

4

Power

4.1 INTRODUCTION

Chapter 3 argued that inter-generational historical abuses are reproduced over time in present day, for victim-survivors, for historically marginalised groups, and for the descendants of those who suffered historical abuses. Chapter 3 suggested that more powerful actors, especially those whose power was developed through historical abuses, bear the greatest responsibility for addressing historical-structural injustices today and are most likely to resist addressing such injustices. This chapter considers power as essential to understanding who is legally liable and who is socially and politically responsible¹ for addressing historical-structural injustices and for evaluating whether and how unfair structures are reproduced in the practices of transitional justice designed to address these wrongs.

Section 4.2 will outline competing conceptions of power, preferring political scientist Mark Haugaard's four-dimensional conception of power. Section 4.3 applies these four dimensions of power to historical-structural injustices. Section 4.4 examines the role of national and religious myths as justification narratives that maintain existing distributions and structures of power. Section 4.5 examines power as a limitation in addressing the past in transitional justice. Section 4.6 concludes by identifying that assessing the role of power in addressing historical-structural injustices is necessary but insufficient in light of the challenges facing victim-survivors, states, and churches.

¹ Pamela Pansardi, 'Why We Do Need a Concept of Power' (2021) 14(2) *Journal of Political Power* 301, 310.

4.2 CONCEPTIONS OF POWER

Power has been subjected to a range of conceptualisations and evaluations in the last fifty years, across several disciplines.² Different explanations of power have proliferated,³ with several notable traditions forming around different dimensions of power.⁴ The first view is one of power over, which is capable of reflecting an oppressive use of power as domination. The second view of power is as power to, capable of reflecting empowerment of self and others, and is a view of power emphasised and contested within feminist scholarship.⁵ A third approach adds power with,⁶ which ‘denotes wider collaboration between actors that facilitates joint power-to’.⁷ Although some scholarship saw these as opposing approaches to power, a number of authors have combined these approaches in multi-dimensional conceptions of power.⁸ Valeri Ledyaev notes that these approaches are ‘searching for different forms (faces) of power and trying to incorporate them into their conceptual frameworks’.⁹

Since then, Mark Haugaard has argued there are four dimensions of power,¹⁰ adding a re-conceptualised account of Foucault’s work on power as a fourth dimension. Haugaard’s four dimensions overlap but differ from power over, to and with, as explained below. For Haugaard, ‘the four dimensions correspond to four aspects of social interaction. The first dimension refers to the agency-energy aspect of an interaction. The second concerns the structural components. The third concerns the epistemic element of the interaction.

² Robert A Dahl, ‘The Concept of Power’ (2007) 2 *Behavioral Science* 201; Steven Lukes, *Power: A Radical View* (Macmillan 1974); Amy Allen, *The Power of Feminist Theory: Domination, Resistance, Solidarity* (Westview Press 1999).

³ Amy Allen, ‘The Power Family Tree’ (2014) 7 *Journal of Political Power* 443, 443.

⁴ Peter Bachrach and Morton S Baratz, ‘Two Faces of Power’ (1962) 56 *American Political Science Review* 947; Valeri Ledyaev, ‘Conceptual Analysis of Power: Basic Trends’ (2021) 14(1) *Journal of Political Power* 72, 73.

⁵ Amy Allen, ‘Feminist Perspectives on Power’ in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2021) <<https://plato.stanford.edu/archives/win2021/entries/feminist-power/>>.

⁶ Mark Haugaard, ‘Editorial: Reflections upon *Power over*, *Power to*, *Power with*, and the Four Dimensions of Power’ (2012) 5 *Journal of Political Power* 353.

⁷ Mark Haugaard, ‘The Four Dimensions of Power: Conflict and Democracy’ (2021) 14(1) *Journal of Political Power* 153.

⁸ Allen, *The Power of Feminist Theory* (n 2) 33–5; Pamela Pansardi, ‘Power to and Power over: Two Distinct Concepts of Power?’ (2012) 5 *Journal of Political Power* 73; Stewart Clegg, *Frameworks of Power* (Sage Publications 1989).

⁹ Ledyaev (n 4) 74.

¹⁰ Mark Haugaard, ‘Rethinking the Four Dimensions of Power: Domination and Empowerment’ (2012) 5 *Journal of Political Power* 33; Haugaard, ‘The Four Dimensions of Power’ (n 7); Haugaard, ‘Editorial’ (n 6).

The fourth relates to the social ontological elements of social subjects'.¹¹ In most social interactions, all four dimensions are present, but analytically it may be useful to separate them out. Each is discussed in depth below.

The use of power can often be exploitative, and references to power in the context of historical-structural injustices are often in this pejorative sense.¹² However, Haugaard and others maintain that uses of power have the potential to empirically be sites of either domination or emancipation.¹³ Such a distinction operates where power is understood as a scalar concept, reflecting instances that are more or less dominating or emancipating.

The experience of power as either domination or emancipation across each dimension of power can be assessed through an intersectional lens, reflecting the potential for multiple forms of domination, such as patriarchy and racism, to overlap and intersect, causing distinct forms of harm to women of colour, for instance.¹⁴ While Crenshaw's account of intersectionality can be taken to primarily analyse multiple forms of oppression in individual interactions and exercises of power, Patricia Hill Collins notes the need for an additional account of the structural features of interlocking systems of oppression.¹⁵ Such accounts may also benefit from emphasis on the link of privilege and domination in relationships of power.¹⁶ Chandra Talpade Mohanty argues that an intersectional account of power should refuse to homogenise the lived experiences of women under a variety of forms of oppression.¹⁷ This concern reflects the need for epistemic injustice to be addressed, discussed in the third dimension below. Finally, the ontological dimensions of power, associated with the work of Michel Foucault, have also been adapted and critiqued to consider overlapping forms of oppression.¹⁸ These dimensions of power and

¹¹ Haugaard, 'The Four Dimensions of Power' (n 7) 154.

¹² Madison Powers and Ruth Faden, *Structural Injustice: Power, Advantage, and Human Rights* (Oxford University Press 2019) 82.

¹³ Haugaard, 'Rethinking the Four Dimensions of Power' (n 10) 34; Allen, *The Power of Feminist Theory* (n 2) 124–5; Steven Lukes, 'Power and Domination' (2021) 14(1) *Journal of Political Power* 97, 105.

¹⁴ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Law Forum* 139.

¹⁵ Patricia Hill Collins, 'Symposium: On West and Fenstermaker's "Doing Difference"' (1995) 9 *Gender & Society* 491.

¹⁶ Ann Garry, 'Intersectionality, Metaphors, and the Multiplicity of Gender' (2011) 26 *Hypatia* 826, 827.

¹⁷ Chandra Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 *Feminist Review* 61.

¹⁸ Ladelle McWhorter, *Racism and Sexual Oppression in Anglo-America: A Genealogy* (Indiana University Press 2009).

their intersectional application offer a complex but thorough way of conceptualising power and evaluating its role in historical-structural injustices, and in modern-day responses through transitional justice.

4.3 DIMENSIONS OF POWER AND HISTORICAL-STRUCTURAL INJUSTICE

4.3.1 *First Dimension of Power: Agency*

The first dimension of power is its exercise by individuals. In this dimension of power, compliance with a legitimate exercise of ‘power over’ by one agent, may enable the other agent to exercise their ‘power to’, for instance, compliance with a road traffic police officer enables road users to exercise their power to use an ordered traffic system.¹⁹ In contrast, where the individual exercise of power is not mutually empowering, it may constitute domination, where A gains at the expense of B.²⁰ In considering the individual’s exercise of power, Haugaard notes that ‘the three most significant power resources are violence-cum-coercion, authority and material-cum-economic resources’.²¹ He distinguishes between acts of violence, from coercion, where the threat of violence is used to ensure compliance.²²

As discussed in Chapter 2, historical-structural injustices constitute significant acts of violence. Feminist scholars have emphasised the role of power and domination in rape.²³ Several inquiry reports note that child sexual abuse constitutes an inherent and abhorrent abuse of power and act of violence, given the power imbalance between child victim and adult perpetrator.²⁴ The racist violence of slavery, Jim Crow, and modern-day racial violence in the

¹⁹ Dahl (n 2) 202.

²⁰ Lukes (n 2) 27.

²¹ Haugaard, ‘The Four Dimensions of Power’ (n 7) 154.

²² Mark Haugaard, *The Four Dimensions of Power: Understanding Domination, Empowerment and Democracy* (Manchester University Press 2020) 172–85.

²³ Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (Routledge 2006).

²⁴ ‘The Commission to Inquire into Child Abuse Report’ (Government Publications 2009) vols 1, chapter 7, paras 111; chapter 8, 104; Australia and others, *Lost Innocents: Righting the Record: Report on Child Migration* (Senate Community Affairs References Committee Secretariat 2001) 112; *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (Commonwealth of Australia 2004) 135; Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, The History Part 2* (McGill-Queen’s University Press 2015) 415.

United States have been analysed as ongoing forms of domination.²⁵ Lynching as a communal and group form of violence depends on the power of numbers and public endorsement.²⁶ Settler colonial violence can be understood as not only biopower and an ontological form of power, discussed in the fourth dimension below, but also in power expressed in direct violence and coercion.²⁷

A second form of agency relates to the role of authority. Law and religion play a particular role in creating and maintaining authority. Law purports to render conduct non-optional, which enables it to perform a function in guiding individual conduct.²⁸ Law's claim to authoritatively render conduct obligatory is one of a state's primary means of changing perceptions, behaviours, and attitudes.²⁹ Similarly, religion seeks to use charismatic authority, related to individual roles of priests, clerics, and other religious leaders, and the authority of scripture, such as the Bible.³⁰ Steve Ogden argues that in institutional Christianity, church leadership see themselves as divinely authorised through their own theological and epistemological interpretations of scripture and tradition.³¹ Richard Sipe et al emphasise that Roman Catholic clerical culture operated out of blind obedience to the authority of superiors and led to a culture of malignant narcissism that facilitated and covered up abuse.³² The role of religious authority is noted in existing inquiries into historical abuse, as leading to 'exaggerated levels of unregulated power and trust, which perpetrators of child sexual abuse were able to exploit'.³³

²⁵ William J Wilson, *Power, Racism, and Privilege: Race Relations in Theoretical and Sociohistorical Perspectives* (Free Press 1976).

²⁶ Kathleen Belew, 'Lynching and Power in the United States: Southern, Western, and National Vigilante Violence' (2014) 12 *History Compass* 84.

²⁷ Chelsea A Pardini and Ana Espinola-Arredondo, 'Violence, Coercion, and Settler Colonialism' (2021) 33 *Journal of Theoretical Politics* 236.

²⁸ Herbert Lionel Adolphus Hart, *The Concept of Law* (Clarendon Press 1998) 6.

²⁹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009) 28–37.

³⁰ Mark D Jordan, *Convulsing Bodies: Religion and Resistance in Foucault* (Stanford University Press 2015) 8.

³¹ Steven G Ogden, *The Church, Authority, and Foucault: Imagining the Church as an Open Space of Freedom* (Routledge, Taylor & Francis Group 2017) 8.

³² AW Richard Sipe, Thomas Doyle and Marianne Benkert, 'Clerical Spirituality and the Culture of Narcissism' (2013) <www.awrsipe.com/reports/2013/Spirituality-and-the-Culture-of-Narcissism.pdf>.

³³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 68–9; Truth and Reconciliation Commission of Canada (n 24) 550; 'The Commission to Inquire into Child Abuse Report' (n 24) Executive Summary, paras. 18–30.

Finally, agents exercise power through economic resources,³⁴ which can both be used coercively as a form of domination and also have a communicative component, reflecting a message regarding the legitimacy of the distribution of economic resources. Existing studies demonstrate significant political, economic, and social gain to empires, settler colonial states, and churches and religious orders involved in the expansion of empires, the process of transatlantic slavery, racial discrimination, and the institutionalisation of social groups in the eighteenth and nineteenth centuries.³⁵

Power as a form of individual agency is important to establish individual liability and responsibility but may be challenging in the context of historical-structural injustices. Lukes notes that distributing responsibility between individual agents and social structures impacts how a society conceptualises 'the link between power and responsibility of both past and present actors' for prior wrongdoing.³⁶ Placing responsibility primarily or exclusively on either long-dead individuals or defunct authority, particularly historical authorities, also has the effect of relieving contemporary individuals and societies from more thoroughly examining their own responsibility to address injustice.

4.3.2 *Second Dimension of Power: Structure*

A second dimension of power is its role in the creation and maintenance of social, political, legal, and religious structures. Bachrach and Baratz define structural power as where: 'A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration only of those issues that are comparatively innocuous to A'.³⁷ Iris Young defines a structural dimension of power as where actors may suffer 'systematic threat of domination or deprivation of the means to develop and exercise their capacities' as result of multiple widespread social processes that are not controlled or directed by single agent.³⁸ For Clarissa Hayward, 'structural power' is 'institutionalized, objectified, internalized as motivational systems', and embodied in relatively enduring

³⁴ Haugaard, 'The Four Dimensions of Power' (n 7) 158–9.

³⁵ Daron Acemoglu, Simon Johnson and James Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *American Economic Review* 1369; Eugene D Genovese, *The Political Economy of Slavery: Studies in the Economy & Society of the Slave South* (Wesleyan University Press 1989); Edward E Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (Basic Books 2016).

³⁶ Lukes (n 13) 101.

³⁷ Bachrach and Baratz (n 4) 948.

³⁸ Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011) 52.

dispositions.³⁹ Hayward notes that structural power is particularly difficult to change due to its institutionalisation and reproduction over centuries.⁴⁰

Haugaard distinguishes between ‘structural conflict’, which concerns conflict of the nature of this reproduction, and ‘structural bias’, which concerns the unfair possibilities created by a particular form of structure.⁴¹ Structures have the function of organising issues into law, politics, or the private sphere, or excluding them from consideration completely. As a result, a conflict regarding historical-structural injustices is a fundamental conflict about the social order and concerns whether its structures and their reproduction are normatively legitimate and appropriate.⁴² In a conflict about structure, ‘the rules of interaction are contested because the social structures that underpin ordered interaction are in dispute’.⁴³ As a result, the interaction of agency and structures represents one of the key sites where power affects the potential for structural injustice to be addressed.

Resolving conflicts about the exercise of power as agency alone are conflicts *within* a structure, whereas conflicts regarding historical-structural injustice also involve conflict *about a structure*. In this regard, Stewart Clegg distinguishes between the ‘episodic aspect of power, which focuses upon specific outcomes, and dispositional power, which constitutes the structured rules of the game, defining the dispositions of actors over time.’⁴⁴ This distinction makes it possible to recognise that, for instance, within a male-dominated power structure, ‘episodic power may, under certain conditions, be exerted by specific women whether through occasional access to power over or through power to’, without affecting underlying patriarchal structures.⁴⁵ In the contexts of historical abuses, individual acts of violence, coercion, and claims to authority existed and operated alongside structural constraints in legal political and religious systems over time. Foucault suggests that structures continue patterns of violence and domination by other means.⁴⁶ For instance, as discussed in Chapter 2, after the US Civil War, attempts to reintroduce new forms of discrimination and marginalisation of black Americans reflected

³⁹ Clarissa Rile Hayward, ‘On Structural Power’ (2018) 11 *Journal of Political Power* 56, 62.

⁴⁰ *ibid* 56.

⁴¹ Haugaard, ‘The Four Dimensions of Power’ (n 7) 159–163.

⁴² *ibid*.

⁴³ *ibid* 161.

⁴⁴ Haugaard (n 10) 37; Clegg (n 8) 83–5.

⁴⁵ Alix Tiernan and Pat O’Connor, ‘Perspectives on Power over and Power to: How Women Experience Power in a Mining Community in Zimbabwe’ (2020) 13 *Journal of Political Power* 86, 89–90.

⁴⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books 1991) 151.

attempts to exclude blacks from the structures of power.⁴⁷ Wolfe's account of the structure of settler colonialism is worth repeating: 'Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base . . . invasion is a structure not an event'.⁴⁸ In addition, structural dimensions of power will impact on how historical-structural injustices are addressed today. Specific elements of legal systems relevant to transitional justice, such as law's relationship to time, will be explored in Part II of this book for their capacity to confirm structure or offer the potential to de-structure existing power biases and structures.

4.3.3 *Third Dimension of Power: Epistemic Elements*

Steven Lukes is credited with the development of a third dimension of power, at an epistemic level.⁴⁹ Haugaard argues that there are five aspects of this third dimension of power: practical knowledge, natural attitude, reasonable versus unreasonable, reification, and truth versus Truth.⁵⁰ Conflicts regarding epistemology concern the idea that 'social reality is made, therefore it can be unmade'.⁵¹

Epistemic power is particularly relevant to historical-structural injustices in at least three ways. First, the process of reification, whereby the social constructedness of structures is denied,⁵² is of particular relevance to historical-structural injustices, where there is often the combined denial of its occurrence and legitimization of a resultant legal, political, or religious order. Balint et al note: 'The nature and power of structural injustices is traceable to the way in which they become significantly naturalised over time so that populations commonly perceive their manifestations in entrenched inequalities persistently suffered by particular groups as taken for granted.'⁵³ Walter Benjamin observes that 'positive law demands of all violence a proof of its historical origin, which

⁴⁷ Angela Y Davis, 'Racialized Punishment and Prison Abolition' in Tommy L Lott and John P Pittman (eds), *A Companion to African-American Philosophy* (Blackwell Publishing 2007) 360; Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump* (2nd ed, Oxford University Press 2018) 6.

⁴⁸ Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 *Journal of Genocide Research* 387, 388.

⁴⁹ Lukes (n 2); Lukes (n 13).

⁵⁰ Haugaard, 'The Four Dimensions of Power' (n 7) 163.

⁵¹ *ibid* 165.

⁵² *ibid*.

⁵³ Jennifer Balint and others, *Keeping Hold of Justice: Encounters between Law and Colonialism* (University of Michigan Press 2020) 14.

under certain conditions is declared legal and sanctioned'.⁵⁴ Costas Douzinas observes similarly that the sanctioning of historical violence through legal instruments allows past violence to be forgotten.⁵⁵ This role of law in structuring and portraying historical violence as legitimate, or failing to portray it and rendering it invisible in national legal or political consciousness, contributes to explaining why the abuses considered in this book are only being addressed in earnest in recent years, several decades after their commission. In particular, settler colonialism can also be understood to centrally involve a denial and disavowal of historical wrongdoing.⁵⁶ Lorenzo Veracini argues that 'settler colonialism obscures the conditions of its own production'⁵⁷ and instead constructs a mythical role for original violence: 'even when settler colonial narratives celebrate anti-indigenous violence, they do so by representing a defensive battle ensuring the continued survival of the settler community and never as a founding violence per se'.⁵⁸ In this context, law plays a key function. Peter Goodrich writes that a mythical legal history provokes 'an escape from memory'.⁵⁹

Second, within Judeo-Christian traditions, religion often functioned as a form of reification, deriving from a foundational distinction between the sacred and profane.⁶⁰ Jeffrey Alexander argues that even modern secular social systems remain significantly structured along a sacred versus profane distinction.⁶¹ Historical-structural injustice evidences persistent 'othering' across diverse time periods and contexts. Ogden defines 'othering' as a 'heuristic term used to describe the process of marginalization on the basis of difference'.⁶² Powers and Faden note othering is a key dimension of structural injustice: 'structural injustice all too often arises out of and persists because of an explicit or implicit judgment that some lives matter less than others'.⁶³ Schwartz concurs that othering is an inherent violent act that also constitutes

⁵⁴ Walter Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writing* (Schocken Books 1986) 279.

⁵⁵ Costas Douzinas, 'Violence, Justice, Deconstruction' (2005) 6 *German Law Journal* 171, 175.

⁵⁶ Walter L Hixson, *American Settler Colonialism: A History* (1st ed, Palgrave Macmillan 2013) 12.

⁵⁷ Lorenzo Veracini, *Settler Colonialism* (Palgrave Macmillan UK 2010) 14.

⁵⁸ *ibid* 78.

⁵⁹ Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson 1990) 43–54.

⁶⁰ Emile Durkheim and Karen E Fields, *The Elementary Forms of Religious Life* (Free Press 1995).

⁶¹ Jeffrey C Alexander, *Performance and Power* (Polity 2011) 98.

⁶² Ogden (n 31) 19.

⁶³ Powers and Faden (n 12) 6.

identity: 'Violence is not only what we do to the Other. It is prior to that. Violence is the very construction of the Other.'⁶⁴ The non-white, non-male, non-adult, non-Christian person is described variously as other: as savage, as moral dirt, as in need of salvation, and so on.

A third form of power in this epistemic dimension is the capacity for testimonial and hermeneutical injustice, understood as the lack of concepts necessary for the articulation of experiences of the oppressed.⁶⁵ Gayatri Chakravorty Spivak described epistemic violence as when subaltern peoples are prevented from speaking about themselves or their own interests because others claim to know what those interests are.⁶⁶ Miranda Fricker situates such injustices within a conception of social power that may be exercised by individual agents or which may operate structurally.⁶⁷ She distinguishes between testimonial and hermeneutical injustice: 'testimonial injustice is caused by prejudice in the economy of credibility; and that hermeneutical injustice is caused by structural prejudice in the economy of collective hermeneutical resources'.⁶⁸ For Fricker, testimonial injustice occurs 'if prejudice on the hearer's part causes him to give the speaker less credibility than he would otherwise have given. Since prejudice can take different forms, there is more than one phenomenon that comes under the concept of testimonial injustice'.⁶⁹ In contrast, hermeneutical injustice arises where 'the social experiences of members of hermeneutically marginalized groups are left inadequately conceptualized and so ill-understood, perhaps even by the subjects themselves; and/or attempts at communication made by such groups, where they do have an adequate grip on the content of what they aim to convey, are not heard as rational owing to their expressive style being inadequately understood'.⁷⁰ Fricker notes: 'testimonial injustice, in which someone is wronged in their capacity as a giver of knowledge; and hermeneutical injustice, in which someone is wronged in their capacity as a subject of social understanding'.⁷¹ Jugov and Ypi note that the distinctive nature of structural injustice, and how it is replicated over time, 'renders agents operating within such structure

⁶⁴ Regina M Schwartz, *The Curse of Cain: The Violent Legacy of Monotheism* (University of Chicago Press 2004) 5.

⁶⁵ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007).

⁶⁶ Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois 1988).

⁶⁷ Fricker (n 65) 13.

⁶⁸ *ibid* 1.

⁶⁹ *ibid* 4.

⁷⁰ *ibid* 7–8.

⁷¹ *ibid* 8.

vulnerable to epistemic opacity when it comes to observing the persistence of injustice', affecting both those who benefit from structural injustices and those harmed by them.⁷² Epistemic injustice is deeply gendered in nature, with the distinct knowledge and experience of women ignored, marginalised, or misunderstood across diverse contexts.⁷³ Berenstain et al note:

Colonization and land dispossession would not be possible without the violent disruption of Indigenous knowledge systems and ongoing organized attempts to disrupt their survival. Embodied ways of knowing, spiritual ways of knowing, and land-based ways of knowing – these are all forms of knowledge that are violently foreclosed in the name of settler futurity.⁷⁴

For Charles Mills, epistemic injustice arises in the United States in a racial contract which regards white men as 'generic' knowers collectively and deems those it categorises as non-white as incapable of intellectual achievement and progress.⁷⁵ Mills describes an 'inverted epistemology' in which those who have created injustices remain largely ignorant of how they benefit from them.⁷⁶ Similarly, children have been historically subjected to a lack of testimonial credibility,⁷⁷ resulting in some instances in a lack of response when they disclosed abuse to adults. Epistemological power is a key site where knowledge, truth claims, and lived experiences can be heard and validated or ignored, denied, or suppressed. In this regard, it can form a key component of historical-structural injustices or be a site of opposition to such domination and harms. To address epistemic injustice at these structural and interpersonal levels will require not merely the practice of epistemic virtues aimed at counteracting these injustices⁷⁸ but also the practice of political, media, and educational institutions that can affect broader structures.⁷⁹

⁷² Tamara Jugov and Lea Ypi, 'Structural Injustice, Epistemic Opacity, and the Responsibilities of the Oppressed' (2019) 50 *Journal of Social Philosophy* 7, 9.

⁷³ Debra L Jackson, "'Me Too': Epistemic Injustice and the Struggle for Recognition" (2018) 4 (4) *Feminist Philosophy Quarterly Article* 7 1–20; Marjorie Johnstone and Eunjung Lee, 'Epistemic Injustice and Indigenous Women: Toward Centering Indigeneity in Social Work' (2021) 36 *Affilia* 376.

⁷⁴ Nora Berenstain and others, 'Epistemic Oppression, Resistance, and Resurgence' [2021] *Contemporary Political Theory* 2 <<https://link.springer.com/10.1057/s41296-021-00483-z>> accessed 19 August 2021.

⁷⁵ Charles W Mills, *The Racial Contract* (Cornell University Press 2011) 44–6.

⁷⁶ *ibid* 18.

⁷⁷ Michael D Baumtrog and Harmony Peach, "They Can't Be Believed: Children, Intersectionality, and Epistemic Injustice" (2019) 15 *Journal of Global Ethics* 213.

⁷⁸ Fricker (n 65) 170.

⁷⁹ Elizabeth Anderson, 'Epistemic Justice as a Virtue of Social Institutions' (2012) 26 *Social Epistemology* 163; José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination* (Oxford University Press 2013) 90–118.

4.3.4 Fourth Dimension of Power: Social Ontology

The fourth dimension concerns the construction of individuals into social subjects.⁸⁰ Foucault argues that modernity involves a shift in the use of power from coercive domination alone to one where such power coexists with a constitutive or disciplinary power.⁸¹ From an original Christianised form of public execution to the use of closed institutions as a form of punishment and discipline, Foucault argues that power controls and shapes individual bodies, and illustrates this through an examination of disciplinary institutions, such as prisons, and later through a society-wide concept of biopower.⁸² For Foucault, the terms 'bio-politics' and 'governmentality' describe new forms of governing that arose in the mid-eighteenth century that were closely allied with the creation and growth of modern bureaucracies and institutions. In his later writings, Foucault employs the term 'bio-power' to describe how standards of normality are fostered in society as a means of social control, rather than through overt control through institutions.⁸³ Biopower is about normalisation,⁸⁴ the construction of what is 'normal' and the threat of punishment for what is deemed abnormal.

Similarly, in his account of nationalism, Ernest Gellner argues that key to the emergence of the modern state was not simply a monopoly upon violence and taxation, equally paradigmatic was the attempted monopoly upon socialisation, through control of education, particularly disciplinary education.⁸⁵ The modern state attempted to monopolise education and impose a common culture on all society.

Finally, Norbert Elias argues that modernity involves a change from obedience based upon coercion alone to compliance based upon self-restraint, understood as the 'civilizing process',⁸⁶ a term used to create authority and structures of power. For Elias, the civilising process emphasises the construction of social prestige and hierarchy through a focus on the appearance and compliance of bodies, and thus includes but extends beyond institutional

⁸⁰ Michel Foucault, 'The Subject and Power' in Hubert Dreyfus and Paul Rabinow (eds), *Beyond Structuralism and Hermeneutics* (University of Chicago Press 1982) 208.

⁸¹ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Pantheon Books 1980) 79–108.

⁸² Foucault, *Discipline and Punish* (n 46) 53–70; Jordan (n 30) 44–7.

⁸³ Foucault, *Power/Knowledge* (n 81).

⁸⁴ Luna Dolezal, *The Body and Shame: Phenomenology, Feminism, and the Socially Shaped Body* (Lexington Books 2015) 63–4.

⁸⁵ Ernest Gellner, *Nations and Nationalism* (Blackwell 1990).

⁸⁶ Norbert Elias and others, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Rev edn, Blackwell Publishers 2000).

contexts.⁸⁷ The account given by Elias can be understood as an individual-focused, bottom-up approach to the internalisation of a socially constructed world, in addition to top-down and explicit processes of modernisation by nation states.

Historical abuses sit at the intersection of the use of power as domination in historical contexts and the normalisation of such power relations as a structure in the present. On these accounts, closed and coercive institutions seem to play a particular role in the construction of liberal freedom and modern society.⁸⁸ Haugaard notes: 'For those who do not internalize 4-D power willingly, coercive disciplinary institutions remain.'⁸⁹ Una Crowley and Rob Kitchin suggest that in post-independence Ireland power was used to 'mould and police the sexual practices of its citizens and create a sanitised moral landscape'.⁹⁰ Diarmaid Ferriter notes: 'Control of sex and sexual relations was central to the creation and maintenance of power and the social order, as recognised by both Freud and Foucault, and, in the Irish context, the attitudes adopted by the new class of farmers and the desire to control marriage, supported by the Catholic Church, was a reflection of such power.'⁹¹ Scott Morgensen similarly notes that settler colonialism as a form of historical-structural injustice 'can be denaturalised by theorising its constitution as biopower, as well as how it in turn conditions all modern modes of colonialism and biopower'.⁹² Ladelle McWhorter similarly asserts that both race and gender arise within the same 'normalizing disciplinary power/knowledge networks that arose in the early nineteenth century as means of managing individuals in large groups, and the biopower networks that arose from the nineteenth through the mid-twentieth centuries as large governmental systems augmented and intensified their control over populations'.⁹³

Historical-structural injustices occurred in widespread and systemic fashions and are reproduced in present day in a manner that affects large sectors of society, including the descendants of historically abused groups. The four

⁸⁷ Dolezal (n 84) 66–8.

⁸⁸ Haugaard, 'Rethinking the Four Dimensions of Power' (n 10) 36; Kevin Ryan, *Social Exclusion and the Politics of Order* (Manchester University Press 2007).

⁸⁹ Haugaard, 'The Four Dimensions of Power' (n 7) 171.

⁹⁰ Una Crowley and Rob Kitchin, 'Producing "Decent Girls": Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922–1937)' (2008) 15 *Gender, Place & Culture* 355.

⁹¹ Diarmaid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (Profile 2012) 19.

⁹² Scott Lauria Morgensen, 'The Biopolitics of Settler Colonialism: Right Here, Right Now' (2011) 1 *Settler Colonial Studies* 52, 53.

⁹³ Ladelle McWhorter, 'Sex, Race, and Biopower: A Foucauldian Genealogy' (2004) 19 *Hypatia* 38, 54.

dimensions of power provide a basis for analysing who benefits and who is harmed from these injustices, in a manner that enables a shared and integrated assessment of responsibility. Both individual uses of power by agents and the confirmation of power by existing structures of states and churches can be seen as sites of responsibility. In addition, the third and fourth dimensions of power demonstrate that historical-structural abuses can be evaluated not merely in interactive or structural terms but also in terms of individual and structural knowledge and the construction of social subjects in society.

Though helpful to separate analytically, a single interaction within the context of historical abuses can reflect multiple dimensions of power simultaneously. For instance, an individual instance of child abuse within a closed institution represents (i) the abuse of power at an individual level of the perpetrator; (ii) a structural abuse of power where the nature and environment of the closed institution placed the child in a position of risk and particular vulnerability to abuse; (iii) a situation where the child may be subject to epistemic injustice in the abuse being denied, justified, or rationalised; and (iv) in being conceptualised as 'moral dirt' or inferior based on their status and potentially contributing to the eradication of the child as a First Nations or Indigenous person and assimilating them into a settler society. These four dimensions thus thoroughly reflect the material and ideational dimensions of power and its capacity to cause harm in the context of historical-structural abuses. However, the four dimensions of power may also be involved in maintaining and legitimating existing distributions and structures of power that have their origin in historical violence. In particular, the role of power can be assessed in its contribution to fostering and maintaining national and religious myths as a source of justification and legitimating for the contemporary legal, national, and religious state of affairs.

4.4 POWER AND NATIONAL AND RELIGIOUS MYTHS

Part of the resistance of existing power structures and actors to addressing historical abuses may arise from the challenge that doing so poses to myths or self-images of states and church institutions and identities. Clarissa Hayward identifies the role of justification narratives as a force that maintains existing distributions and structures of power. For Hayward, when such justification narratives 'are institutionalized, they constrain and enable action by shaping incentive structures. When they are objectified in material form, they constrain and enable action through practical/corporeal experience'.⁹⁴ National

⁹⁴ Hayward (n 39) 65.

and religious myths seem to function as these narratives to justify (ignoring) the historical-structural abuses of the nation and churches and sustain and structure society in such a way that inhibits critique of the myth. Milan Kundera wrote, ‘The struggle of man against power is the struggle of memory against forgetting.’⁹⁵

G rard Bouchard defines a myth as ‘a collective representation that is hybrid, beneficial, or harmful, imbued with the sacred, governed by emotion more than by reason, and a vehicle of meanings, values, and ideals shaped in a given social and historical environment’.⁹⁶ He notes that myths are typically reified, taken for granted, and avoid being questioned.⁹⁷ For Roland Barthes, myths reify and present the particularities of history as natural, ‘making contingency appear eternal’.⁹⁸ In doing so, myths complicate and distort our understandings by adding a further layer of meaning to the form where they are presented.⁹⁹ Walter Hixson notes that myths are central to the functioning of settler colonies in particular: ‘for the settler colony to establish a collective usable past, legitimating stories must be created and persistently affirmed as a means of naturalizing a new historical narrative. A national mythology displaces the indigenous past ... *Becoming the indigene* required not only cleansing of the land, either through killing or removing, but sanitizing the historical record as well’.¹⁰⁰ In these ways, myths function both as a form of epistemic injustice, silencing alternative narratives regarding the past, and as a form of social ontology, by constituting national identity and sentiment wrapped in myth and seeking to displace other identities.

National and religious myths have been used to justify violence on the basis of perceived differences between Europeans and Indigenous peoples, between races, and between men and women. Religion, Christianity, and the Bible are central to the national myths of Western societies, even after secularisation.¹⁰¹ In particular, the myth of a chosen people or nation can be traced to the Hebrew Bible or Old Testament, originally for the people of Israel. Rosemary Ruether Radford notes: ‘Early Christianity denationalized, universalized, spiritualized and eschatologized these ideas of an elect nation and its future

⁹⁵ Milan Kundera, *The Book of Laughter and Forgetting* (Aaron Asher tr, Harper Classics 2015) 4.

⁹⁶ G rard Bouchard, *Social Myths and Collective Imaginaries* (University of Toronto Press 2017) 25.

⁹⁷ *ibid* 9.

⁹⁸ Roland Barthes, Annette Lavers and Sian Reynolds, *Mythologies* (Vintage Classics 2009) 155.

⁹⁹ *ibid* 131.

¹⁰⁰ Hixson (n 59) 11.

¹⁰¹ Schwartz (n 67) 6.

hopes. God's chosen people were no longer the Jews but the Church',¹⁰² giving rise to the pursuit of Christendom discussed in Chapter 2. Competing imperial and colonising powers later employed this myth, each claiming to be God's chosen people, converting the newly discovered 'pagans' to Christianity as mandated by the Bible, seeking to bring about the ultimate redemption of the earth.¹⁰³ Such national, imperial, and religious myths form part of the structure of settler colonialism: the settler leaves their land of origin, arrives in and 'settles' a new land, and transforms it from savagery to 'civilisation' in a process of irreversible 'progress'.¹⁰⁴ There are distinctive variations of national myths across the jurisdictions studied.

The English defined themselves 'for colonial purposes as an elect people over the Irish, considered as a "non-people"' and later extended this logic to enable the colonisation of territories worldwide, on the basis of control of non-white and non-Christian bodies'.¹⁰⁵ Krishan Kumar argues that across a wide variety of English cultural myths, the experience of the rise and fall of empire over a thousand years indelibly shapes English and British myths and national identity.¹⁰⁶ He notes: "The imperial experience gave England a sense of itself as something more than a mere nation. It developed a "missionary" outlook, geared to purposes and causes – "Commerce, Christianity, and Civilization," ... that took it into the wider world beyond its borders'.¹⁰⁷ Kumar notes that the 'Whig myth of English history' in the seventeenth century advanced the 'stadial theory of progress, whereby societies advanced successively through stages of development, from "savagery" to "civilization", reflecting "England's rise to freedom and greatness" and its entitlement to impose these standards of civilization across the world'.¹⁰⁸ As the British Empire ended, myths emerged about the orderly 'transfer of power' from the imperial capital to national elites.¹⁰⁹ Robert Gildea suggests that 'the pain of the loss of empire has resulted in attempts to conjure up new fantasies of empire which in turn reinforce colonial divisions in contemporary society'.¹¹⁰

¹⁰² Rosemary Radford Ruether, *America, Amerikkka: Elect Nation and Imperial Violence* (Equinox 2007) 7–8.

¹⁰³ *ibid* 9.

¹⁰⁴ Veracini (n 57) 22–33.

¹⁰⁵ Richard Kearney, *Strangers, Gods, and Monsters: Interpreting Otherness* (Routledge 2003) 72.

¹⁰⁶ Krishan Kumar, *The Making of English National Identity* (Cambridge University Press 2003).

¹⁰⁷ Krishan Kumar, '1066 and All That: Myths of the English' in Gérard Bouchard (ed), *National Myths: Constructed Pasts, Contested Presents* (Routledge 2013) 101.

¹⁰⁸ *ibid* 107.

¹⁰⁹ Robert Gildea, *Empires of the Mind: The Colonial Past and the Politics of the Present* (Cambridge University Press 2019) 7.

¹¹⁰ *ibid* 13.

Similarly, Paul Gilroy suggests that Britain struggles to reconcile its self-identity as victors over Nazi Germany, as being morally upright when facing murderous racism and fascism, with its own legacy of imperial violence.¹¹¹

American myths have their origin in European myths of chosenness and colonisation, including English myths. Avihu Zakai has argued that there were two distinct models of the elect nation, one predicated on expansion from a base of divine election to a larger empire;¹¹² another, developed by the Puritans, where European nations had sinned and lost their election, and the true people of God were called to exodus in new territories.¹¹³ For the Puritans and other settler colonialists, the notion of being a chosen nation carried the ‘assumption of entitlement’ to expand, to colonise, to bring Christianity to non-Christians, and to drive away competitors of other faiths and denominations.¹¹⁴

American myths continued in the US revolution and foundation of the federated state. The revolutionary United States is founded on a contradictory myth. It is first founded on a critique of Europe and England as corrupt, religiously intolerant, and unequal. In reaction, the new American nation would be egalitarian, democratic, a ‘new Jerusalem’, and reflective of a new stage of divine election in the eyes of Protestant clergy.¹¹⁵ Bouchard notes: ‘The consciousness of being founders, the feeling of creating a superior nation without historical precedent, gave substance to a veritable paradigm of new beginnings. Here, there was no cultural cringe but, rather, a providential mission, a “manifest destiny” (as John O’Sullivan of New York declared in 1845)’.¹¹⁶ Ian Tyrell suggests the myth of American exceptionalism is built on a set of more specific myths and has adapted over time to add new features: ‘In addition to a successful “revolution,” there is the assumption of small government or laissez-faire as an American tradition; equality of opportunity; the “melting pot” for immigrants, a theme linked to material progress and abundance; the availability of “free” land in the “West” as the basis of abundance and opportunity; political and religious freedom; and anti-imperialism and anti-colonialism’.¹¹⁷ However, the myth remains

¹¹¹ Paul Gilroy, *Postcolonial Melancholia* (Columbia University Press 2005) 87–120.

¹¹² Avihu Zakai, *Exile and Kingdom: History and Apocalypse in the Puritan Migration to America* (Cambridge University Press 1992).

¹¹³ Perry Miller, *Errand into the Wilderness* (Belknap 1996).

¹¹⁴ Ruether (n 102) 30–1.

¹¹⁵ *ibid* 36.

¹¹⁶ Gérard Bouchard, Michelle Weinroth and Paul Leduc Browne, *The Making of the Nations and Cultures of the New World: An Essay in Comparative History* (McGill-Queen’s University Press 2008) 291.

¹¹⁷ Ian Tyrell, ‘The Myth(s) That Will Not Die: American National Exceptionalism’ in Gérard Bouchard (ed), *National Myths: Constructed Pasts, Contested Presents* (Routledge 2013) 52.

contradictory: despite claiming to be based on a universal ‘rights of man’, this meant only white Anglo-Saxon Protestant males and was never intended to include women, Native Americans, or African slaves,¹¹⁸ and is blind to the violence and harms done in establishing the state and expanding the frontier. The failure to name and reconcile this contradiction continues to shape US national identity.¹¹⁹

Paulette Regan articulates the Canadian myth of the ‘benevolent peacemaker’, in which settlers used British law to peacefully transform the land and its inhabitants into a civilised society.¹²⁰ The peacemaker element of the myth distinguishes it from American myths of settlement by violent conquest of the frontier¹²¹ and reinforces Canadian identity as compassionate, caring, and committed to diversity and multiculturalism.¹²² Thobani argues that Canadians use the process of racial othering to construct an identity of ‘exalted subjects’ who are superior to First Nations peoples and non-white immigrants but do so through peaceful, legal, and multiculturalist means.¹²³ Eva Mackey describes the ‘benevolent Mountie myth’, which frames the expansion of Canada as peaceful, law-abiding, and well intentioned and reinforces a myth of ‘national tolerance’ as central to Canadian national identity.¹²⁴ Similarly, Gina Starblanket argues that Canadian treaties with First Nations peoples have been treated in mythic terms as transferring land to Crown control and by which First Nations peoples surrendered not merely land but their powers of governance.¹²⁵

In Australia, a fictional myth of *terra nullius* viewed Australia as unowned, with First Nations peoples as unproductive and without possession of the land. This combined with a religiously motivated desire to pursue the ‘civilisation’ of the continent. Joanne Faulkner notes: ‘Rather than admit the violence by which the British ‘settled’ the continent, Australians throughout their history

¹¹⁸ Ruether (n 102) 41.

¹¹⁹ *ibid* 211–2.

¹²⁰ Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press 2010) 11.

¹²¹ Scott W See, ‘The Intellectual Construction of Canada’s “Peaceable Kingdom” Ideal’ (2018) 52 *Journal of Canadian Studies* 510.

¹²² Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (University of Toronto Press 2007) 3–29.

¹²³ *ibid* 248.

¹²⁴ Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada* (Repr, University of Toronto Press 2008) 24; Daniel Francis, *National Dreams: Myth, Memory, and Canadian History* (Arsenal Pulp Press 1997) 29–51.

¹²⁵ Gina Starblanket, ‘The Numbered Treaties and the Politics of Incoherency’ (2019) 52 *Canadian Journal of Political Science* 443, 446.

have repeated “terra nullius” as if it were a serenity mantra.¹²⁶ These myths established and legitimated the settler colonial structure of Australia and the subsequent violence and abuses documented in Chapter 2. In addition, subsequent Australian myths emphasise the distinctive nature of Australia from Britain, such as myths of ‘mateship’.¹²⁷ Russel Ward argued that the origins of Australia’s national identity were to be found in the anti-authoritarian and egalitarian ethos of convict society, giving rise to a collectivist concept of mateship in a classless society.¹²⁸ In the twentieth century, Australian myths of national character emphasised and developed as a result of the ANZAC involvement in World War I.¹²⁹ The combination of myths of *terra nullius* and rugged individualism contribute to debates regarding modern national identity.

Independent Ireland presents a post-settler colonial context with a heightened role for the Roman Catholic Church and its religious orders. In this context, a nation and church once themselves subject to conquest and discrimination, on the establishment of the Irish Free State, chose to consolidate and expand the process of institutionalisation that had begun under British rule, continuing to condemn the poor, women, and children, owing to an increasingly assertive Catholic quasi-theocratic rule and the poverty and inexperience facing the new state. In Ireland, after the establishment of the Irish Free State in 1922, church and state authorities engaged in a process of nation-building in pursuit of an imagined nation: ‘a nation of Irish Catholic virtues without the unnatural sexual vices that were seen by Free State ideologues, lay and clerical, as corrupting the rest of the world’.¹³⁰ This process enabled the continued use of institutions that predated the Free State and accelerated the identification of the Catholic Church and Catholic morality as synonymous with Irishness.¹³¹ Enright writes: ‘The new Irish state was built on an ideal of reconciliation of governmental power to

¹²⁶ Joanne Faulkner, ‘Suffer Little Children’: The Representation of Aboriginal Disadvantage through Images of Suffering Children, and the Wages of Spectacular Humanitarianism’ (2019) 22 *Theory & Event* 595, 600.

¹²⁷ Nick Dyrenfurth, *Mateship: A Very Australian History* (Scribe 2015).

¹²⁸ Russel Braddock Ward, *The Australian Legend* (Repr, Oxford University Press 1993).

¹²⁹ Henry Reynolds, ‘Are Nations Really Made in War?’ in Henry Reynolds and others (eds), *What’s Wrong with Anzac?* (UNSW Press 2010).

¹³⁰ Anthony Keating, ‘Church, State, and Sexual Crime against Children in Ireland after 1922’ (2004–2006) 5(7) *Radharc* 155–80, 157–8

¹³¹ Máiréad Enright, ‘Involuntary Patriotism’: Judgment, Women and the National Identity on the Island of Ireland’ in Máiréad Enright, Julie McCandless and Aoife O’Donoghue (eds) *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Bloomsbury 2017) 27–49, 31

religious precept, which promised to create a well-regulated, virtuous, prosperous and presumptively masculine nation. Its terrible failure was apparent throughout the twentieth century in a quotidian experience of physical violence, shame and sacrificial destruction of lives . . . Belief in the good faith of law and religion was duly undone'.¹³²

Across these national contexts, the national and religious myths share a common feature: a belief in the value of redemptive violence,¹³³ where violence and social control are permissible because of the broader social value that the violence achieves. Walter Wink notes that this myth is pervasive in Western culture and is central to cultural depictions of the solutions to conflict.¹³⁴ Wink notes that Christianity plays a central role in maintaining this myth of redemptive violence, functioning as a shell that empties Christianity of its prophetic legitimacy to criticise the societies in which it operates and instead is 'manipulated to legitimate a power system intent on the preservation of privilege at all costs'.¹³⁵ The histories and origins of the states and churches in this book are deeply violent in nature. Failure to address the past and its impact on the present only serves to legitimate and sanctify this violence and continue the present deployment of the myth of redemptive violence.

4.5 POWER AS A LIMIT TO ADDRESSING THE PAST

Power plays a key role in the creation and reproduction of historical-structural injustice across the four dimensions examined above. Transitional justice necessarily engages with power and as a result creates risks that its practices can be used to create new forms of harm for victim-survivors¹³⁶ or reproduce historical-structural harms itself. Nagy writes: 'In the determination of who is accountable for what and when, transitional justice is a discourse and practice imbued with power.'¹³⁷ McAuliffe argues that 'the extent to which theories of transitional justice do not grapple with these profound complexities of elite

¹³² Máiréad Enright, 'No. I Won't Go Back': National Time, Trauma and Legacies of Symphysiotomy in Ireland' in Emily Grabham and Siân M Beynon-Jones (eds), *Law and Time* (Routledge 2018) 58.

¹³³ Walter Wink, *Engaging the Powers: Discernment and Resistance in a World of Domination* (Fortress Press 1992).

¹³⁴ *ibid* 87.

¹³⁵ *ibid* 99–100.

¹³⁶ Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2017).

¹³⁷ Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 *Third World Quarterly* 275, 286.

power and wealth retention suggests the limits of the field's utility for catalysing emancipatory change'.¹³⁸

A number of key features of transitional justice structure its relationship to power. First, the role of victim-survivors in transitional justice institutions can represent mere instances of episodic power through agency or, in more radical approaches, could lead to significant changes in the structural relationship between victim-survivors and the state. David Taylor constructs a typology of victim-survivor participation, reflecting both direct and indirect forms of participation.¹³⁹ The most direct, active form of participation in a transitional justice mechanism can be understood as full empowerment, where 'victims would participate at each stage of a transitional justice mechanism – from conception to design to implementation – as decision-makers, with real decision-making power. Powers are thus conferred on victims, with corresponding obligations on state and/or international implementing authorities to give form to these powers'.¹⁴⁰ According to Arnstein, anything other than full empowerment can result in token participation or empty ritual.¹⁴¹ Lundy and McGovern argue that participation in transitional justice can be most successful when it involves 'co-generative dialogue' as a result of the 'transfer of power' in decision-making processes.¹⁴² They recognise that participation has other challenges – 'who the locals are, who speaks for whom, and what exactly participation means', as well as the 'wholesale valorization of "insiders" to the exclusion of "outsiders"'.¹⁴³ Such an approach may not only involve survivors as agents experiencing empowerment in the context of particular institutions or practices but may also extend beyond that to affect broader structural features and lead to a more sustained engagement and empowerment of survivors or historically marginalised communities.

In contrast, survivor engagement may take the form of collaboration: 'Victims and affected communities must be consulted by the implementing authorities,

¹³⁸ Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017) 82.

¹³⁹ David Taylor, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?' (Impunity Watch 2014) Discussion Paper 22–27 <www.antonioacasella.eu/restorative/Taylor_2014.pdf> (accessed 13 September 2022); I Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *British Journal of Criminology* 967.

¹⁴⁰ Taylor (n 139) 24.

¹⁴¹ Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216.

¹⁴² Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 *Journal of Law and Society* 265, 280.

¹⁴³ *ibid* 292.

but are under no obligations themselves to participate. The process is in part extractive, with victims providing input, but the process preserves the decision-making power in the hands of the authorities.¹⁴⁴ Third, participation can also take lesser forms such as the provision of information, including witnesses at TRCs or criminal trials.¹⁴⁵ Finally, Taylor extends the typology of participation to include indirect forms of participation, involving victim-survivor representation through advocacy or legal representation.¹⁴⁶ These forms of survivor engagement represent at best episodic and agency-based forms of power and would likely struggle to affect broader structural injustices and harms.

Hamber and Lundy critique the existing transitional justice practices on victim-survivor empowerment: ‘Notwithstanding a general universal commitment to the principle of victimcentredness, in practice, full participation is often superficial. Victims are primarily still seen as “objects” in TJ with little power to influence outcomes . . . Victim participation in TJ therefore remains an aspiration rather than a reality’.¹⁴⁷ Robins and Gready similarly criticise limited existing roles for participation as nominal or instrumental, offering ‘little or no agency in challenging power relations or in determining what mechanisms occur or how they are implemented. They have no transformative potential for victims’.¹⁴⁸ As a result, transitional justice processes may reflect an episodic and irregular exercise of power by victim-survivors¹⁴⁹ and would struggle to address the particular challenges of historical-structural injustices, where the structures are called into conflict.

Secondly, transitional justice mechanisms risk confirming the social structures in which they operate, where victim-survivors accept the terms of the debate set by the state. In transitional justice mechanisms, especially in the context of historical abuses considered in this book, there is a conflict about what type of conflict is taking place. State and religious institutions want to treat addressing the past as non-structural disputes, concerning interactions between individuals and perpetrators and, perhaps, institutional responsibility. This is explored more fully in Part II, across inquiries, litigation, and redress especially.

¹⁴⁴ Taylor (n 139) 24.

¹⁴⁵ *ibid* 25.

¹⁴⁶ *ibid* 26–7.

¹⁴⁷ 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, 4.

¹⁴⁸ Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ (2014) 8 *International Journal of Transitional Justice* 339, 356.

¹⁴⁹ Clegg (n 8); Dennis H Wrong, *Power: Its Forms, Bases, and Uses* (Transaction Publishers 1995).

In contrast, some victim-survivors and advocates recognise the potential and need to address the conflict not only at individual but also at structural levels, particularly in the settler colonial context, or in examining institutional racism, misogyny, or other forms of structural violence. Transitional justice mechanisms have the potential to change or transform the ideas and beliefs of people regarding the institutions and structures that seek legitimation and claim authority. Dealing with the past and highlighting wrongdoing as intimately linked to the construction of the state and church may render their ongoing claims to authority unreasonable and illegitimate. Addressing historical-structural injustice may require that some forms of power and some claims to authority and legitimacy – such as being a legitimate settler colonial state – must be taken off the table. They cannot be legitimated, no matter how well intentioned or perfected with time and resources. Instead, to effectively respond to violence, coercion, and claims to authority over time, the structures need to change to redistribute and reimagine the nature of the institutions and their use of power.

Third, transitional justice may constitute a site of significant epistemic injustice that may exclude or marginalise the voices, knowledge, and preferences of survivors in the construction of the truth about the past and its implications for the present. For instance, Máiréad Enright and Sinéad Ring suggest that in Ireland ‘the legal responses to victim-survivors enact a refusal to listen (testimonial injustice) or to alter the conditions under which victim-survivors can be heard (hermeneutical injustice)’.¹⁵⁰ They suggest the Irish state is ‘benefitting from and continuing the prejudicial exclusion of victim-survivors from participation in the spread of knowledge about Ireland’s history of abuse of marginalized women and children’.¹⁵¹ Epistemic injustice is explored across Part II of the book.

Fourth, transitional justice performs an ontological function, by shaping the definition of who is a victim-survivor and the nature of the ‘transition’ involved for a society. The definition of victim and the creation of sub-categories of victim, such as ‘innocent’ and ‘non-innocent’, reflect deeply political forms of power. In addition, state-operated transitional justice institutions run the risk of constructing an ‘imagined victim’¹⁵² who does not challenge the state’s

¹⁵⁰ Máiréad Enright and Sinéad Ring, ‘State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice’ (2020) 55 *Éire-Ireland* 68, 70.

¹⁵¹ *ibid* 86.

¹⁵² Laurel Fletcher, ‘Refracted Justice: The Imagined Victim and the International Criminal Court’ in Sara Kendall, Carsten Stahn and Christian De Vos (eds), *Contested Justice: The Politics and Practice of International Criminal Court Intervention* (Cambridge University Press 2016); Adriana Rudling, ‘“I’m Not That Chained-Up Little Person”: Four Paragons of Victimhood in Transitional Justice Discourse’ (2019) 41 *Human Rights Quarterly* 421.

transitional justice responses. Balint et al note that failure to recognise victimhood is itself a form of othering and violence.¹⁵³

Similarly, Ratna Kapur notes that the idea of transition may promote a linear and progressive conception of time and history that may operate as a means of exclusion: ‘suggesting that the “post” in postcolonial does not merely mark the end of the colonial moment’.¹⁵⁴ Balint et al share this concern suggesting transitional justice is presentist in its concerns: “Transitional justice assumes too a linear notion of time as progress, in which the past and the future are seen as separable and successive instead of intertwined and co-implicated. This makes it difficult for transitional justice to acknowledge and hence redress the enduring structural arrangements that may have resulted in past as well as present injustice and the ongoing effects of past inequities on present and future generations’.¹⁵⁵

However, Winter suggests that viewing transitional justice as domination may result in a ‘just so’ account: ‘the group in question is always occupying the “dominant” position (and indeed are identified as a class because they are dominant), it is always the case that any policy can be described as “functional” for the continuance of domination. Even when the state responds to a radical demand, such as the demand for apology and pecuniary redress, the state’s response is always explicable as a way of maintaining an elite “power base”’.¹⁵⁶ In his view, such a critique is infallibly sceptical.

Instead, however, it should be possible to conceive of more or less oppressive uses of power in the name of transitional justice, rather than seeking some ideal or neutral use of power.¹⁵⁷ Rather than aiming at infallible scepticism, the hope in the following chapters of this book is to illustrate whether and how less oppressive forms of transitional justice may be pursued in addressing historical abuses.

4.5 CONCLUSION

The definition and role of power are politically significant as they enable us to ascertain whether and how individuals can exercise their own choices,¹⁵⁸ and

¹⁵³ Balint and others (n 53) 15.

¹⁵⁴ Ratna Kapur, ‘Normalizing Violence: Transitional Justice and the Gujarat Riots’ (2006) 15 *Columbia Journal of Gender and Law* 889.

¹⁵⁵ Balint and others (n 53) 95.

¹⁵⁶ Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan 2014) 34.

¹⁵⁷ Jeremy R Carrette, *Foucault and Religion: Spiritual Corporality and Political Spirituality* (Routledge 2000) 149.

¹⁵⁸ Pansardi (n 1) 11.

whether and how those choices are limited by broader structural, epistemic, or ontological forms of power. Changes in the distribution of power across these four dimensions 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. However, merely naming the dimensions of power and their role in reproducing historical-structural injustice and in inhibiting the work of transitional justice is foreseeably insufficient. The experiences of addressing the past in the countries and contexts of this book demonstrate that those in power and who benefit from power are, whether consciously or unconsciously, invested and attached to their present circumstances, privilege, and position. Social norms and reification present existing power dynamics as natural and inevitable.¹⁵⁹ To more fully unpack the reasons for resistance to addressing and redistributing the structures of power, it is necessary to examine the role of emotions in historical-structural injustices and in dealing with the past.

¹⁵⁹ Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh University Press 2014) 12.