

Season 5, Episode 1 (September 2023)

Victim Participation in Transitional Justice: Institutional Reform

Welcome to Justice Visions. The podcast about everything that is new in the domain of Transitional Justice (TJ). Justice Visions is hosted at the Human Rights Centre of Ghent University. For more information visit JusticeVisions.org.

Tine: Welcome to this new season of the Justice Visions podcast. Here at Justice Visions, we're just back from a summer break, which was really nice, and we're excited to be kicking off a new season of the podcast. My name is Tine Destrooper and with me is my co-host Brigitte Herremans.

Brigitte: Hello Tine, yes these are exciting times for us at Justice Visions because we are preparing for our international conference on victim participation, mobilization and resistance, which will take place in March 2024.

Tine: Actually in the last episode, we already hinted at some of the topics that we will be discussing during that conference, and we did so during our last episode with Cheryl Lawther, in which we spoke about more ecological understanding of participation, and that episode really sparked some interest. So, we decided to do a deep dive about the four topics that will structure our conference in the episodes to come.

Brigitte: In the coming episodes we will talk about the institutional dimensions related to victim participation in transitional justice. And of course, we will discuss the way in which victims experience participation themselves. And important for our topics, are epistemological and methodological questions. And lastly, of course, we need to ask the question whether participation is the right word to use at all.

Tine: That's the plan for the next episodes, and today we'll be talking about, indeed about institutional innovation and its impact. Not so much, I think I should say, because we're institutionalists per se, but because whichever form of participation or mobilization or engagement we're talking about, I think it's fair to say that it often at least co-exists with, if not being part of formal institutions and what they do. And so I think it's fair to say that we adopt a more complex and ecological understanding of transitional justice ourselves. But at the same time, with this episode, we're also acknowledging that formal transitional justice mechanisms do continue to have a decisive importance in many TJ processes, but also for many victims. And then, of course, there's also the fact that I think it would be hard to deny that also formal institutions of transitional justice really have in the past decade or so, or maybe the past two decades, have really increasingly embraced victim participation as a necessary condition for legitimacy, for working towards TJ's normative goals. So that's also a reality.

Brigitte: And of course, the latter issue is not something that just happened out of the blue, the participatory turn in transitional justice, if you want to call it that way, it has been really significant and victims really pushed for inclusivity, for recognition, and insisted on the fact that their involvement is crucial to achieve the goals of accountability, disruption and innovation. So yes, today we will be talking about institutions, but we really approach it from the work of victims that drove these innovations within the institutions.

Tine: And with us today to explore that interaction between formal and informal avenues and the topic of institutional change more broadly, is Dr. Brianne McGonigle Leyh, who is an Associate Professor with the Netherlands Institute of Human Rights (SIM) and Montaigne Centre on Rule of Law and Administration of Justice at Utrecht's University's School of Law. She's been working extensively on international criminal law, but also on transitional justice and victims' rights, as well, and this is also important and exciting new work, on documentation and accountability for serious human rights violations. Welcome, Brianne.

Brianne: Thank you for having me.

Tine: It's great to have you here. And Brianne, maybe to start with a really easy first small question, when we're talking about institutional innovation in transitional justice, we've been particularly interested in the evolution across pillars of these modalities, of victim participation. So could you give us an overview of how these participatory rights have evolved over time across the pillars of TJ?

Brianne: I liked the phrase that was used "the participatory turn in transitional justice". I definitely think we've seen major changes in the past 20, 15, even 10 and 5 years. It's become so integral, not just in transitional justice, I must say. Actually, even in the broader field of human rights law, participation has become absolutely integral. There's an expression, I believe it was first used in disability rights: "Nothing about us without us". And we've seen that phrase really spread to so many different groups and communities that have really fought. They've long fought for these participatory rights, particularly within these institutional structures that get established in transitioning contexts. So, in criminal trials, certainly at the international level, we have seen a massive move, from having, except as witnesses, no participatory rights at the Yugoslavia and Rwanda tribunals, to recognize civil party status at ECCC, and as victims before the International Criminal Court. It's really been great that the rights of participation have progressed in those courts, particularly at the ICC together with the right to reparation and greater rights to protection. So I don't think participation should be seen necessarily on its own, but also in conjunction with these other advancements. In truth commissions also, you see, good and bad. You still see truth commissions that may collect a handful of statements or hold a handful of meetings, but generally there's also been some really wonderful practice where it's broad attempts to try to speak to as many individuals who feel victimized by a certain conflict or situation, taking their statements, holding public sessions but also holding private sessions. So there we've also seen a greater awareness of which victims are we speaking with? Are we being more inclusive? And

reparation programs follow very similar trends. Guarantees of non-repetition, is an interesting one, because that whole pillar, I think, has also evolved itself from being much more about legal and institutional reforms to thinking about also educational reform. And there with educational reform, that's really an area where I think we've seen victims teaming up with different organizations to try to have a say on what types of narratives are getting taken in into different educational contexts. And that's yeah ... I think that's maybe one of the more exciting areas in the last two to three years that's been taking place. And of course with memorialization. But memorialization has almost not exclusively, but is largely driven by victims, and it's a matter of negotiation with different public authorities of where their voice can really come through. But there as well, we see greater consultations with different victim communities. So overall it's increasing. But of course there's a long way to go, a long way to go still.

Brigitte: Obviously there is. And, as you've just pointed out, there is of course a different treatment with regard to participation in the different pillars, and that's quite logical seen very diverse nature of the pillars. We were wondering if there are some lessons that could be learned and that could easily travel beyond the obvious lessons, of course, of involving victims right from the start and throughout the whole process. Are there any best practices that you have observed in specific cases that you've been working on?

Brianne: Yeah, yeah, and it's funny because you say: yeah, it's obvious you should include them from the beginning. But sometimes it's not so obvious to the authorities that are setting up these processes, for some reason. It is shocking how often victims are an afterthought and their participation in these processes is an afterthought. Very often what we see is these processes then become reactive to the frustrations that are voiced and around how these processes are getting developed. So actually I would start there. And I would say the best practices are thinking about victim participation in the setup and design of any type of process that's coming forward. We don't see it all the time. I must say I'm happy to see it in a handful of different cases. But yeah, so I think the experiences from the big transitional justice processes, like in Colombia, having a victim's unit set up there with a diverse set of staff, with diverse expertise, that's certainly very welcome. California is doing a wonderful job in all of its processes. They're really leading the way, but they have a lot of institutional support. They have the support of the governor, they have support of state representatives and that really helps. But they have learned from other processes where this has been taking shape.

And maybe I can share something from California, because maybe your listeners don't know as much about what's happening there. But California has really undergone a big push around transitional justice in different areas. So sometimes it's at the city level, sometimes it's at the state-level. But in 2019 the governor apologized for the state's treatment of Native Americans and following from that, they established a law establishing the California Truth and Healing Council. It's a truth commission-like body, but it does collect information and they organize different meetings and listening sessions throughout the state. And this is really important because they're both in person and online. They also make very clear the priority for speaking, starting with California Native Americans, followed by Native Americans outside of California, then policymakers and government

officials, then NGOs and other organizations, and finally the general public. And I think that's very interesting. I had not seen that before it. Maybe it did exist. But putting that on the website and making that clear at certain meetings, this priority of speaking that puts the native Americans in California at the forefront of those spaces. I also think, having an understanding in the regulations and documents that surround these types of more institutional processes, of the complexity of victim identity, we see that more and more. This is hugely important, in part because traditionally they're set up ... I mean lawyers like these types of things and lawyers like categories, and particularly when it comes to discrimination laws, et cetera, there's very clear individual categories that are established. But scholarship, critical scholarship, has told us that these individualized categories are not reflecting the lived experiences of the victims. And so transitional justice processes are responding to this, whether on paper or in processes, trying to capture the more complex identities that victims have, which impacts the harms that they then experience. I think this is really important work. It started a while ago. It started way back when Sierre Leone issued a separate report for children, which was the first time that had been done by a truth commission. But I think we've only gotten better and better. So, we not only have more child-friendly reports, but thinking about how can we, how can we be flexible enough as a transitional justice response and respond to different needs that may be more complex than what we envisioned when we first set it up?

Tine: Thinking about work that you've recently been doing on civil society and documentation, I wanted to invite you to maybe talk a bit more, maybe not so much on that issue of representation, but rather inclusivity. And if you have any insight on how these civil society initiatives offer ways for thinking about how formal mechanisms too might seek to better include women, youth, diaspora but also differently-abled people, elderly persons, plus or maybe other groups that have often been overlooked, LGBTQIA+, is there anything that you see in what civil society is doing that's relevant, also for formal mechanisms?

Brianne: We've mostly seen this in relation to children and youth, also other vulnerable groups: women, less so for men, though it is improving, but particularly for women who have been victims of conflict-related violence, sexual violence, though that is also improving for men. But for other communities I've seen it much less. I mean for the LGBTQTI community, much less so. One area in relation to the elderly which I think is important to mention. There is a really great example, again out of the US. I'm currently researching the US, so I have some examples from there. But there's a city initiative in Evanston, Illinois, for reparations that was designed specifically for reparations for black residents, for loss of generational wealth due to housing discrimination, and they initially they created this fund by setting up a tax on marihuana sales and they set up this fund for reparations. It's really innovative, it's wonderful, but what they envisioned was people applying for, I think it's up to 20 or \$25,000 that they can then put towards down payment on a home for home ownership, because this was seen as a way as a way of growing generational wealth. But what happened in practice was the victims were saying: Hey, I'm an elderly victim and I have suffered this discrimination, but I in no way want to necessarily own my own home right now. I as an elderly individual am very happy to rent. So can I apply for this fund, for these funds to help me with my rent payments? And that wasn't originally

envisioned. And so what we see is, through having these open public spaces and open discussions where the elderly individuals, and also individuals advocating on their behalf, had the space to say: hey, the current program, well-intentioned, wonderful, but it's not working for certain segments of the population. We need to be flexible enough and adaptable enough to also include their needs and concerns, and I think that's just one small example. People weren't thinking: Oh yes, an elderly person may not want to all of a sudden become a homeowner and take all of that responsibility on. How can we then bring them in midway? How can we be more inclusive in our processes to take on board their needs and concerns? So that's one example where I've seen that. But again, it's constant, it's constant discussion, constant dialogue, having those open spaces where individuals can voice their frustrations and concerns. And then having a responsive city council or authoritative body that's willing to adapt their policies and procedures. I think that's crucial.

Brigitte: I wanted to talk a bit more about the inclusivity and also the roles that NGOs can play in promoting inclusivity. And of course, we talked very much about the importance of NGOs, CSOs in driving institutional innovation, notably, in the domain of victim participation. But in your experience, are there also ways in which victim participation in the formal mechanisms have a clear effect on how civil society organizations and activists, human rights defenders operate in the orbit of these formal mechanisms?

Brianne: I've had a lot of interactions with NGOs over the last 20 years. I've worked closely with a number of larger NGOs, but also smaller ones. There's definitely been a shift. And maybe I'm speaking specifically with NGOs that are predominately based out of either North America or Western Europe. But there's been a remarkable shift, I think, in terms of just thinking about basics. Who are we speaking with when we are going into communities? Are we differentiating different groups and under what circumstances? And why? How are we staffing our own NGOs? Staffing I think is really interesting question. Because I think sometimes there is a huge disconnect between the community members and the NGOs that are trying, I'm putting air quotes, "trying to help". In my research, I'm fascinated by that tension because you have some NGOs that are very effective in terms of their discussions with the policy-makers and they believe that they represent community interests, but sometimes they don't always have the strongest connections with those communities. And that role that they play, it's a difficult one, but it's one that I think for the most part they are seeking to improve. And this goes across the board. I've really looked at lots of different contexts, but in the end I think what we see is NGOs, and there's so many different types of NGOs. But I think what I have seen anecdotally is there has been a push to become more diverse and more inclusive, both in their internal policies as well as in their external relations with community actors.

Tine: Thanks Brianne, and it's so great to hear you talk about all these best practices and innovation. And I think, especially like the example you gave of Evanston in California, it's really good to see that these things are also happening and I'd maybe like to use that as kind of a stepping stone to move us towards the last question that we always ask of all our interviewees, which is a question about

where you are looking for inspiration and which evolutions you see that make you most hopeful with regard to this topic of victim participation in TJ.

Brianne: Great last question to be hopeful. So, I get so inspired by lots of different initiatives, I must say. So at the moment because I'm undertaking this research on the US in part because of your book, Tine, that got me looking at aparadigmatic cases in transitional justice. And I've fallen four years now down this rabbit hole and it's been wonderful. And I think what has inspired me is innovation, so innovation in responses. I think it is, however flawed because every transitional justice process is flawed, so we have to accept there will be flaws. But what I love is that there are new ways of using the language of transitional justice, using the language of human rights to advance a cause that meets the needs and concerns of community actors and community members. So, when we see even traditional processes being used to advance justice for historical harms, that's brilliant. When we see a change of leadership and after 50 years of trying to get justice all of a sudden, a change of leadership offers new opportunities for redress, I get excited and hopeful because it shows you my field, that law is a social construct that can change and can adapt, and I think that's really important to see. I am very also excited about transitional justice's turn to the environment. There's a lot happening there and that's very, very exciting and to learn from scholars who have maybe been active in different fields and bringing in there insights into transitional justice, I think this is wonderful. So I think for me right now I'm just getting inspired by almost every month there is a new transitional justice response popping up, at least in the US, which is quite remarkable given that the US is usually a context that is very insular and not really bringing in language from the international or comparative responses. And they are learning from what has happened in Peru and they're learning what has happened in Colombia and they're bringing in expertise from those places and from Canada to share with different groups across the US and in vice versa. So the sharing is going both ways and I get excited about that. There's so much, I mean our field is just I'm inspired all the time. I'm a glass half full person. So I do believe that there's a lot of work to be done, but the steps ... I can give one example and then I can stop talking. But I think when we look about the discussions around reparations for slavery ... The discussions we are at now are so much more advanced and so much more progressed than they were 5 years ago, 10 years ago. I mean it's just remarkable and that gives me hope. That gives me so much hope that this framework that was established for more immediate types of harms is also the language that is used, and the frameworks are useful also for other struggles, for struggles that have been going on far longer.

Tine: Thanks for sharing that excitement with us. It's very tangible and thanks for bringing up the book, because if people read your chapter in that book, we will link to it, they will understand why I asked you such an ambitious first question, because in your book chapter you're doing nothing less than trying to map the whole evolution of transitional justice across all the pillars for the entire United States. It is an ambitious project.

Brianne: I still have a year, so that's great.

Tine: We'll be following your work and we'll link to it in the show notes, for now, thank you so much and for taking the time to talk with us.

Brianne : Thank, you and I really look forward to this conference in March.

Tine: We do too, and we'll link to that again as well in our show notes for the listeners to check it out. Thank you so much.