

Addressing transitional justice in the context of an ongoing conflict is a new field which has been expanded by recent studies. For example, the Norwegian Peace Institute (PRIO), in a research covering 204 conflict countries, has come up with important findings on the impact of transitional justice processes or its important pillar, trials and the impact of the judicial process on the conflict, which I will discuss in the article¹.

There is little work on how transitional justice (TJ) can be implemented and addressed during the 40-years-old armed conflict between Turkey and the PKK, rather than waiting for the conflict to end². For Turkey, some mechanisms have been put in place to address conflict-related forced displacement and enforced disappearances in relation to TJ. In the existing literature, these mechanisms have generally been analyzed in isolation, in relation to TJ, but without linking them to each other³. Besides, TJ has been treated as *a set of post-conflict mechanisms* in the classical sense, based on the existing literature, but taking my analysis one step further, I evaluate the pillars related to TJ together. In a departure from the existing studies, I first take a picture of the official mechanisms implemented in Turkey in relation to three main paradigms of TJ: reparations, criminal trials, and truth. After describing the official mechanisms in Turkey, the article presents a critical analysis of TJ as a perspective rather than a set of mechanisms, which I will elaborate on below.

The main critical perspective of the article is that Turkey has not used transitional justice as a framework, explicitly or implicitly, in the mechanisms, it has established to deal with the injustices that have occurred in the context of the Kurdish issue. If the Turkish government had adopted TJ as an umbrella, that is, if the steps taken towards reparation, trial and truth had been constructed in dialogue with each other, these steps could have helped to make certain progress in dealing with the past despite the continuation of the conflict.

Reparations for victims of the Kurdish Conflict and the Compensation Law No. 5233

Reparation, which has long been recognized as one of the main pillars of transitional justice, includes mechanisms that are much diverse beyond compensation. In Turkey, the most fundamental step taken in the reparation pillar was the Compensation Law, which was enacted in 2004 as a response to the forced migration in the 90's, with the long title "Law No. 5233 on the Compensation of Losses Arising from Terrorism and the Fight against Terrorism". This law was widely criticized by civil society organizations. Rather than acknowledging state

responsibility for violations and repairing damages, it was enacted in order to get rid of the “burden” of the 1500 cases pending before the European Court of Human Rights⁴. On the other hand, although insufficient, Turkey allocated considerable public resources for this law; the compensation process lasted 5 years in the first application where the applications were intense and dozens of civil servants were assigned for this process.

Despite all these limitations, could the time and human effort spent on the Compensation Law and its implementation have contributed to an understanding of justice in the context of transitional justice?

The Compensation Law could have been a contribution, had it been implemented with a victim-centered approach. From a TJ perspective, rather than allocating more resources or perfecting mechanisms, the active participation of those who suffered from forced migration, village burnings and enforced disappearances in the parliamentary process and in the commissions in the governorates could have transformed the law into a victim-led process. Such sense of ownership could, in my opinion, have had a much different impact, even if the reparative compensations were eventually paid in the same amount.

The second problematic point was that the law was in no way linked to justice. However, many of the damages subject to the law were the subject of litigation. Even if it did not directly lead to criminal proceedings, a step could have been taken to point to the state’s responsibility at this point, such as the inclusion of immaterial compensations, which was also demanded by the victims.⁵ To the contrary, as an official interviewed by TESEV during the compensation process regarding the implementation of the law said, what dominated the compensation process was a logic of paying the compensation in a way that would pose the least burden on the state⁶ and the underlying understanding of the state as sacred over its citizens. Such mentality and the lack of a holistic perspective ultimately led to a failure to link compensation to TJ.

Criminal justice and accountability regarding human rights violations in the 90’s

The biggest development on the criminal justice side of transitional justice was the trials initiated as a result of the *Balyoz* and *Ergenekon* trials that began in 2007. These trials, and the *Temizöz and Others* case in 2009, were part of the AKP government’s reckoning with the

radical nationalist sector of the state, especially in the military, after AKP came to power by itself in 2002. However, many of the defendants in these cases were also the perpetrators of enforced disappearances and unsolved crimes committed in the 90's. The involvement of victims and Kurdish lawyers as plaintiffs led to the opening of other cases. The trials, publicly known as the *JITEM* trials, were opened back to back in 2011 and 2015.⁷ *JITEM*, or Gendarmerie Intelligence and Anti-Terrorism Organization, was a paramilitary group working together with the mafia and the military, established by the state to carry out crimes such as enforced disappearances, village burnings, and unsolved murders during the conflicts in the 90's. This paramilitary structure, which the state has constantly denied, was built by the defendants who testified in the *JITEM* trials. On the other hand, we witnessed that the trials did not turn into a mechanism for coming to terms with the past, especially when the peace process ended in July 2015, with acquittals coming one after the other, decisions of non-prosecution, or the statute of limitations running out on the cases. The fact that these trials did not even come close to justice, despite well-prepared indictments, eyewitness accounts of enforced disappearances, consistent location and identification efforts, and confessions by the perpetrators, is of course highly related to the shortcomings of the domestic legal infrastructure. The meticulous study report prepared by *Hafıza Merkezi* following the trials points to such issues.⁸

Apart from the Turkish judicial system's shortcomings, the prosecutions were not linked to the other mechanisms targeted to deal with the Kurdish conflict, such as the Compensation Law process, nor to the parliamentary commissions I will discuss below. Indeed, all were set up in the same time frame. The content of the reports established in the Grand National Assembly of Turkey (TBMM), which contain important information and testimonies on the violations of the 90's, could have been utilized.

This relationship was established only for the enforced disappearance of Mr. Kırbayır, who disappeared in 1980. For Cemil Kırbayır, who disappeared immediately after the military coup of September 12, 1980, the Prime Minister of the time, Recep Tayyip Erdoğan had a meeting with Mother Berfo, the mother of the disappeared person, in 2011. It was a historic meeting to break the state's denial of enforced disappearances, and in this public meeting, Erdoğan promised Mother Berfo that the bones of her son would be found and the truth would be uncovered. The parliamentary commission of inquiry established in 2011 wrote a very detailed report that explicitly recognized the violation of enforced disappearance and

recommended that the case should also be investigated in the judicial process. Although parliamentary commissions are not binding on judicial processes, the case went to trial shortly after the commission's report recommended so. Although the Kirbayır case ended similarly to the other cases, the establishment of this relationship was an important experience in the context of TJ.

Apart from this isolated example, we see that such a relationship is not established between criminal trials and the truth investigated by parliamentary commissions established in similar processes. This lack of relationship is another indicator of the disconnected functioning of mechanisms in Turkey within the framework of TJ.

Truth-recovery and parliamentary commissions

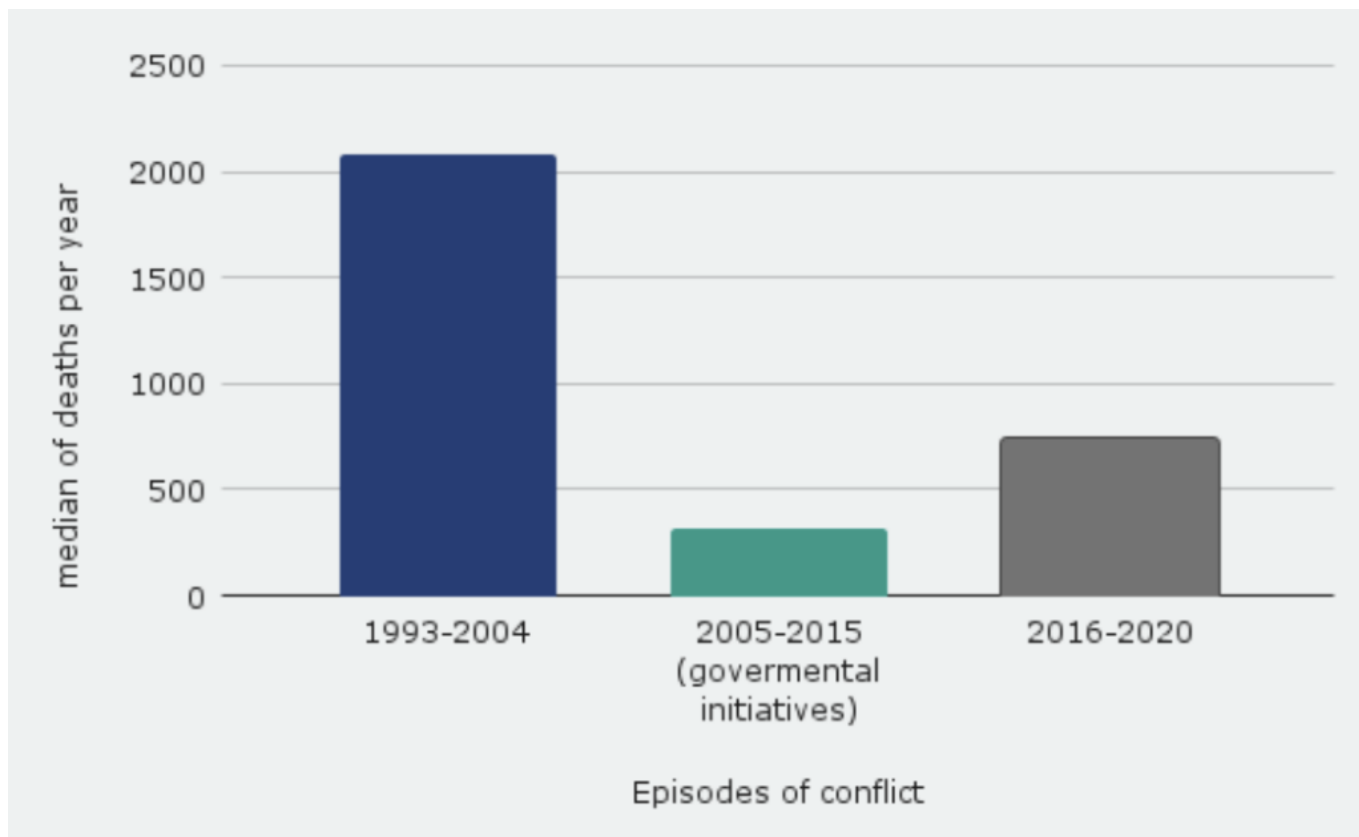
Another pillar of the concept of transitional justice, as important as reparations and criminal proceedings, is truth-recovery. In Turkey, the mechanisms that correspond to this pillar have been parliamentary commissions of inquiry. Apart from the *Susurluk Commission*, which was established in the Grand National Assembly of Turkey in 1996 in response to a traffic accident in the town of Susurluk, which was a breaking point in exposing the state's dirty relations with the mafia, such as JITEM, the commissions established in the 2000's were important. In 2011, the Kirbayır Commission was established, which recognized enforced disappearances for the first time, and the report of the research commission established in 2013 gave comprehensive figures on the human rights balance sheet of the conflict in the 90's. The parliament's petition commission also prepared a significant report on the Dersim massacre, despite its shortcomings. Although all these reports cannot replace a truth commission, they can be considered as mechanisms that serve to reveal truths in a situation where the conflict is still ongoing.

In the context of TJ, although the parliamentary commissions adopted an ambivalent language⁹, they also played a significant role in uncovering the truth. The most obvious example was the parliamentary commission report's recognition of enforced disappearance in the context of the Kirbayır case, drawing attention to the fact that the case was not isolated. However, other parliamentary commissions outside the Kirbayır case were not designed as mechanisms in relation to either the reparations processes or criminal proceedings. For example, during the process of the compensation law, a research

commission covering forced migration and the violations and stories caused by this migration could have supported the compensation process. Likewise, during the judicial process, detailed commission reports on the commission of crimes in the Grand National Assembly of Turkey could have supported the judicial process, albeit indirectly. Since such a connection was not established, the commission reports were reduced to mere texts in the parliamentary archives. However, in the absence of a peace agreement, parliamentary commissions that could have operated in the context of truth could have been used more effectively in the context of TJ.

Turkey's shattered picture of transitional justice

What do these steps I have evaluated under the pillars of reparation, criminal justice, and truth tell us about TJ in the absence of a peace agreement? Discussions in the literature on TJ regarding an ongoing conflict revolve around the questions of whether TJ is possible while the conflict is ongoing, and whether it is indeed conducive to eliminating the victimizations and injustices arising from the conflict. I agree with Sarkin (2016), whom I find more realistic, and argue that while the conflict is ongoing, TJ cannot end violations, but it can have a diminishing effect. Likewise, in the Turkish experience, when we look at the 2004-2015 period, including the solution process during which these mechanisms were established, albeit in a disjointed, incomplete and fragmented manner, even though they were implemented within the same timeline, we see that the number of deaths caused by the conflict decreased significantly.



Figures compiled from IHD's annual human rights balance sheet reports from 1993 to 2020¹⁰.

The graph above reveals a striking picture. The chart shows that while there was a very high number of people who lost their lives between 1993 and 2004, this figure drops dramatically between 2005 and 2015. This period includes the establishment of the compensation program, JITEM trials and parliamentary commissions concerning transitional justice. Based on this finding, I argue that the implementation of TJ mechanisms, albeit disconnected from each other, had an impact on reducing the intensity of the conflict. I am not establishing this as a cause and effect relationship. The impact of the EU candidacy process and related reforms, the Kurdish movement's legal struggle for democracy, and finally the peace talks between 2013 and 2015 cannot be denied. We can say that violations of the right to life have decreased as a result of all these initiatives. However, PRIO's research concluded that the establishment of criminal trials and/or mechanisms such as truth commissions in countries where there is armed conflict reduces the intensity of conflict compared to countries where

these mechanisms are not used at all.¹¹ The Turkish experience, as well, supports this finding.

When I look holistically at the Turkish experience in the context of TJ in ongoing conflicts, I see that Turkey has not contented itself with only one of the mechanisms of TJ, but instead mobilized all three. While this may seem positive, the fact that these mechanisms were disconnected, and the fact that the pillars of reparation, criminal justice and truth were not inter-connected appears as a critical shortcoming. The fact that such a connection was not established even to a certain extent shows that the violations that were being addressed in all three pillars (the reparations law, the JITEM trials and the parliamentary commissions) were injustices committed in the 90's, and in the context of the Kurdish issue, truth was missed by the AKP government.

Finally, I would like to underline that despite all these shortcomings and disconnections, the process between 2004 and 2015 has turned into an enormous archive and memory thanks to the great efforts of victims and civil society organizations. Another important effect of implementing TJ mechanisms regarding an ongoing conflict is that it creates an infrastructure for transition processes that may occur in the future. In the Turkish experience, we can foresee that both the archives created and the increased experience of civil society have created an infrastructure for future processes of dealing with the past.

¹Binningsbø, Helga Malmin & Cyanne Loyle, *Justice During Armed Conflict: Trends and Implications*, Conflict Trends, PRIO, 2018.

²The most comprehensive and holistic of these studies is Nisan Alici's PhD study and unpublished dissertation conducted at the Institute for Transitional Justice at the University of Ulster.

³For a study analyzing the Compensation Law, which has been enacted in 2004 in the context of TJ: Yeliz Budak, *Dealing with the Past: Transitional Justice, Ongoing Conflict and the Kurdish Issue in Turkey*, *International Journal of Transitional Justice*, 9, 219-238, 2015. For an article discussing the JITEM trials in the context of transitional justice, see: Özlem Has, *Discussing Transitional Justice in the Light of the Jitem Trials*, "Transitional Justice: Subjects,

Methods and Tools of Return”, Hafıza Merkezi Yayınları, 2020.

⁴Dilek Kurban and Mesut Yeğen, On the Verge of Justice: The State and Kurds after ‘Forced’ Migration – An Evaluation of the Compensation Law No. 5233 – The case of Van, TESEV, 2012.

⁵ibid.

⁶ibid.

⁷For detailed information on the cases, see the website that provides a database:
<https://www.failibelli.org/tum-davalar/>

⁸Hafıza Merkezi, The Problem of Impunity and the Prosecution Process in Serious Human Rights Violations in the 1990’s, 2021.

⁹It is possible to see this ambivalent language in many texts of the Turkish state from the past. However, when I examine the parliamentary reports, it is possible to see that while on the one hand there is an attitude that recognizes the violations that took place in the 90’s and even admits that the state committed crimes by exceeding the legal framework, on the other hand, it does not spare vague definitions such as “fight against terrorism” or “public security”. This ambivalent attitude may further damage the already damaged trust in the state, especially among Kurdish citizens. How this trust, which has been eroded for decades, can be restored is a subject for a separate study.

¹⁰For the human rights balance sheets from 1993 to 2020 prepared by IHD, see:
<https://www.ihd.org.tr/category/c86-raporlar/c32-bilanar/page/3/>.

¹¹For a summary on the findings of the related research, see the link: <https://www.prio.org/publications/11004>

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