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AP

COMING TO TERMS WITH THE 12 SEPTEMBER COUP D'ÉTAT: THE SOUTH AFRICAN EXPERIENCE RECONSIDERED[1]

GÜNEY AFRİKA TECRÜBESİNİ YENİDEN GÖZDEN GEÇİREREK 12 EYLÜL DARBESİYLE YÜZLEŞMEK

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ABSTRACT

The objective of this article is to determine whether particular processes, mechanisms and principles employed to deal with the past in *one* society can be applied to *another* with a different legacy of past abuses. This question will be answered by analyzing applicability of some of the practices and principles of the South African Truth and Reconciliation Commission to Turkey where there are an ongoing prosecutions regarding the 12 September 1980 Coup D'état. It concludes that "truth commission" as a transitional justice measure can be adopted in Turkey and *complement* trials due to the limitations and shortcomings of the indictment and prosecution process. However, only certain aspects of the

[1] This article is revised and shortened version of the dissertation submitted to the University of Essex, for the degree of Master of Arts in Theory and Practice of Human Rights at the end of 2011-2012 Academic Term. It is also an enlarged and updated version of the article, which won the Human Rights Essay Prize by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in 2013. I would like to thank my adviser Prof. Rainer Schulze for his invaluable guidance and support throughout my masters research and Prof. Dr. Mine Gencel Bek for her encouragement to write on this topic. I am indebted to Assist. Prof. Şerife Çam and Assoc. Prof. Kerem Altıparmak for their constructive and insightful comments on the first draft of this article. I am also thankful to Lawyer Mehmet Horuş for providing me with the court documents and giving his time to answer some of my questions. Special thanks go to my husband Hakan for his encouragement, patience, love and support. Needles to say, all errors, misconceptions and misrepresentations remain my own.

South African TRC can be relevant for a future truth commission in Turkey, as there is no one-size-fits-for-all model for transitional justice and as the practices and the principles of the South African TRC is historically and politically contingent. It is argued that that the public, institutional and thematic hearings should be core elements of a future truth commission in Turkey as they have a capacity to demonstrate broader social context of large-scale abuses and to establish collective responsibility regarding the 12 September 1980 coup d'état as well as to create a space for victims' to share their plight. New truths to guide the society should be adopted as they enable the re-presentations or re-interpretation of the facts, which were used to justify systemic use of violence and, therefore, show that these abuses are not justified. However, granting individualized amnesty for crimes against humanity should not be embraced it may not conform to international law and by contributing to on-going legacy of impunity, it might cause serious problems in terms of achieving reconciliation.

Keywords: Transitional justice, truth commissions, prosecution, the South African Truth and Reconciliation Commission, 12 September 1980 Coup D'état Trial

ÖZ

Bu makalenin amacı bir toplumda geçmişle yüzleşmek için kullanılan süreç, mekanizma ve ilkelerin, farklı ihlal geçmişine sahip bir toplumda uygulanıp uygulamayacağını belirlemektir. Bunun için Güney Afrika Hakikat ve Uzlaşma Komisyonu'nda izlenen bazı ilke ve pratiklerin Türkiye'de 12 Eylül Darbesi'yle yüzleşmek üzere benimsenip benimsenmeyeceği incelecektir. Bu çalışma, bir geçiş dönemi/süreci adaleti yöntemi olarak "hakikat komisyonları"nın Türkiye'de 12 Eylül darbesine ilişkin cezai takibatları tamamlayabileceğini öne sürmektedir. Bunun nedeni hem iddianamenin hem de yargılama sürecinin sınırlılıkları ve eksiklikleridir. Bununla birlikte, Güney Afrika Hakikat Komisyonu'nun sadece bazı yönleri Türkiye'de gelecekteki bir hakikat komisyonu için uygun olabilir;

çünkü geçiş dönemi/süreci adaleti için herkese uyan tek bir model yoktur. Bunun yanında, Güney Afrika Hakikat Komisyonu'nun bazı ilke ve pratikleri tarihsel ve siyasal olarak olumsaldır. Makalede kamusal (kamuya açık), kurumsal ve tematik oturumların gelecekteki bir hakikat komisyonunun en temel unsurları olması gerektiği belirtilmektedir. Bu oturumlar, mağdurların acısını paylaşacak bir alan yaratmanın yanında büyük ölçekli insan hakları ihlallerinin daha geniş toplumsal bağlamını gösterme ve 12 Eylül 1980 darbesine ilişkin kolektif sorumluluğu tespit etme kapasitesine sahiptir. Bu oturumların yanında, aynı Güney Afrika Hakikat Komisyonu'ndaki gibi topluma yol gösterecek yeni hakikatler kabul edilmelidir, çünkü bunlar sistematik şiddet kullanımını haklı göstermeye yarayan olguların yeniden yorumlanmasını ve farklı bir şekilde temsil edilmesini sağlayacak, böylelikle ihlallerin haklı olmadığını ortaya koyacaktır. Ancak insanlığa karşı suçlar için bireysel af uygulaması kabul edilmemelidir, çünkü bu hem uluslararası hukuka uygun olmayabilir hem de süregiden cezasızlığa katkıda bulunarak uzlaşmasının sağlanması açısından ciddi sorunlara yol açabilir.

Anahtar Kelimeler: Geçiş süreci/dönemi adaleti, hakikat komisyonları, cezai takibat, Güney Afrika Hakikat ve Uzlaşma Komisyonu, 12 Eylül Davası

INTRODUCTION

One of the most significant discussions in societies with the legacy of large-scale abuses is how to best deal with the past injustices. The answer to this question is not simple as there is no single correct response but a multitude of options to consider. These include but not limited to truth telling, prosecutions, reparations and institutional reform.

Despite the multiplicity of responses to past injustice, it is not easy to adopt one solution among others at the policy level the because of the complexity of material conditions. Set against the difficulties in practice, the normative promises of some of the transitional justice measures such as providing accountability, serving justice and achieving reconciliation have been challenged. This raised the question of whether different processes and mechanisms to come to terms with the legacy of large-scale abuses are equally

appropriate for each society.

Against this background, the objective of this article is to determine whether particular processes, mechanisms and principles employed to deal with the past in *one* society can be applied to *another* with a different legacy of past abuses. This question will be answered by analysing the applicability of practices and principles of one transitional justice measure, a "particular" truth commission (the South African Truth and Reconciliation Commission, 'the TRC') to another transitional context where there are an on-going prosecutions as well as an appeal (Turkey).

South Africa[2] and Turkey[3] were chosen as case studies for several reasons. These countries have pursued different models of justice in their transition processes. Whereas South Africa adopted restorative justice, in Turkey the retributive model has been maintained so far.[4] Two countries have different legacy of past abuses. Choosing a country with similar historical experiences with Turkey would have rendered the task of comparison easy by providing a quick answer. [5] In addition to this, some features of the TRC such as being one of the one strongest truth commissions (Hayner, 2011), trading truth with individualized amnesty, incorporating many features of preceding commissions and presenting an important example of victim-centeredness (Sancar, 2007)

[2] In South Africa, following the breakdown of apartheid, a truth and reconciliation commission was established in 1995 in order to grant an individualized amnesty to perpetrators of gross violations of human rights through disclosure of truth (there were other criteria as well) and to provide national reconciliation.

[3] In Turkey, two generals were given life sentences for overthrowing the parliament and constitutional order in a military coup on 12 September 1980 in the judgement delivered in June 2014. Although this trial aimed to deal with the legacy of the past, namely staging of the coup, it failed to come to terms with the legacy of *large scale abuses*, which is the defining criterion of a transitional justice measure. Therefore, this trial in Turkey cannot be regarded as a *genuine* transitional justice measure. Nevertheless, investigation has been extended to cover allegations of torture. After the 2010 referendum, in 59 cities numerous torture complaints have been filed with the office of the Prosecutor General. However, some of the courts dismissed the motion for the lack of jurisdiction. In some, there is an on-going process. Therefore, it can be said these trials in totality can be considered as transitional justice measures as far as they try to come to terms with large-scale abuses.

[4] It should be noted that a "truth commission" regarding the 12 September coup d'état was established in Turkey. The commission, which entitled as "Commission of Justice and Investigation into Diyarbakır Prison" launched its work in 2007 and completed its final report in 2011. It investigated the facts about the gross violations of human rights in Diyarbakır Prison (no.5) between 1980 and 1984, by collecting statements from over 500 victims/survivors. This commission was a product of a civil initiative; therefore, it was an "informal truth commission". Since it was informal, it cannot be said that Turkish state has adopted a restorative approach to deal with 12 September coup d'état.

[5] Latin America could be such an example. There are similarities between Turkey and Latin America in terms of being "cautious transitional regimes" where big transformations and ample reforms have not taken place (Bora, 2011: 94).

make it a very distinctive model. Turkey is an interesting case with regards to inchoate process of dealing with the past; the presence of life sentences given two the surviving generals of the coup d'état and on-going investigations and prosecutions about crimes against humanity.

In 2007, Sancar (2007: 21) pointed out that the issue of dealing with the past did not resonate in academia in Turkey. This has important consequences as "the continuity and long-lasting effect of dealing with gross human rights violations in the past depends on academic discussions and scientific work" (Nolte, 2007: 114), among the other issues. In recent years, there has been change in this trend and there is a growing research interest in "dealing with the past in Turkey" (Dufner ve Oğan, 2007; Sancar, 2007; Bora, 2009; Ağtaş ve Özdinç, 2011, Günal and Özengi, 2013; Aktaş, 2014). Nevertheless, only a very limited number works *directly* addresses the 12 September 1980 coup d'état. For example, Altıparmak (2011) highlights the necessity of trying the perpetrators of the 12 September military coup and elaborates on what ground the gross human rights violations of 12 September Coup can be brought before the court. Although a truth commission has been proposed as an option for dealing with the 12 September coup d'état by some scholars[6] and human rights activists and in some columns and semi-academic articles, none of these has given a detailed account for which aspects of what model could be applied to Turkey and why. This works aims at filling this gap in the literature by showing which dimensions of the South African model would be relevant for Turkey.

This research adopts a comparative (historical) analysis. Based on the literature on the TRC and Turkey, the court hearing records and the justified decision of the 12 September Case, it explores the causes and characteristics of the South African TRC and employs comparison to examine whether the methods and/or principles used in the South African TRC is relevant for Turkey.

The research has unavoidable limitations. Only two cases were examined to answer the research question. Two other main transitional justice measures, namely reparations and institutional reform were excluded from the analysis. In addition to these, not all the aspects of South African TRC and the prosecution process in Turkey were analysed.

[6] For example, even before the referendum in 2010, a law scholar and human rights activist Assist. Prof. Levent Korkut suggested that a truth commission could be established in Turkey to reveal what happened in the 12 September coup d'état. For more info: http://bianet.org/bianet/siyaset/123702-darbecileri-yargilamak-icin-gercekleri-belgelemeliyiz. A distinguished professor of history Timothy Garton Ash "said that truth commissions are better than courts for dealing with difficult past events, such as Turkey's Sept. 12, 1980 coup d'état". For more info: http://www.todayszaman.com/_truth-commissions-better-than-courts-to-deal-with-difficult-past_276749.html.

This paper begins by examining the conceptualization of transitional justice. It, then, analyses trials and truth commissions and compares two bodies and gives a brief overview of transitional contexts in Africa and Turkey by comparing relevant dimensions of two cases. It will then evaluate the limitations of prosecutions in general and the shortcomings of the indictment and prosecution in particular in Turkey so as to demonstrate why a truth commission is necessary to complement the prosecution in Turkey. Finally, it will assess three features of the TRC (excluding reconciliation, forgiveness, reparations and naming of the perpetrators) and discuss which aspects would be relevant for Turkey. In short, this article argues that provided that piecemeal implementation of transitional justice measures will deliver partial justice, a truth commission can complement the trial regarding the 12 September coup d'état. However, the TRC model cannot be applied in its entirety to Turkey. The TRC is 'not a one-size fits all' mechanism and the features of the TRC are historically and politically contingent. It is argued that that the public, institutional and thematic hearings should be core elements of a future truth commission in Turkey as they have a capacity to demonstrate broader social context of large-scale abuses and to establish collective responsibility regarding the 12 September 1980 coup d'état as well as to create a space for victims' to share their plight. New truths to guide the society should be adopted as they enable the re-presentations or re-interpretation of the facts, which were used to justify systemic use of violence and, therefore, show that these abuses are not justified. Granting individualized amnesty (trading truth with amnesty) for crimes against humanity should not be embraced, as it may cause difficulties in terms of achieving reconciliation.

1. THE FRAMEWORK OF TRANSITIONAL JUSTICE: HISTORICAL BACKGROUND OF THE TERM AND CONCEPTUAL CLARIFICATION

Societies emerging from massive violations of human rights and humanitarian law face a difficult question about how to deal with legacies of their past. As there is no single correct response, they adopt various measures and approaches to respond to past injustice and bring about political change. These processes are subsumed under the framework of "transitional justice.[7]

The rise of discourse of transitional justice is related to the critique of the concept of simple historical progress upheld by modernist liberal theory. The critique pointed out that the past cannot be regarded simply as being overtaken, as the burden of history remains and shapes our communitarian identity. Therefore, the issue at stake is not whether the past would be confronted or not

[7] I have discussed the limitations of the concept of transitional justice elsewhere (Gürsoy-Ataman, 2012).

but *how* (De Greiff, 1996 cited in Forsberg, 2001: 58).

The term transitional justice was first used in 1989[8] and as a field it came into the view in late the 1980s, in relation to the new practical conditions in the countries where new "democracies" came into existence following an authoritarian regime.[9] Both because of the backgrounds of the actors (human rights, law and comparative political science) who contributed to the field and of their approaches, the field and the concept have been dominated by a legal-institutional paradigm (Arthur, 2009: 324-333). "Coming to terms with the past" in its complexity was only narrowly addressed (Forsberg, 2001) and remained marginal (Arthur, 2009).

The phrase "transition to democracy" was adopted to examine political change and became a dominant paradigm in the emerging field (Arthur, 2009).[10] The process of transition is mostly viewed intrinsically as forward moving and restorative. However, there are many difficulties and sometimes calamities in the practice of political transitions. The association of transition with only positive outcomes has created a huge gap between theory and practice (Dube, 2011:182-184).

The framework of "transition to democracy" was mainly directed to "transformation of a repressive state security apparatus" and "instauration of

[8] Arthur (2009, p.329) shows that there are a few people who used the term around the same time including Ruti Teitel who claims authorship of the phrase. The first book on this issue was entitled as "Transitional Justice: How Emerging Democracies Reckon with Former Regimes" edited by Neil Kritz in 1994. As the title of the book demonstrates, transitional justice was associated with the way that emerging democracies deal with the legacy of former regimes. The conceptualization offered in the book was accepted by many reviewers at the time except Timothy Garton Ash. He thought that the term is not adequate to capture the complexity of new phenomena. Ash's critique pointed out what was absent in the Kritz's work: contribution of historians. Neither the German historians' debate on "how to interpret Nazi Regime and the Holocaust" was considered in the book in details nor the historians contributed to the work (Arthur, 2009:331-333).

[9] "Human rights activists, lawyers and legal scholars, policy makers, journalists, donors, and comparative politics experts concerned with human rights and the dynamics of 'transition to democracy'," tried to find out solutions to the practical dilemmas posed by transitions. Rather than creating an ideal type, knowledge base of this field depended on the comparison between different experiences of countries (Arthur, 2009:324-326).

[10] There are several reasons for adoption of this term. The populations living in such countries where regime change took place were aiming at democratic reform. In addition to this, there was need for a new paradigm to succeed the earlier theories of democratization affiliated with modernization theory. The term "transition" which was mainly used by Marxists, was appropriated and its meaning was altered to signify "political reform", namely changes in the legal-institutional level. Moreover, the decline of global left in1970s, the resulting interest in human rights among left-wing intellectuals to criticize state violence and the encounters of intellectuals in exile with social democratic experiences contributed to the articulation of the phrase "transition" to political democracy (Arthur, 2009:337-341).

procedures and practices of democratic citizenship".[11] The main actors of transition were seen as elites whose aim was to pursue-legal institutional reform (Arthur, 2009: 347). Exclusion of socio-economic transformation rendered the 'transitional justice' framework a partial one.[12]

The understanding of the conception of transitional justice is still incomplete and thin. A systematic conceptualization of the term has not been fully developed yet (De Greiff, 2012: 32). There is no fixed meaning of the term. Some scholars (Teitel, 2003; Uprimny and Saffon, 2006) state that transitional justice is a "distinct phenomena". Some (Posner and Vermeule, 2004:764) indicate that it is "continuous with ordinary justice", not creating a distinctive set of political and jurisprudential dilemmas.[13] Some (De Greiff, 2012: 64) view it as "general understanding of justice applied to peculiar circumstances". Others (Allen, 1999; Teitel, 2002; Uprimny and Saffon, 2006) express that it is a compromise shaped by the political contingency.

What is common in most of the definitions of transitional justice is "to address past human rights abuses in the context of a shift in political order" (Apland, 2012). Therefore, transitional justice can be defined *as set of practices, mechanisms and concerns* which aims at confronting and dealing with past violations of human rights and humanitarian law (Roth-Arriaza, 2006:2).

Most of the time transitional justice is informed by the tension between peace and justice, the international and the local, retribution and restoration, and law and politics. The choice of the mechanisms and practices is influenced by

[11] Although transition to democracy was seen desirable, the scholars dealing with this issue such as O'Donnell and Schmitter (1995) suggest that it is uncertain that these regimes in transition would actually become democracies.

[12] There are some challenges to transitional justice. The first point is whether the types of justice claims should be shaped by the end point of transition (i.e. democracy, peace). For example, "why some measures such as legal reforms was seen as proper transitional justice measures whereas redistribution of wealth is not" had been a challenge. Secondly, the Latin American influence on the field raised questions of whether this framework would be relevant for countries with different, histories, cultures and positions in the world economy. Another challenge was the limitations of the transitions paradigm in terms of its applicability to places where there is no transition but an historical injustice. The failure of some countries in the mid 1990s who were in the process of transition to democracy also debilitated the "transition to democracy paradigm". Some argue that transitional justice paradigm is affected by a particular political project (democratization) of specific actors (US based democracy promoting organizations), therefore not credible. Finally, there is also a growing anti impunity movement, based on international law and principles, which is called international justice. It poses another challenge to this field. It is unclear whether the field would endure these challenges (Arthur, 2009:359-363).

[13] Posner and Vermeule (2004) argue that the problems of justice in transitional times, is not strictly disparate from the problems of justice in ordinary times. Both of them are shaped by moral compromises and critical moral judgements. The difference is not one of kind but degree (Williams and Nagy, 2012:22).

these tensions. Thus, a plausible account of transitional justice should be able to consider dilemmas involved and regard it "as a negotiation between normative and political forces; the infusion of moral (and legal) considerations into what is an inherently political project" (Apland, 2012). It might be this sort of negotiation, which makes transitional justice distinct despite being thin and incomplete.

The objectives of transitional justice, according to the UN, are "to ensure accountability, serve justice and achieve reconciliation". Other goals are listed as providing recognition to victims, fostering civic trust, and contributing to reconciliation and democratization (De Greiff, 2012: 40). Adorno states that the "past will have been worked through only when the causes of what happened then have been eliminated" (2010: 227). Therefore, the goals of transitional justice should be able to address underlying causes of what happened.

Transitional justice measures were determined by the meaning associated with the term "transition" in the emergence of the field (Arthur, 2009: 326). A non-exhaustive list includes criminal prosecutions, truth telling, reparations, and institutional reform (De Greiff, 2012: 40). In the broader sense, it includes a multitude of approaches such as changes in the representation of the issue in the school textbooks, creation of memorials and museums, commemoration and designing a more just distribution of resources (Roth-Arriaza, 2006:2).

These measures, far from being randomly chosen, share some common goals such as accountability and serving justice. "International experience suggests that if these measures are implemented haphazardly, piecemeal and in isolation from one another, it is less likely that they will be interpreted as instances of justice" (De Greiff, 2012:36).[14]

Although there are four transitional justice measures, in the context of the limitations and aims of this study, only two of them, namely prosecutions (trials) and truth commissions will be examined.

Trials vs. Truth Commissions

Some accounts of transitional justice suggest that demands of justice[15] and the needs of peace and reconciliation push in opposite directions (Uprimny and Saffon, 2006:2). It has been assumed that the pursuit of criminal justice can disturb fragile political settlements and deepen societal divisions. Therefore,

[14] Orentlicher (2004:5) states in "Independent Study on Best Practices, Including Recommendations, To Assist States in Strengthening Their Domestic Capacity To Combat All Aspects of Impunity" that "[a]n effective policy requires a multifaceted strategy, with each component playing a necessary but only partial role….truth commissions, prosecutions and reparations are widely seen as complementary, each playing a distinctly important role".
[15] This is individualizing the crime and punishing the perpetrators.

repairing the social ties damaged by the war or authoritarian regimes was seen as requiring sacrificing justice understood as punitive measures.[16]

To provide a moral justification for sacrificing of retributive justice, disclosure of truth has been used as a replacement in some of the contexts, as in the example of the South African Truth and Reconciliation Commission (the TRC). This practice created what is referred to as the "truth vs. justice" dilemma. It was thought that if the justice mechanisms depend on punitive measures, the disclosure of the truth would be less likely because offenders would not have motivation to reveal what happened, how and when.

However, in recent years, it has been seen that the dichotomy between the truth and justice is fallacious (Lutz, 2006:327). Although the government might have some leeway in deciding in what order, when and how to implement transitional justice measures, it is now accepted that overlooking any of them might upset the political environment. In a similar vein, I would argue that prosecutions and truth commissions are not alternatives to each other but are complementary mechanisms. As it will be shown below, there are some important differences between courts and truth commissions as well as similarities. These differences underlie the fact that truth commissions can be necessary under the circumstances where there are prosecutions (and vice-versa).

Both truth commissions and courts provide truth, justice, reform, reparations, public debate, and the validation of victims' experiences [recognition] (Freeman, 2006:73). Both of these institutions try to redirect the revenge through public legal institutions (Minow, 2000: 254). Although a truth commission is victim-centred and trials focus on perpetrators, both bodies try to engage related parties to their respective practices. Therefore, it can be said that courts and truth commissions try to meet all these objectives in varying manners and degrees.

There are also some differences between truth commissions and courts. Truth commissions are tasked with investigation and reporting of the facts; therefore there are *generally* no plaintiffs, no prosecution, no defence and no trial (Freeman, 2006:71).[17] Courts and truth commissions differ from each other in terms of their consequences. The judgment of the court is legally binding. The findings of the truth commission have no intrinsic legal effect (Freeman, 2006:71). Trials try to establish individual responsibility, therefore "take events

[16] [I]mpunity was seen as a necessary political compromise…[sometimes] 'price of peace' (Wilson, 2003:368).

[17] South Africa is an exception in terms of the amnesty hearings, as amnesty hearings had a format similar to courts.

out of its social context" (Wiebelhaus-Brahm, 2010:14).[18] However, truth commissions try to determine the broader social context that enables the violation and roles of the actors other than perpetrators such as institutions and bystanders (Wiebelhaus-Brahm, 2010:14); therefore they have a potential to demonstrate collective responsibility as well as the individual one unlike the individualization of responsibility in trials. It is generally suggested that trials are backward looking where as truth commissions are forward-looking in terms of aiming at social renewal (Wiebelhaus-Brahm, 2010:10). Truth commissions reach far more people (victims, witnesses and perpetrators) compared to trials. What distinguishes truth commissions from trials is balancing the independent forces of both justice and reconciliation (Allen, 1999:320).

Before analysing whether a truth commission should be established in Turkey to complement the prosecution and whether some of the methods used and justice principles adopted in the TRC can be applied to Turkey, basic features of case studies, namely relevant historical background of Africa and Turkey will be examined in the next section.

2. TRANSITIONAL CONTEXTS: HISTORICAL BACKGROUNDS OF SOUTH AFRICA AND TURKEY

Although Turkey and South Africa have different histories, there are some similarities between these countries when it comes to the experience of large-scale human rights violations at some point of their history. As the detailed analysis of these countries' histories is beyond this article's scope, only the dimensions of their history, which are relevant for the aims of this article, will be summarized below.

Africa was not ruled by a military regime but a civilian government. In Turkey, it was the military that saw itself as "the guardian of the Turkish State" (Savran 2002) and was involved in politics directly or indirectly in the presence of civilian governments (Ahmad 2010; Zurcher 2004). Nevertheless, both the apartheid regime[19] and the military regime in Turkey in the 1980s were

[18] It indirectly contributes to explaining broader social causes of the violations.

[19] Racism and oppression manifested themselves in different forms in South Africa with the beginning of colonialism. The white supremacist acts and practices were formulized as a "concerted ideology and overarching plan of segregation" only in the beginning of the twentieth century (Worden 2012, pp.74 -88). The hegemony of the white population and segregation of a very large majority of the population were reinforced through constitutions in the twentieth century (De Lange 2000, p.16). In the late 1940s, segregation was revived in the form of apartheid policy (Worden 2012, pp.74-88). Apartheid was "the system of institutionalised racism and racial and social engineering" (Posel 2011, p.319). It was based on "minority domination of statutorily defined colour groups on a territorial, residential, political, social and economic basis" (Boraine 2000, p.141). It lasted for nearly fifty years. The durability of the system did not imply

authoritarian and undemocratic based on tight control over state apparatus and the exclusion of large proportions of people from the rule during *certain periods*.

Although the common point in two cases is vertical violence through the direct and indirect participation of state apparatus, the natures of the conflict in the two countries were different. In Africa, there was an organized armed struggle against the repressive policies of the government based on *race* (skin colour). The struggle of these armed groups gained international support (Worden 2012). In Turkey, there were revolutionary leftist associations, which have considerable societal base and organized around *class-based* objectives in the 1970s. There were ultra-nationalist organizations and paramilitary groups fighting with them. Organizations from both these camps used arms for different reasons in varying degrees and forms (Ahmad 2010; Zurcher 2004). Although the revolutionary leftists' cause did not get international support, the paramilitary groups got support from the US through funds and training (Ahmad 2010).

In the South African context, the NP (the National Party) and organizations struggling against apartheid were unable to defeat each other; therefore they negotiated for peace (Worden 2012).[20] In the Turkish context, the revolutionary leftists as well as the ultranationalists were repressed by the state in 1980s. The military took control of the state. The revolutionary left did not have a say in the creation of new order whereas the leader of ultranationalists said, "we are in jail, but our ideas are in power" (Ahmad, 2010:95-96).

The negotiation process in South Africa was one of the most participatory and democratic among the transitions from authoritarian rule (Boraine, 2000; Hayner, 2000; Wilson, 2001a; Wilson, 2001b). The parties of the conflict reached a consensus on the amnesty outside the official consultative process (Wilson, 2001a:8). However, the conditions for amnesty and its combination with a truth commission were shaped by the limited but significant contributions

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that it was internally stable, coherent and uncontested (Posel 2011, p.320). The common ground was sustaining white supremacy by disenfranchising Africans (Worden 2012, pp.101-102).

[20] In 1989, F.W. de Klerk, the new head of the NP, won the elections and started to lift repressive measures. In 1990, the ANC and some other organizations were unbanned. The political prisoners, including Mandela, were released. In 1991, the main elements of apartheid legislation were removed. The formal negotiation between the government and some other parties such as the ANC for the new constitution took place in 1991. In September 1992, a Record of Understanding had been reached by the ANC. It resulted in the issuing of a new democratic constitution in 1993 and the election of ANC-led government in 1994 (Worden 2012, pp.131-152). Despite the persistence of economic and social problems, apartheid was broken down and the transition began (Boraine 2000, p.142).

of the civil society (Wilson, 2001b:200). A truth commission was created a few years after the conflict ended, based on the act of the parliament (Boraine, 2000:145).

In Turkey, the prosecution started 32 years after the coup d'état happened. The lifting of the ban on prosecution of the 1980 coup leaders was accepted in the public referendum in 2010. Nevertheless, some *victims'/survivors' groups* might feel excluded as no one asked their ideas and suggestions about how they would like to deal with the past abuses besides *criminal trials* in Turkey.

Both the truth commission in South Africa and prosecution regarding the 12 September 1980 coup d'état in Turkey can be interpreted as a part of "new nation-building" (Wilson 2001a; Laciner 2012:3-7) and both of these processes are shaped by economic, social and political interests.

The TRC did not take the apartheid regime to trial, but rather "documented gross human rights violations committed during the maintaining and fighting against apartheid" (Ally cited in Wilson 2001a: 48). Turkey did not put the 12 September 1980 regime or the coup d'état mentality on trial, but charged "two generals with overthrowing the parliament and constitutional order in a military coup" and handed down life sentences to them.

These differences and similarities of the *historical background and transitional context listed above* are important in terms of affecting *of the choice of transitional justice measures* in these countries. As Teitel indicates "response to transition is contingent on a number of factors— the affected society's legacies of injustice, its legal culture, and political traditions— as well as on the exigencies of its transitional political circumstance" (2000:219).[21]

Whereas the factors explained above led to the creation of a truth commission in South Africa, in Turkey prosecution was adopted. Zalaquett notes that "in cases where a clear victor emerges, no truth commission is established. The winners simply prosecute the losers. Truth commissions have been established in situations where there is no clear victor" (cited in Freeman, 2006:11). Therefore, the *prosecution* might be explained with the defeat of authoritarian modernist bourgeois by the conservative modernist bourgeois in

[21] It is also noted that "the strength and legitimacy of legal institutions", "the strength of democracy prior to conflict", "the legacy of colonialism" "international intervention in the country", "the commitment of governing parties to confront the past", "interventions since the transition to democracy to address underlying structures and power inequities that contributed to the conflict" and "timing (time since the onset of transition period and its relevance to addressing the articulated needs of the survivors)" are among factors that affect of the choice of transitional justice measures in each society (Fletcher, L.E., Weinstein, H.M. and Rowen, J., 2009:190).

Turkey (Laçiner, 2012:3-7). Nevertheless, despite providing a possible explanation of why there *is* no truth commission in Turkey, Zalaquett's comment does not account for why there *should not* or *should* be a truth commission. I will clarify why there should be a truth commission, complementary to the prosecution in Turkey below.

3. THE LIMITATIONS AND SHORTCOMINGS OF THE INDICTMENT AND PROSECUTIONS IN TURKEY

Turkey's army has staged three "classic" coups and a "post-modern" one since 1960. The 1980 coup was the bloodiest in Turkey's modern history.

> *A total of 650,000 people were detained during this period and records were kept on 1,683,000 people and kept on file at police stations. A total of 230,000 people were tried in 210,000 cases, mostly for political reasons. A further 517 people were sentenced to death, while 7,000 people faced charges that carried a sentence of capital punishment. Of those who received the death penalty, 50 were executed. As a result of unsanitary and inhumane living conditions and torture in prisons, a further 299 people died while in custody.*[22]

All political parties, trade unions and civil society organizations were banned,[23] archives of some of the parties were disappeared, newspapers were closed down and journalists were arrested.

Following the coup, in 1982 a new constitution was accepted in a referendum (Ahmad, 1985:214-215) (getting % 91.4 vote).[24] The provisional Article 15 of the new constitution prevented any prosecution against those responsible for the 1980 coup.[25]

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[22] http://www.todayszaman.com/newsDetail_openPrintPage.action?newsId=268151

[23] It was stated that the number of the banned parties, trade unions and organization amount to 24.000. However, organizations of big businesses such as TUSIAD were not closed down.

[24] It should be noted that voting in the referendum was compulsory. There a was fine for those who would not vote, in addition to the suspension of right to vote for five years. The "no" votes were relatively higher in the Southeast part of Turkey (Zurcher, 2004:281).

[25] Provisional Article 15 of 1982 Constitution: "No allegation of criminal, financial or legal responsibility shall be made, nor shall an application be filed with a court for this purpose against any decision or measure whatsoever taken by the National Security Council formed under Act Nr. 2356 which has been exercising legislative and executive power on behalf of the Turkish nation from 12 September 1980 to the date of the formation of the Presidium of the Grand National Assembly of Turkey which is to convene following the first general elections; or against any government formed during the term of office of the Council; or against the Consultative Assembly which has exercised its functions under Act Nr. 2485 on the Constituent Assembly.
Provisions of the above paragraphs shall also apply in respect of persons who have taken decisions and adopted or implemented measures as part of the implementation of such decisions and measures by the administration or by the competent organs authorities and officials. No allegation of unconstitutionality shall be made against decisions or measures taken under laws or

After 32 years, in March 2010 the Justice and Development Party proposed a constitutional amendment package including a change in the Provisional Article 15 of the 1982 Constitution. It was voted in the referendum on 12 September 2010 and the 57.88% of the electorate voted in favour of the amendment. Following the amendment, complaints were filed against two surviving leaders of the coup and an indictment was prepared. Kenan Evren and Tahsin Sahinkaya were "charged with overthrowing the parliament and constitutional order in a military coup".

The prosecution process in Turkey started on 4 April 2012 and the court delivered the judgement on 18 June 2014. Ankara 10th high "criminal court in Ankara gave "life sentences to retired generals Kenan Evren and Tahsin Şahinkaya, who led the Sept. 12, 1980 military coup, on charges of violating Article 146 of the Turkish Penal Code (TCK), which concerns "crimes committed against state forces… in accordance with the court's ruling, Evren -- also the seventh president of Turkey -- and Şahinkaya, then-commander of the Turkish Air Force, will be stripped of their military rank and demoted to private."[26] Now the case is in the appeal process.

The decision of the court is a milestone in terms of bringing coup d'état generals to justice, finding them guilty and giving them life sentences. It has been an important first step in the fight for ending impunity. Confirming Malamud-Goti's views on criminal trials (1995: 200), it has shaken the dominant position of the generals and made them accountable citizens. However, when the extent and type of atrocities (severity of violations) committed by military junta and its accomplices are taken into account neither the prosecution process nor the judgment can be seen as adequate. It does not only stem from the specific limitations and shortcomings of the indictment and prosecution process in Turkey, but also from the limitations of prosecutions in general. General limitations of prosecutions in the context of transitional justice will not be discussed here; only the ones that correspond to the case in Turkey will be given place below.

The indictment[27] regarding the coup d'état on 12 September 1980 claims that the coup was the result of the actions of 'deep' illegal structures within the state which aimed at preparing grounds for a successful military takeover by creating a chaotic environment through planning and conducting terrorist

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decrees having force of law enacted during this period or under Act Nr. 2324 on the Constitutional Order."

[26]http://www.todayszaman.com/_turkish-court-hands-down-life-sentence-to-sept-12-coup-generals_350670.html

[27] Full text of "the indictment of 12 September Coup D'état" could be reach from the following link: http://hepimizdavaciyiz.net/?s=12-eylul-iddianamesi

actions. There is an *implication* about the role of the military in stirring up political turmoil in the late 1970s.

The indictment depends on "conservative-liberal (right-wing) interpretation of the history" (İnsel 2012:12) because of its democracy definition, depicting socialist experiences as detrimental practices and regarding the conscious struggles of some social movements as provocations of a 'deep state'.

The scope of the indictment is very narrow. Some intervening lawyers raised this concern in the first few hearings of the trial. The roles of political, economic and social actors - such as heads and members of other governmental institutions, business associations and the media - and many other incidents related to the coup in different geographical locations in Turkey have been overlooked by the indictment. It can be said that the indictment is seen as vindicating the 12 September 1980 regime only by accusing two generals and excluding the broader social context. [28] Therefore, there is strong evidence that the limited space provided by this trial is inadequate to reveal the complexity of 12 September 1980 coup d'état. Since the court has to simplify complexity with a view to producing a "single outcome", namely to do "justice" (Maier 2000:267), "the simplistic questions of guilt or innocence framed by criminal trial can never capture the multiple sources of mass violence" (Minow 2000:238).

The indictment includes the testimonies of victims who were tortured in detention centres and prisons and touches on different methods of torture. It acknowledges that there was a conscious and systematic use of torture in detention centres and prisons. However, the generals are not charged with torture, which is included in the "crimes against humanity" under Article 77 of the Turkish Penal Code. During the court hearings, some intervening lawyers called for the investigation to include crimes against humanity (T.C. Ankara 12. Ağır Ceza Mahkemesi, 2012a). In the third hearing, the 12th High Criminal Court in Ankara decided to file a criminal complaint against coup d'état generals for committing human rights violations such as systematic torture (T.C. Ankara 12. Ağır Ceza Mahkemesi, 2012b). The investigations of generals with regards to torture are unclear yet. Although torture and death in custody complaints filed in Ankara were referred to prosecutors' offices in 59 relevant provinces of Turkey[29],

[28] Other criminal investigations were opened against the officers (other perpetrators/accomplices) who were involved in committing the crime (M.Horuş, 2014, Personal Communication, 2 October).

[29] "After indicting the two surviving leaders of the coup, he [prosecutor Kemal Çetin] issued a decision of non-jurisdiction for many complaints filed in Ankara for cases of torture and deaths in custody which took place in many parts of the country, including in Ankara, in the wake of the coup. Instead, he referred these complaints to prosecutors' offices in the provinces of Turkey [59 provinces] in which the incidents originally occurred and to the relevant Ankara prosecutor for the Ankara cases. Furthermore, he argued his decision of non-jurisdiction the basis of the

local courts in Samsun, Diyarbakır, Amasya and Bursa dismissed the cases as time-barred, despite the fact that they should not be subjected to statute of limitations. A case in Kırklareli continues. Lawyers demanded recusation in another case in Amasya (M. Horuş, 2014, Personal Communication, 2 October). Considering the trajectory of these cases, it cannot be said that they offered a "disapproval of official policies" and "promote confidence in the new political arrangements" (Malamud-Goti, 1989 cited in Arthur, 2009: 355). Dismissal of some cases about crimes against humanity by the local courts due to statute of limitations are not in accordance with international law and by doing so, the local courts have been protecting the perpetrators and therefore, contributing to impunity.

The Court collected the evidence through witnesses, records and exhibits.[30] Even though evidences gathered by the court- as the intervening lawyers agree- are adequate to establish whether generals are guilty or not (which is the primary purpose of the trial), they are not sufficient to reveal underlying reasons for the coup d'état. More importantly, this information does not account for why gross human rights violations had happened. One of the intervening lawyers Mehmet Horuş stated that the Court confirmed the previously known facts, more than uncovering new information. He added that the court did not create a casual link between the coup d'état and human rights violations (2014, Personal Communication, 2 October). Although criminal trials can establish "tangible facts about past crimes" (Malamud-Goti, 1989 cited in Arthur 2009:355), considering the severity of violations such as unlawful killings, torture and enforced disappearances, the evidence gathered by the court only very partially established *tangible facts about gross human rights violations* resulted from the coup.

The defendants did not attend to the trial and delivered their testimonies at the 10th and 11th hearings of the trial via teleconference on the pretext of ill health and age considerations.[31] The generals did not accept the legitimacy of authority putting them on trial. They argued that they constituted a "founding government" and the Constitution they made is still in place, therefore the Court has no jurisdiction to hear the case and only history can judge them (T.C.

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case-law of the European Court of Human Rights and Turkey's obligations under the ECHR that torture and violations of the right to life (articles 2 and 3 of the ECHR) were crimes for which the statute of limitations could not apply." (HRW, 2012: 7).

[30] A detailed list of evidences can be found in the justified decision of the Court.

[31] In the first few hearings, some of the intervening lawyers and parties stated that poor health should not afford coup d'état generals a pretext for absence in the court and health reports should be requested from institutions other than the Forensic Medicine Institute. The Court accepted it and health reports from the hospitals of two universities did not change the result. Although some of the lawyers demanded generals' arrest, they were only placed a ban on leaving the country (T.C. Ankara 12. Ağır Ceza Mahkemesi, 2012a).

Ankara 10. Ağır Ceza Mahkemesi, 2014).[32] They pleaded not guilty. As they did not consider themselves as defendants, they refused to answer the questions asked by the court during direct examination (Evren interfered only a few times). Although intervening lawyers (and some of the survivors/victims) pressed them to talk about death sentences, death in custody and torture in prison among the other issues during cross-examination, they kept their silence (T.C. Ankara 10. Ağır Ceza Mahkemesi, 2014). They showed no remorse and did not respond to questions related to forgiveness and apology.

Abovementioned facts lead to some defects in the trial. As the generals refuse to answer the questions about coup d'état charges, in contrast with Slye's argument about criminal trials (2000:171-172), the trial was unable to supply more reliable information by direct testimony of the accused. In addition to this, despite the fact that criminal trials enable a space for formal dialogue between victims and the accused (Slye, 2000:172) the absence of the generals during the most of the hearings and their refusal to answer the questions asked by victims/survivors resulted in the lack of a formal dialogue between them and victims/survivors. Similar to Maier's concerns about the perpetrators' tactics to distance themselves from their identities as violators (2000:267), the coup d'état generals refused accusations of torture and blamed prison officers for it. They did not accept their identity as human rights offenders. They tried to keep their immunity by participating via teleconference and by not accepting the legitimacy of authority putting them on trial.

During the hearings, except asking questions, victims/survivors of the 12 September coup d'état talked about human rights violations which they/their relatives were exposed to in order to prove that they are victims of crime of the coup d'état so that they would be involved in the case. However, most of the time it was lawyers who spoke in the name of them. Since the court were trying to establish whether the generals are guilty of coup d'état crime or not, victims'/survivors' say and the attention given to them were limited. The court was not an ideal environment for victims/survivors to share their plight.

[32] "The defense statement was prepared by Bülent Hayri Acar, a lawyer for Evren and retired Gen. Ali Tahsin Şahinkaya. The defense statement was published as a booklet. Evren demanded his acquittal, arguing that the 1980 government was a "founding" government, and the Turkish Penal Code (TCK) does not explicitly forbid staging a takeover. He argued that there is no legal order in the world that forbids staging coups as a de facto necessity that arises from the nature of overtaking an older government. He said as long as "the power that stages the coup" is not eliminated, it should be considered a founding government. He maintained that since the 1982 Constitution, adopted as a result of the 1980 generals' two-year military rule, is still in place and all other legislation is based on it, this means the intervention is still legitimate. "This trial is not valid," he said, arguing that it was "against reason" to consider the intervention a crime." Please see: http://www.todayszaman.com/_1980-coup-leaders-defense-arguments-not-legally-sound_274954.html.

It was stated that some victims/survivors welcomed the decision of the court (M. Horuş, 2014, Personal Communication, 2 October). Nevertheless, the violations such as deprivation of liberty, mental anguish and loss of life might constitute "pain and suffering that can never be compensated" (Maier, 2000:269). Therefore, the retributive measures can only partially provide redress for pain and suffering (Maier, 2000:269) the coup d'état caused on victims/survivors.

4. ASSESSING THE APPLICABILITY OF THE PRINCIPLES AND METHODS OF SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION TO TURKEY IN THE TERMS OF COMING TO TERMS WITH 12 SEPTEMBER 1980 COUP D'ÉTAT

As it is demonstrated above, the trial regarding 12 September coup d'état was not a case involving crimes against humanity. Cases referred to local courts about crimes against humanity were either dismissed due to statute of limitations or are slowly progressing. The 12 September 1980 case excluded the roles of political, economic and social actors and the broader social context of the coup d'état. The tangible facts about gross human rights violations resulted from the coup d'état were only fragmentally revealed. The limited attention given to victims/survivors seems to be inadequate to recognize their plight. Therefore, in my view, such deficiencies and limitations of the prosecution can be recovered by public, institutional and thematic hearings in the context of a truth commission. In the following part, this argument will be elaborated by examining which methods and principles adopted in the TRC might be applied to Turkey.

The TRC Combined An Amnesty Process With The Truth Commission

The main issue for the first post-apartheid government in South Africa was formulating a "morally acceptable" amnesty requirement since the conditions and procedures for granting amnesty were not clarified in the Interim Constitution. The solution was incorporating amnesty with a truth commission (Hayner 2011:100).[33] A technical committee was appointed by the main negotiators to draft a "post-amble" to the Constitution, which would include an amnesty clause.[34] Therefore, an amnesty clause was prepared outside the official consultative process (Wilson, 2001a:8).

The unique feature of the TRC was combining an amnesty process with the

[33] "A grant of amnesty would be the carrot to get perpetrators' cooperation in the process, and the threat of prosecution would be the stick" (Hayner, 2011:100)

[34] The Committee prepared the post-amble entitled "National Unity and Reconciliation" just after the end of the Constitutional talks and before the Constitution were brought to Parliament in December 1993 (Wilson, 2001a:8).

truth commission (Slye 2000; Wilson 2001a; Hayner 2011).[35] The *reconciliation* was initially aimed to be reached through "amnesty" (Wilson 2001b, p.198).[36] Amnesty was associated with the *disclosure of truth* later through the TRC (Hayner, 2011:27).

The Committee on Amnesty (the AC) was tasked with the examination of applications for amnesty through hearings. Amnesty hearings were similar to court hearings.[37] The main aim of the hearings was *establishing the full truth through perpetrators' testimonies* before granting amnesty. The amnesty process was viewed as the best possible opportunity to learn more about obscure incidents (Wilson, 2001a:23) as the judges of the old regime were not dislodged by the new regime (Greenawalt, 2000:209) and the judicial system was weak.

The way that the TRC granted amnesty was legally the most stringent of amnesties applied in different transitional contexts (Wilson, 2001a). It was an individualized amnesty. The applicants had to demonstrate that the violations were committed for political reasons in the time period specified in the Act. There had to be proportionality between the act and the political objective. Perpetrators had to provide full disclosure with respect to the nature and context of their actions.[38] The legal proceedings against the perpetrators were suspended until the amnesty application was considered and the case was concluded. The refusal of amnesty meant that criminal and civil prosecutions could be pursued against the perpetrators (Wilson, 2001a; Hayner, 2011).

There were some drawbacks of the amnesty process. Firstly, amnesty is a violation of state's duty to punish individuals responsible for certain gross violations of human rights under international law. Granting amnesty led to the indemnifying the state for the damages, especially with regards to the crimes perpetrated by government officials (Wilson, 2001a:24). Secondly, the TRC named the perpetrators and granted them amnesty by bypassing due process requirements. Despite the similarities with the courts, standard legal rules of evidence were not followed here. Thirdly, there were inconsistencies and controversies in amnesty rulings. Since the AC was an administrative tribunal, there was lack of jurisprudence in the decisions. The criterion of proportionality

[35] In many countries amnesty process was a separate legal mechanism.

[36] By upholding amnesty in the post- amble, the Constitution gave precedence to "national unity and reconciliation" more than "protecting individuals' rights", especially individual's right to justice (Wilson, 2001a:9).

[37] These hearings were different than public hearings, institutional hearings and thematic hearings.

[38] The consequence of noncompliance with the requirement was not clarified in any single regulation (Sarkin 2008:102-103). The standard about full disclosure was later made clear by the TRC in its 2003 report. However, this was a late clarification and did not prevent the inconsistency in the application of the notion of full disclosure.

for granting amnesty was implemented in very few decisions[39] and the criterion political objective[40] was defined and applied narrowly (Sarkin 2008, p.98).[41] Fourthly, perpetrators needed to associate their acts with the political objective to benefit from amnesty. This criterion sometimes led to either overrating or undervaluing their political motivations (Slye, 2000:177). Moreover, it was contested whether the perpetrators disclosed all the relevant facts about the cases considered by the AC (Slye, 2000:177). The insufficient resources and limited investigative capacities of the Investigative Unit as well as the lack of information coming from victims and perpetrators affected the establishment of the factual truth about the case (Sarkin, 2008:94-105). Lastly, the amnesty process did not place a moral burden on the perpetrators: regret and apology were not required (Wilson, 2001a). This hindered a true reconciliation.

It should be noted that amnesty for *gross violations of human rights* is not a widely accepted option for truth commissions since amnesty provisions have been regarded as violating international law.[42] A duty not to grant amnesty is inferred from "international norms requiring states to provide victims with remedies for human rights violations, or to prosecute perpetrators, as well as from specific provisions in treaties on torture, forced disappearances, genocide and certain war crimes" (Lutz, 2006:330).[43]

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[39] Most of the time the AC exercised discretion (Sarkin 2008, p.98).

[40] Political objective was generally interpreted as to "whether an authorized superior in a recognized political organization ordered the act, or whether the act was closely related to an explicit programmatic statement of an established political organization" (Slye 2000b, pp.179-180), although there were other factors set forth in the law to determine the element of political objective. Other factors stipulated in the Article 20(3) of the NURA includes motive of the person committing the act, the context in which the act took place and the proportionality with the act and the objective pursued.

[41] The murderers of Steve Biko were not granted amnesty since perpetrators claimed that the killing was accidental. The abuses related to simple racism were not granted amnesty because it was asserted that political objective was not present in these acts. Sometimes the committee did not follow the procedures for granting amnesty: there was no hearing for the thirty seven ANC leaders which committed gross human rights violations; the case was considered in the chambers. Because of these inconsistencies, some of the rulings of the AC were subjected to judicial review (Hayner 2011, p.30).

[42]There is an increasing international normative consensus that perpetrators of gross violations of human rights should be held responsible by states. The "Pinochet Effect" (Roth-Arriaza, 2005 cited in Lutz 2006:329), the indictment issued in Spain against General Pinochet of Chile for human rights violations he committed in Chile and the House of Lord's decision that could be extradited from the UK because torture constitutes an extradition crime, and therefore would be tried in Spain, has shown that it is becoming more difficult for perpetrators of gross human rights violators to avoid responsibility by leaving their countries. The possibility of trials for such persons abroad motivated some states to prevent immunity at home and prosecute perpetrators so as to protect their sovereignty (Lutz, 2006:329).

[43] These norms could be found in the following treaties: Convention Against Torture, Art.5; Genocide Convention, Art. 5; Geneva Convention I, Art. 49, II Art.50, III, Art. 129, Art. 146.

Considering the drawbacks of granting amnesty listed above, unlike the TRC, an amnesty process should not be combined with a truth commission and amnesty should not be granted to perpetrators who have committed gross human rights violations during the 12 September 1980 Coup D'état.[44] A combination of a truth commission with amnesty in South Africa was historically and politically contingent. Therefore, it might not be relevant for each and every society. Granting amnesty for perpetrators who committed crimes against humanity may be a violation of states' duty to punish individuals responsible for gross violations of human rights under international law. It can lead to the indemnifying the state, especially with regards to the crimes perpetrated by government officials. The South African case as well as other examples in the post-socialist countries demonstrates that "where there was little or no prosecution of the former authorities for past crimes… [there is] high levels of violence" (Borneman, 1997 cited in Wilson, 2001a:26). Thus, a truth commission should complement the retributive process in Turkey through removing its deficiencies rather than replacing it.

Against those who claim that amnesties (combined with truth commissions) are only ways to get information from the accused, it can be said that amnesties do not guarantee the disclosure of all relevant facts as the TRC experience demonstrates. Where judicial system is strong, trials can provide factual information. However, because of the weaknesses of the justice system and problems related to hearings outlined above, it is contested to what extent courts in Turkey can contribute to the establishment of the truth.

The TRC Held Public Victim Hearings, Thematic Hearings And Institutional Hearings In Order To Identify And Analyse Both Individual And Broader Social Dimensions Of The Past Abuses

The other Committee working under the TRC was the Committee on Human Rights Violations (the HRVC). The mandate of the HRVC was "to enquire into systematic patterns of abuse, to attempt to identify motives and perspectives, to establish the identity of individual and institutional perpetrators, to find whether violations were the result of deliberate planning on the part of the state or liberation movements and to designate accountability, political or otherwise, for gross human rights violations" (TRC, 1998:227).

The HRVC communicated with many state and non-state actors to motivate different organizations and citizens to tell their accounts of human

Not to grant domestic amnesty for crimes such as torture can be found in the case law of ICTY trial chamber and the Inter-American Court of Human Rights.

[44] It should be noted that perpetrators are not limited to the surviving coup d'état generals in Turkey.

rights violations to the Committee (TRC, 1998). It held *public victim hearings*. Fifty hearings were conducted in town halls, hospitals and churches all around the country in 1996 and early 1997 (Wilson 2001a:21). Two thousand of the victims and witnesses attended the public hearings (Hayner, 2011:28).

In addition to this, it held *theme hearings* (based on groups) and *institutional hearings*. Theme hearings covered different issues such as women as the subject of human rights violations, youth and children. In institutional hearings, the role of businesses during apartheid, the legal system, the faith communities, the media, the heath care sector, the involvement of the former state in chemical and biological warfare, the role of the armed forces, the prison system and the state security system were analysed. These were aiming at demonstrating how certain groups and institutions took part in or responded to abuses of human rights (Hayner, 2011:28). These hearings enabled the Commission to uncover more about the social context and institutional structure of apartheid, although in a fragmented fashion (Wilson, 2001a:35-36).

Over 21,000 victims and witnesses gave testimony (Hayner, 2011:28). The accuracy of each testimony was corroborated by the Committee. The investigative role enabled the HRVC to establish comprehensive documentation of the past, through issuing subpoenas and recording the evidence using camera (Wilson, 2001a: 21).[45]

The HRVC conducted public awareness activities (TRC, 1998). Every day, the latest news stories about the Commission and hearings were published in newspapers and broadcasted on TV and the radio. A TV show entitled "Truth Commission Special Report" was broadcasted every Sunday evening (Hayner, 2011:28).

Although not many criticisms were encountered with respect to the hearings listed above, one of the most notable can be that a once-off testimony in the TRC had a limited capacity to recover victims with a personal and social history of human rights abuses. Revelation of truth, in some cases, reopened old wounds (Hamber, 2001; Hayner, 2011).

Similar to the TRC, public (victim) hearings, thematic hearings and institutional hearings can enable *discovering and clarifying* individual and broader social dimensions of the 12 September 1980 coup d'état *as well as formally acknowledging abuses related to it.* Adorno states that the "past will have been worked through only when the causes of what happened then have been eliminated" (2010: 227). Therefore, the first step should be revealing the reasons

[45] However, these powers, was rarely exercised in its fullest extent by the Commission, since reconciliation was the prioritized aim more than the disclosure of the truth (Hayner, 2011:28).

for the 12 September Coup D'état and large-scale abuses in order to eradicate the causes and guarantee their non-repetition.

Public hearings

Truth commissions [through *public hearings*] devote much of their time and attention to hear, respect and respond to the needs of victims and survivors (Hayner, 2011:22). Public hearings enable victims/survivors to tell their stories and reflect their traumatic experiences to a group who take their plights seriously in a public forum. They also provide a sort of justice, namely "justice as recognition or acknowledgement" (Norval, 1998; Allen, 1999; Du Toit, 2000; Haldemann, 2008) by publicly recognizing injustices through public testimonies and accepting victims/survivors as "legitimate sources of truth" (Du Toit, 2000). Many of the victims/survivors of the coup in Turkey were depicted as "terrorists". They were seen are less than human and deserving ill treatment and torture. The coup leader Evren asked in a speech in 1984: "Should we feed them in prison for years instead of hanging them?". In my view, public hearings in a future truth commission might serve as a justice measure for victims/survivors in Turkey by recognizing their accounts of violations resulted from the coup d'état publicly. They can reaffirm the equal moral standing of victims/survivors and thus potentially recover their dignity by treating them as legitimate sources of truth. However, in the absence other types of transitional justice measures such as prosecutions and reparations, victims might find this type of justice insufficient. Telling their stories might pose a risk of retraumatization; therefore rehabilitation measures should be taken to prevent this.[46]

In addition to it, victims'/survivors' accounts of the coup d'état through public hearings in Turkey can also offer an alternative to the "conservative-liberal (right-wing) interpretation of the history" in the indictment, as they enable writing of an adversarial history by giving voice to the people who were suppressed in the past (Maier, 2000:274).

Although the generals refused to accept charges of torture in the trial, public hearings can also end the possibility of continued denial (Hayner, 2011:21) about human rights violations and reduce the number of lies (Ignatieff, 1996:13) regarding the coup d'état in Turkey.

Institutional hearings

Institutional hearings can reveal the responsibility of institutions such as, the military, the police and the judicial system for the abuses. They can also publicly name and shame institutions (Wiebelhaus-Brahm, 2010:12-14). After

[46] In addition to these, as so much time has passed, some of the victims might not want to tell their stories.

the 1982 Constitution passed, the president of TISK (the Confederation of Employers' Union), said that: "Up until today it was the workers who rejoiced. Now it is our turn." (Savran, 2002:16). There are other business associations and professional groups who supported the coup by their discourses or contributed to it through their professional practices. Therefore, the role of the business, the legal system, the faith communities, the media, and the heath care sector, the role of armed forces, the prison system, the state security system and other related institutions can be revealed by conducting institutional hearings in Turkey.[47]

Thematic hearings

Thematic hearings can be used to analyse how the coup d'état influenced different social groups in society such women, children, Alawites (Alawis), Kurds and LGBTT individuals. The attorney of "Black Pink Triangle", a LGBTI association, states that their intervention in the case was denied on the grounds that they were not a legal association at the time. However, the attorney states that the LGBTI individuals were not allowed to use their freedom of association in that period, and therefore could not form a legal entity (K. Dikmen, 2014, Personal Communication). Limitations of the prosecution process similar to this can be removed by thematic hearings.

Lastly, the broadcasting of these hearings on T.V., as in the TRC, would be useful to reach the public. Despite the decline, according to a survey conducted by the Ministry of Family and Social Policy in 2012, TV viewing rate is quite high in Turkey (% 91.9).[48] Therefore, consistent release of news and airing of news programs on truth commissions might open up a public discussion on gross human rights violations and raise awareness of them.

The TRC Has Formulated Four Guiding Notions Of Truth

The National Unity and Reconciliation Act in the South Africa established the framework of truths to be produced. Each truth had to be (or about) a gross violation of human rights.

There was no single unified procedure for truth finding. Different units of the Commission created different definitions of truth depending on their diverse resources. Therefore, the TRC adopted four different guiding notions of truth (Wilson, 2001a:36).

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[47] Although truth commissions recommended detailed reforms for institutions responsible for abuses, such recommendations have not been seriously considered so far (Hayner, 2011:23). Therefore, a future truth commission in Turkey might consider possible monitoring mechanisms.

[48] http://www.milliyet.com.tr/turk-ailesi-tv-bagimlisi/gundem/gundemdetay/26.04.2012/1532758/default.htm%20(26)

The first one was *factual or forensic truth*. It was "[t]he familiar legal or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures" (TRC, 1998:111). The second one was *personal and narrative truth*. It was based on individual subjective experiences of victims and perpetrators and was produced through the oral tradition and storytelling. The third one was *social truth*. It was "established through interaction, discussion and debate" (TRC, 1998:113). Its objective was to affirm the dignity of individuals through participation. The last form of truth was *healing and restorative truth*. It aspired to situate facts within the context of human relationships and explained their meaning in that context, with a view to repair the damages done in the past and to prevent similar violations in the future. It was assumed that this truth would result in official acknowledgement and restore the dignity of victims/survivors (TRC, 1998:114).

There were some criticisms against the TRC's guiding notions of truth. Firstly, truths defined as gross violations of human rights excluded many everyday injustices resulted from bureaucratic enforcement of apartheid (Mamdani 1996; Wilson 2001a). This made the work of the TRC less representative of many South Africans' experiences (Hayner, 2011:76-77). Secondly, these conceptualizations were a "wobbly and poorly constructed conceptual grid" which was insufficient to cope with the complexity of the task that TRC had to fulfil (Posel, 2002: 55). Thirdly, only two paradigms of truth were dominant in the work of the commission: narrative truth was prioritized in the first year; legalistic forensic paradigm became hegemonic in the later years.[49] The knowledge about the past was created according to the forensic truth (Buur, 1999, Wilson, 2001a, Posel, 2002,).[50] Other types of truth were seen as means of ""emotional catharsis" and nation-building" (Wilson 2001a). "It lead to an incomplete report which lacked any overarching and unified historical narrative, only a moralizing narrative predicated upon a notion of 'evil'" (Wilson 2001a:34). Lastly, the Final Report did not explain the relationship between the four categories of truth (Wilson 2001a, p.37).

It should be noted that the pursuit of "truth" is political in nature (De Brito, 1997 cited in Norval, 1998:252). Truth commissions demonstrate a contextual and negotiated nature of the truth of the past (Norval, 1998:252). Therefore, what matters in the context of truth commissions is the political

[49] The adoption of Infocomm (information management system) changed the format that victims statements were taken and reduced people's stories to the passive data (quantifiable acts). Truths contained in complex narratives were lost. Public hearings were not included in the information flow created by this system (Wilson, 2001a).

[50] It was impossible to create an "objective or forensic truth" which was not affected by local influences and negotiations, namely power relations in the non-ideal environment of truth commissions (Buur, 2002:86).

decision about what type of social knowledge would be offered rather than whether objective knowledge about the past is attainable. One of the most important aspects of a truth commission in Turkey would be demonstrating that "social knowledge is a construct" (Dimitrijevic, 2006:376).[51] Many people in Turkey have been exposed to official truth about 12 September Coup D'état. Some groups gave consent to the actions of the government on the basis of these truths. Therefore, a future truth commission in Turkey should provide new truths condemning human rights violations and show that these violations have not been justified.

Four guiding notions of truth in the TRC were the products of internal dynamics of the TRC. Therefore, it can be said that different conceptions of truth to guide a future commission in Turkey would emerge from its practice. Nevertheless, they should allow people to reflect their subjectivities - and enable the re-presentations or re-interpretation of the facts, which were used to justify systemic use of violence (Dimitrijevic, 2006:376).

The mandate of a future truth commission in Turkey does not have to limit itself with producing a report limited to human rights violations. The TRC was unable to provide a plausible explanation for why the violations happened by failing to account for racism (Posel, 2002) and to regard apartheid as a system (Mamdani, 1996). A truth commission in Turkey should produce truths explaining why the coup d'état was happened in order to come to terms with the past in-depth and to prevent repetition of such atrocities in the future.

5. CONCLUSION

This research considered the question of whether the methods and principles of the South African Truth and Reconciliation Commission (the TRC) can be applied to Turkey in order to come to terms with the gross human rights violations resulting from the 12 September Coup d'état. It concludes that "truth commission" as a transitional justice measure can be adopted in Turkey and *complement* trials due to the limitations and deficiencies of the indictment and the prosecution. However, the methods used and justice principles adopted in the TRC cannot be implemented to Turkey as a whole, since these features of the TRC are historically and politically contingent.

Truth commissions can be regarded as one step in the long process of reconciliation (Minow, 2000) and as "the condition under which citizens can trust one another as citizens again (or anew)" (De Grieff, 2012:50). Therefore, granting individualized amnesty for crimes against humanity (trading truth with

[51] An example could be "identification of a victim's status as a civilian rather than as a combatant" (Teitel, 2000:223).

amnesty) should not be implemented in Turkey; it may not conform to international law and by contributing to on-going legacy of impunity; it might cause serious problems in terms of achieving reconciliation. However, public (victim), institutional and thematic hearings and new truths to guide the society *can be* adopted in Turkey, since they focus on victims' experiences, establish the role of institutions and other related actors in the commission of gross human rights violations, enable the re-presentations or re-interpretation of the facts - which were used to justify systemic use of violence- and serve as a measure of justice. Although, reconciliation, forgiveness, naming of the perpetrators and reparation procedures are important features of the TRC, their in-depth discussion is beyond the limits of this study. A future research should focus on the victims'/survivors' ideas and requests regarding transitional justice.

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