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Improving the Effectiveness of the Administrative Judiciary and Strengthening the Institutional Capacity of the Council of State

JOINT REPORT
Webinar on Alternative Dispute Resolution Mechanisms
in French and Turkish Administrative Disputes
16 December 2020

Assoc Prof Karine Gilberg
Prof Sabine Boussard
Assoc Prof Nilay Arat
Dr Yusuf Sertaç Serter

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On 16 December 2020, a Webinar brought together experts from France and Turkey to discuss the current developments and practices on alternative dispute resolution in both jurisdictions. The webinar aim to explore the available alternative dispute resolution mechanisms (ADR) in the French Administrative Justice System. It provided a platform for Turkish stakeholders to exchange views on the applicability of ADR methods in the Turkish Administrative Justice System and new approaches to ADR mechanisms.

The webinar focuses on the existing ADR legal framework and methods applied on pre-trial and during trial within the administrative justice system.

Keynote Speaker(s)

1. Assoc Prof **Selami Demirkol**- Council of State, Member of the Council of State
2. **Hakan Öztatar** - Director General of Legal Affairs, Ministry of Justice
3. **Metin Engin** - Head of Department, Directorate General of Legal Affairs Ministry of Justice
4. Prof **Sabine Bousard** - Université Paris Nanterre
5. Assoc Prof **Karine Gilberg** - Université Paris Nanterre, Head of the Office for European and International Law, Ministry of Economy and Finance
6. Assoc Prof **Nilay Arat** - Kadir Has University
7. **Abdürrahim Taş** – Seconded Judge, Mediation Department, Directorate General of Legal Affairs, Ministry of Justice

After the webinar, a survey was created to receive comments and suggestions of participants (150 participants in the morning, 138 in the afternoon session). A vast majority of participants (86%) consider that the online event met their expectations, ranging from good to very good and excellent.

1. *The Webinar's main outcomes*

1.1. Summary: ADR, the French case

The webinar aimed at presenting the French ADR methods and explore whether they could be applicable to Turkey.

French experts presented the evolution and the current state of play of ADR in resolving administrative disputes in France:

- In introduction, Prof Sabine Boussard gave a presentation of the **different ADR methods in France**: mediation/conciliation, transaction and arbitration, explaining that some of them, such as transaction, were already introduced as early as 1804;
- Prof Sabine Boussard and Karine Gilberg gave a presentation of the two kind of existing ADR methods: 'institutional mediation' which can be used at a very early stage of a citizens/administration dispute; 'judicial/conventional ADR', which is used at a later stage, including when a case is lodged before an administrative court;
- The creation, in 1973, of the 'Mediateur de la République' (the 'Défenseur des droit' since 2011) is considered as a turning point in the development of the so-called **institutional mediation**. As explained by Prof Karine Gilberg, institutional mediation, has development at a fast pace since the 1970s. An individual can introduce a request before the concerned administration to ask for an amicable resolution of a dispute (e.g. regarding the functioning of public services). The apparent diversity of institutional mediation mechanisms (see ppt presentation annexed to the report) is compensated by an effort to rationalise and to give consistency (through codes of ethics i.e. 'chartes déontologiques'; coordination mechanism between the Ombudsperson 'Défenseur des droits' and individual mediators…). Two case studies were shared on territorial mediation and mediation in the public health sector: the former as an example of bringing mediation closer to the public service users; the later to show a form of mediation involving representatives of the public service users (through a mixed commission);
- The introduction and development of judicial/conventional ADR at a **later stage of the dispute**:
    - The Law no 86-14 of 6 January 1986 gave the administrative judge of first instance tribunals a **conciliation mission**, which was extended to the administrative courts' judges in 2011 (Décret n° 2010-164 du 22 février 2010 relatif aux compétences et au fonctionnement des juridictions administratives);
    - The **1993 Conseil d'Etat's report** "*Régler autrement les conflits : conciliation, transaction, arbitrage en matière administrative"* (ADR: conciliation, transaction and arbitration in administrative law) and later the **law n°2016-1547 of 18 November 2016 "de modernisation de la justice du XXIe siècle"** (Justice of the 21rst Century) were turning points in the **development and generalisation of ADR methods**. The latter generalised mediation, which was merged with the so-called conciliation procedure.

      Mediation can be chosen by the parties or ordered by the judge, if the parties agree, in any administrative law case (Article L. 213-12 of the Administrative Justice Code: mediation can be initiated by the parties even before a case is lodged or, after the case is lodged, they can ask the judge to designate a mediator; Article L. 213-7, if the parties agree, the judge may order a mediation). Mediation procedure (choice of a mediator, fees etc.) is regulated by the Administrative Justice Code (see Prof Sabine Boussard presentation annexed to the present report).

1.2. Mains features of the Turkish case

Turkish experts presented, respectively, the evolution of the current legal framework of ADR methods in administrative disputes in Turkey:

- Assoc. Prof. Dr. Selami Demirkol, from the CoS, presented the contribution of the CoS to date on the evolution and understanding of the ADR in administrative disputes, suggested specific administrative disputes that could be considered "eligible" for ADR by referring comparative administrative law practices and the tools in the current system that could be first steps of ADR in administrative disputes, underlined the need for an administrative procedure act;
- In search of the most applicable ADR methods in administrative law Assoc. Prof. Dr. Nilay ARAT first underlined the need in existence of ADR methods and pose questions in order to reach the answer for the best practice of ADR in administrative disputes in Turkey;
- In this overall picture there is one judicial ADR for administrative disputes under the current legal system as arbitration for administrative contracts under the Article 125 of the Turkish Constitution. Other than that, there are mechanisms exist such as "negotiation" under the Law No 442 and Law No 6326 and "reconciliation" under the Law No 5846 and Roaming Regulation. However, all those examples are not for administrative disputes in nature, yet for the ones in which administration is engaged with. The closest examples for ADR in administrative disputes would be "peaceful settlement" under the Law No 5233, Law No 2942, Law No 5302, Law No 5393 and Regulation on Law No 5018. In mentioned legislations administration is party to the dispute in which a compensation or a payment from administration is at stake.
- In examining the current legal system, the most prominent ADR methods in administrative disputes could be regarded as the procedure before ombudsperson under the Law No 6328 and peaceful settlement under the Decree Law No 659. Under the Law No 6328 the Ombudsperson examines and investigates all sorts of act/actions of administration upon a complaint on the functioning of the state and gives recommendations on such on the grounds for legality and fairness. Under the Decree Law No 659, an individual aggrieved from acts and/or actions of the administration might make an application to the administration for his/her losses within the term of litigation.
- If a start has to be given for the good practices of ADR in administrative disputes in Turkey more extensive and effective use of the procedure before the ombudsperson and peaceful settlement have to be provided. In doing such, especially for the procedures before ombudsperson, the mediation practices of French experience might have been benefitted from. As for the utilization of peaceful agreement procedure the barriers on referring such ADR method have to be put away. On dealing with that problematic issue, it has to be re-considered to provide for;
    - compulsory ADR in general (in specific peaceful settlement),
    - detailed rules on legal status and decision-making procedure of the representatives of the administration (especially on legal and pecuniary liability issues and revocation),
    - mechanisms to facilitate the execution of the outcomes (especially budgetary issues).
- As for the facilitation of "regulatory negotiation" type of ADR a legal framework providing open, accessible and transparent administration that leaves room for participation could be considered in designing procedural rules for the functioning of administration namely "Administrative Procedure Act".

1.3. Questions from the participants and answers

The experts addressed the following questions of the audience. They are presented in their original translation.

Q1. In the report on French Administrative Justice Reform, it was stated that through the reform on 8 February 1995 it was possible to apply administrative fines and sanctions directly on Public administrations. How does this function and on which matters?

When the judgement necessarily implies that the public authority takes a particular action, the judge, when asked to do so by the other party or on its own initiative, may order that such an action is taken in a particular timeframe (such an order is called '**injonction'**, **Article L911-1 Administrative Justice Code (CJA)**[1]).

The judge may also order a 'periodic penalty payment' for each day, week, or month of delay in taking this required action (**Article L911-3 CJA**).

Such injunction and penalty may be ordered in all administrative law cases.

Q2. How is mediation applied on the zoning cases?

See, the paper mentioned in the Report on ADR in France: https://gemme-france-mediation.fr/2020/01/31/la-mediation-administrative-en-urbanisme-a-lepreuve-des-faits/ (select English version).

Q3. Is it compulsory for citizens to be presented by a lawyer in the ADR methods in administrative judiciary? Would the compulsory representation by lawyer be possible in at least certain case types (malpractice) or in certain ADR systems? Can I learn about your opinions related to the possibility or compulsory representation by lawyer?

Representation by a lawyer is not mandatory in ADR proceedings in France.

When a mediation is proposed during the judicial procedure, a litigant who is already represented by a lawyer would likely be assisted by his/her lawyer during the mediation process as well.

No opinion can be given here on compulsory representation as we do not have such case in France.

Q3. Do you find the legal aid application of your country sufficient in the scope of ADR related to the access to justice and right to legal remedies? What are your opinions for the possibility to have legal aid for citizens if the ADR methods are applied in the administrative judiciary in Turkey – especially when it is a prerequisite to apply before legal remedies?

In France an independent legal aid is not provided for ADR methods: legal aid is covering the trial as well as the mediation process ordered in the course of the trial. It means that individuals who benefit from legal aid in their judicial case will also be awarded legal aid in the mediation process to cover the mediator's fees (see article Article L213-8 CJA).

[1] *« Lorsque sa décision implique nécessairement qu'une personne morale de droit public ou un organisme de droit privé chargé de la gestion d'un service public prenne une mesure d'exécution dans un sens déterminé, la juridiction, saisie de conclusions en ce sens, prescrit, par la même décision, cette mesure assortie, le cas échéant, d'un délai d'exécution.*
La juridiction peut également prescrire d'office cette mesure ».

Institutional mediation as well as mandatory preliminary mediation are free of charge (see for the latter, **Article L213-5** CJA).

Q4. In the case of applying to legal remedies, is there an ADR method that is a prerequisite to apply before filing a case in the jurisdiction of administrative judiciary? Is there a method to resolve the disputes by negotiating and conciliating among the parties by establishing a commission within the administration?

Mandatory preliminary mediation. As mentioned in the report on Administrative Justice Reforms and ADR in France (p. 20 of the English version), Mandatory preliminary mediation was introduced, as an experiment, by Article 5 IV of the Law n° 2016-1547 of 18 November 2016 for cases concerning personal situation of civil servants or in cases concerning social or welfare benefits, social housing (Décret no 2018-101 of 16 February 2018, Portant expérimentation d'une procédure de médiation préalable obligatoire en matière de litiges de la fonction publique et de litiges sociaux. The experiment has been extended for one more year and is foreseen to end on 31rst December 2021 (see article 34 of the Law n°2019-222 of 23 March 2019). The experiment should be evaluated then to consider its generalisation or termination.

From April 2018 to July 2019, an experiment was lead in unemployment cases in 3 French regions (Auvergne-Rhône-Alpes, Occitanie, Pays de la Loire) regarding decisions taken by the Employment Agency (Pôle Emploi) to struck persons off the list of social benefits recipients: over the 996 requests for preliminary mediation, 973 led to an agreement (source : Pôle Emploi). Hence, only 23 may have led to the introduction of a case before an administrative court.

We are not aware of ad hoc commissions established for the purpose of negotiation or conciliation on individual cases. However, commissions are established on a permanent basis in public hospitals. The so-called 'Commission des usagers' were created, as 'commissions for the relations with users and quality of care (CRUQ-PC)' by the Law no 2002-303 of 4 March 2002, they are now regulated by Article L. 1112-3 of the Public Health Code. These commissions are in charge of guaranteeing users' rights and good quality of services as well as the highest quality of care. Such commissions are assisting patients and their family throughout their day to day formalities as well as assisting them in filing any complaint. Eventually, they may hear both parties (patients and hospital representatives). Each commission comprises at least representatives from the hospital's personnel (medical and non-medical staff), mediators and users' representatives (Article R1112-81 of the Public Health Code).

Q5. Does the institutional mediators (in-house) have a liability related to the unlawful actions? Which sanctions would be applied? If any, how is the sanction process?

In house mediators are liable for their unlawful actions as any other public servant would be. The applicable liability regime would depend on the nature of the wrongful action taken (disciplinary or criminal liability) and the status of the concerned institutional mediator (for instance, the current mediator of the Ministry of Economy and finance is a 'General Inspector of Finance', the current mediator of national education is a 'General Inspector' as well). On top of these ordinary-law arrangements, the mediator shall comply with his/her confidentiality obligation and may be exposed to disciplinary sanctions if he/she fails to do so.

Q6. It was said that there are 510 volunteer delegates in Ombudsman in France, but can you please further clarify it?

The Ombudsman's delegates are the local representatives of the Ombudsperson (article 37 of the Law no 2011-333 of 29 March 2011 on the Ombudsperson). They are appointed by the Ombudsperson and

accountable to him/her. Several delegates may be appointed to be posted in prison facilities. The Ombudsperson's delegates are registering and handling individual complaints (e.g. asking public authorities for further information or explanations on the given case, holding hearings, etc.) and answering requests for information. When the case does not fall under the scope of the Ombudsperson's attribution, the delegates may also refer the person concerned to the relevant authority.

Q7. It was said the application to the Ombudsman would stop all the other applications to other mediators and the mediators would send an activity report to Ombudsman. What is the character of the relation between Ombudsman and mediators? Is there a hierarchy?

There is no hierarchy between the Ombudsperson and other institutional mediators. But for the sake of effectiveness in handling complaints, especially to avoid overlaps and/or discrepancies, the law may provide coordination mechanisms. For instance, in cases when a claim has been lodged in the first place before the so-called mediator of 'France compétences' and the person concerned also filed a complaint before the Ombudsperson, the law provides for the termination of the first procedure (Article R. 6123-14, Labour Law Code).

Specialized institutional mediators may be the correspondents of the Ombudsperson (e.g. **médiateur de l'enseignement agricole technique et supérieur**, Article L. 723-34-1 and Article D. 810-2 Code on Agriculture and Fishery Law, his/her annual report is sent to the Ombudsperson for information purposes so that the latter may be aware of the room for improvement in delivering school education).

Q8. When the recommendations of the Ombudsman are not complied with and the individual apply to the legal remedies, is the non-compliance to the recommendation assessed?

The Conseil d'Etat ruled that public authorities are free to choose the measures (legal, budgetary, technical, organisational) as they deem appropriate to implement the recommendations issued by the Ombudsperson in individual cases, as long as they comply with their obligations or take the necessary actions to do so (see Conseil d'État, 13 November 2020, req. 433243, SFOIP).

The Conseil d'Etat rely to the Ombudsperson's recommendations and reports to rule on the merits of a case (see Conseil d'État, 23 November 2015, no 394540, Ministre de l'Intérieur et commune de Calais, see the conclusions of the public rapporteur on Conseil d'Etat, 13 November 2020, req. 433423, SFOIP). The judge may also take into consideration general observations issued by the Ombudsperson (see, Conseil d'Etat, 1 February 2019, no 427386).

Q9. It can be seen that the mediator must have an experience of at least 5 years on the subject matter of the case in France. Is it required for all the individual mediators (that are not institutional) to have a law degree? Or is it possible to have individual mediator in different disciplines related to the subject matter of the case? For example, during processing of a case on health services, can the court assign an individual mediator with a medical degree?

There is a clear difference between expertise and mediation. However, according to Article R 213-3 CJA, the mediator shall have acquired, through his/her professional experience, a specialisation in the concerned field (a 5-year experience according to the Charter of ethics of mediators issued by the Conseil d'Etat).

He/she must be trained or should have had a professional practice in mediation.

According to the Charter of ethics, he/she shall update and continuously improve his/her legal knowledge). There is no formal requirement though to have a law degree.

Q11. Which kind of disputes are under the conciliation and mediation methods in French legal system?

Conversely, disputes in social affairs and tax law may be solved through ADR. According to the CJA, disputes in any field of administrative law can be solved through ADR. There are only few exceptions: for instance, disputes in migration law are out of the scope of mediation.

Q12. Can she please give more details related to the disputes that are subject to amicable solutions? For example, the issues related to public order are under the scope of mediation and conciliation? What are the limits of public order?

Pursuant to Article L213-3 CJA, the agreement reached by the parties shall not infringe or violate their fundamental rights (i.e. the parties cannot waive their fundamental rights) and public authorities may not undertake unlawful actions (e.g. interdiction to alienate public land). Mediation only concerns individual decisions. Thus, legality review of secondary legislation is outside the scope of mediation.

Q13. Are the disputes related to environment, urbanisation, and zoning under the scope of amicable solutions? For zoning cases, see answer to Q2 above.

Q14. Is there a class or a group of judges that are assigned or delegated as mediators only in France? Not that we are aware of.

Q15. As a result of the implementation of ADR methods, has any mechanism considering the possibility of acceptance of a solution against the legislation – i.e. such as giving some rights to exceeding those foreseen in the legislation?- been foreseen? No, see answer to Q11.

Q16. It has been mentioned that the contract made as a result of the mediation is binding but not compulsory to be enforced. Is it compulsory to be approved by an administrative judge to make it enforceable among the parties? If there would be no approval, what would be the legal consequence of the settlement reached?

An agreement resulting from a mediation does need to be approved or certified by a judge to be enforced by the parties, they have the legal force of a contract.

However, pursuant to Article L. 213-4 CJA, the judge upon request of the parties may certify and give the agreement the legal force of a ruling (see for instance, Administrative Tribunal of Poitiers, 12 July 2018, n° 1701757: "the tribunal ensures that the parties gave their consent to the agreement, that this agreement is lawful, that it is not infringing any fundamental rights of the parties, that it is not a public donation - "libéralité", or in breach of other public order requirements") (see also, Administrative Court of Bordeaux, 30 December 2019, no 19BX03235)

Q17. As far as I can understand, the judge proceeding the case can be the mediator themselves. But this method has been scarcely implemented since the enforcement of the law. One of the most important subjects in mediation is confidentiality. This confidentiality is also valid for the court adjudicating the case. It is not possible for the documents and information submitted during the mediation to be presented to the court without the consent of the parties. When the judge is also the mediator would it not violate the principle of confidentiality when there is no settlement at the end of the mediation and the adjudication would go on? Because the judge would get familiar with the documents during the mediation process. On the other hand, the fact that the judge acting as the mediator and providing some advices would create an opinion on the case to be known. Would that not negatively affect the impartiality and trustworthiness for the parties of the judge? Maybe

the French administrative judges do not want to act as mediators due to these negativities? What is your opinion?

The judge acting as mediator shall not be the judge of the concerned case. There are former administrative judges among mediators but more rarely sitting judge. Sitting judges may have explanations on the psychological, practical, sociological and cultural reasons of such a situation.

Q18. What do you think are the reasons for the small popularity of disputes to be resolved through mediation of administrative judges or third parties in administrative judiciary?

The main reason is that the new system of mediation is quite recent, the other reason is the need to raise awareness on mediation. The third reason may be the importance of institutional mediation: most disputes that may be solved through judicial or conventional mediation have already gone through institutional mediation. When institutional mediation failed and the case is lodged before a court it may be unlikely that the parties use conventional or judicial mediation.

According to the DGFIP (Ministry of Economy), 99% of the cases regarding tax law are solved through preliminary institutional mediation.

Q19. Among the tax cases in France, are all the cases of 1st instance courts subject to 2nd instance and Conseil d'État applications or are there any finalized in the 1st instance?

In 2019:

- 16 577 incoming cases in tax law before administrative tribunals,
- 4 145 before administrative courts of appeals,
- 1 398 before the Conseil d'Etat.

Based on these data, it appears that the appeal rate is around 25%, which is quite low compared to the number of cases in first instance tribunals (Source: Annual report of the Conseil d'Etat for 2019, p. 33). We did not retrieve the data on the repartition of first instance cases that were confirmed or overruled in appeal.

Q20. What is the rate of pre-judicial ADR and of during litigation ADR in the total number of disputes in the French system?

In 2020, 1 394 mediation procedures were initiated during the litigation phase and, in 2019, 180 000 institutional mediation were initiated at a pre-litigation stage (source: Données consolidées des rapports annuels 2020 des membres du Club des médiateurs de services au public; Conseil d'État, Chiffres clés for 2020).

The total number of incoming cases before the Administrative Justice in 2020: 250 766 (Administrative tribunals, courts of appeals, Conseil d'Etat).

Q21. In Turkey, when there is no reply given to the applications made to the administration within 60 days, the application is deemed as rejected pursuant to Law on administrative litigation procedures; and we call it "tacit rejection". When no reply is given within these 60 days, a case can be filed within the next 60-day period. In short, is the "tacit rejection" practiced in the same manner in France or is the lack of reply by the administration deemed as "tacit acceptance"? I have heard that in France "tacit acceptance" is practiced. Can we clarify the issue, so as to have an example practice for us in Turkey?

"Tacit acceptance" is the principle: when the public administrative remain silence for a 2-month period after receiving a request, the request is deemed as accepted (see Article L. 231-1 Relations between the public and the administration Code CRPA).

I am copying below explanations already given in the report on Administrative Justice Reforms and ADR in France (point 5):

In the context of governmental program initiated in 2013 (called 'choc de simplification'), a reform was initiated to reverse the traditional rule according to which the absence of response of a public authority to a request introduced by an individual is considered as a rejection of that request.

Since 2013 (Article 21 of the LAW N.2013-1005 on simplification of relations between the public and administration, codified at Article), the principle has been that the absence of answer is, in principle, an acceptance of the request.

This new rule is applicable to 1 200 different administrative procedures (400 before the reform). When confirming the receipt of the request, public administrations shall inform the individual of the procedure under which his/her request falls (i.e. tacit acceptance or exception to tacit acceptance) (Article R112-5).

To support the implementation of the reform, an official webpage is dedicated to the reform and lists those different cases to which the rule applies (see Article D 231-2 CRPA, https://www.service-public.fr/demarches-silence-vaut-accord).

According to an evaluation report issued by the Senate (Report no 629, 15 July 2015), as a consequence of legal exceptions to the general rule, in 2015, silence still leads to rejection of requests in 50 % of cases; in 33,33 % of cases, silence leads to the acceptance of the request.

Q22. Is ADR organized as a legal entity independent from the administration? Or is it an establishment within each administration? If it is an establishment within the administration, how is the impartiality of the representative of administration secured?

For institutional mediation, the organisation is different from one administration to another. Generally the impartiality is guaranteed by the status of the mediators for instance. For instance, in the ministry of Finance and in the ministry of Education, the mediator is appointed among "General Inspectors" and are not submitted to hierarchy.

The Ombudsperson is an independent constitutional body as such he/she shall not receive any instruction from any public institutions or public officials.

In both cases, the administrations concerned are bound to answer the requests for information addressed by the institutional mediator.

Q23. Is there a legal guarantee protecting the authority making the payment for the administration against the audit of the Court of Accounts, in the cases where the plaintiff is paid by the administration when there is a settlement between the parties?

Public finances principles and procedures prevent public authorities from paying undue sums. The Conseil d'Etat has forbidden since 1971 to engage undue sums as a result of a transaction – no donation can be done in this context (CE, Sect., 19 mars 1971, *Sieur Mergui, req. no 79962*), this ruling is applicable to mediation as well.

A payment on public funds can only be performed by accounting officers (comptables publics) and only if they were authorised to do so by order of authorising officers ('ordonnateurs publics').

Q24. Was it discussed to transform some of the Ombudsman decisions to mandatory enforceable decisions during the harmonization process of EU Directives of 2008/52 and 2013/11 ?

Not that we are aware of.

Questions to national consultants

Q25. What kind of studies were performed in the Council of State following the decisions and recommendations taken in the meeting in Antalya in 2015?

Following the studies in Antalya, ADR methods were on the agenda of many sessions organized between 20015-2018 by the administrative judiciary commission established in the CoS, studies were conducted and notifiques were prepared and presented and they have been shared with relevant institutions and the Ministry with a study entitled as General Report.

Q26. Can I learn your opinion on the application of Peaceful settlement agreement upon the approval of administrative judge?

Approval of judge of the peaceful settlement agreement would put emphasis on the agreement and put it in a more powerful position which in turn would ease the reluctance of administration as regards on its enforcement. Yet, on the other hand, that would be another burden on courts' docket and would not serve an important phase of the ADR, namely easing court load.

Q27. Peaceful settlement concept has not become common enough in the disputes where the administration is a party, even though the Decree No 659 is in force. Can the reason be in the genetic codes of bureaucracy? That is can a bureaucratic understanding be the obstacle which believes in case of a settlement, an account should be given; but if no settlement is done, no sanction would be applied?

Peaceful settlement is quite a good method that can be applied in the current system, but ADR is an understanding, a culture, a mentality. It seems from the experience to date mentality of resolving disputes through peaceful settlements is quite far from us, where even the enforcement of administrative court decisions is problematic.

Other than bureaucratic understanding blockage to practice peaceful settlement there is also lack of encouragement from bureaucratic side as there are some implications of "liability" issue. Public personnel equipped with settlement authority is mostly reluctant to settle in order to avoid consequences of settlement with one being revocation. Besides, administrations are generally not willing to settle as they are unable to fulfil peaceful settlement agreement. As such an agreement might result in compensation that requires budget allocation, administrations mostly refrain from concluding settlement.

Q28. What do you think of a provision to be stated in the legislation worded as "Relevant administration shall be fined in cases of failure to revoke or correct the act by the administration despite the existence of a recommendation/decision on violation by the Ombudsman Institution and/or Human Rights and Equality Institution of Turkey (similar to the refusal of enforcement in the

Civil Enforcement Law) and the decision of the administrative judiciary on the unlawfulness of the relevant act or action of the administration."

The regulations to implement the decisions resulting from the ADR methods are vital for functioning. But such a suggestion would be possible to make the system functioning in an environment where the enforcement of decisions including that of the judiciary is not problematic in the whole system, as it would require an aspect of a part of the whole. Besides, we come across with various types of sanctions for administrations which refrain from enforcement of judicial decisions and/or law in comparative administrative law. Especially the ones in UK Legal system "mandamus" and in French Law, as stated at the Q&A section as A1, "injunction" or "periodic penalty payment" might be considered and modelled as similar examples of such suggestion.

Q29. How do you assess the bureaucratic resistance or conservativism against the implementation of Peaceful Settlement Application that has been prescribed in the Article 12 of the Decree 659 but not implemented despite the foregone 9 years, as mentioned by Nilay Arat at the end of her presentation? Please refer to the answer 3.

Q30. How do you assess that some of the provisions accepted in the legislation not being reflected in the practice by the administrations and even by administrative judiciary authorities, i.e. the *juro de facto* dilemma; which is one of the chronical problems of the administrative judiciary in our country and how can we overcome this problem?

The hesitation of the bureaucracy against the peaceful settlement can be overcome through the touch of a judge on the settlements; that is the peaceful settlements to be under the supervision or approval of judges.

Q31. In Turkey, in the field of tax law, there are processes of conciliation before assessment and conciliation after assessment and during these processes, conciliation is targeted between the tax offices and the interlocutors. In fact, there is an alternative dispute resolution method before the judicial processes in the Turkish tax system. At this point, could it be useful to apply ADR methods during the judicial processes as a pilot practice and disseminate this practice according to the results achieved during piloting as the tax cases represent a field more prepared both In terms of legal discipline and organization?

Piloting ADR in tax cases would surely be an achievement to disseminate the practice of ADR. Such proposition was put forth under this project even before. However, bearing in mind that administrative procedure stage is far more different in tax system, it would not be the same case as in administrative disputes, where lack of procedural rules exists as well. And taking into account the main aim of this project, the focus is mostly centred on administrative disputes other than tax disputes.

Q32. ADR methods provide in general fair solutions in simple procedures based on the principle of equality in reasonable times for the disputes between parties to reduce the workload of the courts. Within this context, considering that one of the objectives of the project is to strengthen the institutional capacity of the Council of State; would it be possible to make the advisory and examination authority role of the Council of State, pursuant to the law on establishment of the CoS, more effective in line with the objectives of the project? For example, could the ministries request opinions from the CoS on certain disputed subjects? If such a method exists in practice of French Law, how does it function?

Request of opinion from the CoS by ministries would be helpful for good administration practices in compliance with laws in administrative procedure and also for far beyond. It would be helpful in the

preventing filing of cases of similar nature. Yet the issue has to be dealt delicately taking into account the different functions of the CoS.

Q33. There have been many questions in relation to the Ombudsman Institution and the Human Rights and Equality Institution of Turkey, but can CIMER (Presidential Communication Centre), which is a similar institution, be assessed for ADR methods? Especially in terms of resolving problems, CIMER is considered as efficient in the public.

The practice of CIMER till to date has been considered very much helpful for various complaints communicated from citizens to the President's Office. However, both the types and content of complaints and the procedure to apply CIMER is far more different than the context of applications to Ombudsperson and Human Rights and Equality Institution. In applying to CIMER an individual might put wishes/requests, grievances, denouncement, suggestion or request for information and while doing that there are not such formal rules to follow, only guidelines has been issued. As the content is mostly not based on functioning on the administration and even it is so where there has not yet been any kind of relation with administration nor any dispute still it is possible to apply CIMER on the grounds of a wish/request. However, in considering applications to Ombudsperson and the Human Rights and Equality Institution there is mostly a complaint as regards on the relation with and functioning of a state organ. Assessing the issue on the nature of the procedure CIMER is mostly sounds like grievance mechanism rather than resolving disputes by participation of the parties.

Q34. What is the legal situation of the dispute when one of the parties (individual or administration) of the disputes does not fulfil the liability in the settlement resulting from mediation? Are there mechanisms in place to enforce the decisions of mediation (in the examples of countries where there is mediation in administrative judiciary) or the position of the disputes goes back to the initial stage? In the latter option, would it lead to delaying the payment of the debt as we see very common in the restructuring of the payments (especially in public receivables) or are there measures in place to prevent such situations?

According to *the article 32 of the "Regulation on Procedures and Principles Concerning the Implementation of Law on the Ombudsman Institution"* ombudsperson gives recommendations on the disputes including compensation, to take a course of action, acceptance of misconduct, amendment in legislation, to proceed with conciliation and so on. This recommendation is communicated with the related state organ for its enforcement. However, as this is only a recommendation it is not binding. However, if that recommendation is not for to be obeyed a justified decision has to be put forth. Other than that, according to the Article 22 of the "*Ombudsperson Institution Law"* Ombudsperson releases annual reports which would put public pressure on the related state organ. Unfortunately, there is no strict compelling procedure for decisions of Ombudsperson to be obligatory.

2. RELEVANCE OF THE FRENCH EXPERIENCE FOR THE TURKISH CONTEXT: TAKING STOCK OF OUTCOMES AND CHALLENGES

2.1. ADR has helped to tackle some of the administrative disputes challenges as well as administrative justice challenges in France

Institutional mediation is considered by public administrations as an effective instrument to solve most disputes between public service users or citizens and the considered public administration: in 90% of cases, the solution proposed by an institutional mediator is accepted by both parties; in 63% cases introduced before the mediator the initial request is satisfied either partially or totally. Citizens may favour institutional mediation as it is free of charge.

Institutional mediation has helped to tackle the caseload before the administrative judges especially in tax law cases.

Mandatory preliminary mediation has been experimented since 2018 and will end on 31 December 2021. It is too early to draw conclusion on the efficiency of the system (experimented in cases concerning civil servants and social affairs). This solution would need to be evaluated before considering its applicability to administrative law cases in Turkey.

2.2. ADR challenges in France and ways they have been or should be overcome.

	Number of mediation cases	Mediations ordered by a judge	% of amicable solution
2017	261	90%	61%
2018	808	76%	41%
2019	1040	Non available	66%
2020	1394	Non available	42%

Source: Chiffres clés de la justice administrative and Annuals Report of the Conseil d'Etat

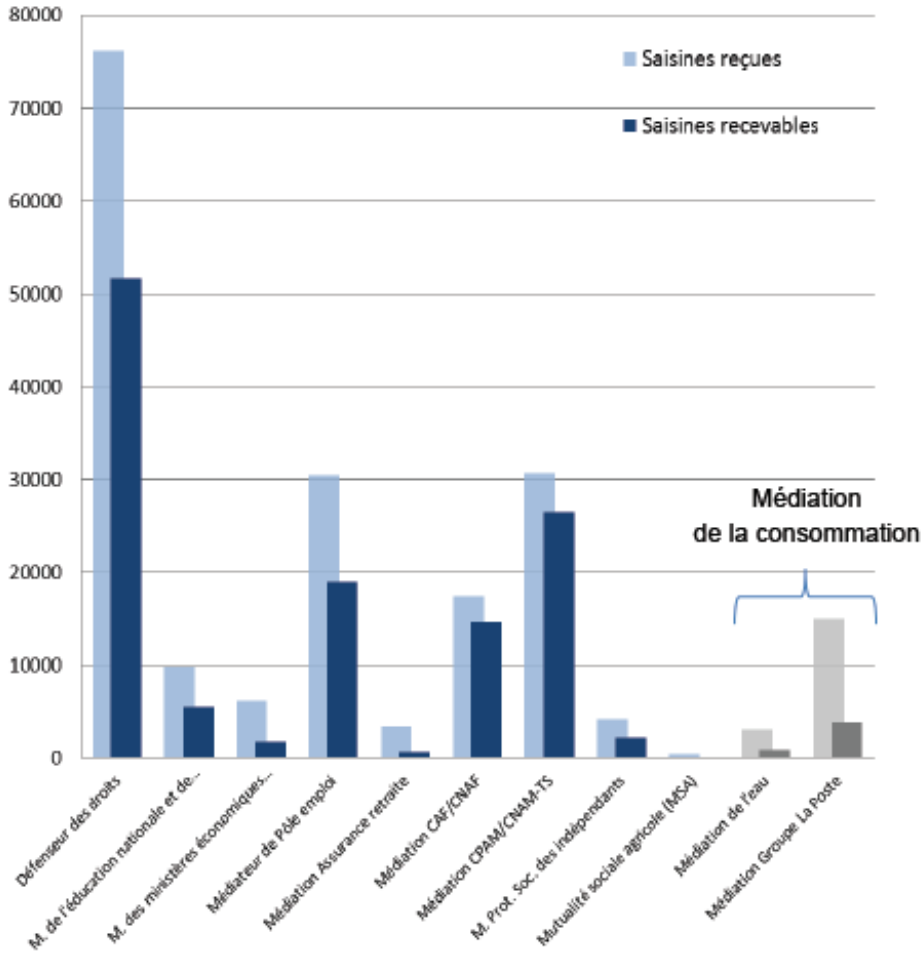
Although institutional mediation is a widespread practice, conversely, there is a limited number of mediation at a trial stage. A reason could be that the generalisation of judicial and conventional mediation is a quite recent (2016). To encourage ADR, in 2019 the Council of State set a goal: 1% of cases before Administrative Justice should be resolved through mediation (i.e. around 2 500 cases).

Even though growing, the number of judicial and conventional mediations is still limited even after the 2016 ADR reform. As mentioned above, several factors may explain the situation: the success of institutional mediation but also a limited interest for mediation from both the administration and the litigants.

A high number of cases introduced before an institutional mediator are declared non-admissible, generally because citizens have not performed the necessary steps (such as challenging the administrative decision or introducing a preliminary request for compensation before the administrative authority). For instance, in 2017, more 50 000 cases were declared inadmissible by the Ombudsperson and around 80 000 were admissible mostly for that reason. According to a study issued in July 2019 by France Stratégie, the lack of awareness of citizens on the procedure may explain the situation.

As mentioned above, there is a high number of inadmissible cases in institutional mediation. The main reason is that citizens generally fail to introduce a request before the concerned administrative before introducing a request for mediation. Such an issue could be solved through awareness-raising. For instance, the Ombudsperson communication campaign and local proximity through to inform and guide citizens.

The preliminary request before the public administration is considered in French administrative law as a necessary prerequisite step in most cases to ensure a preliminary communication of the complaints and that an administrative decision is formally issued (whether explicitly or tacitly).



2.3. ADR claims and how they performed in practice: quicker, reduce caseload before Administrative Justice, equity, lower costs, bringing public administration closer to citizens.

2.4. Mechanism to guarantee the enforcement of the ADR agreement/settlement (mechanism to ensure effective implementation of the agreement? Homologation of the agreement in mediation). How binding is the settlement?

Outcomes of ADR in France:

a. Institutional setting and legal framework: French longstanding experience and the 2016 (what's different since 2016 and benefits); administrative procedure act and codification (consolidation of case-law and further reform)
b. What are the type of ADR mechanisms and their functioning, which is the most used one and why?
    - Mandatory mediation
    - Institutional mediation
    - Mediation/transaction during the course of a trial before administrative justice
c. Institutional Mediation

d. ADR as a mean to reduce the caseload?
e. Level of amicable resolution of administrative disputes (%)
f. ADR best practices (legal fields, type of disputes, benefits for both parties)
    - Existence of a local network of correspondents (Ombudsperson's delegates – dense local network) (institutional mediation in municipalities – 2019 reform)
    - Mixed commissions (representatives of the concerned administration and public services users);

3. Recommendations on the areas of possible applicability of ADR approaches in the Turkish Administrative Justice System

Recommendation 1. Consider establishing a clear and uniform legal framework on conventional and judicial mediation procedure together with the establishment of a full Administrative Procedural law. The 'codification' of administrative procedure has improved the transparency and accessibility to administrative procedure in France, creating a level playing field and providing more clarity to the decision-making process

> According to the survey performed after the webinar, all participants to the webinar support legislative changes for effective functioning of ADR methods. A major part of the participants thinks that an Administrative Procedural Law is absolutely necessary. Furthermore, all participants agreed is the necessity of legislative amendments in Law on Administrative Litigation Procedure (2577) and other existing laws.

Recommendation 2. Consider to perform a pilot project on judicial and conventional mediation in a particular area. This project could be performed in selected administrative courts to identify the main features of the system and make sure that the future designed solutions are fully adapted to current administrative justice and public administration challenges. We would recommend an incremental process and to concentrate on one or two areas (e.g. France has chosen social affairs cases to experiment innovative ADR methods).

> Participants to the webinar have considered that ADR methods would be best suited for selected disputes such as cases related to civil servants, pecuniary disputes, indemnification claims, social security, some zoning cases (to be identified), some municipality cases.

Recommendation 3. To foster conventional and judicial mediation, consider establishing and publishing a list of mediators specialised in administrative Justice, sorted by field of specialisation. Such a step would ease the mediation process and ensure that mediators are highly qualified in administrative law and specialized in the field of the case.

Recommendation 4. To support the high quality of mediation, consider setting criteria to be fulfilled by mediators in order to be included on the list and build a training curricula based on the required competences (ensure a training in mediation techniques and in relation to administrative law issues).

Recommendation 5. Consider the establishment of a Charter of ethics on common and shared grounds between mediators and the administrative Justice.

Recommendation 6. Consider the conclusion of conventions between national or local bar association and the Conseil d'Etat and individual tribunals. Such a convention could also be concluded with association of mediators as deemed appropriate by the Turkish authorities. Such convention will raise awareness of both mediators, lawyers and judges on mediation.

Recommendation 7. Consider conducting an in-depth study, together with the Ombudsperson, of areas where both citizens and public administration would benefit from institutional mediation. Identify the main features and include the necessary guarantees of independence, impartiality,

effectiveness of institutional mediation. France has chosen a system of specialized mediation and as close as possible from the general public with a strong local presence in public services and with the development of online tools (information, applications).