7

Litigation and Historical-Structural Injustices

7.1 INTRODUCTION

Litigation has proved a significant but limited tool in addressing historical-structural injustices. Litigation is a central site where the four dimensions of power are contested by parties to a case. Criminal law, civil litigation, canon law, and international human rights law have all played a role in addressing these abuses to date, but each has proven limited in its ability to provide a victim-survivor-centred process. Section 7.2 provides an overview of the intended functions of different forms of litigation; Section 7.3 assesses these forms across the four dimensions of power and emotion; Section 7.4 considers the different national experiences of employing litigation to address historical-structural injustices and in particular examines how high-profile victories for survivors are nonetheless circumscribed in their subsequent implementation by governments. Section 7.5 concludes by framing the appropriate expectations for the role of litigation in addressing historical-structural injustices.

7.2 LITIGATING HISTORICAL-STRUCTURAL INJUSTICES

Litigation can take a variety of forms relevant to historical-structural injustices, including individual criminal responsibility, institutional and state responsibility in civil litigation or international human rights law, and responsibility of individual Roman Catholic priests in canon law. In transitional justice, such litigation typically operates in a context of widespread or systemic harms, with the result that the vast majority of perpetrators will not be prosecuted,[1] due to the limitations of time, capacity, and resources. In a context of limited

[1] William Schabas, 'The Rwanda Case: Sometimes It's Impossible' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Transnational Publishers 2002).

potential accountability through litigation, transitional justice scholarship has emphasised the symbolic power of pursuing a select number of perpetrators.[2] However, the evidence in support of the therapeutic role played by ordinary criminal or civil justice processes for victim-survivors remains extremely limited[3] and may be undermined by further trauma for victims who testify.[4]

In addition, civil liability is designed to hold individuals, institutions, and states accountable for the breach of appropriate standards of care. Several grounds of civil liability have been employed in addressing historical abuses.[5] Some of these, such as negligence, involve an assessment of fault of the individuals or institutions involved. Others, such as vicarious liability or non-delegable duties are non-fault-based forms of liability. Civil liability typically seeks to provide compensation to enable a plaintiff to be in the position akin to that before the harm took place. However, this goal is particularly challenging in the context of historical abuses,[6] which may concern irreparable harm or harm that took place in the non-recent past, rendering return to a prior state unfeasible.

Third, canon law forms the Roman Catholic Church's own internal accountability structure and has prohibited child sexual abuse by clergy from the earliest records of church governance.[7] In canon law, the most severe sanction for offending priests is their removal from office, known as defrocking or laicisation. However, other non-sexual forms of historical abuse are not prohibited. Before the United Nations Committee against Torture, the Holy See asserted that it had confirmed 3,420 credible allegations of sexual abuse by priests between 2004 and 2013, resulting in the removal of 848 priests and disciplining of 2,572 others.[8] More recent global figures are unavailable.

Finally, human rights law can be employed through national litigation or international individual complaints mechanisms and treaty-based monitoring mechanisms to address violations within a given state. The relevance and

[2] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50 Politorbis 17; Ellen L Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (Cambridge University Press 2009).

[3] Penney Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press 2006) 23.

[4] Judith Lewis Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16 Journal of Traumatic Stress 159.

[5] James T O'Reilly and Margaret SP Chalmers, *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press 2014) 32.

[6] Paula Case, *Compensating Child Abuse in England and Wales* (Cambridge University Press 2007) 37.

[7] Faisal Rashid and Ian Barron, 'The Roman Catholic Church: A Centuries Old History of Awareness of Clerical Child Sexual Abuse (from the First to the 19th Century)' (2018) 27 Journal of Child Sexual Abuse 778.

[8] United Nations Committee against Torture, 'Concluding Observations on the Initial Report of the Holy See' CAT/C/VAT/CO/1, para 10.

impact of human rights will naturally vary depending on whether a state has a bill of rights, the number of international human rights treaties they have ratified, and their degree of cooperation with international courts and tribunals.[9] International human rights treaties may be limited temporally to their date of ratification, which may preclude their addressing historical-structural injustices.[10] In addition, Antony Anghie notes that 'the vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures'.[11] The design and extent of existing human rights may therefore inhibit their effective use by Indigenous peoples.[12] The capacity of victim-survivors to engage in legal litigation thus arises in a variety of contexts, each with its own inherent goals and limitations. Each area of litigation can be assessed along the four dimensions of power and emotion employed in this book.

7.3 ASSESSING LITIGATION

7.3.1 *Litigation and Agency*

Litigation represents a site for significant agency by survivors seeking to assert their rights or allege their experiences of harms. However, several features of litigating regarding non-recent harms will affect this agency. First, criminal trials of non-recent abuses take place in a context 'disconnected from the normal matrix of physical and circumstantial detail',[13] associated with an isolated criminal offence close to the period of investigation or trial. Fair trial concerns are thus especially prominent for historical abuses, which will be impacted by the availability of documentary evidence[14] and limited by the deaths and old age of alleged perpetrators.[15]

[9] Beth A Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge University Press 2009).

[10] James Gallen, 'The European Court of Human Rights, Transitional Justice and Historical Abuse in Consolidated Democracies' (2019) 19 Human Rights Law Review 675.

[11] Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 Social & Legal Studies 321.

[12] Noelle Higgins, 'Creating a Space for Indigenous Rights: The Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' (2019) 23 The International Journal of Human Rights 125.

[13] *R v DPP [2009] IEHC* 87.

[14] Elisabeth Baumgartner and others, 'Documentation, Human Rights and Transitional Justice' (2016) 8 Journal of Human Rights Practice 1.

[15] Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26 Current Issues in Criminal Justice 55.

Second, the distinctive legal personality of church dioceses and religious orders, which will often be unincorporated associations, or in the case of a bishop a corporate sole, or where the assets are held in a trust, may make it difficult for survivors to sue the correct defendant.[16] Canon law concentrates executive, legislative, and judicial power in diocesan bishops, until recently giving individual bishops discretion and authority to respond to allegations of sexual abuse.[17] However, recent developments in Canada, the United Kingdom, and Ireland have allowed for dioceses and religious orders to be sued,[18] with the most recent changes in Western Australia enabling survivors to sue current holders of religious institutions for historical abuse cases and access the assets of related trusts and corporations for the purposes of satisfying judgments.[19]

Third, attempts to litigate may be met with aggressive tactics employed by state or church institutions in resisting allegations of historical abuses, including delayed compliance with discovery and interrogations of plaintiffs' personal histories.[20] Jo Renee Formicola notes that across multiple dioceses, church leaders would offer significant financial settlements to survivors in exchange for confidentiality and secrecy, allegedly to protect not only the identity of victims but also the reputation of the church and alleged perpetrators.[21] This had the effect of precluding one survivor from knowing about other allegations in the diocese or against their perpetrator. Finally, across several jurisdictions, as discussed below, historically canon law was not an effective form of justice for survivors, in large part because its own standards were not even implemented regarding child abuse cases, with few if any canon trials taking place for contemporary allegations of non-recent child sex abuse.[22] This combination of factors suggests it has been challenging for

[16] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) 58.

[17] Canon 381; Timothy A Byrnes, 'Catholic Bishops and Sexual Abuse: Power, Constraint, and Institutional Context' (2020) 62 Journal of Church and State 5, 9.

[18] *Re Residential Schools, 2002 ABQB 667*; *Re Residential Schools, 2001 ABCA 216*; *Hickey v McGowan [2017] IESC 6*; *[2017] ILRM 293*; *Various Claimants v The Catholic Child Welfare Society [2012] UKSC 56*.

[19] Western Australia, Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018, No. 3 of 2018.

[20] Timothy D Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press 2008) 69.

[21] Jo Renee Formicola, *Clerical Sexual Abuse: How the Crisis Changed US Catholic Church-State Relations* (Palgrave Macmillan 2016) 55.

[22] Commission of Investigation, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (Department of Justice, Equality and Law Reform 2009) para 4.6 and 4.87.

survivors to assert their rights and allege wrongdoing against state and church actors, even where the harm was criminal or illegal when it took place. In addition, structural factors compound these limitations to litigation.

7.3.2 *The Structure of Litigation*

The use of litigation for historical-structural injustices remains particularly challenging due to a number of structural features. First, to bring civil litigation regarding non-recent harms, victim-survivors must overcome the law of limitation, which allows a plaintiff a specific amount of time from a specified date within which to bring an action against a defendant. Ireland has the most restrictive limitation regime in the common law world.[23] The lack of a general discretionary judicial power in the Irish limitation regime contrasts with the approach in the United Kingdom[24] and extended approaches in Canada, and with the United States.[25] However, in Canada, limitation regimes have denied Indigenous peoples the capacity to litigate in several cases outside of the context of sexual abuse.[26] In Australia, the Royal Commission to Investigate Institutional Responses to Child Sexual Abuse concluded that 'current limitation periods are inappropriate given the length of time that many survivors of child sexual abuse take to disclose their abuse'.[27] The Australian States of Queensland and Western Australia recently retrospectively removed the limitation period for child sex abuse cases, enabling a case to be brought at any time in a person's life.[28]

Second, given the scale of historical abuses, there are a large number of potential litigants, which suggests a benefit to using class actions in civil litigation. In a class-action lawsuit, one party sues as a representative of a larger 'class' of people, reducing the cost to individual plaintiffs and the need for repetitive hearings. In jurisdictions with class-action mechanisms, this structure may operate as a form of survivor empowerment, enabling survivors to share the risks and costs of litigation. Third, unlike other forms of litigation,

[23] James Gallen, 'Historical Abuse and the Statute of Limitations' (2018) 39 Statute Law Review 103.

[24] See UK Limitation Act 1980, S33, as applied in *A v Hoare [2008] UKHL 6*.

[25] Marci Hamilton, 'The Time Has Come for a Restatement of Child Sex Abuse' (2013) 79 Brooklyn Law Review 397, 401.

[26] Craig Empson, 'Historical Infringements of Aboriginal Rights: *Sui Generis* as a Tool to Ignore the Past' (2019) 24 Appeal: Review of Current Law and Law Reform 101, 110–12.

[27] Royal Commission into Institutional Responses to Child Sexual Abuse (n 16) 52.

[28] Western Australia, Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018, No. 3 of 2018; Queensland, Civil Liability and Other Legislation Amendment Act 2019 (Qld).

canon law largely operates in secret. It is only in early 2020 that Pope Francis ordered the removal of the 'pontifical secret', hiding the existence of canon law trials from national law enforcement.[29] Until then, no mandatory reporting or cooperation with civil laws was required under canon law, despite repeated national inquiries and United Nations Human Rights Committees recommending the abolition of such secrecy.[30] Formicola suggests that this structure emerged as successive popes were reluctant to accept the separation of church and state and instead emphasised the theological superiority of church teaching and law.[31] In their relationship to non-recent violence and to the widespread scale of abuse, the structure of civil litigation may both empower and constrain survivors' ability to address their experiences of harm.

7.3.3 *Accountability and Epistemic Injustice*

Litigation may also represent a site of fresh epistemic injustice for victim-survivors or their families, where their knowledge may not be believed or acknowledged as true,[32] especially in contexts of limited corroborating evidence.[33] Historically women and girls were often disproportionately disbelieved or blamed if they alleged sexual violence.[34] Any delay in bringing a criminal complaint regarding non-recent abuse may be heavily scrutinised by a court, which has tended to address such delay by establishing whether post-traumatic stress disorder (PTSD) or repressed memory inhibited an individual from bringing a complaint.[35] Such approaches frame survivor emotions as relevant only in medical terms and may neglect consideration of the broader political, cultural, and legal circumstances, where the alleged harm may have been authorised or condoned by the state. This approach creates an artificially receptive historical context that may deny victim-survivors access to courts for non-recent events and compound their experience of harm.

In contrast, civil liability could contribute to redistributing epistemic and ontological power, by reframing abuse that was once denied and not believed

[29] Marie Collins, 'Removal of "Pontifical Secret" in Clerical Sex Abuse Trials a Step Forward for Justice' *The Irish Times* (Dublin, 18 February 2020).
[30] Kieran Tapsell, 'Civil and Canon Law on Reporting Child Sexual Abuse to the Civil Authorities' (2019) 31 Journal for the Academic Study of Religion 143.
[31] Formicola (n 21) 11–13.
[32] Lewis (n 3) 7.
[33] *Stogner v California (2003) 539 US 607 (USSC)*.
[34] Laura Lammasniemi, '"Precocious Girls": Age of Consent, Class and Family in Late Nineteenth-Century England' (2020) 38 Law and History Review 241.
[35] Lewis (n 3) 9.

as injury and an abuse of power,[36] and telling victim-survivors' stories individually, publicly, and graphically.[37] Timothy Lytton concludes that tort litigation reframed clerical child abuse: 'Legal nesting fuelled public outrage, increasing impatience for real reform and making efforts to symbolically placate pro-reform constituencies harder. It also undermined the unquestioning trust and obedience of many Catholics that had been exploited by some to deflect allegations'.[38] Similarly, reframing an issue of historical abuse as a present-day violation of human rights could offer a significant form of epistemic justice where it results in belief of survivors and responsibility for wrongdoing.[39] However civil litigation can also remain a potential re-traumatising or marginalising process for victim-survivors.[40] Research disagrees on whether there are sufficient therapeutic benefits to victim-survivors to overcome the potentially harmful or re-traumatising effects of engaging in litigation and the legal process.[41] Finally, cases involving Indigenous peoples can provide several instances of epistemic injustice where Indigenous forms of knowledge and identity are denied equal value or recognition in settler colonial legal systems.[42]

7.3.4 *Accountability and Ontology*

Finally, whether law condemns, condones, or is silent regarding historical-structural injustices will make a significant contribution to either reproducing harms in the present or meaningfully addressing the past. Chapter 2 demonstrated how colonisation, the transatlantic slave trade, or more recently, the process of the institutionalisation of the poor or of women and children were framed as either morally, legally, and religiously justified, or formed part of constituting the nation states that today are challenged to address their legacies of historical abuses. Child sexual abuse by priests, in contrast, was long historically prohibited, albeit with a highly defective system of penalisation and enforcement.

[36] Martha Chamallas, *Introduction to Feminist Legal Theory* (3rd ed, Aspen 2012) 303–39.
[37] Helen Duffy, *Strategic Human Rights Litigation* (Hart Publishing 2018) 72.
[38] Lytton (n 20) 136.
[39] Ian Werkheiser, 'A Right to Understand Injustice: Epistemology and the "Right to the Truth" in International Human Rights Discourse' (2020) 58 The Southern Journal of Philosophy 186.
[40] Duffy (n 37) 78.
[41] Nathalie Des Rosiers, Bruce Feldthusen and Oleana AR Hankivsky, 'Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System' (1998) 4 Psychology, Public Policy, and Law 433; Case (n 6) 46.
[42] Dina Lupin Townsend and Leo Townsend, 'Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System' (2021) 35 Social Epistemology 147.

While prior investigations may hold historical legislation or governmental policy as morally or politically unacceptable in present day, separate legislative action would be required to criminalise such harms. Recognition of historical-structural injustice needs more than identifying individual perpetrators who violated pre-existing rules, it necessitates problematising historically accepted but now impugned standards. Several historical abuses were not aberrant violations of laws but instead were historically permitted or encouraged by law, reflecting an unjust baseline by contemporary standards.[43] Mamdani distinguishes between violence that preserves the law and legal system, such as criminal law offences, and violence that makes the law, such as settler colonial violence or violence otherwise constitutive of the state: 'A single-minded focus on identifying perpetrators leaves undisturbed the logic of institutions that make nation-building violence thinkable and possible'.[44] As a result, such violence represents an ontological dimension of power.

Canon law also communicates a distinct set of values and world view. Kieran Tapsell describes clericalism as arising out of a theology that priests are 'ontologically changed', that is marked out by God through ordination as special people whose very nature has been changed and who are divinely destined to change the world.[45] Byrnes suggests that the result is 'preserving that indispensable church from scandal was perceived as the central obligation of their positions'.[46] Nicholas Cafardi suggests that the Vatican remains pervasive in its use of a 'bella figura' (beautiful figure), that a good external appearance must be presented to the world.[47]

Specific forms of litigation also shape the presentation of historical abuses and contemporary responses to them. In civil liability, when the justifications for non-fault-based liability are interrogated, they create problematic narratives for legal responsibility and accountability regarding historical abuses: 'If liability attaches irrespective of fault, it is no longer necessary for lawyers to probe into how the Church handled abuse cases, and whether it was guilty of negligence or worse'.[48] For instance, Winter notes while vicarious liability

[43] Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press 2017) 123.

[44] Mahmood Mamdani, *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (Belknap Press 2020) 17.

[45] Kieran Tapsell, *Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse* (ATF Press 2014) 51.

[46] Byrnes (n 17) 7.

[47] Geoffrey Robinson, *For Christ's Sake: End Sexual Abuse in the Catholic Church . . . for Good* (2013) 122.

[48] Richard Scorer, *Betrayed: The English Catholic Church and the Sex Abuse Crisis* (Biteback Publishing 2014) 299.

cases 'helped publicize the abuse endemic in Canada's residential schools system, it was not a trial of that system itself'.[49]

As already noted, rights discourses and practices may serve as important sites for reimaging historical abuses in terms of victims' rights and the duties of states to prevent and repair harms. However, early critical legal studies (CLS) scholarship suggested that rights litigation was part of a legal ideology that was compatible and the cause of the original oppression and injustice.[50] In turn, such concerns were rejected by critical race scholars such as Patricia Williams and Kimberley Crenshaw. Williams asserted that while a CLS critique of rights as empty may be true for white communities, for black Americans, rights represented a site of black empowerment.[51] Similarly, Crenshaw argued that rights rhetoric had been a significant force in inspiring black communities to pursue radical reform.[52] For Seán Eudaily, 'legal activism conceived as tactical resistance may lead to fundamental change in the epistemic, political, and subjective structures in which such practices are articulated'.[53] While in some instances, rights may be viewed as compatible with existing forms of oppression, there may also remain potential for litigation to disrupt existing ontological orders and provide the basis for resistance and alternative conceptions of the past. As a result, rights litigation may be a site where national and religious myths are challenged, affirmed, or ignored.

7.3.5 *Conclusion*

This range of factors impact how law will address the initial number of allegations and instances of harm significantly. The criminal law truncates the continuities of harm across different forms and generations of historical abuse discussed in earlier chapters, focuses on allegations of breaching existing law within lived memory, and selects from them, subject to the evidential requirements of a fair trial. Civil law litigation may provide a basis for action against state or church institutions but may do so in a manner limited by the form of liability, the limitation regime, and the availability of

[49] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan 2014) 121.

[50] Mark Tushnet, 'An Essay on Rights' (1984) 62 Texas Law Review 1363, 1398–402.

[51] Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401.

[52] Kimberlé Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harvard Law Review 1331.

[53] Seán Patrick Eudaily, *The Present Politics of the Past: Indigenous Legal Activism and Resistance to (Neo)Liberal Governmentality* (Routledge 2004) 49.

suitable defendants, class actions, or affordable costs to victims. Canon law remains nebulous in its capacity to offer a victim-survivor-centred approach to addressing child sex abuse cases. Human rights law may offer the basis for empowerment for survivors and affected communities but, as explored below, will also be likely resisted in its implementation by governments. No single basis for litigation is therefore a panacea to addressing historical-structural injustices. Instead, in employing a range of litigation mechanisms, victim-survivors have demonstrated considerable resilience across the jurisdictions examined in the book in demanding accountability through litigation. Where such demands are not met, the entire enterprise of transitional justice may be undermined in its ability to address the past.

7.4 NATIONAL EXPERIENCES

7.4.1 *Ireland*

Accountability for Irish historical abuses has focused almost exclusively on child sexual abuse. A 2002 documentary regarding clerical child sexual abuse in Dublin prompted a criminal investigation.[54] The 2011 Murphy report considered that this investigation was 'an effective, co-ordinated and comprehensive inquiry'.[55] Between 1975 and 2014, there were 4,406 allegations of child sexual abuse by priests reported to church authorities and Gardai from across Ireland in non-residential settings. It resulted in ninety-five criminal convictions, based on a church compilation of figures.[56] Only eleven criminal cases were forwarded to the Director of Public Prosecutions based on the Commission to Inquire into Child Abuse (CICA) report regarding abuse in child residential institutions.[57]

Several cases that proceeded to trial were ultimately unsuccessful on the grounds of a fair trial being impossible due to the delayed complaint.[58] Sinéad Ring notes the approach of the Irish courts fostered 'a simple narrative of the

[54] Commission of Investigation (n 22) para 5.28–31.
[55] ibid 5.43.
[56] Figures compiled from the annual reports from National Board for Safeguarding Children in the Catholic Church in Ireland, available at <www.safeguarding.ie>.
[57] United Nations Committee Against Torture, Concluding Observations CAT/C/IRL/CO/1, para. 20
[58] Sinéad Ring, 'The Victim of Historical Child Sexual Abuse in the Irish Courts 1999–2006' (2017) 26 Social & Legal Studies 562.

passive and traumatised victim paralysed by the domination of the abuser' and precludes examination of how society kept victims silent for decades after the abuse.[59] Support organisations for victim-survivors of child sexual abuse report that clients who engaged with criminal trials found the processes humiliating and re-traumatising.[60] In addition to individual acts of child sex abuse, the Gardai considered charges for the offence 'misprision of felony', where a person who knew that a felony had been committed and concealed it from the authorities,[61] but no prosecutions arose for this offence.[62] Finally, there have been no recent criminal prosecutions related to Magdalene Laundries, mother and baby homes, or illegal adoptions.[63]

Colin Smith and April Duff identify several difficulties for victim-survivors of historical abuse in Irish civil litigation.[64] As a smaller jurisdiction without the benefit of class actions, protective costs orders limiting potential financial cost to plaintiffs, or reform of Ireland's restrictive statute of limitations, litigating historical abuse cases has proven highly problematic. Smith and Duff note a practice from state and religious defendants of 'procedural delay in historic institutional-abuse cases [which] operates in favour of the defendants'.[65] Despite a strong constitutional bill of rights, Ireland's courts have not recognised violation of constitutional rights in the context of historical-structural abuses, likely owing to the procedural barriers restricting potential litigants. Enright and Ring conclude that the Irish state 'has failed to reimagine or supplement frameworks of civil and criminal liability, leaving victim-survivors without adequate conceptual means to give public legal expression to their experiences or to establish new legal discourses of unashamed authority and credibility that might enable them to speak to the state without fear of sanction'.[66]

However, Ireland is unique in making use of multiple forms of international law and human rights law to address historical abuse. In 2011, the

[59] ibid 565.
[60] July Brown, Damien McKenna and Edel O'Kennedy, 'Only a Witness: The Experience of Clients of One in Four in the Criminal Justice System' (One in Four 2018) 23, 60, 95.
[61] Commission of Investigation (n 22) para 5.35–6.
[62] ibid 5.39.
[63] Mike Milotte, 'Adoption Controversy: Only One Person Was Ever Charged over Bogus Birth Certificates' *The Irish Times* (Dublin, 1 June 2018).
[64] Colin Smith and April Duff, 'Access to Justice for Victims of Historic Institutional Abuse' (2020) 55 Éire-Ireland 100.
[65] ibid 112.
[66] Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68, 86.

United Nations Committee against Torture criticised Ireland's failure to address the Magdalene Laundries,[67] leading to the establishment of an inquiry, discussed in Chapter 6. Similar efforts have been pursued regarding the issue of mother and baby homes in several United Nations human rights treaty body mechanisms.[68]

In addition, in *O'Keeffe v Ireland*, the European Court of Human Rights concluded that Ireland failed to protect Louise O'Keeffe from sexual abuse suffered as a child in an Irish National School and violated her rights under Article 3 (prohibition of inhuman and degrading treatment) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.[69] The court considered that when relinquishing control of the education of children to non-state church actors, Ireland should have been aware, given its inherent obligation to protect children, of potential risks to their safety if there was no appropriate framework of protection.[70] The decision represents a site of epistemic justice, where the Strasbourg court accepts the reformulation of the case that was originally argued in tort law in Irish courts, as a violation of human rights. However, its impact in Ireland has been circumscribed significantly by the state's implementation of the judgment through an ex gratia redress scheme that interprets the judgment narrowly.[71]

In 1996, 2005, and 2009, the Irish Bishops' conference adopted a new set of canon law guidelines, which provided for all allegations of child abuse to be taken to the civil authorities.[72] However, these documents did not receive official recognition from the Vatican and remained without standing in canon law.[73] The Murphy report stated that historically the Archdiocese of Dublin 'did not implement its own canon law rules and did its best to avoid any

[67] United Nations Committee against Torture, 'Concluding Observations' CAT/C/IRL/CO/1

[68] United Nations Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Ireland'; Addendum: Information received from Ireland on follow-up to the concluding observations, CCPR/C/IRL/CO/4/Add.1, paras 1–3.

[69] *O'Keeffe v Ireland [2014] ECHR 96.*

[70] ibid at para 162.

[71] Iarfhlaith O'Neill, 'Decision of the Independent Assessor Iarfhlaith O'Neill' (Department of Education 2019) <www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/independent-assessment-process/okeeffe-v-ireland-decision-of-the-independent-assessor.pdf>.

[72] 'Report into the Catholic Diocese of Cloyne' (Department of Justice and Law Reform 2011) para 4.21; Child Sex Abuse: Framework for a Church Response 1996 Our Children Our Church 2005; 2009 Safeguarding Children, Standards and Guidance Document for the Catholic Church in Ireland.

[73] Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power, and Organizational Culture* (Oxford University Press 2012) 182.

application of the law of the State'.[74] Similarly, the 2011 Cloyne report concluded that the church had failed to carry out proper canonical investigations or to report all complaints to the Gardai or health authorities.[75] In response to the report, Taoiseach Enda Kenny emphasised in the Irish parliament that the Cloyne report demonstrated the attempts by the Catholic Church and the Holy See to frustrate a government inquiry in the recent past.[76]

7.4.2 *Australia*

Australian jurisdictions have long legislated against the sexual abuse of children.[77] The Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) criminal justice report concluded that between 1950 and 2010, a total of 1,880 alleged perpetrators (diocesan and religious priests, religious brothers, religious sisters, lay employees, or volunteers) were identified in claims of child sexual abuse.[78] The RCIRCSA final report concluded that children were allegedly abused in over 4,000 institutions and made 2,562 referrals to the police,[79] leading to at least 127 prosecutions to date.[80] The RCIRCSA also criticised the criminal trial process as unfair and traumatic for victims of child sexual abuse.[81] The common law offence of misprision of felony has been abolished in all Australian jurisdictions, but it has been replaced with a series of offences regarding the concealment of or failure to prevent serious offences in several jurisdictions,[82] with one recent prosecution of an archbishop for failure to report abuse overturned on appeal.[83]

[74] 'Commission of Investigation (n 22) para 1.15.
[75] 'Report into the Catholic Diocese of Cloyne' (n 72) paras 1.31–1.37.
[76] 'Enda Kenny Speech on Cloyne Report' *RTE News* (Dublin, 20 July 2011).
[77] Lisa Featherstone, '"Children in a Terrible State": Understandings of Trauma and Child Sexual Assault in 1970s and 1980s Australia' (2018) 42 Journal of Australian Studies 164, 167.
[78] 'Proportion of Priests and Non-ordained Religious Subject to a Claim of Child Sexual Abuse 1950-2010' (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 5.
[79] <www.childabuseroyalcommission.gov.au/sites/default/files/final_information_update.pdf>
[80] Melissa Davey, 'Royal Commission Has Led to More than 100 Child Abuse Prosecutions, Says Head' *The Guardian* (London, 15 May 2017).
[81] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 15.
[82] Section 316(1) of the Crimes Act 1900 (NSW); section 327 of the Crimes Act 1958 (Vic); section 49C of the Crimes Act 1958 (Vic)
[83] Tony Foley, 'Changing Institutional Culture in the Wake of Clerical Abuse – the Essentials of Restorative and Legal Regulation' (2019) 22 Contemporary Justice Review 171, 179.

The RCIRCSA noted that up to the 1990s, Catholic authorities did not engage with canon law processes or trials for allegations of child sexual abuse.[84] Although national responses (Towards Healing and the Melbourne Response) were established in the 1990s, the RCIRCSA concluded that processes 'to dismiss priests and religious appear to have been rarely used during the 1990s and early 2000s'.[85] The RCIRCSA concluded that the canon law system 'contributed to the failure of the Catholic Church to provide an effective and timely response to alleged perpetrators and perpetrators'.[86]

Several other areas of historical abuse have not resulted in any criminal accountability, such as the Stolen Generations, genocide against Indigenous peoples, the child migration process, or Aboriginal stolen wages, many of which operated under legislative authorisation or state complicity.

In Australia, civil liability has offered some limited success in addressing historical-structural injustices, particularly around the land rights of Aboriginal peoples. Early attempts to establish a right to traditional customary lands were unsuccessful.[87] However, in *Mabo & Ors v Queensland (No 2)*, the Australian High Court concluded that the Meriam people possessed native title over their traditional lands, defined as the rights and interests over land or waters that exist according to the traditional laws and customs of Indigenous inhabitants of land.[88] In rejecting the doctrine of *terra nullius*, the court concluded that native title exists when an Indigenous community could show there is a continuing association with the land in circumstances where no explicit act of the Crown has extinguished title.[89] Ann Curthoys et al note: 'The notion of *terra nullius* had always been deeply offensive to Indigenous people. The symbolic overturning of the doctrine was an important legal, political and psychological achievement. However, the *Mabo* case replaced the legal fiction of *terra nullius* with another legal fiction that Australia was 'settled', a legal narrative that also conflicts with the dominant Indigenous perspectives of Australian colonial history'.[90]

[84] Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 62.
[85] ibid 64–5.
[86] ibid 70.
[87] *Milirrpum v Nabalco Pty Ltd and the Commonwealth (1971) 17 FLR 141.*
[88] *Mabo & Ors v Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1.*
[89] ibid para 83.
[90] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008) xi.

As in the US Supreme Court decision of *Brown*, the radical nature of the decision led to a political and popular backlash.[91] Short notes that the mining industry was particularly threatened by the case, and lobbied the government, concerned that some existing title could be invalid in the absence of compensation or that future purchases would involve greater control by Aboriginal peoples.[92] The campaign eventually led the government to legislate to provide 'certainty' for the commercial lobby by passing the Native Title Act 1993, which established a Native Title Tribunal for assessing native title claims.

Several subsequent decisions used historical documentation from British settlers to deny the claims of Indigenous peoples, which were based instead on oral testimony from Indigenous peoples corroborated with archaeological, anthropological, genealogical, and linguistic evidence,[93] creating a very high evidential threshold for First Nations peoples to assert land rights.[94] A people group had to show they formed a society, substantially the same as that which existed at sovereignty and had continued to observe a system of laws and customs which were, again, substantially unaltered from those observed by their ancestors at sovereignty.[95] As a result, native title litigation forms a further site of epistemic injustice for Indigenous peoples, with expansions of rights often counteracted. In *Wik*, the High Court held that native title could coexist with pastoral leases, which represented about 40 per cent of the total area of Australia.[96] In response, the Australian government passed the Native Title Amendment Act in 1998, which complicated the native title claims process for litigants. Native title remains deeply contested in Australia. Jon Altman concludes: 'If hypothetically all native title claims were successful, as much as 70 per cent of Australia could be under some form of Indigenous title and as much as 40 per cent of the Indigenous population could be resident on these lands'.[97]

In addition to cases involving native title, attempts to argue that Australia was responsible for genocide against First Nations peoples have also proven

[91] ibid 38.

[92] Damien Short, 'Reconciliation, Assimilation, and the Indigenous Peoples of Australia' (2003) 24 International Political Science Review 491, 498.

[93] *Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606*; *Western Australia v Ward [2000] FCA 191*.

[94] Curthoys, Genovese and Reilly (n 90) 67.

[95] *Yorta Yorta Aboriginal Community v Victoria [2002] 214 CLR 422*, para 50.

[96] *The Wik Peoples v State of Queensland & Ors [1996] HCA 40, (1996) 187 CLR 1*; Curthoys, Genovese and Reilly (n 90) 64.

[97] Jon Altman, 'The Political Ecology and Political Economy of the Indigenous Land Titling "Revolution" in Australia' [2014] Maori Law Review 1, 7.

unsuccessful,[98] particularly as Australia had not ratified the Genocide Convention retrospectively. These cases contrast with the findings of the Bringing Them Home report, which noted the potential for child removal to constitute genocide.[99] Curthoys et al note these cases demonstrate 'the challenges that Indigenous peoples face when using the law strategically to gain recognition of past wrongs'.[100] In subsequent cases,[101] Indigenous applicants were denied in their attempts to litigate regarding the Stolen Generations by an approach to the historical record that relied on 'the standards of the time' to judge the policy of child removal for the Stolen Generation. By adopting this approach, the court denied the applicants the ability to use oral evidence to reinterpret or reframe historical documentation in light of their lived experience,[102] confirming a narrow approach to epistemic justice. The result is law remains unable to 'escape its complicity in the colonial project, and its ability to write out, again and again, the experiences of Indigenous peoples'.[103] Buti writes that these decisions 'brought into relief the multiple legal and evidential obstacles involved in pursuing litigation to redress the alleged wrongs of past Aboriginal child separations or removals'.[104]

In *Trevorrow v South Australia [No 5]*, the applicant was fostered out without the consent of his parents by the Aborigines Protection Board despite their requests for the child's return.[105] Critically, the applicant's experiences were all documented in departmental medical records and could be interrogated by testimony from relevant doctors. Gray J concluded that the state was in breach of the limits of relevant legislation at the time, which did not give it the power to foster an Aboriginal child without parental consent,[106] a decision affirmed on appeal.[107] This finding has value for other members of the Stolen Generations interested in litigating their removals but would likely depend on the existence of similar documentary evidence. With these limited successes,

[98] *Wadjularbinna Nulyarimma & Ors v Phillip Thompson; Buzzacott & Ors v Minister for the Environment (1999) 96 FCR 153; (1999) 165 ALR 621; [1999] FCA 1192.*
[99] Curthoys, Genovese and Reilly (n 90) 134.
[100] ibid 132.
[101] *Cubillo v Commonwealth of Australia (includes summary dated 30 April 1999) [1999] FCA 518 (30 April 1999).*
[102] Curthoys, Genovese and Reilly (n 90) 136.
[103] ibid.
[104] Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32 Melbourne University Law Review 382, 386.
[105] *Trevorrow v State of South Australia (No 5) [2007] SASC 285 (1 August 2007)* para 152.
[106] ibid para 1229. Curthoys, Genovese and Reilly (n 90) 161–4.
[107] *Lampard-Trevorrow (2010) 106 SASR 331* 417.

Curthoys et al note: 'there has been considerable disillusionment among many litigants with the law as a form of redress'.[108]

Finally, no national bill of rights or regional human rights mechanisms are available in Australia, which impacts on victim-survivors' capacity to use human rights to examine historical abuse.[109] The absence of a strong human rights framework within Australian law has meant there is little to temper or fetter the exercise of power by the federal government in relation to policy on Indigenous people,[110] despite instances in which the state's treatment of Aboriginal peoples has been criticised.[111]

7.4.3 *Canada*

Despite the prosecution of child sex abuse being a historical legal possibility since 1892, the TRC report notes that contemporary reporting of abuse to government or church authorities arising from residential schools did not often lead to prosecution or conviction.[112] As in other jurisdictions, several other inquiries and issues of historical abuse have not led to significant or sustained prosecutions, such as illegal adoptions, or enforced disappearances of Aboriginal women.

Changes in Canadian law between 1991 and 2003 for class actions led to a situation where 18,000 outstanding civil lawsuits related to abuse in residential schools would take fifty-three years to conclude at a cost of $2.3 billion, not including the value of any compensation awarded to survivors.[113] The pressure of such litigation led to negotiations between Aboriginal organisations, religious organisations, and the federal government that would lead to the IRSSA. Regarding the Sixties Scoop process of transfer of Indigenous children into foster homes and adoption by white families, class-action litigation began in 2011, and in 2017 a $800 million settlement was announced based on a ruling

[108] Curthoys, Genovese and Reilly (n 90) 8.
[109] Hilary Charlesworth (ed), *No Country Is an Island: Australia and International Law* (University of New South Wales Press 2006) 64.
[110] Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans and others (eds), *Sovereignty* (University of Hawai'i Press 2012) 170.
[111] United Nations Committee against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' CAT/C/AUS/CO/4-5.
[112] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 1, Part 1* (2015) 560.
[113] 'Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools' (Assembly of First Nations 2004) 6.

that the Canadian government was liable for the harms caused by this process.[114] However, Bruce Feldthusen noted that the adversarial nature of civil litigation necessitated aggressive cross-examination of victim-survivors with the potential for re-traumatisation.[115] In addition, the length of proceedings, limited testimony from victim-survivors, and the complexity of potential liability of both church and/or state institutions created further difficulties for pursuing accountability.[116] In particular, 'a recognition of "power disparities and the special vulnerability of children" were mostly "absent from the judgments of most members of the High Court"'.[117]

In Canada, efforts to address clerical sex abuse began in 1987 in response to the Mount Cashel orphanage crisis.[118] Several subsequent reports were commissioned to address the issue[119] but have not produced national figures on the number of allegations or canon trials. A Committee for Responsible Ministry and the Protection of Minors and Vulnerable Adults was established in 2018 as a consultative body established within the Canadian Conference of Catholic Bishops (CCCB). Their 2018 report notes that each Canadian province now has mandatory reporting laws for child abuse.[120] However, the document suggests a preference for out-of-court settlements and mediation as a form of accountability.[121] As in other jurisdictions, such an approach may spare victim-survivors interrogating through the process of a court trial but also hides the scale and extent of the problem from public scrutiny and disables accountability for the systemic nature of the abuse.

There remains a significant practice of land disputes between Indigenous nations and Canada that reflects some of the epistemic and ontological injustices in Australia. In *Calder v British Columbia* in 1973, while the Nisga'a people were unsuccessful in seeking a declaration of their

[114] Ontario Sixties Scoop Steering Committee, 'Sixties Scoop Survivors' Decade-Long Journey for Justice Culminates in Historic Pan-Canadian Agreement' *Newswire.ca* (6 October 2017) <www.newswire.ca/news-releases/sixties-scoop-survivors-decade-long-journey-for-justice-culminates-in-historic-pan-canadian-agreement-649748633.html>.

[115] Bruce Feldthusen, 'Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It' (2007) 22 Canadian Journal of Law and Society 61, 68–9.

[116] 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) 560–1.

[117] Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28 Melbourne University Law Review 169, 200.

[118] 'Protecting Minors from Sexual Abuse: A Call to the Catholic Faithful in Canada for Healing, Reconciliation, and Transformation' (Canadian Conference of Catholic Bishops 2018) 13.

[119] ibid 15.

[120] ibid 23–4.

[121] ibid 46.

Aboriginal title to ancestral lands in British Columbia,[122] the court recognised the existence of Aboriginal rights in Canadian law before the Royal Proclamation in 1763. The decision led to a change in government policy on native land claims and ultimately an amendment to the Canadian Constitution in 1982 to recognise and affirm 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada' under section 35(1). Borrows suggests: 'In the moment, the constitution appeared to present a path to genuine reform. Then the idea of originalist history re-emerged and became the touchstone for proving Aboriginal rights'.[123] In 1996, the Supreme Court ruled in *R. v Van der Peet* that Section 35(1) offered protection of Aboriginal rights but only for those practices, customs, and traditions that were 'integral to the distinctive culture' of particular groups prior to European contact.[124] Borrows notes the Supreme Court placed a search for 'original' understandings of Aboriginal rights as central, narrowing the scope of evolving knowledge, power, and epistemic justice.[125] In *Delgamuukw v British Columbia*, the Supreme Court stated the test to determine what constitutes a justified infringement on Aboriginal rights and title, and in doing so, placed the onus on Indigenous nations to prove occupation prior to sovereignty and subsequent continuous occupation,[126] as 'aboriginal title crystallized at the time sovereignty was asserted'.[127]

In *Tsilhqot'in Nation v British Columbia*, the Canadian Supreme Court found that the Tsilhqot'in Nation was entitled to a declaration of Aboriginal title in their traditional territories,[128] due to evidence of sufficient and exclusive historical occupation at the time of Canadian sovereignty. The Court in *Tsilhqot' in* stated that the doctrine of *terra nullius* never applied in Canada.[129] Borrows suggests that while a significant decision and victory for the Tsilhqot'in Nation, the case represents the continuation of a problematic treatment of Indigenous history in Canadian law: 'This test requires proof of what was integral to distinctive Aboriginal societies upon contact. If a practice developed after contact it cannot be protected as an Aboriginal right within

[122] *Calder v British Columbia (AG) [1973] SCR 313, [1973] 4 WWR 1.*
[123] John Borrows, 'Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism' (2017) 98 Canadian Historical Review 114, 120.
[124] *R v Van der Peet [1996] 2 SCR 507* [5, 73].
[125] Borrows (n 123) 115.
[126] *Delgamuukw v British Columbia [1997] 3 SCR 1010* [144].
[127] ibid 145.
[128] *Tsilhqot'in Nation v British Columbia 2014 SCC 44.*
[129] ibid 69.

Canada's Constitution."[130] Thus, courts' use of history is providing a significant structural constraint on Indigenous rights in Canada.[131]

Canada has also addressed historical-structural injustices through a human rights lens. In 2007, the First Nations child agency, the Assembly of First Nations, alleged that state-run child welfare services provided to First Nations children and families on reserve were flawed, inequitable, and discriminatory on an ongoing basis.[132] In 2016, the Canadian Human Rights Tribunal found that Canada was racially discriminating against First Nations children. The Canadian government is currently seeking judicial review of this decision, which may cost between $2 and 15 billion to implement. Rauna Kuokkanen argued that even if successful, the discriminatory treatment of First Nations peoples must be addressed through examining other relations of domination, including heteropatriarchal gender relations, 'which often displace Indigenous women, and consequently, their children from their communities'.[133]

In terms of employing international human rights, Kuokkanen notes: 'Traditionally, there has been no strong Indigenous engagement with international human rights instruments at the national level, although this has somewhat changed with the adoption of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).'[134] A notable exception is *Lovelace v Canada*, where the United Nations Human Rights Committee concluded that Canada had violated the International Covenant on Civil and Political Rights as the Indian Act violated the cultural and language rights of Indigenous woman Sandra Lovelace.[135] This led to an amendment of the Indian Act aimed at removing gender-based discrimination but denied Indigenous women the means to transfer their Indigenous status to their children. Subsequent cases have attempted to overcome this but have only removed 'the specific discrimination identified by each case, rather than addressing the foundational sex-based hierarchy in the status provisions'.[136]

In 2021, on National Indigenous People's Day, Canada formally adopted An Act respecting the UNDRIP. The Act provides that the Canadian government

[130] Borrows (n 123) 130.
[131] ibid 134.
[132] Cindy Blackstock, 'The Complainant: The Canadian Human Rights Case on First Nations Child Welfare' (2016) 62 McGill Law Journal 285.
[133] Rauna Johanna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford University Press 2019) 37.
[134] ibid 29.
[135] *UNHRC, Sandra Lovelace v Canada, Communication no 24/1977, UN Doc CCPR/C/13/D/24/1977.*
[136] Kuokkanen (n 133) 72.

must 'in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration'. In particular, the Act provides that relevant government ministers must prepare and implement action plans to achieve the objectives of the Declaration. While this may offer the basis for advancing the potential of UNDRIP provisions, Section 2 of the Act nonetheless provides that '[t]his Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them'. It remains to be seen whether this Act will make a material difference to the Canadian government's treatment of First Nations peoples. Although the Canadian government rhetoric recognises the need for 'transformative change' with Indigenous peoples, Rosemary Nagy notes its practices continue to cause concern.[137] Rights have proven problematic and limited as a mechanism to achieve the empowerment of First Nations peoples, rights discourse and practice remains one element of addressing historical-structural injustices but one that risks framing First Nations interests, such as self-determination, as something to be granted by the state, affirming existing settler colonial structures.[138]

7.4.4 *United Kingdom*

English criminal law has long prohibited offences relevant to historical abuse, such as rape, child cruelty, or assault or neglect of a child in the care of another.[139] The UK demonstrates the potential and risks of criminal prosecution for historical sexual violence. Following a television documentary alleging abuse by English celebrity Jimmy Savile, Operation Yewtree was established as a police investigation into child sexual abuse led by the Metropolitan Police Services (MPS). A 2013 MPS report concluded that Saville, deceased, had committed at least 450 acts of child sexual abuse.[140] The operation led to nineteen arrests of other high-profile public figures and to seven convictions. More broadly, a 'Yewtree effect' was reflected in part in a 124 per cent increase in

[137] Rosemary Nagy, 'Transformative Justice in a Settler Colonial Transition: Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada' (2022) 26(2) The International Journal of Human Rights 191, 206.
[138] Kuokkanen (n 133) 39.
[139] Section 1 of the Children and Young Persons Act 1933.
[140] David Gray and Peter Watt, 'Giving Victims a Voice: Joint Report into Sexual Allegations Made against Jimmy Savile' (NSPCC/Metropolitan Police Service 2013).

the reporting of rape since 2012.[141] In response, MPS Operation Hydrant was established in 2014 to oversee and coordinate all 'non-recent' investigations concerning persons of public prominence and those historical institutional sexual offences. Figures in early 2020 indicate that '4,024 allegations led to guilty verdicts at court after police investigations since 2014 into decades-old child sex offences'.[142] Since Hydrant's launch, 7,000 suspects have been identified, with 11,346 allegations of attacks received from 9,343 victims, all concerning sexual abuse of children. Such figures relate to both institutional and non-institutional contexts of historical child sexual abuse. These figures have encouraged some victim-survivor representatives.[143] Other forms of historical abuse, such as institutionalisation per se, child migration, and illegal adoption, have not formed the object of criminal prosecutions but have been pursued through civil litigation.

The experience of victim-survivors in UK civil litigation continues to risk distress or re-traumatisation. The Independent Inquiry into Child Sexual Abuse (IICSA) report on accountability and reparations noted that for many victim-survivors 'the litigation process was emotionally challenging and that it compounded the trauma they had already suffered as children. They also felt dissatisfied with the outcome, either because their claims had failed or because they had succeeded, usually by accepting a settlement offer, but they had never received any explanation or apology for what had happened to them and did not feel that justice had been done'.[144]

The IICSA report on the safeguarding within the Roman Catholic Church confirms that in the church's historical responses to child sex abuse allegations, 'resistance to external intervention was widespread'.[145] The Nolan report in 2001 recommended the need for a single set of rules to address such allegations across the Catholic Church in England and Wales, leading to the eventual establishment of independent child commissions and child protection offices. The 2007 Cumberlege review of this process found the

[141] Peter Spindler, 'Operation Yewtree: A Watershed Moment' in Marcus Erooga (ed), *Protecting Children and Adults from Abuse After Savile: What Organisations and Institutions Need to Do* (Jessica Kingsley Publishers 2018) 212.

[142] Vikram Dodd, 'Police Uncovering "Epidemic of Child Abuse" in 1970s and 80s' *The Guardian* (London, 5 February 2020) <www.theguardian.com/uk-news/2020/feb/05/police-uncovering-epidemic-of-child-abuse-in-1970s-and-80s>.

[143] ibid.

[144] Alexis Jay and others, 'Accountability and Reparations' (IICSA 2019) CCS0719581022 09/19 26 <www.iicsa.org.uk/reports>.

[145] Alexis Jay and others, 'The Roman Catholic Church: Safeguarding in the Roman Catholic Church: in England and Wales' (Independent Inquiry into Child Sexual Abuse) vi <www.iicsa.org.uk/key-documents/23357/view/catholic-church-investigation-report-4-december-2020.pdf>.

church had made some progress regarding child protection, though noted the limited change for religious orders compared to dioceses.[146] The IICSA report concluded: 'The absence of published data about the number of priests laicised for child sexual abuse offences (whether in crimes in civil or canonical law) diminishes confidence in the Church's handling of such cases.'[147]

Beyond individual criminal and civil cases, the 2012 case of *Mutua & Ors v Foreign and Commonwealth Office* represented the first time that victims of colonialism were given the right to claim compensation from the British government. The claims arose from the systematic abuse and torture inflicted on the Kenyan people by British colonial officials and Kenyan 'home guards' under British command, including castration, systematic beatings, rape, and sexual assault with bottles; all of which were known about and sanctioned at the top levels of the British government.[148] Justice McCombe noted that a fair trial was possible due to the existence of extensive and meticulous colonial records that had been found in discovery.[149] The case extended principles of vicarious liability in tort law to the joint activities of British government and colonial administrations.[150] In 2013, the British government apologised and agreed to pay £19.9 million in compensation to over 5,000 claimants who had suffered abuse.[151] Balint notes that the settlement 'was couched in terms of being important for future economic and political relations, rather than as an important acknowledgement of British responsibility for these harms as integral to Empire'.[152] Balint suggested the case offered the potential for a new constitutive moment 'ushering in a new legal order in which colonial harms can be heard and redressed as well as changing the public and political landscape of how the British Empire is collectively remembered and discussed'.[153] However, she concludes that 'the absence of a broader public appreciation of the structural nature of these harms – as constitutive of Empire, not exceptional to it – means that the claims brought and heard in

[146] ibid 40.
[147] ibid 27.
[148] *Mutua & Ors v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) (05 October 2012) para. 45.
[149] David M Anderson, 'Mau Mau in the High Court and the "Lost" British Empire Archives: Colonial Conspiracy or Bureaucratic Bungle?' (2011) 39 The Journal of Imperial and Commonwealth History 699.
[150] Jennifer Balint, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment' (2016) 3 Critical Analysis of Law 261, 277.
[151] William Hague MP, House of Commons Debates, vol. 563, col. 1692 (6 June 2013).
[152] Balint (n 150) 283.
[153] ibid 264–5.

their particularity will fail to have a more extensive constitutive impact'.[154] The potential impact of the case has been circumscribed by subsequent decisions and legislation.

In *Kimathi & Ors v The Foreign and Commonwealth Office*, in 2018, Stewart J dismissed similar group litigation, where over 40,000 Kenyans brought claims for damages against the UK Foreign & Commonwealth Office (FCO), alleging abuse in Kenya during the 1950s and early 1960s.[155] Stewart J held the claim was barred by the statute of limitations and that it would not be equitable to extend time in the claimant's favour due to the severe effects of the passage of time on the defendant's ability to defend the claim.[156] The judgment emphasised that civil litigation is distinct from a public inquiry and that 'the claims must stand or fall on established principles of civil litigation'.[157]

In *Keyu v Secretary of State for Foreign and Commonwealth Affairs*, the UK Supreme Court was asked whether the FCO should be required to hold a public inquiry into allegations of British soldiers shooting and killing twenty-four unarmed civilians in 1948 in Malaysia.[158] The UK government had rejected the claim for a public inquiry. The Court rejected the claim to compel the government to establish an inquiry, concluding that a historical claim that predates the European Convention on Human Rights needed a supervening event to create an obligation under the Convention to create an obligation to investigate.

Although these cases represent attempts to address the legacy of the British Empire through litigation, the future capacity of litigants to build on these approaches has been undermined by government legislation. Schedule 2 of the Overseas Operations (Service Personnel and Veterans) Act 2021 restricts a court's discretion, under the Limitation Act 1980, to disapply time limits for civil actions in respect of personal injuries or death which relate to overseas operations of the armed forces. The minister John Mercer in introducing the bill spoke of the need 'to lance the boil of lawfare and to protect our people from the relentless cycle of reinvestigations against our armed forces'.[159]

[154] ibid 265.
[155] *Kimathi & Ors v Foreign & Commonwealth Office [2018] EWHC 2066.*
[156] ibid 475.
[157] ibid 21.
[158] *Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355.*
[159] John Mercer MP, House of Common Debates, vol. 678, col. 1671 (16 July 2020).

7.4.5 *United States*

In the United States, there has been a significant focus on the criminal prosecution of clerical child sexual abuse but little systemic efforts to prosecute other forms of sexual abuse or non-sexual historical abuses. Attempts to hold priests accountable for child sex abuse began in 1984, in Louisiana,[160] but it would not be until 2002 and revelations of clerical abuse and its cover-up in Boston that the issue garnered national attention and forced the church to attempt to change its approach to dealing with abuse allegations. Formicola suggests that the successive investigations and litigation challenged the primacy of canon law and created expectations of legal cooperation from church institutions,[161] with secular governments less deferential to churches and as a result more powerful in how the past is addressed.[162] Most recent figures published by the United States Conference of Catholic Bishops (USCCB) indicate that 7,002 priests 'not implausibly' and 'credibly' were accused of sexually abusing minors in the period 1950 through 30 June 2018.[163] However, criminal convictions are not recorded in USCCB annual reports. Figures in the United States may continue to underestimate the extent of abuse as they rely on survey responses filled out by church officials without independent verification and are based on church personnel files, which may be incomplete or have removed incriminating material from personnel files to secret archives.[164] In addition, the US-based Survivors Network of those Abused by Priests (SNAP) unsuccessfully petitioned the International Criminal Court (ICC) alleging that Vatican officials had superior responsibility for consciously disregarding information that showed subordinates were committing or about to commit sexual violence. The request was rejected on the basis of lack of jurisdiction and because some of the allegations concerned events prior to the court's founding in 2002.[165] Similarly attempts to sue the Holy See in US court directly in tort law were also unsuccessful.[166]

[160] Jason Berry, *Lead Us Not into Temptation: Catholic Priests and the Sexual Abuse of Children* (LevelFiveMedia 2013).
[161] Formicola (n 21) 56.
[162] ibid 149.
[163] Annual reports available at <www.usccb.org/issues-and-action/child-and-youth-protection/reports-and-research.cfm> and <www.usccb.org/issues-and-action/child-and-youth-protection/archives.cfm>.
[164] Lytton (n 20) 44.
[165] James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 International Journal of Transitional Justice 332, 345.
[166] *Doe v Holy See* 557 F3d 1066 (9th Cir 2009); *O'Bryan v Holy See* 556 F3d 361 (2009).

Criminal prosecutions in the United States largely fail to address other areas of historical abuse involving state apparatus, involving racially motivated violence against African Americans, systemic assessment of police brutality, or violence against Native Americans. According to Manfred Berg, of all lynchings committed after 1900, only 1 per cent resulted in a perpetrator being convicted of a criminal offence of any kind.[167] In contrast, litigation has formed a key part of seeking to address the legacy of slavery, Jim Crow laws, and racial discrimination. Early decisions of the US Supreme Court affirmed both the Doctrine of Discovery and white supremacy.[168] However, the litigation strategies addressing injustice against Native peoples and black Americans are significant in their differences. In *Brown v Board of Education* in 1954, the applicant successfully argued that the principle of 'separate but equal' was unconstitutional, thus prohibiting the racial segregation of public schools.[169] Brown remains the canonical example of how the US legal system addresses the nation's legacy of past racial violence[170] but perhaps remains of limited ontological value. Joshi notes that while significant for demonstrating that racially separate public schools are 'inherently unequal', the decision is also notable for its failure to mention white supremacy and the degrading treatment of black children.[171] Angela Onwuachi-Willig suggests that such an approach left intact and unchallenged pre-existing notions of white superiority and black inferiority pervasive in American society.[172]

The potentially radical nature of the decision was limited by the Court's own approach to its implementation. In *Brown II* the Supreme Court turned over the implementation of school desegregation to local judges, who were to act not immediately but with 'all deliberate speed'.[173] After *Brown*, segregation persisted significantly for ten further years and the Civil Rights mass movement was required to realise its potential.[174] This mass movement and legal

[167] Manfred Berg, *Popular Justice: A History of Lynching in America* (Rowman & Littlefield Publishers, Incorporated 2015) 153.

[168] *Plessy v Ferguson*, 163 US 537 (1896); *Dred Scott v Sandford*, 60 US (19 How) 393 (1857); *Johnson v M'Intosh*, 21 US 543 (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

[169] *Brown v Board of Education of Topeka*, 347 US 483 (1954).

[170] Jack Balkin and Sanford Levinson, 'The Canons of Constitutional Law' (1998) 111 Harvard Law Review 963, 994.

[171] Yuvraj Joshi, 'Racial Transition' (2021) 98 Washington University Law Review 1181, 1235.

[172] Angela Onwuachi-Willig, 'Reconceptualizing the Harms of Discrimination: How *Brown v. Board of Education* Helped to Further White Supremacy' (2019) 105 Virginia Law Review 343, 355.

[173] *Brown v Board of Education (Brown II)*, 349 US 294, 299 (1955) 138 301.

[174] Michelle Alexander *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (Revised ed, New Press 2012) 38.

changes in turn led to retrenchment and resistance to racial integration,[175] ultimately finding expression in the Supreme Court with the successive appointment of conservative judges throughout the end of the twentieth century, who largely deny continuities of historical injustices to present inequalities.[176]

Other significant victories have been achieved through litigation, such as prohibiting voter discrimination,[177] but have equally been undermined by subsequent retrenchment in the Supreme Court.[178] Joshi suggests: 'In trying to disassociate the United States of today from its antebellum and Jim Crow histories, the Court denounced blatant forms of racism from the past while discounting the racism present today and denying continuities between past and present racism', and emphasises the Court's preoccupation with an end point to racial transition at which any exceptional measures would no longer be justified.[179] As a result, the most high-profile forms of litigation to address historical-structural injustices, such as *Brown*, are limited both by the structure of litigation requiring subsequent government action and by the relatively narrow framing adopted by the Courts in relation to the nature of the injustices addressed.

There have been several cases litigating the issue of reparations for slavery, but these have proven largely unsuccessful due to structural barriers in litigation, in particular the doctrine of sovereign immunity, that a political subject cannot sue the government without its consent, has barred two attempts.[180] In addition, descendants of slaves' claims for reparations have been rejected as courts concluded that the descendants had not been directly harmed themselves.[181] Emma Coleman Jordan notes the limited potential to achieve reparations for slavery: 'The litigation-for-reparations strategy suffers from the old problem of using the master's tools to tear down the master's house.'[182]

[175] Sumi Cho, 'From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from *Brown* to *Grutter*' (2005) 7 University of Pennsylvania Journal of Constitutional Law 809; Eduardo Bonilla-Silva, *White Supremacy and Racism in the Post-Civil Rights Era* (L Rienner 2001).

[176] Joshi (n 171) 1211.

[177] *Harper v Virginia State Board of Elections* 383 US 663, 663 (1966).

[178] *Shelby County v Holder*, 570 US 529 (2013).

[179] Joshi (n 171) 1185.

[180] *Johnson v McAdoo* 244 US 643 (1917); *Cato v United States*, 70 F3d 1103, III 1 (9th Cir 1995).

[181] *In re African-American Slave Descendants Litigation*, 375 F Supp 2d 721 (ND Ill 2005); *Cato v United States*, 70 F.3d 1103, III 1 (9th Cir. 1995) (n 181).

[182] Emma Coleman Jordan, 'A History Lesson: Reparations for What?' (2003) 58 NYU Annual Survey of American Law 557, 559.

The use of civil and constitutional rights has also been limited and risky for Native peoples. In the 1950s, Native claims were limited to those under the Indian Claims Commission, which allowed for the recovery of money but not return of Native lands,[183] and is discussed further as a limited form of reparation in Chapter 8. By the 1960s, Native tribes began to pursue the advancement of their interests through litigation through the development of the Native bar of attorneys.[184] This strategy led to a trend of the recognition of native rights to title in the 1970s and 1980s, recognising that federal Indian law was based on a government-to-government relationship between tribes and the United States.[185] Wilkinson notes that these successes became more limited in the 1980s and 1990s, similar to retrenchment against addressing racial injustice, with Justices Rehnquist, Scalia, and Thomas refusing to take seriously existing Native treaties.[186] Kirsten Matoy Carlson notes that at the US Supreme Court, Indian nations lose over 75 per cent of the cases litigated.[187] This rate suggests that efforts of Native tribes to assert their rights and power and address past injustices may be better pursued through Congressional legislation, through both general and tribal-specific legislation.[188]

The Court's approach to addressing Native sovereignty and jurisdiction has fluctuated in its effects as a form of epistemic injustice. In *Oliphant*, the Supreme Court declined to acknowledge criminal jurisdiction for Indian tribal courts over non-Indians.[189] In doing so, the Court concluded that the relevant treaty text was silent on this issue and as a result the Court could examine 'the common notions of the day' and 'the assumptions of those who drafted [the texts]' to resolve the issue.[190] Blackhawk is critical of this approach that remained rooted in a dominant ideology that sought to restrict the textual recognition and impact of Native sovereignty.[191] In contrast, in *Solem v Bartlett*, the Supreme Court concluded that three principles would evaluate the existence of any Congressional intent to diminish the borders of a Native

[183] Charles F Wilkinson, '"Peoples Distinct from Others": The Making of Modern Indian Law, 2006 Utah L. Rev. 379' (2006) 2006 Utah Law Review 379, 380.
[184] ibid 384.
[185] ibid 387–8.
[186] ibid 389; *Nevada v Hicks* 533 US 353 (2000).
[187] Kirsten Matoy Carlson, 'Congress and Indians' (2015) 86 University of Colorado Law Review 78, 81.
[188] ibid 156.
[189] *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978).
[190] ibid 207.
[191] Maggie Blackhawk, 'On Power and the Law: McGirt v Oklahoma' (2020) 2020 Supreme Court Review 1, 23.

reservation.[192] First, the Court affirmed that an explicit provision from Congress is required to diminish the boundary of a reservation. Second, the language must specifically state the intent to diminish a reservation or make a blatant statement from which the intent to diminish is presumed. Third, the Court made clear that historical evidence of intent to disestablish the reservation must be 'unequivocal' in order to be dispositive.[193] Such an approach raised the burden to displace existing reservations and Native borders. Maggie Blackhawk suggests that rights-based frameworks, such as that in *Brown*, have been used as a tool of settler colonialism against Native peoples. Instead, recognition of tribal sovereignty has benefited Native peoples as a recognition of power, not rights.[194] The potential of Native litigation in the United States thus remains predicated on recognition of Native sovereignty, not individual or collective rights granted by the state. Such litigation has the potential to redistribute ontological power, affirming the shared sovereignty and power on the territory of the United States/Turtle Island.

A recent Supreme Court decision illustrates the potential of an approach focused on power, rather than rights for Native peoples. In 2020 in *McGirt v Oklahoma*, the Supreme Court held that 'three million acres and most of the city of Tulsa, Oklahoma' was recognised by the United States as within reservation lands of the Muscogee (Creek) Nation, potentially leading to one-third to one-half of Oklahoma being part of a reservation.[195] In *McGirt*, the United States and the Muscogee (Creek) Nation had agreed on the borders of the reservation in a treaty that recognised Native sovereignty. The Supreme Court held that the text of the treaty would determine the outcome and that subsequent practices aiming to usurp sovereignty had not changed or made law. It notably stated: 'Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right'.[196] Such an approach affirms the potential for litigation to serve as a mechanism to address historical-structural injustice directly, providing measures of truth and reparation through the recognition of native title.

In contrast, Blackhawk suggests that the dissents by Justices Roberts, Alito, Kavanaugh, and Thomas are notable for their attempts to perpetuate national

[192] *Solem v Bartlett, 465 US 463 (1984)*.
[193] ibid 471.
[194] Maggie Blackhawk, 'Federal Indian Law as Paradigm within Public Law' (2019) 132 Harvard Law Review 1787, 1798.
[195] *McGirt v Oklahoma, 140 S Ct 2452 (2020)*.
[196] ibid 2482.

myths regarding American western frontier expansion, such as manifest destiny. The dissent's approach would shift the epistemic power away from a textual analysis that emphasised Native sovereignty and allow a contextual approach that would empower the court to find sufficient Congressional intent to diminish the borders of the reservation in the treaty.[197] In doing so, the dissent would have made legal an infringement of Native sovereignty that was non-consensual and violent.[198] The broader impact of the decision remains to be seen, with the Court noting that delay, laches, and other doctrines of civil litigation may bar Native nations from exercising power and jurisdiction.[199] Blackhawk argues that generations of Native advocacy have sought to emphasise the language of sovereignty, power, and conquest into law, 'thereby making the experience of Native people legible to formal lawmaking institutions'.[200] Such an approach can enable advocates 'to fracture the law in order to lower the barriers to reform' as a means of recognising and remedying historical-structural injustices.[201]

7.5 CONCLUSION

Each element of litigation has brought some element of justice for survivors but is also limited in significant ways. Criminal law responses to child sex abuse remain significant in undoing the self-created exceptionalism of Catholic priests and clericalism, and subject them to ordinary rules of criminal law.[202] However, the focus on clerical sexual abuse does not explain the limited number of prosecutions on sexual assaults against First Nations women and girls nor against African American women. The continuities of violence against women, especially women and girls of colour, should counter the idea that there was a historically exceptional period of sexual abuse. While prosecuting historical child sex abuse remains significant, this focus also obfuscates the absence of prosecution of non-sexual, state-sanctioned violence.

Civil litigation may bring 'some satisfaction and other therapeutic gains to victim-survivors and the community more generally, but law can never fully erase the injury or long-term impacts of violence'.[203] While civil litigation has

[197] Blackhawk (n 194) 19.
[198] ibid 20.
[199] *McGirt v Oklahoma, (n 195)* 2481.
[200] Blackhawk (n 194) 39–40.
[201] ibid.
[202] Thomas P Doyle, 'Clericalism: Enabler of Clergy Sexual Abuse' (2006) 54 Pastoral Psychology 189.
[203] Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice* (Palgrave Macmillan UK 2015) 5.

been used to gather institutional responsibility, the settlement of cases and the uneven nature of civil forms of responsibility across jurisdictions create arbitrary and invidious discriminations across victim-survivors.

There have been some significant achievements through litigation – the decisions in *Brown* in the United States or *Trevorrow* in Australia demonstrate that while historical legacies of state-authorised injustice can exceptionally be recognised by states, implementing remedies remains highly contested, challenging, and political. As a result, there are two competing tensions in the pursuit of accountability for historical abuse through litigation. Pablo de Greiff notes: 'Refraining from prosecuting mass violations is not an option since this omission in itself constitutes a new violation of international human rights obligations. The question is how to muster and organize available resources – institutional, political, human and material – to maximize the impact of criminal justice measures.'[204] On the other hand, in addressing the challenges facing the Stolen Generation, Pam O'Connor concludes '[l]itigation is a poor forum for judging the big picture of history'.[205] This insight appears true across the range of efforts for accountability for historical abuse across the countries examined.

Regarding canon law, to date it has been largely ineffective at providing justice for victims or punishment to perpetrator priests. In 2014, the Committee on the Rights of the Child expressed grave concern that the Holy See had neither acknowledged the extent of nor sufficiently addressed the crimes committed but had adopted policies and practices which have led to its continuation and to impunity for perpetrators.[206] Under Pope Francis, the Holy See has centralised the church's policies related to child abuse with mandatory reporting procedures from national bishops to the Holy See and the removal of the secrecy of canon trials. However, it remains to be seen whether this centralisation will result in more support for victims or be an instrument of impunity.[207]

The majority of international human rights mechanisms have been used, at best, to create domestic political pressure for states to engage in addressing historical abuse. The limits to this approach include a diminishing return to repeated engagement with international oversight bodies and a lack of

[204] 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff' A/HRC/27/56 para 37.
[205] Pam O'Connor, 'History on Trial: Cubillo and Gunner v The Commonwealth of Australia' (2001) 26 Alternative Law Journal 26, 30.
[206] 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.
[207] Byrnes (n 17) 23.

effective emphasis on individual accountability. Each mechanism of litigation makes a partial contribution to addressing historical-structural injustices. The possibilities for doing so are limited by both the non-recent nature of the harms, the structure of litigation in the legal systems considered, and the willingness and capacity of courts to hear and acknowledge survivors as bearers of knowledge and truth, and to embrace the need for radical change prompted by the widespread or systemic harms they speak to.