

Introduction

1.1 HISTORICAL ABUSES OF CHURCH AND STATE

Western states and Christian churches and organisations have marginalised, shamed, and harmed women, men, children, and entire peoples and nations, despite seeking to serve the least among them. These societies and Christian churches today claim to address this impact of widespread and systemic pain and suffering on victim-survivors and their descendants and on the legitimacy of societies and churches. This book argues that these states, churches, and religious organisations must repent, acknowledge, and materially address their roles in these historical abuses. If not, states and churches cannot credibly claim the authority to lead their citizens and congregations and, worse, the structure of these abuses will continue to be replicated and repeated, including in the very measures designed to address the past.

In this book, ‘historical abuses’ mean non-recent violence and human rights violations that occurred decades or generations before the time at which there were (additional) efforts to promote the national legal and political recognition of their wrongdoing. Although historical abuses are evident across all social contexts, this book argues that Western societies and churches co-created a violent Christian nationalism through their constructions of civilisation, empire, patriarchy, and the control of individual bodies and the social order. Across various states and churches, historical abuses include the genocide of Indigenous peoples; killing, violence against, and lynching of African Americans; the rape and sexual assault of women and children in institutions and beyond; the arbitrary detention, slavery, and forced, unpaid labour of African Americans; Indigenous peoples in the United States, Canada, and Australia and women in Magdalene Laundries and maternity homes; the theft and expropriation of Indigenous land; the forced medical experimentation

and procedures on vulnerable adults and children; and the forcible removal of children from families, including illegal adoptions.¹

This book believes that a distinctive response is warranted to address the widespread and systemic harms understood as historical abuses. Several national investigations have confirmed that child sexual abuse and non-sexual forms of historical abuse, such as physical abuse, neglect, emotional abuse, and forced family separation, occurred against large numbers of individuals and were ‘widespread’, ‘endemic’, or ‘systematic’.² Investigations of the global Catholic Church at United Nations human rights treaty body mechanisms confirm the widespread and systemic nature of child sexual abuse in that institution.³ The nature of historical institutional abuse, involving entire classes of peoples, in the case of Indigenous peoples and African Americans, and particularly the marginalisation of women, especially women who became pregnant outside marriage, of the poor, and of children, are suggestive of a widespread and systematic practice, that constitutes a ‘gross violation of human rights’.⁴

From the twentieth century until present, through the tireless efforts of victim-survivors,⁵ of communities, and social movements, states and churches have been forced to address their responsibility for historical abuses across a range of jurisdictions.⁶ This book will examine historical abuses in the United

¹ Regrettably, this book will not address the role of prisons, psychiatric institutions, or the medical profession as sites of historical abuses.

² The Commission to Inquire into Child Abuse, *Final Report* (Government Publications 2009); Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017); Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 2*: (McGill-Queen’s University Press 2015) 399–452; Commission of Investigation, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (Department of Justice, Equality and Law Reform 2009).

³ United Nations Committee on the Rights of the Child, ‘Concluding Observations on the Second Periodic Report of the Holy See’ (2014) CRC/C/VAT/CO/2; James Gallen, ‘Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice’ (2016) 10 *International Journal of Transitional Justice* 332. United Nations Committee against Torture, ‘Concluding Observations on the Initial Report of the Holy See’ (2014) CAT/C/VAT/CO/1.

⁴ Theo van Boven, ‘Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms’ (1996) 59 *Law and Contemporary Problems* 284.

⁵ This book uses the term ‘victim-survivor’ to enable individuals who have experienced serious harm to self-identify in their own manner. Paul Rock, ‘On Becoming a Victim’ in Carolyn Hoyle and Richard Wilson (eds), *New Visions of Crime Victims* (Hart Publishing 2002).

⁶ Shurlee Swain and Johanna Sköld, *Apologies and the Legacy of Abuse of Children in ‘Care’: International Perspectives* (Palgrave Macmillan 2015).

Kingdom, Australia, Canada, the United States, Ireland, and the Holy See, the legal representation of the Roman Catholic Church. In each setting, similar responses to historical abuses have emerged, including the establishment of inquiries; litigation to hold individuals, non-state actors, and states accountable; reparation schemes and apologies on behalf of states and churches; and reconciliation discourses and processes.

This book argues that to adequately address historical abuses, the modern responses of Western states and Christian churches need to not only draw from the ideas, legal rules, and practices of transitional justice but also practise a new justice paradigm that addresses historical-structural injustice and, in particular, the dimensions of power and of emotions in responding to this longer form of injustice. A failure to expand the imagination and practices of what is necessary to respond to historical abuses may result in the very mechanisms of transitional justice being used to consolidate the power of states and churches and cause fresh and additional harm to victim-survivors.

This book is among the first to address these historical abuses from the perspective of transitional justice.⁷ Transitional justice is defined by the United Nations as

the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.⁸

This book has four central claims regarding historical abuses and the potential for a transitional justice response from states and churches. First, perpetration of historical abuses forms part of a consistent and inter-generational pattern of violence in the name of Christian nations that continues to be reproduced in the present. Both church and state were interested in the construction of the 'ideal' human, enforced with norms of civilisation, shame, and control, with highly racialised, patriarchal, and class dimensions, and violent consequences for those who did not conform to the ideal. Over time, the use of power, law, and Christianity shifted from explicitly imperial in

⁷ Brandon Hamber and Patricia Lundy, 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) 15 *Victims & Offenders* 744.

⁸ United Nations Security Council. 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (3 Aug 2004) S/2004/616, 4.

nature to a focus on the institutionalisation of the vulnerable. In increasingly secular or post-Christian societies, efforts to address individuals and groups that are perceived as social problems may have broadened the ideological justification for intervention in individual, family, and community lives, but the structure remains one of marginalising and ‘othering’ those perceived as non-ideal from society. This history poses the question of how transitional justice can address abusive enterprises and structures pursued and endorsed by a religious and moral belief in the goodness of churches and nations.

Second, this book demonstrates that both Christian churches and states in responding to historical abuse in modern times, despite extensive time, energy, and resources, have largely sought to retain and consolidate power and avoid the challenges to the foundational myths and narratives of nation states and Christian churches provoked by addressing historical abuses. In this way, the responses of states and churches constitute ‘unrepentant justice’, where the states and churches refuse to accept that their claims to legitimate state and religious authority, which formed the basis on which historical abuses have taken place and continue to be reproduced in the present, were wrong and are fundamentally incapable of being legitimated. Instead, states and churches frame their responses to historical abuses primarily as a matter of political benevolence. The book argues Western states and Christian churches must relinquish claims to absolute authority and instead attempt to build an alternative legitimacy in societies through new national myths, structures, and practices. These include explicit legal and political recognition of the fallibility and wrongdoing of states and churches and involve the empowerment of individuals and groups subjected to historical abuses at individual, structural, epistemic, and ontological levels.

Third, in applying the principles and frameworks of transitional justice to Western democracies and Christian churches, the book argues that its mechanisms of investigations, accountability, reparations, and apology are wholly necessary but also inherently inadequate to the task of addressing gross violations of human rights in any context. As presently designed and practised, such mechanisms may serve the needs of victim-survivors on an episodic basis. However, to adequately address inter-generational and systemic harms, states and churches must increase their acknowledgement of and directly address structural injustices that pervade modern societies and reproduce harms and attitudes that gave rise to such historical abuses. States and churches must end their attempts to maintain and reinforce their claims to power, legitimacy, and authority and instead pursue guarantees of non-repetition of harm that effectively empower victim-survivors and marginalised communities. Fundamentally, this approach must make real the slogan ‘nothing for us without us’.

Finally, there is a necessarily tragic quality to addressing historical abuses that occurred decades or generations ago. Even if every wish of victim-survivors were met, justice cannot undo the harms done to those who have died nor to those who live and endure the suffering they have experienced and witnessed. The hunger to resolve and overcome pain is inevitable, universal, and impossible to satisfy. The transformation of power relationships and structures is not easy, inevitable, or quick, and this inherent inadequacy must inform any new conception or approach to justice. An appropriate justice response incarnates inter-generational commitments to remember and transform the meaning and material impact of historical abuses and includes a haunting sense of inadequacy, rather than justice as triumphalism.

Section 1.2 of this chapter outlines the existing and related conceptions of justice that may inform a response to historical abuses and positions transitional justice as the dominant but flawed approach to addressing the violent aspects of the past. Section 1.3 considers the application of these justice approaches to the context of historical abuses of Western states and Christian churches. Section 1.4 previews the remaining chapters of the book.

1.2 DIMENSIONS OF JUSTICE

How societies deal with the violent aspects of their past is a perennial problem.⁹ At present, multiple conceptions and practices of justice inform responses to past violence, involving assessing individual, institutional, and social responsibility. This section assesses whether and how restorative justice, transitional justice, and transformative justice should operate to guide Western societies and churches in how to respond to their legacies of historical abuses. Restoration, transition, and transformation are different conceptions of social change that can accompany justice measures, each distinctive from mainstream legal justice in Western societies and churches. To offer an adequate response to the enormity of the nature and scale of historical abuses, it is necessary to draw from each conception.

1.2.1 *Restorative Justice*

Restorative justice can be understood as a set of diverse processes where ‘all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the

⁹ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004).

future'.¹⁰ Restorative justice emphasises crime primarily as a breakdown of private relationships between the victim, the offender, and the community.¹¹ The use of restorative justice to address criminality and prior wrongdoing gathers continued support and academic interest as an alternative to traditional punitive and carceral approaches to justice and aligns with alternative responses to crime from secular, Christian, and Indigenous perspectives.¹²

Restorative justice literature has begun to address historical abuses, such as institutional care of children, and in doing so, overlaps with transitional justice discourse.¹³ However, the use of restorative justice in cases of sexual violence and other serious harms remains controversial and challenging.¹⁴ Some argue that restorative justice may downplay violence against women or re-victimise or endanger victim-survivors.¹⁵ In addition, restorative justice theory sometimes emphasises the Christian roots and spiritual dimensions of the practices, which may be problematic in cases where historical abuse was perpetrated by church institutions.¹⁶ Julie Stubbs suggests the need for caution in applying restorative justice practices in Indigenous communities.¹⁷ In addition, restorative justice, if focused on victim–perpetrator relations alone, struggles to conceptualise a response where the state perpetrates or condones this violence.¹⁸ As a result, restorative justice principles and practices may only form a

¹⁰ Tony Marshall, *Restorative Justice: An Overview* (Home Office 1999) 5.

¹¹ Jonathan Doak and David O'Mahony, 'In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland' (2011) 31 *Legal Studies* 305.

¹² Margarita Zernova, *Restorative Justice: Ideals and Realities* (Ashgate 2007) 7–31; John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 3–28; Marie Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities?* (University College Dublin and School of Applied Social Science 2014).

¹³ Jennifer J Llewellyn, 'Restorative Justice in Transitions and Beyond: The Justice Potential of Truth Telling Mechanisms for Post-Peace Accord Societies' in Tristan Anne Borer (ed), *Telling The Truths: truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame Press 2006); Jennifer J Llewellyn and Robert Howse, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission' (1999) 49 *University of Toronto Law Journal* 355; Kerry Clamp, *Restorative Justice in Transition* (Routledge 2015); Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge 2016).

¹⁴ Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge 2017).

¹⁵ Liz Kelly, 'What's in a Name? Defining Child Sexual Abuse' (1988) 28 *Feminist Review* 65, 66.

¹⁶ Kate Gleeson and Aleardo Zanghellini, 'Graceful Remedies: Understanding Grace in the Catholic Church's Treatment of Clerical Child Sexual Abuse' (2015) 41 *Australian Feminist Law Journal* 219, 224.

¹⁷ Julie Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in James Ptacek (ed), *Restorative Justice and Violence against Women* (Oxford University Press 2009) 103.

¹⁸ Jonathan Doak, 'Stalking the State: The State as a Stakeholder in Post-Conflict Restorative Justice' in Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge 2016).

particular component of an overall justice response to widespread or systemic historical abuses.¹⁹ While the practices of restorative justice may offer victim-survivors therapeutic value in specific contexts, in the absence of addressing the broader systemic issues arising from historical abuses, restorative justice alone seems an inadequate response.

1.2.2 *Transitional Justice*

Since its emergence in the late 1980s and early 1990s, transitional justice has addressed how societies reckon with a legacy of gross violations of human rights,²⁰ principally in the contexts of post-conflict and post-authoritarian societies. In contrast to restorative justice, its primary focus is on system-wide justice responses. As a body of scholarship and practice, transitional justice covers several discrete elements: truth seeking, accountability, reparation, institutional reform, or guarantees of non-repetition and reconciliation.²¹ These elements of transitional justice have claimed to operate with two dimensions: (1) responding to the violation of human rights of victim-survivors, drawing on restorative justice principles, and (2) contributing to or facilitating a ‘transition’ from widespread violence to democratic rule.²² As a result, transitional justice operates on claims based on principled beliefs about what is the just response to past violence and on causal beliefs about how justice measures contribute to social change.²³ The early practice of transitional justice employed a thin conception of ‘transition’, focused on legal-institutional forms of politics at an elite level, rather than broader social transformation.²⁴ Influential early scholarship from Guillermo O’Donnell and Philippe Schmitter reflected a belief in the causal power of elite decisions in transforming abusive state security actors and reinstalling democratic norms,²⁵ and narrowed ‘perceptions of what justice entailed, or could become,

¹⁹ Anne-Marie McAlinden, ‘Are There Limits to Restorative Justice? The Case of Child Sexual Abuse’ in Dennis Sullivan and Larry Tift (eds), *Handbook of Restorative Justice* (Routledge 2006) 307.

²⁰ Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321.

²¹ United Nations Security Council (n 8).

²² Arthur (n 20) 355.

²³ *ibid* 358.

²⁴ *ibid* 338.

²⁵ Guillermo O’Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Johns Hopkins University Press 1986) 37–9.

during a time of transition'.²⁶ This preference for a narrow, legal-institutional approach to transition has proven largely inadequate for the task. In 2002, Thomas Carothers noted that the transition paradigm was not capturing reality in countries with the potential for democratic transition.²⁷ He concluded that it was no longer appropriate to assume that 'a country's chances for successfully democratizing depend primarily on the political intentions and actions of its political elites without significant influence from underlying economic, social, and institutional conditions and legacies'.²⁸

Nonetheless, while the practice of transitional justice expanded to address post-conflict states, such as Rwanda, the idea of how justice mechanisms contribute to 'transition', now from armed conflict to peaceful democracy, remained under-theorised and unresponsive to this expansion.²⁹ Pablo de Greiff recently noted the contextual features in post-authoritarian countries, such as a functioning set of legal institutions, economic capacity to provide large-scale reparations, and a narrow and asymmetrical set of human rights violations, are absent in post-conflict situations.³⁰ Despite these challenges in both post-authoritarian and post-conflict societies, transitional justice has grown significantly since the 1980s and has become a dominant paradigm of international law, policy, and practice for addressing widespread or systemic human rights violations. Transitional justice forms part of the policy of the United Nations, the European Union, and a range of states in their foreign policy goals.³¹ It is the framework employed in jurisdictions across the world, as not only a top-down and elite-driven form of policy making but also through bottom-up and victim-survivor-driven initiatives. As will be examined in its specific elements in subsequent chapters, transitional justice is at once a potential vehicle for elite-driven pacts framed as justice and human rights measures, and a potential means of social change and emancipation for victim-survivors.

In this context, there has been an expansion of transitional justice scholarship and practice to address widespread human rights abuses outside of its

²⁶ Arthur (n 20) 348, 349.

²⁷ Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13 *Journal of Democracy* 5, 6.

²⁸ *ibid* 17.

²⁹ Pablo de Greiff, 'The Future of the Past: Reflections on the Present State and Prospects of Transitional Justice' (2020) 14 *International Journal of Transitional Justice* 251, 254.

³⁰ *ibid*.

³¹ Annie R Bird, *US Foreign Policy on Transitional Justice* (Oxford University Press 2015); Laura Davis, *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice* (Routledge 2014); United Nations Security Council (n 8).

paradigms of armed conflict or post-authoritarian rule.³² Arthur notes that it remains unclear whether the standard transitional justice measures, designed with the specific limitations of post-authoritarian societies in mind, would add value to addressing historical injustices in mature societies.³³ In contrast, Posner and Vermeule suggest that while transitional justice operates typically in post-conflict and post-authoritarian states, these are not exceptional circumstances, but instead should be understood as operating along a continuum to include questions of legal change in settled, peaceful consolidated democracies.³⁴ On their account, transitional justice does not present ‘a distinct set of moral and jurisprudential dilemmas’. There is a considerable and growing practice of inquiries and truth commissions; accountability in criminal, civil, and canonical trials, and in international human rights law; redress and reparation programmes; and apologies and reconciliation addressing historical abuses in these contexts. Historical abuses have been addressed through a transitional justice literature in the context of Canada, Australia, and Ireland.³⁵ Scholarship addressing historical abuses in the United States is growing in employing transitional justice to address historical racial injustices.³⁶ While there may be potential for transitional justice to inform responses to historical abuses of states and churches, it is necessary to address below (i) the nature of transition involved in addressing historical abuses in Western democracies and Christian churches and (ii) how the mechanisms of transitional justice may contribute to this transition.

1.2.3 *Transformative Justice*

A third trend in justice literature and practice is growing discontent with transitional justice. For instance, transitional justice can be criticised as not

³² Dustin N Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition’ (2015) 9 *International Journal of Transitional Justice* 150; Fionnuala Ni Aolain and Colm Campbell, ‘The Paradox of Transition in Conflicted Democracies’ (2005) 27 *Human Rights Quarterly* 172.

³³ Arthur (n 20) 362.

³⁴ Eric A Posner and Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’ (2004) 117 *Harvard Law Review* 761.

³⁵ Rosemary Nagy, ‘The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission’ (2013) 7 *International Journal of Transitional Justice* 52; James Gallen and Kate Gleeson, ‘Unpaid Wages: The Experiences of Irish Magdalene Laundries and Indigenous Australians’ (2018) 14 *International Journal of Law in Context* 43; Mark McMillan and Sophie Rigney, ‘Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment’ (2018) 41 *Ethnic and Racial Studies* 759; Elaine Loughlin, ‘Katherine Zappone: “We Will Find the Truth and Achieve Reconciliation”’ *Irish Examiner* (Cork, 10 March 2017).

³⁶ Andrew Valls, ‘Racial Justice as Transitional Justice’ (2003) 36 *Polity* 53.

engaging questions of socio-economic rights or socio-economic causes of violence meaningfully, thus replicating the privileging of civil and political rights in mainstream human rights discourse.³⁷ A related concern is that transitional justice is not meaningfully empirically evaluated to assess how successfully it achieves its stated goals.³⁸ Some critiques examine the risk that transitional justice practice typically disadvantages and de-prioritises women in the provision of testimony, accountability, and prosecution strategies, and in access to effective remedies and redress.³⁹ Others critique transitional justice as offering only a ‘top-down’ account of addressing the past, that minimises or ignores grassroots or ‘bottom-up’ participatory approaches that substantially privilege the views of victim-survivors.⁴⁰ As transitional justice has grown in popularity and prominence, it has been criticised as being indifferent to context, formulaic, and technocratic.⁴¹ Further critiques challenge the value of the transitional justice paradigm and enterprise as a whole. Catherine Turner has asserted the inherently inadequate nature of transitional justice, if pursued through legal institutions alone, to overcome political conflicts and warns strongly that transitional justice may perpetuate division and create new sites of exclusion⁴² and harm to victim-survivors. Balint et al highlight the conceptual constraints present in transitional justice that inhibit its ability to address structural harms, especially for historical, inter-generational injustice.⁴³ Transformative justice has built on these critiques

³⁷ Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29 *Third World Quarterly* 275; Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ (2014) 8 *International Journal of Transitional Justice* 339; Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017).

³⁸ Lauren Marie Balasco, ‘The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice’ (2013) 12 *Journal of Human Rights* 198, 211.

³⁹ Lia Kent, ‘Transitional Justice in Law, History and Anthropology’ (2016) 42 *Australian Feminist Law Journal* 1, 3.

⁴⁰ Patricia Lundy and Mark McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’ (2008) 35 *Journal of Law and Society* 265; A Eriksson, ‘A Bottom-Up Approach to Transformative Justice in Northern Ireland’ (2009) 3 *International Journal of Transitional Justice* 301; Laurel E Fletcher, ‘Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation’ (2009) 72 *Law and Contemporary Problems* 51; Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008).

⁴¹ de Greiff (n 29) 255.

⁴² Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (1st ed, Routledge 2017).

⁴³ Jennifer Balint, Julie Evans and Nesam McMillan, ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’ (2014) 8 *International Journal of Transitional Justice* 194, 200–1.

to suggest fundamental reform of the goals and methods of transitional justice or alternatively a parallel practice and discourse, or most radically a replacement of transitional justice with a transformative justice framework. Simon Robins and Paul Gready define the concept of *transformative justice* 'as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level'.⁴⁴ Although these criticisms are warranted, transformative justice remains largely critical rather than constructive in nature and without a substantial body of practice to date.

However, the expansion of transitional justice to transformative justice has been recently challenged as improbable or unfeasible.⁴⁵ Some authors suggest that while transitional justice mechanisms may contribute to social transformation, they are unable to restructure the future or achieve transformation on their own.⁴⁶ Pádraig McAuliffe argues transformative justice advocates fail to account for any political conditions that inhibit transformation and, instead, reflect 'great optimism that the social world within states can be changed – the main barriers to justice exist not in context, state capacity or the efficacy of transitional justice's mechanisms, but at the cognitive or ideational level'.⁴⁷ A transformative approach to justice may have broader ambitions of social change than securing or building the legitimacy of Western societies or churches. It may also make claims regarding an appropriate process to give meaning to transitional justice's claims to be bottom-up and victim-survivor centred. Nonetheless, it must address the political and social obstacles to transformation to offer a feasible account of justice as transformation, especially in the novel context of Western societies and churches. If the ambitious goals of transitional justice have been deemed to fail, in what context would the more ambitious goals of transformative justice succeed? Each of these dimensions of justice is deeply related and has the potential to add value to a justice response to historical abuses. Each in turn has limits and flaws and would be in new territory in its application to historical abuses by churches and Western states.

⁴⁴ Gready and Robins (n 37) 340.

⁴⁵ Dustin N Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13(3) *International Journal of Transitional Justice* 570.

⁴⁶ Margaret Urban Walker, 'Capturing Transitional Justice: Exploring Colleen Murphy's *The Conceptual Foundations of Transitional Justice*' (2018) 14 *Journal of Global Ethics* 137, 144; Colleen Murphy, 'On Theorizing Transitional Justice: Responses to Walker, Hull, Metz and Hellsten' (2018) 14 *Journal of Global Ethics* 181, 187.

⁴⁷ McAuliffe (n 37) 72.

1.3 TRANSITIONAL JUSTICE IN WESTERN DEMOCRACIES AND CHRISTIAN CHURCHES

Restoration, transition, and transformation offer different conceptions of social change that accompany justice measures. Both restorative justice and transitional justice espouse similar values, such as truth, accountability, reparation, and reconciliation, and criticise exclusively retributive and adversarial justice approaches.⁴⁸ Both seek to pursue processes involving the acknowledgement of wrongdoing and need for reparation by the perpetrator.⁴⁹ Both can be understood as evaluative concepts, requiring consistent clarification of the meaning of the concept and judgements as to whether a given practice constitutes effective justice.⁵⁰ Similarly, restorative and transformative justice may be understood as distinctive, or entirely overlapping, with perhaps the more profitable views suggesting that they operate along a spectrum and that restorative justice practices may have a transformative dimension, where they affect broader conflicts, communities, and social structures.⁵¹ Transitional justice and transformative justice have a variety of potential relationships. Transformative justice may seek to reform or replace transitional justice concepts and practices. However, in the absence of momentum regarding such replacement, it may be best positioned ‘at the radical end of a transitional justice continuum’ and remain in need of a constructive dimension.⁵²

It remains necessary to address what is the ‘restoration’, ‘transition’, or ‘transformation’ involved in addressing historical abuses of Western societies and Christian churches. ‘Restoration’ as a return to some prior state of right relationship may be inappropriate and inapplicable in the context of historical abuses. The colonisation and genocide of Indigenous peoples, the enslavement of African Americans, and the institutionalisation of women and

⁴⁸ David O’Mahony and Jonathan Doak, ‘Transitional Justice and Restorative Justice’ (2012) 12 *International Criminal Law Review* 305; Kerry Clamp and Jonathan Doak, ‘More than Words: Restorative Justice Concepts in Transitional Justice Settings’ (2012) 12 *International Criminal Law Review* 339.

⁴⁹ Howard Zehr, ‘The Intersection of Restorative Justice with Trauma Healing, Conflict Transformation and Peacebuilding’ (2009) 18 *Journal for Peace and Justice Studies* 20.

⁵⁰ Nicola Henry, ‘From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies’ (2015) 9 *International Journal of Transitional Justice* 199; Gerry Johnstone and Daniel W Van Ness, ‘The Meaning of Restorative Justice’ in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2007) 7.

⁵¹ M Kay Harris, ‘Transformative Justice: The Transformation of Restorative Justice’ in Dennis Sullivan and Larry Tiffit (eds), *The Handbook of Restorative Justice* (Routledge 2007) 556.

⁵² Dáire McGill, ‘“Post-Conflict” Reconstruction, the Crimes of the Powerful and Transitional Justice’ (2017) 6 *State Crime Journal* 79, 80.

children, all depended upon an initial view of these groups as ‘other’, which is an inadequate basis on which to restore just relationships. Christopher Cunneen suggests, ‘One of the great dangers is that restorative justice may simply dissolve into a process of maintaining neo-colonial relations’.⁵³ Kathleen Daly notes that when discussing responses to sexual violence, restorative justice scholars and advocates often focus on an *individual* context of violence, which may overlook other contexts of violence, such as when individuals abuse positions of power, or when sexual victimisation occurs in closed institutions or communities.⁵⁴ To address these concerns, any feasible approach to restoration must address the need to reject the lie of otherness as inferiority and do so in both individual and structural terms.

How is it possible to think about transitional justice within Western liberal democracies and churches? Social change from conflict or dictatorship to a peaceful liberal democracy is the primary understanding of transition within transitional justice. In Ruti Teitel’s account, state transition remains the key distinguishing feature between ‘ordinary’ and transitional justice.⁵⁵ Instead of a required feature of transitional justice, it may be profitable to consider that paradigms of armed conflict or dictatorships are not the only sites in which widespread or systemic violence or significant social change can take place and may be situated within a spectrum of social transition. A single paradigm of transitional justice ‘ignores the problem that human rights abuses may continue to take place in circumstances where, in theory at least, the norms of liberal democratic accountability prevail’.⁵⁶ Limiting transitional justice to societies emerging from conflict or authoritarian rule ‘implies a moral differentiation’ where poor countries are seen as having endemic human rights problems while rich Western countries ‘are implied to be free of such mess and only have a need to come to terms with practices that took place in a relatively distant past’.⁵⁷

In Colleen Murphy’s account, the circumstances of transitional justice, in which it makes sense to address questions of transitional justice goals and

⁵³ Chris Cunneen, ‘Restorative Justice and the Politics of Decolonisation’ in GM Elmar Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing 2002) 46.

⁵⁴ Kathleen Daly, ‘Sexual Violence and Justice: How and Why Context Matters’ in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice: Beyond the Realm of Law* (Palgrave Macmillan 2015).

⁵⁵ Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000) 213.

⁵⁶ Lundy and McGovern (n 40) 273.

⁵⁷ Thomas Hansen, ‘Transitional Justice: Toward a Differentiated Theory’ (2011) 13 *Oregon Review of International Law* 1, 40.

institutions, continue to operate along a spectrum between transitional and more stable democracies.⁵⁸ For Murphy, there are four existence conditions which when present warrant consideration of transitional justice – pervasive structural inequality, normalised collective and political wrongdoing, conditions of serious existential uncertainty, and contested authority.⁵⁹ In Murphy's account, the assertion that democracies such as the United States and Canada exhibit her four existence conditions for the circumstances of transitional justice challenges the legitimacy of the democratic institutions and structures in those states and requires evidence that there is widespread systemic and profound injustice, which suggest they do not warrant the label 'democratic'.⁶⁰ As a result, the challenge in applying transitional justice to historical abuse in Western democracies and churches concerns establishing whether there are sufficiently unjust existence conditions to warrant consideration of questions of transitional justice, reflecting a harm-centric 'justice model'.⁶¹ To what extent do the historical abuses and their consequences in Western states and churches challenge their legitimacy? This book argues that the nature and extent of historical abuses and their present-day reproduction present fundamental challenges to such legitimacy.

In the case of settler democracies, such as the United States, Australia, and Canada, Stephen Winter argues that while a 'settler polity already occupies the 'idealized endpoint' of transitional justice',⁶² transitional politics are forms of politics in which agents seek fundamental changes to basic governing norms,⁶³ and, in doing so, may pose a potentially existential threat to settler societies.⁶⁴ To apply to settler democracies, both Augustine Park and Esme Murdock have argued that transitional justice must be radicalised to make a meaningful contribution to decolonisation, rather than affirm existing settler democratic orders.⁶⁵

The original violence of settler democracies in conquest and colonisation does not exhaust the contexts where sufficient structural injustice exists. Anne-

⁵⁸ Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (1st pbk ed, Cambridge University Press 2017) 42.

⁵⁹ *ibid* 75.

⁶⁰ *ibid* 78.

⁶¹ Balint, Evans and McMillan (n 43).

⁶² Stephen Winter, *Transitional Justice in Established Democracies a Political Theory* (Palgrave Macmillan 2014) 43.

⁶³ *ibid* 54.

⁶⁴ *ibid* 15.

⁶⁵ Augustine SJ Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14(2) *International Journal of Transitional Justice* 262–3; Esme G Murdock, 'Storied with Land: "Transitional Justice" on Indigenous Lands' (2018) 14 *Journal of Global Ethics* 232.

Marie McAlinden suggests the ‘regime change’ that has been thrown up by Irish inquiries into institutional abuse of children is a ‘defining moment in Irish political and legal history’ because it ‘offers a unique opportunity to make a permanent break with the past’ from an ‘amorphous or undefined’ relationship to one of greater state control of church authority.⁶⁶ Similar arguments could be made regarding historical abuse in the United Kingdom or other states where the state delegated care of vulnerable individuals or groups to church control or implementation. As the United Kingdom faces attempts from survivors of atrocities during the British Empire for inquiries, accountability, and redress, transitional justice could apply to post-imperial and post-colonial contexts.

Finally, the transition involved may also concern the nature and structure of religion in Western states more generally. The conditions giving rise to historical abuse, through the limited governance and oversight in Christian institutions, have been exported by Christian organisations from one country to another, as discussed later. For instance, the challenge caused by the abuse scandals to the Catholic Church’s legitimacy and credibility across the Global North is immense.⁶⁷ The crisis may thus require the church to undergo a radical transformation of its governance and theology to the extent that they are relevant causes of historical abuse. As a result, the transition involved in historical abuse could be understood as an evaluative tool to assess the re-imagining and resetting of relationships between Christian churches and state institutions and the re-founding of the provision of state care to vulnerable individuals and groups.

These plural and related understandings of transition reflect McAuliffe’s critique that ‘the inherently imprecise term “transition” has proven susceptible to extreme conceptual stretching, encompassing any transformation in social, economic or political life’.⁶⁸ McAuliffe bemoans such an approach to transitional justice as a ‘hopelessly capacious norm’. This book does not share this hopelessness. Rather than be a cause for despair, this book recognises the distinctive potential, political symbolism, and tactics involved in addressing the past in Western democracies and Christian churches as a ‘transition’, rather than the application of ‘business as usual’ standards to existing administrative and justice processes (inquiries, trials, redress, apologies).

⁶⁶ Anne-Marie McAlinden, ‘An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland’ (2013) 33 *Legal Studies* 189.

⁶⁷ ‘U.S. Catholics See Sex Abuse as the Church’s Most Important Problem, Charity as Its Most Important Contribution’ *Pew Research Center* (6 March 2013).

⁶⁸ McAuliffe (n 37) 75–6.

The task in responding to historical abuses may be profound: to restore a truth that there are no ‘others’ whom it is legitimate to control, denigrate, or destroy; to transition from a society built on national and religious myths of redemptive violence to one that incorporates acknowledgement of individual, social, and institutional responsibility for wrongdoing; and to transform processes from those that assume expertise and elite-led mechanisms are the primary ways to achieve social change and embrace a transformation where the nature and quality of change and progress are the transformation itself.

1.4 OUTLINE OF THE BOOK

1.4.1 *Part I Understanding Justice for Historical Abuses*

In Part I, the problem of historical abuses and the need for a distinctive justice response are examined. Chapter 2 addresses early Christian justifications for organised violence and demonstrates the inherent risk of links between religion, politics, and violence. It then examines early justifications for colonisation, where conceptions of non-Christian inferiority justified expansion and transatlantic slavery. In that context, the chapter assesses the emergence of closed institutions run by church and state actors as a key development in how social orders responded to those individuals and groups that were deemed a problem, based on religious and secular motivations. The chapter concludes by documenting the available evidence and estimates of historical abuses available for harms that can today be recognised, if controversially, as gross violations of human rights.

Chapter 3 argues that historical abuses concern longer-term historical violence but also resulted in structural injustice: broader patterns that result in everyday injustices and wider forms of discrimination and marginalisation against historically targeted social categories, conceived of as ‘historical-structural injustice’.⁶⁹ The chapter argues to address historical-structural injustices involves responding not only to past harms experienced across generations and within lived memory but also to the ways in which these harms are reproduced in the present. The chapter hypothesises that two factors inhibit states and churches from addressing historical-structural injustices – a desire to maintain and consolidate power and the role of public emotions, particularly shame. These factors enable states and churches to maintain existing national and religious myths that avoid a fundamental challenge to state and church authority and legitimacy.

⁶⁹ Alasia Nuti, *Injustice and the Reproduction of History: Structural Inequalities, Gender and Redress* (Cambridge University Press 2019) 13–14.

Chapter 4 considers power as essential to understanding who is legally liable and who is socially and politically responsible for addressing historical-structural injustices. The chapter outlines competing conceptions of power, preferring and applying political scientist Mark Haugaard's four-dimensional conception of power to address the complexities of historical-structural injustices, namely power as agency, structure, epistemic, and ontological. The chapter then examines the role of national and religious myths as justification narratives that maintain existing distributions and structures of power and construct limitations in addressing the past in transitional justice. As a result, it argues that changes in the distribution of power are central to addressing historical-structural injustices, which have coalesced to form national and religious myths that support the existing distributions of power and modern national and religious identities.

Chapter 5 argues that emotions are a mechanism by which victim-survivors may exercise agency and provide the symbolic and public means by which the states and churches themselves seek to respond in kind in addressing their legacies of gross violations of human rights, through the construction and practice of symbolic public-facing emotions.⁷⁰ In doing so, the chapter argues that political and religious leaders and official practices can perform emotions as symbolic representations of their communities and can subject victim-survivors to engagements that affirm and acknowledge their emotional states and needs or engagements that deny and dismiss these positions and emotions. This chapter argues that emotions are deeply enmeshed with the four dimensions of power and in particular that shame remains a key and problematic emotion in the modern responses from states and churches to historical abuse and greatly impacts the lived experiences of victim-survivors and their descendants today.

1.4.2 *Part II Assessing Transitional Justice for Historical Abuses of Church and State*

Part II of the book applies this framework of historical-structural injustices comparatively. This book will examine Ireland, the United Kingdom, Australia, Canada, and the United States, while also examining the global role of the Holy See, the legal representation of the Roman Catholic Church, diocese and religious orders, and other Christian denominations,

⁷⁰ Jonathan G Heaney, 'Emotion as Power: Capital and Strategy in the Field of Politics' (2019) 12 *Journal of Political Power* 224, 225.

within the jurisdictions mentioned. These jurisdictions were chosen for the following reasons:

- (i) Complex multi-actor histories of abuses involving states, churches, and national societies;
- (ii) Shared common law heritage and British imperial background;
- (iii) Shared and differentiated experience with settlement, colonisation, and postcolonial contexts;
- (iv) Shared history and experience of institutionalisation;
- (v) Varied experiences and approaches regarding addressing historical abuses as part of transitional justice; and
- (vi) Varied engagements with international law, human rights law, and courts as a component of addressing their past.

The book does not propose a comprehensive comparison of transitional justice-like measures in these jurisdictions but instead adopts a focused and targeted comparison based on its evaluative and critical framework, looking at historical-structural injustices through the lenses of power and emotion.

Chapter 6 argues that inquiries, whether traditional public inquiries or more innovative and participatory forms of truth and reconciliation commissions, can enable episodic uses of power from victim-survivors and advocates, evidenced in the nature and extent of consultation and ownership of the process and the opportunity to engage with and influence the inquiry's operations. Inquiries may shape the nature and function of the articulated emotions of victim-survivors but also have a significant emotional and potentially re-traumatising effect for victim-survivors. The chapter argues that these episodic uses of power and experiences of emotional disclosure in well-designed inquiries or commissions will necessarily raise the expectations of victim-survivors for other elements of justice, including structural justice, to be addressed through and beyond other mechanisms of transitional justice.

Chapter 7 argues that law's framing of accountability results in an inevitably partial and fractured picture of wrongdoing for historical abuse. The chapter argues that despite a focus on accountability for historical child sexual abuse, non-sexual historical abuses, especially those authorised or ignored by law, struggle to achieve modern-day legal accountability against individuals, institutions, or states. Law's claim to sovereign authority is unable to comprehensively address historical-structural abuses, which may challenge the legitimacy of the legal order created by states and churches. The chapter considers these challenges in the context of accountability mechanisms, including criminal prosecutions, civil litigation, and the use of canon law.

Chapter 8 argues that despite significant munificence to the compensation and redress schemes for historical abuses, the approach taken across a range of states misses the opportunity to transform the relationship between victim-survivors of historical abuse and the states and churches responsible for their harm. If the monetary and material dimensions of reparations are necessarily inadequate to the harms experienced, then the symbolic and communicative dimensions form a critical part of reparations as a response to historical-structural injustice. Rather than act as a form of settlement and closure of claims regarding wrongs, reparations can also serve as examples, to communicate ongoing commitments from states and churches to other aspects of transitional justice, that reflect a desire for a renewed relationship with victim-survivors.

Chapter 9 argues that apologies offer the most direct and explicit mechanism for states and churches to reframe and narrate historical-structural abuse. It argues that although apologies may address institutional or state failure to prevent historical abuses or the illegitimacy of historical practices, few apologies take the further step of problematising the claim by states and churches to have the legitimate power and authority to structure lives and society using violent, coercive, or dominating values and means. In doing so, they limit the capacity of the apology to impact underlying structures of power and authority in society or challenge their fundamental self-identity or founding myth.

Chapter 10 argues the practices and discourses of reconciliation have tended to operate as a form of inappropriate and premature settlement or closure of the grievances of victim-survivors and their descendants. To encourage victim-survivors and a society to pursue reconciliation in the absence of addressing other elements of transitional justice may operate as a reaffirmation of the power structures of states and churches. While the experience of Canada and Australia contains an explicit reconciliation discourse and practice, in the absence of significant change in, and imagination regarding, power relationships in those societies, they join the United States, Ireland, and the United Kingdom in remaining deeply unreconciled societies. In addition, the reconciliation practice of the Catholic Church regarding historical abuse demonstrates its inability to effectively self-critique in its processes of reconciliation.

Chapter 11 concludes the book by arguing that if it fails to consider structural injustice, power, and emotions, transitional justice may be used to legitimate structures of power and emotional narratives that continue to subordinate and marginalise historically abused groups and individuals. It concludes that a different conception of progress and transition is required

to navigate the meaning of historical abuses for the legitimacy of Western liberal democracies and Christian churches. In this account, the book concludes, transition and transformation are matters of the character of progress itself, progress that lives in the tension between wrongs that ‘can never be repaired and must never be forgotten’.⁷¹

The challenge of addressing historical abuses considered in this book arrives at a significant time. In light of the human rights violations during the Trump presidency and the attempted insurrection in the United States in 2021 and ongoing racial inequity and violence,⁷² in light not only of the Rhodes Must Fall movement but also of Brexit in the United Kingdom, Western liberal democracies can no longer be understood as unproblematic end states for processes of democratisation or transitional justice but are themselves the sites of significant social change and conflict. We are at a time where there is deep and wide dissatisfaction with the way in which Western societies and human rights operate.⁷³ Institutional Christianity also faces its own crises. In addition to the decades of crisis in the Catholic Church caused by clerical abuse scandals, awareness of sexual abuse scandals, both recent and non-recent, grows in other Christian denominations.⁷⁴ The persistence and rise of Christian nationalism seeking to support the populist threat to Western liberal democratic values and institutions also deeply implicates the theology and pursuit of power from Christian leaders and institutions across denominations.

As a result, a new articulation and practice of transitional justice, human rights, and the values designed to serve the needs of victim-survivors is required. After thirty years or more of theorising and practice of transitional justice with deep imperfections, it should not come as a surprise that these commitments are often partially implemented or not at all. In offering a new approach, it is hoped this book will not make the perfect the enemy of the good but can also serve to advance discourse and practice in this especially challenging historical period for human rights and transitional justice. If this

⁷¹ This draws from the mission statement of the Conference on Jewish Material Claims against Germany which states: ‘We know the horrors of the Holocaust can never be repaired and must never be forgotten.’

⁷² ‘Towards Non-Recurrence: Accountability Options for Trump-Era Transgressions’ (Protect Democracy 2020) <<https://protectdemocracy.org/project/towards-non-recurrence-accountability/>>.

⁷³ Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights Practice* 1; Martti Koskeniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (Asser Press 2019).

⁷⁴ Katherine W Bogen and others, ‘It Happens in #ChurchToo: Twitter Discourse Regarding Sexual Victimization within Religious Communities’ (2022) 37(3–4) *Journal of Interpersonal Violence* 1338–1366.

challenge is not embraced and historical deaths, discriminations, and harms that human rights aim to prevent are forgotten, they will be repeated in present and future contexts. Mindful of these concerns and seeking to be vigilant in not reproducing an elite-driven, top-down transitional justice, this book offers a new conception of transitional justice to analyse and evaluate the responses of states and institutional churches to historical abuses.