

Thinking Systemically About Transitional Justice, Legal Systems, and Resilience

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Introduction

Legal systems are commonly judged on the basis of certain criteria: their stability, their transparency, their procedures, and the fairness of the laws they apply. These criteria might be broadly subsumed under the label *resilience*. When societies undergo change, and when they face new upheavals and crises, it is often legal systems that act as a crucial stabilizing factor. They are social structures that help to absorb the impact of stresses and shocks, while at the same time reinforcing a sense of continuity. When they function well, they can be described as resilient. This resilience, however, has boundaries. While legal systems have to adapt, they need to do so in a way that does not undermine their “own basic behavioural structure” (Ruhl, 2011, p. 1388). Therefore, thinking about resilience in the context of legal systems necessarily has wider implications because of their inter-connections with other systems. As Connell (1997) has underlined, “there is a dialectic interplay between law and society” (p. 123). The resilience of a legal system, thus, will necessarily affect the resilience of other systems. For example, legal systems can help to make societies more resilient by providing institutional structures needed for good governance and social order. Viewed in this way, part of the conceptual and empirical utility of resilience as a concept is that it opens up a space for analyzing the wider societal and systemic impact of legal systems. This broad argument is explored and developed in this chapter through a specific focus on transitional justice. Although it is important to underline at the outset that legal processes form only one part of transitional justice, they are often a very central part.

It will be shown that the multifarious goals of transitional justice implicitly encompass a resilience element; the process of dealing with the past is posited as a way of rebuilding and strengthening societies. It is striking, however, that discussions of resilience are pronouncedly absent from existing transitional justice literature. While there have been some references to resilience (e.g., Duthie, 2017; Wiebelhaus-Brahm, 2017), to date there are no systematic analyses of transitional justice within a resilience framework, or vice versa. Kastner's work (2020) is a recent exception. Approaching resilience as a systemic concept and drawing insights from dynamic systems approaches to conflict analysis, this chapter demonstrates how resilience thinking can potentially enhance the impact of transitional justice on the ground. In particular, it argues that a resilience lens can significantly contribute to the development of more ecological approaches to transitional justice that locate individuals within their broader social environments. Furthermore, by showing that transitional justice can make legal systems more resilient, especially during extreme events like war, this chapter provides the basis for thinking about legal systems as part of a matrix of interrelated systems that create the conditions for societal resilience in contexts of adversity.

Transitional Justice

Transitional justice is the complex process of dealing with a legacy of past human rights violations and abuses, through a combination of judicial and nonjudicial means. These can include criminal prosecutions, truth commissions, lustration (administrative purges of officials) and institutional reforms, reparations, memorials, and apologies. The ambitious goals associated with transitional justice are similarly diverse. Among the most frequently mentioned are delivering justice, giving victims a voice, combating impunity, strengthening the rule of law, establishing the truth and contributing to reconciliation (United Nations [UN], 2010). While the field of transitional justice rapidly continues to grow, so too does the imperative of thinking critically and pushing new boundaries. Albert Einstein once said, "Problems cannot be solved at the same level of perspective from which they are perceived to exist as problems. . . . Some new level of perspective must be found" (cited in Coleman, 2006, p. 346). This chapter aims to contribute a new perspective by looking at transitional justice and legal systems through the lens of resilience.

Defining Resilience

Existing scholarship on resilience is vast, and the concept is discussed and dissected in highly diverse contexts extending across multiple disciplines. Accordingly, a plethora of definitions exists. One of the consequences is that resilience has become an increasingly slippery concept that is often difficult to describe. What adds to its lubricity in this regard is the fact that, as this volume shows, resilience resides not just in individuals, but in entire systems which influence and interact with each other. Resilience is thus a dynamic concept with highly fluid boundaries. As Nguyen-Gillham, Giacaman, Naser, and Boyce (2008) underline, "resilience

does not exist as a static quality or a mechanistic process but in a continuum that varies over time and context” (p. 296).

Within the field of transitional justice, resilience can be described as a latent concept in the sense that it is present in various guises. Prior to completing its mandate in December 2017, for example, the International Criminal Tribunal for the former Yugoslavia (ICTY)—which will be further discussed in the case study section of this chapter—engaged in significant capacity-building work to support and strengthen local courts in the former Yugoslavia (including Bosnia-Herzegovina, Croatia, Kosovo, and Serbia; see ICTY, n.d.b). This international-to-national transfer of knowledge and expertise in the handling of complex war crimes cases can be viewed as an example of building resilience within national legal systems. Resilience, in this regard, is the process of enabling and assisting these systems to adapt to prosecuting crimes—including genocide, massacres, and widespread acts of sexual violence—that ordinarily fall outside the remit of domestic courts. As a further example of the contribution that resilience can make to transitional justice, Wiebelhaus-Brahm (2017) notes that although proponents of transitional justice do not employ resilience language, they “claim transitional justice processes can promote such outcomes as reconciliation, trust, and the rule of law, which development practitioners associate with more resilient societies” (p. 142). The latent presence of resilience as a concept within transitional justice points to the existence of “common features” between the two (Kastner, 2020, p. 369). For example, “individuals and communities undergo significant changes in conflict and post-conflict situations; they need to adapt, find strategies to cope with various forms of violence and develop the ability to survive through and after periods of significant stress” (Kastner, 2020, p. 369). If important synergies exist, this necessarily invites crucial reflection on why the concept of resilience has rarely been explicitly discussed within the field of transitional justice. This section’s point of departure is precisely to engage with that question, as a way of contextualizing the relative absence of resilience definitions within transitional justice literature.

Resilience—A Neglected Concept within Transitional Justice

There are four main reasons why transitional justice (and, indeed, the justice literature as a whole) has largely overlooked the concept of resilience. The first reason is that one of the core aims of transitional justice is to deliver justice (UN, 2010). While justice has an obvious legal dimension, involving the prosecution of indicted war criminals, it can also encompass victim-focused restorative and reparative forms of addressing the past, including truth and reconciliation commissions, compensation, and rehabilitation. Prioritizing resilience, however, can potentially result in justice trade-offs. By way of illustration, Fainstein (2015) asserts:

Efforts to achieve resilience in relation to climate change through developing natural buffers against sea level rise will likely result in the displacement of populations.

Who will be displaced and what measures will be taken to replace lost housing and community are crucial questions not captured by the term resilience. (p. 157; see also Harris, Chu, & Ziervogel, 2018)

Yet, conversely, giving more attention to resilience within transitional justice, and possible ways of fostering resilience, can potentially provide a framework for delivering more comprehensive and deeper forms of justice. The human rights abuses that trigger transitional justice processes, for example, may intersect with and build on longer-term patterns of discrimination and structural violence, including socioeconomic marginalization and deprivation of land rights. In other words, acts of episodic violence against individuals may be embedded within broader systems of oppression (Lykes, 2001). If transitional justice processes do not address these systemic injustices, the “justice” that they deliver can easily appear deficient. Highlighting this, Laplante (2008) underlines that “even with trials and reparations, if economic and social inequalities go unaddressed and the grievances of the poor and marginalized go unheard, we are left with only uncertain guarantees of non-repetition” (p. 332). Such arguments, however, have met with concerns that transitional justice risks losing its quintessential *raison d'être* and becoming overstretched if it is asked to do too much and to address issues such as economic and social rights (McAuliffe, 2011, p. 33; Waldorf, 2012, p. 179). From this perspective, the introduction of a resilience discourse, especially one that emphasizes the multiple systems that produce resilience, could contribute to this problematic overreach.

The second reason why resilience remains underdiscussed in the field of transitional justice is that there does not immediately appear to be an obvious place for it. Within transitional justice theory and practice, there is a strong emphasis on victims and their rights—for example, to know the truth, to have their suffering formally acknowledged, and to receive reparations. Some scholars have, therefore, called for more victim-centered ways of doing transitional justice that prioritize the needs of victims (e.g., Robins, 2011). At first glance, introducing the discourse of resilience potentially takes away part of the rationale for having transitional justice. If victims have positively adapted to the adversities they have faced, if they are coping well and managing their everyday lives, what can transitional justice offer them? This is, of course, both an erroneous and highly simplistic way of viewing the relationship between resilience and transitional justice. However, on the surface at least, the victimological dimensions of transitional justice may not be entirely compatible with the discourse of resilience. This is not to say that victims do not demonstrate resilience. The very act of testifying in court against an indicted war criminal, for example, can be a powerful act of resilience. The important point is that transitional justice has given little attention to the concept of the resilient victim or to possible ways of fostering resilience in victims and their communities. Relatedly, transitional justice processes and the expectations that they can generate on the ground potentially diminish the incentive for victims to actively negotiate for vital resources (an important part of resilience), encouraging them instead to overrely on their status as victims to get what they need. Discussing their work in northern Uganda, for example, Hollander and Gill (2014) reflect on their discomfort “as those affected [by the conflict] sought to make themselves visible by putting their bodies on display, exhibiting wounds, scars and other physical deviances” (p. 221). They observe that “the logic of this biomedical gaze implies that only by representing themselves as abject, agency-less ‘victims’ with extreme medical needs would they be ‘entitled’ to any kind of assistance” (Hollander & Gill, 2014, p. 221).

A third reason for the lack of writing connecting resilience and transitional justice may be that in a transitional justice environment where mass human rights violations have occurred, the language of resilience is problematic. It might be asked, for example, whether the resilience label places unfair demands on individuals who have endured immense suffering and trauma. Kastner (2020), for example, points out that “Transferring the responsibility to local actors to find their own solutions to past and present forms of violence also means that, thanks to their presumably commendable ‘resilience’, they would and should be able to continue to endure various forms of ongoing violence and suffering” (pp. 374–375). A related issue is the criteria for dividing those who are “resilient” from those who are not. Lenette, Brough, and Cox (2013), for example, pertinently ask: “Given the experience of human rights violations among refugees, who should decide what constitutes a (non)resilient response? Is it reasonable to assign some responses to human rights violations as resilient and some not resilient?” (p. 640). Resilience is a process, not an end state, and it varies across both time and space. An individual may demonstrate resilience in one part of his or her life, for example, but not in another (Wright, Fopma-Loy, & Fischer, 2005). It is important to stress, however, that many of these issues and concerns with resilience primarily arise when the concept is reductively viewed “as a personal trait” (Mohaupt, 2008, p. 67), rather than as an innately complex and multilayered concept that reflects the interactions between individuals and their environments (Hayward, 2013; Southwick, Bonanno, Masten, Panter-Brick, & Yehuda, 2014; Ungar, 2013).

A final reason for the underexplored linkages between resilience and transitional justice is that transitional justice is associated with the exceptional (van der Merwe & Lykes, 2016, p. 362). It focuses on seemingly out-of-the-ordinary crimes, such as genocide and crimes against humanity, and on regimes that commit singularly flagrant violations of human rights. Orford (2006), for example, remarks, “The literature gives the sense that large-scale human rights violations are exceptional, so that mechanisms to address them take place in a state of transition from apartheid, dictatorship, or communism to liberal democracy” (p. 861). This emphasis on the extraordinary can deflect attention from the quotidian—from the needs, challenges, and problems that individuals living in postconflict environments face in their daily lives. Resilience, as many authors have noted, is often manifested in the domain of everyday life and everyday practices (Nguyen-Gillham et al., 2008, p. 296; see also Ziervogel et al., 2017, p. 123). If interventions aimed at fostering and enhancing resilience need to align with the “life circumstances and everyday ecologies of the individuals served” (Luthar & Cicchetti, 2000, p. 878–879), the crucial point is that these everyday ecologies have not been a central focus of transitional justice practice to date.

All of the above reasons contribute to explaining why resilience remains a notably overlooked concept within the field of transitional justice. It is essential to reiterate, however, that there are important synergies between the two (and, perhaps, justice systems as a whole). To cite Wiebelhaus-Brahm (2017), “intentionally or not, transitional justice is one policy intervention that likely affects the resilience of human societies” (p. 142). Examining some of the definitions of resilience in related fields, moreover, helps to further accentuate these synergies—and the relevance of resilience to transitional justice.

The Concept of Resilience as Relevant to Transitional Justice

In their work on gender and resilience, Smyth and Sweetman (2015) underline:

At the heart of the concept of resilience is the idea of strength in the face of adversity. Resilience-based approaches in humanitarian and development work aim to support people not only to survive and recover from current crises, but to strengthen their defences in the face of future threats. (p. 406)

This future-focused orientation finds a strong resonance in transitional justice, which is quintessentially about addressing the past to create a better future. Moreover, if resilience-based approaches in the context of development and humanitarian aid include enhancing well-being and investing in resources to help reduce risk (Smyth & Sweetman, 2015), there are obvious overlaps in this regard with transitional justice goals—and in particular with peace-building (UN, 2010; see however, Kastner, 2020, p. 374).

In the context of human security, Chandler (2012) defines resilience as “the capacity to positively or successfully adapt to external problems or threats” (p. 217). He further underlines:

The resilient subject (at both individual and collective levels) is never conceived as passive or as lacking agency (as in the case of 1990s understandings of victims requiring saving interventions), but is conceived only as an active agent, capable of achieving self-transformation. (p. 217)

In a very different context, Pulvirenti and Mason (2011) similarly underscore the nexus between resilience and agency. In their research on female refugees experiencing domestic violence during resettlement in Australia, they argue:

The resilience of these women is not a capacity for ongoing survival that comes with having been through so much already but, instead, a dynamic process of shifting, changing, building, learning and moving on from those violent histories to ‘establish meaningful lives’ now and in the future. (p. 46)

The framing of resilience as a strongly agentic concept is highly relevant to the development of more complex theorizations of victim-centered transitional justice that extend beyond the needs of individuals. In this regard, victim-centered is also about recognizing the agency of victims—and creating the space for this agency to directly shape transitional justice processes and outcomes. Highlighting this point, van der Merwe and Lykes (2016) argue, “Work to date demonstrates that victims are typically engaged in drawn-out struggles for reparations and other rights. Transitional justice mechanisms need to equip them for this and other battles” (p. 364). As an agentic process, moreover, resilience also has an important transformative dimension, which, in turn, is an intrinsic part of its dynamicity. Resilience is less about “bouncing

back” and more about “bouncing forward” (Scott, 2013, p. 601; for a critique of both types of “bouncing”, see Clark, 2020). It is not about returning to what was but about creating something new. According to Pulvirenti and Mason (2011), “it is the capacity to transform their lives—not just cope with violence—that makes refugee women resilient” (p. 46).

For the purpose of analyzing the relationship between resilience and transitional justice, this transformative dimension is highly significant. The concept of transformation underlines that resilience is not just about individuals but also about their wider environments—and the various interconnecting systems that constitute these environments. Focusing on these systems, the next section explores how resilience operates as a multisystemic concept within the fields of transitional justice and law more generally.

Law, Transitional Justice, and Multisystemic Resilience

The concept of resilience has received considerably more (although still limited) attention within general legal literature than it has within transitional justice literature. As an illustration, some scholars have questioned the compatibility of law and resilience—and the extent to which legal systems can in fact be resilient or foster resilience in other systems. Garmestani, Allen, and Benson (2013), for example, maintain that “a legal system that is linear and largely static is ill-suited for the nonlinear dynamics of linked social-ecological systems.” They further underscore that “while the law seeks resolution, a legal system that sets a rule and does not revisit and adjust the rule following assessment of the rule’s effects is incompatible with managing for resilience.” In a similar vein, Odom Green et al. have pointed to possible tensions between law and resilience, noting that legal systems may operate in a way that circumscribes the scope for flexibility and adaptation. They remark:

Our legal system is designed to promote social stability through reliance on precedent, prescriptive rules, and adherence to procedure. In theory, this ensures fair treatment among parties involved in disputes, resolves conflicts, and fosters economic investment and civil society, all of which are advantageous social goals. One disadvantage is rigidity in the face of change or new information (Odom Green et al., 2015, p. 333).

Such arguments have often been made in relation to environmental law, a subdiscipline that highlights the interconnections between legal systems and wider social systems. It is a branch of law that is concerned with the ecological environments in which individuals and societies live and with ensuring that these environments are safeguarded and protected. As one scholar has argued, “the environment is even more fundamental than human rights as it represents the natural conditions of all life including human beings” (Bosselmann, 2015, p. 173). Environmental law thus needs to be highly responsive to fulfill its core function, while also operating in the context of broader legal systems that have their own functions. Nevertheless, this does not mean that there is a tension between law and resilience.

Arnold and Gunderson (2013) maintain that it is essential to improve the adaptive capacity of environmental law. This, they argue, “will require the development of overarching systemic principles that maintain the resilience and adaptive capacity of ecological and social systems, not merely the occasional use of specific adaptive methods” (p. 10426). Viewed in this way, a more complex intersystemic relationship emerges. Laws are not resilient (adaptive) in and of themselves, but rather as elements of broader socioecological systems with which they synergistically interact. As part of this interaction, laws and legal systems can contribute to fostering systemic resilience by offering a social compass and providing stability. As Ebbesson and Hey (2013) point out, “while the notion of the rule of law may hamper the flexibility to adapt to change, the rule of law and legal certainty also foster trust and help to buffer capacity to persist, adapt and transform, when required.”

As a response to mass human rights violations and abuses, many transitional justice processes have an important legal dimension. According to Teitel (2005), “in the contemporary phase, transitional jurisprudence reflects the normalization of an expanded juridicized discourse of humanitarian law associated with pervasive conflict” (p. 840). Legal aspects of transitional justice include the criminal prosecution of perpetrators, the restoration of the rule of law and the reform/creation of institutions tasked with upholding legal norms and human rights. These legal processes have a significant resilience underpinning, even if they have not been explicitly theorized within a resilience framework. In societies displaced and torn apart by violence and armed conflict, legal processes form an important part of recreating a sense of normality and stability. Additionally, and to reiterate an earlier point, commonly stated goals of criminal prosecutions and nonretributive forms of transitional justice—such as peace and reconciliation—have an implicit resilience component. In short, “while transitional justice is only one of many possible policy interventions, it holds the potential to promote or undermine the resilience of post-conflict societies” (Wiebelhaus-Brahm, 2017, p. 142).

The process of fostering resilience in the context of transitional justice processes, moreover, is necessarily multisystemic. This is for two key reasons. First, human rights violations that catalyze transitional justice processes and activate international criminal mechanisms affect not just individuals but entire systems—families, communities, and societies. At a metasystemic level, they are crimes that “deeply shock the conscience of humanity” (International Criminal Court, 2002, p. 1). Transitional justice processes need to address these multiple layers of impact and thereby contribute to fostering resilience and adaptive capacity across these different interlocking social systems. Second, transitional justice processes do not exist in a vacuum, and the impact that they have on societies is not one way. They exist as part of broader systems, which, in turn, can critically shape the extent to which transitional justice processes are successful and achieve their stated goals. Duthie (2017) highlights “the bi-directional relationship between contexts of social and economic structures and transitional justice” (p. 24). For example, the existence of deep-seated structural inequalities within a society will potentially influence how communities engage with transitional justice processes and what they expect from them.

As an example of these structural inequalities, systems-based discussions within transitional justice scholarship have often focused on the concept of gender. The very notion of

transition appears a misnomer if it leaves intact social systems and structures that perpetuate gender inequality and the marginalization of women. Discussing institutional reforms, for example, Ní Aoláin and Rooney (2007) note: “Questions about the equal representation of women, and which women are deemed ‘representative’ in these institutional decision-making sites, reveal how institutions embed conceptual frameworks that have forceful, concrete gendered outcomes” (p. 345; see also Rooney, 2006). Piecemeal institutional reforms that do not address wider systemic and gender issues can only take us so far. Relatedly, inclusivity requires that transitional justice processes take account of different intersectional experiences of conflict across gender, class, ethnicity, and so on. This is because these varied experiences “will produce different ideas as to the necessary ingredients for resolving the conflict” (Bell & O’Rourke, 2007, p. 31)—and, by extension, different ideas about dealing with the legacy of the human rights abuses committed.

Concerns that transitional justice processes often do not go far enough or penetrate deep enough—and not only in relation to gender issues—have led some scholars to call for a more comprehensive transformative justice (Daly, 2001; Lambourne, 2015). Transformative reparations, for example, would not only address the harm that results from experiences such as sexual violence, but would also seek to “transform the conditions that initially made them possible, such as cultural stereotypes and stigma surrounding sexual violence” (Sandoval, 2017, p. 170). The concept of transformation is highly relevant to both resilience and justice, and in this way it forms an important connective thread between the two. According to Gready and Robins (2014), “transformative justice entails a shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns” (p. 340). Transformative justice, thus, “is not the result of a top-down imposition of external legal frameworks or institutional templates, but of a more bottom-up understanding and analysis of the lives and needs of populations” (Gready & Robins, 2014, p. 340). This conceptualization of transformative justice, however, is too narrow because it extracts people’s “lives and needs” from the broader systems of which they form an intrinsic part. This risks replicating one of the major issues with existing transitional justice practice, namely, the fact that the strong focus on individuals (perpetrators and victims) often downplays the wider social ecologies in which these men and women live and navigate their lives (Aguirre & Pietropaoli, 2008, p. 362).

Speaking about resilience in adolescents, Olsson, Bond, Burns, Vella-Brodrick and Sawyer (2003) assert that “effective interventions could be aimed at developing the individual’s internal resources and skills and equally importantly changing the social environment to further promote resilience” (pp. 3–4). By extension, it is argued that effective transitional justice interventions can promote and contribute to resilience by seeking transformations that cut across interconnecting levels. Collective reparations, for example, can include housing support or the rebuilding of a school (International Criminal Court, 2017). The extent to which such developments contribute to community resilience will be limited, however, if they do not address divisive social attitudes that potentially undermine a community’s resilience. Qayoom (2014) notes, for example, “Widowhood is socially stigmatized in South Asia and becoming a widow means possible isolation, loss of dignity and individual identity, since widows become dependent on their relatives. They are frequently denied inheritance and

property rights” (p. 162). Relatedly, efforts to rebuild infrastructure resilience within a community will fall short if the support networks that play an elemental role in buffering shocks and strains are not themselves repaired and restored. In the Ivory Coast, for example, women who are internally displaced in the capital have described “feeling socially isolated in Abidjan and far from family and friends.” As a result of this they are less likely to disclose interpersonal violence and seek help (Cardosa et al., 2016, p. 371).

Thinking explicitly about resilience in a transitional justice context, and the different systems involved in resilience, offers a framework for theorizing and developing more ecological—and transformative—pathways to doing transitional justice that address the interactions between individuals and their environments. It also provides deeper insights into how legal systems and resilience can work better together and how the balance between “legal certainty and flexibility” manifests and is resolved at different levels (Ebbesson, 2010, p. 417). Ebbesson and Hey (2013), for example, suggest that “as law moves from the local level to the national, regional, and international levels, law itself, due to the enhanced complexity of decision-making, becomes more resilient to change, and its capacity to address change, complexity, and adaptation slows down” (para. 7).

This notion of resilience to change brings forth a conceptual aspect of resilience that runs counter to ideas of adaptation and flexibility. It is the juxtaposition between change-resistant and change-enabling resilience that is central to the next section, which presents a model aimed at guiding future study of multisystemic resilience within the fields of law and transitional justice. The development of this model is informed by conflict analysis literature and, in particular, the concepts of attractors and feedback loops.

Modeling Multisystemic Resilience

Transitional justice and legal systems form part of a broader “dynamical system,” which Coleman (2006) defines as “a set of interconnected elements that changes and evolves in time” (p. 327). A change in one element causes changes in the other elements. Thus, resilience thinking can contribute to enhancing the social ecological impacts and effectiveness of transitional justice and legal processes. As a starting point, it is important to recognize, however, that components within the overall dynamical system can obstruct and impede these processes. Creating friction and resisting change, these components can be described as attractors—a concept that has been used to explain the genesis and persistence of conflict.

According to Vallacher, Coleman, Nowak and Bui-Wrzosinska (2010),

in generic terms, an attractor refers to a subset of potential states or patterns of change to which a system’s behaviour converges over time. Metaphorically, an attractor ‘attracts’ the system’s behavior, so that even very different starting states tend to evolve toward the subset of states defining the attractor. (pp. 264–265)

In other words, the existence of attractors fosters change-resistant resilience that restricts the possibilities for multisystemic change. Conversely, “in the absence of an attractor, a

system can change and evolve in response to whatever influences and forces it experiences” (Vallacher et al., 2010, p. 265). These attractors are necessarily cross-systemic and may include entrenched social attitudes, deep-rooted historical grievances, the persistence of political ideologies at the state level, absence of political reforms, and embedded structural violence. Because attractors hinder change, they are “similar to the notion of equilibrium or homeostasis” (Vallacher et al., 2010, p. 265).

Transitional justice processes and legal processes, however, are not about homeostasis but about addressing the past as a way of enabling societies that have experienced mass atrocities, violence, and human rights atrocities to rebuild and move forward. These processes cannot contribute to fostering resilience to future shocks and stressors if many of the factors that underpinned or fueled past violence remain unchanged. Us–them thinking, for example, is a significant driver of conflict and violence (Staub, 2012) and may be expressed within communities, through media outlets and via state and religious institutions. The persistence of such thinking in postconflict societies can be conceptualized as a significant attractor, pulling a system back to a negative status quo and thereby obstructing transitional justice work that indirectly seeks to create community resilience by laying the foundations for trust and reconciliation.

If, as previously argued, resilience opens a space for thinking more ecologically about transitional justice processes, then a critical part of developing and building ecological ways of doing transitional justice is to look at the wider whole. Some authors have used the term *holism* in relation to transitional justice to underscore the necessity of combining different retributive, restorative, and reparative mechanisms, thus shifting from an overreliance on criminal prosecutions (e.g., Boraine, 2006; Sooka, 2006). Yet, this type of holism does not extend far enough. The peace that is discussed in the context of transitional justice is not merely a negative peace or a return to a previous state of homeostasis, defined by the end of physical violence or a return to previous patterns of social exclusion (Galtung, 1969). Rather, it is a deeper and more resilient “positive peace” that is “inherently holistic” and transformational (Sharp, 2014, p. 159). If transitional justice is to contribute to positive peace, it needs to be more “holistic” in the sense of looking at the dynamical system as a whole—and at the attractors that can derail core transitional justice goals. What is imperative is that transitional justice processes do not harden these attractors and thereby reinforce change-resistant resilience within and between systems.

In this regard, the concept of feedback loops is extremely useful. Positive and negative feedback loops form important parts of conflict dynamics, affecting whether or not those dynamics escalate and destabilize systems or make systems more resilient. According to Coleman (2006):

a positive feedback loop (in which one element stimulates another along its current trajectory) is instrumental in bringing together the mechanisms necessary to generate and maintain an action (e.g., when a series of negative encounters with someone leads to an explicit expression of hostility). A negative feedback loop (in which one element constrains another), on the other hand, is necessary for terminating action once a threshold is reached that suggests the action is sufficient or extreme (e.g., when a parent steps in to stop a fight between siblings). (p. 328)

In terms of their impact on conflict, it is positive feedback loops that present the biggest danger, causing conflicts to escalate, while negative feedback loops help to promote conflict resolution. In short, “As long as a system is characterized by negative feedback loops, control mechanisms are available for mitigating and terminating conflict, allowing situations of conflict to be temporary and constructive rather than destructive” (Coleman, 2006, p. 328). Transposing the concept of feedback loops to a transitional justice context, one way in which transitional justice processes can potentially weaken the pull of attractors within the system is through the creation of negative feedback loops that limit the scope for individual attractors—which will often be mutually reinforcing—to spread to other levels within the system. For example, a highly unpopular court judgement can potentially strengthen a broader system attractor, such as nationalism or revisionism. In this situation, an optimal transitional justice response would be the creation of a negative feedback loop around the court judgement—for example, through engagement with local communities, the media, and religious leaders—to minimize its impact on the attractor. To reiterate, it is essential that the individual parts of the system are seen in the context of the systemic whole. Figure 27.1 summarizes this relationship between the dynamical system, transitional justice, attractors, and feedback loops.

The example of an unpopular court judgement highlights a broader issue, namely, that transitional justice processes can be highly polarizing. As Leebaw (2008) notes, “truth commissions and criminal tribunals investigate extremely divisive and violent histories” (p. 96). Their impact on the ground can be similarly divisive (Olsen, Payne, & Reiter, 2010, p. 988), potentially reinforcing attractors. Vallacher et al. (2010) suggest a possible approach for dealing with attractors that is useful in this regard. “The key,” they argue, is “moving the system out of its manifest attractor into a latent attractor that is defined in terms of benign or even positive thoughts, actions, and relationships” (p. 273). One way in which transitional

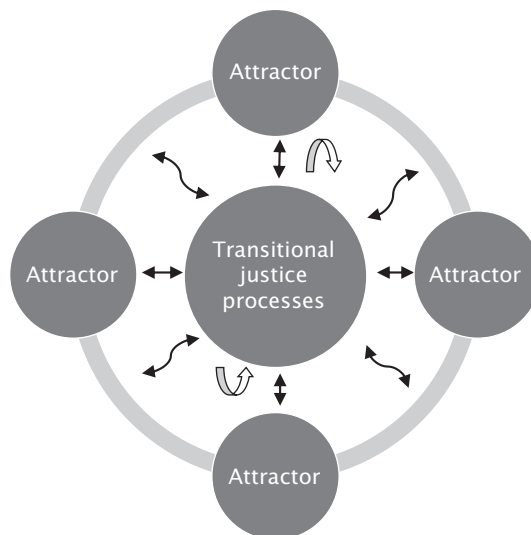


FIGURE 27.1 Attractors, feedback loops, and transitional justice processes.

justice processes might move an attractor into a latent form is by focusing people's attention on what they have in common—the desire for peace, for stability, for “normal” lives. In societies where levels of poverty, unemployment and general malaise are high, communities may struggle to see the relevance of transitional justice, particularly if they do not personally benefit from it (Clark, 2014). If people are focusing on making ends meet and getting through each day, the notion of dealing with the past to create a better future can seem highly abstract. When viewed from the ground up, it is often the case that “the normative and intellectual frame of transitional justice floats above” everyday needs and priorities (Shaw & Waldorf, 2010, p. 4).

This frame can assume a more connected and concrete form, however, through a greater emphasis on the relevance of transitional justice for shared hopes and goals relating to the present and the future, which are known elements of resilient communities (Zautra, Hall, & Murray, 2008). As the attractor fostering change-resistant resilience moves into a latent form, this in turn opens the space for transitional justice work to contribute to resilience by enabling societies to grow, positively adapt to the legacy of the past and rebuild. Bringing the everyday into focus also draws attention to important quotidian manifestations of resilience. In their work with female antimining activists in Peru and Guatemala, Jenkins and Rondón (2015) depict resilience as “an ability to survive in challenging contexts—not in the context of sudden disaster or crisis, but in relation to longer-term challenges such as mining conflict, violence, and poverty” (p. 419). Thus, a further way in which transitional justice processes (and possibly all legal processes) can assume a more grounded and locally embedded form is by enhancing resilience-supportive environments that enable individuals and communities to manage the challenges that they face.

While the aforementioned discussion has focused on transitional justice, the discussion about attractors has broader implications for the relationship between legal systems and resilience. Within all legal systems, there are attractors that create the necessary stability and certainty. These include criminal codes, constitutions, and jurisprudence. Yet, these attractors should not make legal systems unresponsive to change. The attractors, in other words, need to provide enough stabilizing resilience while at the same time allowing for sufficient adaptive resilience. In this regard, the relationship between legal systems and resilience is not one of compatibility or incompatibility but, rather, of balance and degree. The balance that is achieved, in turn, is critical for shaping how legal systems affect the resilience of other co-occurring systems. In this regard, Ruhl (2011) observes that “it is important to distinguish between resilience of the legal system and resilience of other natural and social systems the law is aimed at addressing” (p. 1382). However, the two are intrinsically interconnected. The rule of law and the security of property rights that legal systems provide, for example, are important dimensions of good governance, and “good governance is essential for an economic system to function properly and hence to be resilient” (Briguglio, Cordina, Farrigia, & Vella, 2009, p. 236).

One of the few scholars to have written about resilience in a transitional justice context, Wiebelhaus-Brahm (2017) reflects that “given the range of global transitional justice experiences and the tremendous diversity in human societies, the plausibility of diverse relationships between transitional justice and resilience is perhaps unsurprising” (p. 149). With

this thought in mind, this section has outlined a model for thinking about resilience and its relationship with transitional justice through a focus on the attractors (and positive feedback loops) that maintain negative or change-resistant systemic resilience. This is an entirely novel way of both approaching transitional justice and thinking about resilience in the context of transitional justice and broader legal systems. The next section applies the model to an empirical case study, drawing on the author's fieldwork in the former Yugoslavia.

A Case Study of the International Criminal Tribunal for the Former Yugoslavia

In 1993, the UN Security Council established the ICTY. Acting under Chapter 7 of the UN Charter, it deemed that the violations of international humanitarian law taking place in the former Yugoslavia, and in particular in Bosnia-Herzegovina, constituted a threat to international peace and security (UN Security Council, 1993). The Tribunal's mandate was to prosecute crimes (specifically, violations of the laws or customs of war, grave breaches of the 1949 Geneva Conventions, crimes against humanity, and genocide) committed in the territory of the former Yugoslavia since 1991. Located in the Hague in the Netherlands, the Tribunal issued 161 indictments in total and convicted a number of high-ranking political and military figures. These included the former Bosnian Serb leader, Radovan Karadžić; the wartime commander of the Army of Republika Srpska, Ratko Mladić¹; and the leadership of the Croatian Defence Council.

Retired judge Gabrielle Kirk McDonald, who was the ICTY's second president, has stated that when she and the other original 10 judges took their oath of office in November 1993: "We believed the judicial process would exact individual accountability instead of 'collective responsibility' and thereby contribute, albeit gradually, to a lasting peace" (ICTY, 2017b). The Tribunal's statute itself referred to the "restoration and maintenance of peace" (UN Security Council, 1993), although not specifically to reconciliation. However, reconciliation is arguably necessary for a lasting peace, particularly in communities and societies torn apart by violence and bloodshed, and over the years the Tribunal's work increasingly came to be associated with reconciliation. Giving a speech in Belgrade in 2007, for example, the then-prosecutor, Carla Del Ponte, maintained that "the Tribunal was established as a measure to restore and maintain peace and to promote reconciliation in the former Yugoslavia." She further claimed that "the Tribunal's primary contribution to peace and security, to regional stability and reconciliation is in establishing the facts and individual criminal responsibility" (ICTY, 2007). Speaking on July 11, 2016 during the annual memorial event in Potočari to commemorate the Srebrenica genocide in 1995, the then-president of the Tribunal, Judge Carmel Agius, noted, "A fundamental part of any reconciliation process is justice, which of course is where the ICTY directly plays a role." He added, "The contribution of the ICTY also helps you all to redouble your determination never to forget, and your efforts to strive for peace and reconciliation" (ICTY, 2016, p. 2).

Intrigued by the idea that an international tribunal, located outside the former Yugoslavia, might contribute to such a complex—and, in many respects, highly personal—process as reconciliation, I undertook extensive fieldwork in the former Yugoslavia to empirically explore the impact of the Tribunal's work on interethnic reconciliation (e.g., Clark,

2011, 2012, 2014). Over a five-year period from 2008 to 2013, more than 300 semistructured interviews in Bosnia-Herzegovina, Croatia, and Kosovo were conducted. That research concluded that the work of the ICTY did not make any contribution to improving or rebuilding interethnic relations (Clark, 2014). Reaching a similar conclusion, and speaking shortly before the Tribunal completed its mandate, Prosecutor Serge Brammertz commented: “It has been said that the Tribunal has not achieved reconciliation in the former Yugoslavia. It is hard to disagree” (ICTY, 2017a, p. 3). Reflecting on why reconciliation remains a significant challenge, he underlined that “the reality is that there is still no true will within the region to accept the immense wrongdoings of the past and move forward, sadly most of all among the political leadership” (ICTY, 2017a, p. 3). This lack of political will—and the culture of denial that it has contributed to fostering on all sides—can be conceptualized as a major system attractor.

The Tribunal embraced the assumption that its work would puncture denial. The facts that it established about the crimes committed in the former Yugoslavia, and about who was responsible, would make it impossible for individuals and communities to continue negating the truth. In this regard, the ICTY’s (n.d.a) website expressly stated: “The Tribunal’s judgments have contributed to creating a historical record, combatting denial and preventing attempts at revisionism.” Such claims, however, are overly simplistic. This can be illustrated using the concept of fractals. Fractals are “complicated figures of infinite length that do not simplify when magnified, that is, whose structure repeats itself at all scales” (Post & Eisen, 2000, p. 547). What is significant is that “fractals appear to get longer and longer as the measuring stick gets smaller and smaller, and the estimated length of a true fractal diverges to infinity as e [length of the ruler] approaches zero” (Post & Eisen, 2000, pp. 549–550). The central point, thus, is that fractals have “no ‘true length’” (Post & Eisen, 2000, p. 551). In the context of war crimes and transitional justice, truth can itself be conceptualized as a fractal object. It has no true length and is repeatedly contested (Clark, 2014; Mannergren Selimovic, 2015).

What is also noteworthy about fractals is that the parts replicate the whole. For example, “A fern leaf, its small leaves reflecting the shape of the leaf as a whole, is often taken as demonstrating fractal properties, as are pieces of broccoli and clouds” (Finan, 2012, p. 67). In the former Yugoslavia, the fractal truths that people cling to are pieces of broader ethnic narrative wholes that jostle and collide. These narratives act as a major system attractor, which is highly resilient (i.e., resistant) to “disconfirmatory events and information” (Vallacher et al., 2010, p. 267). The existence of this attractor, it is argued, limited the impact of the ICTY’s work and in particular its contribution to interethnic reconciliation—and, by extension, resilience.

This chapter’s core argument is that transitional justice must be done in a systemic way if it is to counter system attractors, restrict positive feedback loops that accentuate violence, and contribute to building societies that can cope with shocks and stressors. If transitional justice processes simply deal with the parts but not with the whole, their effects will be limited. Rather than seeking to address system attractors, the ICTY arguably reinforced them because it assumed that its work would counter denial, rather than seeking—as part of broader justice efforts—to address the factors that underpin this denial and the concomitant glorification of war criminals (Hodžić, 2010).

While the ICTY has now completed its mandate, the same trend continues. In October 2018, for example, a transitional justice conference in Sarajevo organized by the Balkan

Investigative Reporting Network had a strong focus on criminal prosecutions, and many of the speakers emphasized the need for regional cooperation between different national courts in the former Yugoslavia. What was critically overlooked were the obstacles to such cooperation—including nationalism, lack of political will relating to extradition (Mackic & BIRN Sarajevo, 2018), and denial—and how these might be addressed within a transitional justice framework. Connell (1997) underlines that “while law has the potential for fostering social transformation, law may itself also be shaped by social-cultural processes” (p. 124). Hence, efforts to use the law to (indirectly) enhance a community’s resilience need to take account of wider social and cultural practices that can foster the very behaviors that fuel interethnic tensions and conflict. These are the same behaviors that the law seeks to prevent as part of its deterrent function.

Conclusion

Underlining that resilience remains a neglected concept within the field of transitional justice, this chapter has sought to demonstrate—through a combination of conceptual and empirical discussion—that resilience should be taken more seriously. It is highly relevant to transitional justice and offers a new framework in which to situate existing debates. As a way of drawing out this relevance and exploring what it means for transitional justice theory and practice, this chapter concludes by making several suggestions for future research.

First, adding a resilience lens magnifies the flaws of piecemeal approaches to transitional justice and foregrounds the need for more systemic approaches that situate processes of dealing with the past within the context of broader social-ecological systems. Fineman (2014) notes that resilience is accumulated within social systems and that “the failure of one system . . . to provide necessary resources such as a failure to provide an adequate education affects the individual’s future prospects in employment, building adult family relationships, and old age” (p. 321). Taking the example of conflict-related sexual violence, transitional justice processes need to tackle the stigma that male and female victims-survivors often face (Clark, 2018). If these processes do not work to create attitudinal resources in the sense of building understanding and empathy, this will affect how victims-survivors deal with their experiences, regardless of whether their perpetrators have been prosecuted or reparations have been awarded. Future research should, therefore, explore what these systemic approaches to transitional justice might look like—and how they can be operationalized in practice.

Second, Olsson et al. (2003) argue that “where young people are well resourced within themselves, within their family and social contexts, a capacity for constructive adaptation to adversity, that is, resilience can be enhanced” (p. 6). A key question for future study is how can transitional justice processes, and legal processes more generally, enhance resilience? More specifically, to use common resilience terminology, how can these processes strengthen protective factors and minimize the impact of risk factors (Rutter, 1987)? While the language of risk and protective factors is not currently utilized within the context of transitional justice, future research should identify where these factors exist within different transitional justice contexts and how transitional justice processes can address them. Because these risk and protective factors are likely to exist across multiple levels, engaging with them is part of

the process of developing more social-ecological and systemic approaches to doing transitional justice.

Third, and relatedly, while transitional justice is partly about creating better futures, communities can become disengaged from these processes when they see no benefits, and when the costs of dealing with the past appear to deflect resources away from current needs (Hayden, 2011). A resilience discourse has the potential to offer a way of addressing this. Folke (2006) maintains that resilience is partly about “the opportunities that disturbance opens up in terms of a recombination of evolved structures and processes, renewal of the system and emergence of new trajectories” (p. 259). In other words, future research should explore how the inclusion of resilience thinking into transitional justice potentially adds a new forward-looking dimension, through an emphasis on the opportunities that can be created from past shocks.

Finally, this chapter has shown that giving greater attention to resilience in the field of transitional justice has wider implications for the relationship between resilience and legal systems. Arnold and Gunderson (2013) argue that “law is brittle and maladaptive if it assumes and reinforces a static state that does not match ecological or sociological change” (p. 10427). However, if legal systems, like transitional justice processes themselves, are situated within a broader systemic framework, the key issue is not whether these legal systems are adaptive or maladaptive. Rather, what is crucial is that they provide sufficient stability to enhance adaptive capacity within the social ecologies of which they form a part, while at the same time being adaptive enough to keep up with changes within these social ecologies. In this regard, future research should explore the adaptive capacity of legal systems within a broader systemic framework and how the two interact. According to Ruhl (2011), resilience theory views legal systems as “a set of landscapes over which we find engineering and ecological resilience strategies mixing in different blends to form topographies of various contours depending on where in the system we look” (p. 1318). Giving more attention to these strategies within a systemic context can provide new insights into the resilience dynamics of legal systems.

Key Messages

1. Thinking about resilience in the context of transitional justice scholarship potentially enriches the field both theoretically and practically.
2. Individual-centered approaches to transitional justice neglect wider socioecological dynamics. Adding a resilience lens to transitional justice can contribute to the development of more ecological ways of addressing the past that situate individuals in their wider environments.
3. Resilience is a multisystemic concept that draws attention to the systemic dimensions of transitional justice processes. These processes necessarily interact with other systems, which can limit their on-the-ground impact.
4. The concept of resilience has an important transformative dimension. It is therefore useful for theoretically and empirically developing the notion of transformative justice.
5. The relationship between law and resilience is not one of compatibility/incompatibility, but rather of balance and degree between legal certainty and flexibility. How legal systems intersect with other systems critically shapes the level of balance that is achieved.

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Note

1. The Mladić case is currently on appeal at the International Residual Mechanism for Criminal Tribunals (see <http://www.irmct.org/en/cases>).

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