A POLITICAL APPROACH TO TRANSITIONAL JUSTICE: TRUTH-SEEKING MECHANISMS IN SOUTH AFRICA AND GUATEMALA

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

DAMLA KURU

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
THE DEPARTMENT OF POLITICAL SCIENCE AND PUBLIC ADMINISTRATION

MAY 2020

Approval of the Graduate School of Social Sciences

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ABSTRACT

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May 2020, 111 pages

Transitional justice aims to confront violent past, systematic and widespread human rights violations through its unique mechanisms. This thesis initially focuses on the literature developed on transitional justice practices and truth-seeking mechanisms with a specific look at two cases. The literature has been dominated by a legalist approach, and due to it overwhelm, the evaluation of transitional justice process as a political phenomenon is inadequate. Although the application of its unique legal mechanisms is critical to bring democracy and reconciliation and to avoid a falling back to the trap of revenge, the sole reliance on the legal measures neglects the political aspects of the problems at hand, is the major obstacle in reaching the desired objectives. Thus, transitional justice is in between the legal and the political; this paradoxical aspect of transitional leads problems in its implementation. The conflicting parties cannot have any possibility to constitute their politically active agencies, and they just can attend transitional justice process. To increase participation in transitional justice process could solve this fundamental paradox. This study analyses the establishment processes of truth-seeking mechanisms in South Africa and Guatemala around the participation problem. With references to Carl Schmitt's conceptualization of state of exception, this study tries to show the significance of

the establishment moments of the transitional justice. After an in-depth analysis of the existing literature on transitional justice and two case studies, this study tries to contribute to the literature to increase participation by applying Hannah Arendt's concepts of plurality and publicity.

Keywords: Transitional Justice, Participation, Politically Active Agency, Plurality, State of Exception.

ÖZ

GEÇİŞ DÖNEMİ ADALETİNE SİYASAL YAKLAŞIM: GÜNEY AFRİKA VE GUATEMALA'DA HAKİKAT ARAYIŞ MEKANİZMALARI

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Mayıs 2020, 111 sayfa

Bir uygulama olarak geçiş dönemi adaleti, 1990'lı yıllarda sistematik ve yaygın insan hakları ihlallerine cevap olarak ortaya çıkmıştır. Geçiş adaleti, hakikat komisyonları, cezai kovuşturmalar ve tazminatlar gibi kendine özgü mekanizmalarıyla geçmişle yüzleşmeyi amaçlamaktadır. Bu tez, başlangıçta geçiş dönemi adaleti uygulamaları üzerine geliştirilen literatüre ve ayrıca iki vakaya odaklanmaktadır. Bu çalışmanın bakış açısına göre, geçiş dönemi adaleti hakkındaki literatüre hukuki bir yaklaşım egemen olmuştur ve bu sebeple geçiş dönemi adaleti sürecinin siyasi bir olgu olarak değerlendirilmesi eksik veya en iyi ihtimalle yetersizdir. Bir yandan, geçiş dönemi adaletinin özgün yasal mekanizmalarının uygulanması, demokrasi ve uzlaşma amacında intikam tuzağına düşmekten kaçınmak için çok önemlidir. Öte yandan, eldeki sorunların politik yönünü ihmal eden hukuki yaklaşımın egemenliğinin bir sonucu olarak istenen hedeflere ulaşılmasındaki en büyük engeldir. Geçiş dönemi adaleti hukukilik ve siyasallık arasında bir çelişki içerisindedir. Bu tez geçiş dönemi adaletine içkin olan siyasal hukuki çelişkisinin katılım ile aşılabileceğini göstermeye çalışacaktır. Bu çalışma, Güney Afrika ve Guatemala'da hakikat arayışı mekanizmalarının kuruluş süreçlerini katılım sorunu etrafında incelemektedir. Bu tez Carl Schmitt'in olağanüstü hal kavramsallaştırmasına

referansla geçiş dönemi adaleti mekanizmalarının kuruluş aşamlarının önemini göstermeye çalışacaktır. Geçiş dönemi adaleti üzerine mevcut literatürün ve iki vaka çalışmasının derinlemesine incelenmesinden sonra, bu çalışma katılım kavramsallaştırılmasını Hannah Arendt'in kamusallık ve çoğulluk kavramlarına başvurularak literatüre katkıda bulunmaya çalışmaktadır.

Anahtar Kelimeler: Geçiş Dönemi Adaleti, Katılım, Politik Olarak Aktif Özne, Çoğulluk, Olağanüstü Hal.

ACKNOWLEDGMENTS

Even though most people claim that writing thesis is a lonely process, they are right and wrong at the same time. Honestly, I was alone most of the time, but I always felt the support and love of my family especially in hard times. That is why I would like to express my gratitude and love to my family, Nur, Fahri and İlyas Deniz Kuru. In this part, I would like to mention Osman Zeki Oral too, as he always belonged to our family in his unique way.

Although I know Işıl Demirakın and Süha Ünsal do not need any results because they were always with me including the times I failed, I would like to express my gratitude to them. Without their support, both intellectual and emotional, most probably I would feel lonelier and be more confused. I would like to thank them for their challenging questions, some of which I could not find any answer still.

I really do not know how to express my thanks to Ahmet Akkaya. He was always supporting me in every possible way. I might not be good at welcoming criticisms at all times, but he always had the courage to criticize my work without hesitation. However, without his criticism or his intellectual support, I could not develop my arguments as they are. He was always there to make my life easier during these hard times, and with his love I never felt lonely.

I always remember the first course of Cem Deveci, in those days it was hard for me to even ask questions due to my excitement and admiration for him. Finally, I defended my thesis in front of him. I would like to express my gratitude to Cem Deveci for everything he taught us. I would also like to express my deepest gratitude to my dear advisor Aslı Çırakman Deveci and to Aylin Özman for their guidance, support and criticisms.

I would like to thank Erdoğan Yıldırım, who was always there to help me and to answer my questions when I could find him in his office. Every time I asked him questions, he confused me even more with his additional and more challenging

questions. I felt his support every time and I am so happy to have him in his own unique way. I would like to express my gratitude to Stephane Voell, who introduced me the transitional justice topic, for his guidance and encouragement. I would like to thank Burcu Sümer for her enlightening comments. And I do not know how to thank Tolunay Turhan for her lovely attitude, she was always on the other side of the phone to solve our problems.

As I said before, although thesis writing was a lonely experience for me, thanks to my friends, Çağdaş, Christophe, Çiğdem Ayşenur, Ceylin, Dürdane, İrem, Murtaza, Sarper, Selen and Zümrüt, I did not despair. Likewise, I thank Raşit and Tankut, they supported me a lot. I am so thankful to have Fulden and Kübra, despite of our physical distances, they were always easy to reach, and they supported me every time I needed them.

Finally, I would like to express my gratitude to all my colleagues at Amnesty International Turkey individually for their friendly support and their thoughtfulness especially during hard times.

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LIST OF ABBREVIATIONS

ANC	The African National Congress
AZAPO	Azanian People's Organization
CEBs	Christian base Communities
CEH	Historical Clarification Commission of Guatemala
CGUP	The Guatemalan Committee of Patriotic Unity
CIA	Central Intelligence Agency
CODESA	Convention for a Democratic South Africa
COSATU	Congress of South African Trade Unions
EGP	The Guerrilla Army of the Poor
FAR	Revolutionary Armed Forces
FDCR	The Democratic Front Against Repression
FGEI	Edgar Ibarra Guerilla Front
FP-13	January 13th Popular Front
FUR	United Front of Revolution
GDP	Grand Domestic Product
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
MLN	National Liberation Movement
MR-13	13th November Revolutionary Movement
NGOs	Non-Governmental Organizations
NLA	National Liberation Army
ORPA	The Organization of the People in Arms
PAC	Pan Africanist Congress
PDGC	Christian Democratic Party
PGT	Guatemalan Labor Party
Poqo	The Military Wing of PAC

PSD	Democratic Socialist Party
REHMI	The Recovery of Historical Memory Project of the Catholic Church's Human Rights Office
SASO	South African Student Organization
TRC	South African Truth and Reconciliation Commission
UDF	United Democratic Front
UFCO	United Fruit Company
UK	United Kingdom
UN	United Nations
UNSC	United Nations Security Council
URNG	Guatemalan National Revolutionary Union
USA	United States of America

CHAPTER 1

INTRODUCTION

Transitional justice emerged in the 1990s as a response to systematic and widespread human rights violations such as civil wars, genocides, apartheid, etc. Transitional justice has been applied mostly in post-soviet and post-colonial societies after big human rights violations. Post-conflict societies in Latin America, Eastern Europe, and Africa in the 1990s claim that they are turning to democratic regimes, so they deal with their past crimes to start a new peaceful order and to bring reconciliation (Méndez, 2001, p.25).

Transitional justice aims to confront violent past through its mechanisms such as truth commissions, criminal prosecutions, reparations, etc. Paige Arthur claims that despite the existence of other concepts and debates on to deal with the past, starting from the 1990s, transitional justice has been presented in the Anglo-Saxon context as the only practice of confrontation with the past (Arthur, 2009, p.327-332). Thus, it is needed to state transitional justice's distinction as a concept. Transitional justice has distinguishing and unique features. First, one of the most distinguishing aspects of transitional justice approach is the "transition period" of these countries. It is claimed that they are in a "transition" period to a new regime, and this emphasis on transition is one of the most founding features of transitional justice. Second, it has stress on "transition to democracy." In transitional justice, recognition of victims, enabling possibilities for peace, reconciliation, and peaceful coexistence of survivors and oppressors are presented as the bases of democracy. What transitional justice tries to achieve is crucial for human dignity and protection of human rights. Third, in the transitional justice framework, governments adopted several unique and concrete legal mechanisms. These legal mechanisms are unique: Contrary to legal proceduralism in

democratic regimes, transitional regimes need to confront with "past" human right violations; however, this kind of retrospective application of legal ways is contrary to legal proceduralism. Thus, transitional justice has developed its own mechanisms that should be necessarily temporary (Teitel, 2003, p.76). These mechanisms include criminal prosecutions, truth commissions, reparations program, gender justice, security system reforms (or other kinds of institutional reforms), memorialization efforts (symbolic reparations) (International Center for Transitional Justice [ICTJ], 2009). Considering three aspects of transitional justice, it is possible to say that transitional justice is a proper case to study the tension between the legal and the political.

The development of transitional justice as a concept in the literature cannot be thought separate from the implementation of it in post-conflict settings. The transitional justice literature is composed of reflections of scholars upon transitional justice policies. A considerable amount of these scholars has also involved in the implementation of transitional justice policies. In almost every part of the world from Africa to Asia, from Europe to America, nearly the same mechanisms have been applied, and also almost the same political objectives have been aimed.

The context in which transitional justice emerged has a crucial effect on the development of the field. Related with the post-Cold War context that is marked with the fall of radical Left, decrease of the importance of socio-economical relationships for achieving democracy, and increase of hegemony of liberal institutionalist conceptualization of democracy all over the world, the legalist approach has gained valuable space in the transitional justice literature and its implementation. In addition to transitional justice's common and central legal mechanisms, the idea that institutional reformations finally bring democracy and peaceful coexistence in post-conflict states has become dominant. Democracy and peaceful coexistence of people are subject of political; however, in the literature, the political feature of confronting with past has started to lose its

importance due to the rise of transitional justice and its dominant legal institutionalist approach.

Non-recurrence of past human rights violations, reconciliation, not mere ceasefire but rather peace, and peaceful coexisting between past enemies are political objectives of transitional justice. In societies that decide to make peace and change regime to democracy, former enemies need to recognize each other as political agents of the new regime. They are trying to construct new public space together where they make peace. The traumatic past undoubtedly has an impact on this new identity construction. Thus, they need to find out what happened in the past in order to recognize each other. Accordingly, the truth-seeking mechanism is the fundamental mechanism for a political approach to transitional justice. Mechanisms of transitional justice, such as truth commissions and criminal courts, are legal mechanisms in their nature. The aims of transitional justice could not be grasped just through legal ways because these aims do not belong to legal concepts; they are political concepts. On the one hand, to confront big human rights violations like genocide, civil wars, etc. requires legal formality to overcome revenge. Moreover, legal formalism is consistent with the aims of transitional justice because the rule of law differentiates democracy from authoritarian regimes. On the other hand, to construct a new regime or new political space is as necessary as the confrontation with the past. Being capable of deciding within the process and capable of having an impact in political space are some of the crucial aspects to be a politically active agent. Achieving peace, reconciliation, and democracy needs political space to decide the conditions of them. Nevertheless, at the same time, as mentioned above, the parties need the formality of legalism for not to fall back in the trap of revenge. The question is, how do parties construct and recognize their politically active agent positions within these dominantly legalist transitional justice processes? What kind of shortcomings does the legalist approach towards transitional justice bring about? How is it tried to be solved in the framework of transitional justice? Critical approaches towards the legalist domination in transitional justice approach could

not solve the shortcomings of transitional justice's legal approach because, in the implementation, there is no big difference between the legalist approach and the critical approach. Thus, a political approach, which would increase the participation of parties without harming legal proceduralism, is needed.

Application of transitional justice's necessarily legal approach to reach its political aims produces a dilemma, which is a reflection of the tension between the legal and the political. Scholars within transitional justice, who are mostly in social science disciplines, are sensing this dilemma somehow and starting to criticize transitional justice due to its excessive legalist approach or from above approach. To increase participation or to overcome the dilemma of transitional justice, scholars are turning to a more critical position towards the from above approach of transitional justice and trying to revise it through developing participatory approach — but becoming politically active agent necessitates going far beyond attending; it necessitates effective participation. Attending is not the same as participation. Participation is central to be a politically active agent for the position of this study in the literature.

The necessity to keep politically active agents within the legal framework of transitional justice is underestimated in the literature. That is why I want to discuss the possibility of both former victims and oppressors' politically active agent status in transitional justice process or the possibility of approaching transitional justice politically through looking at the establishment of truth-seeking mechanisms of South African and Guatemala. Whether the former victims and oppressors are able to impact the frameworks of the transitional justice process or not. If they had this politically active agent status, how come they achieved, and in other cases, they failed. If they fail, what aspect of transitional justice leads to losing their politically active agent positions? Whether they are able to take positions within the legal institutions of transitional justice like the truth and reconciliation commission or not. If they have seats in the truth commission, can they affect the working principles of the commissions? If they have an effective position in the working principles of transitional justice

mechanisms, they can protect their politically active agent position within the legal framework of transitional justice. Through looking at the empirical data in the field, my question would be "how does transitional justice solve or fail its legal- political dilemma?"

1.1. Overview of the Literature about Transitional Justice

Two categories are developed in this study to analyze the transitional justice literature. These categories are named as the legalist and the critical approaches. The legalist approach is composed of scholars who do not find legal domination as problematic. The critical approach is composed of scholars who problematize the distance of people in transitional justice's implementation. In this part, firstly the legalist approach is summarized, and then the critical is presented.

According to Ruti Teitel, transitional justice is defined as the conception of justice within political changes, characterized by legal responses to confront with previous regimes (Teitel, 2003, p.69). As the common legal mechanism of transitional justice also shows, the transitional justice literature is dominated by legalism. Some scholars in the literature do not approach critically towards this dominant legalism in transitional justice. Within the dominant legalist approach in transitional justice, there are two dominant tendencies. On the one hand, scholars like Eric Posner and Adrian Vermeule debate that transitional justice does not have that much big difference from crises of law in the consolidated democracies (Posner & Vermeule, 2004, p.764). On the other hand, scholars like Teitel approach transitional justice as an exceptional form of justice. For Teitel, legal responses of transitional justice play an extraordinary constituting role in such transition periods (Teitel, 1997, p.2011). The common point of these two approaches is that neither Posner and Vermeule nor Teitel posits themselves critically toward the legal domination in transitional justice. They have opposite positions within this legalist approach. The shortcoming of legalist approach has found out by other scholars as non-involvement of victims in a transition period, absence of politically active agencies of both former oppressor and victims in the new transitional regime, and in a kind of different way they point out legitimacy

problem of the transition period due to lack of involvement of parties. The critical scholars claim that the international community's impact on the transition period could cause a disconnection between locals and transition periods, and finally, that could give rise a legitimacy problem.

In the literature, some other scholars analyze the legalism of transitional justice in contextual bases. Different from contextual studies on the emergence of transitional justice as a concept, their contextual analyses are related to the implementation of transitional justice. These scholars, who criticize legalism through contextual analysis, claim that transitional justice's legalism fails to comprehend the uniqueness of locals, and it could lead to other problems within transitional justice policies. Laurel M. Fletcher, Harvey M. Weinstein, and Jamie Rowen analyze seven cases to evaluate the standardized tool kit application of transitional justice. This standardized tool kit means the application of legal mechanisms of transitional justice such as criminal courts, truth commissions, etc., in almost every case in the same manner. Based on the conclusion of their case studies, they claim that one critique could be developed to transitional justice policy and its implementation. This criticism is transitional justice's ahistorical and decontextualized feature (Fletcher, Weinstein, & Rowen, 2009, p.208). Related with the narrow legalistic lens of transitional justice, scholars like Kieran McEvoy argues for the dominance of legalism in transitional justice which produces from above process that causes inadequate truth recovery process and deficient acknowledgement of violence (McEvoy, 2007, p.413). Rosemary Nagy is one of the critical scholars who can be grouped under this approach. According to Nagy, a technocratic focus on the law abstracts from lived realities (Nagy, 2008, p.279). Although these kinds of analyses are promising for the recognition of the uniqueness of cases, its inhabitants, and recovering the truth about human rights violations, they still do not address the political agency problem of transitional justice, and they could not increase participation, or in broader terms, they still miss the political approach to transitional justice.

In line with rising criticism towards the from above approach of transitional justice summarized above, in the literature, more critical reflections on transitional justice have taken place too. Within these critical approaches, scholars are trying to find ways to increase the participation of parties in the conceptualization and mostly in the implementation of transitional justice processes. Kieran McEvoy and Lorna McGregor are the scholars who suggest transitional justice should be rethought following the from below perspective. Transitional justice's legalism is related to the idea that elite-driven or institutional change is enough for social change; however, McEvoy and McGregor suggest that the praxis of grassroots actors, who take transitional responsibilities themselves, could propose an alternative (McEvoy & McGregor, 2008, p.5). In addition to them, Patricia Lundy and Mark McGovern also propose transitional justice from below approaches too. According to Lundy and McGovern grassroots approach to transitional justice should be regarded as an intrinsic part of its agenda and implementation (Lundy & McGovern, 2008, p.266).

The scholars who could be grouped within this critical framework are skeptical towards legalism and its relationship with the mediation of third parties in the post-conflict settings. For example, Lundy and McGovern point out the UN's direct involvement or UN's expert's key positions within transitional justice's legal mechanisms in transitional justice process (Lundy & McGovern, 2008, p.269). The third party's involvement could be debated in different disciplines like international relations to reveal the power relations that it poses; however, such an examination is not a direct concern for the problem presented in the thesis. Nevertheless, within the framework of the thesis, it could be said that the third party's involvement could put distance between local communities and the transitional justice process. Some scholars debate participation problems in line with the legitimacy problem of transitional justice mechanisms. For example, Ellen Emilie Stensurd argues that mixed courts can provide crucial bases for the conditions for legitimacy for justice mechanisms (Stensrud, 2009, p.9). For

instance, Ismael Muvingi claims that transitional justice's requirement of human, financial, and technical resources makes it predominantly donor-driven (Muvingi, 2016, p.14). Related with this influence of third parties, the exclusion of locals from the process leads to the legal system's failure to meet expectations of locals, so transitional justice needs to extend its conception of justice to increase the inclusion of locals. (Nickson & Braithwaite, 2014, p.445). Scholars like Sanne Weber (2018) and Rebekka Friedman (2018) also contribute to transitional justice by developing the concept of transformative justice. According to Friedman, the difference of transformative justice from transitional justice is related to its aims of long-term fundamental changes in society, particularly in the economic realm (Friedman, 2018, p.703). The scholars who develop transformative justice are more critical towards the hegemony of legalism in transitional justice. Furthermore, transformative justice examines the concept of transitional justice through the inclusion of locals with empowering them in a socio-economic sense. Although this kind of empowerment and their serious criticism towards from above approach to transitional justice is valuable, their theory is silent still for the problem of the political agency within transitional justice.

These studies realize the exclusion problem of local communities from transitional justice. What they suggest is not going beyond attendance. Attendance is not enough for effecting the process. Attending cannot enable agents to have an impact on the conduct of the transitional justice process. The participants cannot be in an effective position by merely attending the process. This problem is treated by some scholars within the transitional justice literature. Scholars like Roland Kostic debate the non-involvement problem of locals in transitional justice policies. According to Kostic, since the end of the cold war, powerful third-party interventions and hegemonic position of liberal peacebuilding formula based on institution building have been increased. Parties to the conflict are usually included as a participant, but often they have little influence over the content and outcome (Kostić, 2012, p.652). Even though Kostic has somehow agency problems in his analysis, Kostic stresses on the

reception of reconciliation, the problem of mutually accepted collective narratives, and truth recovery process. According to Kostic, local constituencies were excluded from meaningful influence over politics, and as a result, transitional justice resulted in a policy of policing the past (Kostić, 2012, p.652). I partially agree with Roland Kostic because his study is focused on the reception of the truth recovery process and reception of the reconciliation of locals. Although analysis of Kostic gets closer to the problem of the political agency problems in the transitional justice process, Kostic still measures the reception of transitional justice, which has already been done. According to this thesis, that kind of approach still fails to comprehend the political agency construction because the reception of the already finished process cannot make locals politically active agents in which local communities can impact the process. In Kostic's analysis, even though Kostic realizes that effective participation is far beyond attending, Kostic still focuses on reception. However, the establishment phase of transitional justice mechanisms could be more important than reception. So, the question about the construction of the political agency within the necessary legal process in transitional justice is still unanswered in the transitional justice literature. The field should be legal because of preventing falling back in the revenge trap. Nevertheless, at the same time, the politically active agency is necessary to go beyond just ceasefire and make peace to democracy and peaceful coexistence of former enemies.

1.2. Political Approach to Transitional Justice?

Due to the natural dilemma of transitional justice, politically active agency problem cannot go beyond attending. Thus, politically active agency problem remains somehow untouched in the literature. Enabling co-existence between former enemies and establishing democracy necessitates more effective participation; mere legal and institutional revisions could not bring these naturally. That is why the transitional justice literature require political approach in that communities can participate deeply, and the political agency problem could be debated.

The study is trying to examine the participation of conflicting parties in transitional justice mechanisms and their impact on the methodology and working principles of truth-seeking mechanisms in South Africa and Guatemala. To engage the claim of the necessity of political approach in transitional justice and to present the problem of politically active agency, the study is examining the establishment of truth-seeking mechanisms in South Africa and Guatemala. The establishment phase is critical because it is the breaking point between old regimes and new regimes. If communities participated actively in transitional justice, how did they achieve? If they failed, what aspects of transitional justice led exclusions of communities from the transitional process?

The study focuses on truth-seeking mechanisms because, in the truth recovery process, the political agency problem could be more relevant compared to the other mechanisms like criminal courts, etc. Criminal prosecutions are legal in nature. Study of truth-seeking mechanisms in South Africa and Guatemala cases has some criteria. These criteria shape around whether commission members are from international members or nationals (domestic, international or hybrid), whether all parties of conflict have representation or only recognized parties by the government included, whether these parties have an impact on the decision of working principles and methodology of truth-seeking mechanisms or not, whether truth-seeking mechanisms have access to all kinds of resources or not, whether the victims attended these mechanisms only as witnesses or do they have an impact on its methods, working principles, etc.

To examine these questions, this study examines the establishment process of truth-seeking mechanisms of two prominent and crucial cases: The South African Truth and Reconciliation Commission (TRC) and the Historical Clarification Commission of Guatemala (CEH). These cases are selected because they provide concrete bases for study. TRC was domestic commission in that its 17 commissioners were selected from nationals. Furthermore, the CEH was a hybrid commission in that the UN General Secretary appointed its chair commissioner, and its other two commissioners were from nationals. On this base, the study

could question the commissioner's impact on methodology and the working principles of commissions. Furthermore, in the TRC, half of all violations were reported by witnesses, such as relatives, friends, families, etc., rather than victims. Nevertheless, direct victim participation as a witness was seen in the CEH. Moreover, in the TRC, public testimonies were seen, but this was not a case for the CEH. Through these points, the study is going to debate distinctions between attendance, participation, decision-maker position, and active political agent status in transitional justice. To sum up, these two prominent cases could be promising for the study of the problem posed in this thesis – political agent dilemma in the legal framework of transitional justice.

In the following chapter, the transitional justice literature is debated in depth. As it was mentioned above, the two categories were invented for this study to analyze and to group the scholars in the literature: the legalist approach and the critical approach. Critical ones detect the shortcomings of the legalist approach in the literature, which are going to be elaborated in detail. And the critical approach is going to be presented. At the end of this chapter, the questions are asked towards the critical approach to test whether what they propose is able to overcome these shortcomings or not.

In the next chapter, South African and Guatemalan cases are debated through their conflicts and the establishment process of truth-seeking mechanisms. The questions asked in this chapter is trying to be answered through looking at the establishment of truth commissions in South Africa and Guatemala cases, which are covered in the third chapter.

In the concluding chapter, first, the state of exception concept of the Schmitt will be expressed to clarify the importance of the establishment of the transitional justice mechanisms as an extraordinary moment. Then, plurality and publicity concepts of Hannah Arendt will be presented as a solution to further attending towards participation. The action and speech from Hannah Arendt will be summarized to contribute the transitional justice literature through developing the possibility of a political approach to transitional justice.

CHAPTER 2

EXAMINATION OF THE TRANSITIONAL JUSTICE LITERATURE

2.1. What is Transitional Justice?

In this chapter, the concept of transitional justice and the literature about it will be clarified. As it is mentioned already briefly, scholars approach transitional justice from various standpoints. Despite differing approaches, scholars agree with the notion that the conceptualization of transitional justice has emerged in the 1990s. According to Mouralis, another common point of scholars is that they work on transitional justice regardless of its historical, geographical, or social context (Mouralis, 2014, p.84).

On the contrary, scholars like Paige Arthur and Guillaume Mouralis are interested in the conceptual analysis of transitional justice. In other words, Paige Arthur and Guillaume Mouralis study the emergence and evolution of the concept. That kind of historicism or conceptual analysis could be crucial in social sciences because the evolution of concepts is mostly depended on context, and contexts present social scientists a framework for analysis. According to Mouralis, the need for a new term often can indicate the displacement of the positions occupied by agents in the social space, and it can also mean a change in articulation of the experiences (Mouralis, 2014, p.86). Thus, to start with a conceptual analysis of transitional justice could be fruitful to analyze approaches in the literature.

"Dealing with Wars and Dictatorships: Legal Concepts and Categories in Action," edited by Liora Israel and Guillaume Mouralis, is one of the canonical books about transitional justice. Guillaume Mouralis's chapter aims to historicize phases of transitional justice. According to Mouralis's research, before 1992, transitional justice was used a few times in its current sense. Transitional justice

has been seen after World War II infrequently for the discussions on the temporary judicial offices or temporary legislations implemented during regime changes (Mouralis, 2014, p.86). This usage of transitional justice partly seems similar to the current use of the term due to the legal sense of the current usage and also temporality of offices and legislations. Nonetheless, in that usage the democracy stress as a final aim and transitional justice as a holistic process did not exist, unlike the current usage of the term. Furthermore, the most apparent difference of current usage is its hegemonic position and the frequent application in the regime changes since the 1990s. Depended on Mouralis' study, transitional justice was also seen sporadically in the Marxist debates too. In the Marxist debates, transitional justice was used in argumentation about the transition from capitalism to socialism., The conceptualization of justice of "transitional justice" within these Marxist debates included more redistributive meanings (Mouralis, 2014, p.86). Unsurprisingly, this meaning of the concept has been vanished or changed in the opposite way in the post-Cold War period.

2.2. The Emergence of Transitional Justice: The Practice and the Literature

As mentioned above, Paige Arthur and Guillaume Mouralis focus on the historicity or conceptual analysis of transitional justice. Both of them point two critical historical moments for the evolution of the transitional justice concept to its current usage.

Paige Arthur starts her article by an examination of the first critical moment: The Aspen Institute Conference in November 1988, which was funded by Ford Foundation. The conference, which was named "State Crimes: Punishment or Pardon," aimed to discuss how successor governments should deal with human rights violations of former regimes (Arthur, 2009, p.322-325). Arthur claims that together with this historical conference, two other conferences, which are "Justice in Times of Transition" Conference in 1992 and "Dealing with Past" Conference in 1994 by the Institute of Democracy in South Africa, are critical in the emergence of transitional justice literature in the current sense.

According to Guillaume Mouralis, the second critical moment in the emergence of transitional justice as a dominant concept for confronting with past was the "Justice in Times of Transition" conference held in 1992. The conference was held in Salzburg by the Charter 77 Foundation. Mouralis states that the participants of Conference were the scholars who we are familiar with them in transitional justice literature such as Neil Kritz, Ruti Teitel, etc., and the report of the Conference showed that the roots of the ingredients of "transitional justice" as it exists today could be found in the Conference (Mouralis, 2014, p.87).

2.2.1. Transitional Justice as a Rupture

Since Aspen Institute's conference in November 1988 and the "Justice in Times of Transition" conference in 1992, transitional justice has meant "legal responses to confront with past regimes" (Teitel, 2003, p.69). Although Teitel's definition of transitional justice has gained recognition in the literature, according to Paige Arthur's contextual analysis, transitional justice emerged as a rupture within the other concepts about how to confront with past (Arthur, 2009, p.327-334).

Neil Kritz's four-volume compendium, "Transitional Justice: How Emerging Democracies Reckon with Former Regimes" (1995), has been accepted as one of the constitutive books of the literature. As Paige Arthur claims, Kritz's volumes were reviewed by lots of scholars who have a range of institutional affiliations. Except for Timothy Garten Ash, all reviewers uncritically accepted Kritz's volumes' definition of transitional justice, that is how emerging democracies reckon with former regimes (Arthur, 2009, p.330-331). In the following parts of the article (Arthur, 2009, p.331-333), Paige Arthur explains Ash's review of Kritz's canonical book in detail to show how the concept of transitional justice could be seen as a rupture from the other concepts of "dealing with past." Timothy Garten Ash proposes two German words as alternatives to transitional justice. As a reason for suggestion from the German language, Ash finds "transitional justice" too narrowly titled that fails to cover the full range of its attending process (Arthur, 2009, p.331-332). Second contribution of Timothy Garthen Ash in the literature is about the necessity of historians' involvement in

the establishment process of transitional justice literature (Arthur, 2009, p.331-333). According to Ash history as a discipline should have been included to the development of the field because there was already a debate engaged by historians in the 1980s about how to deal with the past after experiencing the Nazi Regime and its crimes. According to Arthur, even though the historian's debate takes place forty years after prosecutions and reparation programs, the historians still disagree about several points, which makes these debates more sophisticated and highly public (Arthur, 2009, p.332-333). Although these debates about how to deal with past crimes especially after crimes of Nazi Regime existed in the literature, transitional justice literature does not give any references to these debates. Thus, the emergence of the transitional justice literature is seen as a rupture or discontinuity in literature on the "confronting with past". That kind of discontinuity also supports Guillaume Mouralis' argument about the emergence of new terms in the literature that could be related to the displacement of agents, experiences, and positions in social space (Mouralis, 2014, p.86). Taking into the consideration the context that transitional justice emerged, that was the post-Cold War Era, transitional justice's rupture from other confrontation with past concepts made sense. In this regard, transitional justice has some common points with the conceptualization of democracy after the Cold War Era. For instance, both transitional justice and democracy conceptualization in the post-cold war era has liberal-institutionalist perspectives.

The other fact about transitional justice literature, which could not escape from notice, is the overlapping scholars who took seats in the implementation of transitional justice and architects of transitional justice as a concept. For example, Pablo De Grieff has contributed to academical literature in transitional justice, especially with his approach to the debate on transitional justice as an ordinary justice or an exceptional form of justice. At the same time, Pablo De Grieff has been currently serving as the United Nations Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence. This is

not a special case for Pablo De Grieff because these overlapping positions are widespread in the transitional justice literature. As Paige Arthur also stresses, the scholars who constituted the literature as an academic are playing significant roles in the implementation of it. According to Paige Arthur, constitutive conferences like "State Crimes: Punishment or Pardon," "Justice in Times of Transition," and "Dealing with Past" had many overlapping participants too. The other notable overlapping participants were Jose Zalaquett, Jaime Malamud-Goti, Aryeh Neier, Juan E. Mendez, Alice Henkin, etc. (Arthur, 2009, p.325). According to Paige Arthur, the similar arguments within these conferences could be an outcome of the participation of same people. According to Arthur, practical problems were understood in similar way and this resulted in similarity of discussions (Arthur, 2009, p.355). Overlapping names between literature and implementation should not be ignored, because in a similar vein with Paige Arthur's criticism, these similar names in literature and implementation could have potential to prevent development of critical point of view in the transitional justice literature.

2.3. General Framework of Transitional Justice and Its Central Mechanisms

Richard Lewis Siegel contributed to the transitional justice literature with his book review, which covered seven important books of the transitional justice literature, including books of Timothy Garten Ash, Neil J. Kritz, Jaime Malamud-Goti, Lawrence Wsechler, Alison Brysk, Tina Rosenberg and Irwin P. Stotzky. Siegel starts with analysis of transitional justice examples from South Africa to Cambodia. According to Siegel, most of the countries of the late-twentieth century that have an authoritarian legacy were not willing to use their own criminal justice system. Transitional justice enabled them to confront their violent past through alternative legal ways instead of their own criminal justice system. And also, according to Siegel, new leaders chose transitional justice in the wake of "the third wave of democratization" (Siegel, 1998, p.432-433). Samuel Huntington, with his "the third wave of democratization" argument, has a crucial

impact on the transitional justice's literature and implementation. Not only because Huntington was a participant of the "Justice in Times of Transition" conference, but as Siegel also claims, the third wave democratization conceptualization is compatible with the transitional justice framework.

In "Democracy's Third Way," Samuel Huntington starts with the historicity of democracies in the world, and for Huntington, there have been three waves in the spread of democratic regimes. According to Huntington, the first wave of democratization began in the 1820s; the triumph of the Allies in Second World War led the second wave of democratization; between 1974 and 1990 at least 30 countries made transitions to democracy that tendency constituted the third wave of democratization (Huntington, 1991, p.12). The compatibility of Huntington's third wave of democratization and transitional justice is not depended only on overlapping time periods of them. The conceptualization of third wave democracy by Huntington and transitional justice also correspond with each other in theoretical sense too.

Huntington's democracy conceptualization is compatible with liberal-institutionalist democracy conceptualization and thus transitional justice as well. Huntington's democracy conceptualization is institution-based, realized by political leadership and sometimes depended on foreign actors and democratic culture. Even though Huntington mentions the importance of economics at several points for explaining the democratic waves and reverse waves, Huntington mostly focuses on geographical, cultural, religious differences for analyzing democracies (Huntington, 1991, p.20-23). According to Huntington, obstacles to economic development are obstacles to democracy too (Huntington, 1991, p.31). But Huntington's stress on the economy in the development of democracy is not related to the socio-economic well-being of people or to the redistribution of wealth, so his democracy conceptualization is still compatible with liberal-institutionalist democracy, which is the final aim of the transitional justice policies. And in the last instance, political leaders are more influential than

economic development to reach democracy in his analysis. Huntington claims that

> [e]conomic development makes democracy possible, political leadership makes it real. For democracies to come into being, future political elites will have to believe, at a minimum, that democracy is the least bad form of government for their societies and for themselves (Huntington, 1991, p.33).

Thus, transitional justice and it's from above approach to bring democracy could be influenced by Huntington's conceptualization. In transitional justice policy, this political leadership stress is not seen as much as Huntington's third wave democratization, but still, in transitional justice, someone needs to decide to implement transitional justice policy or leads to start transitional justice process. At least the central mechanism of transitional justice needs to be established by the initiative of some groups, some leaders, third parties, or the UN. Furthermore, like the political leadership emphasis of Huntington's theory, transitional justice policies have this from above approach too. For example, from truth commissions to reparations programs, the victims of former regimes could not take decision-maker positions in transitional justice. Instead of victims themselves or representative groups of victims, specialized professionals like UN experts decide for the best interest of victims. Even though it is not the same with Huntington's democracy conceptualization under the political leadership, it shares lots of similar characteristics with Huntington's hierarchical approach. And democracy is the final aim for both the countries that can be grouped as "third wave democracies" in Huntington's analysis and the countries in which transitional justice has implemented.

2.3.1. Central Mechanisms of Transitional Justice

In "Theorizing Transitional Justice," Pablo De Greiff presents two mediate and two final goals of transitional justice: The recognition of victims and the establishment of civic trust are two mediate goals of transitional justice; the final goals of transitional justice are reconciliation and democracy (De Greiff, 2012, p.34). It could be hard to deny these four goals because the aims of the central

mechanisms of transitional justice themselves are compatible with these both mediate and final goals. Truth-seeking mechanisms, criminal prosecutions, reparations, and institutional developments are the central mechanisms of transitional justice. In the following part, these are going to be explained briefly.

2.3.1.1. Truth-Seeking Mechanisms

The first step for the recognition of victims lies in the truth-seeking mechanisms. In order to recognize victimized status of people, knowledge about what they experienced in the past is a necessity. Truth commissions provide the formal acknowledgement and documentation of the past human rights abuses (Zupan & Servaes, 2007, p.4). However, truth commissions are unique mechanisms and their uniqueness produces confusion sometimes. For example, the relationship between criminal courts and truth commissions are sometimes confusing. The South African Truth and Reconciliation Commission had amnesty power, which normally belongs to the criminal law, but the mandate of The South African Truth and Reconciliation Commission gave this authority to the Commission. Thus, the mandates of the commissions are critical in that sense and the scope of the mandates varies depending on the uniqueness of the country. Previously, especially in the Latin American cases truth commissions were set up as an alternative to the criminal courts (Zupan & Servaes, 2007, p.4). However, the report of United Nations Security Council in 2004 could be sign that this understanding changed. According to important report of United Nations Security Council (Hereafter UNSC) (S/2004/616), a more holistic approach to transitional justice has started to gain prominence, and this is why the idea that truth commissions can positively complement criminal tribunals, as the examples of Argentina, Peru, Timor-Leste and Sierra Leone has started to be settled (UNSC, 2004, p.9).

2.3.1.2. Criminal Prosecutions

Local criminal courts and the International Criminal Court (hereafter ICC) are one of the central mechanisms of transitional justice. International law obliges

states to prosecute war crimes, crimes against humanity, and human rights violations. And these prosecutions can take place either at the national or international level. After conflict settings, national criminal courts are mostly not capable of these prosecutions. The ICC was established in 2002 to overcome this problem (Zupan & Servaes, 2007, p.4). But in principle the domestic judiciary is preferred rather than ICC. Only if domestic authorities are unwilling or unable to prosecute, then ICC's involvement becomes a necessity (Hayner, 2011, p.113). As Pablo De Greiff claims, the prosecutions are important to promote civic trust through increasing trust in institutions (De Greiff, 2012, p.46). Criminal prosecutions are important to prevent impunity, to bring to justice, to diminish the revenge, and also to promise non-recurrence in the future as well. Nonetheless, as Pablo De Greiff claims that in order to obtain better results for transitional justice measures, the need for a more holistic conceptualization and implementation of transitional justice is undeniable (De Greiff, 2012, p.38).

2.3.1.3. Reparations

Reparations could be one of the most complicated mechanisms of transitional justice because it is different from reparations provided by the positive law. Developing reparations to crimes against humanity is complex in nature because reparations in that context are mostly not capable of bringing back to pre-conflict conditions and even if they are capable of it since the pre-conflict conditions could lead to conflict again, turning back could not be something preferred. Reparations within the transitional justice framework include material reparations, provision of services, symbolic acts such as apologies, memorial sites, and remembrance days (Zupan & Servaes, 2007, p.4-5). Reparations within transitional justice is a big debate in itself, but within the scope of this thesis, it is not included in detail. Reparations obviously promote democracy that includes both recognition of victims and empowering the victims to attend democratic processes more equally in a material and symbolic sense.

2.3.1.4. Institutional Developments

Institutional developments include a new constitution, a new power-sharing mechanism, promotion of the rule of law, reformation or establishment of a new judicial system, and security forces (Zupan & Servaes, 2007, p.5). This kind of focus on institutions is expected in transitional justice's liberal institutionalist democracy conceptualization. As one can see in the whole transitional justice process, almost every mechanism in transitional justice aims to strengthen the rule of law and the reformation of institutions to establish democratic order as a final goal.

2.4. Approaches to Transitional Justice: The Legalist Approach and The Critical Approach

In this part of the chapter the approaches toward transitional justice will be clarified. Even though such naming does not exist in the literature, this thesis divides the literature into two: the legalist approach and the critical approach. The reason behind this division is to show existing literature about transitional justice in a more organized way to prove that the literature needs an extension of the critical approach in a more political way or a political approach. The criteria to that division are shaped around the participation problem to the transitional justice process. The critical ones are in the same group because they take victim participation to transitional justice as a research interest in various points. On the contrary, the legalist approach does not have any interest in participation problem.

2.4.1. The Legalist Approach

As stated above, the context in which term has developed has an impact on transitional justice. It emerged in the post-Cold War Era; In these times, liberal institutionalist democratic theory and focus on the rule of law has gained dominant position vis-a-vis the alternative democracy theories such as the ones in which social-economic relationships are as important as institutions. Hence, liberal democracy has become final goal of the transitional justice process.

Relatedly, legalism has gained a hegemonic position in the literature. Applying legal ways to confront human rights violations should be affirmed because legal formalism is necessary for several aspects in transitional justice. For example, it could provide a peaceful ground for reconciliation, truth recovery, avoidance of impunity, democracy, and, most importantly, stopping the conflict. Although legalism provides a formal ground for transitional justice, it could lead a one-fits-all path, or in other words, from above approach. This from above approach includes shortcomings about the participation of victimized parties to the process. The scholars analyzed under the "the legalist approach" group do not see this as a shortcoming of transitional justice. In order to comprehend the shortcoming about the participation, it is important to grasp how the scholars adopted the legalist approach in transitional justice. It is also important to understand their legalist position in the literature to understand why other scholars are called critical within the scope of this thesis.

There exist two opposite poles within the legalist approach. The first group of scholars describes transitional justice as an exceptional form of justice. The second group of scholars claims that transitional justice is not exceptional since the consolidated democracies also have paradoxes of transitional justice. For example, consolidated democracies have both forward-looking and backward-looking perspectives. In addition to these two dominant poles, some scholars like Pablo De Grieff tries to develop a middle way. Thus, Pablo De Grieff's third way is going to be explained at the end of this part of the chapter.

Ruti Teitel is one of the representative names who claim that transitional justice is an exceptional form of justice in nature. Ruti Teitel explained her analysis of transitional justice as a transitional jurisprudence. Teitel's analysis reflects the law's transformative potential through three areas of transitional justice: The rule of law, criminal justice, and constitutional justice (Teitel, 1997, p.2014). Teitel's study on transitional jurisprudence underlies the transition period, the period between past and future, between retrospective and prospective. Teitel finds the

conception of law in transitional justice inherently paradoxical due to its transitional aspect (Teitel, 1997, p.2014).

Teitel's article, in general, makes divisions between laws in consolidated democracies and transitional justice in order to show the exceptional nature of transitional justice. And Ruti Teitel analyses three areas of law that were mentioned above. Teitel compares the consolidated democracies' rule of law, criminal justice system, and constitutions with transitional regimes' mechanisms for each area of law. According to Teitel's study, first, in established democracies, the rule of law means principles that constrain the purposes and application of the law. But in transitional justice, the law is unsettled, and the rule of law implies as a normative value scheme developed reactional to the former legal system (Teitel, 1997, p.2015). Second, criminal justice in ordinary democracies does not work for past wrongdoings, in other words, it does not work retrospectively. However, in the implementation of transitional justice, criminal justice works retrospectively for establishing order (Teitel, 1997, p.2015). And also, in criminal justice conceptualization, there exists another difference between consolidated democratic order and transitional justice. This difference is depended on the individuality of crimes. In normal conditions, the criminal law examines individual cases. But crimes against humanity creates a vacuum in the individuality of crimes. Teitel claims that the crime against humanity mediates the individual and collective responsibility in the transition (Teitel, 1997, p.2047). Third, although constitutionalism has constitutive purposes in both consolidated democracies and transitional justice, in normal order, constitutionalism has a forward-looking perspective. Nevertheless, in times of transitions, due to transition periods inherent features, constitutionalism has both forward- and backward-looking perspective (Teitel, 1997, p.2015).

Teitel proposes transitional justice as an exceptional form of justice because what transitional justice is doing is actually against positive legal norms. Positive legal norms or the rule of law is final the aim of the transitional justice process. These past authoritarian regimes are trying to be one of the consolidated regimes in

which positive legal norms are applied properly. That is why the first group of scholars who belong “transitional justice an exceptional form of justice" claim that the period is “transitional,” and so these paradoxical applications could be justified. Transitional justice due to its in-between position carries this paradox inherently. Teitel asks that “What are the rule of law implications of prosecuting for actions that were legal under the prior regime?” (Teitel, 1997, p.2024). Teitel answers her question with several justifications. Teitel’s first justification of the paradox of transitional justice depends on validity principle of law. According to Ruti Teitel, putative law under tyrannical rule lacks morality and thus it is not valid (Teitel, 1997, p.2021). Teitel’s second justification is also related to this morality and validity principle actually but with more obligatory. According to Ruti Teitel, in periods of transitions, international law provides the ground. The rule of law dilemma in transitional justice could be solved with references to international humanitarian law (Teitel, 1997, p.2029).

According to Teitel’s analysis, these aspects of transitional justice could also be challenging for the dominant liberal position. Teitel claims that according to the dominant liberal position, lawmaking is neutral and autonomous from politics, but transitional justice or transitional jurisprudence shows that the rule of law in times of transitions is defined in constructive relation to past politics (Teitel, 1997, p.2035).

Briefly, Teitel presents a noncontradictory framework about transitional justice, which focuses on the “transitional” side of transitional justice and produces justifications for paradoxical sides of transitional justice. Teitel underlies the differences between consolidated democracies and transitional regimes, and she concludes that transitional justice is an exceptional form of justice. Teitel’s framework implies that transitional justice is exceptional but in normal times or in consolidated democracies, justice or legal mechanism are neutral and independent from politics. Teitel’s opinion about neutrality of legal mechanism are criticized frequently in the literature. The criticisms toward Ruti Teitel will be elaborated in the explanation of the opposite pole within the legalist approach,

that is transitional justice is not exceptional form of justice, by giving references to Eric A. Posner and Adrian Vermule.

Eric A. Posner and Vermule take a direct opposite position vis-a-vis Ruti Teitel in the debate. Posner and Vermule explain their argument in the "Transitional Justice as Ordinary Justice" article, as title claims they do not see transitional justice as an exception. Posner and Vermule present two related arguments to make their position clearer (Posner & Vermule, 2004, p.762). First, according to Posner and Vermule, scholars are mistaken about accepting regime transitions as a self-contained subject. Second, they claim that transitions occur in consolidated democracies as well (Posner & Vermule, 2004, p.762-763). The second claim of Posner and Vermule, which has an emphasis on transitions in consolidated democracies, is more relevant to debate about whether transitional justice is exceptional or not. Because scholars, who accept transitional justice as an exceptional form of justice, tend to find a reason for its exceptionality due to the transition period. As it was clarified above, according to the first pole, which includes Ruti Teitel, the inherent paradox of transitional justice is depended on its in-betweenness. But for the opposite pole represented by Posner and Vermule transitions are seen in ordinary legal regimes too. Thus, with their second claim, Posner and Vermule criticize exceptionality argument from the fundamentals.

To strengthen their argument, they show that differentiation of consolidated democracies from transitional justice that is made to show the exceptional nature of transitional justice are also mistaken.

> They have erred by holding stereotyped view of ordinary justice in consolidated democracies- one in which laws are always prospective, individuals always costlessly obtain compensation for harms to person or property inflicted by others, and transitions essentially never occur because the legal system runs smoothly in settled equilibrium (Posner & Vermule, 2004, p.764).

The quotation from Posner and Vermule implies that Teitel presents legal orders in consolidated democracies as stereotyped, static, and, most importantly, ideal. This static view of consolidated democracies includes that these normal orders do

not have any inner contradictions, unlike transitional regimes. Moreover, Teitel's comparisons are also biased because she compares the ideal perception of liberal democracies with transitional regimes. Observation derived from Posner and Vermule is critical because aim of transitional justice is also to construct an ideal and stereotyped operation of a liberal democratic order. And the justification of aims of transitional justice are already depended on existing liberal democracies in the world such as the USA or the other Western democracies. But according to Posner and Vermule, ordinary legal orders also constantly deal with policy shifts that could be related with economic and technological changes or change in value judgements of citizens and legal elites (Posner & Vermule, 2004, p.764). Thus, accepting current consolidated democracies as an ideal and static could be misleading to justify the aims of transitional justice too.

Posner and Vermule's position could be criticized also. If transitional justice and ordinary legal orders do not have significant differences from each other, then what makes transitional justice a distinctive concept? Posner and Vermule also realize the problem that is why they claim that their argument could 'explode' that transitional justice as a distinctive topic (Posner & Vermule, 2004, p.764). Posner and Vermule claim that they analyze alleged distinctive dilemmas of transitional justice in the second part of their article. And after Posner and Vermule's analysis they come up to the conclusion that the problems of transitional justice are the most overblown versions of ordinary justice (Posner & Vermule, 2004, p.765).

According to this thesis, accepting transitional justice's paradoxes as an overblown of paradoxes of the legal order in normal periods is a very reductionist explanation for two reasons. First, justification of Posner and Vermule is too reductionist because transitional justice is applied as a response to violent past. These violent experiences could not be imagined in normal times because they are big, systematic human rights violations such as genocides, atrocities, or civil wars. Thus, the uniqueness of transitional justice lies on this ground firstly. The second reason lies on the differences between claims of regimes in normal times

and regimes in transitional justice. In normal times, the regimes could claim a "re-establishment" of order at most. On the contrary, the states that experience transitional justice period claim peace, reconciliation and democracy. The claim of peace, reconciliation and democracy are loaded than re-establishment of the order.

As stated above, Pablo De Greiff criticizes both poles in the legalist approach in several points, and De Greiff proposes a third way to approach transitional justice within the legalist approach. In De Greiff's approach to transitional justice, transitional justice is neither exceptional in itself nor a mere compromise but rather "principled application of justice in distinct circumstances" (De Greiff, 2012, p.59). In this part of the chapter, De Greiff's criticism toward each position will be summarized firstly, and then his third way will be explained in short.

De Greiff starts with criticism toward Teitel's position that accepts transitional justice as an exception or distinctive from the consolidated democratic legal system. Unlike Teitel, De Greiff suggests that law in normal times have both retrospective and prospective applications. As Teitel also claims, there exists a distinction between legitimate and illegitimate laws. Under the tyrannical regimes, we cannot talk about legitimate laws since moral and ethical concerns make law legitimate and lawful. According to him, ethical and moral concerns include retrospective elements (De Greiff, 2012, p.60). Second, according to De Greiff, Teitel is wrong in presenting democracies in normal times as idealized. De Greiff states that there is no consensus among either scholars and citizens about criminal, repertory, and administrative justice in consolidated democracies too (De Greiff, 2012, p.60).

De Greiff continues to criticize the position represented by Posner and Vermule. According to De Greiff, arguments of Posner and Vermule to show continuity between transitional justice and ordinary justice cause underestimation about the significance of transitionary moments. Transitionary moments are critical for the articulation and establishment of norms, values, and institutions (De Greiff, 2012, p.62). Also, for De Greiff, the approach of Posner and Vermule also misses the

importance of reparations especially for victims. Reparations mean the difference between the perception of '*right*.' Victims did have nothing before transitionary moment after reparations rights do matter for them (De Greiff, 2012, p.62).

What De Greiff recommends is in between these two opposite poles. According to De Greiff, general principles and norms are necessary to deal with massive human rights violations. But at the same time, these general principles and norms should not be blind to the context in which they apply. These principles should work as guidance. Then De Greiff makes a distinction between the justification and the application of the norms. Thus, in De Greiff's understanding, the principles and norms become sensitive to the context in which they apply (De Greiff, 2012, p.63-64). Even though what Pablo De Greiff proposes seems consistent and concrete, he does not concretely elaborate his third way. Thus, his third way seems vague because he does not have practical solutions about implementation. Although he mentions what he recommends should work as a guidance, he does not elaborate how these guiding principles apply concretely. De Greiffdoes not have participation stress neither. that is why what he suggests also belongs the legalist approach within the scope of this thesis.

2.4.2. The Critical Approach

As it is stated at the beginning of the chapter, "the critical approach" title does not exist in the literature. For a more systematic analysis, some scholars are collected under the critical approach title. As its naming reveals scholars take a critical position towards the legalist approach due to its from above perspective. Some scholars in the critical approach just show the shortcomings of the legalist approach. Others suggest a new approach to transitional justice. For instance, they deconstruct the existing literature to reconceptualize transitional justice with a from below perspective. Critical scholars also accept transitional justice has serious problems regarding participation. Thus, they try to increase participation of the victims in the transitional justice process.

In this part, first, the scholars who criticize the legalist approach due to its from above approach will be expressed. Their criticism toward the legal approach is various. For instance, the disregard of contextual uniqueness of the countries in which transitional justice process applied due to the standard application of transitional justice and exclusion of active participation of locals in truth recovery process are two major examples of criticisms. Second, the suggestions about increasing participation of victims to the transitional justice process, i.e., approach to the transitional justice process from grassroots or from below perspective, will be elaborated by giving references to relevant scholars. Afterwards, the transformative justice conceptualization will be explained, which is a variation of transitional justice that has been developed by critical scholars. Transformative justice includes socio-economical dynamics to transitional justice, unlike sole application of legal measures. Finally, Roland Kostic and his arguments about the distinction between participation and decision making in the transitional justice process will be expressed. The emphasis on distinction between attendance, participation, and decision making contributes to show the need for "an extension of the critical approach with political references" or "a political approach" to transitional justice.

Criticism toward the dominant position of transitional justice's legalism does not always directly come from scholars who study on transitional justice, scholars who are from peace studies also criticize the dominant position of it. For instance, according to Dustin N. Sharp, transitional justice has become to be seen as a component of post-conflict peacebuilding, even in societies not undergoing a paradigmatic liberal transition (Sharp, 2015, p.150-151). According to Sharp, peace necessities a more holistic set of objectives than liberal political transitions (Sharp, 2015, p.151). Peace is one of the fundamental bases for the goals of transitional justice, such as democracy, reconciliation and the rule of law. Like peace, the other goals of transitional justice necessitate a more holistic approach.

The shortcomings of the legalist approach of transitional justice will be elaborated to show need for more holistic approach to transitional justice. Kieran

McEvoy is one of the scholars who realize the domination of narrow legalist lens in both scholarship and praxis of transitional justice. McEvoy examines the dominance of legalism in transitional justice and he suggests several practical and theoretical correctives to this legalist tendency (McEvoy, 2007, p.413). According to McEvoy's observation, the rationality underlined in legalism is the idea that law is capable of regulating behaviors in that law could shape political relations and the way citizens think (McEvoy, 2007, p.416). In transitional justice practice, the law is also accepted as a crucial practical and symbolic turning point for successive regime to differentiate itself from the past regime and the law becomes a demonstration of new legitimacy and accountability (McEvoy, 2007, p.417). The rule of law is actually one of the important differences between authoritarian regimes and democracies, so in that regard increase in legalism makes a reasonable breaking point. However, as McEvoy underscores, legalist domination could exclude questions from other complementary disciplines and perspectives that could contribute transitional justice (McEvoy, 2007, p.417). To be stuck in legalism could miss or underestimate the structural reasons for human rights violations. For instance, as McEvoy claims, the underestimation of wider political, social, or cultural context, which produces the violence in the first place, with an entrust on the capability of legal procedures and legal institutions may lead the institutions' potential to prevent future violence to be correspondingly reduced (McEvoy, 2007, p.419).

According to Laurel E. Fletcher, Harvey M. Weinstein, and Jaime Rowen, another shortcoming of the legalist approach is that it could miss contextual dynamics of the countries such as economic development levels, culture, tradition, legacy of past, capacity of countries to employ mechanisms of transitional justice etc. due to its from above approach (Fletcher, Weinstein, &Rowen, 2009, p.207-208). Moreover, timing and sequencing of mechanisms of transitional justice are also important variables that could be neglected in the legalist approach (Fletcher et.al., 2009, p.228). Laurel E. Fletcher, Harvey M. Weinstein, and Jaime Rowen examine seven cases. The case studies of Fletcher,

Weinstein, and Rowen reveal the need for new thinking about the relationship between social relations and the mechanisms of transitional justice (Fletcher et.al., 2009, p.166). As a response to criticism of Fletcher, Weinstein and Rowen, proponents of the legalist approach could claim that legal mechanisms of transitional justice vary in implementation to different contexts. On the one hand, Fletcher, Weinstein, and Rowen agree with the proponents of the legalist approach in that sometimes only truth commissions, only criminal prosecutions or sometimes both are used. Also, the mandates of each mechanism are different from each other for every case. But on the other hand, according to Fletcher, Weinstein and Rowen, these various applications of transitional justice mechanisms are standardized as a "tool kit" of interventions that can be applied in different contexts because variation is only at the basis of determining which mechanism to be deployed (Fletcher et.al., 2009, p.170). As a result of their comparisons of seven cases, Fletcher, Weinstein, and Rowen came up with several criticisms toward the standard tool kit application of transitional justice. For example, Fletcher, Weinstein, and Rowen detect the ahistorical or decontextualized implementations of transitional justice policies. Debates about the various applications of the transitional justice policies shape around the topics of truth versus justice, trials versus truth commissions, and remembering versus forgetting. Fletcher, Weinstein, and Rowen show that these concepts are vague, abstract, universal, and blind to context like the from above the legalist approach to transitional justice. If the context is ignored like that, the mechanical manner of the transitional justice mechanism will be less successful (Fletcher et.al., 2009, p.208-209).

The incapability of locals to have an impact on the transitional justice process could be seen through several other points too. For example, The South African Truth and Reconciliation Commission (hereafter TRC) worked with its all committees for three years, between 1995 and 1998, and TRC examined more than 40 years of Apartheid Regime. Guatemalan Historical Clarification Commission (hereafter CEH) worked in two years, between 1997 and 1999, and

CEH examined 36 years of internal armed conflict. Sierra Leone Truth and Reconciliation Commission also worked two years for truth recovery in 11 years of civil wars. Even though the cultures of South Africa, Guatemala and Sierra Leone, the natures and the duration of the conflicts are different from each other fundamentally, the durations of the truth commissions show similarities in terms of length. The similar tendencies around the world could be results of disregard of contextual uniqueness of local communities in the transitional justice process, the incapability of locals to effect ongoing transitional justice process and also could be a result of third parties' impact on the process. As Sharp also suggests, the implementation of transitional justice turned to be institutionalized, mainstreamed, professionalized, embraced by United Nations, and buttressed by an emerging industry of international nongovernmental organizations (Sharp, 2015, p.153). A more explicit explanation on the impact of third parties is shown in Ismael Muvingi's analysis. According to Muvingi, transitional justice has been shaped by actors external to the post-conflict societies, donors for the transitional justice initiatives (Muvingi, 2016, p.10). According to Muvingi, conflict is socially and financially devastating for the societies, and it is one of the factors that give a powerful role for the external actors in the transitional justice process (Muvingi, 2016, p.13). As Muvingi also remarks, in order to avoid transitional justice as a propagation of preferred political, social, and economic policies of donors, appropriate local practices should be allowed in the transitional justice process (Muvingi, 2016, p.21).

As explained above, the domination of the legalist approach to transitional justice could shape the process by the impact of third parties and could result in disregard of contextual uniqueness of the countries. Disregard of contextual uniqueness could mean ahistorical, decontextualized implementation of the transitional justice policy. It could also cause damages to the truth recovery process. As Rosemary Nagy claims, a technocratic focus on the law, as the prominence of the legalist paradigms does in the transitional justice literature, abstracts from lived realities (Nagy, 2008, p.279). Abstraction is one possible

method to comprehend the truth, but what Nagy also underlies is that legalist approaches have become dominant and hegemonic in the literature. However, the aims of transitional justices, that is valuable for human dignity, necessitates a more meticulous approach. As Nagy states, a scientific or technocratic focus to detect 'trend analysis' of gross human rights violations or prosecuting high-level perpetrators will not necessarily beneficial for community-based truth or reconciliation (Nagy, 2008, p.279). At this juncture, it should not be forgotten that the truth recovery process is not the final aim in itself; these truths should contribute to reconciliation and democracy. At the same time truth revealing process should guarantee the non-repetition of gross human rights violations.

As stated above, some contexts do not include truth commissions and criminal prosecutions simultaneously, as observed in the Former Yugoslavia case. Richard Ashby Wilson contributes the debate in that through questioning whether criminal prosecutions are adequate to historical accounts of human rights violations or not if separate truth recovery mechanisms do not exist (Wilson, 2005, p.909). The debate about whether the criminal prosecutions are capable of truth recovery or historical record is not something new in transitional justice; the debate has taken place since criminal prosecutions of the Holocaust. The debate has two opposite poles. On the one hand, according to the first group, one of the famous representatives of them is Hannah Arendt, questions of history, conscience, and morality are not legally relevant, and the trials should not be had historical record claims (Wilson, 2005, p.910). And according to the first group of scholars, the distinction between disciplines is fundamental as such law and history have different modes of reasoning (Wilson, 2005, p.912). Moreover, courts are too selective and limited in scope to reveal the whole story due to the individuality principle of criminal law (Wilson, 2005, p.914). On the other hand, according to the other group of scholars, there exist fundamental similarities between law and history as disciplines, such as both of them give importance to evidence, the testimony of witness, and facticity. Moreover, legal arguments also do not merely rely on the presentation of facts. The presented facts make sense in

chronical order and narrative form (Wilson, 2005, p.917). These chronical order and narrative forms create the contexts that are important for history as a discipline too. Like Wilson states, the courts dealing with massive or systematic human rights violations cannot escape interpreting the history (Wilson, 2005, p.918). Wilson concludes that the former ones are right in criminal prosecutions about France and Israel, still, The International Criminal Court for Former Yugoslavia example is capable of proving that historical records can be documented through criminal prosecutions (Wilson, 2005, p.940). However, according to viewpoint of this thesis, even though Wilson has come up with a kind of compromise about comprehending truth in transitional justice through its own mechanism, Wilson's arguments do not deny that from above approach of transitional justice. The from above approach excludes active participation of locals in truth revealing process. Thus, whether criminal courts or truth commissions are used in truth production process, the locals who experienced truth actually participate process just as attendees, they could not have effect in the frameworks of both mechanisms due to from above approach of legalism. Thus, as Bronwyn Anne Leebaw signifies, a 2004 report prepared by the Secretary-General of the United Nations entitled "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," reveals that the dominant tendency has been shifted towards to be more responsive to local political contexts (Leebaw, 2008, p.117). Thus, the transitional justice literature has inclined towards more from below approaches.

The from below tendency has been seen not only in truth recovery mechanisms of transitional justice; it has been observed also in 'justice' conceptualization too. For instance, Ray Nickson and John Braithwaite seek to deepen justice to enable both survivors and citizens to shape justice through participation. Nickson and Braithwaite suggest the survivor's direct participation in justice conversations about cases. (Nickson & Braithwaite, 2014, p.452- 453). Moreover, Nickson and Braithwaite point that the transitional justice process should continue longer. For example, according to Nickson and Braithwaite, speedy reporting process of truth

commissions or speedy trials cause participation problems. For victims, it takes a longer time to be ready to participate in the transitional justice process (Nickson & Braithwaite, 2014, p.454). Even though participations to prosecutions except a defendant or a complainant is harmful to neutrality of trials, as these studies show, the efforts to increase it has been observed in prosecutions of transitional justice.

Scholars like Kieran McEvoy and Lorna McGregor try to reinterpret transitional justice with from below perspective. As McEvoy and McGregor show, there is a rising sympathy amongst many scholars to increase community ownership of and participation in the process of transitional justice (McEvoy & McGregor, 2008, p.9). According to McEvoy and McGregor, it is revealed by scholars that institutionalized international law is not always capable of hearing the voices of the most affected ones. But in some cases, such as in Colombia and Northern Ireland, due to the absence of working international justice mechanisms, the creative energy for transition could come 'from below' (McEvoy & McGregor, 2008, p.3). The common feature of from below examples is that their justice mechanisms and national justice systems were not viable in that they are too aloof, corrupted, ineffective, and incapable of responding transitions (McEvoy & McGregor, 2008, p.3). Thus, in the absence of properly working justice mechanisms, it is frequently victims and survivor groups through community and civil society organizations, non-governmental organizations or church bodies etc. that have been the engines of the change (McEvoy & McGregor, 2008, p.3). The tendencies of the from below perspectives include an exploration of the praxis of grassroots actors who take transitional responsibilities themselves (McEvoy & McGregor, 2008, p.5).

However, the authors do not affirm from below perspective with blind eyes. According to them, this perspective also carries some risks. According to McEvoy and McGregor, first, these community-based initiatives have a risk to replicate social inequalities that caused the conflict before (McEvoy & McGregor, 2008, p.9). The second risk is about capacities of locals. Locals could

encounter problems with resources, skills, and they could lack authority to investigate (McEvoy & McGregor, 2008, p.10). Thus, McEvoy and McGregor suggest that the international law could offer a framework for transitional justice initiatives at all levels to ensure the rights of victims. So that, instead of static international law, international law advances as an evolving process developed by actors other than the state (McEvoy & McGregor, 2008, p.11). What McEvoy and McGregor suggest in dealing with gross human rights violations is that not rejecting universal values of international law but make international law more context oriented at the same time. According to the viewpoint of this thesis, McEvoy and McGregor's deconstruction of transitional justice has shortcomings in proposing concrete methods to make international law more context oriented. McEvoy and McGregor carry the same problem with De Greiff's third way to transitional justice mentioned above. The participatory approach of McEvoy and McGregor summarizes the critiques properly, but their participatory approach lacks concrete solutions. How can international law maintain its universal values while turning itself to a more context-oriented form? How can the impartiality problem about justice could be protected in context-oriented implementation of international law? McEvoy and McGregor do not answer these questions that is why their recommendation is vague.

Patricia Lundy and Mark McGovern suggest a participatory approach to transitional justice that is more concretely elaborated. According to Lundy and McGovern, the law is seen by the international community as the safest way to intervene in other countries, and it also shows the international law and the rule of law initiatives are not politically neutral against commonsense about their politically neutral position (Lundy & McGovern, 2008, p.266). According to Lundy and McGovern, to increase the involvement of locals at the implementation stage of transitional justice is not enough; the participation of locals should include conception, design, decision making, and management levels too (Lundy & McGovern, 2008, p.266). According to the viewpoint of this thesis, being politically active agency should include participation into the entire

process. The existing situation of transitional justice is obviously under the UN influence. As the Secretary General of United Nations Kofi Annan stated in 2004, the direct UN involvement in post-conflict societies has been engaged through the importation of transitional justice apparatus. In other countries such as Guatemala, United Nations experts have taken key positions of transitional justice mechanisms (Lundy & McGovern, 2008, p.269). Even though the reason behind these professional involvements has been related to providing assistance to transitional governments in transition to democratic regimes, the locals did not participate these political processes effectively. As Lundy & McGovern point out there exists an increasing tendency to question the problems about one-fits-all approach and to increase local ownership of the transitional justice process (Lundy & McGovern, 2008, p.271). According to Lundy and McGovern, a community-based truth-telling mechanism is capable of putting locals in a decision-maker position in design, remit, conduct, and character of the transitional justice process (Lundy & McGovern, 2008, p.271). This thesis agrees with Lundy and McGovern at that point, thus only the truth-seeking mechanisms are debated in the following chapter. According to Lundy and McGovern, the participatory approach should enable locals identify the problems, find solutions, mobilize resources, and implement them permanently (Lundy & McGovern, 2008, p.280). The problem is about the empowerment of locals to manage their own transition process (Lundy & McGovern, 2008, p.280). The participatory approach for Lundy and McGovern is going beyond of being the 'advisor' of locals, according to Lundy and McGovern, local communities should at least collaboratively control the process (Lundy & McGovern, 2008, p.281). Lundy and McGovern analyze concrete example of Northern Ireland and The Ardoyne Commemoration Project as an example of participatory action research., As a conclusion Lundy and McGovern claim that they present from below initiatives as an alternative to the existing from above approaches. Lundy and McGovern insist that "who are the locals," "who speaks for whom," and "what does local ownership and participation mean" are still relevant questions (Lundy & McGovern, 2008, p.291-292). Lundy and McGovern's conceptualization of

grassroots transitional justice is more concrete to compare with Kieran McEvoy and Lorna McGregor, and their position in the literature is important because they pay attention to the importance of empowerment of locals within the participatory approach. Lundy and McGovern do not just claim the need for increase participation of locals, they also realize need for capacity building or empowerment of locals to participate the transitional justice process.

Transformative justice is a variation of transitional justice that has been developed by the critical scholars and it has emphasis on empowerment of locals in various ways. Transformative justice, with its stress on economic and social relations, posits itself more critically towards the legalist approach to transitional justice. Transformative justice searches for root causes of violence, including the socio-economic inequalities and ways to increase participation through victim-centered agenda (Friedman, 2018, p.702). Transformative justice raises criticism towards transitional justice for its backwards-looking short-term process, and transformative justice aims long-term fundamental changes in society, especially in the economic realm, unlike transitional justice does (Friedman, 2018, p.703). According to Rebekka Friedman, transformative justice is both forward-looking and backward-looking. It is backward-looking through its financial and other kinds of material compensation features and forward-looking through its distributive justice in the future (Friedman, 2018, p.703). Transformative justice suggests the local ownership and participation of the most affected ones, and it needs to reframe socio-economic rights and continuities of conflict that persist into the present (Friedman, 2018, p.703).

According to Friedman, transformative justice carries difficulties too. Especially through her case study of Peru, Friedman claims that there exists little consensus about the causes of conflict in particular cases. Second, long term experiences of violence have generated new conflicts and inequalities, which are neglected in the transition process. Third, conflict of interest could be possible for the targets of transformative justice. And Friedman underlines the necessities of perpetrators' involvement into the process (Friedman, 2018, p.704-705).

Friedman examines the practical problems for the participation of victims and perpetrators in the transformative justice process through focusing on continuing unequal power relations, lack of civic trust, and conflicting conceptualization of micro and macro causes of conflict in Peruvian example. For the scope of this thesis, searching for structural reasons for conflicts, emphasizing unequal power relations of societies, the necessity of the empowerment of locals could be important for the increasing participation of locals in transitional justice process because these could break the hegemony of legalist from above approach and also enable more concrete bases for increasing participation too.

However, transformative justice in general carries important risks, especially in implementation. First, it is not an easy task to compensate for social-economical inequalities for two reasons. The first reason is related with big accumulation that depends on these inequalities. For instance, how could reparations compensate colonial era's social economical right violations through policies in the short term? Colonial legacy is common in most of the cases that transitional justice process applied such as South Africa and Guatemala. It should be compensated because social economic inequalities are depended on legacy of colonial era in most of the cases of transitional justice, but the first step for its compensation can be done through symbolic reparations. Symbolic reparations enable former victims as equal parts in the political sphere so that former victims can decide their future policies. Second, due to violent human rights violations depended on the inequalities, the damages were irreversible. How could transformative justice bring back the beloved losses of victims? The second risk of transformative justice is more structural. Transformative justice carries risks to fall the trap of revenge. In order to avoid this material compensation trap, dealing with the past should be approached through symbolic dimension such as memorialization, apologies etc. Symbolic reparations enable equal citizens in public space. The former victims should be empowered to become politically active agencies. Although it is not independent from socio-economic empowerment, enabling them as a decision-maker of the new political space from the beginning of the

transition is a more structural solution. Thus, for more structural solutions, former victims should have a capacity to affect future regime as decision-makers.

Attending to the transitional justice process and participating to the process are different from each other. According to Roland Kostic, the conflicting parties are usually included as participants in the process (Kostic, 2012, p.652). According to Kostic, the result of these processes, in which conflicting parties had been included as participants without an impact on the process, has been a policy of policing the past and preserving the conflicting believes about the past, instead of agreements on the past and mutual acknowledgement of the sufferings (Kostic, 2012, p.652). Roland Kostic tests his theoretical arguments on the popular perceptions of transitional justice initiatives in Bosnia and Herzegovina through survey data (Kostic, 2012, p.652). It is not easy to differentiate between attendance and participation without analyzing concrete cases. That is why in the following chapter, the truth-seeking mechanisms of South Africa and Guatemala will be analyzed with the perspective seeking who had capacity to decide, who were included in and excluded from the constitution of truth seeking mechanisms of the transitional justice process. Former conflicting parties' inclusion in commissions, especially victims', is important to provide an equal ground. As Pablo De Greiff states, transitional justice aims to provide victims recognition not only as victims but also as equal right-bearers and ultimately as citizens (De Greiff, 2012, p.42). Equality is the ground for citizenship, and after big human rights violations, providing equality lies in the future. The first step to become equal right-bearers and citizens, the former enemies at least have equal capabilities to have an impact in on going transitional justice process from the beginning of the new regime i.e., transitionary phase to be expected and hoped to become a democratic regime.

CHAPTER 3

TRANSITIONAL JUSTICE AT WORK

3.1. The Framework for Case Studies

The previous chapter analyzed transitional justice literature through its two major poles: The legalist approach and the critical approach. The differences between the approaches depend on "participation" stress. Participation is a contested concept. As more critical names such as Roland Kostic and Paige Arthur claim that to attend transitional justice process with having less impact on the process and to participate transitional justice more actively are radically different from each other. To elaborate the difference between "to attend" and "to participate", this third chapter aims to go beyond the theoretical discussions of transitional justice literature. In this chapter, establishment phases of the truth-seeking mechanism of South Africa – Truth and Reconciliation Commission (TRC) – and Guatemala – Commission for Historical Clarification (CEH) – will be analyzed. Cases studies focus on constituent texts and mandates of commissions, exclusion and inclusion of actors in establishment processes, and transparency and publicity of transitional justice process. The aim for these focal points is to measure participation of actors in the South African and Guatemalan transitional justice process. First, the reasons for the examination of the establishment phase will be explained. Guiding questions to examine cases will be presented. The aims of the questions are related to measurement of former conflicting parties' participation to the establishment of truth-seeking mechanisms. Afterward, the reasons for the selection of these two cases will be explained. Second, the South African Truth and Reconciliation Commission will be explained through historical background of the Apartheid Regime. Legal documents that established the TRC and its mandate, commissioners and staff will be analyzed through questioning active

political participation of South Africans. Lastly, the Guatemalan civil war will be explained briefly. Legal documents such as Peace Accords and mandates will be explained with other features of it, such as commissioners, staff, etc. CEH will be questioned through active political participation of Guatemalans.

3.1.1. Importance of the Establishment Phase of the Truth-Seeking Mechanisms

As mentioned in the previous chapter, Lundy & McGovern (2008) claim that truth-seeking mechanisms are fruitful bases for local communities to have decision-making capacity on conduct and character of the transitional justice process. This study's reasoning for to examine only the establishment phase of truth commissions is also related to this point. If previous conflicting parties have an impact on the establishment of the mandate, they may decide the methodology, working principles and may have a participatory position in truth commission. Moreover, the selection of commissioners is also a vital phase of the establishment of commissions. If conflicting parties have an impact on the selection process of commissioners, they may have an impact on the implementation of the truth commissions. Thus, participation in the establishment process of truth-commission has an undeniable impact on the entire process of transitional justice.

Concentrating on truth-seeking mechanisms have more theoretical explanations too. Apartheid regime or Guatemalan civil war implies that the ground for equality has been damaged due to widespread atrocities. The conflicting parties did not see each other as equals. Reconciliatory aim of transitional justice should ensure the equality ground for all parties. From the viewpoint of this thesis, a symbolic approach for the construction of equality seems realistic. Participation to truth-seeking mechanisms is one of the solutions to restore symbolic equality. Participation in truth-seeking mechanisms from the establishment phase enable former conflicting parties to exist together and to influence together new forms of public space that will exist after transitional justice. Moreover, participating to ongoing transitional justice processes makes the parties equal and non-violent

political agents. As Paige Arthur also claims, political rights mean the rights of all to participate in decisions that have an impact on their lives (Arthur, 2014, p.208). Transitional justice is a turning point for the societies, so it is obvious that what happened during this transitional moment has affected their lives and future. Furthermore, as Paige Arthur claims, truth commissions can help to reframe political issues and claims of marginalized groups (Arthur, 2014, p.209).

3.1.2. Case Selections

Before separate analyses of cases, the point about why this thesis focuses on South Africa and Guatemala should be elaborated. As underlined already, this thesis is trying to answer the questions about the participation of former conflicting parties especially in the establishment and the conduct of working plan of truth commissions. Despite their differences, both the TRC and the CEH are prominent truth commissions in the literature. Moreover, both of them investigates more than 30 years of human rights violations and both published their conclusion with reports. Another common point of them is related to long preparatory period of conflicts. The mandates of truth commissions limit the duration of investigation, which was possibly necessary for practical reasons. However, in both cases, these time limitations exclude the long-term preparatory period and human rights violations in these periods. For instance, in South African case, the TRC limits investigations to the events that had taken in the period between 1960 and 1994, which means exclusion of human rights violations in Apartheid Era before 1960. Human rights violations during Apartheid was violent as after 1960, and Apartheid Regime itself was a human rights violation. Moreover, conflicts occurred as a result of perpetrators' desire to prevent existence of victims in the political spaces for each case. Apartheid legislations in South Africa and avoidance of elections constantly in Guatemala were against the existence of victims in public space.

Differences between commissions are critical because they provide fruitful bases for answering questions that will be presented in the following part. Their mandates differ from each other in various points. First of all, the Guatemalan

Historical Clarification Commission was established with a peace agreement and South African Truth and Reconciliation Commission was established with a law. Another difference of mandates of both commissions is related to the scope. The mandate of CEH is not detailed as much as the TRC. According to Chapman and Ball, for example, CEH's mandate prohibits the naming of individual perpetrators. This restriction has been widely criticized, but according to Chapman and Ball, CEH enabled to turn this disadvantage to advantage because CEH came up with a more structural conclusion due to this restriction. On the contrary, as Chapman and Ball also claim, the mandate of TRC explains every detail such as the definition of 'gross human right violation' and what are the conditions for 'violations with political motive', etc. (Chapman & Ball, 2001, p.13). The organizational structure of the commission is also related to the establishment phase of the mechanisms. Whether every detail is precisely determined before or not. For example, on the one hand, the TRC maintained the same organizational structure with minor adjustment between 1996 and 1998. On the other hand, CEH went through continuous reorganizations (Chapman & Ball, 2001, p.19). The other kind of difference between commissions is related to their implementation or in other words, impact of commissioners on the implementation. Furthermore, the number of commissioners, their selection process and their representative aspects are also critical points too. The Transitional Justice Database Project categorizes the level of implementation of mechanism in three headings: domestic, hybrid and international. According to Transitional Justice Database Project, the TRC belongs domestic category with its 17 national commissioners who are selected by the president through a public selection process. Nevertheless, the final selection was decided by the president, which is also another essential point for questioning the participation of former conflicting parties. Moreover, according to the Transitional Justice Database Project, CEH is under the hybrid truth commissions category with its international head of the commission and two national commissioners (http://www.tjdbproject.com).

Another reason of focusing on South Africa and Guatemala is to show even in different continents and different kind of conflicts the central mechanisms of transitional justice implemented with very slight differences. Despite their existence in different regions, the legalist approach in the transitional justice literature had an impact on them. To conclude, due to these similarities and differences of two commissions, they provide fruitful ground for the questions of this thesis is trying to find answers.

3.1.3. Guiding Questions for Analyzing Cases

Deciding the guiding questions for the case analysis is important for not to lose focus, especially for analysis of the truth commission that works on long term conflicts. Besides, these questions are related with the understanding of conflicts' background, mandate and terms of reference of commissions, implementers of the commissions like commissioners and staffs, and participatory approach of commissions. The importance of focusing on them lies on the ground that, as Chapman and Ball claim, although truth commissions are often assumed as generic bodies, the official mandates, the perceptions and priorities of their commissioners and staff, the methodologies and level of resources affect the findings of commissions (Chapman & Ball, 2001, p.4).

First, to understand what happened during conflicts, the questions of "what are the preparatory events of conflict" and "what was the historical background of conflict?" are going to be asked. The following questions are "what happened during conflict?" and "who were the conflicting parties?". Relatedly, the questions of "who were the perpetrators and victims?" and, if possible, "who were both victims and perpetrators?" are going to be asked.

Following the questions about background, several questions regarding legal texts that established the truth commissions will be raised. Generally, legal documents that established truth commissions had been negotiated and been agreed during peace negotiations or soon after negotiations in consultation with several actors. Thus, "who negotiated to peace and to establish commission?" and "Did every

party of conflict attend the process?" or "what kind of selection criteria were applied for the parties who negotiate on behalf of parties?" are relevant questions. More openly speaking, whether the only "legitimate" parties exist in the negotiation process or not. What are the criteria for being legitimate? Who did decide this legitimacy: The United Nations, states, etc.? If all parties existed in the negotiations, "Did they have the capacity to decide or did they just attend with minimum influence?" could be proper questions. If the mandate or terms of reference of truth commission were determined through consultation of conflicting parties and civil society, "who are the civil society?" or more directly "who speaks for whom?" would be asked. Furthermore, "what kind of representation criteria were applied in the content of the establishing text of truth commission?" and also "were the people well-informed about the extent of authorities they transfer to their representatives?" should be asked.

Moreover, the mandate is decisive for the time period that commission investigates. "Whether the participants agree on this limited time period or not" is also a relevant question because the time period is important for the conclusions of the commission report. For example, the South African Truth and Reconciliation Commission investigated the period between1960 and 1994, meaning that the human rights violations occurred before 1960 are not included in the report. Thus, the decision on the time period is essential, especially for victims.

A mandate includes objectives of truth commissions, definitions of human rights violations, methodologies of commission to uncover the truth, and authority of the commission, which have a crucial impact on the commission's result. If successor government implements these results fully; they have an impact on the lives of everyone after transitions. Thus, "were representatives of all parties included during decision making process in determination of these points?" is a crucial question for the analysis of the cases. Furthermore, if they have representation in the mandate for these points, again "what kind of representation did they have?" is essential too. For example, it is claimed that civil society's

opinion was included in the mandate of TRC, but who represents whom? Who was included in civil society or to what degree they have the capacity to affect decisions?

Analysis of Chapman and Ball shows that there should be other features than mandates that have an influence on truth-seeking mechanisms. According to them, despite the limited mandate of the CEH vis-a-vis the TRC, the CEH offered a more penetrating analysis of the official policy of racism and social exclusion than the TRC did (Chapman & Ball, 2001, p.14). So, it could be reasonable to claim that there exist other factors that had an impact on the conclusion of commission and in the long run in the life of all, especially after transitions. Thus, what could be other factors that influence the work of truth commissions? The commissioners and the key staff have a crucial role in that regard.

Related with commissioners, "how many commissioners are charged for truth commission?", "who represents whom?" or "Were all parties represented?" should be asked. More importantly, "did all victims have representation?" will be questioned. "Did commissioners work full time or part-time?" and "what kind of authorities did they have?" are relevant questions too. Again, representation and criteria for the selection of commissioners are crucial. "Were their selection criteria appropriate with the authorities they have?" is going to be asked.

The justification of all questions mentioned above is related to possible variables that had an impact on participation in establishment process, and publicity and transparency of the establishment processes. Both the dominant the legalist approaches to transitional justice and critical approach to this legalism has the same shortcoming. This shortcoming is related to the loss of political agencies of conflicting parties during the transitional justice process. Or in short, need for an extension of participation in critical approach or lack of political perspective to the transitional justice. As mentioned above, politically active agents have political rights to participate in decisions that have an impact on their lives (Arthur, 2014, p.208). Thus, the most critical question for the analysis of the cases are "did all parties have active participation in the process or did they just

attend the process?" and "what does 'participation' mean in that sense and what should it mean?".

3.2. South Africa

Apartheid was initiated in 1948 with a new government as an effort to maintain status quo of white supremacy, which was the transformation of the de-facto segregation into a systematic pattern of legalized racial discrimination (TRC, 1998, p.30). As the first Volume of TRC report listed, the government enacted several acts to institutionalize the racial discrimination: The 1949 Prohibition of Mixed Marriages Act, 1950 Immorality Amendment Act, 1950 Population Registration Act, 1950 Group Areas Act, 1950 Suppression of Communism Act, 1953 Separate Amenities Act, 1953 Bantu Education Act, and 1959 Extension of University Education Act (TRC, 1998, p.30-33). These amendments show that, the non-white populations seemed like a scapegoat, even in the rise of communism, and the diversity of these acts provided that the non-whites were discriminated in every aspect of life. Even though the time period of TRC is between 1960 and 1994, these were presented in the report in the part covering the historical background.

In order to comprehend the participation in South African transitional justice process, this part covers the background of racial discrimination, Anti-Apartheid Movement, diversity of conflicting parties, the impact of international community on settling down of the conflict, the negotiations and establishment of the TRC.

3.2.1. Background of Racial Discrimination

Colonial Period is critical on the analysis of the establishment phase of the TRC because the racial division between whites and non-whites of apartheid has rooted in colonialism. By the end of 17th-century, the Dutch colonialism started in South Africa. The Dutch Colonialism grew gradually. Initially, Dutch people intended to create a small base for their movement between the Netherlands and colonies in the Southeastern Asia (Thompson, 2014, p.33). One of the factors that changed the faith of South Africa was the settlement of "free burghers", who

were former employees of the Dutch East India Company. The company released them from their contacts and gave them land. The company brought slaves to the Cape for the construction of an infrastructure of a colony under the Dutch supervision (Thompson, 2014, p.33). These were the first steps taken for the transformation of the small basement into a colony. By 1713, the situation for indigenous people started to become harsher when whites took control of the fertile soils, and the Khoikhoi; the indigenous population could not resist the Dutch invasion and lost their livestock. Finally, the indigenous people were becoming subordinated caste in colonial society; they were technically free but treated like a slave (Thompson, 2014, p.38). Britain seized the colony in 1806, and it was the second turning point of the colony (Bundy & Cobbing, 2020). South Africa had an important geo-political position for colonialism and was also attractive for European colonialism for its fertile soils, gold and diamond mines, which is why Britain, French, Germany and Dutch competed each other for establishing colonies in there.

Colonialism was the first era of racial discrimination and Union and Segregation Era followed Colonialism in that sense. There were some legislations for racial segregation in Union and Segregation Era, which were The 1911 Mines and Works Act, that allocated skilled occupations for whites, and Native Lands Act in 1913, which divided fertile soils depending on races that allocated only seven percent of farmable lands to Africans.

Unlike the narrated Apartheid, there were no united whites and blacks in the history of South Africa. In order to understand these diversities within racial discrimination, this study covers union and segregation era and relationship of British Colonialist and Afrikaneers. There were no homogeneous “whites” at the beginning. For instance, the Boers were the settled whites in South Africa, who had European descent. Afrikaners speaking Afrikaans are descendants of the Boers (Bundy & Cobbing, 2020). British colonists, another group of whites, and their relations with Afrikaners effected and changed the fate of South Africa in the following decades. For instance, British colonialism led population

composition to change with the migration movement it started. By the 1870s, the situation in the colony changed significantly. For instance, there existed 240,000 whites in the Cape that was one-third of all population in the colony (Bundy & Cobbing, 2020). The struggle between the Boers and the British government for the hegemony in South Africa ended up in South African War that was taken place between 1899 and 1902. The worse thing for the black populations was both sides' using them as labor and soldier. The conclusion of war was in favor of Afrikaners and a treaty between the white minorities was signed, which means black majority was excluded from public space. On 31st May 1910, the Union of South Africa was established with the constitution that excluded Blacks from political power (Bundy & Cobbing, 2020). This period is called as Racial Segregation Era. This segregation era could be summarized like the de-facto application of what happened legally in Apartheid Regime.

3.2.2. Anti-Apartheid Movement and Analyzing the Parties

Like in the white population, the political organizations opposing rising racism established during the segregation era showed similar heterogeneity. The critical ones were African Native National Congress that became African National Congress in 1923, and African Political Organization for Coloureds (Bundy & Cobbing, 2020). Racial discrimination in South Africa did not have two distinct and homogenous poles unlike the hegemonic narrative presents. Although sometimes these different organizations united for a powerful resistance and some of the organizations were more popular than others, the diverse and heterogeneous character of the resistance movement should not be forgotten. This part covers these diverse organizations and critical moments in the Anti-Apartheid Movement.

The African National Congress (hereafter ANC) came as a front against the institutionalized racism after 1948. Another resistance organization that was working at about the same time was South African Indian Congress. In 1952, two organizations cooperated for a passive resistance campaign. This cooperation against Apartheid was followed by the organization of the Congress of People in

1955 that gathered more resistance organizations together. The ANC, South African Indian Congress, the South African Coloured People's Organization, and Congress of Democrats, which was a small and predominantly composed of whites, came together and adopted "Freedom of Charter" that established ground rules and principles of Anti-Apartheid movement. The meeting was broken up by police forces that arrested lots of participants (Thompson, 2014, p.208). The heterogeneous character of the Anti-Apartheid Movement was not only about difference of races; gender also played a role in the diversity of the resistance movement. Along with these male-dominated organizations, women established the Federation for South African Women, which organized mass demonstrations against pass law in 1956 (Thompson, 2014, p.209). Some anti-apartheid activists opposed the inclusion of whites to the ANC and wanted a pure African movement. Mandela and Luthuli, the leaders of the ANC, did not see inclusions of whites in the Anti-Apartheid movements as a problem. On this basis, Robert Sobukwe emerged as an alternative to Mandela and Luthuli leadership. In 1959, the group who did not want whites in their movement against Apartheid founded Pan Africanist Congress with the leadership of Sobukwe (hereafter PAC) (Thompson, 2014, p.210). Within these diversities between Anti-Apartheid Movement, this difference between the ANC and newly established the PAC was seemed to be the most radical one within the Apartheid context.

On 21 March 1960, Sharpeville Massacre, which was one of the most critical moment for the Anti-Apartheid Movement due to its violence, took place and changed the nature of the Anti-Apartheid Movement. Sharpeville Massacre was critical for the transitional justice process too because it was accepted as the beginning of the period that the TRC's officials would investigate. PAC launched a campaign against pass laws, and Africans assembled at police stations. Police opened fire to the mass gathered in front of the Sharpeville police station and killed 67 people and wounded 186 people (Thompson, 2014, p.210). This massacre gained symbolic importance for the anti-apartheid movement. It led to a change in strategy of anti-apartheid organizations: the ANC and PAC changed

their non-violent strategy by reaching a conclusion that non-violent resistance achieved nothing except for more violence employed to non-whites and more repressive legislations (Thompson, 2014, p.211). Three organizations adopted the strategy of revolutionary violence: Umkhonto we Sizwe (The Spear of the Nation) – the militant force of ANC, Poqo – the military wing of PAC, and the African Resistance Movement. These three forces were responsible for more than two hundred bomb attacks (Thompson, 2014, p.211). In 1963, the government succeeded in the quash of three organizations; however, until 1976, resistance spirit continued with three developments. First, during the 1950s and early 1960s, Drum magazine was a tool for anti-apartheid movements. Second, black workers, despite their exclusion from formal negotiation process, were able to organize trade union movement, and since 1973, they started waves of strikes. Third, in 1968 Steve Biko established exclusively black South African Student Organization (SASO). The reaction from government was violent and resulted in murders and jail of lots of people (Thompson, 2014, p.211-213). Even though pressure from government was harsh, the anti-apartheid movement preserved its diversities until 1983.

In 1983, United Democratic Front (UDF), representing 575 organizations including trade unions, community groups, etc., was established for opposition to apartheid with a claim of necessity of unity for struggle (Thompson, 2014, p.228-229).

It should be noted that even though the establishment of United Democratic Front (UDF) unified the anti-apartheid movement, during the apartheid regime, the victims had been successful to organize diversely in various organizations such as the ANC, PAC, women organization, student organizations, separate organizations of Indian and Coloured, trade unions, etc. Furthermore, although the United Democratic Front was seemed as the unification of Anti-Apartheid movement, it still carried diversities with its representation stress. And UDF was still different from narrative of Apartheid consideration of homogenous blacks because it was unification of different organizations for stronger opposition.

Thus, to accept their active political agent status for this victory at least they have to be differentiated in the report.

3.2.3. International Community and the fall of the Apartheid Regime

Apartheid was not the domestic problem of the South Africa; international relations had an impact on the resolution of the conflict. This part summarizes relations of international community and fall of Apartheid Regime.

Although, at the beginning Thatcher government in the UK and Reagan administration in the USA had not taken a position regarding the apartheid regime due to their anti-communist agenda, it become hard even for them to neglect practices of the apartheid regime thanks to the growth of anti-Apartheid movement in the international community. Some measurements taken against South Africa and its apartheid regime functioned effectively. For instance, in 1973, an international embargo was applied. Several states including Zambia, Zimbabwe, Argentina, etc. took position to fight with the apartheid regime through the African Fund. South African government could not resist internal unrest coupled with the pressure of international isolation, so they lifted the ban on the ANC, released Nelson Mandela in 1990 and started the negotiations (Harshe, 1991, p.439-441). Between 1989-1994, South Africa surprised the world, and the process continued with the transition of the government from the National Party – white supremacist government – to the ANC under the leadership of Mandela (Thompson, 2014, p.241).

3.2.4. Negotiation Process for Peace

It became evident for both parties that the conflict cannot be sustained forever. While the apartheid government convinced that they could not sustain their white supremacist regime, the anti-apartheid movement realized that they could not overthrow the apartheid regime (Thompson, 2014, p.243). Thus, negotiation seemed to be the only possible way. The government took the initiative and started negotiations with the ANC due to the ANC's popularity. The ANC was the favorable negotiation partner for the government because the ANC was a

chance for them to ignore their principal rival: The Pan Africanist Congress (Thompson, 2014, p.244). However, this does not mean the end for South Africa's negotiation process because the ANC could take initiative to include participation of other victim organizations. It was a possibility for the ANC because, as claimed above, since neither the anti-apartheid movement nor the government was capable of solving the problems by themselves. Thompson states that the government's committee had several meetings with the other ANC leaders along with Mandela, such as Oliver Tambo, Thabo Mbeki, etc. Even though Mandela rejected conditional freedom offers or some other conditions of the government initially, he did not close the possibility of negotiations to bring an end to the apartheid regime. After long dialogues and Botha's loss of the presidency, who was prime minister between 1978 and 1984, and state president between 1984 and 1989, Mandela and newly elected president Willem de Klerk agreed on Mandela's conditions for negotiations, and the negotiation process was started (Thompson, 2014, p.242-246).

Until the negotiations, heterogeneous character of the resistance movement was preserved, even in the unification with UDF through stress on representation of participant organizations. On the one hand, it might not practical to continue negotiation with several actors from the resistance movement. On the other hand, even in the harshest moments of Anti-Apartheid movement when the oppression was intense, the movement somehow kept its diversities. Nevertheless, during peace negotiations, the black resistance movement was represented as a homogenous group. The problem could have been solved through publicly open process from both sides but especially from Anti-Apartheid Movement side.

Even though the ANC was turned to be the only representative of the anti-apartheid movement in negotiations, it should be noted that before the final agreement was reached, there existed serious disagreements regarding formal negotiations even in the ANC. For instance, the exiled members of the ANC were not fully informed about Mandela's meetings, and they were deeply divided about the formal negotiations with the regime. This contradiction could be an

important sign about Mandela's failure to manage publicly open negotiation process. As a result of this process, in 1989 in Zimbabwe, "Harare Declaration" was issued that emphasizing the possibility of negotiations' depending on regime's attitude whether the government was genuine and serious about it or not (Thompson, 2014, p.246).

One of the most critical challenge for negotiation process came from guerilla forces. Thompson states that Mandela's independent negotiation with the government was shocking for guerilla forces, and they became suspicious of Mandela (Thompson, 2014, p.247). Even though convincing guerilla forces might not be practical for peace negotiations, Mandela's exclusionary attitude towards them is apparent. As a result of this process, after a heated debate in the ANC's executive council, Mandela announced the decision to end the armed struggle, which was advised only by Joe Slovo, the former head of military wing of the ANC (Thompson, 2014, p.248). These developments during the negotiation process are the proof of exclusion of heterogeneous voices within the anti-apartheid front.

Another radical challenge within Anti-Apartheid Movement arose from Mac Maharaj, an Indian member of the ANC, who created an underground revolutionary network, Vula operation. In July 1990, the police force destroyed Vula, so they did not achieve much (Thompson, 2014, p.248). Even if Vula Operation could not have a remarkable impact on the ongoing process, it was a sign that there was no agreement on the negotiation process within the anti-apartheid front. Thus, despite exclusionary attitude of the ANC, the heterogeneous voices within Anti-Apartheid Movement still existed during negotiation process.

Moreover, Mangosuthu Buthelezi, the Chief of The KwaZulu Homeland and the province of Natal, and his organization Inkatha Freedom Party (IFP) was important political organization in Anti-Apartheid Movement since 1975. Mangosuthu Buthelezi was a Zulu nationalist and contended with the ANC's broader definition of the South African nation, which is why he left the ANC.

The IFP was another focal point of opposition towards Mandela and his independent negotiation process. He was frustrated and resented their exclusion from the negotiation process with the government (Thompson, 2014, p.249). The exclusionary attitude of the ANC was apparent again, but this time against the IFP. Buthelezi reacted differently from other figures excluded in Anti-Apartheid Movement: He switched side. Buthelezi and the government turned to be partners against the ANC. As a result, a fight between the IFP and the ANC took place. In 1990, political violence led to lots of losses in the Johannesburg areas as well as in KwaZulu and Natal (Thompson, 2014, p.250). After all, the violence took place during the peace negotiations as a result of exclusions of the IFP. Moreover, the IFP was not the only dissident voice in the United Democratic Front (UDF), the Congress of South African Trade Unions (COSATU) had contradictious opinions about negotiations too (Thompson, 2014, p.250). The opposition to negotiation process was rooted in COSATU's fear of losing black interests, and in lack of many ANC members' trust in Mandela due to his exclusionary attitudes during the negotiations and his failure to manage publicly open negotiations, which Mandela pursued without consultation with his fellow prisoners or with the exiled ones (Thompson, 2014, p.250). The existence of diverse opinions about the ongoing process had been critical during negotiations because the diversities would be references points for the measurement of participation to the transitional justice process.

In this context, in July 1991, after 30 years, the ANC held its first conference with an attendance of 2444 delegates. Since the next most powerful figure Oliver Thambo was unable to be a candidate due to his health conditions, there was no possible rival to Mandela in the race for the presidency of the ANC. Despite many reservations of delegates, Mandela was chosen as the president of the ANC and 66 members of the National Executive Committee were elected in the same conference (Thompson, 2014, p.251).

The tension was high in the IFP's leader Buthelezi's side. The final solution to settle the issue was developed by de Klerk and Mandela by forming a forum to

determine grand rules for negotiations: A Convention for a Democratic South Africa (CODESA). CODESA was composed of 12 members under two chairmanships: one from the government and other from Indian. CODESA was boycotted by the PAC, Azanian People's Organization (AZAPO), and Conservative Party. The former two were the extremist side of Africans and the latter was the right-wing party of the whites (Thompson, 2014, p.252). On 26th May 1990, CODESA was failed due to high tension, and it broke down.

Thompson states that in the period between the drafting of the interim constitution on 18 November 1993 and the election held between 26 and 29 April 1994, the tension in South Africa was so close to spark a civil war. It was apparent that conflicting parties had no intention of participating to the elections. The key actors with military capacities, like the Conservative Party, the IFP, the governments in Ciskei and Bophuthatswana, the PAC, and AZAPO failed to complete the bureaucratic procedures necessary for registering elections, which was a clear sign of their uneasiness with the negotiations. It is interesting to observe that during this turbulent period an unlikely alliance between Volksfront – the racist party of whites, governments of Ciskei and Bophuthatswana, and the IFP was formed on the grounds of demanding a loose confederation for South Africa. It should also be noted that the intensified armed conflict during this process led to considerations about the ANC's capacity for carrying the process (Thompson, 2014, p.259-260). To overcome challenges during peace negotiations, before the elections, both Mandela and de Klerk spent too much effort to convince Viljoen – the leader of Volksfront – and Buthelezi – the leader of the IFP – to attend the elections. During these peaceful talks between leaders of the opposite sides, Mandela announced serious of concessions such as broader powers to provinces, more protection to both Afrikaners and Zulu culture, the unification of KwaZulu and Natal provinces, etc. (Thompson, 2014, p.260). As a result of these negotiations, Viljoen established a new party to attend elections: The Freedom Front Party (Thompson, 2014, p.260).

The most violent moment of negotiation period was the Shell House Massacre. While Mandela and the president de Klerk were continuing peace-talks with the IFP leader Buthelezi, on 28th March 1994, the IFP staged the demonstration in Johannesburg with attendance of thousands of Zulus to boycott elections. The ANC securities opened fire to the protestors and killed fifty-three people; most of them were from the IFP (Thompson, 2014, p.261). Even if the ANC tried to justify what happened in Johannesburg, as the TRC also stated, this violence could not be justifiable. Although Mandela, de Klerk, Independent Electoral Commission (IEC), and Transitional Executive Council worked hard to settle down the tensions, Buthelezi insisted on the independent Zulu Kingdom. As a concession to Buthelezi, Mandela and de Klerk proposed KwaZulu/Natal province to an opportunity to have their own constitution and to form their own police forces. However, Buthelezi rejected these offers. As a result, de Klerk and Mandela decided to continue elections without the IFP (Thompson, 2014, p.261-262). This obsession about a united South African state reminds an establishment of a nation-state, despite the constituting symbol of South Africa was "reconciliation." Even though the new government presents its unitary approaches as a necessity for reconciliation, this focus on united people and indivisible territory is generally seen in establishment process of nation states, which cannot be grasped fully without considerations of exclusionary practices.

Following these tensions with the IFP, mediation between two sides was took place. Nevertheless, the efforts of mediation did not succeed at first, later Kenyan member of the group finally persuaded the IFP and Buthelezi to compete in the election. The IFP joined the elections a week before elections (Thompson, 2014, p.261-262). Thus, even the elections with universal suffrage finally took place for the first time since the liberation of South Africa, the path that went to elections was not easy, included high tensions.

The elections took place on 26th-29th April 1994, and the results were announced on 6th May 1994. The elections and Independent Election Committee was exposed to tense criticisms. These criticisms claim that they were not independent

despite their names. The results were a clear victory for the ANC: the ANC won 252 seats by getting the 62.65 % of votes, National Party won 82 seats and 20.39% of votes, and the IFP won 43 seats and 10.54% of votes. Mandela was elected as the president (Thompson, 2014, 263-264). As stated above, The Promotion of National Unity and Reconciliation Act/Act 34 was passed in the parliament to establish the Truth and Reconciliation Commission. That is why the negotiations for elections are also crucial as the consultation of civil society to the parliament to establish the TRC. Due to this, the negotiation process was explained in detailed.

3.2.5. Negotiations for the Establishment of TRC

The Promotion of National Unity and Reconciliation Act was passed in the Parliament on 19th July 1995 to establish Truth and Reconciliation Commission in South Africa with its 17 commissioners and specified objectives (Zyl, 1999, p.654-655). The Act was prepared with a consultation with civil society, including two international conferences analyzing the global examples of truth commissions (Hayner, 2011, p.27). According to Lyn S. Graybill, the democratic formation of the TRC is the critical feature of it that distinguishes it from the other examples of truth commissions. This may be the first example of officially encouraged public debate for the establishment of truth commissions (1998, p.104). However, at that point, this thesis has serious reservations for the appreciation of the participatory approach adopted during the TRC's establishment phase. The reservations were related with its establishment with the Act that passed through the Parliament. Who were represented in the Parliament? As the previous part showed, before elections, during peace negotiations the ANC and Mandela had an exclusionary attitude towards several organizations and figures within the Anti-Apartheid Movement. They could not enable participation of heterogeneous actors during peace negotiations. And they could not participate in elections or did not have adequate time for preparation for the elections, as observed in the IFP case. Mandela and the ANC also could not achieve to manage negotiation process transparently. Even sometimes their

exclusionary attitude led violation too such as Shell House Massacre. Thus, even though during the establishment phase of the TRC was continued with consultation of civil society, the establishment of the TRC was far from appreciation in participation sense.

3.2.6. Mandate of TRC

The mandates of the TRC and Mandela's speech he gave after he won the elections have some common reference points: Stress on reconciliation and non-recurrence (Thompson, 2014, 264). Especially reconciliation is one of the most central symbols of the TRC and its mandate. The TRC was aware that its amnesty committee would be criticized a lot and they justify their preferences of restorative justice rather than criminal prosecutions depended on reconciliation too. For instance, in Volume I of TRC, the preference for restorative justice and its relationship with "reconciliation" are stated as:

> We believe, however, that there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation. (TRC, 1998, p.9).

Reconciliation symbol is used also for the sake of reaching truth in the TRC. One of the critical figures of the anti-apartheid movement, Kader Asmal, who played an essential role in the establishment of the TRC, stated that "[w]e sacrifice justice for truth so as to consolidate democracy, to close the chapter of the past and to avoid confrontation" (Graybill, 1998, p.103). Method of the TRC that sought truth through amnesties and reconciliation has been heavily criticized in the literature. For instance, as Chapman and Ball state that "…the data from the Amnesty process played almost no role in the substantive evaluations in the TRC report" (Chapman & Ball, 2001, p.25). The focus on reconciliation or avoiding confrontation focus was observed during the negotiation process. For instance, every time when Mandela disagreed with the other organizations of the anti-apartheid front, such as the PAC and the INF, he applied reconciliation as a justification of his exclusionary attitude. There existed various challenging

opinions within the anti-apartheid movement and these diversities and challenges were removed or in Asmal's wording "sacrificed" for the sake of reconciliation.

In the first Volume of TRC Report, there is a part about terminology. Due to opposition of some commissioners, justifications regarding TRC's using the term of 'victim' rather than survivors are included. In that part TRC defines victims as "when dealing with gross human rights violations committed by perpetrators, the person against whom that violation is committed can only be described as a victim" (TRC, 1998, p.59). In the following part of the Volume, the report defines perpetrators too. These definitions were depended on the gross human rights definition of the constitutive Act for the TRC. In that Act, the gross human rights are defined as such:

> gross violation of human rights' means the violation of human rights through - (a) the killing, abduction, torture or severe ill treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to 10 May 1994 within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive. (TRC, 1998, p.60).

The definitions of perpetrators and victims depended on the opposite side of this gross human rights definitions. Physical harm is the only indicator of human rights violations according to this definition.

The mandates of the commissions are important outcomes of the establishment process because mandates designate the framework of investigations. In this regard, the human rights definitions are critical for the final results of the commissions. Participation of the conflicting sides during the establishment phase is critical in that sense. The mandate of the TRC accepted only physical harms as a human rights violation in definition as it was showed above. However, the Apartheid Regime did not violate victims only in physical sense. It should be underlined again: even Apartheid itself was human right violation.

3.2.7. Commissioners

In addition to the mandates of the truth-seeking mechanisms, the impact of the commissioners as implementers is undeniable. Hayner states that commissioners decide the policies and final content of the commission's report (Hayner, 2011, p.212). The thesis, in this part, studies the process for the commissioner selection by focusing on the criteria applied for it.

The selection criteria were “fit and proper who are impartial and who do not have high political profile”. The criteria for the selection was vague at some points. The main adjectives underlined in the applied criteria, “fit” and “proper”, are not criteria that anyone can measure objectively. In addition to them, in the context like the apartheid regime, it was hard to be neutral and also in the same vein, what are the objective criteria between high and low political profiles.

The process for the selection of commissioners of the TRC had three stages. At the first stage, an independent selection panel was established. The selection panel was composed of representatives of human rights organizations. These representatives called for nominations from the public too. The duty of the selection panel was to interview the candidates, which would take place publicly. The TRC received three hundred nominations. The number of candidates decreased to 50 depending on the selection criteria mentioned above. The second stage was the public interview of the candidates by the selection panel. After the interviews, the number of candidates was decreased to 25. The third stage was the appointment of the commissioners. The shortlist was sent to President Nelson Mandela for the final decision. He appointed 15 commissioners from the shortlist, and added two commissioners, who were not on the list, “to provide geographic and political balance” (Hayner, 2011, p.212). Even though the selection of commissioners included publicly open processes like public nominations and public interview of the candidates, the final decision still belonged to Mandela.

South African case was unique also with its crowded commissioners. They had a significant impact on the implementation of the commission because they all

worked full-time basis. Because of this full-time job, they played a more active role than staff in the decisions during the commission. Because of their numbers, each of them was responsible for administering regional offices, committees, etc. Their professional backgrounds had an impact on their methodologies to find the truth. Four of them came from a religious background; five from medicine, psychology and nursing; seven from the law; three from politics; and three from NGOs. For instance, Archbishop Desmond Tutu, as the Chair, was criticized frequently because lots of commenters hearings looked like church service rather than a judicial process (Chapman & Ball, 2001, p.18). Like their professional backgrounds, their gender and ethnic identities were critical in their representation and the implementation process of commission. Out of seventeen commissioners, nine were men, and the rest of them were women. The commissioners were diverse in ethnicities: Two of them were Afrikaners, four were English speaking Whites, two were Indian, two were Coloureds, and rest seven were Africans (Thompson, 2014, p.275).

3.3. Guatemala

From the outbreak of civil war in 1960 to signature of the peace accords between the government and coalition of the guerilla forces in 1996, around 200 000 people were killed in the course of waves of government repression and armed conflict (Arriaza & Roth-Arriaza, 2010, p.205). After peace accord, transitional justice process was initiated to confront with the 36 years of civil war in Guatemala. In order to comprehend participation in transitional justice process of Guatemala, this part studies contradictions causing the civil war, the civil war period, conflicting parties, the negotiations for the establishment of the commission, mandates of the commission and commissioners.

Guatemala part includes a discussion regarding the historical background of the conflict. Specifically, in Guatemala, Laura J. Arriaza and Naomi Roth-Arriaza claim determining the exact preparatory historical moment for the conflict is a contested question (Arriaza & Roth-Arriaza, 2010, p.207). According to them, along with Spanish invasion, overthrown of elected Arbenz government by the

CIA-backed coup in 1954, and insurgency and guerilla movement of 1960 are three historical moments that one can determine as the historical background of conflict (Arriaza & Roth-Arriaza, 2010, p.207). They present these three as options of this determination but according to this thesis these three are equally crucial and necessary to comprehend historical background of the conflict.

3.3.1. Contradictions Leading the Civil War

Guatemala became fully independent in 1841, but it was merely a remedy for the suffering because political instability ruled the country since the 16th century. Mitchell A. Seligson summarizes Guatemala as a country that has experienced decades of coups, repressive military regimes, and horrible civil war until the establishment of democracy, the process of that began in 1986 and finalized with the peace in 1996 (Seligson, 2005, p.202). Since independence from Spain in 1821, the struggle between liberals and conservatives has dominated the political space in Guatemala. In 1871, the liberals took power from conservatives, and Guatemala turned out to be a country that the rule of small elites was institutionalized (Seligson, 2005, p.202). The rule of elites guaranteed the transfer of government from one group to other as the shift between them did not essentially change life of large number of Mayan Indian groups. As Seligson claims, the Mayan Indian population was turned to be indentured servants of the ladino minority to survive (Seligson, 2005, p.202). Thus, the transfer of government to liberals did not change political situation in Guatemala essentially because ethnic discrimination and domination of small elites over majority were continued. This political scheme had been sustained without serious challenges until the presidencies of Juan José Arévalo and later Jacobo Árbenz, who were the first and the second democratically elected presidents.

Ethnic discrimination in Guatemala had also economical exploitation dimension. This part covers the legal foundations of the exploitation of the Indigenous populations, and the international dynamics of it with a focus on the interests and activities of the US concentrated in the United Fruit Company. Liberal dictator Justo Rufino Barrios (ruled between 1873-1885) opened the lands of Church and

indigenous communities to large landowners and coffee growers for cultivation, who dominated economics and politics of Guatemala. The economic power and political power were not distinct in that sense. Justo Rufino Barrios enacted vagrancy laws that forced the Indigenous population to labor in coffee plantations (Booth, Wade & Walker, 2015, p.174). The conditions for the Indigenous population could be summarized that they first lost their lands, then they were coerced to labor for the benefit of small elites by governmental actions. At that point, the foreign investors' impact on the economic and political life of Guatemala is needed to be clarified. The US-based United Fruit Company (UFCO) and International Railways of Central America were the two focal points in this sense. At the beginning of the 20th century, UFCO dominated the economy, with its banana production. UFCO turned out to be a monopoly that squeezed out the whole bananas production in the country (Booth et.al., 2015, p.174). International Railways of Central America was a subsidiary of the UFCO in that it owned 887 miles of railroad track in Guatemala (Schlesinger & Kinzer, 2007, p.150). Foreign investors' economical domination had an impact on political sphere as vagrancy law, preparatory phase of 1954 coup and coup itself would prove. Thus, in Guatemala political oppression and economical exploitation were not totally separate problems. As Seligson states, repressive legislations forced Indians to labor, and governments systematically denied Indigenous' democratic rights and liberties (Seligson, 2005, p.203).

Before the civil war, there existed another turning point for Guatemalan history: The 1954 Coup, overthrow of elected president Arbenz. The reformist era of Guatemalan history started with Juan Jose Arevalo Bermejo's government. Arevalo began with several reforms such as social security, labor code, the professionalization of army, rural education and public health. However, most importantly, Arevalo encouraged labor movement through unions and peasant organizations, and Arevalo also encouraged open elections (Booth et.al., 2015, p.174). Despite Arevalo's own importance to the Guatemalan politics through reforms, Arevalo opened the way of his successor: Jacobo Arbenz Guzman. In

1950, Arbenz was elected, and Arbenz developed social reforms despite the growing opposition of conservatives and the US (Booth et.al., 2015, p.175). The most important actions of Arbenz, which caused the coup overthrowing him, were the 1952 Agrarian Reform Law and legalization of Guatemalan Labor Party (PGT). With Agrarian Reform Law, the government began to expropriate and redistribute farmland to 100,000 peasants (Booth et.al., 2015, p.175). Thus, as Schlesinger and Kinzer state, this land reform was decisive action for the US to act because, with this law, lands of the UFCO would be seized (Schlesinger & Kinzer, 2007, p.149). The UFCO had had some other concessions from Guatemalan government too, such as the exemption from internal taxation, the duty-free importation, and the guarantee of low wages (Schlesinger & Kinzer, 2007, p.153). Thus, unsurprisingly the UFCO was highly dissatisfied with Arbenz's reforms. On 20th April 1954, a formal complaint was delivered to Guatemalan authorities by the US State Department (Schlesinger & Kinzer, 2007, p.156). Thus, this crisis exceeded the company and turned out to be a diplomatic issue. This formal complaint was biggest proof that political power and economical power were not separate from each other. Finally, in the same year, the CIA-supported National Liberation Army (NLA) led by Colonel Carlos Castillo Armas invaded Guatemala. Armas prepared its small forces in the neighbor states in Honduras and El Salvador. In the absence of the army's support, Arbenz was forced to resign to leave the post to Colonel Armas (Booth et.al., 2015, p.174).

3.3.2. Civil War

When Armas, seized the power through coup and became president, he cancelled the Agrarian Reform Law and crushed the labor and peasant movements (Booth et.al., 2015, p.174). Armas' repression regime and his National Liberation Movement (MLN) became institutionalized as a political party. The Arbenz government stood as a break within this violent and suppressed political life of Guatemala until the coup. Arbenz tried to change system of exploitation through reforms such as agrarian reform; however, successor of Arbenz, Colonel Carlos

Castillo Armas cancelled reforms as soon as he took the power and restored the system of exploitation. In 1957, after a leftist sympathizer palace guard assassinated Colonel Castillo Armas in the palace, the army brought General Miguel Ydigoras Fuentes to the presidency as Armas's successor (Booth et.al., 2015, p.175). Despite the changes in the presidency, the control of the army and powerful elites over the politics was continuous and abiding since the overthrow of Arbenz.

Despite this repressive political situation, there existed resistance, which will be mentioned briefly in this part. The first nucleus of the armed resistance that prepared the civil war could be shown as the failure of a coup attempt in 1960 by the reformist wing of the army to overthrow the Ydigoras government. The escaped coup plotters organized several militant groups (Booth et.al., 2015, p.176). The developments in Guatemala obviously were inspired by developments neighboring states, especially by the success of revolutionaries in Cuba in 1959. Two organizations appeared with the ideology of Marxist-Leninism and guerrilla war strategy: Revolutionary Armed Forces (FAR) and the 13th November Revolutionary Movement (MR-13). The FAR and the MR-13 were two separate organizations against Ydigoras government and the military. In this context, the US increased its military aid to Guatemala (Booth et.al., 2015, p.176). This military aid was proof that foreign investors' impact on Guatemalan domestic politics continued. Although the army decided to delegate to the government to the civilians, the army's control over the politics intensified despite the elected president, Julio Cesar Mendez Montenegro from Revolutionary Party (Booth et.al., 2015, p.176). Thus, the polarization in the society of poor and rich, and of Ladinos and Mayans was deepened, so the armed struggle or civil war was not unexpected in this context. Nevertheless, as underlined by the Historical Clarification Commission's (CEH) report, the power of the guerilla forces did not match the power of the army that had a professional structure and receiving the support of the US. According to the CEH Report,

"Guatemala Memory of Silence", 93% of the violations were under the responsibility of the army (CEH, 1999, p.20).

Social-economic rights violations were the bases of political and human rights violations in the Guatemalan case. The economic exploitation was also depended on the ethnical divisions and the CEH reports claims that the violence ended up with genocide. Before the CEH and its periodization of the civil war, a couple of words is needed to be said to clarify the context. In the late 1970s, Ladinos, non-indigenous Guatemalans, appropriated communally or privately lands of the indigenous highlands (Booth, Wade & Walker, 2015, p.177). As a result of the unequal land distribution, even though grand domestic product (GDP) had risen between 1962 and 1980, due to the legislations that regulated land distribution and working conditions of Indigenous populations, the inequalities had been deepened: The rich became richer and poor became poorer (Booth et.al., 2015, p.177). The situation changed in the period between 1981 to 1985; a recession occurred due to commodity prices, political unrest, and relatedly capital flight (Booth et.al., 2015, p.178). By looking at these situations, the civil war in Guatemala was depended on both ethnical division and unequal wealth distribution.

According to the CEH's report, the civil war in Guatemala could be periodized into four phases. The first phase was between 1962 and 1970 when operations were concentrated in the eastern part of the country, and the victims were peasants, members of rural unions, teachers of the universities and secondary schools, and guerilla sympathizers (CEH, 1999, p.22). This period was the same period when ladinos confiscated lands of Indigenous population. The second phase was between 1971 and 1977, during which victims were included leaders of communities and unions, catechists, and students (CEH, 1999, p.22). The third phase covered the period between 1978 and 1985. The victims of this period were mostly Mayans, and the area of conflict was the south coast and the capital (CEH, 1999, p.22). The last period of the civil war was between 1986 and 1996. In this period, repressive actions were selective since the main target of the violence was

mostly the members of The Communities of Population in Resistance, which effected both Mayans and Ladinos (CEH, 1999, p.22).

3.3.3. Parties to the Conflict

To decide who are the parties is hard in civil wars due to its chaotic environment, especially if it continues as long as Guatemala case. Despite the diverse organizations during the conflict from both sides, the army and representatives of guerilla forces sat in the negotiation table as two opposite poles. Before explaining divergent agents of both sides and how it ended up with representatives of two poles, it should be noted that representatives of the guerrilla side had little capacity to represent the Indigenous populations as a whole. The victimized population who might not prefer armed conflict and people who were victimized on economic bases were not represented by guerilla forces obviously.

As stated above, first two insurgent organizations were Revolutionary Armed Forces (FAR), with its passive and resurfaced periods, and the 13th November Revolutionary Movement (MR-13). In 1978, after the restrictions on the unions were relaxed, a wave of strikes was engaged. In 1978 several boycotts followed it too. In this context, FAR appeared again with two new indigenous based guerilla organizations: The Guerrilla Army of the Poor (EGP) and The Organization of the People in Arms (ORPA) (Booth et.al., 2015, p.179). In addition to guerrilla organizations of the late 1970s, there existed other opposition organizations too. For instance, in the 1960s and 1970s, hundreds of agrarian cooperatives and unions gathered in the Christian Democratic Party (PDGC) (Booth, Wade & Walker, 2015, p.179). In addition to PDGC, in the 1970s Christian base Communities (CEBs) appeared in poor rural and urban Guatemala (Booth et.al., 2015, p.179). In this period, in spite of military rule's intense repression, civil society became more active as opposition parties such as Democratic Socialist Party (PSD) and United Front of Revolution (FUR) were also established (Booth et.al., 2015, p.179). As these various resistance organizations showed, Guatemalan resistance movement was heterogeneous too. Like South African

case there were various, non-homogeneous agents existed until the unification of insurgents for more powerful resistance. Insurgent forces united under the name of Guatemalan National Revolutionary Union (URNG).

Army's counterinsurgency movement destroyed Edgar Ibarra Guerilla Front (FGEI), that was another guerrilla organization affiliated with the FAR, and most of the FAR during 1968 – 1970 (Booth, Wade & Walker, 2015, p.179). Until the unification of Guerillas in the name of the URNG, there existed other divergent opposition focal points too such as The Democratic Front Against Repression (FDCR), January 13th Popular Front (FP-13), and The Guatemalan Committee of Patriotic Unity (CGUP). The emphasis on diverse actors is important because resistance was heterogeneous despite the violent oppression. On the other side, the army created its own paramilitary forces: The Civil Defense Patrols. The most striking fact about the Civil Defense Patrol was that the army recruited Mayan men forcibly for their atrocities. The majority of members of this paramilitary organization were indigenous populations under the Ladino commissioners (Arriaza & Roth-Arriaza, 2010, p.208).

3.3.4. Negotiations for Establishment of the CEH

Although the UNRG turned to be the united force of the opposition, it should not be forgotten that during the conflict, the opposition had diverse organizations. However, the negotiation process continued between two opposite poles under the mediation of the United Nations, which accelerated peace negotiations in 1994 (Booth et.al., 2015, p.185). The negotiation was inevitable because both sides could not overcome each other. Even though the army was in a more powerful position militarily vis-a-vis guerilla, they could not maintain their support from the international society, and guerilla forces were able to continue the struggle. Assembly of Civil Society was established in 1994 for advising negotiators. The Assembly was composed of political parties, NGOs, indigenous and women NGOs too (Booth et.al., 2015, p.185). After a lengthy negotiation process, on 29th of December 1996, the government and the URNG signed the Final Peace Accord. Although the Assembly of Civil Society was able to carry

diversities to the negotiation process, whether every distinctive opposition groups, some part of indigenous who do not support guerillas, peasant and labor organizations were represented in the negotiation process remained doubtful.

3.3.5. Mandate of the CEH

Before continuing with the distinguishing characteristics of the Guatemalan truth-seeking mechanisms, the importance of time period of the CEH should be underlined. The peace accord was signed in 1994, and accordingly The CEH investigated the period between 1962 and 1994. According to Chapman and Ball, this time period means that the beginning of the civil war was accepted as 1962 when guerilla insurgencies began. Furthermore, it means that investigation of the CEH excluded human rights violations that had taken place before 1962, like those related to the1954 CIA-supported military coup against the elected government (Chapman & Ball, 2001, p.13). According to this study, as stated above, the mandate of the truth-seeking mechanisms has the capacity of deciding the transitional justice process generally. Thus, accepting 1962 as a beginning means excluding political rights violations between 1954 and 1962 for Guatemalan people at least.

Chapman and Ball (2001) state that mandates of the truth-seeking mechanisms are distinguishing in shaping the conclusions of the commission. The priorities and nature of truth are determined by the mandates (p.12). According to this thesis, the mandates are decisive for the whole transitional justice process and also critical for the measure of participation of the transitional justice process. According to scholars such as Paige Arthur, Joanna R. Quinn, Mark Freeman, the mandate of the CEH was vague and narrow. A couple of examples can be presented to clarify. For instance, the CEH was not allowed to name individual perpetrators even though many criticized this “no-name” feature could weaken its investigation capacity (Chapman & Ball, 2001, p.13). According to Chapman & Ball (2001), the CEH was able to turn the disadvantages of the mandate to advantage because due to its “no-name” handicap, the CEH investigated the roles of the institutions and social structures that created violence (p.13).

Comparison of the CEH and the TRC in terms of mandates shows the narrowness of the CEH. For instance, Quinn and Freeman (2003) underline that the "reconciliation" and "reparation" were not explicit in the mandate of the CEH as much as in the TRC (p.1124). According to the chair of the CEH, Christian Tomuschat, the mandate included lots of restrictions, which they had difficulties in applying word-by-word. The solution found by the commissioners was following the "spirit of the mandate" rather than the actual mandate (Quinn & Freeman, 2003, p.1126). Thus, commissioners took initiative by interpreting this narrow mandate to obtain more broad results. The narrow and vague mandate enabled the commissioners to take the initiative. Guatemalan case shows that mandates and commissioners have an important impact on the conclusions and transitional justice process.

The results of the CEH was appreciated broadly. For example, Paige Arthur also affirms the results of the CEH created, but she still has reservations for the mandate. Paige Arthur states that the report of the CEH points the genocide against Indigenous People and it reframed the political debate in Guatemala (Arthur, 2014, p.207) However; Arthur harshly criticizes the method? Of the establishment of the commission. Arthur (2014) claims that the reason behind the vague mandate of the CEH was the result of the exclusion of Indigenous people from the negotiation process. The peace accord created the mandate of the CEH, and the government and the guerrillas were the only participants of the negotiations for peace (p.212). The exclusion of heterogeneous agents in the negotiations, especially those of from the victim side, had an undeniable impact on the mandates, results of mandates and indirectly in whole transitional justice process. If the commissioners had not taken initiative, this vague and narrow mandate of the CEH means that the truth commission would investigate in vague and narrow framework. Participation to the transitional justice process cannot be enough unless exclusion during the establishment process continues.

The negotiation process was highly criticized by civil society too. Hayner notes that victim groups and civil society representatives was interested a lot in the idea

of establishing the truth commission. They intensely lobbied with negotiators to influence the mandate. However, they failed in that sense, and they were excluded from the negotiations, and they boycotted the negotiations. Thus, they get angry, especially toward URNG to accept and sign the document, but finally, the commissioners were able to gain their confidence with their hardworking characters (Hayner, 2011, p.32). However, the commissioners' achievement in gaining confidence of civil society representatives did not change exclusion of civil societies' during negotiation process. The failure of the CEH in terms of participation of all parties in the establishment is obvious and undeniable. Another obvious fact about the CEH was this deadlock. Commissioners could only resolve it as implementers of the truth-seeking mechanism.

3.3.6. The Impact of Commissioners

Despite the problems of the mandate, as mentioned above, the report of the CEH was appreciated. The reason behind the success of the CEH was related to the initiatives of the commissioners. The Guatemalan Historical Clarification Commission was a hybrid commission with its international chairman and two national commissioners, for the representation of the army and the guerilla. According to Christian Tomuschat, a prominent professor of international law, also the legal identity of the CEH was located in between domestic and international law (Hayner, 2011, p.211).

The UN Secretary-General Kofi Annan appointed Christian Tomuschat as the chairman of the CEH. Tomuschat appointed the remaining two commissioners with the agreement of the two negotiators. As the mandate directs, one would be "a Guatemalan of irreproachable conduct", and the other would be selected from a list that was proposed by Guatemalan university presidents. After this selection process, Otilia Lux de Coti and Edgar Alfredo Balsells Tojo became the other two commissioners (Hayner, 2011, p.33). As the negotiation process already proved that the Indigenous population could not find representation in the appointment process of the commissioners; however, they still counted as successful. As it was stated above, commissioners took initiatives in the

implementation of the mandate of the CEH. There existed some concrete conditions that enabled them to take initiatives. First, small number and part-time working conditions of commissioners are strategic in two ways. They could easily set policy and make significant decisions, unlike crowded commissioners of the TRC. Moreover, their part-time based work enables senior staff to have more responsibility for implementation (Chapman & Ball, 2001, p.18). Moreover, unlike the TRC's long term organizational structure, the CEH was frequently reorganized from July 1997 to February 1999, although technical areas such as database were kept together. This feature of the CEH enabled it to cope with challenges because staff never accustomed to any given role (Chapman & Ball, 2001, p.19). Although all these features of the CEH seemed as shortcomings, they all benefited the results.

According to this thesis, the most crucial factor in the success of Guatemalan report lies in its co-work with civil society. Although representatives of civil society failed to affect the mandate during negotiations, they affected the implementation of the CEH. There existed another truth-seeking mechanism before the CEH: The Recovery of Historical Memory Project of the Catholic Church's Human Rights Office (REHMI), a truth-seeking mechanism of a non-governmental organization. The CEH incorporated the data of REHMI (Hayner, 2011, p.33). Two days after the release of the report of the REHMI in 1998, which is called "Guatemala Never Again", Bishop Juan Gerardi Conedera, who announced the report, was murdered (Isaacs, 2009, p.119). Along with the database, REHMI provided the CEH, REHMI was influential in breaking the silence of Indigenous People. They kept their silence due to fear for long times and the trauma they experienced (Isaacs, 2009, p.122-123). The participation of victims in Guatemala were achieved by REHMI. The impact of REHMI on the success of the CEH is crucial from that perspective.

3.4. Comparisons of South Africa and Guatemala

The main problem about transitional justice is related with the conflicting parties' loss of political agency. The aims of the transitional justice are political in nature,

and the ways of transitional justice are legal inevitably. The legal political dichotomy led the loss of agencies in the transitional justice processes in South Africa and Guatemala because the overwhelming legal formalism did not leave any space to agents where they can act. The deadlock between the aims and the methods of the transitional justice could be solved through effectively increasing the participation. Hence, to solve this deadlock, the participation should go beyond the attendance. In this chapter, South African and Guatemalan cases are analyzed within this framework. More openly, the participation of the two cases are studied. In this part of the chapter, the comparisons between two cases are presented.

3.4.1. Institutionalized Discrimination through Legislations

In both cases, the racial or ethnic discrimination stood at the center of the conflict. Ethnic discriminations had economical dimensions also for both of the cases. These discriminations were institutionalized because there existed legislations that enabled these discriminatory practices since the early time periods in both cases too. For instance, in South Africa the 1911 Mines and Works Act and 1913 Native Lands Act had similarities with Vagrancy Laws of Guatemala in that the indigenous communities first lost their land and then they were forced to labor. Relatedly, the political power was not distinct from economic power, which is the second similarity of the South African and Guatemalan cases.

3.4.2. Diversities of Actors

Another similarity of the cases is that the diversity of agents within the resistance movement. Unlike the narrative about two opposite poles during the conflict, until the negotiation table, the divergency of resistance organizations persisted.

For instance, in South Africa, until the unification of the resistance under the roof of United Democratic Front in 1983, there were lots of organizations that had different focal points about Apartheid regime. For example, the PAC saw emancipatory movement should have been purer, so the PAC excluded whites

from Anti-Apartheid Movement. Furthermore, there existed other organizations such as the Federation for South African Women that focused on gender based Anti-Apartheid agenda.

In Guatemalan case, even though the negotiation table had two opposite poles, until the negotiations there were various organizations. For instance, along with several guerilla organizations, the Christian Democratic Party also had different agenda to resist, the Christian Democratic Party was composed of agrarian cooperatives and unions. Like South African case, in Guatemala at some point the unification of the Guatemalan resistance movement was seen under the name of Guatemalan National Revolutionary Union. The most important difference between these unifications for stronger resistance and the homogenous two poles during negotiations is that both the UDF and the URNG were composed of diverse organizations that gathered. On contrary, during negotiations, the ANC or the representative of guerilla forces excluded diversities on several moments despite they claimed they represented victims.

3.4.3. Exclusions During Negotiations

Exclusions are the most important indicators of failure in terms of the participation. If agents are excluded from the establishment phase of the transitional justice, they will also be excluded from the possibility to have impact on the new public space. Transitional justice is important because what transitional justice aim is establishment of the new public space. The important difference between attending and participation is also based on exclusion in that sense. If agents are excluded in negotiation phase, they could not have any impact on the ground rules directly in transitional phase and indirectly new political space. The establishment phases of the transitional process are critical because they have impact on the results of this confrontation and transition period, which will be elaborated later. Thus, the exclusion of the conflicting parties is one of the central indicators to measure participation, to extend attending towards participation. The exclusions took place in both South Africa and Guatemala during peace negotiations.

Despite the heterogeneity of the Anti-Apartheid movement in South Africa, the Anti-Apartheid front excluded its diverse voices in the transitional process. Peace negotiations were handled with the independent leadership of Mandela. During negotiations for peace, the dissident voices were raised from various actors such as guerilla forces, the PAC and the IFP. The PAC was excluded from the beginning of the peace talks, the government chose the ANC and Mandela as the negotiation partner. Furthermore, the unsuccessful Vula Operation was sign of the exclusions within the ANC, especially of the guerilla force side. And the most important moment that exclusionary attitude of the ANC appeared was the Shell House Massacre. The Shell House Massacre occurred on 28th March 1994 in Johannesburg toward thousands of Zulus and the IFP supporters who gathered to boycott elections. However, what ANC did in the Johannesburg, the Shell House Massacre, cannot be justified with references to peace or reconciliation. Mandela justified his exclusionary approach during negotiations by depending on peace, goodwill, and reconciliation. More importantly, the exclusion of other voices from anti-apartheid front led depoliticization of them. Thus, the heterogeneity of the movement lost in the transitional justice process and the diverse organizations of the Anti-Apartheid movement did not achieve to be an agent in the political space the way that they desired.

Guatemalan case also has severe participation problems starting with the peace negotiations. Despite the divergent civil society lobby efforts, they were excluded from the establishment of mandate, which harmed their participation. The civil society even boycotted the negotiations due to their exclusions. According to Laura J. Arriaza and Naomi Roth-Arriaza (2010), the CEH was incapable of comprehending the meaning of the conflict for people in rural, especially people from specific villages, towns, “hills” or other local spaces (p.206). They concerned only two parties that were in the war: The army and the guerilla forces. Laura J. Arriaza and Naomi Roth-Arriaza (2010) also note the exclusionary attitude of both the national actors and international actors mediated the peace

negotiations and claim that both national and international actors treated the country as an undifferentiated whole (p.206).

The exclusions in the transitional justice not only harmed participation during transitional justice, these exclusions have an impact on the results of the transitional justice process as claimed above. The time period that truth commissions investigate, or the definitions of the human right violations are the two points that have direct impact on the results.

First, since the TRC investigated between 1960 and 1994, the human rights violations that took place in Apartheid regime before 1960 were not included in the report of the TRC; however, the time limitation of the TRC is not the only reason for exclusion of all human rights violations. As Rosemary Nagy states, due to the dominant legalistic approach, transitional justice process tends to focus on civil and political rights or criminal acts. Thus, structural violence and social justice posit in the periphery of the process (Nagy, 2008, p.284). The TRC is also a suitable example in that regard. Rosemary Nagy underlines that even though the TRC accepted apartheid as a crime against humanity, due to the narrow definition of gross human rights violations, the TRC focused on the human rights violations that were only related with bodily harm (Nagy, 2008, p.284). Due to the TRC's mandate, the apartheid regime was considered as the context of the crimes, rather than the crime itself (Nagy, 2008, p.284). The violence that derived from poverty and racism remained in the background (Nagy, 2008, p.284). Furthermore, According to Chapman and Ball, due to the approach of the TRC, the system of apartheid seemed to be independent of both supporters and beneficiaries. Thus, the apartheid seemed like a mistake, that no one had the responsibility of it (Chapman & Ball, 2001, p.14). In sum, the exclusions during the establishment of the mandates affected the conclusions of the TRC through its terminology and time limitation.

Similarities of Guatemalan transitional justice process to the South African case in terms of the time period of investigation and definition of human rights violations have been observed. According to the mandate of the CEH, the

investigations covered the human right violations that occurred between 1962 and 1994, which means the investigations did not include the human right violations during the coup overthrowing the elected government in 1954. The political and social rights are included in the human rights, so at least the political rights of the communities were violated with the coup. Although the report of the CEH still pointed the USA involvement in the conflict through supporting the army during violations, and after the release of the report, Bill Clinton, the president of the USA at that time, apologized for their responsibility in the civil war, but the role of the USA in the 1954 coup was not investigated. Moreover, the impact of the exclusions observed in Guatemalan Truth Commission, especially in its narrow and vague mandate. Despite the problems of the mandate, report of the CEH was able to turn this disadvantage into an advantage with its macro analysis about the civil war. Report pointed the structural causes of conflict since the post-colonial period and highlighted the role of the authoritarian state, racist practices to protect the economic interests of the privileged minority and poverty in the conflict (CEH, 1999, p.17). The CEH also reported the acts of genocide towards Indigenous People and showed the legal documents against the genocide that had been violated during the conflict separately (CEH, 1999, p.38-41). The inclusion of structural violence of the report is seen rarely, and the CEH is affirmed in that sense.

3.4.4. The Problems in Selection of the Commissioners

The problems about the selection of the commissioners are centered around two problems. First problem was again related with the mandates: The vagueness of the criteria to become commissioners. The second problem was that appointment of the commissioners were far away to be public.

The selection criteria for the South African Truth and Reconciliation Commission were “fit and proper who are impartial and who do not have high political profile”. According to the mandate of the Guatemalan Historical Commission, criteria for the one of the commissioners was to be “a Guatemalan of irreproachable conduct”. The selection criteria of the both the TRC and the CEH

were far away from become objective. “Fit and proper” or “irreproachable” are vague, indefinite and also almost impossible within that long-term conflicts.

The second problem about commissioners include serious exclusions, the final decisions about commissioners were taken behind the doors in both of the cases. For instance, in South Africa publicly opened process had been implemented until the last phase of the commissioners’ selection. In the final phase, the shortlist was sent to President Nelson Mandela for the final decision. Mandela appointed 15 commissioners from the shortlist, but Mandela appointed the last two commissioners not from the shortlist. In Guatemala, UN Secretary-General appointed chairman of the CEH. The selection of the commissioners is important because the impact of the commissioners on the final result of the commissions is undeniable.

3.4.5. The Conclusory Observations for the TRC and the CEH

In the cases of South Africa and Guatemala, transitional justice practices would be expected to be unique due to geographical differences and inherently different characteristics of the conflicts. On the contrary, transitional justice process were applied in both cases with very slight differences. Considering the literature, the reason for these similarities may be from above approach of the legalist approach. Moreover, the local communities could not participate during the establishment phase of the transitional justice process in both cases, so they could not reach uniqueness of the conflict in the transitional justice process. Based on these observations, it could be claimed that even for the critical approach the need for extension of the participation is necessary to overcome this problem.

CHAPTER 4

CONCLUSION

The 20th century observed gross human right violations around the world and confrontations with this violent past. The literature and the implementation have been developed simultaneously. With a humanist point of view, the scholars and the policymakers have been trying to find a solution to the big question: “How can humanity deal with these gross human right violations?”. Related with the rise of legal-institutionalist democracy conceptualization, transitional justice has become prominent in “dealing with past” literature. Transitional justice has its own legal mechanisms to deal with the violent past such as criminal courts, truth commissions, etc. Furthermore, the aims of transitional justice are not only to confront with past, but also to establish democratic and peaceful regimes. Thus, the aims of transitional justice exceed its legal mechanisms because democratic regime establishments belong to the political. However, the tension between the legal and the political within transitional justice has not been studied adequately. The impact of the tension between the legal and the political within transitional justice has been observed around the participation problem. Thus, this thesis tried to answer how do conflicting parties become politically active agents in a necessarily legal transitional justice process. Or in other words, how could conflicting parties go beyond the attendees of the transitional justice process and participate in the process?

The existing literature sees participation as a problem. Basing the reference for distinction as to their approach to “the participation problem”, this thesis analyzed the relevant literature under the two poles: The legalist approach and the critical approach. The legalist approach attaches importance to institutions in order to establish democracy. The critical approach tries to increase participation

in the transitional justice process; however, the shortcomings persist. The shortcomings about participation in the critical approach could not be overcome because the critical approach tries to increase participation only in the implementation of transitional justice. However, according to this thesis, participation during the implementation could not go beyond attending the transitional justice process. In order to go beyond towards "participation", participation should be started from the beginning, starting from the negotiations that establish mechanisms of transitional justice. The truth-seeking mechanisms are decisive mechanism because truth-seeking mechanisms shape the entire transitional justice process. According to Lundy and McGovern (2008), the truth-seeking mechanisms could enable the decision-maker position of the locals in design, remit, and conduct of the transitional justice process (p.271). According to Lundy and McGovern, the possibility of decision-maker position of the locals in transition could be possible through the truth-seeking mechanisms. That is why the thesis analyzed two canonical examples of truth commissions – the South African Truth and Reconciliation Commission (TRC) and the Guatemalan Historical Clarification Commission (CEH) – with a focus on the establishment phases of the commissions and the participation of the locals in the process.

The tension between the legal and the political within the framework of transitional justice necessitates more clarification. Transitional justice has been applied in after conflict settings through its legal ways in order to bring reconciliation and democracy. Transitional justice necessarily applies legal mechanisms because of two reasons. First, confronting with past without falling the trap of revenge is only possible through legal formalism. Second, the rule of law is one of the most important differences between democracy and authoritarian regimes. Transitional justice is a political concept because its aims are political undeniably. Democracy, reconciliation or peace can never belong to legalism. Thus, transitional justice inherently carries this deadlock between the political and the legal. This deadlock can only be solved through the participation of the conflicting parties. Participation does not harm legal formalism but also

enables agencies to determine the framework and conduct of transitional justice and in the long run, determine the new public space after the transition. The scholars of the critical approach have noticed this problem; that is why the scholars try to increase participation in transitional justice. The shortcomings about participation continue still in critical approach because the critical approaches try to increase participation in the implementation of transitional justice. However, before implementation, there exist extraordinary moments that is the beginning point of transitional justice since the peace negotiations. Thus, the critical scholars fail to notice the importance of extraordinary moment inherent in transitional justice.

4.1. The Importance of Extraordinary Moments in Transitional Justice

The exceptionality aspect of transitional justice has been studied considerably within the literature. For instance, Ruti Teitel claims that transitional justice is an exceptional form of justice (Teitel, 1997, p.2011). However, Teitel focuses on the exceptionality of transitional justice through paradoxes of transitional justice in legal formalism. For instance, Teitel emphasizes the retrospective implementation of transitional justice, which is against how legal proceduralism is applied in consolidated democracies. From another angle, according to this thesis exceptionality of transitional justice and the importance of the establishment phase of the truth commissions depend on the extraordinary moment. That extraordinary moment exists just before the implementation of transitional justice. Carl Schmitt is important at that point to comprehend extraordinary political moment in transitional justice, and the transitional justice literature has a couple of references to Carl Schmitt. Line Engbo Gissel (2017) claims that the exceptionalism of transitional justice differs from Schmitt's exceptionalism. Gissel claims that even though transitional justice is also a response to the existential crises, the notion of transitional justice politics is defined by agency and negotiation, unlike Schmittian friend-enemy distinction (p.356). However, according to this thesis, both South Africans and Guatemalans were forced to negotiate because none of the conflicting parties could eliminate the conflict by

themselves. Hence, during the conflict, obviously, there did not exist any sovereign, unlike claims of conflicting parties, and negotiations are founding moments for the new sovereign or new regime establishment. Thus, there could not be a big difference between exceptionalisms of transitional justice and of that Schmitt discusses.

Although Gissel has an important point through claiming that the establishment of a new sovereign by negotiations could not properly fit the Schmittian framework. According to Schmitt (1985), like the decision of the extreme case, the sovereign also decides the way to eliminate the extreme emergency (p.7). Thus, the legal order also rests on the decision, not the norm (Schmitt, 2007, p.10). When we look at both Guatemalan and South African cases, we observe that neither of parties could take the decision to eliminate the extreme emergency case. More openly, nobody won a decisive victory over others and established sovereignty. Thus, neither Guatemalan nor South African cases do exactly fit the Schmittian framework. Nevertheless, applying Scmittian framework to transitional justice could be enlightening to comprehend the importance of the extraordinary moment of transitional justice.

David Dyzhenhaus accepts the relationship between transitional justice process and sovereign establishment more openly. Dyzhenhaus(2012) claims that the application of transitional justice policies is the breaking point; the division between the old regime and successor regimes rests in the transitional period. The problems for political actors in the transitional regime are how to re-establish the order (p.201). According to this thesis, a new peaceful and democratic regime, which transitional justice promises, is established during negotiations before the transitional regime. Because, even if transitional justice is exceptional as Ruti Teitel claims, due to its application of legal mechanisms, it needs some kind of a normal situation. According to Carl Schmitt (1985), in the chaos, there is no possibility to any norm. For legal order, a normal situation must exist, and the sovereign must exist to decide this normal situation actually exists (p.13). More openly, Schmitt claims that every legal order is based on a decision (Schmitt,

185, p.10). Thus, just before the transitional regime, this extraordinary moment exists during negotiations; the order must be established for the establishment of a mechanism of transitional justice. Thus, this thesis focuses on the establishment phase of the truth commissions in Guatemala and South Africa. Moreover, the reason behind the failure of the critical approach in participation is related to their failure to notice the importance of participation from the beginning of transitional justice.

4.2. Conclusions from South African and Guatemalan Cases

It is possible to draw two important conclusions from the experience of transitional justice in South Africa and Guatemala. First, exclusions during peace negotiations are observed in both of the cases. Second, as a result of these exclusions, the conflicting parties presented as two unitary and homogenous poles.

In South Africa, exclusions started since the negotiations between the government and Mandela, who was the prisoned leader of the ANC. Disappointments of exiled ANC members and guerilla forces were a sign of exclusions from the beginning. Majority of the Anti-Apartheid Movement were excluded from the negotiations, and they criticized Mandela's independency in the negotiation process. These exclusions gradually became violent; Shell House Massacre was the most significant sign of it. The Guatemalan transitional justice experience does not differ much from South Africa in that sense. In Guatemala, several local indigenous groups and civil society groups were eager to be a part of the peace negotiations, which established truth commission as well; however, they were excluded. As a result of their exclusions, the civil society in Guatemala boycotted negotiations in the transitional justice process.

Along with exclusions, homogenization of diversities is also common in both of the cases. Until the negotiations, there existed divergent resistance actors in both South Africa and Guatemala. However, in the negotiation table has assumedly two homogenous poles. For example, In South Africa, despite the heterogeneous

voices in the Anti-Apartheid movement that ranged from the IFP to the PAC, the ANC was presented as the only representative of the Anti-Apartheid Movement by the government, by the ANC itself, and by the international community. Separate organizations within the Anti-Apartheid movement, such as women's, student's, or locals' organizations, which were the source of the heterogeneity of the movement, carried their own perspective in the struggle. Inclusion of diversities to the establishment process of transitional justice is critical to comprehend the dynamics of gross human right violations, especially if it is layered and dimensional as in the Apartheid regime. Guatemalan case is slightly different from South African example in that sense because the impact of the UN as a mediator was very effective. The Historical Clarification Commission had one chairman, who was appointed by the UN General Secretary, and the other two commissioners represented two sides. The numbers of commissioners and their representations show the application of homogenization of pluralities in Guatemala case. Laura J. Arriaza and Naomi Roth-Arriaza (2010) point that both national and international actors were criticized due to their homogenous and undifferentiated conceptualization of the conflict, which resulted in the CEH's incapacity to comprehend the meaning of conflict as experienced by the people in rural (p.206).

These two conclusions, exclusions and homogenization of pluralities, belong to the establishment phase of transitional justice and are consistent with each other. Homogenization of diversities and exclusions are important in the sense of participation; with the homogenization of diversities and exclusions, the participation cannot be furthered from attending. Obviously, homogenization of diversities is also another form of exclusions. Unless communities carry their own uniqueness, communities will not have any constitutive impact through participation, so they will have to just follow or attend the process. Unless attending furthers towards participation, transitional justice cannot overcome its fundamental paradox between the legal and the political.

4.3. From Attending to the Participation

Attending and participation are different from each other because through attending communities can only play their roles that are allocated during the establishment of transitional justice process. On the contrary, through participation from the beginning of the process, communities have the opportunity to establish themselves by impacting the transitional justice mechanisms. In the long run, the communities' impact on transitional justice mechanisms would impact on the new public space emerged after the transition. Based on the conclusions derived from case studies, it is possible to say that the exclusions and homogenization of diversities cause conflicting parties to have passive positions in the transitional justice process: The conflicting parties can have space just for attending the transitional process, the merits of which is already decided. Thus, in order to further their position from attending to participation, these two points are needed to be reversed opposite direction. The opposite poles of exclusions and homogenization of diversities are inclusions, publicity and plurality. Hannah Arendt is an important figure in the political conceptualization of publicity and plurality.

Hannah Arendt (1998) presents fundamental human activities as labor, work and action in her canonical book, "The Human Condition". According to Arendt (1998), the biological process of human correlates with labor; humans' relation with the artificial world corresponds to work; and action associates with plurality and the condition of all political life depends on the condition of a plurality (Arendt & Canovan, 1998, p.7). Since the main problem of this thesis is to study paradox of the legal and the political in transitional justice, action as political human activity is going to be examined. Plurality is an important concept in this regard because it is directly against the exclusionary and homogenizing attitude of the implementations of transitional justice. According to Hannah Arendt (1998), "[p]lurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live." (p.8). Plurality is the condition of human action

because “to live” is “be among the men” (Arendt & Canovan, 1998, p.7). Moreover, according to Hannah Arendt, humans are equal, but this equality does not homogenize humans, and this equality does not eliminate differences and uniqueness. That is why the plurality is the condition of political life. To exist in political space, human beings’ plurality cannot be avoided, otherwise, like South African and Guatemalan cases show already, when uniqueness and divergencies of communities are excluded, they can only attend the transitional justice process. Thus, the communities that are homogenized remains only as a legal agent; the communities cannot constitute themselves as political agents.

To become political agents is meaningful during the transitional justice process because, at the end of the transition period, a new public space is created. The new regime and new public space are the aims of transitional justice. During the conflict, it is impossible to become political agent, because, in the conflict, parties do not exist among each other, in the conflict there existed two points: the violence and aim to destroy each other.

According to Hannah Arendt, even though labor and work are depended on natality, the action has the strongest tie with natality (1998, p.9). Arendt (1998) claims that

> However, of the three, action has the closest connection with the human condition of natality; the new beginning inherent in birth can make itself felt in the world only because the newcomer possesses the capacity of beginning something anew, that is, of acting (p.9).

In that sense, natality is an important concept to comprehend the aims of transitional justice, because the aims of transitional justice are the new beginning of the states through dealing with gross human rights violations that took place in their past. Arendt (1998) claims that to take the initiative, to begin and to set something in motion means acting (p.177). Thus, in addition to preserving pluralities of agents, to act to create new beginnings enable the conflicting parties to go beyond attending to reach participation. At that point, it is meaningful to remind Mandela’s justification about exclusionary attitudes towards some parts of Anti-Apartheid Movements. Mandela tried to justify exclusions of some

radical actors of the Anti-Apartheid Movement such as the PAC, guerilla forces, etc., by mentioning the peace and the avoidance of turning back to the conflict again. Although these concerns are reasonable, these kinds of precautions should not harm the extraordinary aspect of the action. Like the extraordinary aspect of transitional justice, the extraordinary aspect of action exists, and it rests on unexpectedness. According to Hannah Arendt (1998),

> The new always happens against the overwhelming odds of statistical laws and their probability, which for all practical, everyday purposes amounts to certainty; the new therefore always appears in the guise of a miracle. The fact that man is capable of action means that the unexpected can be expected from him, that he is able to perform what is infinitely improbable. And this again is possible only because each man is unique, so that with each birth something uniquely new comes into the world (p.178).

Thus, due to the transitional justice's aim of new beginnings, the unexpectedness of action of conflicting parties is a necessary risk to be taken. Mandela's concerns might be acceptable; however, precautions must be proportionate and should not harm the action of the agencies.

As stated above, conflict needs to be settled down in order to become a political agent. To make it clear, the relationship of action to speech needs to be summarized. As explained above, plurality is the condition of becoming equal and different from each other. Moreover, plurality is the ground for the political. Thus, this plurality needs to be concretized. The actualization of human plurality that is living as a distinct and unique being corresponds to speech (Arendt & Canovan, 1998, p.178). As Arendt (1998) claims that actions are performed in the manner of speech. Without speech capacity, action would lose its expressive character. To become subject also depends on speech; without speech, people cannot act, people can just perform (p.178). In this regard, attending the transitional justice process reminds performing. In order to act, communities need to participate, needs a space for speech in the transitional justice process. Exclusions or homogenizing subjects limits the action and speech capacities of subjects in the transitional justice process. For speech, the community needs to be

together without violence, so without conflict. According to Hannah Arendt (1998) “This revelatory quality of speech and action comes to the fore where people are *with* others and neither for nor against them that is, in sheer human togetherness” (p.180). Hence, the establishment phase of transitional justice must be open to plurality and diversity to solve the fundamental paradox of transitional justice: the paradox of the legal and the political.

Possibly, some actors who took part in the implementation of transitional justice tended to justify two-sided negotiations for practical reasons. On the one hand, it is hard to have all political actors have a seat during negotiation due to the exigency; at that moment, the implementers are right. On the other hand, negotiations should follow a publicly open procedure. According to Hannah Arendt (1998), publicity is the other important feature of political space (p.50). Arendt (1998) claims that one of the important meaning of “publicity” is that “[i]t means, first, that everything that appears in public can be seen and heard by everybody and has the widest possible publicity” (p.50). Thus, rather than negotiations behind the doors like in South African and Guatemalan cases, negotiations should be engaged publicly. With increasing publicity along with preserving pluralities, the agents in transitional justice can go beyond attendance towards participation, and the shortcoming about the critical approach also can be overcome.

After all, this thesis examined the possibility of politically active agent status of parties during transitional justice. In order to answer that question, the existing literature and also establishment phases of the South African Truth and Reconciliation Commission and Guatemalan Historical Clarification Commission were examined in-depth by focusing on the establishment phases. The thesis tried to show that a politically active agency requires going beyond sole attending. This thesis applied to arguments of Carl Schmitt on the sovereignty to discuss the importance of extraordinary moments of the negotiation process, and to arguments of Hannah Arendt especially on the action, publicity and plurality to seek for ways of reaching effective participation. The main objective of this

thesis is to overcome the fundamental paradox of transitional justice. Transitional justice is a concept in between the political and the legal; it creates paradoxical situations in its implementation. The adequate study about this fundamental paradox of transitional justice is not found in the literature. This thesis is a contribution to the literature for its proposing participation as a tool to overcome paradox between the political and the legal in transitional justice. The participation as a solution should start from the negotiation process and should go beyond attending through carrying pluralities of the community.

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APPENDICES

APPENDIX A: TURKISH SUMMARY/ TÜRKÇE ÖZET

GEÇİŞ DÖNEMİ ADALETİNE SİYASAL YAKLAŞIM: GÜNEY AFRİKA VE GUATEMALA'DA HAKİKAT ARAYIŞ MEKANİZMALARI

Bu çalışma, 1990'lı yıllarda yaşanan sistematik ve yaygın insan hakları ihlallerine cevap olarak ortaya çıkmış olan geçiş dönemi adaletine siyasal bir yaklaşımın gerekliliğini ele almaktadır. Bu sebeple tezde daha geniş bir perspektifle incelenen "geçiş dönemi adaleti" kısaca tanımlanacak ve neden siyasal bir yaklaşıma ihtiyaç duyulduğu açıklanmaya çalışılacaktır.

Bu çalışmanın iddiasına göre geçiş dönemi adaletine siyasal yaklaşım 'katılım' ve 'süreçlerde bulunmanın' farkının çizilmesi yoluyla olur. Katılmak (*participation*) ve süreçlerde bulunmak (*attending*), öznelerin etki edebilme kapasitelerine sağladıkları olanaklar açısından farklılık gösterir. Bu çalışma ortaya attığı problemin varlığını göstermek için öncelikle literatürdeki çeşitli yaklaşımları 'katılım' sorunu etrafında ele almış, ardından Güney Afrika ve Guatemala'daki hakikat komisyonlarının kuruluş aşamalarını 'katılım' sorunu çerçevesinde incelemiştir. Literatüre ve uygulamalara bakılan bu iki bölümde ortaya çıkan iki nokta vardır: geçiş dönemi adaleti uygulamalarında taraflar kendi içlerinde homojenleşmiş/aynılaşmış iki ayrı kutup halinde sunulmuş ve özellikle geçiş dönemi adaleti mekanizmalarının kuruluş aşamaları çoğu zaman kapalı kapılar ardında gerçekleşmiş, taraflar dışlanmıştır. Sonuç bölümünde ise öncellikle Carl Schmitt'in 'olağanüstü hâl' kavramsallaştırmasına referansla geçiş dönemi adaletinin kuruluş aşamalarının önemi gösterilmiştir. Schmitt referansı ile kuruluş aşamalarının önemini göstermesi ve kuruluş aşamalarında katılımın arttırılması

önerisi, bu tezi literatürdeki diğer çalışmalardan, özellikle geçiş dönemi adaletine eleştirel yaklaşanlardan, ayrıştırır. Geçiş dönemi adaleti süreçlerinde 'bulunmayı' aşacak bir şekilde 'katılımın' önündeki iki engel; tarafların homojen kutuplar olarak sunulması ve dışlanmalardır. Bu noktada, Hannah Arendt'ten referansla, kamusallık (*publicity*) ve çoğulluk (*plurality*) yukarıda bahsedilen iki olgunun (homojenlik ve dışlanmak) tam tersidir. Kamusallık ve çoğulluğun geçiş dönemi adaleti kavramına ilişkin kullanımı siyasal yaklaşımın çerçevesi çizmektedir.

Geçiş Dönemi Adaleti

Geçiş dönemi adaleti hakikat komisyonları, cezai kovuşturma, tazminat vb. gibi özgün mekanizmalarıyla geçmişle yüzleşmeyi amaçlamaktadır. Geçmişle yüzleşme alanında başka kavramların ve tartışmaların varlığına rağmen, 1990'lardan itibaren geçiş dönemi adaleti geçmişle yüzleşmenin tek uygulaması olarak sunulmakta, önceki tartışmalar ve kavramlarla bağı koparılmaktadır (Arthur, 2009, s. 327-332). Bu sebeple, geçiş dönemi adaleti kavramının belirleyici özelliklerinin üzerinde durulması gerekir. Geçiş dönemi adaletini geçmişle yüzleşme bağlamında kullanılan diğer kavramlardan ayıran üç belirleyici nokta vardır. Bunlardan ilki kavramın "geçiş dönemi" ile ilgili olması yani geçiş dönemi adaleti kalıcı bir dönem olamayacağı için, kavramın ve uygulamanın bir ara dönem için geçerli olmasıdır. İkinci nokta, geçiş dönemi adaletini takip eden sürecin demokrasi olmasıdır. Yani geçiş dönemi adaleti esasen demokrasiye geçişte bir ara dönem uygulamasıdır ve mutlak olarak takip eden süreçte demokrasiyi hedeflemektedir. Geçiş dönemi adaleti kavramsallaştırılmasında tarafların birbirlerini ve birbirlerinin deneyimlerini öğrenmesi, tarafların barışçıl bir şekilde bir arada yaşama imkanlarının oluşturulması, bir uzlaşımın yaratılması ve barışın sağlanması demokrasinin temelleri olarak sunulmaktadır. Bu bağlamda, geçiş dönemi adaletinin amaçları insan haklarının ve onurunun korunması açısından oldukça önemlidir. Geçiş dönemi adaletini diğer geçmişle yüzleşme kavramlarından ayıran üçüncü nokta ise özgün yasal mekanizmalarıdır. Geçiş dönemi adaletinin yasal mekanizmalarının özgünlüğüne bir örnek vermek gerekirse esasen geçmişe dönük

işlemekte olmaları söylenebilir. Geçiş dönemi adaleti, geçmişte yaşanan hak ihlallerine bugünün yasaları ile yahut uluslararası hukuka göre ceza vermektedir, bu da demokratik rejimlerin suç ve cezaların geriye yürümezliği ilkesine aykırıdır. Tam da bu sebeple geçiş dönemi adaleti mutlaka geçici olması gereken kendine has mekanizmalarını geliştirmiştir (Teitel, 2003, s.76). Ceza mahkemeleri, hakikat komisyonları, tazminatlar, güvenlik sistemi reformları (veya diğer kurumsal reformlar) ve anmalar gibi sembolik tazminatlar geçiş adaleti kavramına ait özgün mekanizmalara örnektir (Uluslararası Geçici Adalet Merkezi [ICTJ], 2009).

Hukuki-Siyasi İkilemi

Yasal-kurumsal düzenlemelere dayanan demokrasi kavramsallaşmasının yükselişi ve geçiş dönemi adaletinin ortaya çıkışının eş zamanlı olmasının bir sonucu olarak, geçiş dönemi adaleti literatürde hegemonik bir pozisyon edinmiştir. Yasalara ve kurumlara yaslanan bir demokrasi kavramsallaşması ile uyumlu olarak geçiş dönemi adaletinin, ceza mahkemeleri, hakikat komisyonları, vb. gibi özgün yasal mekanizmaları vardır; fakat, tek hedefi geçmişle yüzleşmek değildir, sonrasında demokratik rejimler inşa etmeyi de hedefler. Bu durumda bir yanda demokrasi, barış gibi siyasal hedefleri varken, diğer yanda bunları elde etmek için kullandığı hukuki mekanizmaları vardır ve hukuki-siyasi ikilemi tam da bu noktaya dayanmaktadır.

Demokrasi, demokratik rejimlerin inşası yahut barış hukuki kavramlar değildirler. Bu anlamda geçiş dönemi adaletinin hedefleri siyasaldır. Yeni bir rejim ya da yeni bir siyasi alan inşa etmek, geçmişle yüzleşmek kadar gereklidir ve siyasala aittir. Yeni oluşacak rejime ve kamusal alana etki edebilme politik olarak aktif özne olmayı gerektirir. Yani geçiş dönemi adaleti zorunlu olarak siyasala ait bir kavramdır. Fakat bu hedeflerini tesis etmek için kullandığı mekanizmalar hukukidir ve hukuki olmalıdır.

Geçiş dönemi adaletinin hukuki yollarla çalışmasının kaçınılmazlığının dayandığı iki nokta vardır. Bunlardan ilki, soykırım, iç savaş vb. büyük insan hakları

ihlalleri ile yüzleşirken intikam alma durumuna düşmemek için yasal formalitelerin yerine getirilmesinin zorunlu olması, diğeri ise, yasal formalizm geçiş adaletinin amaçlarıyla tutarlı olması, çünkü hukukun üstünlüğünün demokrasiyi otoriter rejimlerden ayırmasıdır. Geçiş dönemi adaleti doğası gereği hukuki-siyasi gerilimini taşır. Peki bu ikilemden çıkmak mümkün müdür? Geçiş dönemi adaletine taraf olan öznelerin siyasal olarak aktif katılımları hukuki yaklaşımın hegemonyasında nasıl sağlanır? Bu tez geçiş dönemi adaleti süreçlerinde bulunmanın ötesine geçen bir katılımın, bu siyasi-hukuki ikilemini aşmakta çözüm olabileceğini iddia etmektedir. Çalışma bu savını desteklemek için ilk olarak literatürü ve ardından Güney Afrika ve Guatemala'daki geçiş dönemi adaleti uygulamalarını incelemiştir.

Geçiş Dönemi Adaleti Literatürü: Legalist ve Eleştirel Yaklaşımlar

Bu çalışma geçiş dönemi adaleti literatürünü ikiye ayırmış ve öyle incelemiştir. Bu ayrım geçiş dönemi adaletinde katılım sorununa yaklaşımlara dayanarak yapılmıştır. Bunlardan ilki olan legalist yaklaşım demokrasiye kurumlar merkezli yaklaşmıştır. Kurumlardan tabana doğru yani yukarıdan aşağı bir prensiple yerleşecek demokratik kültüre dayanan legalist yaklaşım tarafların süreçlere katılımını bir sorun olarak ele almamıştır. Literatürde bu yukarıdan aşağı örgütlenen legalist yaklaşıma karşı eleştirel bir tutum alan diğer bir kanat gelişmiştir. Bu yaklaşım bu çalışma bağlamında eleştireller olarak isimlendirilmiştir. Eleştireller ise tabandan yukarı olacak bir yaklaşımla geçiş dönemi adaleti kavramını ele almakta ya da başka bir ifadeyle katılım sorunu etrafında literatüre katkı sunmaktadır. Eleştirel yaklaşımın katılımı arttırmaya dönük çabaları en iyimser ifadeyle geçiş dönemi adaletine hâkim olan katılım sorununa çözüm bulmakta eksik kalmıştır. Bu çalışma eleştirel yaklaşıma siyasal bir bakış açısı kazandırarak, eleştirel pozisyonu genişletmeyi amaçlamaktadır.

Eleştirel yaklaşımın katılımla ilgili eksiklikleri gideremmemesi yalnızca geçiş adaletinin uygulanma aşamasında katılımı arttırmaya odaklanmasından kaynaklanmaktadır. Ancak bu çalışmanın bakış açısına göre, uygulama sırasında katılımı *(participation)* artırmaya odaklanmak, taraflar açısından geçiş adaleti

sürecinde bulunmanın *(attending)* ötesine geçemez. "Süreçlerde bulunmanın" ötesine geçip etkili bir katılımın sağlanması için geçiş dönemi adaleti mekanizmalarının başlangıcından itibaren daha açık bir ifadeyle sürecin nasıl uygulanacağına karar verilen müzakere süreçlerinden başlayarak katılım sorununa odaklanılmalıdır. Müzakereler sürecin nasıl işletileceğine karar verilen önemli anlardır ve taraflar bu önemli anlara katılmadıkları takdirde süreçte sadece bulunurlar, üzerlerine düşen rolleri oynar, yeni kamusal alanların kurulumunda aktif olarak söz sahibi olamazlar.

Hakikat komisyonları, tüm geçiş dönemi adaleti sürecini şekillendirme kapasitelerinden dolayı önemli mekanizmalardır. Lundy ve McGovern'a göre, hakikat komisyonlarına yerel halkın katılımı, yerel halkı güçlendirmektedir; bu sayede taraflar geçiş adaleti sürecinin tasarımında ve yürütülmesinde karar verme kapasitesine sahip aktif bir rol oynama imkânı bulurlar (2008, s.271). Lundy ve McGovern'a göre, tarafların geçiş dönemi adaletinin çerçevesinin belirlenmesinde karar verici aktif bir katılım göstermelerinin imkânı, hakikat komisyonlarına katılımları ile mümkün olabilir. Bu nedenle bu çalışma hakikat komisyonlarının kuruluş aşamalarındaki katılımlara odaklanmıştır.

Güney Afrika ve Guatemala Örneklerinin Karşılaştırılması

Güney Afrika ve Guatemala örneklerinin incelenmesi de göstermiştir ki geçiş dönemi adaletinin temel sorunu, geçmişte çatışan tarafların siyasal olarak aktif özne pozisyonlarını kaybetmiş olmalarıdır. Güney Afrika ve Guatemala geçiş dönemi adaleti uygulamalarında da başvurulan legalist yaklaşımın sonucu olarak taraflar yeni oluşacak kamusal alanın çerçevesinin inşasına aktif katılım gerçekleştirememişlerdir. Geçiş dönemi adaletine içkin olan siyasal-hukuki ikileminin aşılması için tarafların uygulamada bulunmanın ötesine geçip aktif bir katılım gerçekleştirmeleri gereklidir. Güney Afrika ve Guatemala örneklerinde aktif katılımın sağlanamadığı benzer olan çeşitli noktalar üzerinden incelenmiştir. Yanı sıra bu iki ülkenin çatışmaların kaynağı ya da çatışmaları hazırlayan sebepler konusunda da benzerlikler gösterdiği saptanmıştır.

Güney Afrika ve Guatemala örneklerinde karşımıza çıkan ilk benzerlik mevzuatla kurumsallaşmış ayrımcılıktır. Hem Güney Afrika'nın hem Guatemala'nın çatışmalarının merkezinde etnik temelli ayrımcılık vardır. İki ülkenin tecrübe ettiği ayrımcılıklar mevzuatla kurumsallaşmıştır çünkü ülkelerin tarihinde hakikat komisyonlarının inceleme dönemlerinin çok öncesine dayanan ayrımcı yasalar mevcuttur. Örneğin Güney Afrika'da 1911'de madenlerde çalışma koşullarını belirleyen yasa ve bu yasayı takiben 1913 yılında çıkarılan Yerli Topraklar Kanunu ile Guatemala'nın benzer yasal düzenlemeleri (Vagrancy/Serserilik Kanunu) yerel halkın önce topraklarına el konulmasına sonrasında da yerel halkı belli sektörlerde çalışmaya zorunlu tutmasına sebep olması açısından benzerlikler taşır.

Yukarıda değinilen yasalardan hareketle çıkarılacak bir diğer sonuç, siyasi iktidar ile ekonomik gücün hem Güney Afrika'da hem de Guatemala'da birbirlerinden kolayca ayrılamayacağıdır. Siyasi ilişkiler ile ekonomik ilişkilerin birbirine geçmiş olması iki örnekte de benzerdir.

Güney Afrika ve Guatemala örneklerinin bir diğer benzerliği ise direniş hareketlerinin çeşitliliğidir. Her ne kadar direnişin ayrımcılıkla mücadele vb. gibi temel çatı hedefleri aynıysa da direniş hareketleri iki ülkede de çok çeşitli aktörler tarafından örgütlenmiştir. Bu çeşitlilik iki ülke için de müzakere aşamasına kadar korunmuş, müzakere süreçlerine gelindiğinde bu çeşitlilikler indirgenerek iki ayrı kutup şeklinde karşımıza çıkmıştır. Çatışan taraflar iki ayrı homojen kutup gibi sunulmuş ve müzakere bu iki ayrı grup arasında gerçekleşmiştir. Homojenleşmiş kutup halinde sunulan mücadele hareketleri, geçiş dönemi adaletine katılımda başarısız olunduğunun en önemli göstergelerindendir.

Katılım sorununun baki kaldığının bir diğer göstergesi ise uygulamalar süresince gözlenen dışlanmalardır. Örneğin, barış müzakereleri Mandela'nın bağımsız liderliğiyle gerçekleştirildi. Barış müzakereleri sırasında gerilla kuvvetleri, PAC ve IFP gibi çeşitli aktörler muhalefetlerini çeşitli şekillerde dile getirdi. Güney Afrika hükümeti ANC'yi ve Mandela'yı müzakere için seçti, PAC gibi daha radikal örgütlere ise barış müzakereleri önerisi bile götürülmedi. Dışlanmaların

Güney Afrika örneğinde bir diğer belirtisi ise kuşkusuz başarısızlıkla sonuçlanan Vula Operasyonu'dur. Apartheid karşıtı hareketin bu dışlanmalardan rahatsızlığını daha somut bir şekilde gösterdiği başka bir olaysa 28 Mart 1994'te Johannesburg'da binlerce IFP destekçisinin seçimleri boykot etmek için toplanmasıdır. Bu gösteriye Mandela ve ANC'nin verdiği yanıt barış süreci içerisinde kabul edilemeyecek derecede şiddet içermekteydi. Bu olay Shell House Katliamı olarak bilinmektedir. Guatemala'nın geçiş dönemi adaleti uygulamalarında da Güney Afrika'dakine benzer şekilde dışlanmalar görülmüştür. Guatemala'daki sivil toplum örgütleri Guatemala'nın geçmişle yüzleşme süreçlerine yoğun ilgi göstermişlerdir. Guatemala'daki hakikat komisyonunun kurucu metnine katkı sağlamak için yoğun lobi çalışması yapmalarına rağmen, hakikat komisyonunun yasal metinlerinin oluşturulması süreçlerinden dışlanmışlardır. Bu sebeple Guatemala'daki geçiş süreci adaleti uygulamalarını boykot bile etmişlerdir.

Hakikat komisyonuna üyelerin seçimi ise iki ülke içinde dışlanmaların somutlaştığı örneklerdendir. Komisyon üyelerinin seçimindeki sıkıntılar iki ayaklıdır. İlk olarak, hakikat komisyonlarının kurucu metinlerinde komisyon üyelerine ilişkin kriterler muğlaktır. İkinci sorun, komisyon üyelerinin atanmasının kamuya açık olmaktan çok uzak olmasıdır. Güney Afrika örneğinde, kademeli ve halka açık bir şekilde ilerleyen komisyon üye seçim süreci son aşamada kısa liste halinde Mandela'ya sunulmuştur. Son karar hakkının elinde bulunduran Mandela , coğrafi olarak adil bir dağılım olması gerektiği gerekçesi ile kısa listede olmayan iki kişiyi de Hakikat ve Uzlaşma Komisyonu'na eklemiştir. Mandela coğrafi adaleti sağlamak için iki komisyon üyesini liste dışından atamış bile olsa, bu durum kapalı kapılar ardında verilen kararları ya da daha açık bir ifadeyle dışlanmaları kanıtlar niteliktedir.

Guatemala ve Güney Afrika'da gözlenen dışlanmalar ve aynılaştırmalar sadece sürece katılım sorunlarına işaret etmemiş, aynı zamanda hakikat komisyonlarının sonuçlarını da etkilemiştir. Örneğin iki hakikat komisyonu da insan hakları ihlallerinin tanımları ve komisyonların incelediği zaman dilimleri açısından

çeşitli sıkıntılar taşımaktadır. Hak ihlallerinin tanımları ve incelenen zaman dilimi, hakikat komisyonlarının sonuçlarını içeren raporlar için önemli referans noktalarıdır. Hem ihlallerin tanımlanmasında hem de incelemeye tabii tutulacak zaman dilimlerinin belirlenmesinde direniş hareketlerindeki çeşitli aktör ve örgütlerin çoğulluğunu yansıtacak bir şekilde sürece dahil edilmesi sonuçları etkilemesi açısından oldukça önemliydi, ne yazık ki iki komisyon da bu anlamda başarısız olmuştur. Bu konuda daha somut örnek verilmesi gerekirse, Güney Afrika Hakikat ve Uzlaşma Komisyonu'nun insan hakkı ihlali tanımı sadece fiziksel zarar içeren fiilleri ihlal kabul eder. Oysa Apartheid karşıtı birçok örgüte göre, Apartheid sadece fiziksel zarara indirgenemeyecek şekilde pek çok insan hakkı ihlaline dayanan bir rejimdir. Direniş hareketinin çeşitli aktörleri müzakere süreçlerinden dışlandıkları için bu tanımın dar olmasına itiraz edememiş ve dolaylı olarak komisyon raporuna ve geçiş dönemi adaleti sürecine etki edememişlerdir.

Guatemala ve Güney Afrika örneklerinden çıkarılabilecek son sonuç, iki ülkenin coğrafi farklılıkları ve çatışmaların doğası gereği çok farklı olmasına rağmen geçiş adaleti uygulamalarının çok küçük farklılıklar içermesidir. Literatür göz önüne alındığında, bu benzerliklerin nedeni legalist yaklaşımın yukarıdan aşağıya değişim yaratmaya dayalı hiyerarşik perspektifinden kaynaklanmaktadır. Dahası, yerel topluluklar her iki durumda da geçiş adaleti sürecinin kuruluş aşamasına katılamamışlar ve dolayısıyla geçiş adaleti sürecine kendi farklı bakış açılarını taşıyamamışlardır. Bu gözlemlere dayanarak, eleştirel yaklaşım için bile bu sorunun üstesinden gelebilmenin katılımın genişletilmesine, yani süreçlerin içerisinde bulunmayı aşacak şekilde aktif bir katılıma ihtiyaç duyulduğu söylenebilir.

Geçiş Dönemi Adaletine Siyasal Yaklaşım

Literatürde eleştirel yaklaşımı legalist yaklaşımdan farklı kılan nokta, katılım sorununu ele almasıdır. Fakat eleştirel yaklaşım, geçiş dönemi adaletinin hukuki-siyasi ikilemini aşmakta yine de yetersiz kalmaktadır. Bu çalışmanın iddiasına göre geçiş dönemi adaletine içkin olan hukuki-siyasi ikilemi katılımın arttırılması

yolu ile aşılır. Fakat eleştirel yaklaşım, geçiş dönemi adaleti uygulamalarında yani geçiş dönemi adaletinin başlangıcından, süreçlerin nasıl işleneceğine karar verilen müzakerelerden sonra katılımın arttırılması üzerinde durmuştur. Bu durumun bir sonucu olarak ise taraflar geçiş dönemi adaleti süreçlerinde sadece bulunmuş, pasif olarak süreçlerde bulunmayı aşıp aktif bir katılım gösterememişlerdir. Bu çalışmanın iddiasına göre süreçlerde bulunmak ve aktif katılım göstermek birbirlerinden farklı iki pozisyondur ve geçiş dönemi adaletine içkin hukuki-siyasi ikileminin aşılıp, geçiş dönemi adaletine siyasal yaklaşmanın mümkün olması için aktif bir katılım elzemdir. Eleştirel yaklaşım, geçiş dönemi adaleti uygulamalarından önce gerçekleşen olağanüstü anları yakalayamamıştır. Bu olağanüstü anlar, barış müzakerelerinde ya da sürecin başlangıcında gerçekleşen ve geçiş dönemi adaletine içkin olan belirleyici dönüm noktalarıdır. Süreçlerde bulunmayı *(attending)* aktif katılımdan *(participation)* ayıran belirleyici özelliklerden birisi bu olağanüstü anların öneminin kavranmasında yatar.

Carl Schmitt'in 'olağanüstü hâl' kavramı geçiş dönemi adaletindeki olağanüstü anları/halleri anlamak için önemlidir. Çünkü bu çalışmaya göre geçiş dönemi adaletinin sonrasında kurmayı vaat ettiği barış ve yeni demokratik rejimler aslında barış müzakerelerinde kurulur. Çünkü, literatürde Ruti Teitel'in de iddia ettiği gibi, geçiş dönemi adaleti 'istisnai' yasal uygulamalar dahi olsa, nihayetinde yasal mekanizmalardır ve yasal mekanizmalar kurulmak ve çalışabilmek için bir tür normal duruma ya da düzene mutlak olarak ihtiyaç duyar. Olağanüstü hallerde yasalar ve hukuk siyasal anlamda rafa kaldırılır. Çünkü olağanüstü hâl kaotik bir haldir; düzen yoktur. Hukuki ya da yasal mekanizmaların işlemesi için normal zamanlara ya da düzene ihtiyaç vardır. Carl Schmitt'e (1985) göre, kaosta herhangi bir norm bulunma imkânı yoktur. Yasal düzen için normal bir durum ya da düzen mevcut olmalı ve bu normal durumun gerçekten var olduğuna karar veren bir egemen olmalıdır (Schmitt,1985, s.13). Bu noktada egemen ve egemenin kararı vurgusu önemlidir. Daha açık ifadeyle,

Schmitt her yasal düzenin bir karara (egemenin olağanüstü hali bitirip normal düzeni kuran kararı) dayandığını iddia ediyor (Schmitt, 1985, s.10).

Dolayısıyla, geçiş dönemi adaleti süresince kurulan rejimden hemen önce, müzakereler sırasında bu olağanüstü hâl bulunmaktadır. Geçiş dönemi adaletinin hakikat komisyonları, ceza mahkemeleri gibi 'istisnai' bile olsa yasal mekanizmalarının oluşturulması ve işletilmesi için kaostan çıkılmalı ve yasal mekanizmalara olanak sağlayacak normal zaman yahut düzen kurulmalıdır. Bu nedenle, bu çalışma Guatemala ve Güney Afrika'daki hakikat komisyonlarının kuruluş aşamalarına odaklanmaktadır. Dahası, geçiş dönemi adaletinin başlangıcından itibaren katılımın önemi de bu noktada yatmaktadır. Barış müzakereleri, kurulacak mekanizmaların belirlenmesi, mekanizmaların çalışma prensipleri gibi çeşitli önemli noktalara karar verilen anlardır. Çünkü bu anlar olağanüstü halin bittiği, normal düzene dair kararların verildiği anlardır. Dolayısıyla burada aktif bir katılımın sağlanması tarafları pasif bir şekilde süreçte bulunan özneler olmaktan kurtaracaktır. Literatürde eleştirel yaklaşım üst başlığında toplanan diğer yazarların odaklandığı gibi geçiş dönemi adaletinin uygulamalarında katılımı arttırmak tarafların pasif bir şekilde geçiş dönemi adaleti süreçlerinde bulunmasını aşamayacak, geçmişle yüzleşme süreçlerinde de barışın ve demokrasinin inşasında da etki edebilme olanaklarını ortadan kaldıracaktır. Çünkü barışın yahut demokrasinin çerçevelerine barış müzakereleri gibi geçiş dönemi adaleti uygulamasının başlangıcından önce karar verilmiş olacaktır.

Geçiş dönemi adaletine aktif olarak katılımı etkileyen tek faktör olağanüstü hallerin önemi değildir. Güney Afrika ve Guatemala geçiş dönemi adaleti uygulamalarının incelenmesinden elde edilen sonuçlar göstermiştir ki aktörlerin homojenleştirilmesi ve geçiş dönemi adaleti sürecinden dışlanmaları aktif katılımın önünde engel olmuştur. Bu nedenle süreçlerde pasif bir şekilde bulunmayı aşacak aktif katılımın sağlanması için homojenleştirme/aynılaştırma ve dışlanmaların tam tersi 'kamusallık' ve 'çoğulluk' kavramlarına başvurulmuştur.

Hannah Arendt, kamusallık ve çoğulculuğun siyasal kavramsallaştırılmasında önemli katkıları olan bir düşünürdür. Bu bölümde Hannah Arendt'ten ve onun kamusallık ve çoğulluk kavramlarından faydalanılmıştır. Hannah Arendt (1998) "İnsanlık Durumu" başlıklı kitabında insanın temel faaliyetlerini emek, iş ve eylem olarak tanımlar. Arendt'e (1998) göre, insanın biyolojik süreci emek ile ilişkilidir; insanların yapay dünya ile olan ilişkileri işe karşılık gelir. Eylem ise çoğullukla ilgilidir ve tüm siyasal hayatın temelidir. Dolayısıyla siyasallık ve çoğulluk arasında da benzer bağ vardır ve tüm siyasal hayat çoğulluk temeline dayanır (Arendt ve Canovan, 1998, s.7). Bu çalışmanın temel sorunu geçiş adaletindeki hukuki ve siyasal ikilemi incelemek olduğundan, insanın temel faaliyetlerinin sonuncusu yani eylem incelenecektir. Bu bağlamda çoğulluk önemli bir kavramdır, çünkü doğrudan geçiş adaleti uygulamalarının dışlayıcı ve homojenleştirici tutumuna karşıdır. Hannah Arendt (1998) çoğulluğu anlatırken çoğulluğun eylemin koşulu olduğunun altını çizerken hem insan olarak eşsizliğimizin hem de eşitliğimizin koşulunun çoğulluk olduğunu belirtir (Arendt 1998, s. 8).

Dahası, Hannah Arendt'e göre, insanların eşitliği çoğulluğa dayandığı için bu eşitlik insanları homojenleştirmez ve bu eşitlik farklılıkları ve benzersizlikleri ortadan kaldırmaz. Bu yüzden çoğulluk siyasi yaşamın da koşuludur. Siyasi alanda var olmak için, insanların çoğulluğundan kaçınılamaz, aksi takdirde, Güney Afrika ve Guatemala örneklerinin de gösterdiği gibi, dışlanmalar ve homojenleştirmeler sonucunda taraflar yalnızca geçiş dönemi adaleti sürecinde bulunabilir. Dolayısıyla, homojenleşmiş topluluklar yalnızca yasal bir özne olarak kalırlar; topluluklar kendilerini aktif politik özneler olarak kuramazlar.

Dahası siyasal olarak aktif özne olmak ancak ve ancak geçiş dönemi adaleti süresince ve sonrasında mümkündür. Geçiş dönemi adaleti sürecinde politik olarak aktif özne olmak anlamlıdır, çünkü geçiş döneminin sonunda yeni bir kamusal alan yaratılır. Yeni rejim ve yeni kamusal alan, geçiş dönemi adaletinin hedefleridir. Bunun yanında çatışma sırasında politik olarak aktif özne olmak imkansızdır, çünkü çatışmada taraflar çoğulluğun gerektirdiği şekilde bir arada

değillerdir, çatışma sırasında şiddet vardır ve haliyle taraflar birbirlerini yok etmeyi hedefleyen düşmanlar olarak karşımıza çıkar. Dost düşman ilişkisi ve şiddet, çoğulluk prensibine aykırıdır.

Arendt'e göre emek ve işin de doğarlık kavrayışı *(natality)* ile bağlantısı olmasına rağmen doğarlık kavrayışı ile en güçlü bağ eylemde kurulmaktadır (1998, s.9). Bu bağlamda doğarlık kavrayışı geçiş dönemi adaletinin hedeflerini anlamak konusunda önemlidir çünkü geçiş dönemi adaleti geçmişle yüzleşerek yeni başlangıçlar yapmayı amaçlar. Arendt'e göre eylem inisiyatif almak, yeni bir şeye başlamak demektir (1998, s.177). Öznelerin çoğulluğunu muhafaza etmenin yanı sıra yeni bir başlangıç yapmak için öznelerin eylemde bulunması da öznelerin aktif bir şekilde sürece katılmalarına olanak sağlar. Bu noktada Mandela'nın Apartheid karşıtı hareketten PAC ve gerilla kuvvetleri gibi çeşitli aktörleri barış müzakerelerinde dışlamasını meşrulaştırdığı sebepleri hatırlamakta fayda var. Mandela'ya göre, bu radikal aktörlerin dışlanmasının meşru sebepleri tekrar çatışma durumuna dönülmemesi ve barışın sağlanması ile alakalıydı. Mandela'nın barışı korumak ve çatışmadan kaçınmak ile ilgili kaygıları oldukça yerinde olmasına rağmen, bu tarz tedbirler eylemin olağanüstü yönüne zarar vermemelidir. Geçiş dönemi adaletinin olağanüstü tarafı gibi, eylemin de olağanüstü tarafı vardır ve eylem beklenmezlik ilkesine dayanır. Bu nedenle, geçiş dönemi adaletinin yeni başlangıçlar ortaya çıkarmak amacı nedeniyle, çatışan tarafların eylemlerinin beklenmedik olması ve bunun yol açabileceği sonuçlar riskli dahi olsa bu riskler göze alınmalıdır. Bu yüzden Mandela'nın endişeleri kabul edilebilir; ancak, bu endişelere dair alınacak önlemler orantılı olmalı ve tarafların eylem kapasitelerine zarar vermemelidir.

Geçiş dönemi adaletine siyasal yaklaşımın bir diğer dayanak noktası ise yine Hannah Arendt'ten referansla "kamusallık" ve kamusallığın arttırılması ile bağlantılıdır. Geçiş dönemi adaletinin iki kutuplu olarak gerçekleştirilen müzakere süreçleri pratik sebeplerle meşrulaştırılabilir. İlk olarak çatışmanın tüm taraflarının müzakere masasına oturması, özellikle Guatemala ve Güney Afrika gibi uzun süreli çatışma ve direniş hareketlerinin çok çeşitli olduğu örneklerde

çok zordur. Fakat diğer taraftan bu durum müzakerelerin halka açık ya da kamusal bir şekilde yürütülmesinin önünde engel teşkil etmez. Bu nedenle, Güney Afrika ve Guatemala örneklerinde de olduğu gibi müzakereler kapalı kapılar ardında gerçekleştirilmek yerine kamuoyuna açık bir şekilde yürütülmelidir. Çoğulluğu korumakla birlikte kamusallığın arttırılmasıyla, geçiş dönemi adaletinde aktif bir katılım sağlanabilir.

Sonuç

Bu çalışma geçiş dönemi adaleti süreçlerinde siyasal olarak aktif özne inşasının olanaklarını araştırmıştır. Bu temel sorun etrafında ilk olarak mevcut literatürü sonrasında da Güney Afrika ve Guatemala hakikat komisyonlarının kuruluş dönemlerini incelemiştir. Bu çalışma siyasal olarak aktif öznelerin sadece süreçlerde bulunmayı aşacak bir katılımla mümkün olabileceğini iddia eder. Bu çalışma barış müzakereleri gibi olağanüstü anların önemini tartışmak için Carl Schmitt'in argümanlarına ve tarafların geçiş dönemi adaleti sürecine aktif katılımlarını sağlamak için Hannah Arendt'in özellikle eylem, kamusallık ve çoğulluk kavramlarına başvurmuştur. Bu çalışmanın asıl amacı geçiş dönemi adaletine içkin olan hukuki-siyasi ikilemini aşmaktır. Geçiş dönemi adaleti, hukuki-siyasi ikiliğini içinde taşıyan ve taşımak zorunda da olan bir kavramdır fakat literatürde kavramın bu yönü yeterince çalışılmamıştır. Bu çalışma, aktif bir katılımın geçiş dönemi adaletine içkin olan siyasi-hukuki gerilimini aşmanın bir aracı olduğu iddiasındadır ve literatüre de bu şekilde katkı sunmaktadır. Fakat aktif bir katılımı sadece süreçlerde bulunmaktan ayırmak oldukça önemlidir. Yanı sıra katılım, tarafların bütün çoğulluğunu içermeli ve müzakere süreçlerinden itibaren başlamalıdır ya da kamusal olarak açık bir müzakere süreci işletilmelidir.

APPENDIX B: TEZ İZİN FORMU / THESIS PERMISSION FORM

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TEZİN ADI / TITLE OF THE THESIS (**İngilizce** / English) :
A POLITICAL APPROACH TO TRANSITIONAL JUSTICE: TRUTH-SEEKING MECHANISMS IN SOUTH AFRICA AND GUATEMALA

TEZİN TÜRÜ / DEGREE: **Yüksek Lisans** / Master ■ **Doktora** / PhD ☐

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