

Episode 4 (May 2020)

## What about social and economic rights?

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**Brigitte:** Good morning, Tine.

**Tine:** Good morning, Brigitte.

**Brigitte:** Here we are again for our new episode of Justice Visions. How are you?

**Tine:** I am fine. I am quite happy that we get to talk to each other again, yet again on Skype. I am super excited about this episode, an episode about social and economic justice, social and economic rights and transitional justice.

**Brigitte:** And what is also nice about it is that we have been working on it some time ago, when we were both in Switzerland. I was there for a conference at the Geneva Academy of International Humanitarian Law and Human Rights, and you were there for a couple of meetings.

**Tine:** True. I was in Lausanne. And so I took the opportunity to talk to Evelyne Schmid on that occasion. Evelyne, who is one of the leading experts on social, economic and cultural rights and international criminal justice. I mean, apart from it being a really interesting chat, it was also nice to be working with that material again now because it just threw me back to back to those days when it was still possible to do train-travel throughout Europe and go and visit people face-to-face.

**Brigitte:** And the topic is also quite connected to the focus of our last episode on victimization. It's an important topic as we also felt from the comments we got. A lot of people felt that it was drawing them in because it's about what victims want, what their needs are, and how we can find out more about how to connect these needs to victims' rights. And in that respect, it was nice to talk to Simon Robins.

**Tine:** Oh yeah, talking to Simon is always very inspiring. Simon was actually also on last month's episode and he is a humanitarian practitioner and senior research fellow at the University of York. And I have been really fascinated with his work and how successfully really he tries to combine that perspective of a practitioner with a scholarly analysis, which focuses on that whole topic of social and economic justice. So, it's really nice that in this episode we can actually be listening to both Simon Robins and Evelyne Schmid.

**Brigitte:** Both of them are experts in social and economic issues.

**Tine:** Oh, and it's actually quite interesting that you use the word social and economic 'issues' because Simon really uses that language of social and economic justice, whereas Evelyne uses the language of social and economic rights and we'll hear later in the episode how important that distinction between justice and needs on the one hand, and rights on the other hand, is to them.

**Brigitte:** Yes, and not only that distinction is crucial, because we have the distinction between on the one hand we have social, economic and cultural rights and then on the other hand civil and political rights.

**Tine:** Yes, it is a really interesting distinction and it is also really reflective of how different their background is, and I think that is exactly what made this is a really inspiring conversation. What was also inspiring to me is, just before the interview, when Evelyne started talking about she came to this topic of economic, social and cultural rights in transitional justice because she was really in a way showing how coincidental sometimes our research interests come about. She was telling us when I think as an intern being in New York in 2006, just as Louise Arbour, the then UN High Commissioner on Human Rights, was delivering that landmark speech on the place of economic, social and cultural rights in transitional justice. And the way in which she speaks about it, how Evelyn speaks about it, I think is so passionate that it is a really interesting starting point for this conversation.

**Evelyne** What puzzled me a lot about her speech was this ambivalence, this impression that in some parts of the text Louise Arbour actually seemed to suggest that transitional justice was not well equipped to look at economic, social and cultural rights. That maybe we needed to expand the legal framework, and then in the same speech in other parts, there were ideas suggesting that maybe it's not so much a problem of the legal framework, but of maybe the lawyers using it and how we've used it so far. And that we could do much more on economic, social and cultural rights if we would just take that part of human rights a lot more seriously. So I set out this endeavor to find out who is basically to blame for that neglect. Is it the legal norms or maybe rather the lawyers and how we've been using the legal framework, so far.

**Tine:** So this to me was really fascinating because it really shows how Evelyne got drawn into this topic of social and economic rights through an academic conversation and academic debate on the matter. Whereas when we talked to Simon, he really has that background of a practitioner, and for him being exposed to realities on the ground is really what sparked his interest in the topic of social and economic justice in transitional justice.

**Simon:** My research with victims was preceded by something like a decade working in humanitarian action in and after conflict, where every day I would see victims, and as I moved from that practice into a research and academic environment, I came across transitional justice as a discourse, a practice that purported to address victims' needs. And I saw this gap between the needs that the victims I've been working with for decades were expressing and what transitional justice was delivering to them, particularly on the economic and social aspects that Evelyne just referred to. And I think that led me towards the idea of participation as something that can address that gap. Participation is both essential for a transitional justice agenda to be shaped by victims, and to challenge agendas that come from centers of power rather than from the margins where victims tend to be. My perception, I think, then and now, was that most victims are failed by transitional justice processes in terms of their needs being addressed.

**Tine:** So I really love how just in these two first bits that we listened to, it's already becoming very apparent how Simon and Evelyne come from a really different background already and their use of language and terminology where you heard that Evelyne is really talking about the language of rights, social and economic rights, and Simon is really talking about the language of needs and how social and economic justice is something that we



should care about because of the needs of victims. And that in itself I think is already very compelling and Simon actually goes on to talk about this in the next bit.

**Simon:** I think we have to try and define justice in ways that resonates with, with what victims articulate. And my experience is that if you go to victims and ask them how they understand justice or how they express their needs, you get something very different from the global transitional justice discourse. So even if you look at those who are acknowledged by international human rights stories, victims, people who are victims of personal integrity violations, people suffering in some way that is seen by human rights law as a violation. Even those people, when you talk to them about their needs, they very often prioritize the fact that they can't feed their children, they cannot afford to send their children to school, before they will prioritize a rather abstract process of truth and accountability. And I think that's just natural. That's a human response to an everyday need that you're confronted by.

And given that most transitional justice processes now unfolds in lower income States, I think it's clear that we have to try and address that issue and address the fact that victim's priorities don't resonate necessarily with a discourse that's purely normatively driven. And that's why often talk about needs. If justice is needs-based, rather than based on an external framework, a framework external to context, then you're much more likely to get a result where the concept of justice resonates with what those most affected by what you're in transition from are demanding. Rights are a set of legally based claims. And because legally based there they're very powerful but they are only one way of addressing needs. I think it's very important to have that legal baseline that you can use in a number of areas. And my problem is how the rights discourse actually plays out in the real world. And what I've seen, particularly low-income States where people who are already marginalized become victims and are marginalized further by their victimhood, is that those people are least able to use and access the rights discourse. So, what we often see is we see a civil society that's educated, that's linked to maybe more elite sectors of society who advocate *on behalf of* victims. And the second issue with the rights agenda is, if the rights agenda drives claims making, it skews the agenda in the ways we've already alluded to. You see economic and social rights slip down the agenda. So, I think to address those two issues, you have to engage more and empower the most marginalized so that they can raise their voices and make claims on their own terms.

**Brigitte:** Simon's approach, of course, is a very different one from Evelyne's. Evelyne as a progressive lawyer is really trying to engage in almost the opposite exercise, not as much looking *beyond* the rights discourse, but really questioning how to open up the rights discourse to become more representative of these lived realities.

**Tine:** I think they are an accord insofar as that they both start by thinking in a very solution-based way, which is what I really like about both of their takes on the issue. Evelyne, for example, when we were talking to her, she had this really beautiful example where she said, you know, if your roof is leaking, it doesn't matter so much to you, whether someone is going to help you to fix it because of a legal or because of whichever other reason. What matters to you, is that that roof gets fixed. She agreed that legal concepts are not the only vocabulary that's useful to talk about justice and sometimes they're not even the most relevant one. But then at the same time, I really like how she's treating these legal concepts as a very powerful tool, of course, as a legal scholar, and she's arguing that relying on that legal framework can actually be a really promising way to have a broader and a more structural impact.

**Brigitte:** And of course her seminal book on economic and social rights also does a great job in this respect.

**Tine:** Oh yeah.

**Brigitte:** You really liked that book, didn't you?

**Tine:** I do. I found it one of the most compelling and well-written books on that topic that I ever read, so yeah, I'm a big fan.

**Brigitte:** Oh, that's nice. I can imagine why, because she really challenges the widespread belief that international criminal law cannot deal with these issues. What's compelling is that Evelyne starts from these very real protections that the legal framework offers and seeks to establish how we can ensure that economic, social and cultural rights violations also trigger accountability. And that's really beautiful because it's not an argument that everything needs to be completely reformed, but rather, Evelyne shows that we're not starting from scratch. Everything we need is there, but we just need to do a better job at using these legal tools we have currently, and she illustrates that beautifully in the next piece.

**Evelyne:** I remember a conversation early into this project with now retired human rights officer at the United Nations, Mara Bustelo. She was working on economic, social and cultural rights and, we talked about armed conflict and low-income countries and how sometimes soldiers put homes on fire, for instance. Burning homes is something that happens in armed conflicts and sometimes it's done in order to have people leave a certain area. And she said, look, it's really not nuclear physics. It's a violation of the right to housing and everyone can understand that this is potentially part of a crime of forcible transfer and it stuck with me. And then as time passed, I came across a number of similar stories in which a connection between economic, social and cultural rights issues and elements of established international crimes was actually relatively obvious. But what happens in practice, human rights lawyers or truth commissions or actors in transitional justice sometimes quite explicitly communicate to victims that what they are dealing with in the socioeconomic realm is not related to the mandate of, for instance, a truth commission. And there's a big danger in my view in doing that, because it does confirm the impression that what victims suffer from in relation to let's say their access to food or housing or education or land, etcetera, or things that are just part of the background. Just providing the context to the crimes that we may more easily recognize. But what is a typical crime from the perspective of a prosecutor trained in New York is maybe just not necessarily the same as what is the crime from the point of view of a victim suffering from starvation in a low-income country, but legally the two can potentially be crimes.

**Tine:** This is a really good argument, right? I mean some of the things that she says, they're actually quite obvious. Some of them, they're not precisely rocket science and yet at the same time what she points out in her work is that this is almost a myth that economic, social and cultural rights are not justiciable and she does such a great job at exposing that myth, I think.

**Brigitte:** And she also talks about where that myth comes from.

**Evelyne:** Yes, it's actually interesting and I played with it sometimes deliberately when I gave people the title of my project: economic, social and cultural rights and international crimes. I would get sometimes very astonished reactions, and people would assume I was



doing something relatively crazy. Whereas sometimes I deliberately did not start with the title but gave an example and then the reaction was remarkably different. People would sometimes even say, well, that seems so obvious, why would you write the book on the idea that forced sterilization can be a violation of the right to health and a crime against humanity? That's so obvious that it doesn't merit the book. But where does the myth come from? It is related, of course, to the fact that economic, social and cultural rights always had a difficult stance in human rights law. They've been misunderstood, dismissed, sometimes ignored, seen as simply these wishful lofty political objectives, not obligations that lawyers can understand in a way that is similar to the way we understand civil and political rights.

Some of the old misconceptions of the legal nature of ESCR actually still linger around in transitional justice, and this has consequences on the discourse because if you believe that the economic, social and cultural rights obligations are inherently vague and difficult to understand, then of course from the point of view of international criminal law, it's difficult to even engage with them because you have the rule of the principle of legality and strict construction. So if you mistakenly believe that all aspects of economic, social, and cultural rights are very, very vague and related to structural violence, et cetera, then it's not surprising that you think it's at least going to overburden the mechanism and at worst, it's going to infringe the principle of legality.

**Brigitte:** But then Simon raised another point altogether and it's actually not solved. Even if this myth would be debunked. Let's hear what he has to say.

**Simon:** I think it's interesting that terms that Evelyne chose to talk about violations. So somebody burning a house is an individualized violation and that's what the contemporary liberally-grounded human rights discourse is very good at. It completely revolves around the idea of an individual perpetrator that can be judged in a court of law. And I'm much more interested in the collective violations represented by the structural violence that she referred to. And I would emphasize that there are these links always, particularly in conflict, between individual violations and marginalization of entire communities arising from historical structural violence. Those are the people who are most likely to be victims of personal integrity violations, those already marginalized economically, socially, and politically. And I think that tells us where the obstacle to transitional justice engaging with this more substantially lies. And that is not a technical, normative legal challenge, but a political one. So I think law is not the route to changing it, this situation, what we have to do is try and bring a different politics to transitional justice that challenges this individualizing legal framework and finds collective approaches beyond the individualizing mechanisms of transitional justice. And I think we're seeing that in human rights advocacy now. We're seeing human rights work moving from the conference room to the streets. And I think there's a lot of arguments to be made that transitional justice similarly can mobilize collectivities to drive change and let those non-legal norms that emerge from most affected populations drive the type of justice that transitional societies can construct.

**Tine:** So, what I found quite convincing about this argument of Simon is that he really presents transitional justice as a discourse also, that's to say where he points out, the normative weight that comes with this rhetoric of transitional justice. And to me, actually, I think this also brings us to a conversation that we had with yet another colleague, professor Zinaida Miller of Seton Hall. She's a professor of international law and human rights there. And to me personally, I think she is one of the most inspiring scholars to be writing about that topic of how transitional justice processes, but also transitional justice

discourse, can actually completely render certain topics invisible, can really create blind spots and not in the least for the issue of social and economic rights. And the way in which she makes that argument, I think in the [2008 article on invisibility](#), is just so convincing and so compelling. I think in a way that article is what sparked our whole research project on unforeseen effects of victim participation.

**Brigitte:** The article she wrote was seminal, and also very inspiring for my research as well. She's very closely connected to my research on Syria, which also deals very much with invisibilization and erasure. And I had a conversation with her earlier and it might be nice to listen what she had to say on the effects of invisibility.

**Zinaida:** So, the article at the time was really arguing that the field of transitional justice had really left out particular issues, so structural violence, economic inequality, redistribution. I was thinking a lot about invisibility with the idea that it foregrounded how we had a set of assumptions that crystallize over time and become a kind of common sense and that in turn once we have that common sense, it becomes increasingly hard to see particular issues that are left out or not discussed at all or dismissed in various ways. And I think looking back on it now, I think a lot about that as a kind of concept that we needed to take responsibility in the field for seeing the ways in which we were shaping and framing and influencing understandings of conflict and victimhood and harm and that we were helping to produce and construct a kind of ongoing invisibility and leaving out a number of issues that were incredibly important to thinking about conflict and harm and all of the issues that were of concern to many of us.

**Brigitte:** So I asked Zinaida to elaborate on the places where she observed invisibility and at that time she was very interested in South Africa and Rwanda, but more broadly, she was fascinated by the question of inequality and structural violence as a background issue.

**Zinaida:** I was interested in this question of inequality, structural violence as a background issue, reparations as a place where we did see questions about the economy or redistribution coming up, but in a very narrow sort of way. So the invisibility was coming up in the scholarship and also in the institutions. In the scholarship, we would sort of see that articles would reference briefly economic questions, but then leave them out. We would see some reference to resource inequality, for example. And then moving back into issues around justice and truth as if they were completely separated from one another. And in the institutions, a lot of different truth commissions and prosecutions were focusing on physical integrity harms, civil and political rights, much more than socioeconomic rights or broader issues of structural violence and inequality. So there were, of course, many people who were talking about this at the time and thinking about it, it was the most obvious in [Mahmood Mamdani's famous argument in South Africa](#) about the idea that the beneficiaries of apartheid weren't being thought about in the processes of transition. It was much more focused on perpetrators and human rights violations in a very narrow way. So in all of those different places, there was a sort of consistent invisibility of issues around either inequality or background problems of lack of opportunity and access and a variety of issues around dispossession, displacement and resources.

**Brigitte:** Zinaida wrote her article back in 2008 and of course there have been a lot of important developments since that time. We saw evolutions such as the establishment of the transformative justice school, if it were, and social-economic justice are much more at the center of the discussion now. And it's interesting to hear what she says about that.



**Zinaida:** I think there have been a lot of really important developments in the field, certainly in the areas that I was concerned about and more broadly all over the place. So, if you think about that, I was worried at the time about the kind of effects of not seeing the origins of conflicts in particular. So looking at individual and physical harms or political and ethnic rather than economic issues. Seeing them as separate, focusing on very narrow forms of reparations, not thinking about the ways in which not attending to the origins of conflict might reproduce conflict. I think in different ways, all of those have been taken up over time. I think there's much more explicit acknowledgement of the need to look at issues around economy, root causes of conflict, economic rights and many more truth commissions and commissions of inquiry are taking up all sorts of questions, I think now about deprivation, economic and social rights development, resource exploitation, corruption. So in that way it's very directly making visible what was not visible initially. And there's been also important questions raised in those arenas that suggest that we have limited resources, human and financial, in transitional justice. And we should think about whether we can do everything we want to do at the same time. So I also take that seriously as a set of questions. But I do think, again, in thinking about our own responsibility in the field of understanding that transitional justice is about both material results and also symbolic and narrative ideas about conflict that we do need to continue to address these.

**Tine:** What's really interesting about what she says is this whole idea of the symbolic power of transitional justice. And in a way that is also the question that inspired our Justice Visions project. That is this realization that we are drawing victims into transitional justice processes as agents of change, as potential mobilizers. So basically, we assume that people will carry forth the justice process, but we don't really know what the effects are of this invisibilization, of this erasure, in terms of how people understand justice, for example. And this is also interesting in what Simon had to say about this, this dimension of erasure in a way, right?

**Brigitte:** Yeah. He saw this in his fieldwork in the Nepalese case where he noticed that people often had very different demands from justice processes, from what transitional justice was actually offering. And often their demands were not being accommodated, and rather being erased from the mobilization.

**Simon:** I see that in many contexts where people don't want to go back to where they were before the violation. They want to use the moment of transition to demand a much broader justice that makes public, that tells the truth about acts of violence against people, but also tells the truth and tries to undo very, very long histories of oppression and marginalization. And I think that's where transitional justice has consistently failed to address the demands and the conceptions of justice that victims have.

**Tine:** Yeah, and this is really interesting because it also links to what Zinaida was just saying about deprivation, resource exploitation, corruption. And I also asked Evelyne whether like Simon, she is quite skeptical about the extent to which the current legal framework can actually accommodate or provide an answer to these issues that relate to structural injustices or whether she is looking elsewhere to start to tackle these issues.

**Evelyne:** Yes, and that's where I think I'm slightly more optimistic than Simon. For instance, in one case at the ICTY, there was an issue of discriminatory dismissals from work, so that all people of one group got dismissed from their jobs in order to have them leave the area. So, there are ways in which this more collective or more structured dimension can at least partially be addressed. And I think as soon as we mention transitional justice or

international crimes, it's a label that is attached to certain conduct and certain things that went wrong. Some people call it the expressive capacity of international criminal law or more broadly of transitional justice. The label means that what happened was not okay. What happened was the result finally of adverse human agency, not just bad weather or unfortunate things happening. It matters what conduct we actually put in the forefront as an issue deserving of the attention of a TJ mechanism.

**Brigitte:** And this also brings us to the norm-setting power of transitional justice initiatives because often norms do have quite a strong influence and they shape the contours of the discourse, of how we think about what is right and what is wrong, and also what is considered a crime and what isn't.

**Tine:** Exactly. It's that extra-legal, that expressive function of the law again that we also talked about with Zinaida Miller, and I think what Evelyne also shows is that as a legal scholar, she is very aware of this. She's very aware of the risks of what happens when an issue doesn't make it into the legal discourse. And that also became clear when she talked about the Katanga case at the International Criminal Court, which to me was really an eye-opener.

**Evelyne:** So I think what we need at the very early state is when transitional justice actors gather evidence or documents that we are aware of the full diversity of people's experiences and suffering and that we do not, from the beginning, exclude that we are dealing with violations of human rights law or with international crimes. Even if, for instance, in the Katanga case at the ICC, there was an issue of household items being stolen. If you're coming from The Hague or Geneva or New York, you may think it's just a few pots. But actually, these devices are sometimes of enormous importance to the victims, because it's maybe their only way to get drinking water out of a well, for instance. And indeed the trial chamber did say this was related to the crime of a pillage. So the links I've been showing between international crimes and economic, social and cultural rights issues do actually happen in practice. And we do see it sometimes addressed. What we don't see happening, and this is not necessarily a problem, is that international criminal trials are not explicitly talking about economic and social *rights*. It's not their job. They do not qualify facts under human rights laws. They have to decide whether or not someone is guilty of a crime. But I think maybe the most promising or important is this way of approaching a situation at the very beginning where victims may tell TJ actors what they've been going through, that we do not start opening boxes of categories of legal rights, and then we assume that everything in relation to socioeconomic wellbeing would go to a box which cannot be opened in the transitional justice experience.

**Tine:** So, this in a way it was also her takeaway in terms of where she is looking for inspiration and what her recommendations were, based on her own experience, which is always what we try to ask people to wrap up the episode. And you also asked the same question to Simon, right?

**Brigitte:** Yes, I did. And when I asked Simon to tell us more about promising places to start to look for inspiration on how to make transitional justice interventions more relevant to victims, he had this to say:

**Simon:** Paul Gready and I have tried to make this more visible by talking about justice in transition to get away from transitional justice as a box with a few very well-defined mechanisms inside it. We're talking about many different parts of a complicated social machine that we're trying to push in a certain direction and I would say, for that to drive



change that's socially, culturally relevant, we have to measure the agency of victims and affected populations. That will come back to what I said earlier about collective engagement, political engagement, social mobilization beyond the advocacy. And my example, would go back to Nepal where the international community and their proxies in the Nepalese civil society said, the process here does not meet international standards for accountability, therefore we will boycott this. We will have nothing to do with it. We will give them no money. We will give them no support and victims should not engage with this process. Victims had already, in many cases, waited a decade or more for any acknowledgement of their suffering and their overwhelming view was even if this system is politicized and flawed – as it clearly was – we want to engage with it. So, victims mobilized, they went around the country and they got something like 60,000 victims to register with the truth commission. Even though global civil society, national civil society was telling them not to, because they desperately, desperately wanted any route to engaging with the process that could address their history of suffering. And I think that's an example of how you can challenge the legalistically-driven agenda with ordinary people coming together with no external resources to really change things. I would also say that in any transitional society, there will be processes going on at the community level: there'll be traditional approaches embedded in traditional hierarchies, traditional cultural approaches, and that what we ultimately need to do is ensure that we're cognizant of all those things, because they're going to happen anyway, and they're a crucial part of the transitional justice process. So, what we have to do is not abandon the human rights framework that's legally defined, but ensure that that is complimented, hybridized if you like, with an acknowledgement of the other social and political processes that are part of ensuring justice in transition. And this hybrid machine can actually deliver both participation of ordinary people, victims and affected populations and an idea of justice that's much more relevant and much more resonant with what victims and communities are looking for.

**Tine:** And that really ties in nicely with the discussion on victims and agency of last month, I think. Actually, I feel it also opens a whole new conversation on alternative justice practices beyond the classical legal TJ toolkit. No?

**Brigitte:** Yes, in terms of alternative justice practices, next month we will discuss an issue, which moves beyond traditional classical international criminal justice, which is universal jurisdiction. But of course it's also very innovative because it opens up a whole new range of judicial avenues, such as we see currently in Germany. And we spoke to two very impressive researchers Naomi Roht-Arriaza from UC Hastings she wrote an amazing book on universal jurisdiction 'The Pinochet Effect'. And secondly we spoke to Thijs Bouwknegt, a very influential researcher on universal jurisdiction working at NIOD in Amsterdam.

**Tine:** And I'm super excited because there are two mighty interesting people, and the conversations we had with them were super fascinating. That's next month. And then I think we should already start to think about how we can look even further beyond that legal realm to think about what justice initiatives look like. So we have that on our plate for the coming episode.

**Brigitte:** Yes, and I'm really looking forward to that.

**Tine:** Let's see where we will be able to talk each other next month. That's a big uncertainty, but that we will talk, that's for sure. And I really look forward to it.

**Brigitte:** So do I. Bye, Tine.

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