance to know when they have right

[72] Offical Secrets Act, 1911 (Section 1); OSA 1920; OSA 1939; OSA 1989 (c. 6).

to use it adequately. The bill makes the content of the state secrets clearer whereby not only men on the street but also public officials would know whether a certain information is state secret.

It must be stated that even in a democracy, the government must be able to control the flow of information within certain limits which must be made clear to the public.

BIBLIOGRAPHY

Akgüner, Tayfun, 1961 Anayasasına Göre Milli Güvenlik Kavramı ve Milli Güvenlik Kurulu (National Security and National Security Council Under 1961 Constitution), İstanbul University Publishing, İstanbul 1983

Akgüner, Tayfun, Some Thoughts on National Security Concept, İdare Hukuku ve İlimleri Dergisi, Vakur Versan'a Armağan Özel Sayısı, Year 6, Dec. 1985, no. 1-3.

Akıllıoğlu, Tekin, Yönetimde Açıklık – Gizlilik ve Bilgi Alma Hakkı (Openness – Secrecy in Administration and Freedom of Information), I. Ulusal İdare Hukuku Kongresi (1-4 Mayıs 1990), İkinci Kitap, Kamu Yönetimi, Ankara 1990.

Barker, Anne, Executive Order No: 13233: A Threat to Government Accountability, Government Information Quarterly, vol. 22, 2005.

Bayraktar, Köksal, İdare ve Ceza Hukuku Açısından Bilgi Edinme Hakkı (Freedom of Information in Administrative and Criminal Law), Bilgi Edinme Hakkı Paneli (5 Mayıs 2004), Türkiye Barolar Birliği Yayınları, No: 63, Ankara 2004.

Blanton, Thomas, National Security and Open Government in the United States: Beyond the Balancing Test, in Campbell Public Affairs Institute, National Security and Open Government: Striking the Right Balance, New York 2003.

Collins Cobuild Dictionary, Oxford 1990, p. 715.

Duran, Lûtfi, İdare Hukuku Ders Notları (Course Notes on Administrative Law), İstanbul 1982.

Dycus, Stephen, et. al., National Security Law, Aspen Publishers, Third ed., New York 2002.

Eken, Musa, Kamu Yönetiminde Açıklık ve Bilgi Edinme Hakkı (Openness and Freedom of Information in Public Administration), Unpublished PhD Thesis, İzmir 1993.

Eken, Musa, Kamu Yönetiminde Gizlilik Geleneği ve Açıklık İhtiyacı (The Tradition of Secrecy and Need for Openness in Public Administration), Amme İdaresi Dergisi, v. 27, June 1994, no. 2.

Gemalmaz, Mehmet Semih – **Gemalmaz**, Haydar Burak, Ulusalüstü İnsan Hakları Standartları Işığında Türkiye'de Bilgi Edinme Düşünce – İfade ve İletişim Mevzuatı (In the Light of Supra-National Human Rights Standarts Freedom of Information, Thought – Expression and Communication Legislation in Turkey, Yazıhane Yayınları, İstanbul 2004.

Hammitt, Harry A. – **Zaid**, Mark S., National Security Information, in Eds. Harry A. Hammitt – David L. Sobel – Mark S. Zaid, Litigation Under the Federal Open Government Laws 2002, EPIC Publications, Twenty-first Edition 2002.

Jackson, Paul, – **Leopold**, Patricia, O. Hood Phillips & Jackson: Constitutional and Administrative Law, Sweet & Maxwell, Eighth Edition, London 2001.

Kaya, İbrahim, Devlet Güvenliği ve İngiliz Gizli Servisleri: Anayasa ve İdare Hukuku Açısından Yaklaşım (State Security and British Secret Services: A Constitutional and Administrative Law Approach), Eds. Laçiner, Sedat, Bir Başka Açıdan İngiltere, ASAM, Ankara 2001.

Kaya, İbrahim, İngiltere'de Silahlı Kuvvetlerin Anayasal Konumu ve Askeri Hukuk (Constitutional Status of Armed Forces in Britain and Military Law), AYİM Dergisi, 2000, no. 14,.

Marsh, Norman S., Access to Government-Held Information: An Introduction, in Ed. Norman S. Marsh, Public Access to Government-Held Information: A Comparative Symposium, Steven & Son Ltd. London 1987.

Marsh, Norman S., Public Access to Government – Held Information in the United Kingdom: Attempts at Reform, in Public Access to Government – Held Information: A Comparative Symposium, Stevens & Son Ltd., London 1987.

Mason, Anthony, The Relationship Between Freedom of Expression and Freedom of Information, in Eds. Jack Beatson – Yvonne Cripps, Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams, Oxford University Press, Oxford 2000.

Mendel, Toby, National Security v. Openness, in Campbell Public Affairs Institute, National Security and Open Government: Striking the Right Balance, New York 2003.

Özek, Çetin, Basın Özgürlüğünden Bilgilenme Hakkına (From Freedom of Press to Right to Information), İstanbul 1999.

Palmer, Stephanie, Tightening Secrecy Law: The Official Secrets Act 1989, Public Law, Summer 1990.

Savaş, Vural – **Mollamahmutoğlu**, S., Türk Ceza Kanunu Yorumu (Interpretation of Turkish Penal Code), v. II, Ankara 1995.

Silverman, Matthew, National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information, ILJ, vol. 78, 2003.

Thompson, Donald, The Committee of 100 and The Official Secrets Act, 1911, Public Law, Summer 1963.

Wadham, John and **Modi**, Kavita, National Security and Open Government in the United Kingdom in in Campbell Public Affairs Institute, National Security and Open Government: Striking the Right Balance, New York 2003.

White, Laura A., The Need for Governmental Secrecy: Why the U.S. Government Must Be Able to Withold Information in the Interest of National Security, VJIL, vol. 43, no. 4, 2003.

Yayla, Yıldızhan, İdare Hukuku I (Administrative Law I), Filiz Kitabevi, İstanbul 1990.

Yıldırım, Ramazan, İdare Hukuku Açısından Bilgi Edinme Hak ve Özgürlüğü (Right to and Freedom of Access to Information in Administrative Law), T.C. Başbakanlık İdari Usul Kanunu Hazırlığı Uluslararası Sempozyumu, (17-18 Jan. 1998)