COMPENSATING DAMAGES ARISING FROM PUBLIC SERVICES THROUGH ALTERNATIVE DISPUTE RESOLUTION METHODS. QUEST FOR FUTURE*

Kamu Hizmetlerinden Kaynaklanan Zararların Alternatif Uyuşmazlık Çözüm Yöntemleriyle Giderilmesi. Geleceğe Yönelik Bir Arayış

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ABSTRACT

In Turkey, as in the world, idea of resolving administrative disputes through non-judicial mechanisms has emerged in order to eliminate inconveniences caused by the increase in administrative justice's workload. However, current Turkish constitutional structure and administrative law's pecularities make it difficult for alternative resolution methods to be a real alternative to jurisdiction. Although procedures such as administrative appeals, mediation and application to ombudsperson, which are in force, have a very wide application and are advantageous methods compared to judicial adjudication in theory, they are far from being a success due to practicalties. In order to explore ways to reduce the workload of administrative justice and increase use of alternative methods in Turkish administrative law, developments in French law, which gives great importance to judicial authority in administrative disputes, might be taken into account. Thanks to amendments made in French legislation, alternative remedies, which also exists in Turkish law such as mediation or ombudsperson, have become more effective.

Keywords: alternative methods, ombudsperson, mediation, administrative dispute, administrative appeal.

ÖZET

Dünyada ve Türkiye›de de idari yargının iş yükünün artmasından kaynaklanan olumsuzlukların giderilmesi bakımından idari uyuşmazlıkların yargı dışı mekanizmalar yoluyla çözümlenmesi anlayışı ortaya çıkmıştır. Ancak, Türk hukukundaki mevcut anayasal yapı ve idare hukukunun kendine has özellikleri, alternatif çözüm yöntemlerinin idari yargıya gerçek bir alternatif olmasını güçleştirmektedir. Yürürlükte olan idari başvurular, arabuluculuk ve ombudsmanlık başvurusu gibi usuller teorik anlamda çok geniş bir uygulama alanına sahip olmasına ve yargıya nazaran avantajlı özellikler taşımasına rağmen, başarılı olmaktan pratikte oldukça uzak kalmıştır. Türk hukukunda idari yargının iş yükünü azaltmak ve idari uyuşmazlıkların çözümünde alternatif yöntemlerin kullanımını artırmak bakımından, idari uyuşmazlıkların çözümünde yargı yoluna büyük önem atfeden Fransız hukukundaki gelişmelerin incelenmesi faydalı olabilecektir. Fransız mevzuatında yapılan değişikliklerle arabuluculuk ve ombudsmanlık kurumu gibi

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Türk hukukunda da yer alan alternatif yöntemler daha etkin hale getirilmiştir.

Anahtar Kelimeler: alternatif yöntemler, ombudsman, arabuluculuk, idari uyuşmazlık, idari başvuru.

INTRODUCTION

In the last paragraph of Article 125 of Turkish Constitution it is stipulated that, the administration shall be liable to compensate for damages resulting from its actions. Articles 40 and 129 of the Constitution also contain provisions regarding liability. The state has the duty to provide public services in most appropriate conditions and at the highest level in meeting the needs. In case of failure of fulfilling this duty, aggrieved persons may demand compensation from administration.

Pursuant to Article 2 of Administrative Judicial Procedure Law(AJPL), lawsuits filed for compensation of damages arising from public services are full remedy actions. Besides, according to Article 155 of the Constitution, the Council of State is the last instance for reviewing judgments of administrative courts. So the aggrieved person may apply to administrative courts in order to demand compensation from administration.

As the scope of public services extended, there has been a striking increase on caseload of administrative tribunals[1]. Because of this excess, judicial procedures take long time. Expansion of judicial review has led to inefficiencies, such as delays and disproportionate litigation costs, that compromised ability of the courts to safeguard a proportionate dispute resolution and diminished their ability to assure good administration[2]. Access to justice has become more difficult and expensive[3]. This violates the right to a fair trial which is enforced by the European Convention of Human Rights (ECHR)[4]. As a matter of fact, the Council of Europe recommended application of alternative dispute resolution methods also for administrative disputes in 2001[5].

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1 Karine Gilberg, Fransız İdari Yargı Sisteminde Reformlar ve Alternatif Uyuşmazlık Çözüm Yöntemleri (Council of Europe 2020) 29.

2 David Marrani and Youseph Farah, 'ADR in the Administrative Law: A Perspective from the United Kingdom' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) p. 259; Gatis Litvins, 'Alternative Methods of Judicial Protection and Dispute Resolution in Administrative Law' (2018) 1 ELTE Law Journal 371.

3 Mehmet Karaarslan, 'Genel ve Özel Bütçeli İdarelerin Taraf Olduğu Uyuşmazlıkların Çözümünde Yardımcı Bir İdari Birim: 'Hukuki uyuşmazlıkları Değerlendirme Komisyonu' in Tahir Muratoğlu and M. Burak Buluttekin (eds) *Hukukta Alternatif Uyuşmazlık Çözüm Yolları* (Seçkin 2018) 84.

4 Yahya Zabunoğlu, 'Adil Yargılanma Hakkı ve İdari Yargı' (2000) 2000 Yılı Yargı Reformu Sempozyumu 319.

5 Council of Europe Recommendation, Rec(2001)9 03/09/2001.

Alternative dispute resolution procedures have been applied for a long time in private law[6]. Because of the fact that administrative trials have become increasingly formal, costly, and lengthy, resulting in expenditures, alternative tools that are faster, less expensive and contentious, has also begun to be regulated for administrative disputes[7]. Alternative methods are aimed to provide most appropriate dispute resolution and promoting public trust to administration[8]. Here, dispute is evaluated in terms of legality, equity and fairness, which prevents negative consequences that will occur in case of legal rules' strict application. Alternative methods also have better possibilities to preserve good relations between parties of dispute[9].

Alternative dispute resolution methods might be defined as procedures which generally require the participation and assistance of an independent and impartial third party and that are alternative to litigation carried out by courts[10]. Although it is not impossible to make an exhaustive list, some of them might be enumerated as negotiation, mediation, short trial, preliminary impartial assessment, mini jury trial, ombudsman and arbitration[11]. Alternative tools are described in US Administrative Dispute Resolution Act of 1996 as "any procedure that is used to resolve issues in controversy"[12], which can be understood in a narrower sense, by focusing not on alternatives to proceedings led by administrative authority but to proceedings of a court considering administrative appeals, besides mediation and ombudsperson[13]. But, alternative tools are not real alternatives to courts which replace them, but might be accepted as procedures that could be applied before taking a case to the court[14].

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6 Council of Europe Recommendation, Rec(86)12 16/05/1986.

7 Rec. (n5).

8 Litvins (n2) 372.

9 Nilay Arat, 'Türk İdare Hukukunda Alternatif Uyuşmazlık Çözüm Yolları' (Doctoral thesis, İstanbul University 2009) 73; Bengt Lindell, 'Alternative Dispute Resolution and the Administration of Justice – Basic Principles' (2007) 51 Scandinavian Studies in Law 315.

10 Mustafa Özbek, 'İdarî Uyuşmazlıkların Çözümünde Yargılama Dışı Usuller (I)' (2005) 56 Türkiye Barolar Birliği Dergisi 90; İbrahim Özbay, 'Alternatif Uyuşmazlık Çözüm Yöntemleri' (2006) 10(3-4) Erciyes Üniversitesi Hukuk Fakültesi 461.

11 ibid 464.

12 www.adr.gov.

13 Alexander Balthasar, 'Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law' (2018) 1 Elite Law Journal 11; Ahmet Özkan, 'Alternatif Uyuşmazlık Çözüm Yollarının Yargılama Sürecine Etkisi ve İdari Yargı Sisteminde İşlerliği' (2016) Süleyman Demirel Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 620; Nusret İlker Çolak 'İdari Uyuşmazlıklarda Alternatif Çözüm Yolları' www.ilkercolak.com.tr accessed 15 December 2021.

14 Özbay (n10) 460.

In countries of Anglo-Saxon law sphere, alternative methods have emerged in both private and public law. Since specialized rules are not applied for public activities, same authorities participate in resolution of disputes between individuals and administration with individuals: ombudsperson resolves disputes arising from consumer law, construction law, insurance law or labor law[15]. In Scandinavian countries, where alternative procedures have a wider application, administrative courts' monopolistic nature in dispute resolution has been weakened and control on administration is shared between judicial and independent administrative authorities. In this study, which aims to explore ways to reduce the workload of administrative justice by increasing application of alternative methods, solutions will be sought based on developments in French law, which gives great importance to administrative judicial authority as in Turkish law.

In first chapter, current legal situation concerning applicability of alternative methods in Turkish law and their success will be examined **(I)**. In second part by analyzing situation in comparative law, we will look for solutions to make them successful and present new methods that might succeed **(II)**.

I. ALTERNATIVE DISPUTE RESOLUTION METHODS IN ADMINISTRATIVE LAW: ARE THEY REALLY USEFUL?

In accordance with principles in Turkish Constitution, arrangements have been made to distribute dispute resolution authority between judiciary and alternative methods **(A)**. Various studies were made to break the judicial monopoly in resolution of administrative disputes. However, it is hard to say that they have been successful **(B)**.

A. Applicability of Alternative Dispute Resolution Methods and its Limits

In administrative law the fundamental principle is judicial review of the legality of administrative actions. According to Article 125 of Constitution, recourse to judicial review shall be available against all actions of administration who shall be liable to compensate for damages resulting from its actions. As also emphasized by the Constitutional Court, it is unconstitutional to exclude actions of administration from judicial review[16].

Besides, according to Article 2 of the Constitution, Turkey is a democratic state, governed by rule of law, within the notion of justice, respecting human rights. The efficiency of judicial protection and dispute resolution presents one of the cornerstones of a democratic state. Undoubtedly, in accordance with the

15 Özbek (n10) 129.

16 Constitutional Court, E:2008/112-K:2010/31, 04/02/2010.

principle of rule of law, there should be no administrative action not subjected to judicial review[17]. The purpose of administrative judicial review is to force administration to stay within the scope of rule of law[18]. Administrative justice has two sets of values[19]: delivering of fair and quality justice, achieving of efficient resolution of dispute[20].

However, alternative methods focuses on interests of parties rather than focusing upon the parties' existing rights[21]. The main aim is not ensuring rule of law, but resolving the dispute. Therefore, application of alternative methods in administrative law, falls short of satisfying the constitutional values[22]. Here, we need to ask how to apply administrative methods while preserving constitutional values. Since it is almost impossible to maximize these values, it is useful to utilize the complementarities among judicial review, the tribunals system and administrative dispute resolution[23].

The most important discussion concerning alternative dispute resolution tools is on principle of access to court. This principle is one of the essential features of rule of law which is protected under Article 2 of Constitution, but it is also covered in Article 36 of Constitution. Article 125 of the Constitution ruled that recourse to judicial review shall be available against all actions of administration. The alternative methods should be commenced or continued if the litigation before the court is unavoidable and judicial review is a remedy of last resort. Aggrieved individuals should have the option to seek remedy before the court following an unsuccessful alternative procedure. The same approach is also underlined by the Constitutional Court, "…alternative dispute resolution methods are introduced in order not to occupy the courts with matters that do not need to be resolved through litigation and subsequent judicial review do not prevent the right to access to a court."[24] So, alternative methods cannot replace jurisdiction. The Council of Europe's the Committee of Ministers also recommends that the use of alternative means should allow appropriate judicial review which ensures protecting both users' rights[25].

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17 Bahtiyar Akyılmaz, Murat Sezginer, Cemil Kaya, *Açıklamalı – İçtihatlı Türk İdari Yargılama Hukuku* (Savaş 2019) 107.

18 Metin Günday 'İdari Yargının Görev Alanının Anayasal Dayanakları' (1997) 14 Anayasa Yargısı Dergisi 347.

19 Erhan Tutal, *Dünyada ve Türkiye'de Ombudsmanlık* (Adalet 2014) 241

20 Constitutional Court, E:1976/1-K:1976/28 25/05/1976.

21 Nilay Arat, 'Türk İdare Hukukunda Alternatif Uyuşmazlık Çözüm Yolları' (Doctoral thesis, İstanbul University 2009) 899.

22 Marrani and Farah (n2) 267.

23 ibid 260.

24 Constitutional Court, E:2016/143-K:2017/23, 09/02/2017; Constitutional Court, E:2013/96-K:2014/118 03/07/2014.

25 Council Directive 2008/52/EC 21 May 2008 certain aspects of mediation in civil and commercial matters [2008] OJ 136/3.

The right to access to a court is protected in Article 6 of ECHR[26] which is also underlined by European Court of Human Rights (ECtHR). Firstly, the application of noncompulsory alternative methods is not accepted as a restriction of the right to access to a court[27], where aggrieved person has possibility of making a claim before the court or sustaining the right until the end of alternative resolution initiative. Also, mandatory alternative methods before starting court trial are not found directly contrary to the ECHR. The right to access to court might be restricted with the condition of exhaustion of remedies. But, if such conditions delay the filing of the case for a long and indefinite period, this may be considered a violation of the right[28]. The ECtHR found it unlawful not to set a deadline for conclusion of application[29]. A reasonable period of time must be allowed for the application to a mandatory procedure, otherwise it is considered as a violation of the right to access to court[30]. Moreover, if the deadline is missed due to complexity of procedure, it would be a violation of the right to file a lawsuit[31].

In accordance with the explanations above, it is possible to resolve administrative disputes with alternative methods. However, it is obligatory to keep open the possibility of applying to the judicial authorities if the dispute cannot be resolved by these methods[32].

Furthermore, the role of court acting in the field of administrative law is quite different from that in private law. Also, the role of administrative authority differs from the parties'. Firstly, relationship between individuals and administration is asymmetrical, authoritarian, unequal and hierarchical[33]. Since one of the parties has an advantage, this kind of relationship is contradictory to the idea of negotiation[34].

Secondly, administrative authority is bound by the principle of legality. The actions of administration should be based on the competences given by

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26 Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press 2011) 270.

27 K. Burak Öztürk, *Hak Arama Özgürlüğü Çerçevesinde Zorunlu İdari İtiraz* (Yetkin 2015) 115.

28 Sibel İnceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı* (Beta 2008) 134.

29 *Janosevic v. Sweden* App nº34619/97 (ECtHR 21/05/2003).

30 *Hennings v. Germany* App nº12129/86 (ECtHR 16/12/1992).

31 *De Geouffre de la Pradelle v. France* App nº12964/87 (ECtHR 16/12/1992).

32 Özbay (n10) 463.

33 K. J. de Graaf and A. T. Marseille and H. D. Tolsma, 'Mediation in Administrative Proceedings: A Comparative Perspective' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 595.

34 Arat (n9) 220; Lindell (n9) 315.

the legislator[35]. The activity of negotiate could only be lawful if the authority is legally competent to amend its precious decision[36]. The administration is sometimes completely bound by the law; but in other cases, has discretionary power. If administration has no discretionary power, there is a very limited applicability of alternative tools. Otherwise, if administration acts in a different way from the statutory rules, it would be against the rule of law.

Another problem is related to the principle of equality. Article 10 of Constitution guaranteed that administrative authorities are obliged to act in compliance with the principle of equality. This fundamental principle implies equal treatement of equal cases. This rule limits possibility of an administrative authority negotiating on the use of its discretionary power[37]. Here, in response to the appeal, it has competence to investigate whether to use its discretionary power differently, which might keep with the interests of parties. But also, administration should apply its discretionary power for the benefit of public interest[38].

Lastly, an important characteristic of alternative methods is confidentiality. Access to information is also one of the most important features that will allow for public participation and contribute to the accountability of administration. In this respect, aspect of confidentiality in dispute resolution and principle of transparency in administrative law seem to be in conflict with each other[39].

Because of these reasons, it is hard to say that alternative tools play a major role and are a real alternative to court proceedings, but might be applied in a limited scope of subjects. Firstly, all actions of administration subject to private law are eligible for alternative procedures. For the matters of administrative law, since the wills of parties are not considered in matters of public interest, the application of alternative methods will be narrower. Here, resolution of dispute may create results that exceeds the limit of the rights and interests of parties. In general, it might be considered that negotiation should not lead a party to renounce the exercise an action for excess of power, if the object of dispute affects third parties[40]: such as rulemaking acts of administration. Also, individual acts that have effects on behalf of third parties do not seem conducive. Besides, if administration has bound power or in the matter of

35 Arat (n21) 895.

36 Aynur Cidecigiller, *İdarenin Taraf Olduğu Uyuşmazlıkların Sulh Yoluyla Çözümlenmesi* (Adalet 2015) 35.

37 Arat (n21) 896.

38 Indeed, control of discretionary power of administration, United Kingdom, is accepted as one of the reasons for emergence of ombudsperson. (Müslüm Akıncı, *Bağımsız İdari Otoriteler ve Ombudsman*, (Beta 1999) 269).

39 De Graaf and Marseille and Tolsma (n33) 599.

40 Arat (n9) 234.

sanctions, administration has no authority to negotiate. In general, we can say that matters concerning demands of compensation which cause full remedy action are suitable for negotiation process[41].

B. Current Alternative Methods: Are They Really Alternative?

In Turkish legislation there are several arrangements ensuring alternative procedures to administrative disputes. Some of them are for the resolution of disputes between administrations[42]. For example, in Article 4 of Law No. 3533, a procedure of arbitration has been regulated for settlement of private law disputes between administrations[43]. In addition, sometimes administrations are authorized to settle disputes between individuals, where administration acts as conciliator, not as a party of dispute[44]. In this study, which only examines the damages on individuals as a result of the administrative activities, these remedies will not be examined.

Alternative methods that find the widest application in administrative law may be listed as administrative appeals, mediation and ombudsperson institution **(1)**. However, it is still disputable these procedures constitute a real alternative to justice **(2)**.

1. Current Alternative Dispute Resolution Methods

Administrative applications are the earliest method for compensation of damages arising from administrative activities. This method is based on understanding that administration should indemnify damages caused by itself **(a)**. Another method is mediation procedure, whose limited application in administrative disputes has begun since 1990s **(b)**. The ombudsperson is also one of the nonjudicial dispute resolution mechanism, who investigates administration's behaviours **(c).**

a. Administrative Appeals

Administrative appeals might be described as requests addressed to a public authority by which aggrieved person demands administrative measures to be taken regarding an administrative decision or action[45]. The appeal may concern

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41 Murat Asiltürk, 'Arabuluculuk Müessesesinin İdari Yargılama Hukuku Uyuşmazlıklarının Çözümlenmesinde Uygulanabilirliği' (2014) 95 Terazi Hukuk Dergisi 37.

42 Aynur Hasoğlu, 'İdare Hukukunda Alternatif Uyuşmazlık Çözüm Yolları' (2016) 65(4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 1989.

43 Laws nº3867, 3289, 4586, 5312 and 5502 contain regulations regarding resolution of disputes between administrations through arbitration.

44 In Laws nº442, 6326, 3091, 406 and 2813, there are regulations regarding resolution of disputes between individuals by administration.

45 Dacian C. Dragos and David Marrani, 'Administrative Appeals in Comparative European Administrative Law: What Effectiveness?' in Dacian C. Dragos and Bogdana Neamtu

legality or appropriateness of administration[46]. An administrative appeal can be addressed to the authority which has issued the unlawful decision or to its hierarchically superiors. The subject of appeal might be annulment, modification or issuance of a new act, but also compensation of damages. With exceptions, in general they are optional. Also, administrative appeal and judicial review that are independent of each other and do not interfere with one another.

The administrative appeals reduce the caseload of administrative courts by providing a mechanism for aggrieved person to seek redress and an option for administration to mend its errors. Therefore, administrative appeal is included in the category of alternative tools[47]. Administrative appeals have many advantages. Firstly, both parties avoid complications and expenses of long judicial process. Also, relations between the individual and administration is improved by providing a method that favors a form of dialogue. Further, parties of dispute themselves are best equipped to handle disputes, as judges may not always have a fully nuanced understanding of how the administration functions and administrative authorities must balance individual interests[48]. The most important inconvenience is the inexistence of guarantee on impartiality in administrative appeals[49], as there is no assurance that the authority will not be inclined to favor the decision already made.

In Turkish Law, administrative appeal is a dispute resolution tool envisaged in Article 13 of the AJPL only for compensation of damages arising from administrative actions which is also called a 'preliminary decision'[50]. If an individual suffers losses, prior to commencing court proceedings, an administrative appeal must be filed to demand damage. Individuals should apply to the relevant administration within one year after the learning of violating action and in any case, within five years from action. If this request is rejected or no response is given within thirty days, it will be possible to file a lawsuit. However, the Council of State has developed a case-law that differs from legal regulation, regarding the date from which the one-five year periods will begin, for protecting the right to legal remedies. First of all, if the action and damage occur on different dates, it is necessary to consider the date when

(eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 540.

46 Jean Marie Auby, 'Les recours administratifs préalables' (1997) 1 AJDA.

47 Dragos and Marrani (n45) 539.

48 Rhita Bousta and Arun Sagar, 'Alternative Dispute Resolution in French Administrative Proceedings' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 63.

49 Litvins (n2) 372.

50 Onur Karahanoğulları, *İdari Yargı İdarenin Hukuka Zorlanması (Yargı Kararlarına dayalı Bir İnceleme)* (Turhan 2019) 321.

damage occurred fully and definitively[51]. In addition, the Council of State does not accept the date of action as beginning of the period; five-year period should be calculated from the date when administrative nature of damage is learned[52].

As the prior administrative appeal is mandatory, if a lawsuit for compensation of damage is filed directly before the court without making such application, this remedy will be rejected and the petition will be submitted to the administration that caused damage[53]. Here, if administration responds aggrieved person negatively, a new lawsuit might be filed[54]. Considering the compulsory nature of this appeal, if it is not filed within the time limit, the possibility of application will disappear, as well as the right to file lawsuit.

Another remedy for compensation of damages arising from public services' execution is the legal compromise regulated in Article 12 of the Decree Law No.659. This remedy is a method that can only be applied for compensation of damages arised during services rendered by administrations falling within the scope of this Decree. It is not possible to apply the procedure of preliminary decision in disputes to which Article 12 of Decree Law is applied[55].

It is possible to file a compromise application regarding the disputes arising from services provided by the administrations specified in the tables (I) and (II) attached to the Public Financial Management and Control Law (PFMCL): units affiliated to central government, Grand National Assembly of Turkey (GNAT), Presidency, high courts, ministries, their affiliated and related organizations, Council of Higher Education, Assessment, Selection and Placement Center, state and foundation universities and public institutions having separate public legal entities. It is not possible to implement the compromise procedure envisaged in Decree Law on the regulatory and supervisory authorities, the Social Security Institution and local administrations.

Both remedies of preliminary decision and compromise procedure stipulated in Decree Law are mandatory in which parties of dispute participate in process with their own consent, third parties are not included as either conciliator or mediator. If a solution is reached, the text signed by parties carries the provision of a verdict. If parties do not come to a common solution, recourse to judicial procedure remains possible[56]. These two remedies differ from each other in terms of procedural rules applied. In compromise procedure, which is regulated in detail in Decree Law, procedural rights and guarantees of parties in process are clearly protected.

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51 Council of State10th Chamber, E:2017/1003-K:2018/3493, 14/11/2018.

52 Council of State 10th Chamber, E:2004/2931-K: 2006/7287, 20/12/2006.

53 Council of State 8th Chamber, E:1987/340-K: 1989/306, 27/04/1989.

54 Turan Yıldırım and Gül Fiş Üstün, *Açıklamalı-Notlu İdari Yargılama Usulü Kanunu* (On İki Levha 2020) 266.

55 Council of State General Assembly, E:2018/4662-K:2019/1288, 25/03/2019.

56 Cidecigiller (n36) 285.

Applications for compromise must be concluded within sixty days. Otherwise, the request is deemed to be rejected. The applications are subjected to a two-stage review. Firstly, application is sent to legal dispute evaluation commission. All kinds of necessary research and examination, including expert examination are carried out and witnesses can be heard[57]. Here, subject of application, the way damage occurred, whether administration is responsible, amount of damage and compensation to be paid are determined. In the second stage, the report prepared by commission is submitted to the competent authorities. The decision-making authorities are respectively the top supervisor, minister in charge or president, depending on magnitude of the amount of damage claimed. If the competent authority accepts settlement, the applicant is given at least fifteen days to sign compromise.

On the day specified in invitation letter, if amount of compensation and payment method are agreed, a protocol is signed by parties which has the force of verdict. It is not possible to file a lawsuit regarding the agreed subject or amount. The compromise protocol does not include any remarks on issues such as fault, liability, and illegality. Therefore, compromise protocol does not have effect of a definitive judgment in terms of the illegality of action in cases to be brought before the court later on. If compromise protocol is not accepted, a dispute protocol is prepared and given to applicant, who may file before administrative court.

b. Mediation

The mediation is an agreement by finding an intermediate solution compromising demands of each party. In principle, all disputes between persons in same situation are concluded in same way in court proceeding; while the solution varies in mediation[58]. In Turkish law the mediation for disputes of administration entered into force in 2017 with Article 15 of Law No. 6325. A number of arrangements were made for the resolution of administration's private law disputes through mediation. However, apart from few exceptions, the said regulation has not achieved its expected positive result.

The procedure of mediation is defined as resolution of a dispute with the help of an impartial and reliable third party, upon the application of parties by applying procedures and principles that are determined by parties[59]. It is based on continuing voluntary consent of all disputants, mediator does not have the authority to impose a decision or measures upon parties[60]. By decreasing number of court judgements, mediation enhances efficiency of administrative proceedings.

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57 Karaarslan (n3) 90.
58 Asiltürk (n41) 34.
59 Dir. (n34).
60 Litvins (n2) 379.

Mediator must be independent and impartial as a neutral third party. During the process, confidentiality and privacy of parties must be observed[61]. Three main characteristics of mediation are voluntariness, impartiality and confidentiality[62]. Mediation also scores high on aspects of procedural justice, parties have opportunity to be heard and are able to take control of process[63]. It is essential that information and documents obtained during mediation are kept confidential. When a lawsuit is filed regarding the dispute, invitation made by parties to mediation, requests of parties, opinions and proposals put forward, acceptance of any case and all documents cannot be put forward as evidence[64]. This characteristic of mediation limits public authorities' accountability and transparency[65].

Mediation might be implemented only in resolution of private law disputes which parties can freely dispose of[66]. Disputes arising from actions based on public power are excluded[67], which will be resolved in administrative jurisdiction. It is suggested that mediation finds application for administrative disputes in which a certain amount of money is involved such as, compensation claims, penalties, taxes, fees and financial liabilities[68]. Currently, mediation is applied only for private law disputes of administration. Disputes arising from contracts that are not related to execution of public services, such as lease agreements, contracts of sale, of carriage, of construction and subscription agreements signed between administration and individuals are subject to private law. Besides, disputes regarding the amount to be paid in expropriation procedures and disputes of administration in cases where workers are employed under a contract of employment might be also subject to mediation[69].

Two members determined by the top supervisor and the head of the legal unit or a lawyer shall represent administration during mediation negotiations[70]. Members of commission are fully authorized to take decisions independently. Decision, which is taken unanimously, does not have to be approved by their

61 www.eur-lex.europa.eu/eli/dir/2008/52/oj

62 UNCITRAL Conciliation Rules, www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en

63 De Graaf and Marseille and Tolsma (n33) 592.

64 Asiltürk (n41) 37.

65 Marrani and Farah (n2) 271.

66 Article 1/2.

67 Gül Fiş Üstün, 'Arabuluculuk Faaliyetlerinde İdarenin Yeri ve Yetkisi' (2020) 26(1) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 14.

68 Mehpare Çaptuğ, 'İdarenin Taraf Olduğu Uyuşmazlıklarda Arabuluculuğun Uygulama Alanı ve Aksayan Yönler' (2021) 157 Türkiye Barolar Birliği Dergisi 305.

69 Fiş Üstün (n67) 14.

70 Article 15/8.

top supervisor[71]. However, mediator is not allowed to exercise powers that are exclusive to judicial power by their nature. Mediator cannot make viewing, witness and expert examinations. At the end of the negotiations, commission shall prepare a motivated report and keep them for five years.

Compensation lawsuits arising from decisions and actions of commission members within mediation activity can only be brought against the state. The compensation paid by the state might be recoursed to the members who abuse their power by acting against the requirements of their duty in one year from the date of payment. In accordance with Article 18/7 of Regulation on Mediation Law, members of Commission are not held responsible for their decisions except it is determined by a court decision that they have acted contrary to the requirements of their duty. Therefore, third parties can only file a lawsuit against the state due to activities carried out by commission; state may recourse to officers after a court decision establishes their fault[72]. The lawsuit filed against state will be opposed to Ministry of Treasury and Finance. Indeed, it is seen that damage caused by a public agent to his own institution is undertaken by another administration[73].

c. Ombudsperson

As a result of the need to restructure the public administration, new searches have begun to re-evaluate the functioning of public services and to minimize complaints. There was a need for a control mechanism which supervizes administration, that is constituted outside the judiciary power, but which is independent from administration[74]. Ombudsperson has direct connection with traditional parts of *trias politicia* (legislative, judicial and executive power), whether it is their status as a representative of the parliament, investigator of the government and the supporter of judiciary[75].

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71 In article 15, it has been stated that commissions represent administration, however their right to start mediation procedure is not recognized. In accordance with rule of law, unless such authorization is given by the highest supervisor of administration, it is not possible for commissions to apply *ex officio* to mediation.

72 Çaptuğ (n68) 310.

73 Fiş Üstün (n67) 22. The International Bar Association (IBA), defines the Institution of Ombudsperson as '[an] office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports.' (Hazal Duran, 'The Intermediary Function of Turkey's Legislative Ombudsman in Resolving Public Disputes' (2021) 96 Bilig 37.)

74 Muhammed Serkan Şahin, *Kamu Denetçiliği* (Astana 2020)156.

75 Engin Saygın, 'Improving Human Rights through Non-judicial National Institutions: The Effectiveness of the Ombudsman Institution in Turkey' (2009) 3 European Public

Ombudsperson institution has entered into Turkish law as an alternative procedure of controlling actions of administration with the amendment in Article 74 of Constitution in 2010[76]. Pursuant to article 74/7 of Constitution, ombudsperson is regulated by Law nº6328. Purpose of the establishment of ombudsperson is to increase the quality of public service and to reduce the workload of judiciary. But also, the Ombudsperson is an institution that protects and promotes human rights and justice[77]. So, the Ombudsperson might be described as an authority which, is not limited to be a monitoring mechanism but which investigates on citizens'complaints and promote human rights and democracy. Therefore, ombudsperson is not only an alternative method of resolving disputes, but also a structure that aims to ensure the fairness of administration's acts and to prevent unfair behaviors of public officials[78].

Ombudsperson which is a public legal entity affiliated to the GNAT, examines complaints on functioning of administration in the name of parliament. The main reason why ombudsperson depends on parliament is to ensure independence of institution[79]. No organ, authority or person can give orders and instructions,

Law Review 418; Milan Remac, 'The Ombudsman: An Alternative to the Judiciary?' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer Verlag 2014) 568.

76 The first initiative of Turkish Parlement to create Ombudsperson Institution in Turkey was in 2006 by the Supervisory Institution Act. However, the former Turkish President Ahmet Necdet Sezer vetoed the forementioned Act depending on the justificaions on principle of separation of powers and unconstitutionality of the Ombudsperson Institution and sent it back to Parlement to be reconsidered. Following the Parlement's insistance and promulgation process, the President took the forementioned Act to the Constitutional Court. With its decision in 2008, the Constitutional Court declared the forementioned act unconstitutional and annuled. (Constitutional Court, E:2006/140-K:2008/185, 25/12/2008.) For detailed analysis and criticisms of the justifications in Presidents veto (Saygın (n75), 418 ff.

77 Saygın (n75) 425. In different texts of international or regional organizations, such as United Nations, Council of Europe, and the Organization for Security and Cooperation in Europe, the Ombudsperson is described as a '*national human rights institution'* which shows how the rule of law should be implemented. (Saygın (n75) 409 ff.)

78 H. Alpay Karasoy, 'Ombudsman in Turkey: Its Contributions and Criticism' (2015) 22 European Scientific Journal 47; Akıncı (n38) 286; Ahmet Yatkın and İzzet Taşar, 'Ombudsman As an Audıt Tool in Publıc Admınıstratıon: Comparatıve Case Study Research of Turkey And European Unıon' (2014) 59; Didem Geylani and Ahmet Nohutçu, 'The Effectiveness of the Public Auditorship Institution (Ombudsman) in Turkey and a Comparison with the National Ombudsmen of England and France' (2021) 106 Liberal Düşünce Dergisi 128; Duran (n73) 36.

79 Saygın (n75) 419; Servet Alyanak, 'The New Institution on Protection of Fundamental Rights: Turkish Ombudsman Institution' (2015) 1 Ankara Avrupa Çalışmaları Dergisi 12; Geylani and Nohutçu (n78) 129. However, it should be noted that relations between the Ombudsman Institution and the GNAT does not conform to a conventional hierarchical model. (Duran (n73) 41.)

send circulars, make recommendations to ombudsperson[80]. While performing their duties, ombudsperson and auditors must behave impartially[81].

Ombudsperson is competent to examine decisions, actions, attitudes, behaviors of administration and to make suggestions to administration in terms of compliance with law, equity and principles of good governance within the understanding of justice based on human rights[82]. Decisions and actions of ministries, local administrations, Social Security Institution, professional organizations having the characteristics of public institutions, public benefit associations and foundations, banks, companies operating in electricity and natural gas market, non-political activities of executive authorities might be questioned before ombudsperson[83]. Not only decisions and actions of administration, but also its behaviors, which cannot be contested before the courts, are under the supervision of ombudsperson. The institution does not start investigations *ex officio*; but upon complaint[84].

All real and legal persons may apply to ombudsperson directly[85]. This application which is free, can be submitted electronically or through other means of communication. Since application to ombudsperson is less formal, the opportunity to apply to Institution is quite wider[86]. In order to apply to ombudsperson, administrative appeals stipulated in the AJPL and mandatory administrative remedies stipulated in special laws must be exhausted. However, exhaustion of optional applications regulated in special laws is not necessary[87]. The applications filed without exhausting administrative remedies are sent to the relevant administration. Yet, ombudsperson accepts applications against attitudes and behaviors of administration and in cases where damages whose compensation is difficult or impossible, are likely to arise even if administrative remedies were not exhausted.

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80 Litvins (n2) 376; Duran (n73) 41.

81 Karasoy (n78) 47; Remac (n75) 567

82 Kadir Aktaş, 'Kamu Denetçiliği Kurumunun Anayasal Sistemdeki Yeri ve Etkinliği Sorunu' (2011) 94 Türkiye Barolar Birliği Dergisi 371; Saygın (n75) 425; Karasoy (n78) 52.

83 Alyanak (n79) 9; Tutal (n20) 200.

84 Saygın (n75) 424; Alyanak (n79) 20; Geylani and Nohutçu (n78) 132.
In Sweden, ombudsperson may start investigations upon a complaint or on his own initiative. And it should be noted that the number of investigations started with their own initiative is greater than the ones started after complaint. (Lester B. Orfield, 'The Scandinavian Ombudsman' (1966) 1 Administrative Law Review 19; Müslüm Akıncı, *İsveç İdare Hukuku* (Yetkin 2010) 169).

85 Karasoy (n78) 51; Yatkın and Taşar (n78) 132. Unlike the situation in British Law, there is no obligation to first apply to the parliament or any other body to seek remedy before ombudsperson. (Akıncı (n38) 332.) However, it could not be admitted that the groups or NGOs have right to complaint before the Ombudsperson. (Saygın (n75) 424.)

86 Alyanak (n79) 10; Litvins (n2) 376.

87 Alyanak (n79) 21.

An application can be made to ombusperson within six months from the date of notification of administration's reply; if administration does not respond application within sixty days, from the expiry of that period. Applications made within the period of filing suspends the filing period. The institution shall finalize its examination within six months from the application. In case of failure to conclude, suspended filing period starts to run.

As a result, if the application is found unreasonable and there is no violation of law or equity, it is rejected. In this case, pending filing period starts to run again from the notification of decision. If it is concluded that there is a violation, a recommendation is given. Recommendation is defined as a decision that includes suggestions for administration to accept the wrongful behavior, compensate damage, propose an amendment in regulations, withdraw, abolish or amend the act that is the subject of complaint[88]. If the application is accepted; related administration notifies the ombudsperson within thirty days whether it will comply with recommendation.

All information and documents that are requested by ombudsperson in relation to the subject of examination has to be given within thirty days. If not, the institution has the authority to initiate a disciplinary investigation. In this case, disciplinary investigation is not carried out by ompudsperson who only initiates it[89]. Ombudsperson has no authority to impose sanctions.

While exercising its supervising function, ombudsperson deals with the disputes between individuals and administration just like judiciary. Ombudsperson has authority to appoint experts; hear witnesses or relevant parties; can also make on-site wievings, who solve disputes while retaining impartiality, unlike administrative appeals. But also, ombudsperson has a normative function as a result of the necessity to explain the content of general normative concepts: good administration, proper administration, maladministration[90].

Appeals to ombudsperson have many fundamental and procedural advantages compared to judicial remedies[91]. Firstly, ombudsperson supervises decisions, actions, attitudes and behaviors of administration while in judicial review, it is only possible to examine decisions and actions of administration. The scope of activities that can be reviewed is wider[92]. Secondly, administrative judiciary checks compliance with the law, not fairness, which controls

88 Kamu Denetçiliği Kurumu, *40 Soruda Ombudsmanlık*, (Kamu Denetçiliği Kurumu 2017) 48; Alyanak (n79) 23.

89 Yatkın and Taşar (n78) 134; Alyanak (n79) 12.

90 Remaac (n75) 574; Alyanak (n79) 22.

91 For detailed information Karasoy (n78) 8-10.

92 Cevdet Atay, *Denetim ve İdarenin Yönetsel Denetimi* (Anka 2017) 74; Tutal (n22) 198; Alyanak (n79) 10; Geylani and Nohutçu (n78) 129.

discretion of administration in terms of proportionality, compliance with the public service's requirements, and public interest[93]. But, it cannot review appropriateness of the actions[94]. Judicial power is limited to the review of legality and in no case review of expediency might be used. Judicial ruling shall not restrict the exercise of executive function nor remove discretionary power. However, ombudsperson conducts an audit of compliance with the law, including the expediency[95], who can cover different normative concepts such as proper administration, good administration and compliance with human rights[96].

Moreover, procedural rules of ombudsperson remedy are more favorable for applicant. Individuals must meet some requirements to file a complaint before ombudsperson, which are less formal than in case of court proceedings. For example, since principle of written judication in administrative jurisdiction is strictly enforced, it is not possible to hear witnesses while, ombudsperson can hear witnesses or related persons[97]. Also, ombudsperson can examine information and documents of state secret nature on-site while in administrative proceedings, these documents may not be provided.

Conversely, the decisions of the institution are advisory[98]. Administration is not obliged to follow recommendations of ombudsperson. In countries with young democratic traditions, ombudsperson faces the challenge of ensuring the fulfilment of its conclusions[99] which will cause a significant decrease in applications. Ombudsperson is established not to replace, but to supplement judiciary by presenting additional possibility to protect fundamental rights. In practice, courts do not directly rely on ombudsperson's decision in cases brought before administrative justice based on the data revealed by ombudsperson[100]. Although it is emphasized in the dissenting opinions of some decisions that the results of ombudsperson's examination should be considered, in practice judicial decisions are not based on those findings[101]. This approach causes

93 Alyanak (n79) 22. Council of State 5th Chamber, E:1978/2266-K:1980/2236, 18/06/1980.

94 Council of State 13th Chamber, E: 2013/1125-K:2013/1925, 26/06/2013.

95 Ombudsperson, nº2022/1628, 01/03/2022.

96 Ombudsperson, nº2018/8486, 24/12/2018.

97 Geylani and Nohutçu (n78) 132.

98 Duran (n73) 42; Remac (n75) 567; Geylani and Nohutçu (n78) 133.

99 Saygın (n75) 426; Alyanak (n79) 14; Litvins (n2) 376. For statistical ınformation on complaint applications and comparasion of the situation between Turkey, England and France, Geylani and Nohutçu (n78) 134 ff. For proposals to increase the effectiveness of the Ombudsperson Institution, Saygın (n75) 423 ff.

100 Council of State General Assembly, E:2021/2538-K:2021/3208, 20/12/2021; Council of State 13th Chamber, E:2020/3816,-K:2021/1104, 29/03/2021; Council of State 10th Chamber, E:2014/1938-K: 2016/222, 18/01/2016.

101 Council of State General Assembly, E:2020/1450-K: 2021/23, 21.06.2021.

that ombudsperson's decisions remain only at recommendation level, gives administrations wide discretion in their implementation[102].

2. Lack of Success

In order to reduce workload of administrative judiciary, different dispute resolution methods have been introduced. However, in practice, aggrieved individuals mostly preferred to apply directly to judiciary; notwithstanding the fact that a little number of applications were unsuccessful[103]. This situation reveals that these methods are not a real alternative to judiciary. There are several reasons.

The first reason arises from the financial responsibility of public officials. According to Article 40/3 of Constitution damages incurred through unlawful treatment by public officials shall be compensated by the state, who can recourse to responsible official. Besides, pursuant to Article 12/2 of Law No. 657, in case administration has been harmed because of the fault, negligence or imprudence of its agent, the damage is paid by relevant official. These regulations reveal financial responsibility of officials. The lack of legal guarantee regarding payments to be made without a judicial decision and liability of competent public officials prevented the implementation of both procedures[104]. There is also no regulation for exemption of public officials acting in line with recommendation of ombudsperson. In the understanding of public administration, atmosphere of distrust towards public agents and lack of trust in people who use authority on behalf of administration cause the competent authorities not to use their authority to pay, even if the demands are justified. It would be appropriate to specifically regulate these procedures by a separate law to envisage provisions that will force administration to respond applications[105] and to arrange judicial guarantees that are provided for public officials who fulfill ombudsperson's decisions[106].

Another reason why public agents avoid making a positive decision about applications for compensation, is for not being defective in audit conducted by the Court of Accounts. Pursuant to Article 160 of the Constitution, the Court of Accounts is charged with auditing expenditures, and assets of public administrations with taking final decisions on accounts and acts of the responsible officials. Public officials authorized in acquisition and use of

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102 Saygın (n75) 427; Karasoy (n78) 55; Geylani and Nohutçu (n78) 136; Onur Kaplan, 'Kamu Denetçiliği Kurumu Tarafından Verilen Tavsiye Kararlarının Hukuki İşlevi ve Etkisi' (2020) 13 Ombudsman Akademik 100.

103 Mutlu Kağıtçıoğlu, 'Kamu Denetçiliği Kurumunu (Türk Ombudsmanını) Yeniden Tasarlamak' (2018) 14 Anayasa Hukuku Dergisi 461.

104 Karaarslan (n3) 91.

105 Hasoğlu (n42) 1990; Çaptuğ (n68) 301.

106 Aktaş (n82) 366; Tutal (n22) 214.

all kinds of public resources are responsible for obtaining, use and abuse of resources effectively, economically and efficiently[107]. The Court of Accounts judges as a tribunal[108] actions of responsible officials that cause public loss. As a result of the trial, compensation of damage from responsible official might be decided[109]. In doctrine, Üstün argued that certain criteria should be clearly stipulated by legislator to limit the scope of the Court of Accounts' audit in cases of agreement through compromise and to be excluded from audit.

Besides, there is no budget in behalf of administration to cover payments regarding applications for alternative procedure. If dispute is resolved by an alternative method, sufficient funds shall be allocated to budget for the payment of administration[110]. In this way, administration may also save amount of interest that it will have to pay as a result of court decision[111]. Together with the strong emphasis on *service public*, prerogative of *puissance public*, and the role of the Council of State as conceived in Turkish law could also explain why alternative tools are implemented with resistance[112].

A disposition allowing resolution of disputes amicably between administration and aggrieved person was included in Law No. 4353[113]: In case of resolution of legal disputes between the state offices within general budget and other departments with real or legal persons, which have not yet been taken before a court, ministries are authorized to conclude compromises or to make amendments to agreements that include the recognition of a right up to an amount or the abandonment of a benefit. Amendments to agreements and compromises exceeding this amount shall be made by taking the Council of State's opinion. In this respect, it will be mandatory to seek opinion of the Council of State while settlement of disputes over the amount specified in Law[114]. Receiving opinion of the Council of State will not only relieve concerns arising from the trust of public official involved in dispute resolution, but also enable public official to take the initiative easily. Arranging a similar regulation would be beneficial to increase of aforementioned methods.

Moreover, it is also argued that the cases where the court does not evaluate legality nor use discretion power, but where performs a formal supervision, should be removed from administrative judiciary and resolved by alternative

107 Article 8 of PFMCL.
108 Constitutional Court, E:2014/172-K:2014/170, 13/11/2014.
109 Akyılmaz and Sezginer and Kaya (n17) 9-10.
110 Cidecigiller (n36) 249.
111 Arat (n9) 238.
112 ibid 223.
113 Law nº4353 was abrogated with Article 18 of Decree Law nº659.
114 Council of State 1st Chamber, E:2008/1570-K:2009/94, 19/01/2009; Council of State 1st Chamber, E:2005/164-K:2005/357, 14/03/2005.

methods[115]. Resolution of cases regarding the objections of students to exam grades by a commission determined by the Council of Higher Education can be given as an example. Since, court has very limited scrutiny, especially in disputes that require technical knowledge and expertise, disputes are generally resolved according to expert opinion. The function of court here is only to approve expert report[116]. Indeed, in its jurisprudence, the Council of State considers it unlawful for a tribunal to directly resolve issues that require technical expertise without seeking opinion of an expert[117]. Resolution of disputes by a committee having ability to evaluate the conflict will increase effectiveness and satisfaction of decision.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS IN ADMINISTRATIVE LAW: HOW TO MAKE THEM USEFUL?

In French law, rules governing contentious administrative law are found in *Code de Justice Administrative* (CJA) adopted in 2001. As in Turkish law, it is accepted that dispute resolution power must be exercised by administrative justice which may implement best privileged legal regime in relations with state. This fact is so deeply rooted that alternative methods were seen for a long time unnatural[118]. French *Conseil d'Etat* has been accepted as the main authority in supervision of administration in terms of compliance with the law and in resolving administrative disputes. Besides, the idea of execution of alternative methods was difficult to implement in France, where concept of legality is at center[119].

This situation has changed for reasons which *Conseil d'Etat* indicates in its report of 1993. Apart from well-known element of administrative justice's congestion, *Conseil d'Etat* invoked: the need to consider fairness in settlement of certain disputes; saved time, recent developments of certain contractual disputes; concern to bring administration and citizens closer by allowing a direct dialogue[120]. Beside reforms to improve traditional mechanism of judicial review[121], new dispute resolution methods has begun to be applied.

One of the oldest alternative method of resolving administrative disputes is to bring an administrative appeal. In French law, administrative application is

115 Özbek (n10) 98; Cidecigiller (n36) 36.

116 Çolak (n13).

117 Council of State 10th Chamber, E:2005/1870-K:2006/2294, 10/04/2006; Council of State 10th Chamber, E:2001/1968-K:2003/692, 25/02/2002.

118 Bousta and Sagar (n48) 57.

119 ibid 59.

120 Auby (n46) 10.

121 Such as reforms concerning injunctions and possibility of issuing urgent judgments since 2000.

not required before filing a lawsuit, unless it is expressly regulated by law[122]. The Constitutional Council has ruled that obligation of a prior appeal does not call into question the exercise of right to seek against action before a court[123].

In practice, administrative appeals correspond to another aspect of problem. *Conseil d'Etat* has never really endeavored to give administrative appeals, a properly developed organization. In absence of legal provisions there are no clearly established procedural guidelines. It is *Conseil d'Etat* who accepts that even a verbally presented appeal may be admissible. The aggrieved person may raise any issues in the appeal, both related to fact or to legality or based on equitable considerations. Administrative appeals commonly have no suspensive effect on contested action[124].

There is no guarantee of impartiality and administrations are usually in favor of previous decisions, so administrative appeals are far from being succeed in resolving disputes. *Conseil d'Etat*, whose role has not been negligible, was thought to consider administrative appeals as a minor means of settling disputes. Methods of applying to *defenseur des droits* and recourse to mediation have become more effective with the amendments made in legislation **(A)** [125]. Moreover, independent authorities have been established within the administration, that are responsible for dispute resolution and which carry out functions as mediator **(B)**.

A. Activating Current Mechanisms

In order to reactivate alternative procedures, amendments were made in the fields of authority and scope of activity of mediator **(1)** and of ombudsperson **(2)**.

1. Tendency to Resolve Disputes through Mediation

After European Union Directive No. 2008/52 was transposed in domestic law in 2011, administrative disputes could be resolved through mediation if one of the parties is a European Union's citizen[126]. However, for disputes between administration and French citizens, mediation procedure could not be applied. Finally, with Article L.213 added to CJA in 2016, mediation became possible in administrative procedures, where mediation is defined as any structured process, by which two or more parties attempt to reach an agreement for amicable resolution of their differences, with assistance of a third party, chosen

122 Constitutional Council, n°88-154, 10/03/1988.
123 Gilberg (n1) 24.
124 Auby (n46) 14.
125 Conseil d'Etat, *Régler autrement les conflits: conciliation, transaction, arbitrage en matière administrative* La Documentation française 1993.
126 Dir. (n34)

by them with agreement. Mediation procedure can be initiated *ex officio* by court or upon request of parties[127], that deals with entirety or part of a dispute[128].

Mediators exercise their mission with impartiality, competence and diligence. As pointed out by Benard-Vincent: "mediator has become a new player in administrative law, positioned between administration and judge"[129]. Person who ensures mediation mission must have, through the exercise present or past of an activity, the qualification required given the nature of dispute[130].

Mediation is subject to the principle of confidentiality. Findings of mediator and statements collected during procedure may not be disclosed to third parties nor invoked or produced within the framework of a jurisdictional proceeding without parties' agreement[131]. There are two exceptions: presence of overriding reasons of public order or reasons related to protection of child or integrity of a person. The CJA defines two types of mediation: initiated by parties or by judge. Whatever the procedure is, mediation is always subject to agreement of parties even if they have not initiated it[132].

Mediator might be designated by the parties of dispute; the president of tribunal may also organize a mediation mission and appoint a mediator. When a tribunal is seized for a dispute, president of the court may order mediation mission to try to reach an agreement after having obtained their consent[133].

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127 Assemblée Nationale, 'Rapport d'Information sur l'évaluation de la médiation entre les usagers et l'administration' n°2702, 100, www.assemblee-nationale.fr; David Taron, 'Pourquoi et comment recourir à la médiation administrative?' www.village-justice.com/articles/pourquoi-comment-recourir-mediation-administrative 36131.html

128 Article R.213-1 of CSP

129 Georgina Benard-Vincent, 'Les enjeux de la médiation en droit administratif' (2017) La Grande Bibliothèque du droit www.blogdroitadministratif.net/2017/07/28/les-enjeux-de-la-mediation-en-droit-administratif. This subject indeed holds all the attention of doctrine: "the qualities of the mediator guarantee the balance of the parties." (Audrey Dameron, 'Les modes alternatifs de règlement des litiges administratifs: pour un équilibre des parties?' (2017) 101 Petites affiches, www.lextenso.fr.)

130 It is interpreted that the term "according to the case", should militate in favor of recourse to mediation professionals, magistrates can also refer to the list of mediators drawn up by each court of appeal. (David Taron and Jean Grésy, 'La médiation administrative: panorama des récentes évolutions' (2017) 169-170 Petites affiches www.lextenso.fr.) One of the difficulties for litigant and judge who wish to resort to mediation remains unquestionably the choice of mediator. But, article L.213-2 of CJA does not require that mediator presents guarantees of independence necessary. (Bertrand Nuret, 'La médiation en droit public: d'une chimère à une obligation?' (2019) 9 La Semaine juridique- Administrations et collectivités territoriales www.lexisnexis.fr.)

131 Gilberg (n1) 26.

132 Assemblée Nationale (n127) 100.

133 Taron (n127).

Time limits for judicial remedies are interrupted and prescriptions are suspended from the day on which, parties agree to resort to mediation, that begin to run again from the date on which either one or both parties or mediator declares that mediation is over. If dispute cannot be resolved within six months, litigation period begins to run[134]. Here exercise of a non-contentious or hierarchical appeal does not interrupt time limits again, unless it constitutes a mandatory prerequisite[135].

All kinds of administrative disputes can be brought before a mediator, but the CJA establishes an absolute prohibition which provides that "the agreement reached by parties cannot infringe rights of which they do not have free disposal". So, it will be impossible to resort to mediation if it results in renunciation of a fundamental right. It must be considered a priori that mediation should not lead a party to renounce exercise an action for excess of power which proceeds from the defense of interests beyond the sole parties. Also, recourse to mediation should also be extremely restricted when dispute involves sovereignty matters, fundamental interests of public persons or public interest[136]. In general, compensation demands which come under of full remedy action will be suitable for mediation process. Other areas where subjective rights are at stake, it is applicable. The recourse to mediation will be possible on questions such as progress of public agents, or issues in which trade unions could bring the claims for their members.

For certain administrative disputes mediation is obligatory[137]. The Constitutional Council did not find mandatory mediation requirement before exercise of the right to file before the court unconstitutional[138]. In such cases, prior mediation must be initiated within the period of two-months. Administrative authority must inform aggrieved person of this obligation and provide contact details of mediator. Otherwise, deadline for contentious appeal does not run. Here also, remedy to competent mediator suspends periods, which start to run again from the date on which mediation is declared over.

The texts do not determine deadline for termination of mediation process[139]. However, abuses should remain marginal since each party and mediator may end process. If mediation process is commenced by judge, judge himself

134 Gilberg (n1) 19.

135 Assemblée Nationale (n127) 101.

136 Taron (n127).

137 Before starting lawsuit concerning decisions relating to active solidarity income, relating to exceptional end-of-year aid which is granted by the State, relating to personalized housing assistance solidarity income and relating to specific solidarity allowance, procedure of mediation has to be exhausted.

138 Constitutional Council, n°2016-739, 17/11/2019.

139 Assemblée Nationale (n127) 101.

determines lenght of process. It can be terminated earlier if a party or mediator so requests. Result of mediation remains binary: either mediation is succeeded or it turns out unsuccessful. If it is successful, mediation must be formalized in writing, with a classic form of protocol. In the event of failure, filing period starts to run again from the date on which mediation terminates unsuccessfully[140].

2. Adventure of Ombudsperson: from "*Médiateur de la République*" to "*Défenseur des Droits*"

The institution of ombudsperson has entered into French Law under the name "*Médiateur de la République*" in 1973, which was only responsible for remedying administrative dysfunctionments, without competing with judiciary at the beginning. This authority was found a *bizarre and useless creature*, which was widely criticized on its independence[141] and decisions' effectiveness[142]. A constitutional amendment on establishing *défenseur des droits*, which replaces *médiateur de la république* was made in 2008. With this revision, ombudsperson became an independent constitutional authority[143]. But this new institution could not change the nature of ombudsperson, which is linked to executive by still being impartial and independent[144], which does not receive instructions from any authority in exercise of its power. *D*éfenseur des droits may not be prosecuted, investigated, arrested, detained or judged on occasion of opinions in exercise of his functions. This immunity is identical to that which Article 26 of Constitution defines for members of parliament.

Applications to *défenseur des droits* are not accepted as an administrative nor judicial remedy, and have no suspensive effect on filing period. Therefore, sometimes a choice has to be made between ombudsperson and judiciary, which does not contribute to the success of *défenseur des droits*[145]. It is not possible to file a lawsuit against his decisions[146].

*D*éfenseur des droits can be seized directly by individuals[147], whose scope of activity covers disputes between administration and individuals, but disputes between administration and its officers remain excluded[148]. Are within the field

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140 ibid 101.

141 Council of State Ass, n°5.130, 10/07/1981.

142 As in the English model, the *médiateur de la république* was appointed by the government and could receive referrals only from a member of parliament, not directly from individuals. He could not be dismissed by the parliament.

143 As for the efficiency of institution, in 2020, *défenseur* received around 96.894 complaints. (Defenseur des Droits (2020) Report, www.juridique.defenseurdesdroits.fr.)

144 Bousta and Sagar (n48) 77.

145 ibid 79.

146 Council of State 7th et 2nd Chambers, n°414410, 22/05/2019.

147 Article 5 of Organic Law.

148 In comparative law, ombudsperson has been given an active function in disputes related to

of competence of *défenseur des droits* disputes concerning: protection of rights of public services' users and children, implementation of security personnels' deontology, discrimination and equality[149]. *Défenseur* might be applied for disputes arising from public services carried out by private law persons[150].

Secondly, transactions in civil or criminal matters are also new prerogatives of ombudsperson in case of discriminations that did not lead to a court action. Here, *défenseur des droits* may directly intervene in settlement of disputes between individuals. He may suggest that individuals involved conclude a transaction to put an end to dispute but also be able to intervene before any jurisdiction for protection of rights and freedoms. He has the power to appeal before a court for disputes within this context. In this case, ombudsperson may decide a fine for individuals and legal entities. Here, transaction has to be homologated by public prosecutor. If transaction is rejected or not implemented, *défenseur des droits* can directly seize criminal court.

While executing his supervision, *défenseur des droits* has authority to investigate, gather evidences, expert opinions, negotiate and settle compromises between individuals and administration, change practices of public institutions, request disciplinary actions and express proposals for changes in existing law. In French law, investigative power of *défenseur* is empowered by sanctions prescribed in Law. All persons who reject demands of ombudsperson will be liable to penal sanctions[151].

Within its impowered relationship with judiciary, *défenseur des droits* may seize court if his order addressed to administration remains without effect. In this case, *défenseur des droits* may address to administrative court for an injunction to administration to order necessary measures[152]. But if this demand also remains without effect, all he can do is writing a special report. However, *défenseur* has also indirect influences on judiciary. In practice, in 68% of cases, judges confirm observations or advices of *défenseur*[153]. For example, in one of its decisions in 2019, *Conseil d'Etat* annulled administrative court of appeal's decision by considering recommendation of *défenseur des droits*[154].

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public personnel. In Sweden, according to article 7 of Act with Instructions for Parliamentary Ombudsmen, if an authority has decided against an official in a case, involving application of regulations in law and matters of discipline or dismissal, temporary deprival of office because of criminal acts, an Ombudsman may refer case to a court for amendment of decision. (www.jo.se/en/About-JO/Legal-basis/Instructions)

149 Gilberg (n1) 15.

150 Jean-Claude Zarka, 'Le Défenseur des droits' (2011) Rec. Dalloz.

151 ibid.

152 Bousta and Sagar (n48) 79.

153 ibid 80.

154 Council of State 4th et 1re Chamber, n°411132, 30/01/2019.

Finally, *défenseur* can seize competent disciplinary authority when in face of events which he deems sanctionable[155]. In this case, disciplinary authority must inform him of result of his referral and indicate reasons in absence of disciplinary proceedings. The Constitutional Council made it clear that competences of *défenseur des droits* in disciplinary matters must comply with rules guaranteeing independence of courts[156]. Here, ombudsperson has only authority to initiate disciplinary investigation[157].

In France, ombudsperson conserves his restricted status, that is promoted with judiciary, who may demand an injunction from administrative courts in case that his recommendations are not followed by administration. This possibility forms a bridge between ombudsperson and judiciary[158]. Indeed, administrative judge has power to give instructions to administrations. The purpose of this authority, which finds application without requirement of filing a lawsuit, is to prevent the occurrence of irreparable damages resulting from unlawful actions of administration[159]. In this respect, if administrative activity is found unlawful by ombudsperson, there is no doubt that this situation will force judge to give injunction to administration. Besides, there is a tendency in practice of *Conseil d'Etat* to use ombudsperson's decisions, unlike situation in Turkey.

However, there are important institutional deficiencies in terms of ensuring effectiveness. In case, decisions or requests of *défenseur* are not followed, he may only initiate disciplinary investigation by seizing competent authority, but here investigation is not carried out by ombudsperson, who does not have a direct disciplinary authority *vis-à-vis* public officials. In Sweden ombudsperson directly initiates disciplinary investigations against public officials who commit crimes[160]. Also pursuant to Article 6 of Act with Instructions for the Parliamentary Ombudsmen[161], ombudsperson has authority to begin a criminal procedure concerning disputes that can be defined as crime[162]. Experiences in Scandinavian countries show the coherence between degree of ombudsperson's

155 Atay (n92) 58.

156 Constitutional Council, n°2011-626, 29/03/2011.

157 While preparation of Organic Law, one more competence was proposed to be given to *défenseur des droits.* Filing before administrative court a request favor of a group of people having same interest. which was abandoned by Senate. (Zarka (n150).)

158 Erdoğan Bülbül, 'Fransız İdari Yargılama Hukukunda İvedi Yargılama Usulleri Reformu' (2002) Danıştay ve İdari Yargı Günü 134. Yıl Sempozyumu 63.

159 René Chapus, *Droit du contentieux administratif (Montchrestien* 2008) 1485, Olivier Gohin and Florian Poulet, *Contentieux administratif*, (LexisNexis 2015) 401.

160 Kağıtçıoğlu (n103) 498.

161 www.jo.se/en

162 Swedish Ombudsperson devoted more and more time on problems about officials of administration. (Orfield (n84) 19.)

power over public officials and effectiveness of recommendations[163].

B. Looking for New Alternative Methods

In addition to alternative methods that find application in all administrative activities, procedures applied to certain public services or in a geographical area have been introduced to French law in recent years. Since generally experts in the field resolves disputes in these procedures, fair results are provided as a result of an examination that are similar to the judgment of court. Besides, since these internal mediation institutions also determine experts taking part in judicial proceedings, their decisions are also taken into account by courts. Internal mediation is applied in various public services: public transports, national railways, postal services, education, economy and finances, energy, municipal public services. These procedures are facultative before applying the court for cases within their authority, are difficult to list because their fields are quite diverse[164]. Since each procedure is subject to different rules, in this study, to give an idea, we will examine alternative methods applied in health services.

There are three main bodies for compensation of damages arising from execution of health services through non-judicial methods. They might be listed as Commissions of conciliation and compensation (*Commissions de conciliation et d'indemnisation-CCI*), National commission on medical accidents (*Commission nationale des accidents médicaux–CNAMED*) and Commission for compensation of medical accidents, malpractice and hospital infections (*Office national d'indemnisation des accidents médicaux, affections iatrogenes, infections nosocomiales ONIAM*)

Firstly, *CCI* operates at regional level with the French Community Health Law of 2002 (*Code de la santé publique* -CSP). There are currently seven *CCI* jurisdictions in France: Paris, South Lyon, North Lyon, West, North, Nancy and Great West which compensate damages arising from health services taking place within its jurisdiction[165]. *CCI* was established to reduce overload of judiciary through amicable settlement procedures. Application to CCI is free of charge.

Individuals suffered damage due to diagnosis, treatment activities, preventive health services and persons who are indirectly aggrieved as a result of their relations with them can apply to *CCI*. The Commission is authorized to resolve any dispute between health service providers and beneficiaries:

163 Orfield (n84).

164 Bousta and Sagar (n48) 72.

165 Claudine Bergoignan Esper and Pierre Sargos, *Les grands arrêts du droit de la santé* (Dalloz 2016) 541.

disputes between healthcare personnel, healthcare institutions, administration and manufacturers of medical products and beneficiaries. Application to commission is optional[166], which suspends filing period[167]. The Commission has to make a decision within six months from application which has power to carry out all kinds of examinations and researches, including expert report, on-site viewing, hearing of witnesses, collection of information and documents. The Commission decides on issues such as cause and scope of damage, regime and amount of compensation[168]. As a result, the Commission may take two types of decisions.

In cases of liability for fault, damage is requested from service provider. However, if service provider has no fault, compensation for damage will be requested directly from ONIAM.

ONIAM is a public legal entity related to Ministry of Health, which has financial autonomy and its own budget, whose main function is making payments to those suffered losses due to health services[169]. The main task of *ONIAM* is compensating damages incurred during execution of health services within principle of national solidarity. In initial version, *ONIAM* would only compensate damages incurred without fault. According to current legislation it operates in cases of fault liability, and liability without fault. Decision procedure between *ONIAM* and *CCI* differs depending on existence of fault[170]. *ONIAM* recourse to administration or public official if there is liability for fault. In cases of liability without fault, *ONIAM* is held primarily responsible.

In cases where there is a fault, compensation procedure differs according to amount of damage. It is possible for *CCI* to operate conciliation procedure or friendly settlement. These two procedures differ considerably in terms of role of administration and parties[171].

If more than 24% of physical integrity or psychology of aggrieved person is affected, if there is a decrease of at least 50% in working power of aggrieved person continuously for 6 months or intermittently for 12 months, or in case of a permanent inability or damage to private life as a result of visible and abnormal harms occurring during preventive, diagnostic or therapeutic activities. it is possible to operate a settlement procedure. In terms of lesser damages, only reconciliation procedure can be initiated[172].

166 Didier Truchet, *Droit de la santé publique* (Dalloz 2016) 543.

167 Cour administrative d'appel Bordeaux 1re Chambre, no10BX00463, 03/02/2011.

168 Esper and Sargos (n166) 543.

169 Claudine Bergoignan Esper and Marc Dupont, *Droit hospitalier* (Dalloz 2014) 911.

170 Esper and Dupont (n170) 912.

171 Truchet (n167) 281.

172 Françoise Avram 'Présentation des commissions de conciliation et l'indemnisation' (2014) 4-5 Bulletin de L'Académie Nationale de Médecine 705.

CCI has a limited dispute resolution power in reconciliation procedure. Here, only instrument of the Commission is to invite parties for conciliation. Before the entry into force of *CSP*, conciliation procedure for damages arising from health services was carried out by commissions established within each health institution. Resolution of dispute with this method is carried out entirely upon initiative of parties[173]. If a settlement is reached, a protocol is drawn up in case of failure, parties may apply before the court.

If damage is above the specified level, *CCI* assumes an active role. In amicable settlement, contol of parties on procedure is reduced and *CCI* functions similar to a judiciary[174]. In this case, upon the appeal of aggrieved person *CCI* prepares an opinion within a period of 6 months whether administration or its personnel has fault and amount of damage. Here, events caused the damage, reasons for liability and type of compensation are examined. If necessary, file is communicated to a medical expert. It is not possible to file a lawsuit against this opinion until process is complete. If *CCI* determines that damage is below foresaid level, conciliation procedure is applied with a decision of non-competence. In case *CCI* finds out that health service provider has fault, it notifies public official who caused damage and his insurer and calls them to pay damage[175].

In this case, insurance company must submit an offer within 4 months. If offer is accepted by aggrieved party, an agreement is signed. Damage should be compensated within a month from offer's acceptance; in any case, within a year from the date of application. The text signed by health personnel or insurance company and aggrieved party is subject to private law[176]. Here, insurance company reserves right to file a recourse lawsuit against *ONIAM* or third parties if it is of the opinion that health personnel has no fault[177].

If insurance company does not submit an offer within stipulated time or amount insured by insurance company is lower than loss or personnel causing damage is not insured, *ONIAM* replaces insurance company and pays the loss. The contract signed between *ONIAM* and aggrieved party is subject to private law. Since *ONIAM* will be successor of aggrieved person, it can recourse to health personnel or insurance company[178]. During recourse proceedings, it is possible for judge to impose a penalty of 15% of damage amount.[179]. If insurance company accepts responsibility but offers a different sum, amount

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173 Esper and Sargos (n166) 543.
174 Truchet (n167) 285.
175 Avram (n173) 706.
176 Cour Administrative d'appel de Bordeaux 1re Chambre, no10BX01629, 23/12/2010.
177 Truchet (n167) 286.
178 Conseil d'Etat, no360280, 17/09/2012.
179 Truchet (n167) 286.

between loss determined by *CCI* and offered by insurance company will be covered by *ONIAM*. Here, *ONIAM* can follow the above recourse procedure with the same faculties[180].

In the last scenario, if applicant does not accept offer submitted by *ONIAM*, he may apply directly to court.

Second type of compensation exercised by *ONIAM* depends on administration's strict responsibility. If damage is greater than cetain amount and there is no fault, with principle of social solidarity, damage is covered by *ONIAM*[181]. In cases where damage on physical or psychological integrity of a person causes at least 25% loss of workforce or in case of death, damage is compensated by *ONIAM*[182]. Damages arising from compulsory vaccination activity; HIV transmission due to blood product transfer or injection carried out within French Blood Institute; damages caused by hepatitis B or C virus and T-lymphotorapique diseases are covered by *ONIAM*[183]. Also, damages occurred as a result of growth hormone treatment carried out by French Pituitary Society, radiological treatments or fulfillment of public health measures taken by Ministry of Health and hospital infections are compensated in the context of strict liability[184].

In the event of liability without fault, it is also possible to apply directly to *ONIAM*[185]. Aggrieved party can first apply to *CCI* and after decision of *CCI* or can directly apply to *ONIAM*. In this case, *ONIAM* is not bound by amount determined by *CCI*[186].

Acceptance of *ONIAM's* offer by aggrieved party is subject to private law. It is regulated that *ONIAM* should pay the amount within a month from the protocol; it is not possible to recourse to a certain public personnel or insurance company[187]. If *ONIAM* does not offer any compensation within 4 months or the offer is not accepted, legal action might be taken against *ONIAM*. In cases where liability in fault and strict responsability are combined, *ONIAM* is obliged to pay compensation in proportion to its own responsibility[188]. Here, *ONIAM's* secondary liability may be mentioned if health personnel or insurance company does not compensate damage proportainate to their liability.

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180 Esper and Sargos (n166) 557.
181 ibid 546.
182 Françoise Avram, 'Dommage corporel et droit de la santé: l'avocat, une plus-value! Choix entre CRCI et juge' (2009) 108 Gaz. Pal 46.
183 Esper and Dupont (n170) 912.
184 Truchet (n167) 280.
185 Esper and Sargos (n166) 547.
186 Esper and Dupont (n170) 914.
187 Conseil d'Etat, nº355052, 12/12/2014.
188 Conseil d'Etat, nº327669, 30/03/2011.

CONCLUSION

Due to increase in administrative justice's workload and formalism of procedural rules, use of alternative dispute resolution methods has become a necessity in order to provide a fair judgment. In Turkish administrative law, as in French law, great importance is given to the scrutiny by the Council of State, which is accepted as the main authority that protects fundamental rights of individuals against administration. Also, because principles of legality and equality are applied strictly in administrative law, it is possible for administration, which has a very narrow margin of appreciation, to benefit from alternative methods to compensate damages arising from its activities in very limited situations.

This study demonstrates that in accordance with constitutional provisions, alternative methods cannot replace the judiciary, but it is possible to make use of them in pre-trial phase. Main alternative procedures in current legislation are administrative applications, mediation and application to ombudsperson. Since mediation is applicable only for private law disputes of administration, its use remains limited. Application to ombudsperson and administrative applications are quite advantageous methods compared to administrative judicial review in terms of subject and scope of control and procedures applied. However, problems related to impartiality in administrative applications and the fact that recommandations of ombudsperson are not binding have led to their failure. Besides, lack of legal protection and reluctance of public personnel who carry out these procedures is another reason of this failure.

Attempts to increase application of alternative procedures in French law, where *Conseil d'Etat* holds a high position, may also be indicative for Turkish law. Accordingly, offsetting forth compulsory mediation procedures to compensate damage before full remedy lawsuits may provide the plaintiff possibility to recover his loss faster; it will also reduce the amount of compensation paid by administration. Also, in order to ensure effectiveness of recommendations of ombudsperson, it would be beneficial to establish a direct link between institution and administrative judicial authorities or public personnel. Recognizing the authority to impose disciplinary sanctions on public personnel to ombudsperson may also be an effective solution.

The most effective and realistic one of these procedures is supervision by independent authorities. Having their own budget for indemnity payment and faculty to use experts in the field for their control make these methods a real alternative to the judiciary. This compensation procedure, which has not yet been implemented in Turkish law, is applicable within the framework of current constitutional system. Determination of public services to which this method will be applied and establishment of its organizational structure might be subject of a new study.

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