FINANCIAL LIABILITY FOR THE ADMINISTRATION ON HEALTHCARE SERVICES*

*Sağlık Hizmetlerinde İdarenin Mali Sorumluluğu***

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ABSTRACT

Doctor or other health professionals working in the public treatment facilities that perform medical services and compensation for losses arising due to the principles of responsibility, as a rule, is determined according to the principles of administrative law and the administration of financial responsibility. Due to the behavior of public officials required by the Constitution, responsibility for administration, although there seem to be mainly the responsibility of defect, arising from the administrative responsibility of health services by the day being engaged in the principles of strict liability. According to the Constitution, the status of public officials while performing their duties in a doctor or other health care workers resulting damages claims in the lawsuit against the authorities and should be opened directly, if the administration, the compensation paid for damages, such as caste or gross negligence in the service activities of the damage in case there are cases that can be considered a personal flaw cause of recourse should the public official.

Keywords: Financial responsibility for the administration, service fault, public servant's personal flaw, establishment of public treatment, health care services.

ÖZET

Kamu tedavi kuruluşlarında çalışan doktor veya diğer sağlık görevlilerinin ifâ ettikleri sağlık hizmetleri dolayısıyla ortaya çıkan zararların tazmini ve sorumluluk esasları, kural olarak idare hukuku ve idarenin mâlî sorumluluğu esaslarına göre belirlenmektedir. Anayasa'nın kamu görevlilerinin faaliyetleri nedeniyle idare için öngördüğü sorumluluğun, esas itibariyle kusur sorumluluğu olduğu görülmesine karşın, gün geçtikçe sağlık hizmetlerinden doğan sorumluluk konusunda kusursuz sorumluluk esaslarının benimsenmeye başladığı da belirtilebilir. Anayasa'ya göre, kamu görevlisi statüsündeki doktor veya diğer sağlık görevlilerinin görevlerini ifâ ederken ortaya çıkan zararların tazmininde kural olarak doğrudan doğruya idare aleyhine dava açılmalıdır, idare ise, ödediği zararın tazmini için, kast veya ağır ihmâl gibi hizmet içinde kişisel kusur sayılabilecek durumların varlığı hâlinde faaliyetiyle zarara sebep olan kamu görevlisine rucû etmelidir.

Anahtar Kelimeler: İdarenin mâlî sorumluluğu, hizmet kusuru, kamu görevlisinin kişisel kusuru, kamu tedavi kuruluşu, sağlık hizmeti.

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Introduction

The regulation included in Article 125 of the Constitution holds the administration responsible in general.[1] According to this regulation; "The administration is obliged to pay for damages resulting from its actions and acts." In addition, apart from Article 40 of the Constitution[2], it was decided in Article 129 that "claims for damages arising from the faults committed by civil servants and other public officers while exercising their powers can be brought against the administration provided that they are recoursed to them and comply with the manners and conditions specified by the related law". The basis of the responsibility stated in this provision is the continuation of the general basis of responsibility regulated in Article 125. Through these regulations, it is desired to allow that the civil servants who have faults in their services carry out their services carefully and to avoid their being held irresponsible; and at the same time, the legal remedies to bring a lawsuit by those who are harmed due to the performance of the services against the administration which has the ability to pay.

In accordance with Article 3 of the new Civil Procedure Law No.6100 which was put into force on 1 October 2011; "Without prejudice to the provisions of the Labour Courts Law, any actions regarding the compensation of the material and moral damages that result in partial or complete loss of the physical integrity or the death of a person[3] due to all kinds of administrative actions and procedures and other reasons for which the administration is responsible."[4] We believe that this provision is contrary to Article 157 of the Constitution.[5] Article

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1 YAYLA, Yıldızhan. **İdare Hukuku,** Beta Basım Yayım, 1.Baskı, İstanbul, 2009. s.346vd.

2 GÖZÜBÜYÜK, A. Şeref - TAN, Turgut. **İdare Hukuku,** Cilt:I, Turhan Kitapevi, 4.Baskı, Ankara, 2006. s.794-795.

3 It should be noted that the performance of the health care services that lead to the partial or full loss of the physical integrity or the death of a person by the administration will be also considered within the scope of this provision.

4 See. Civil Procedure Law No. 6100. Article 3. **Official Gazette.** Official Gazette on 04.02.2011/27836. In addition, the same regulation is also included in the *2nd paragraph of Article 55 of the new Code of Obligations* No.6098 that came into effect on 1 July 2012: "Provisions of this law are applied in any claims and actions regarding the compensation of the material and moral damages that result in partial or complete loss of the physical integrity or the death of a person due to all kinds of administrative actions and procedures and other reasons for which the administration is responsible." **Official Gazette.** Official Gazette on 04.02.2011/27836. See. http://www.resmigazete.gov.tr/Arşiv-Fihrist-Düstur. Access Date:10.09.2011. ;We believe that this provision is contrary to Article 157 of the Constitution. It should be also noted that special legal provisions shall apply in the claims to be filed in case the consequences projected in the provision of this Law occur due to the performance of the health care services are regulated in the paragraph 2 of Article 55 of the Code of Obligations.

5 The Supreme Court annulled Article 3 of the Civil Procedure Law. AYM, Docket:2011/35, Decision:2012/23, Decision Date:16.02.2012, Number and Date of Official Gazette:19.05.2012/28297.

157 of the Constitution regulates that *the disputes arising from administrative proceedings and actions related to military service and concerning military personnel can be brought in the High Military Administrative Court* even if they have been established by non-military authorities. Although, Article 3 of the Civil Procedure Law No. 6100 is clearly contrary to Article 157 of the Constitution, it has not been subjected to any annulment action and the term of litigation which is 60 days has passed. At this stage, it is possible to bring this Article which has been put into force contrary to the Constitution to the Supreme Court through contention of unconstitutionality. In this regard, it is possible to say that the unconstitutionality claim that can be suggested in the first action in which Article 3 of the Civil Procedure Law No.6100 applies may be deemed serious by the court and this provision may be annulled by the Supreme Court.

Article 3 of the Civil Procedure Law is contrary to the case-law of the Supreme Court as well as to the Constitution. Namely, in accordance with Article 3, administrative actions based on an administrative procedure [6]and the claims for the compensation of the material and moral damages that result in partial or complete loss of the physical integrity or the death of a person shall be brought in the judicial jurisdiction; however, the claims on the annulment of the administrative procedure that has led to this administrative action shall be brought in the administrative jurisdiction.[7] This is contrary to the case-law of the Supreme Court. According to the Supreme Court; "... It is not possible to say that the law-maker has an absolute discretion regarding the appointment of the administrative jurisdiction in the solution of a dispute falling within the jurisdiction of administrative courts. The resolution of a dispute that should be depending on the control of the administrative jurisdiction may be left to the judicial jurisdiction by the law-maker in case of a reasonable justification and the public interest. However, there is no public interest in leaving one part of an administrative procedure to the control of the administrative jurisdiction, while leaving the other part to the control of the judicial jurisdiction. This is because these procedures are the continuation and the application of .....an administrative procedure related to the exercise of public power, there is no doubt that administrative jurisdiction shall be authorized in the

[6] It should be also noted that one administrative procedure cannot lead to the partial or complete loss of the physical integrity of a person. However, an administrative action may lead to it, which means that the regulation is defective in this regard.

[7] In such a case, an administrative jurisdiction judge may make the case in the administrative jurisdiction "prejudicial question"; however the rule stating that "the jurisdiction is liable to conclude cases with the least costs and within the shortest time possible" stated in Article 141 of the Constitution and having access to justice easier and with less cost, concluding the cases rapidly and facilitating the right to legal remedies would not be fulfilled, which might constitute contradiction to the public interest.

resolution of possible disputes... Hearing one part of the decision taken by the Administration in the administrative jurisdiction and hearing the other part in the judicial jurisdiction impair the integrity of the proceeding. As the procedure cannot be paused if it is an administrative one and there is no justifiable reason and public interest required by the service in this regard, it would not be right to divide the administrative procedure and leave one part of it to the control of the administrative jurisdiction and the other part to the control of the judicial jurisdiction."[8] According to this decision of the Supreme Court, the disputes arising from administrative acts and actions must be settled in the administrative jurisdiction. However, provided that there is a reasonable justification and public interest, administrative procedures and administrative actions might be audited in the judicial jurisdiction.[9]

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[8] The Supreme Court. Decision Date:15.05.1997 Docket.1996/72 Decision:1997/51 **Official Gazette.** Date and number: 01.02.2001/24305. See. http://www.anayasa.gov.tr/Kararlar Databank. E.T:03.10.2011. ;"As an assumption, accepting that an action might be brought against the subjects regarded as an administrative action or proceeding in accordance with the principles of the administrative jurisdiction in the judicial judiciary through a law and the judicial control could be achieved in this way would be contrary to constitutional principles and a vision that does not go beyond a formal control. The reason why the administrative jurisdiction, namely an administrative jurisdiction system separate and independent from the judicial jurisdiction is accepted by the Constitution and the administration law is the characteristics of the disputes arising from the public services; the legal and technical nature of the rules to apply to them; a difference between the structures, basis and principles of the private law and the administrative law; and the obligation of the audit of administrative proceedings by the knowledgeable and experienced judged specialized in administrative law and public law. The distinction between judicial jurisdiction and administrative jurisdiction lies at the bottom of the fact that private law and administrative law are based on separate principles and rules and the areas of disputes and the legal rules to apply to these disputes are different. The essential principle that dominates the private law is the equality of rights and interests and the freedom of will among people." The Supreme Court. Decision Date:25.05.1976 Docket:1976/1 Decision:1976/28 **Official Gazette.** Date and number: 16.08.1976/15679. See. http://www.anayasa.gov.tr/Kararlar Databank. E.T:03.10.2011.

[9] "In this regard, it is possible to make the following determination In order for a law to be enacted on the resolution of an administrative dispute in the judicial jurisdiction; there should be an a) understandable, reasonable, fair and justified reason regarding the objective; b) The requirements of the service conducted should justify the assignment of the judicial jurisdiction; c) a realistic, objective and o-compulsory cause and effect relationship between the audit of the judicial jurisdiction and the service; d) the preference in the judicial audit must comply with the main goals and tasks of the State. In addition, based on the rule stating that "the jurisdiction is liable to conclude cases with the least costs and within the shortest time possible" stated in Article 141 of the Constitution; in case of the reasons such as having access to justice easier and with less cost, concluding the cases rapidly and facilitating the right to legal remedies, the resolution of some administrative disputes in judicial jurisdiction authorities can be accepted." See. YILDIRIM, Turan. **İdârî Yargı,** Beta Basım Yayım, 2.Baskı, İstanbul, 2010. s.16-17.

Article of the Civil Procedure Law seems to create a problem in the determination of the place of jurisdiction. Namely, in accordance with Article 3 "any claims for the compensation of the material and moral damages that result in partial or complete loss of the physical integrity or the death of a person due to all kinds of administrative actions and procedures and other reasons for which the administration is responsible" shall be settled in the judicial jurisdiction. However, the phrase "other reasons for which the administration is responsible" is an unclear and open to subjective evaluation. The ambiguity of this phrase may lead that the claims may be filed in the judicial authorities in a different judicial branch, and also different qualifications may be made by judicial authorities and therefore different decisions may be taken. It should be also noted that, Article 3 mentions "the complete loss of physical integrity". In this case, it should be also determined whether the related person has lost his/her physical integrity completely or not. This is because it is seen that the places of judicial jurisdiction will be assigned in the claims for damages that result in partial loss of the physical integrity of a person due to all kinds of administrative actions and procedures and other reasons for which the administration is responsible, while the places of administrative jurisdiction will be assigned in the claims for damages in which the complete loss of the person is not accepted. That is to say, whether a person has lost his/her physical integrity might be an issue that determines which judicial branch will be assigned in bringing a claim for damages. For instance, when it is assumed that a person has lost his/her physical integrity due to an administrative action; however this loss is not accepted even partially, the related person may need to file a claim for damages in the administrative jurisdiction.

Due to their nature, most of the health care services incorporate the element of danger. Therefore, general health care services may also cause the administration's defect liability as well as the strict liability based on the characteristics of the concrete case.[10] *Given that Article 3 of the Civil*

[10] "Administration operates often under the administration law, and sometimes under the private law. Thus, it would be useful to analyze the financial liability of the administration in two categories based on the body of law to which the administrations actions are subjected. In case of equality, the actions, acts or control made on behalf of the administration and the case with which a legal relation is established shall be governed by the *private law*. In case equality is not an issue; in other words, the actions, acts or control made on behalf of the administration and the case with which a legal relation is established have been performed within the framework of superior and privileged authorities vested in the administration, the liability of the administration shall be governed by the *administrative law*...In private law, the financial liability of the administration arises from the "*liability relation*". Liability, on the other hand, may arise from various reasons..." See. YILDIRIM, Ramazan. **İdare Hukukuna Giriş,** Anadolu Üniversitesi, Açık Öğretim Fakültesi Yayınları, 1.Baskı, Eskişehir, 2011. s.174vd.

Procedure Law that came into effect on 1 October 2011 can be annulled as it is clearly unconstitutional [11] *depending on the reasons given above* [12]*, the financial liability of the administration is assessed within the framework of the principles of liability in the administrative jurisdiction, and analyzed with the sections that are especially important.*

1. Financial Liability of the Administration in General

1.1. Service Flaw

The flaw arising from the establishment and operation of the service is accepted as the financial liability requirement of the administration. As the administrative liability reason, a flaw means a quality deficiency, flaw or failure arising from the establishment or delivery of public services.[13]

In other words, the administration is deemed defective as it does not think and regulate well as an organization or function or cannot perform the service duly or at all or cannot carry out the audit activities it should properly.[14]

As the administration is comprised of legal persons as a whole, the flaw of the administration is the consequence of the bodies and personnel consisting of real persons; however, it is not possible to mention the public officers who make these mistakes in each case. In the cases where it is possible to identify them, it is not always right and possible to be able to personalize the defects of the public officers.[15] The objective and anonymous flaw of the administration in not fulfilling its supervision and audit task on the establishment, delivery of

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11 Paragraph 2 of Article 55 of the new Code of Obligations No.6098 that came into effect on 01 July 2012 and includes the same regulation can be stated to be unconstitutional due to the same reasons.

12 As mentioned earlier, this provision has been annulled by the Supreme Court but the annulment decision has not been yet published in the Official Gazette. In addition, paragraph 2 of Article 55 of the new Code of Obligations No.6098 that came into effect on 01 July 2012 and includes the same regulation should be abolished as the Article 3 of the Civil Procedure Law by the lawmaker.

13 ARMAĞAN, Tuncay. **İdarenin Sorumluluğu ve Tam Yargı Davaları,** Seçkin Yayınevi, Ankara, 1997. s.17. ;GÖZÜBÜYÜK - TAN, **age,** s.820. ;ÖZGÜLDÜR, Serdar. **İdarenin Hukukî Sorumluluğu ve Tam Yargı Davaları,** in ÖZAY, İlhan. **Günışığında Yönetim,** Alfa Yayıncılık, İstanbul, 2002. s.731vd. ;ATAY, Ender Ethem - ODABAŞI, Hasan - GÖKCAN, Hasan Tahsin. **Teori ve Yargı Kararları Işığında İdarenin Sorumluluğu ve Tazminat Davaları,** Seçkin Yayınevi, Ankara, 2003. s.5vd. ;ATAY, Ender Ethem. **İdare Hukuku,** Turhan Kitapevi, Ankara, 2006. s.559vd. ; ÇAĞLAYAN, Ramazan. **Tarihsel, Teorik ve Pratik Yönleriyle İdarenin Kusursuz Sorumluluğu,** Asil Yayınları, 1.Baskı, Ankara, 2007. s.133. ;GÜNDAY, Metin. **İdare Hukuku,** İmaj Yayıncılık, 10.Baskı, Ankara, 2011. s.369vd. ;YILDIRIM, Turan. **İdârî Yargı,** Beta Basım Yayım, 2.Baskı, İstanbul, 2010. s.320vd.

14 ;ÖZGÜLDÜR in ÖZAY, **age,** s.709vd.

15 DÜREN, Akın. **İdare Hukuku Dersleri,** Ankara Üniversitesi Hukuk Fakültesi Yayınları, Sevinç Matbaası, Ankara, 1979. s.287.

the public services and on the related public official is called a *service flaw*.[16] A service flaw is the one that cannot be depend on the attitudes and behaviors of one or a few certain public officers and that cannot be directed to them. Therefore defining the service flaw as *anonymous*, which means a flaw that cannot be attributed to a certain person [17] is possible and it is also possible to explain it as a deficiency that is the responsibility of one or more than one officers of the administration during the normal delivery of the service, yet that cannot be directed to them personally;[18] however, as mentioned above, it is not possible to personalize this flaw.

A service flaw is also regarded as the legal structure of the public services and the liability of the administration arising from this. The administration has to provide the public services to those who use them in a consistent manner that complies with the requirements of these services or to cause these services to be provided and to ensure that those who use these service benefit from them duly. Provision of public services or ensuring their provision as stated above is the most fundamental duty and reason for being of the administration. The failure to perform this task constitutes a *service flaw*.[19]

The general characteristics of the service flaw can be listed as follows based on its legal character:[20] Service flaw includes an independent feature. The liability based on this flaw is a primary and first degree liability. Service flaw is anonymous. Service flaw has a different structure for each event. Service flaw has general characteristics.[21]

The flaw that results in the personal liability of a public official due to an activity which is not related to the duty is called *an absolute personal flaw* and it requires the liability of the public official in judicial courts in accordance with the rules of private law.[22]

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16 ATAY, **age,** s.571vd.

17 ÖZYÖRÜK, Mukbil. **İdare Hukuku Dersleri,** Ankara Üniversitesi Hukuk Fakültesi, (Çoğaltma), Ankara, 1972-1973. s.241. ;ATAY, **age,** s.577.

18 ÖZYÖRÜK, **age,** s.241.

19 ONAR, Sıddık Sami. **İdare Hukukunun Umumi Esasları,** Cilt:II, Hak Kitabevi, İsmail Akgün Matbaası, İstanbul, 1966. s.1695.

20 Aynı, **age,** s.1695vd.

21 DUEZ collects the outlines of the service flaw under five headings as being independent, being principal, being anonymous, being accurate and being general in his work "Liability of Non-Contractual Public Power" See. DUEZ, Paul. **Amme Kudretinin Mesuliyeti,** Çev. SENİL, İbrahim. Güney Matbaacılık ve Gazetecilik, Ankara, 1950. s.15vd.

22 GÜNDAY, **age,** s.374vd. ;GÖZÜBÜYÜK - TAN, **age,** s.809. ;In Article 3 of the Civil Procedure Law No.6100, it is regulated that the claims to be filed in case the consequences projected in the provision of this Law occur due to the performance of the health care services shall be settled in the civil courts of first instance. With Article 3 of the Civil Procedure Law No.6100, it seems it would not be important anymore whether the personal flaw of a public official is in or out of the service in determining the place of jurisdiction in

1.2. Cases Considered as Service Defects

In the administrative law doctrine and court case-laws, the cases considered to be a service flaw include poor delivery, unsatisfactory, late or non-delivery of a service in general.[23]

1.2.1. Poor or Unsatisfactory Delivery of a Service

The places of administrative jurisdiction, mainly the Council of State, assumes the poor or unsatisfactory delivery of a service as a service flaw and decides on the liability of the administration and the compensation of the damage.[24] Poor or unsatisfactory delivery of a service can be in the form of an administrative action or may arise in the form of an administrative procedure. To mention briefly, what is meant by poor or unsatisfactory delivery of a service is the activities and actions of the administration that can constitute a flaw.

There are countless decisions taken by the 10th Law Chamber of the Council of State that can be shown as an example to the service flaw that has resulted from the poor or unsatisfactory delivery of a service: "…The damage that has arisen from the delivery of a health care service carried out by the defendant administration should be compensated by the administration that performs the service defectively in the case of losing the healthy left eye of the patient due to the anesthesia infection that was acquired during the eye surgery done in the .....hospital…"[25], "The damage incurred by the plaintiffs due to the poor delivery of the service during the transport of the blood sample received from the relatives of the plaintiff after the birth to the related health care unit and during the testing stages should be compensated by the administration…"[26], "The administration has a service flaw and the liability to damage in the case of amputating the patient's arm who was hospitalized in a state hospital for receiving a fractured foot treatment and whose arm became gangrenous due to a defective injection…"[27], "The damage incurred by the concerned person due to his/her amputated leg as a result of the poor treatment and care after the surgery should be compensated by the administration that

the claims filed for the actions for the material and moral damages arisen in health care services which are provided by the administration and have led to the actualization of the consequences foreseen in this provision of law.

23 GÖZÜBÜYÜK - TAN, **age,** s.821. ;ATAY, **age,** s.579vd. ;ÇAĞLAYAN, **age,** s.133vd.

24 YAYLA, **age,** s.362vd. ;GÖZÜBÜYÜK - TAN, **age,** s.821. ;ATAY, **age,** s.580vd. ;ÖZGÜLDÜR in ÖZAY, **age,** s.735-736.

25 10Th Law Chamber of the Council of State. Decision Date:22.11.1999. Docket:1998/190 Decision:1999/6198. See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

26 10Th Law Chamber of the Council of State. Decision Date:20.10.2006. Docket: 2003/3146. Decision:2006/5850 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

27 10Th Law Chamber of the Council of State. Decision Date:16.01.1985. Docket: 1982/2908. Decision:1985/26 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

performed a defective service…"[28], "The administration has a gross negligence and the liability for damage in the death case that happened as a result of not taking the effective measures against the infection-associated shock…"[29], "The administration has a gross negligence and the liability for damage in the death case that happened as a result of giving carbon dioxide instead of oxygen during the surgery in a university hospital…"[30], "The damage arisen from the death case resulting from giving the wrong serum during the tonsillectomy performed in the university hospital of the administration should be compensated by the administration…"[31], "The damage arisen from the death that occurred due to the insufficient medical intervention during the time when the plaintiffs' relative stayed in the hospital to which he/she was brought injured patient should be compensated by the administration…"[32], "The moral damage incurred by the plaintiff who was attempted to be raped by somebody who was wearing a doctor costume while she was under treatment should be compensated by the administration that has a service flaw…"[33], "The defendant administration has a service flaw in the plaintiff's becoming permanently disabled after falling down into the well by stepping on a banana peel, who is also doing his/her specialty in the cardiology department of the faculty of medicine…".[34]

1.2.2. Late or Slow Delivery of a Service

Late or slow service delivery is a service flaw that requires a liability as it is not enough to perform a service regularly and lawfully, the administration must perform its activities and services on a timely basis and in the necessary speed so that the administration can be considered to have fulfilled its duty.[35] Either in taking decisions and precautions or in their implementation, actions must be taken within the period of time required by the legislation and terms and conditions. Otherwise, the administration is obliged to compensate the

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28 10Th Law Chamber of the Council of State. Decision Date:09.12.1992. Docket: 1992/184. Decision:1992/4321 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

29 10Th Law Chamber of the Council of State. Decision Date:01.06.1994. Docket: 1993/363. Decision:1994/2502 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

30 10Th Law Chamber of the Council of State. Decision Date:03.05.1995. Docket: 1994/3258. Decision:1995/2379 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

31 10Th Law Chamber of the Council of State. Decision Date:13.11.1996. Docket: 1996/1091. Decision:1996/7530 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

32 10Th Law Chamber of the Council of State. Decision Date:09.11.1999. Docket: 1997/4839. Decision:1999/5475 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

33 10Th Law Chamber of the Council of State. Decision Date:09.02.2000 Docket:1998/4977 Decision:2000/380 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

34 10Th Law Chamber of the Council of State. Decision Date:20.10.2006. Docket:2003/4153 Decision:2006/5848 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

35 ARMAĞAN, **age,** s.30.

damages arisen from the delay is due to the service flaw.[36]

It is not possible to set a certain rule on the late or slow service delivery. Whether such a situation exists or not can be considered based on the aspects of the case. Indeed, the Council of State determines in the decisions it takes whether the administration has any defects considering the nature of the case. It should be also noted that although the time within which the service should be performed is regulated by the legislation, it can be concluded that the *service is delayed* in case the time foreseen by the legislation is exceeded by the administration without excuse. It is stated that in case the time within which the services are performed is not determined by a rule, a *reasonable and normal* time should pass to allow the administration to take action based on the nature and requirements of the service.[37] For example, in the cases such as performing the surgical intervention in a patient with appendicitis later than the reasonable period of time [38], the administration is held responsible for the material and moral damages arising from the late delivery of the service.

In a decision taken by the 1st Law Chamber of the Council of State on the *late delivery of the service* and including important determinations, it is stated that: "In the last paragraph of Article 125 of the Constitution; it is concluded that the administration is obliged to compensate the damage arising from its actions and transactions. One of the theories that require holding the administration liable for the damages arising from the execution of the public services is the service flaw. Overall, a service flaw is the failure and disorder in the establishment and operation of a public service. In case the administration performs an inappropriate, a poor activity, a defective behavior, or the administration does not deliver a service properly, have adequate facilities, causes damages by not exercising the authority it has to exercise and not taking any actions, causes a delay not deemed ordinary in the delivery of public services and does not act rapidly as required by the task, it should be accepted that the administration has delivered a defective service. It is clear that the administration has to provide the tools and facilities required to provide *services and to take the sufficient measures on a timely basis.* …It is understood that the damages in dispute have arisen due to the *late or poor delivery of the service*…".[39]

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[36] DURAN, Lutfi. **Türkiye İdaresinin Sorumluluğu: Sorumluluğun Temeli ve Sebepleri, Sorumluluğa Yol Açan Olgular,** TODAİE Yayınları, Ankara, 1974. s.12.

[37] 12Th Law Chamber of the Council of State. Decision Date:18.11.1970. Docket:1969/957 Decision:1970/2040 See. DÜREN, **age,** s.290.

[38] 12Th Law Chamber of the Council of State. Decision Date:25.12.1968. Docket:1967/788 Decision:1968/2448 See. ESİN, Yüksel. **Danıştay'da Açılacak Tazminat Davaları, 2.Kitap-İdarenin Hukukî Sorumluluğu,** Balkanoğlu Matbaacılık, Ankara, 1973. s.46.

[39] 1St Law Chamber of the Council of State. Decision Date:12.7.1995. Docket:1994/7359 Decision:1995/3559 See. **Danıştay Dergisi,** Sayı:91, Ankara, 1996. s.1106-1116.

1.2.3. Non-delivery of a Service

Non-delivery of a service appears to be a situation that leads to a service flaw made by the administration. This notion can be used in a sense that the administration is obliged to compensate the damages arising from the non-performance of any actions and/or acts the administration should perform in relation to the provision of the service.[40]

In order to mention non-delivery of a service or in other words non-performance of an administrative activity, the administration should be assigned with the execution of this service at first. It is not possible to hold the administration liable due to non-performance of a public service that does not fall under the liability of the administration in accordance with the legislation or administrative function.

In accordance with the Civil Procedure Law (Art. 2/2), the administrative jurisdiction authority is limited to the audit of compliance of the administrative actions and transactions with law. The administrative jurisdictions cannot perform a legality audit or cannot take judicial decisions in the nature of an administrative action and transaction or in a manner that would eliminate the discretionary power of the administration. However, the discretionary power of the administration is not unlimited. The discretionary power vested in the administration cannot be interpreted as that the administration can act arbitrarily. The discretionary power vested in the administration is not a privilege either. On the other hand, the discretionary power is a power vested in the administration to allow for the operation of services. Indeed, the Council of State states that the discretionary power of the administration should be exercised in accordance with public interest and service requirements and audits the discretionary power as to whether this is exercised in line with the conditions or not.[41]

The administrative jurisdictions cannot place an order and instruction to the administration directly to enable the administration to take action; however, they can hold the administration liable for the consequences of not taking any action in case that the administration has to take action due to public interest and service requirements even within the scope of the non-discretionary or discretionary power. In case a condition is stipulated for

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40 ARMAĞAN, **age,** s.39. ;ATAY, **age,** s.583.

41 ATAY, **age,** s.583. For detailed information for the discretionary power of the administration, please see. YAYLA, Yıldızhan. "İdarenin Takdir Yetkisi", **İstanbul Üniversitesi Hukuk Fakültesi Mecmuası,** Cilt:30, Sayı:1-2, İstanbul, 1964. s.201-202. ;ALAN, Nuri. "Türk İdârî Yargısında Yerindelik ve Takdir Yetkisinin Değerlendirilmesi", **İdarî Yargıda Son Gelişmeler Sempozyumu,** Ankara, 10-11-12 Haziran 1982. s.33. ;SAĞLAM, Mehmet. **Devlet Memurlarının Naklen Atanmaları ve Nakil İşlemlerinin Yargısal Denetimi**, Detay Yayıncılık, Ankara, 1999. s.32vd.

the administration to take action in the delivery of the service and the court assumes that this condition has been fulfilled, the administration may be held liable to compensate the damages that occur.

It should be noted that the administration cannot refrain from performing the activities and services assigned by law due to the lack of financial and technical capabilities or lack or insufficiency of organization and it cannot get rid of liability for these reasons.[42]

The 8th and 10th Law Chambers of the Council of State have taken decisions that can be set as an example for the *non-delivery of a service*. Public administrations are liable for performing the public services properly and constantly check the functioning of these services and take the necessary measures during the execution. The fact that the administration has provided late or unsatisfactory or poor services by not fulfilling this liability and therefore caused damages encumbers the administration with the obligation to compensate the damages that have occurred. It is one of the established principles of law that the damages arising from service defects need to be compensated by the administration…"[43], "In the case where a person who was taken to a state hospital due to an injury he got in a knife attack and died of internal bleeding in a day after he was sent home by the doctor examining him instead of hospitalizing him claiming that he did not have any death risk, the administration which was understood not to perform the necessary examination and treatment in the state hospital has a service flaw…".[44]

1.3. Cases Considered to be Personal Defects

In general, *a personal flaw* means that a public official must be held liable directly instead of the administration legal personality, for any defective action which happens while the administration performs its functions and due to the fact that it delivers public services or which has no relations with the administration function or the service it is assigned to perform and the defective action should be attributed to the public official himself/herself.[45]

If the defective action arises anonymously and non-personally rather than being attributed to one or a few public officers, the flaw is considered to be in the service, in other words the defective action has arisen from the suspension

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42 DURAN, **age,** s.33.

43 8St Law Chamber of the Council of State. Decision Date:26.01.1983. Docket:1982/2490 Decision:1983/120 **Danıştay Dergisi,** Sayı:52-53, Ankara, 1984. s.388.

44 10Th Law Chamber of the Council of State. Decision Date:11.05.1983. Docket:1982/2483 Decision:1983/1106 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

45 GÖZLER, Kemal. **İdare Hukuku,** Cilt:II, Ekin Kitabevi, Bursa, 2003. s.1045vd. ;ÇAĞLAYAN, **age,** s.130. ;ATAY, **age,** s.584-585. ;AKYILMAZ, Bahtiyar. **İdare Hukuku,** Sayram Yayınları, Konya, Ocak, 2004. s.90-91.

of the service and the failure in its functioning and the administration is assumed to be liable..[46]

With regard to the cases considered to arise from personal defects, the following very important determinations can be made: ***Non-service flaw:*** If a damage has arisen from a behavior of a public official which is out of the scope of service and does not have any ties with the service, this defective approach and behavior of the public official constitute the *absolute personal flaw*.[47] The claims to be filed accordingly are settled in the judicial jurisdiction and provisions of private law apply.[48] There is no hesitation in this regard.[49] ***In-service or service-related flaw:*** The fact that the approach and behavior of the public official within or regarding the service constitute a crime, the public official does not apply the clear legislative provision deliberately or applies it wrong or commits a serious flaw while delivering the service or hurts people with malicious intentions such as enmity, political grudge, etc. are considered to be *in-service personal defects*. An in-service personal flaw of the public official does not constitute a personal flaw that eliminates the responsibility of the administration. This is because the public official is employed by the administration and the fact that the administration does not perform the supervision and audit task on the public official it has employed constitutes a service flaw.[50] In addition, the liability of the administration does not disappear to prevent the person who has incurred damages due to the in-service personal flaw of the public official from losing his/her right in case the public official does not have financial capacity.[51] Indeed, the Constitution regulated that the administration is liable in case of in-service personal defects.

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46 BAŞGİL, Ali Fuad. **Devletin ve Diğer Amme Hükmî Şahıslarının Mesûliyeti Meselesi,** Hukuk İlmini Yayma Kurumu, İstanbul, 1940. s.29.

47 GÖZÜBÜYÜK - TAN, **age,** s.809vd.

48 With Article 3 of the Civil Procedure Law No.6100, it seems it would not be important anymore whether the personal flaw of a public official is in or out of the service in determining the place of jurisdiction in the claims filed for the actions for the material and moral damages arisen in health care services that have led to the actualization of the consequences presented by the administration and foreseen in this provision of law.

49 "Public officers are liable for the damages that have arisen due to their actions and transactions that could be completely separated from the duties and authorities, service tools and equipment they use. For example, the damage arisen from an injection given by a doctor using his/her tools and equipment out of working hours and places may lead to the liability of only the doctor. In this case, the relation between the doctor and the injured is a tort liability relation in accordance with the Code of Obligations. See. GÜRAN, Sait. "İdarenin ve Ajanın Sorumluluğunun Belirlenmesine İlişkin Düşünceler", **Amme İdaresi Dergisi,** Türkiye ve Ortadoğu Amme İdaresi Enstitüsü Yayınları, Cilt:12, Sayı:1, Ankara, 1979. s.55-62.

50 GÜNDAY, **age,** s.376.

51 GİRİTLİ, İsmet - BİLGEN, Pertev - AKGÜNER, Tayfun. **İdare Hukuku**, Der Yayınları, İstanbul, 2006. s.656vd. ;ÖZGÜLDÜR in ÖZAY, **age,** s.753vd.

The distinction between a service flaw and an in-service personal flaw of public officers has lost its importance in terms of the damage given to individuals.[52] The regulations brought by the Constitution and the Civil Servants Law and the approaches of the Council of State and the Court of Jurisdictional Disputes became effective in losing the importance of the distinction between a service flaw and an in-service personal flaw of public officers.[53] In accordance with 10th Law Chamber of the Council of State, the availability of in-service personal defects of public officers does not eliminate the liability of the administration.[54] The Court of Jurisdictional Disputes also stated in its decisions that the administrative jurisdictions are assigned in the claims that include a service flaw or an in-service personal flaws of public officers.[55]

1.4. Intertwinement of Service Flaw and Personal Flaw

As mentioned before, the availability of the situations accepted as in-service personal flaws cannot eliminate the service flaw and the liability of the administration.[56] This is because the administration has selected the public official causing a personal flaw. In addition, the administration has a supervision and audit task on the public official. After all, the administration has to train its own officer. Therefore, the personal defective behaviors of the public service while delivering service show that the administration cannot fulfill its duties sufficiently. Hence, the administration is also liable despite the personal flaw of the public official in delivering a service.

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52 In Article 3 of the Civil Procedure Law No.6100, it is regulated that the claims to be filed in case the consequences projected in the provision of this Law occur due to the performance of the health care services shall be settled in the civil courts of first instance. With Article 3 of the Civil Procedure Law No.6100, it seems it would not be important anymore whether the personal flaw of a doctor in the status of a public official or other health care officers is in or out of the service in determining the place of jurisdiction in the claims filed for the actions for the material and moral damages arisen in health care services which are provided by the administration and have led to the actualization of the consequences foreseen in this provision of law. However, this provision was abolished by the Supreme Court.

53 ARMAĞAN, **age,** s.84.

54 "In other words, the public service does not function, functions late or poorly due to the in-service personal flaws of public officers. 10Th Law Chamber of the Council of State. Decision Date:20.10.1999. Docket:1997/721 Decision:1999/5266 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

55 Court of Jurisdictional Disputes Decision Date:04.04.1997. Docket:1997/16 Decision:1997/15 **Official Gazette.** Date and Number:18.05.1997/22993. ;Court of Jurisdictional Disputes Decision Date:15.11.1993. Docket:1993/42 Decision:1993/41 **Official Gazette.** Date and Number:15.12.1993/21789. See. http://www.resmigazete.gov.tr/Arşiv-Fihrist-Düstur. E.T:10.09.2011.

56 GÜNDAY, **age,** s.376. ;ÖZGÜLDÜR in ÖZAY, **age,** s.758vd.

A service flaw actually arises from the actions of the public officials carrying out the service as in the personal flaw committed by public officials in the service. This distinction can be important in terms of whether the cost of the damage that the administration has to pay due to the defective activity is recoursed to the public official who has caused the flaw. In addition, Article 129 of the 1982 Constitution states that "claims for damages arising from the flaws committed by civil servants and other public officers while exercising their powers can be brought against the administration provided that they are recoursed to them and comply with the manners and conditions specified by the related law". In this provision of the Constitution, as the flaws committed by civil servants and other public officers *while exercising their powers* are mentioned, it is concluded that claims can be filed only against the administration for the damages caused by the flaws committed by public officers while they exercise their powers and no claims can be filed against public officers. To mention briefly, claims for damages can be filed only against the administration as in the case of service flaws in terms of the *personal flaws that do not fall under the absolute personal flaws* of public officers.[57] In this case, if the administration is sentenced to pay compensation as a result of such a case, it is entitled to recourse it to the concerned public official.[58] It should be noted that the administration should recourse the compensation of the damage it has paid to the public official who has caused the damage with his/her action *in case of the cases that can be regarded as personal flaws in the service such as intention or severe negligence*.

1.5. Strict Liability

While the basis of holding the administration financially liable is the principle of service flaw, this basis has become inadequate with the increase in the services undertaken by the administration and with their becoming complex. In particular, when the administration started to undertake new services upon the development of the social state principle, the probability of damaging people by the administration has increased as well. Accordingly, in case of only a causal link between an administrative action and damage, it is

[57] The only exception to this is the provision of IYUK 28/4. ;"According to this provision, the administrative that has not fulfilled the decision taken by the administrative jurisdiction is responsible for that. However, if the authorized public official has not fulfilled the judicial decision intentionally, a claim can be filed against the administration and also against the concerned public official. Here, the purpose is to allow for the injured to recourse to the administration which has a higher ability to pay and to bring an action against the public official directly who has a duty to execute the judicial decision but does not fulfill that on purpose in order to facilitate to comply with the judicial decision taken against the administration. See. YAYLA, **age,** s.357.

[58] GÜNDAY, **age,** s.377. ;GİRİTLİ - BİLGEN - AKGÜNER, **age,** s.656vd.

accepted that the administration is liable without seeking a requirement for flaw.[59] The 10th Law Chamber of the Council of State has taken the following decision on the strict liability of the administration: "In determining the liability for damage of the administration, the principle of service flaw should be investigated and in case no flaw is identified, it should be determined whether the principle of strict liability can be applied in the case or not..".[60] As can be seen in this decision, the first basis of the financial liability of the administration is service flaw again. Holding the administration liable without seeking a requirement for flaw only depends on the nature of the concrete case and the realization of the principle of strict liability.

The strict liability cases of the administration seem to be based on two main principles although they are exposed to various classifications by the doctrine: The principle of hazard (risk), the principle of balancing of sacrifices (principle of equality before public burdens).[61]

1.5.1. Principle of Hazard (Risk)

If an administrative activity or equipment of the administration that has a high risk of creating hazard and is technically complex, and therefore, always may lead to damages the reason of which cannot be always identified causes any damage, the damage should be compensated by the administration without stipulating a requirement for flaw. Even if the administration has taken all kinds of due diligence to prevent the hazard, it cannot be excluded liability. The principle of hazard in administrative law is applied in the following cases:[62] *Hazardous activities or equipment of the administration:* Some of the activities performed or equipment used by the administration include a certain level of hazard due to their nature or structure. If such activities or equipment cause damage, the administration has to pay for this damage even if it does not have any flaws in it. *Occupational risk:* It is the form of application of the principle of hazard in the field of occupational accidents. According to this principle, if a person working in a public service incurs damage due to his/her occupation, this damage is accepted as the inevitable hazard of the service or in other terms, of the occupation and the damage arising for this reason is compensated by the administration even if it does not have any flaws in this case.[63]

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59 AKYILMAZ, **age,** s.91. ;ATAY, **age,** s.586vd. ;ÇAĞLAYAN, **age,** s.175vd.

60 10Th Law Chamber of the Council of State. Decision Date:15.10.1996. Docket:1995/482 Decision:1996/5981 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

61 AKYILMAZ, **age,** s.91. ;YILDIRIM, **age,** s.330. ;GÖZLER, **age,** s.1071vd. ;ÖZGÜLDÜR in ÖZAY, **age,** s.720vd.

62 GÜNDAY, **age,** s.379-380. ;ÇAĞLAYAN, **age,** s.255vd.

63 GÖZLER, **age,** s.1102vd. ;ÇAĞLAYAN, **age,** s.286vd.

1.5.2. Principle of Balancing of Sacrifices (Principle of Equality before Public Burdens)

In accordance with the principle of balancing of sacrifices, some people are damaged as a result of any activity that the administration is involved in with the idea of *public interest;* this damage needs to be compensated by the administration even if it does not have any flaws in this case. This principle aims to balance the decreases in the private interests of private interest holders due to an activity performed for public interests, in other words, in the sacrifices they have to make due to the stated activity by compensation. The most obvious area of application of the principle of balancing of sacrifices is expropriation. However, a very extensive area of application has arisen with the judicial case-laws.[64]

1.6. Conditions of Liability and Elimination or Limitation of Liability

1.6.1. Conditions of Liability

As a rule, in order for the administration to have either defect liability or strict liability, there must be a causal relation between the administrative action and the damage.[65]

First of all, an administrative action must be available in order to hold the administration liable. This can be in the form of an administrative procedure or an administrative action initiated to implement an administrative procedure or not based on any administrative procedure. In addition, the administrative behavior that causes damage can be executory or negligent. The second condition of being able to hold the administration liable is that the administrative action has caused any damage. This damage can be material and moral. The damage that will lead to the liability of the administration must be definitive and real. After all, there must be a causal link between the damage and the administrative conduct, namely a cause-and-effect relationship in order to hold the administration liable. If the damage is not a consequence of an administrative action and is an unexpected result within the normal course of events, the causal link may not be mentioned.[66]

1.6.2. Elimination or Reduction of Liability

In some cases, the causal relationship between the administrative behavior and the damage may weaken or vanish due to an intervening cause. In such cases may lead to the elimination or reduction of the liability of the

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64 GÖZLER, **age,** s.1141vd. ;ÇAĞLAYAN, **age,** s.340vd. ;ATAY, **age,** s.594-595. ;ÖZGÜLDÜR in ÖZAY, **age,** s.745.

65 Please see that a causal relation may not be sought in the implementation of the principles of social risk which is accepted to be one of the principles of strict liability in the administrative law. GÜNDAY, **age,** s.381. ;ÇAĞLAYAN, **age,** s.304vd.

66 GÖZÜBÜYÜK - TAN, **age,** s.849vd. ;GÖZLER, **age,** s.1172. ;YILDIRIM, **age,** s.341vd.

administration. The situations that may lead to the elimination or reduction of the liability of the administration are in general; compelling reasons (force majeure), unexpected circumstances, the flaw of the injured person and the third person.[67] The availability of these situations may not necessarily lead to the elimination or reduction of the liability of the administration. Based on the nature of each concrete case in which compelling reasons (force majeure), unexpected circumstances, the flaw of the injured person and the third person exist, it should be decided as to whether the liability of the administration carries on, eliminates or reduces. The emergence of the cases that eliminate or reduce the administration's liability may not affect the strict liability of the administration if the conditions have occurred.

Compelling reasons are the events that occur outside the control of the administration, cannot be possible foreseen and avoided even with great attention and care and that make the execution of a public service impossible. Such as an earthquake, flood, heavy rainfall or lightning and landslides.[68] Unexpected circumstances are the events that occur in beyond the control of the administration and that cannot be foreseen and avoided just like compelling reasons. However, compelling reasons occur out of an administrative action, while unexpected circumstances occur within the administrative action. If the damage has occurred due to the flaw of the injured, the liability of the administration may be eliminated.[69] This is because the flaw of the injured might cut off the causal link between the administrative behavior and the damage. On the other hand, if the damage has increased due to the defective behavior of the injured, the administration may not be responsible for the increasing part. The decrease in the liability of the administration will be in proportion to the flaw of the injured. If the damage has occurred due to the flaw of a third person, the liability of the administration may be eliminated. If the flaw of a third person has led to the increase in the damage, the liability of the administration may be reduced in proportion to the reducing part.[70] In a case on this issue, the 10th Law of Chamber decided that: "The flaw of the injured and the third person cuts off the *causality link* between the defective action of the administration and the damage; therefore, the administration does not have any liability for damage.[71]

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67 Please see for detailed information on this issue. GÖZLER, **age,** s.1221vd. ;ERDOĞAN, Yavuz. "İdarenin Kusursuz Sorumluluğu", **http://www.suchukuku.com/makaleler.htm**, Date of Access:02.07.2011. ;YAYLA, Yıldızhan. "İdarenin Sorumluluğu ve Mücbir Sebep", **Sorumluluk Hukukunda Yeni Gelişmeler III. Sempozyumu,** İstanbul, 1979. s.47vd.

68 ;YILDIRIM, **age,** s.341.

69 GÜNDAY, **age,** s.384-385. ;YILDIRIM, **age,** s.345.

70 BAYINDIR, M. Savaş. "Sağlık Hizmetlerinde İdarenin ve Hekimlerin Sorumluluğu", **Gazi Üniversitesi Hukuk Fakültesi Dergisi,** Cilt:XI, Sayı:1-2, Ankara, 2007. s.564.

71 10Th Law Chamber of the Council of State. Decision Date:18.09.2007. Docket:2005/4493 Decision:2007/4199 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

2. Financial Liability of the Administration in Health Care Services delivered in the Public Health Care Agencies

Before addressing the financial liability of the administration in health care services delivered in the public health care agencies, we should mention the duties of the administration in terms of health care services. Health care has a public service nature.[72] According to the Supreme Court, health care services that require regularity and continuity which are the mandatory requirements of social life are public services due to their nature. The Supreme Court defines public services in its decision as *the continuous and regular activities presented to the public, to meet common needs and to ensure public interest by the State or other public entities or under their supervision and inspections*.[73] As can be seen from this definition, the control of health care services not provided by the administration is among the tasks of the administration. As such, the Constitution (mad.56) and the laws have given the administration several and efficient tasks in terms of comprehensive health care services. The major tasks of the administration in health care services can be specified as follows:

Preventive Health Care Services: The administration has the duty to undertake measures such as vaccination, putting in quarantine, announcements, bans, etc., especially in cases where epidemic diseases might happen. Therefore, in case of an epidemic, the financial liability of the administration might be in question in case of failure to vaccinate, lack of or late vaccination or failure to take necessary similar precautions.[74] The 10th Law Chamber of the Council of State concluded that, "In the event of death caused by rabies vaccine, the administration that administered the high-risk domestic vaccine rather than the imported vaccine has a serious service flaw and liability for damage…"[75].

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72 For detailed information for public service, please see. ULUSOY, Ali. "Kamu Hizmeti Anlayışında Yeni Yönelimler: Avrupa Yapılanmasının Kamu Hizmeti Teorisine Etkileri", **Amme İdaresi Dergisi,** Türkiye ve Ortadoğu Amme İdaresi Enstitüsü Yayınları, Cilt:31, Sayı:2, Ankara, 1998. ;ULUSOY, Ali. **Kamu Hizmeti İncelemeleri,** Ülke Kitapları, 1.Baskı, İstanbul, Eylül, 2004. ;KARAHANOĞULLARI, Onur. **Kamu Hizmeti (Kavram ve Hukuksal Rejim),** Turhan Kitabevi, Ankara, 2002. ;GÜLAN, Aydın. "Kamu Hizmeti Kavramı", **İdare Hukuku ve İlimleri Dergisi (İHİD),** Prof. Dr. Lutfi Duran'a Armağan Özel Sayısı, Sayı:1-3, İstanbul, Yıl:9/1988. ;BİLGEN, Pertev. "Kamu Hizmeti Hakkında", **İdare Hukuku ve İlimleri Dergisi (İHİD),** Yıl:1, Sayı:1, İstanbul, Mart, 1980.

73 The Supreme Court. Decision Date:22.11.1007. Docket:2004/114 Decision:2007/85 **Official Gazette.** Date and Number:24.12.2007/26736. See. http://www.anayasa.gov.tr/ Kararlar Databank. E.T:24.03.2008.

74 KAPLAN, Gürsel. "İdarenin Sağlık Kamu Hizmetinin Yürütülmesinden Kaynaklanan Hukukî Sorumluluğu Alanında Yeni Gelişmeler", **Askeri Yüksek İdare Mahkemesi Dergisi,** Sayı:19, Kitap:1, Ankara, 2004. s.174vd.

75 10Th Law Chamber of the Council of State. Decision Date:14.11.1996. Docket:1995/7086 Decision:1996/7534 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

Regulation of Health Care Services: The administration has to increase and arrange the number of public care institutions such as hospitals, health care centers, dispensaries where the health care services are provided and their supplies, equipment and staff based on the population of the country, socio-economic situation and needs.[76] For example, the obligation to participate in public services which has been brought for doctors who will work in the public care institutions in the health care Services Fundamental Law can be considered in this context. In accordance with this Law (Article 3 of Annex), those who deserve the title of attending physician after completing their specialty and sub-specialty trainings in the country or abroad have to serve for the State as the public officers of health care personnel on contract upon the request of those concerned who are subjected to the Law No.4924 in the Ministry of Health or other institutions deemed suitable by the Ministry of Health separately for each of their trainings. In addition, the personnel who are obliged to serve for the State cannot perform their occupations without completing their compulsory service first (Art. 4 of the Annex). It is suggested that this regulation is against the Articles 13 and 18 of the Constitution. The Supreme Court defines angary as the force labor of an individual without giving a recompense for his/her work or benefiting from a goods or one's labor without paying him/her in return; therefore, considering that doctors are paid in return for their services, their actions under this liability cannot be defined as angary. Given the reasons of introducing a State service liability, the Supreme Court says that introducing this liability cannot be interpreted as forced labor in accordance with the provision "physical and mental work in the form of a civic duty and foreseen in the areas required by the country needs are not interpreted as forced labor" as stated in Article 18 of the Constitution. The Supreme Court also decided in its examination based on Article 13 of the Constitution that it is not possible to accept that introducing a state service liability for doctors limits the freedom of labor of doctors contrary to the principle of proportionality. According to the Supreme Court, the State service liability introduced for doctors means that these people provide their knowledge they acquire in their education to the State's service in line with the country needs: "As is foreseen in Article 18 of the Supreme Court, it is not possible to say that the State service liability which is in the form of a civic duty in the areas required by the country needs is not appropriate and necessary or non-proportional to the purpose of this regulation".[77]

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[76] KIZILYEL, Serkan. **İdarenin Sağlık Hizmetinden Doğan Tazminat Sorumluluğu,** Dicle Üniversitesi Sosyal Bilimler Enstitüsü, Y.Lisans Tezi, Diyarbakır, 2006. s.46vd.

[77] Given the fact that doctors are assigned with the State service so that health care services can be available in all parts of the country as everybody has the right to live in an healthy and balanced environment and the deficiencies or delays to arise from the fulfillment of

A social law state is the one that respects human rights and freedoms, guarantees that people live in welfare and happiness, establishes a balance between individual and society, ensures social justice by protecting the weak against the powerful and in this regards, ensures people to benefit from social services as much as necessary. Therefore, the liability to participate in the public service which is in the form of a civic duty and foreseen in the areas required by country needs does not constitute any contradiction to the Constitution.[78]

In a decision taken by the 12th Law Chamber of the Council of State on the delivery of health care services by the administration and a service flaw that has occurred in this regard: "…The administration has a clear *service flaw* as the ambulance that must be always ready to serve in emergencies has broken down on the way due to *disrepair*… Although all kinds of medical facilities, doctors and serum are available in the state hospital, the serum has not been administered *on a timely basis* for several reasons, and the public health and public services have not been delivered properly."[79]

Medical Assistance: Legislation has loaded the administration with the duty to provide medical help to people. Article 40 of the Constitution states that "the damage caused by officials as a result of their unfair treatment must be compensated by the State in accordance with the law" . Therefore, the administration is liable for the defective action of its civil servant of public official it has assigned, even if it is nor directly liable.

The 10th Law Chamber of the Council of State stated in its decision: "…The administration is liable for establishing the organization to allow for the proper functioning of the public services assigned to the administration and for duly preparing the equipment and personnel in line with the requirements of the service. The administration is liable in case individuals incur any damage due to the poor delivery of a service. The administration is liable for damages that it has caused due to a service flaw."[80]

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the health care service would lead to irreparable consequences due to their nature, it should be accepted that country needs require the State service liability. The Supreme Court. Decision Date:13.03.2006. Docket:2006/21 Decision:2006/38 **Official Gazette.** Date and number: 11.12.2007/26727. See. http://www.anayasa.gov.tr/Kararlar Databank. E.T:03.10.2011.

78 AVCI, Mustafa. **Devlet Memurları Kanunu Kapsamında Kamu Görevliliğine Giriş,** Yetkin Yayınları, Ankara, 2009. s.82-83.

79 12Th Law Chamber of the Council of State. Decision Date:18.11.1968. Docket:1967/2767 Decision:1968/2118 See. ARMAĞAN, **age,** s.33.

80 10Th Law Chamber of the Council of State. Decision Date:06.10.1982. Docket:1982/2613 Decision:1982/1959 ARMAĞAN, **age,** s.227-228.

Audit of Private Health Care Institutions delivering Health Care Services: It should be noted that the administration can be held liable for the defective delivery of any health care services that is related to human life and health and the administration is liable for its supervision and audit together with the private health care institution.[81] The 10th Law Chamber of the Council of State stated in its decision that the administration can be held liable for the damages arising from the non-performance of the audit and control duty of the administration.[82] The 13th Law Chamber of the Council of State concluded in its decision; "Medical examination and diagnostic services are required to be purchased by the very hospital administration without establishing a material relationship between the patient and the private health care institution and delivered *under the supervision and control of the administration* in the centers established in the same hospital without causing any waste of time and resource…"[83]. However, the financial liability of the administration is limited to the supervision and control of the public health care services. In other words, in case the medical treatment provided by private health care institutions is defective, the financial liability of the administration will not be mentioned as a rule. For the financial liability of the administration, the damages arising from any medical treatment need to be originated from the non-legislative operations of the private health care institution, which means that the administration has not fulfilled its supervision and control duty.[84]

Actions of the Freelance Physician or Other Health Care Personnel: The administration grants a license to the freelance physicians or other health care personnel and guarantees that they are the professionals. As the freelance physicians or other health care personnel are not public officers, the administration cannot be held financially liable for their actions; however in case of a service flaw in providing a specialty or in the administrative procedures such as granting a license or consent to freelance physicians or other health care personnel, the administration can be liable provided that the causal link between the administrative procedure and the damage arising is proven.[85] In addition, the administration may have a financial liability as it has not duly fulfilled its supervision and control duty as mentioned before.

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81 YAYLA, **age,** s.363-364.

82 10Th Law Chamber of the Council of State. Decision Date:22.01.2001. Docket:1994/3467 Decision:1997/5311 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

83 13st Law Chamber of the Council of State. Decision Date:06.05.2009. Docket:2007/7931 Decision:2009/4977 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

84 Please see for the financial liability of the administration due to the insufficiency in its supervision duty. YAYLA, **age,** s.363-364.

85 Aynı, **age,** s.362. ;ÇAĞLAYAN, **age,** s.140. ;GÖZLER, **age,** s.1213vd.

2.1.Public Health Care Institutions

Public health care institutions are public service entities founded to provide people with health care and located within the administrative structure. Indeed, the most fundamental purpose of establishing such treatment institutions is to provide individuals with health care services which are also public service and therefore to serve the public interest. Unlike private health care institutions, public health care institutions do not have any intention to generate earnings and profits. Therefore, the amounts received for benefiting from the public services offered in public health care institutions is not possibly interpreted as a *fee*. However, serving the public interest alone is hardly sufficient to be considered for a health care institution as a public health care institution. This is because it is possible to say that private health care institutions also serve the public interest to some extent in terms of their contribution to the protection of social health. Therefore, while determining the boundaries of the concept of public health care institution, the criterion that should be really considered is the *manner of organization and mechanism of a health care institution*. Public care institutions are the health care entities that are established and operated by the state or other public entities. These directly form a part of the administrative organization and are subjected to public law provisions in terms of their functions and closure.[86]

2.2. Conditions for Liability of Public Health Care Institutions

The conditions required to hold the administration financially liable due to the medical interventions[87] performed in public health care institutions should be examined in parallel to the conditions required for the financial liability of the administration in general, in terms of unlawfulness*, flaw, damage and causality link based on the characteristics of the concrete case*.[88] The fact that the administration is held financially liable in the medical interventions performed in private health care institutions as it has not fulfilled its supervision and control duty properly requires the availability of these conditions. There is no *contract* element due to the nature of the legal relation between the person receiving treatment services in the public health care institutions and the public health care institution, this element is not required to be analyzed.

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86 Mehmet, AYAN. **Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk,** Kazancı Hukuk Yayınları:102, Ankara, 1991. s.171.

87 Please see for detailed information on the concept of medical intervention and its content. Aynı, **age,** s.5vd.

88 According to GÜRAN, "…given the complex and technical nature of medical interventions which are open to comments, and discussions… it should be assumed enough that the plaintiff fulfills the liability to create a positive impression at first step on the seriousness of the case and its relations with the defendants and the case". See. GÜRAN, Sait. "Hekimin Faaliyetlerinden Devletin Sorumluluğu", **Sorumluluk Hukukunda Yeni Gelişmeler V. Sempozyumu,** İstanbul, 1983. s.86.

2.2.1. Unlawfulness and Flaw

In order for the administration to have a liability arising from the execution of health care services, the administrative procedure and action (namely, medical intervention or other health care services) should be unlawful or defective. In accordance with Article 3 of Article 40 of the Constitution: "The damage caused by officials as a result of their unfair treatments must be compensated by the State in accordance with the law". The treatments given in Article should be stated *to include actions* as well. In this case, the word "*unfair*" included in the Article means the *unlawfulness or flaw* required for the financial liability of the administration.[89]

Unlawfulness means that a compulsory legal norm has been violated. Therefore, the element of unlawfulness occurs when a public official violates a norm foreseen by the legal order. To mention briefly, a doctor or another health care personnel working in public care institutions, just as self-employed doctors or other health officers should comply with the obligations stated in the health legislation[90], ensure keeping and protecting the records of those who have received treatment services and also comply with the professional secrets.[91] The 10th Chamber of the Council of State decided that "Although an intervention was made to the plaintiff by the administration three times, not keeping the graphs of the patient properly and losing the patient's file would constitute a severe service fault.[92]

It was mentioned before that a service fault may appear in three ways as poor or unsatisfactory service delivery, later or slow service delivery and non-delivery of a service. There is no difference in the service flaw that might arise in health care services in terms of the general principles and the administration's financial liability. For this reason, no matter how it has

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89 "There is no link between the flaw in administration's actions and unlawfulness. Even if the administrations actions are lawful or unlawful, they might be defective. For example, there is no illegality in a doctor's diagnosis or a surgeon's clumsiness, but it they have flaws. In these cases, what gave rise to the damage is not to carry out such actions but they are performed in a defective way. In the administrative procedures, there is a strict link between a flaw and unlawfulness". See. GÖZLER, **age,** s.979.

90 Please see for information on health legislation. ÇELİK, Çelik Ahmet. "Hekimlerin ve Hastanelerin Sorumluluğu", http://www.tazminathukuku.com/araştırma yazıları.htm, Date of Access:10.07.2011.

91 KICALIOĞLU, Mustafa. **Doktorların ve Hastanelerin Tıbbî Müdahaleden Kaynaklanan Hukukî Sorumlulukları,** Adalet Yayınevi, 1.Baskı, Ankara, Ocak 2011. s.62vd. ;KIZILYEL, Serkan. **Sağlık Hizmetinin Sunumunda Sır Saklama Yükümlülüğünün İdare Hukukuyla Etkileşimi Üzerine,** Sağlık Hukuku Digestası, Ankara Barosu Yayınları, Yıl:1, Sayı:1, Ankara, 2009. s.326vd.

92 10Th Law Chamber of the Council of State. Decision Date:29.04.2008. Docket:2007/3301 Decision:2008/2939 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

occurred, the administration who committed a service flaw has to compensate all the damages incurred by a person who has received health care services.

Whether a service flaw is a condition in order to be able to keep the administration liable for the damages arising from the medical interventions and other treatment and care services delivered in public health care institutions should be considered based on the characteristics of the concrete case.[93] Although the liability foreseen by the Constitution for the administration due to the actions of public officers is regarded as the defect liability in essence, it is also possible to say that the principles of strict liability started to be adopted for the administrative liability arising from health care services day by day.[94] The delivery of health care services inherently involves a certain hazard. If such activities cause damage, the administration may have to pay for this damage even if it does not have any flaws in it.

Indeed, the 10th Law Chamber of the Council of State decided that the strict liability of the administration might be in question in the cases where it is not based on a service flaw considering the characteristics of the concrete case: "The compensation of the damages incurred due to the services that have inherent risks can be possible in case of the severe service flaw of the administration [95], as a rule; however, it is not required to seek the severe service flaw of the administration for the damages arising from the poor or non-delivery of some care, supervision and auxiliary interventions that can be considered in health care but cannot be included in medical operation…".[96]

Health care institutions are required to perform the treatment of people within the principles stipulated by the medical science and practice. Whether

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93 "While the administration can be held liable if the health care services such as medical intervention, diagnosis, treatment and care are regular services, the type and nature of the medical activity is extraordinarily difficult and requires professional appreciation, the liability of the administration can be dependent on the condition for a severe flaw. Please see for detailed information on this issue. GÜRAN, **agm,** s.77-87.

94 "The principles of strict liability of the administration started to be adopted in the administrative liability arising from health care services." Please see for detailed information. GÜRAN, **agm,** s.84-86. "Ordinary medical methods may not lead to the strict liability of the administration but the defect liability. The strict liability of the administration may be sought due to the use of extraordinary hazardous medical methods if there are any required conditions. See. GÖZLER, **age,** s.1096.

95 "In the old French administrative judicial implementations, one of the cases where the administration's severe flaw is sought based on the type of public service activities is *health care services*. In the implementations of the Turkish Council of State, it is stated that precise criteria are not set in this regard and in the services and activities such as health, the condition for the severe flaw of the administration could then be sought. " See. ÖZGÜLDÜR in ÖZAY, **age,** s.738-739.

96 10Th Law Chamber of the Council of State. Decision Date:24.09.2007 Docket:2005/3719 Decision:2007/4316 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

health care institutions are formed in public nature and in an administrative structure does not constitute a distinctive feature in terms of a person who receives health and care services based on the requirements of the medical science. The public nature of the health care institutions constitutes a distinctive feature in terms of the obligation to accept the people who apply to them for treatment.[97]

It should also be noted that, diagnosis, treatment and care services should be essentially carried out *with knowledge*, *care and attention* in the health care institutions. The 10th Law Chamber of the Council of State and the Administrative Judicial Chambers Committee have several decisions on the delivery of health care services with knowledge, care and attention: "The administration has a service flaw and the liability for damage in the burn injury that occurred as a result of the carelessness and neglect of the service nurse in charge while administering thermophore to the baby born at the hospital so that his/her temperature went back to normal levels…",[98] "The damage arising from the *announcement of the* HIV test that came out to be positive without making a verification test must be compensated by the administration in line with the principle of service flaw…",[99] "Although it is known by the doctor that the plaintiff's eardrum is perforated, the fact that the he/she has not been informed that the adverse effects of the drug used in the treatment might be more and therefore he/she has not been given the right not to benefit from the service, and the due diligence has not been exercised in adjusting the drug dose in order to mitigate the risk constitutes a severe service flaw…".[100] The damages that might arise from the fact that public health care institutions do not function well, their equipment are defective and maintenance-free or their medication cannot be supplied on time, decisions are taken *without doing enough research* or providing deficient treatment or care requires the liability of the administration in accordance with the principle of hazard (risk),

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97 Undoubtedly, the public nature of the health care institutions does not constitute a distinctive feature in terms of the obligation to accept persons who apply for treatment in emergency cases. Indeed, according to the Emergency Medical Services Regulation, all private-public health care institutions except for the health care institutions of the Ministry of Defense are obliged to accept emergency cases, and provide emergency medical evaluation, intervention and stability when needed. Emergency Medical Services Regulation **article 2, article 15. Official Gazette.** Date and number:11.05.2000/24046. See. http://www.basbakanlik.gov.tr/Mevzuat Information System. E.T:11.11.2011.

98 10Th Law Chamber of the Council of State. Decision Date:06.10.1982. Docket:1982/2613 Decision:1982/1959 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

99 10Th Law Chamber of the Council of State. Decision Date:28.12.2007. Docket:2005/8407 Decision:2007/6526 See. http://www.danistay.gov.tr/Danıştay Database. E.T:03.09.2011.

100 Council of State, Committee of Administrative Action Law Chambers. Decision Date:07.03.2003. Docket:2002/716 Decision:2003/91 See. http://www.danistay.gov.tr/ Danıştay Database. E.T:03.09.2011.

one of the principles of liability of service flaw or strict liability. In case such cases lead to any damage arising that the non-performance or incomplete performance of the audit duty of the administration in private health care institutions, the financial liability of the administration might be in question.[101] In this case, the financial liability of the administration can only be based on the administration's flaw in not performing its audit duty duly, which means the defect liability.

One of the important issues that should be highlighted in case of a service flaw or strict liability of the administration arising from health care services is the medical intervention, treatment and care services delivered by the freelance physicians or other health care officers who are not public officers in public health care institutions.[102] In case there are no chief physicians and attending physicians in public health care institutions in emergency cases, the same branch attending physician of another public institution; and if not, the related freelance attending physicians might be invited to the institution.[103] In case a doctor or other health officer is called at the request of the public care institutions, the administration can be held liable for the medical intervention, treatment and care services of the doctor or other health professionals called, as in the case of a doctor or other health care personnel who is a public official within the framework of the principles of defect liability and strict liability. This is because it is the administration that calls the doctor or other health care personnel, and that is obligated to deliver the service duly, and doctors or other health care personnel are the persons who are involved in the

101 GÖZLER, **age,** s.1005, 1011.

102 In accordance with Article 128/1 of the Constitution: "The principal and permanent tasks required by public services that the State, state-owned enterprises and other public corporate bodies conduct in accordance with the principles of general administration are carried out by civil servants and other public officials." In accordance with this provision, doctors or other health care personnel who are not in the status of public officials and who perform independent activities are prohibited from providing medical intervention, treatment and care services in public health care institutions. It should also be noted that in accordance with the Decree No. 650, doctors or other health care personnel who are in the status of public officials have been prohibited to provide medical intervention, treatment and care services in private health care institutions. Decree No:650 **Official Gazette.** Date and number:26.08.2011/28037. See. http://www.basbakanlik.gov.tr/ Mevzuat Information System. E.T:11.11.2011.

103 See. Regulations on Inpatient Treatment Institutions, **Article 110/r. Official Gazette.** Date and number: 13.01.1983/17927. For the amendment in this regulation, **Official Gazette** Date and number:05.05.2005/25806. ;"The attending physical in charge is not in the institution temporarily for any reason, and if no other attending physician in the same branch is not available, in case inpatients pose a life-threatening risk, one or more than one of the freelance attending physicians can be invited to the institution by the chief physician". Regulations on Inpatient Treatment Institutions, **Article 64.** See. http://www.basbakanlik.gov.tr/Mevzuat Information System. E.T:11.11.2011.

delivery of a public service in terms of the stated administrative activity. For the personal liability of doctors or other health care personnel, the principles foreseen for doctors or other health care personnel who are in the status of a public official might be based on.

Freelance attending physicians out of the inpatient health care institutions in the places that do not have a private hospital can hospitalize their private patients in public health care institutions provided that they perform their operations and treatments if an attending physician is not available in that department of the institution in case of emergency cases.[104] In this case, *a treatment agreement is regarded to be made between* the person who receives treatment services and the doctor or other health care personnel based on *private law provisions* in the public treatment institution.[105] The doctor or other health professional can be held liable against the person receiving the treatment services primarily on the basis of the provisions of breach of contract (Code of Obligations, Article 96). Undoubtedly, if the conditions have arisen, a claim can also be filed in accordance with Article 41 and following articles of the Code of Obligations.[106] Assistant health care officials who participate in the delivery of medical intervention, treatment, care services and work in the public health care institutions can be characterized as assistants of doctors or other health care personnel *in terms of the provision of these services.* A claim can be filed based on Article 100 of the Code of Obligations against the primary doctors or other health care officials due to the actions of the assistant health care officials.[107] A claim should be filed against the administration due to the actions of the assistant health care personnel working in public health care institutions in the delivery of the stated health care services.[108]

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104 These requests of freelance attending physicians are reviewed and if they are deemed as strictly necessary and compulsory, the patient is accepted." Regulations on Inpatient Treatment Institutions, **Article 63/1-2.**

105 "In this case, all responsibility arising from the diagnosis and treatment of the patients shall belong to the physician who has hospitalized the patient." Regulations on Inpatient Treatment Institutions, **Article 63/2.** ;Please see about the legal nature of the treatment contract. AYAN, **age,** s.51vd. ;AYDIN, Nizamettin. "Hasta Haklarının Hukukî Boyutu ve Korunma Yolları", **Dumlupınar Üniversitesi Sosyal Bilimler Dergisi,** Sayı:22, Aralık, Kütahya, 2008. s.301.

106 "The decision on whether Article 41 of the Code of Obligations has been violated or not depends on the judge's discretion." See. PETEK, Hasan. **İlaç Üreticisinin Hukukî Sorumluluğu,** Yetkin Yayınları, Ankara, 2009. s.81.

107 AYAN, **age,** s.177-178.

108 BİRTEK, Fatih. "Sağlık Hizmetlerinin Yürütülmesinde İdarenin Kusura Dayanan Sorumluluğu", **Erciyes Üniversitesi Hukuk Fakültesi Dergisi,** Cilt:II, Sayı:3-4, Kayseri, 2007. s.81vd.

2.2.2. Damage and Causality Link

In order to discuss the financial liability of the administration, any damage needs to have arisen as a result of the medical intervention or other health care services delivered. This damage can be in the form of deterioration in the health of the person receiving the treatment service, failure to recover or a decrease in the assets of the person as well as a decrease in the joy of life of the person feeling pain and grief.[109]

As mentioned before, there should be a causality link between the action of the administration and the damage arisen. If the causality link could not be established or has been cut due to any reason not arising from the administration (might be Force Majeure, defects of the victim or a third person, etc.), the financial liability of the administration may not be sought.[110] Indeed, the Council of State Administrative Judicial Chambers Committee decided on the necessity of a causal link in order to hold the administration liable as follows: "As health care services include a certain hazard that cannot be foreseen before depending on the personal characteristics of the person who benefits from the service and the execution of the service, there must a severe service flaw of the administration and *a causality link between the damage and the health care service delivered* so that the administration can be held liable; and after it is identified whether a severe service flaw of the administration is available or not, it should be determined whether the loss of function in the arm of the plaintiff's daughter has arisen from the defective delivery of the health care services executed by the administration or not and a decision should be taken accordingly....".[111]

2.3. Liability of Doctors or Other Health Care Officials together with Administration

In determining whether public officials can be held personally liable for the damages arisen from the medical intervention, treatment, care and other health care services executed in public health care institutions together with the administration, Articles 40 and 129 of the Constitution and Article 13 of the Civil Servants Law should be considered. According to the Constitution, primary and first degree liability of the administration is accepted in terms of the damages that may arise due to the faults committed by public officials in exercising their powers. This is for the benefit of the person receiving the treatment services and the benefit of public officials delivering the services in

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109 AYAN, **age,** s.178.

110 GÖZLER, **age,** s.1213vd.

111 Council of State, Committee of Administrative Action Law Chambers. Decision Date:18.10.2007. Docket:2004/721 Decision:2007/2030 See. http://www.danistay.gov.tr/ Danıştay Database. E.T:03.09.2011.

the public health care institutions. A person who is damaged due to a medical intervention or other health care services executed in the public health care institutions can only claim a file against the administration. As a rule, a claim cannot be files against the public official. The administration that has to pay compensation to the person receiving treatment services due to the services carried out by the public official is entitled to compensate its damage by recoursing it to the doctor or other health care personnel who caused it by their activities.[112]

As previously indicated, in accordance with the system adopted in the Constitution and law in terms of the financial liability of the administration, the financial liability of the administration is not in question in the *pure personal flaws,* in other words, *in the flaws committed out of service* by the doctors or other health care personnel who are in the status of public officials. What is meant by the pure personal flaws is the damage caused by a public official to people through an activity not related to his/her official status and the performance of the public duties and powers he/she has undertaken. The activities carried out outside the public health care institutions, or outside the duties and powers undertaken in these institutions may constitute the pure personal flaw of a public official based on the characteristics of the concrete case. In the cases where the harmful action taken by the doctors or other health care personnel who are in the status of public officials is not accepted as an administrative action or the doctors or other health care personnel who has delivered the service are not deemed as in the status of public officials during the service, it is possible to say that the doctors or other health care personnel who are in the status of public officials have to incure all the damage alone.[113]

Conclusion

In accordance with Article 3 of the new Civil Procedure Law No.6100 which was put into force on 1 October 2011 and Article 55 of the Code of Obligations which was put into force on 1 July 2012; "*Any actions regarding the compensation of the material and moral damages that result in partial or complete loss of the physical integrity or the death of a person due to all kinds of administrative actions and procedures and other reasons for which the administration is responsible*." As stated in detail in the introduction of the study, these regulations might bring along many legal problems. Also, and more importantly we believe that these regulations contradict Article 157 of

112 KAPLAN, **agm,** s.190vd. ;GÖZLER, **age,** s.1040-1042. ;ATAY, **age,** s.584vd. ;GÖZÜBÜYÜK - TAN, **age,** s.812-815. ;YAYLA, **age,** s.363-365. ;ÇAĞLAYAN, **age,** s.130. ;GÜNDAY, **age,** s.377-378. ;ÖZGÜLDÜR in ÖZAY, **age,** s.753vd. ;GİRİTLİ - BİLGEN - AKGÜNER, **age,** s.660.

113 AYAN, **age,** s.179-181.

the Constitution. Article 157 of the Constitution regulates that *the disputes arising from administrative proceedings and actions related to military service and concerning military personnel can be brought in the High Military Administrative Court* even if they have been established by non-military authorities. Although it is stated in Article 142 of the Constitution that the duties and powers of courts will be regulated by law and the provisions of the above-mentioned laws comply with this regulation, this does not change the fact that the provisions of these laws are contradictory to Article 157 of the Constitution. This is because Article 157 of the Constitution clearly stated that the disputes arising from administrative proceedings and actions related to military service and concerning military personnel are under the duty and authority of the High Military Administrative Court. The provisions of the above-mentioned laws authorize the civil courts of first instance for the compensation of the material and moral damages caused by all kinds of administrative proceedings and actions and other reasons under the responsibility of the administration. "All kinds of administrative proceedings and actions" stated in this regulation covers the "*military service and concerning military personnel*" stated in Article 157 of the Constitution and therefore it is clearly unconstitutional. As a requirement of state of law and the Constitutional order, laws cannot be contradictory to any provision of the Constitution. The impression implying that the above-mentioned regulations have been made to amend Article 157 of the Constitution arises. However, the provisions of the Constitution should be amended first and then the provisions of law should be adopted accordingly. Opposite regulations mean getting round of law, and contrary to the Constitution, norms hierarchy and the law.

The financial liabilities of doctors and other health care personnel for the medical intervention, treatment, care and other health care services they execute in private health care institutions or independent of the administration are determined based on the provisions of private law as a rule (other than the financial liability arising from the supervision and control duty of the administration) and the related cases are settled in judicial jurisdiction. In determining the health care services in terms of the financial liabilities of the administration, it is of importance whether they have been executed by the doctors and other health care personnel who work in public health care institutions and who are in the status of public officials.

Public health care institutions are public service entities founded to provide people with health care and located within the administrative structure. The compensation and principles of liability for the damages caused by the health care services provided by the doctors and other health care personnel working in public health care institutions are determined in accordance with

administrative law and the principle of financial liability of the administration, as a rule. It should be noted that whether a service flaw is a condition in order to be able to keep the administration liable for the damages arising from the medical interventions and other treatment and care services delivered in public health care institutions should be considered based on the characteristics of the concrete case. Although the liability foreseen by the Constitution for the administration due to the actions of public officers is regarded as the defect liability in essence, it is also possible to say that the principles of strict liability started to be adopted for the administrative liability arising from health care services day by day. The delivery of health care services inherently involves a certain hazard. If such activities cause damage, the administration may have to pay for this damage even if it does not have any flaws in it. Indeed, the 10th Law Chamber of the Council of State decided that the strict liability of the administration might be in question in the cases where it is not based on a service flaw considering the characteristics of the concrete case.

In accordance with paragraph 2 of Article 40 and paragraph 5 of Article 129 of the Constitution, a claim should be filed directly against the administration for the compensation of the damages arising while the doctors or other health care personnel who are in the status of public officials perform their duties, the administration should recourse the compensation it has paid to the public official who caused the damage with its action *in case of the situations that can be regarded personal flaws such as wrongful intention or severe flaw in the service.* In case of the pure personal flaw of the doctors or other health care personnel who are in the status of public officials (out of the service-personal flaws that are not related to the service), a claim can be filed in the judicial jurisdiction.

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