

ARTICLE

Can Indigenous truth commissions overcome the legacies and contemporary effects of colonialism?

A study on the Australian-Canadian experience to explore possible paths in Argentina

Valeria Vegh Weis and Chris Cunneen*

Abstract

While restorative justice has been extensively growing in democratic settings, less explored is its connection with transitional justice or, in other words, there have been insufficient attempts to explore the possibility of applying restorative justice mechanisms in countries dealing with the aftermath of mass violence. Seeking to fill this gap, this article addresses the connections between transitional justice and Indigenous demands. Particularly, the study focuses on the role of truth commissions as a restorative justice mechanism with the potential of creating a new narrative on human rights violations (or a 'narrative turn'). The article then analyses the experience of Indigenous truth commissions in Australia and Canada, considering them within their political contexts and providing a critical analysis of the results. Finally, the study analyses the Argentinean case and the possibility for a truth commission to uncover the legacy of human rights violations against Indigenous communities. It also considers how the comparative experience assists in assessing the pertinence of having a truth commission in Argentina. Altogether, the article aims to explore the role of truth commissions, applied through a decolonial, transformative and actor-centred perspective, and their potential to challenge the narratives that have largely legitimised or denied harms against Indigenous peoples.

Keywords: restorative justice, transitional justice, truth commission, Canada, Australia, Argentina.

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1 Introduction

While restorative justice has been extensively growing in democratic settings, less explored is its connection with transitional justice. In other words, there have been insufficient attempts to explore the possibility of applying restorative justice mechanisms in countries dealing with the aftermath of mass violence.

A few remarkable works have tried to fill this gap (e.g. Clamp, 2014, 2016). Within this literature, attention has been paid to the inclusion of traditional justice mechanisms not aligned with punitivity (Braithwaite, 2014) and, particularly, to the consideration of truth commissions 'as the primary example of a restorative justice mechanism' in transitional settings (Weitekamp, Vanspauwen, Parmentier, Valiñas & Gerits, 2006: 218). In the case of the South African Truth and Reconciliation Commission, truth telling and reparations were seen to overlap with the goals of restorative justice (Clamp, 2014: 69). In terms of actors, a call has been made to consider the role of victim involvement in trials as a way of restoration (Nickson & Braithwaite, 2013). In turn, within the transitional justice literature, scholarly works have been increasingly concerned with the particularities of transitional justice processes in countries dealing with the crimes of colonisation (Cunneen, 2016). Dealing with these atrocities is particularly suitable to restorative justice mechanisms, as the perpetrators are already dead, and which obstructs the chances of deploying criminal trial. Instead, 'the advantage of flexible, bottom-level, restorative justice responses is that it is never too late to implement them' (Maršavelski & Braithwaite, 2020: 258).

This study brings a further missing link among these developing lines of research, by inquiring if it is possible to help restore colonial injustices by deploying truth commissions or inquiries. In acknowledging the critiques of the neoliberal, top-down and northern features of transitional justice, the article develops an approach for decolonising and reconceiving truth commissions from a transformative justice perspective. The transformative dimension includes Indigenous peoples in a leading role in the process (Vegh Weis, 2022) and the understanding of truth commissions as a platform to enhance a 'narrative turn' in society (as developed further below). This analysis is particularly timely as the demands of Indigenous peoples are increasingly extending across the globe.

To assess this inquiry, the article will deploy the case study methodology (Yin, 1984), choosing the cases through purposive sampling. This means that the selected cases are those with attributes that allow for an in-depth understanding of the research topic, that is, countries with experiences or the potential to host a truth commission in relation to reviewing Indigenous claims. They had been identified based on knowledge already gained by the researchers who, through their lived experiences and prior scholarly work, are deeply familiar with them (Berg, 2009). Indeed, the researchers' experience in the countries under study is of foremost relevance. As Brahm (2007: 19) states:

The problem here is that much of this literature is written by members of the international human rights community who frequently move on to the next hotspot shortly after the commission is over, we are left with little sense as to

whether truth commissions are a mere blip historically or help put society on a new trajectory.

The life-term engagement of the researchers with the case study is aimed at avoiding this shortcoming. Particularly, the study explores the two truth commissions that took place in Australia¹ and Canada and were specifically devoted to addressing the demands of Indigenous peoples. The shortcomings of these experiences will be evaluated to explore the possibilities of an Indigenous truth commission in Argentina. In this regard, Part 2 addresses the connections between transitional justice and Indigenous demands with a special focus on the role of truth commissions as a restorative justice mechanism with the potential of creating a new narrative on human rights violations (or a 'narrative turn'). Part 3 analyses the experience of Indigenous truth commissions in Australia and Canada, considering them within their political contexts and providing a critical analysis of the results. Part 4 analyses the Argentinean case and the possibility for a truth commission to uncover the legacy of human rights violations against Indigenous communities. It also considers how the comparative experience assists in assessing the pertinence of having a truth commission in Argentina. Altogether, the article aims to explore the role of truth commissions, applied through a decolonial, transformative and actor-centred perspective, and their potential to challenge the narratives that have largely legitimised or denied harms against Indigenous peoples.

2 Connections between transitional justice, restorative justice and Indigenous demands

2.1 *Limitations of transitional justice on Indigenous matters*

Liberal democratic states were usually absent from considerations of transitional justice. This was true concerning a broad range of processes of dealing with the past, from contemporary conflicts based on religion and sovereignty, as in the case of Northern Ireland, to Indigenous peoples' claims for past injustices arising from colonial histories. Much of the transitional justice literature assumed that democratic societies had resolved the conflicts and injustices of their past and that colonial violence, exclusion, dispossession and subjugation could be ignored (e.g.

1 We note there is also a current truth commission underway in the Australian state of Victoria – the Yoorrook Justice Commission established in 2021. It has the powers of a Royal Commission with various objectives including to 'establish a public record based on First Peoples' experiences of systemic injustice since the start of colonisation'; 'support the treaty-making process between the State of Victoria and First Peoples'; and 'identify systemic injustice which currently impedes First Peoples achieving self-determination and equality and make recommendations to address them, improve State accountability and prevent continuation and recurrence of systemic injustice' (see <https://yoorrookjusticecommission.org.au/overview/>). However, this is not a national inquiry and less than 8 per cent of all Indigenous Peoples in Australia live in Victoria. At the time of writing, the Yoorrook Justice Commission had not completed its hearings and is not considered in this article.

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Teitel, 2000). As Matsunaga notes in her discussion of transitional justice in the Canadian context, referring to the nation as an advanced liberal democracy

precludes discussion of harm, persecution, injustice, and ongoing genocide within transitional justice frameworks by treating Canadian democracy as a finished project and a state that is inherently and always just. (2016: 29)

Even when transitional justice is exceptionally deployed to address the colonial past in developed democracies, further problems include the fact that changes are largely superficial. Particularly, the relationship between the state and Indigenous peoples may continue unchallenged if sovereignty remains unaffected and self-determination is left unaddressed (Atilés-Osoria, 2018; Balint, Evansy & McMillan, 2014; Cunneen, 2016). As such, there has been some recognition by proponents that transitional justice processes have not adequately addressed Indigenous concerns. Furthermore, the concept of transitional justice itself might appear short-sighted when considering the time scale of human rights violations committed against Indigenous peoples, which can encompass at least 500 years, and the fact that, in most countries, there has been no rupture or 'transition' between the past and the present. In addition, even when acknowledging this long-term violence and the absence of a traditional transition, Indigenous peoples seeking justice for human rights violations may mistrust the notion of transitional justice because it was developed in the Global North despite the reality that most of the processes analysed occur in the Global South, which may imply a neo-colonising connotation in using the term.

In this vein, the application of transitional justice mechanisms and even their conceptualisation and naming need to be reimagined to give birth to a new epoch of respect for Indigenous rights. Notably, this core challenge is strongly connected with the still-developing inclusion of restorative justice mechanisms and perspectives in transitional justice settings. The restoration of violated sovereignty; acknowledgement of Indigenous peoples as pre-existing nations; openness to alternative sources of truth, such as oral history; and the understanding of unfairness as going beyond a specific criminal offence to encompass collective harms, genocide, systemic persecution and forcible assimilation demand responses that cannot be contained within the possibilities of the criminal justice system and the top-down and state-centred conceptualisation of transitional justice. Instead, a transformative, decolonial and restorative approach to Indigenous peoples' demands might be a suitable instrument for change. Particularly relevant from this perspective are the mechanisms of truth commissions or inquiries, a restorative transitional justice mechanism aimed at ensuring historic justice and with the potential of going beyond punishment to include a broad range of recommendations, as well as to go beyond the state-centred dynamics in favour of prioritising victim voices who can change what was so far conceived as 'truth'.

2.1.1 *What about reshaping mainstream narratives? Towards a 'narrative turn' in transitional justice*

There have already been truth commissions with a specific focus on Indigenous matters, including the Truth and Reconciliation Commission in Canada and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families in Australia, both centred on the forced removal of Aboriginal children from the families and communities and their institutionalisation. Within the Global South, there have been no experiences specifically addressing Indigenous claims, although relevant truth commissions related to massive state violence have included Indigenous concerns as part of their overall agenda (e.g. Guatemala and Peru). In turn, Argentina hosted the first truth commission worldwide, the National Commission on the Disappearance of Persons (CONADEP in Spanish) (Crenzel, 2008). This ground-breaking mechanism was concerned with the crimes of the dictatorship that ruled the country from 1976 to 1983, which did target Indigenous peoples but not exclusively. However, in what concerns us here, the CONADEP has relevant lessons to offer in terms of approaching truth commissions from a transformative, decolonial and restorative justice perspective for Indigenous matters. This is because of the leading role played by victims' organisations; the fact that it was a national creation without the intervention of international experts from the North; the goal of going beyond criminal trials to include the triad 'memory, truth and justice'; and the particular aim of reshaping the false narratives disseminated by the Military (Vegh Weis, 2020).

What is a narrative? It consists of a collection of stories linked to common problems. Narratives realise that people understand and give meaning to their lives through stories (Andrews, Squire & Tambokou, 2008). These stories support memory processes, meaning how people construct meaning about the past and how they relate that past to the present, through the act of remembering (Naidu, 2012). In this vein, Halbwachs (2004) develops the notion of 'historical memory' that involves the reconstruction of the data provided by social life and projected onto the reimagined past. Likewise, the author proposes the concept of 'collective memory', which refers to a group of experiences and collections whose subsequent interpretation fundamentally directs the identity and interests of a nation (see also Warburg, 2010).

Building upon these memory processes, societies create a reference framework from which they structure and provide meaning to their economic, social, political and identity organisation. Stern (1998) adds the notion of 'emblematic memory' and explains that, based on certain historical processes, credibility is imparted to certain memories that end up constructing meaning and which are echoed in a given society and culture. In short, narratives are always socially framed, while social frameworks are the bearers of the prevailing representations in society, based on certain needs and values that come from memories of the past that are interpreted and shape the future (Halbwachs, 2004). In other words, they do not arise spontaneously, but are elaborated, worked and transmitted (Said, 2011); they are the result of the interweaving of traditions and individual memories, in dialogue with others, in a constant flow in which some voices are more powerful than others because they have greater access to resources and scenarios (Ricoeur,

2002). This contested and ongoing recovery of the past is vital as it shapes national identity and local politics (Vezzetti, 2007).

When referring to massive human rights violations, narratives include the individualisation of the people who caused these problems, those who solved them, and the victims, in a specific trajectory and temporal path that, collectively, provide a way of seeing the world (see Fisher, 1984). Moreover, the processes of constructing a narrative can also deal with *why* human rights violations occurred, what was the functionality of those violations, what were the links with the national socioeconomic structure and regional and global politics, and the religious and corporate interests involved (Marks, 2011). Following this logic, seeking the truth is not limited to the past but also to the present (current legacies of the atrocities) and the future (how to avoid repetition). In other words, it is not about 'the simple remembrance of the horror but [of] the resignification of that memory, the analysis of what happened, its causes, those responsible and the ends pursued' (Duhalde, 2015 in Said, 2011: 7).

The narrative turn in transitional contexts, conceived from a decolonial, transformative and restorative perspective, thus, involves contesting hegemonic narratives that distort or deny the colonial harms and their legacies by building up new evidence-based social agreements centred on the voices of Indigenous peoples themselves. From a decolonial perspective, this narrative turn is conceived as bottom-up, led by Indigenous voices and based on facts largely hidden by Western powers and epistemologies. Notably, this involves unearthing not only 'what', but also 'why', human rights violations occurred and endure. Adding the transformative and restorative perspective, this narrative turn also involves the potential of setting a breaking point with a past of oppression and neglect while restoring citizenship and dignity by reframing those targeted by the violations as right-holders and peers. Altogether, the emerging narrative has the potential to include a new paradigm on the role of Indigenous peoples in national identities, an acknowledgement by the state and the public more generally of the atrocities suffered, the legitimisation of the demands for land and economic security, and the urgent need of overturning of ongoing stigmatisation that legitimates the oppression of Indigenous peoples. Moreover, this turn includes bringing awareness of the fact that, far from a monolithic collective, Indigenous peoples' socio-demographic, cultural and political characteristics, as well as their demands, vary substantially.²

Building upon this conceptualisation, the next section explores the experiences of Canada and Australia, which, despite the shortcomings, shed light on the possibilities of Indigenous truth commissions/inquiries as a potential mechanism to foster a narrative turn that, along the CONADEP experience, can offer possible paths for Indigenous peoples living in what is today known as Argentina.

2 According to the United Nations, there are over 370 million Indigenous peoples living in 70 countries worldwide; thus, the notion of 'Indigenous people' can essentialise important distinctions between different peoples, nations and communities even within existing nation-states.

3 Experience of Indigenous truth commissions: Australia and Canada

State crime criminology argues that modern political states have been responsible for the murder of millions of people, including the massive killings and oppression of native communities (Green & Ward, 2013). Indeed, there are multiple layers of state crime: at the highest level is the claim that particular colonial practices against Indigenous people constituted genocide, but claims also include mass murder, racism, ethnocide (or cultural genocide), slavery, forced labour, forced removals and relocations, denial of property rights and denial of civil and political rights (Cunneen, 2007). Australia and Canada are no exceptions. Forced removal and institutionalisation of Indigenous children in these two countries affected hundreds of thousands of children and stretched from the later part of the nineteenth century to the late twentieth century. Race-based colonial law and policy in both countries enabled the specific targeting of Indigenous children. In response to these colonial policies, both Australia and Canada established inquiries in the 1990s and early 2000s, respectively.

3.1 *The 1995 national inquiry into Indigenous child removal in Australia*

By the late nineteenth and early twentieth centuries, most states of Australia developed a systematic policy of child removal utilising both church and state-run institutions (NISATSIC, 1997). Removal policies rested on specific assumptions about race, 'blood' and racial hygiene. According to social Darwinist ideas, 'full-blood' Indigenous people were bound to die out because of their racial inferiority. However, the concern for the state was the rapidly growing population of 'mixed blood' children. These children became the primary target for intervention and permanent removal from their families and communities. By the 1940s, the rationale for removal had shifted from biological absorption to cultural absorption through the assimilation of the children into European society. It was believed that these children, over generations, would be biologically/culturally absorbed into the superior non-Indigenous population. Their 'aboriginality' would be 'bred' out. Both extermination and assimilation policies shared the same goal: the disappearance of Indigenous people as a distinct group throughout the national territory.

As the outcome of a long battle by Indigenous people for recognition of the issue of forced separations, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) was established by the Federal Labor Government in 1995 with a budget of AU\$1.5 million and a reporting period of two years. The Inquiry was conducted by the Australian Human Rights Commission (NISATSIC, 1997). The final report estimated that 10 per cent of Indigenous children were removed under state-sanctioned policies between 1910 and 1970 (NISATSIC, 1997) and that, today, most Indigenous families continue to be affected in one or more generations by the forcible removal of children during this time (NISATSIC, 1997). The Inquiry made 54 recommendations centred around the principle of reparations, which included five components: acknowledgement and apology; guarantees against repetition; measures of restitution; measures of rehabilitation; and monetary compensation. Importantly, the Inquiry recommended a National Compensation Fund.

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Nevertheless, the government only provided a one-time AU\$63 million package focussed on family support, counselling services and family 'link-up' services. Individual compensation was not provided for, nor was a National Compensation Fund established. Over the 25 years following the Inquiry, a minority of States established their compensation funds. Consequently, some Indigenous people received compensation depending on which State or Territory they lived in, and the eligibility requirements and amount of compensation varied. For example, in New South Wales, a fund was established as recently as 2017 with a one-time payment of AU\$75,000 to those affected, which was much more generous than the South Australian and Tasmanian payment schemes. Because of the absence of federal leadership on the issue and the ad hoc development of the local compensation schemes, there is no estimate of the total number of Indigenous people compensated.

3.2 Canadian inquiries to address the residential school system

In Canada, the residential school system lasted for more than a century from the 1870s to 1996. The policy was 'violent in its intention to "kill the Indian" in the child ... The system was, even as a concept, abusive' (Milloy, 1999: 15). Canadian authorities would frequently take children to schools far from their home communities as part of a strategy to alienate them from their families and tribal culture. In 1920, under the Indian Act, it became mandatory for every child to attend a residential school and illegal for them to attend any other educational institution. More than 150,000 children were placed in these institutions. In 2012, there were an estimated 80,000 former students still living (TRCC, 2012). The Royal Commission on Aboriginal Peoples (1996) noted that the residential school system was characterised by

denial of identity through attacks on language and spiritual beliefs, frequent lack of basic care, the failure to ensure the safety of children from physical and sexual abuse, [and] the failure to ensure education. (RCAP, 1996: 187)

The Canadian Government (1997) responded to the Royal Commission's findings with a Statement of Reconciliation which acknowledged past injustice and included an apology to Indigenous peoples, particularly about the effects of the residential school system. The government also acknowledged the long-term intergenerational effects of removals through the residential school system and initially provided CAN \$350 million for the establishment of a healing fund to support community-based initiatives for Indigenous people affected by the residential schools (the amount was significantly less than the amount recommended by the Royal Commission and did not provide for individual compensation).

However, it was after the largest class action in Canadian history, and to avoid ongoing litigation by residential school survivors, that the Canadian government agreed to the Indian Residential Schools Settlement (IRSS) in 2006. The IRSS had two components: the establishment of the Truth and Reconciliation Commission (Canadian TRC) and the Prime Minister's Public Apology (TRCC, 2012). In June 2008, Prime Minister Stephen Harper made a Statement of Apology to

former students of the residential system, on behalf of the Government of Canada. In the same year, the TRC began its work with a budget of CAN \$60 million, and the final report was published in 2015. Similar to its Australian counterpart, the Canadian TRC focussed on the removal of children and their placement in residential schools. However, given that a formal settlement had been reached and an official apology had been made, there was less emphasis on reparations through compensation and acknowledgement compared with the Australian report and more emphasis on documenting the truth and legacy of the residential schools and establishing processes for reconciliation. The Commission received over 6,750 statements from survivors of residential schools, their family members, and other individuals. The Commission's report also outlined the significant impediments the Canadian government employed to prevent access to official documents. The final report of the Commission contained 94 'calls to action' covering such matters as commemoration, processes for reconciliation, access to documentation, and changes to child welfare, education, health and justice institutions.

3.3 The role of 'truth' and the (limited) 'narrative turn' in the commissions

Both the Canadian Commission and Australian Inquiry were concerned with the search for truth – a truth that was to be found not only in documentary evidence but also in lived experience. According to the Canadian TRC,

by *truth*, we mean not only the truth revealed in government and church residential school documents, but also the truth of lived experiences as told to us by Survivors and others in their statements to this Commission. (TRCC, 2015: 12)

In this vein, the inquiry and the commission spent considerable time collecting the testimonies of Indigenous peoples who had been affected by the removal and the residential school process; articulated a direct relationship between establishing the 'truth', the current state of affairs and the possibility of reconciliation; and included colonialism as the broader context in which child removals and residential schools were introduced.

Furthermore, the two initiatives referred to previous government policies as genocide, although in different ways. The Australian report regarded the removal policies as constituting genocide in international law (NISATSIC, 1997). In contrast, the Canadian report regarded the establishment and operation of residential schools as a central element in the government's broader policy goals of causing 'Aboriginal people to cease to exist as distinct legal, social, cultural, religious and racial entities in Canada ... which can best be described as "cultural genocide"' (TRCC, 2015: 1). Furthermore, the two countries focus on establishing the truth surrounding the historical and *ongoing* harms suffered by Indigenous people as a result of child removal, often directly through the voices of survivors. Both called on governments to reduce the number of Indigenous children in care and affirmed the right of self-determination and, specifically in this context, the right of Indigenous organisations to establish their child welfare agencies. However, several factors limited the full involvement of Indigenous peoples in both inquiries,

including government decisions affecting the establishment, budget, timeframe and terms of reference for the inquiries, and the inquiries' internal decisions on processes for hearing evidence and formulating recommendations, as well as implementation mechanisms. In Australia, the NISATSIC was limited by budget and timeframe in the number of public hearings it could undertake. In Canada, the National Residential School Survivors Society argued that survivors had a marginal place in the decision-making process (Petoukhov, 2011: 91-92). As a result, and despite the potential to foster a narrative turn centred on evidence-based collective stories about the Indigenous peoples and the state actions that could build a new social agreement about the past, the present and the future, this was not fully achieved. What was missing?

The scope: The Canadian Commission and Australia Inquiry were specifically focused on Indigenous child removal and residential schools, while broader harms and human rights abuses denounced by the Indigenous communities remain unaddressed (Cunneen, 2012, 2016; RCAP, 1996). Indeed, the residential school system was only one of several strategies used to exercise surveillance, intervention and control over Indigenous peoples and certainly only one part of the broader harms of colonialism. Moreover, the broader structural disadvantages that have been the outcome and long-term consequences of colonialism were not considered.³ This is a particular problem because the broader legacy of colonialism continues: current forms of oppression perpetuate ongoing colonising traits (Macoun & Strakosch, 2013) that are evident in current levels of poverty, structural discrimination and displacements caused by various forms of privatisation of Indigenous lands (Dominello, 2017). The structural long-term consequences of colonialism are reproduced globally: Indigenous peoples constitute 5 per cent of the world population, but they represent 15 per cent of the world's poor and a third of the 900 million people who live in rural areas under conditions of extreme poverty (United Nations, 2009).

In the specific cases of Canada and Australia, these long-term consequences include Indigenous children being removed from their families at extraordinary rates through state child protection legislation, Indigenous youth and adults criminalised and imprisoned at shocking rates through state criminal justice policy and practices, over-crowded housing, low incomes, chronic health issues, substance abuse, lower life expectancies, poor educational outcomes and the negative psychological and social effects of racism and discrimination, all of which have been exacerbated through the global ascendancy of neoliberal economics and the denial of Indigenous rights by states in their pursuit of economic growth (Cunneen & Tauri, 2016; United Nations, 2009). Altogether, the Indigenous demand to go beyond the residential system to include not only the whole range of social harms from colonial times to the present but also the colonial structures that lead to social harms in the first place remained ignored (McCaslin & Breton, 2008).

Decision-making: Although Indigenous peoples were invited as witnesses, they lacked decision-making capacity. Indeed, even the most important claim for many Indigenous people concerning past wrongs, which is the recognition of genocide,

3 Although see footnote 2 for current Australian inquiries.

remained completely off the political agenda. Neither Australia nor Canada accepted the possibility of genocide when issuing apologies; instead, for Canadian Prime Minister Harper 'it was a sad chapter in our history' (CBC News, 2008). According to Australian Prime Minister Rudd, the policies had caused 'profound grief, suffering and loss' (Behrendt, Cunneen, Libesman & Watson, 2019). Perhaps, as Benvenuto, Woolford and Hinton (2014) have noted, responding to the charge of genocide threatens the national identities of settler colonial states and the myths of peaceful colonisation. It goes to the heart of historical and contemporary questions of political and moral legitimacy and that is why it remains unattended in the still colonial, top-down, non-transformative and non-restorative misshaped narrative turn.

Sovereignty: While Indigenous challenges to settler-colonial sovereignty have involved in multiple forms, a common starting point is the recognition of Indigenous sovereignty. In Australia, communities are still calling for this recognition and continue to assert, as in the recent *Uluru Statement from the Heart* (2017), that sovereignty 'has never been ceded or extinguished and co-exists with the sovereignty of the Crown'. In Canada, one of the largest Indigenous mass movements, *Idle No More*, has the vision of honouring and building Indigenous sovereignty, while the Canadian Assembly of First Nations continues to assert 'the right to govern ourselves and the right to self-determination' (Assembly of First Nations, 2017). In addition, in Australia, the *Uluru Statement* calls for the 'establishment of a First Nations Voice enshrined in the Constitution and a Makarrata⁴ Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'. The demands in the *Uluru Statement* reinforce the need for constitutional and institutional change at the heart of demands for recognition of Indigenous sovereignty and self-determination, none of which was considered in the inquiries.

Recommendations: Shortcomings that came as a result of the state-driven process also included the scope and timing of the recommendations' implementation. The Canadian TRC promised to 'provide a context and meaning' when paying financial reparations, but many survivors received payments before the commission began to operate, that is, without any type of context or contention. Those who were still suffering from the trauma and consequences of the undergoing harms were re-victimised by receiving sums of money without psychological, community and comprehensive support (Cornthassel, Chaw-win-is & T'lakwadzi, 2009). In addition, economic reparations at the individual level are not generally associated with a transformative role committed to producing material structural changes for the communities, including massive restitution of land. Another effect of the lack of meaningful involvement of survivors is that the truth commissions can be too oriented towards forcing reconciliation, which might be functional to the state, but of less importance to survivors. In the Canadian case, reconciliation was set as one of the purposes of the Canadian TRC before its establishment (TRCC, 2012). Added to this, the state-centred design is more likely to delay the

4 *Makarrata* is a Yolgnu word and is used as a substitute for the English word 'treaty'. Makarrata is conceptually more complex than 'treaty' and embodies conflict resolution, peacemaking and justice.

implementation and effective monitoring of inquiry recommendations. As exemplified, a ten-year delay in offering a formal apology and the ongoing absence of an Australian federal government response to recommendations for compensation have reinforced the view that harm to Indigenous people is unimportant and Indigenous human rights are dispensable.

Overall, the experiences of Canada and Australia as instances of deployment of transitional justice mechanisms to address Indigenous claims show that they may have had some potential to establish a (limited) truth-based narrative concerning the crimes of the past, the present and the future. However, the political challenges they pose for the settler colonial state have not been resolved and have undermined the full potential of the inquiries. As a result, neither the Canadian nor Australian commissions engaged in a comprehensive narrative turn that is capable of unearthing the extensiveness of colonial harms, its genocidal nature, the persistence of marginalisation, the role of Indigenous peoples in national identities and the urgent task of recognising Indigenous claims upon the settler colonial state.

The explanation for these shortcomings can be found in the fact that the decolonial, transformative and restorative responses that are required challenge the foundations of the state and its sovereignty. Moreover, they are at the heart of political and economic relations that have been built on the expropriation of Indigenous people's lands and the various attempts at their symbolic, political and physical extermination. In this vein, Matsunaga invites us to take into consideration that 'the bases, objectives and discourses of transitional justice are the main factors that block decolonization as they consolidate the power of the state' (2016: 26). The risk of fostering a truth commission without breaking with this state-driven dynamic is that the colonial relationship between Indigenous people and settler states may be further solidified through the failure to consider the indivisibility between the colonial past and the colonial present (Balint et al., 2014; Matsunaga, 2016).

4 Indigenous peoples in Argentina: a truth commission and a narrative turn as a starting point to overcome historical injustice?

4.1 Historical and present injustices in Argentina

Indigenous communities in Argentina have been suffering extermination, displacement, stigmatisation and extensive criminalisation from the fifteenth century to the present day. The initial European colonisation of Ibero-America was catastrophic for the Indigenous peoples of the 'new world'. During the first 50 years of conquest, the Indigenous population was reduced to 25 per cent of the original inhabitants (Vegh Weis, 2019). Argentina's independence in the nineteenth century did not change the state of affairs. Native communities continued to be perceived as obstacles to progress and successive governments persisted in denigratory and stigmatising treatment. Particularly striking is how foreign corporations, aligned with the local elites (Creoles), promoted the ideological and identity construction of a 'white Argentina'. The framing for dispossession from

the land and the denial of Indigenous cultures was clearly articulated by Domingo Sarmiento, who was President between 1868 and 1874 and is still regarded as a national hero. He argued that the biggest challenge in defining the destiny of the country was between 'barbarism [represented by the local population that resulted from Indigenous, Spaniards and Africans] and civilization [represented by the white political leadership originating in Europe]'. The first group were distinguished, according to Sarmiento (1874: 26), 'by their love of idleness and industrial incapacity; they are unable to engage in hard and continuous work.'

Notwithstanding the continuity in practices of violent dispossession as a logic of conquest, exhibited in the persistence of state massacres such as El Zapallar, Napalpi and La Bomba, changes were also taking place in state policies towards Indigenous peoples during the early twentieth century. Like the experiences of Australia and Canada, the new century saw the abandonment of military campaigns as the primary governance strategy of Indigenous peoples. The new hegemonic tool of domination turned towards strategies of assimilation and exclusion. The logic of 'civilization vs. barbarism' denied a role for Indigenous peoples in the national identity and culture and simultaneously perpetuated ostracism and socioeconomic exclusion. These processes of both cultural assimilation and socioeconomic exclusion have continued to the present day (Moyano, 2013).

Identity exclusion becomes clear in the fact that, symptomatically, the national censuses did not consider the Indigenous population comprehensively until 2001, when a more exhaustive measurement of Indigenous populations was included, based on self-identification. The census revealed that 281,959 households had one or more people who identified themselves as Indigenous. The last national census (2010) indicated that the total Indigenous population was made up of 955,032 individuals, which represented 2.38 per cent of the total national population. The increase in the Indigenous population in this census is not linked to a population increase but rather to the greater number of people who found the conditions of possibility to recognise themselves as such in the past decade. These people represented 31 different Indigenous groups distributed throughout the country (Instituto Nacional de Estadística y Censos, 2015).

Land theft remains a crucial problem and reinforces socioeconomic injustice. Much of the territory that is currently claimed by Indigenous peoples is owned or is being exploited by national and foreign corporations. A 2015 National Rural Land Registry report stated that of a total of 16 million hectares of rural land, foreign investors hold 6 per cent, double the percentage demanded by Indigenous populations (Amnesty International, 2017a). The Benetton Company is one of the largest landowners with 900,000 hectares located in four provinces (Moyano, 2013). During the past two decades, the increase in forestry and extractive investments related to mining and oil especially affected the Indigenous claiming these lands. For example, mining initiatives have expanded from 40 in 2000 to 800 in 2017 (Amnesty International, 2017b). Furthermore, despite ILO 169⁵ and the

5 International Labour Organisation (ILO) Indigenous and Tribal Peoples Convention, 1989, No. 169. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document.

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Declaration on the Rights of Indigenous Peoples,⁶ these investments are made without prior consultation and the informed consent of the communities (United Nations, 2011). Added to this is the systematic lack of access to dignifying conditions which makes Indigenous peoples particularly vulnerable to natural and social challenges. In the case of COVID-19, the lack of access to water that the Indigenous communities suffered left them without the most basic preventive measures. Calling out existing racism, one of the Gran Toba community members stated,

They treat us as savages. But, also, they do not listen to us. People say we do not respect the [sanitary] protocol, that we do not even use masks. But no one has ever asked if we can afford to buy them? (Ledesma, 2020).

Paralleling the situation in Australia and Canada, criminalisation also has the effects of entrenching socioeconomic marginalisation and delegitimising the demands for recognition. In particular, the neoliberal government (2015-2019) and mainstream media promoted the stigmatisation of Indigenous peoples as 'criminals', and national authorities have even alleged that the Indigenous Mapuche community belongs to a terrorist organisation financed from abroad (Página/12, 2017). Overall, Indigenous peoples have been and continue to be victims of human rights violations, including extermination and forced displacement while suffering high levels of poverty, criminalisation, dispossession and assimilationist policies and practices. How is it possible to continue sustaining the continuity in the oppression and exclusion of Indigenous peoples in Argentina in the 21st century? Is it possible that the excluding national narrative is operating as a legitimising and neutralising framework for this structural violence? Leaving aside the critical views of a progressive sector of the academy, the political leadership and the social organisations, the hegemonic vision continues to affirm that the Argentine population descends from Europe, turning the Indigenous genocide and the current presence of Indigenous peoples in the region invisible. In line with this, part of the dominant narratives has tried to delegitimise the demands of Indigenous peoples by distorting the historical narrative regarding their traditional location or demography.

For example, the Mapuche people have been characterised as non-Argentine under the presumption that 'they do not originate in our country, but in the Araucanía (Chile)' (La Nación, 2017a, 2017b) or the denial of the diversity of communities in the city of Viedma under the presumption that they were all Tehuelches that are now extinct (Cecchi, 2020) or even the narrative which attempts to falsify the claim by the Qom peoples to prior occupation of national parks in Formosa (Cardin, 2020). The fact is that these Indigenous communities preceded the creation of national borders and, therefore, occupied the current territories of both Chile and Argentina. As Evis Millan, a member of the organisation *Mujeres Indígenas por el Buen Vivir* (Indigenous Women for Good Living, 2013:

6 United Nations Declaration on the Rights of Indigenous Peoples, 2007. <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples>.

117) clarifies, ‘We live on both sides of the Cordillera ... The Chilean and Argentine states settled with our peoples here, we lived here.’

However, despite the voices of Indigenous peoples in Argentina, the international recognition of Indigenous rights (e.g. ILO Convention 169) and their inclusion in the Argentinean Constitution (1994), national laws and some isolated jurisprudence, the processes of socioeconomic oppression and the narratives of Otherness surrounding Indigenous peoples remain in force. Is it possible to promote a narrative turn that finally focuses on the national Indigenous identity, the original genocide and the perpetuation of exclusion as a process for change? Can we learn from the limited experiences in Australia and Canada to foster a more transformative, restorative and decolonial Indigenous truth commission in Argentina? Are there lessons to be learned from the CONADEP?

4.2 Lessons from the past: the experiences of Australia and Canada, and the CONADEP in Argentina

As we pointed out in the introduction, Argentina created a truth commission – the CONADEP – to document the crimes perpetrated during the last dictatorship. In a context in which the outgoing civil-religious-military government maintained that the detainees/disappeared were travelling in Europe, that those shot dead in the street were armed and legitimately killed in ‘confrontations’ and that the Military Juntas had saved the country from terrorism, the final report of CONADEP managed to dismantle these falsehoods and give rise to a new narrative framed within human rights based on concrete evidence provided by survivors and victims’ relatives. Indeed, CONADEP enormously benefited from the commitment of the victims’ organisations, which helped build a solid foundation on what had happened, at a time when many Argentinians were still unaware. The military had spread false narratives among part of the civilian population that affirmed that ‘there must be reasons’ as an explanation that justified why some people were kidnapped, detained, disappeared and murdered. Many victims were shot dead in the streets, but these acts were characterised by the military government and the mainstream media as ‘confrontations’, suggesting that the military was practically forced to use lethal violence when confronting armed groups in the streets. Discovering the real scope of the crimes of the dictatorship showed that the alleged confrontations were extrajudicial executions. In general, the work of CONADEP, together with the commitment of the victims’ organisations, helped to falsify the military narrative and clarify that the country had not experienced any kind of ‘dirty war’ but rather serious and systematic human rights violations perpetrated by the dictatorship (Vegh Weis, 2022).

When connecting this experience with Australia and Canada, it becomes clear that, in their various dimensions, the three commissions framed ‘legitimate’ state practices as human rights violations and started, even if in a narrow manner, a narrative turn as the basis for the many pending challenges in terms of rights and democratic expansion. Building upon these experiences, it seems that a truth commission on Indigenous matters in Argentina might serve as a first step to developing an evidence-based narrative respectful of the real legacy of human rights violations against Indigenous communities. As mentioned, up to now,

mainstream historiography and a relevant part of the political leadership still state that many Indigenous people are not even Argentines; most of our political leaders constantly repeat that Argentines are decedents of Europeans, thus neglecting the Indigenous roots and current demography of the country; the 'discovery' of America by Columbus is still a national holiday celebrated on October 12th; and the perpetrators of the most terrible mass killings against Indigenous people are honoured with their names coronating parks and avenues, monuments and even the national currency. These distorted and self-justifying colonialist narratives of the Argentinean nation disguise the historical and contemporary oppression of Indigenous people.

However, to do so, a particular lesson that arises from the experiences of Canada and Australia, and also from the CONADEP, is that developing the full potential of a truth commission requires creating the conditions whereby Indigenous peoples can take the lead role in the design and implementation of any inquiry, as well as the design, implementation and monitoring of future recommendations. In other words, given that the historical wrongs committed against Indigenous peoples relate in part to their invisibility and physical and symbolic extermination from both the formation of the nation-state and contemporary politics, then processes which seek to redress those wrongs must have as a starting point the revindication of Indigenous voices and leadership in the design, implementation and monitoring of the mechanisms, including truth commissions. Having the affected communities at the centre of the process is crucial to avoid truth commissions becoming a vehicle that speaks 'on behalf of' Indigenous people, thus once again silencing Indigenous representations of themselves and distorting the promising narrative turn.

In contrast, and as shown in the Canadian and Australian experiences, the failure to ensure Indigenous leadership can obstruct the scope, implementation and development of the truth commission and can even cause iatrogenic effects. Taking all of this into account, an Indigenous truth commission in Argentina led by the communities themselves is more likely to focus not only on one aspect or outcome of colonialism (e.g. land dispossession and land rights) or a certain period but on all of the overall human rights violations that have been affecting Indigenous communities for the past 500 years, including current lack of access to water, food, housing and education. The comparative experience also shows that Indigenous leadership might help foster the timely implementation and monitoring of the recommendations as a means to avoid revictimisation and disappointment after communities decide to trust in the ability of the rule of law to enhance and protect their interests. As the truth commissions are temporary bodies, specific mechanisms to monitor their recommendations should be implemented. For example, in Argentina, the work of the CONADEP was followed up by the Secretary of Human Rights.

Furthermore, a prominent role of Indigenous voices can also ensure that comprehensive and restorative recommendations are articulated and implemented with a view to challenge dominant narratives. As the comparative experience and the legacy of CONADEP suggest, these recommendations can include changes to legislation or specific policies to ensure the implementation of existing laws. These

policies and practices should aim at overturning not only material injustice (overcrowded housing, low-income or low socioeconomic status, chronic health problems and lack of access to water and food) but also identity-related injustice (the self-perception of many Argentines as Europeans). Real transformation also requires changes in the training of judiciary members to guarantee the respect of the civil, political, social, economic and cultural rights of the Indigenous communities along with the principle of self-determination proclaimed in international laws. This can have an impact on criminal justice practices that have extensively criminalised Indigenous people as a mechanism of social and political control while enforcing their displacement and dispossession in conflicts over land. The evidence from a truth commission can also form the basis to modify educational curricula at the primary, secondary and university levels, through the development of a respectful narrative and memory which account for the role and contribution of Indigenous people in the country's history and contemporary society. Such changes might also encompass modifications in the memorialisation calendar, including the replacement of Columbus Day on October 12th to October 11th as the last day of Freedom of the Indigenous Peoples, among many other initiatives that communities might recommend in the context of the truth commission. As Bayer (2012) systematically proposed in his works and actions, the recommendations could also include suggestions for changes to the names of streets and statues that still reward and glorify those responsible for the Indigenous genocide, among many other possible initiatives.

Finally, are there particular challenges not present in prior experiences but that might appear in an Indigenous truth commission in Argentina? Many will eventually arise, but, so far, a challenge that can already be perceived is how to gain serious Indigenous involvement when there are many different groups with conflicting interests distributed throughout the country, operating in horizontal communities that take time to meet and make decisions, which seems incompatible with the timing and features of state-run processes. This is a significant issue that has already emerged in initial discussions on the idea of a truth commission with Indigenous leaders in the Neuquén Province. There alone, more than 60 different Indigenous communities with their particular decision-making processes must be approached. A possible solution might be found with a current community-led proposal aimed at incorporating an Indigenous census within the national census. This was suggested by the grassroots organisation 'Knitting of Indigenous Professionals' that looks to enforce the international right to prior, free and informed consent for Indigenous peoples when government actions might affect them. An inquiry into the feasibility of truth commissions and their eventual features, and particularly the ways to facilitate decision-making processes among horizontal and widespread communities, could be included in this special census.

5 Conclusions: towards a truth commission in Argentina?

Indigenous communities in Argentina suffer massive human rights violations that began 500 years ago and continue today. Neither international nor local law nor

transitional justice will magically remedy this story of pain and exploitation. Furthermore, it is clear that there is an uneasy relationship between transitional justice (even one with transformative aspirations) and Indigenous demands for justice that is inclusive of the need to address the colonial past, sovereignty and the right to self-determination, as shown in the examples of Australia and Canada. In terms of the relationship with restorative justice, in many respects the intersection between restorative justice and transitional justice for Indigenous peoples in settler colonial societies highlights in a concentrated form the complex intersection between law, state and community. The political state which has developed on the back of Indigenous exploitation and expropriation is also a vehicle through which reparations and rights are expected to be resolved (Cunneen, 2016; Cunneen & Hoyle, 2010).

Despite these difficulties, the present study recognises the relevance of truth commissions insofar as, at least, they have the potential to document and clarify our stories and promote a narrative turn on the advances mentioned in the past 30 years that goes beyond critical and activist circles to change the paradigm on Indigenous rights at the national level. It is very difficult to guarantee cultural and political democracy and the recognition of the human rights of Indigenous peoples in the present, if our grassroots national narratives are trapped in fallacies about the role of communities in our collective identities and about the origin and continuities of oppression of the original peoples. To overcome the shortcomings analysed in the cases of Australia and Canada, the truth commission must be led by the Indigenous peoples themselves and understand justice from a transformative perspective inclusive of the root causes of current discrimination and ostracism, including colonialism.

Of course, the requirement for a narrative turn is only the beginning of a long journey towards the full implementation of Indigenous rights, but it still appears as a necessary and key step. Argentina has already experienced, after the last dictatorship, how crucial this narrative turn is to clarify the role of the perpetrators, survivors, victims and family members. The challenge is now pending about a clear narrative on Indigenous peoples. Could an Indigenous truth commission do the job?

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