

AMNESTIES, PROSECUTIONS AND CIVIL LITIGATION

Luke Moffett

Luke Moffett is a lecturer in the School of Law Queens University Belfast. He is currently working on an Arts and Humanities Research Council (AHRC) funded project entitled Amnesties, Prosecutions and the Public Interest in the Northern Ireland transition. With colleagues at Queens (Kieran McEvoy Gordon Anthony) the Transitional Justice Institute, University of Ulster (Louse Mallinder) and local NGO Healing Through Remembering, the project is designed to provide legal, historical and international information on dealing with past in order to let people make up their own mind on these difficult and sensitive issue. This blog is part of a series written in response to specific requests for 'user friendly' papers designed to provide technical guidance for civil society and political actors. These and other project outputs may be found on the project website at <http://blogs.qub.ac.uk/amnesties/>

INTRODUCTION

Civil litigation is means for individuals to seek remedy for a breach of their rights or for harm they have suffered. Traditionally under the laws of tort (i.e. wrongs causing personal harm), recourse to the civil courts was viewed primarily as a means of seeking compensation. However, in Northern Ireland, the use of civil litigation has also been seen as a means of holding state and non-state actors accountable for past abuses, a route toward truth telling and acknowledgement that wrongs have been committed and as a way of galvanising and mobilising victims and others affected by the conflict. For example, over the past few years a number of civil claims have been brought against the United Kingdom government for its policy of internment, use of informants, and death caused by members of the security forces. Paramilitaries have also been the target of civil claims, with one of the most notable cases being the civil case brought by some of the families of the victims of the 1998 Omagh bomb against members of the Real IRA.

CIVIL LITIGATION, ACCOUNTABILITY AND TRUTH RECOVERY

Civil litigation can be a useful vehicle for individuals to pursue truth recovery. For example, civil litigation may compel the disclosure of documents from individuals or governments, it may require individuals to appear in court to be cross examined about past events and for the veracity of their accounts to be probed and tested. In terms of accountability, one key variable in civil actions is that the evidential burden is significantly easier than criminal proceedings as those taking the action only have to present evidence which proves that the harm was **'more likely than not'** caused by the defendant, in contrast to a prosecutor having to prove **'beyond a reasonable doubt'** that the accused was responsible. Thus, in the Omagh bombing case, while the evidence against the defendants would not have passed the evidential burden of proof in a criminal trial, it did in the civil courts, enabling the families to claim damages, after numerous appeals.

CIVIL LITIGATION AND REPARATIONS

A more comprehensive blog on reparations is available on <http://blogs.qub.ac.uk/amnesties/>. For current purposes, civil litigation may be viewed as a narrower form of reparations, as it is generally limited to compensation and restitution. One obvious challenge is that when suing individuals (such as paramilitaries), the defendants may have no assets which can used to pay a compensation order, so after years of litigation it may not result in victims receiving any compensation. Thus it is important that victim expectations with regard to civil litigation are properly managed and that, at least with regard to non-state actors, it may be more sensible to focus on civil litigation as a means of truth recovery and public acknowledgement and

accountability rather than compensation. Of course with regard to suing state institutions, it may be possible to achieve these objections as well as compensation.

OTHER CHALLENGES RELATED TO CIVIL ACTIONS

There are a number of barriers for victims to bring civil claims, which are common to other countries. Individuals have to provide sufficient evidence to prove the suspect committed the crimes against them and the victim suffered harm as a result. If a claimant fails to prove that a defendant caused them harm they could be sued themselves for defamation, or at least ordered to pay the defendant's legal costs. Even if a case is successful claimants, unless they can access legal aid, will have to pay for legal representatives to research and advocate their case, which in itself is a substantial barrier to civil litigation. Legal proceedings can also be delayed by counter-claims, challenges to decisions and appeals which can lengthen proceedings by years. In short, the legal and financial obstacles to civil litigation on conflict related matters are significant and should not be undertaken lightly.

THE EUROPEAN CONVENTION OF HUMAN RIGHTS, PROSECUTIONS AND CIVIL LITIGATION

The right to remedy is enshrined in Article 13 of the European Convention of Human Rights. It requires every individual to have recourse to an effective remedy before a national authority if their human rights have been violated. In Northern Ireland the civil courts provide a useful avenue to fulfil this right. The European Court of Human Rights has held in *Kudla v Poland* that the right to remedy does not enable individuals to have a particular outcome or to challenge the lack of domestic laws, just to have a judicial mechanism in place to obtain a remedy. The Court has not explicitly stated the requirements of Article 13, instead it allows states a margin of appreciation as to how the right to remedy may be given effect in practice. Nonetheless, the Court has found violations of Article 13 in circumstances where a state has failed to carry out effective investigations in conjunction with violations of Article 2 on the right to life and Article 3 on the prohibition of torture and ill-treatment. The European Court has further held that, with regard to such violations, compensation is insufficient to meet a state's obligation to investigate and prosecute violations of the right to life or prohibition of torture and ill-treatment.

AMNESTIES AND CIVIL LITIGATION

Amnesties can affect civil litigation in two ways. First an amnesty may negate perpetrators' civil liability for an offence. In such cases, the state should assume the responsibility of providing reparations to those who have suffered harm to ensure that the victims' right to a remedy is not violated. Second, if civil claims are connected to criminal convictions, an amnesty can indirectly prevent civil litigation if all criminal prosecutions and convictions are negated. In some countries where amnesties have been introduced, they have been connected to a reparation process, whereby an amnesty applicant can only avail of the amnesty on the condition that they make reparations to victims. Such a system usually entails the establishment of a specific administrative mechanism to adjudicate on reparations to victims, ensure equality of treatment and the more efficient and effective processing of claims - rather than the onus being on victims to establish a case and fund legal proceedings. By way of example, in Colombia the Justice and Peace Law, modified by the Constitutional Court, imposed a duty on individuals claiming an amnesty to make reparations to victims, who could claim against the legal and illegal assets of such individuals. In circumstances where the perpetrator had no or limited assets, victims could be compensated by a state reparation mechanism. The Colombian Constitutional Court, similar to the Omagh bombing judgment,

also allowed victims to claim against both individuals and organisations, with the effect that any member of an organisation found responsible for atrocities can be sued.

CONCLUSION

Civil litigation is a useful avenue of redress for victims when prosecutions are not feasible. They may be directed at government violations or non-state offences. However, suing perpetrators through civil courts is an arduous process, beset with numerous challenges. Amnesties can be constructed to remove the burden of civil claims from victims, by imposing a duty on perpetrators to make reparations or disclose all that they know as a condition of them claiming an amnesty. Such an alternative process can facilitate accountability and truth, while also acknowledging victims' suffering and remedying their harm.