



Managing Legal Liability: Prosecutions and Amnesties



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There are three broad categories of attempts to manage past harms in transitional justice contexts: truth commissions, prosecutions, and amnesties¹. Unlike truth commissions, both prosecutions and amnesties explicitly use the legal system to either ‘punish’ or ‘forgive’ infractions. When applied to the climate context, lessons from transitional justice suggest that although litigation could be part of a broader political strategy aimed at generating pressure on powerful actors, it alone is unlikely to be a sufficient means for addressing past actions. Similarly, although amnesties are politically appealing – and to some extent already in use in the climate context – they can erode regime legitimacy and effectiveness if not matched with substantial forms of reparations or forward-oriented supports.

Litigation and Prosecutions

In both the transitional justice and the climate context, the complex and systemic nature of the harms pushes the limits of domestic and international law. Understanding how, when and why transitional justice processes have included prosecutions (or not) is useful for the climate context. Although there is an obvious difference between the prosecution of individuals for human rights abuses and the litigation used for climate harms, we are in both cases considering the strategy of relying on legal punishment to resolve calls for justice generally.

Prosecutions are commonly used to punish individuals responsible for committing or facilitating past harms. Obstacles to this approach include the cost of extensive and lengthy trials, the limited capacity of domestic legal systems and suspicion of international courts, inaccessibility to those most affected by past harms, and the perceived ‘injusticiability’ and complex nature of indirect or systemic injustices and harms, such as socioeconomic rights abuses.

Because of these limitations – all of which resonate with the climate context – prosecutions are carefully targeted, usually focusing on a few high-profile cases. Prosecutions are also leveraged by pairing them with other mechanisms such as amnesties, reparations, truth commissions and institutional change in order to create a balance between repairing the past and addressing the future.

¹ Some regimes have also used processes like lustration in which prominent individuals are removed from powerful situations. This was common in the transitions to democracy in Central and Eastern Europe.

Existing legal systems similarly cannot handle the majority of climate harms due to mis-matches between their capacity, the nature of harms, and jurisdictional boundaries. However, legal pressure can facilitate recognition of a “hurting stalemate” by imposing costs and risks to those actors who may otherwise feel insulated from climate impacts or justice claims of those with less power.

Just as human rights advocates continue to apply pressure for prosecutions, climate litigation efforts seem unlikely to cease as long as there is some feeling that questions of responsibility are being avoided. To make litigation part of a productive effort toward including historical injustice in a future-oriented climate regime, other mechanisms such as truth-seeking mechanisms, reparations and institutional reforms need to be pursued in concert.

Amnesties

Amnesties formally recognise and forgive harms and are common in transitional justice processes (*Olsen, T. D., Payne, L. A. & Reiter, A. G. 2010*) due to the political need to provide protection for powerful actors who could otherwise ‘spoil’ a compromise, the costs of prosecution, and the opportunity costs of alienating those with useful resources in a period of transition.

All of these reasons for using amnesties resonate in the climate context. Many actors who could be (and have been) the subject of litigation are also those with the political, financial and technological capabilities needed for effective global climate action. Just as in the transitional justice context, explicit ‘forgiveness’ of historical emissions could be one strategy for partially including those who might otherwise avoid or subvert justice processes entirely in exchange for cooperation in other elements of an agreement.

Amnesties have recently been adopted in the climate context, although they are not framed as such. In the Paris Agreement a protection from legal liability was insisted upon by several developed countries as a condition for including ‘loss and damage’ as a distinct element (*UNFCCC 2015*). Compensation has for many years been known as a ‘red line’ for the United States and the European Union, while others have promoted it as a just solution to historical emissions (*Khan et al. 2013*). Paragraph 51 of the Paris decision text could be seen as an amnesty for countries with causal responsibility for climate impacts in order to secure their cooperation and support in addressing climate change.

Even as some form of amnesty may be politically irresistible or unavoidable in the climate context, it is worth learning from their pitfalls. Granting amnesties is particularly sensitive to concerns about elite co-optation, and without sufficient contributions in other ways, amnesties can undermine solidarity and delegitimise the regime. In multiple cases amnesties have been overturned years later, often because of perceptions that the promised changes or supports that facilitated the bargain had not been met.

The implications for the post-Paris regime are two-fold. First, the **potential for amnesties to delegitimise a regime** if perceived as unfair, or as allowing impunity for past responsibilities, **should be taken seriously**. This is particularly true as the new regime is established.

Second, amnesties can and have been overturned or used as a source of political tension long after they have been granted if the associated changes to the social contract are not perceived as sufficient. Both of these lessons suggest that the long-term political legitimacy of the amnesty approach would require **significant support for adaptation and 'loss and damage', and long-term institutional change designed to systematically benefit those who have most to lose**.

Interestingly, both amnesties and litigation are already being used in some form in the climate context. As demonstrated in many transitional justice processes, these two mechanisms can support each other. But to be successful in the long-term they likely need to be augmented with other mechanisms.

References:

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The Climate Strategies project “Evaluating peace and reconciliation to address historical responsibility within international climate negotiations” took place in 2015-16. It was led by Climate Strategies member Sonja Klinsky, an Assistant Professor at the School of Sustainability of Arizona State University.

As part of the project, Climate Strategies held three international expert workshops to explore how transitional justice experiences could inform efforts to navigate the political territory between complex, historically rooted justice claims and a future that demands solidarity and collective action. The briefs in this series provide an overview of key outcomes from this project.

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