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AREAS OF INTEREST: RESTORATIVE JUSTICE, VIOLENT PROTEST

(PART 2)

REPORT TITLE:

A RESTORATIVE JUSTICE RESPONSE TO VIOLENT PROTEST IN SOUTH AFRICA

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EXECUTIVE SUMMARY

Our Diplomacy Lab group at the University of Pittsburgh, under the leadership of Dr. Karin Warner, was tasked with recommending how a Restorative Justice Framework can be effectively used to disincentivize violent protests, promote partnerships, and advocate for greater social inclusion in South Africa. We work directly through the U.S. Embassy in Pretoria South Africa, and with Mr. Mike Batley, the CEO of the Restorative Justice Center in South Africa. This semester, we built on our previous research from Fall 2020 which spotlighted the root causes of violent protest in South Africa. The work of our group, which is shared in this report, includes recommendations for how a Restorative Justice Framework can be used to consider and respond to systemic socio-economic disparities and a pervasive lack of institutional trust in South Africa. These factors have led to disillusionment among a considerable number of South Africans and encouraged a culture of violent resistance among student and community organizations.

Our group offers recommendations to the RJC at both the practical and strategic level. Specifically, our work shows that the center can apply RJ practices, such as victim-offender mediation and/or community conferencing, as a response to violent protest provided mediators understand the relevant context - particularly the source of conflict. Additionally, in light of the structural and legal limitations on the RJC's capacity to work in this area, the paper explores methods for the center and other like-minded organizations to build support for RJ within the South African society.

INTRODUCTION

This working paper draws on prior research investigating the historical and contemporary root issues in South Africa that have contributed to rising popular unrest and violent protest. This paper first presents relevant contextual research and frameworks that present our assessment of the structural and contemporary issues in South Africa. Then, we draw on these frameworks and contexts to develop Restorative Justice (RJ) based policy recommendations to assist the Restorative Justice Center (RJC) in Pretoria, South Africa. We conclude our paper with a discussion on how these policies help the RJC and South Africa, the limitations of these policies and the need for complementary structural reform, and areas for future research that were beyond our focus.

SUMMARY OF PAST RESEARCH

During the Fall 2020 semester, our Diplomacy Lab at the University of Pittsburgh investigated the history of South Africa from its pre-colonial indigenous history to the present post-apartheid government. We provided a comprehensive assessment of the key themes recurrent throughout South African history and demonstrated how these themes explain the root causes of current unrest. We found that drivers of unrest include historical and unresolved inequality, state repression and intimidation, and widespread disillusionment. Our research found that there is a growing sense, especially among the youth, that the ANC has broken its promises to the most vulnerable within South Africa. With a deepened understanding of South African history and its relevance in the present day, we are thus able to proceed with the task of developing RJ-based policy recommendations.

DEVELOPING FRAMEWORKS AND CONTEXT

In order to form a rationale for our policy recommendations, we engaged in further research of the contemporary issues in South Africa and developed frameworks and relevant contexts to help serve as a theoretical foundation. With these theoretical frameworks and contextual information, we present our perspective and assessments of the situation in South Africa thus providing the rationale for our policy recommendations.

Political Context and Frameworks

During the Fall 2020 semester we discussed at length the lack of responsiveness of the ANC led government to grievances held by South Africans, especially the poor and working classes. A theory that can help frame the political situation in South Africa is Robert Michel's Iron Law of Oligarchy.¹ The Law explains that political party structures are inherently undemocratic and authoritarian. Though they may exist in democratic systems, political parties utilize coercive means to discipline their party members and constituents, usually to maintain policy consistency and to achieve political objectives. A top-down, hierarchical vision of political parties is consistent with this framework where there is little contestation within a political party. The takeaway for Michel's Iron Law of Oligarchy for South Africa is that party politics undermine the public responsiveness of democracies. Giovanni Sartori, a critic of Michel's Iron Law, argued that although party apparatuses can be quite authoritarian, the element of horizontal contestation between different political parties drives them to compete for votes and the favor of constituencies.² In a pluralist democracy, although responsiveness is indirect, voters

¹ Darcy Leach. "Oligarchy, Iron Law Of." International Encyclopedia of the Social & Behavioral Sciences. (London: Elsevier, 2015). Accessed May 12, 2021. ProQuest Ebook Central.

² Sartori, Giovanni. "Anti-Elitism Revisited." *Government and Opposition* 13, no. 1 (1978): 58-80. Accessed May 11, 2021.

can punish political parties that do not fulfill their wishes by voting for a competitor. The ANC in South Africa has maintained a one-party state (despite some minor competition and local political movements) since the first elections after apartheid. Without a major competing political party to contest ANC actions, South Africa is without Sartori's horizontal contestation and suffers from the lack of vertical contestation described in Michel's Iron Law. *When a political party is synonymous with the state, there is a profound inability to achieve meaningful contestation, even with the presence of elections and representatives.*

Although political polarization has occurred between growing factions within the ANC, political party polarization has largely remained a non-issue within the institutions of South Africa. McCoy and Somer utilize South Africa as a case study for their theory on 'pernicious polarization' and reach this conclusion on the ANC's role in shaping the model of contestation:

Apartheid South Africa was democratized with institutional and electoral arrangements that carried their own seeds of both vulnerability and resistance to repolarization. Although the first post-apartheid presidency under Nelson Mandela avoided the polarizing temptation, successive leaders in the African National Congress used their dominant-party status to grow increasingly hegemonic and self-serving. As Southall points out in this volume, the ANC's origin as a national liberation movement allowed it to conflate self-determination with democracy and to claim that it alone represented the will of the people... The party's comparative advantage in mobilizing voters led its political opponents to turn to horizontal accountability mechanisms—namely the courts—for redress, while ANC figures attacked the judiciary as “counter-revolutionary.” At the same time, the electoral hegemony of the ANC meant there was little political polarization and little choice in representation, making the hegemonic party-state subject to corruption and authoritarian tendencies.³

While political polarization is bemoaned in nations like the United States because dramatic divergence in political attitudes has had severe socio-political consequences, the lack of polarization in South Africa's post-apartheid development has contributed to the lack of effective

³ Jennifer McCoy, and Murat Somer. “Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies.” *The Annals of the American Academy of Political and Social Science* 681, no. 1 (2019): 268-269

horizontal contestation leading to a lack of vertical responsiveness. When vertical responsiveness is lost, Michel's Iron Law can be more easily invoked, and there is a stronger perception that political institutions behave in a manner that is oligarchical rather than democratic. Alternatives to ANC governance are too underdeveloped, disorganized, disparate, or weak in appeal to prove valuable as counter-hegemonic means of representation. McCoy and Somer are optimistic for South African pluralism and representation after the expulsion of President Zuma and the anti-corruption reforms of President Ramaphosa⁴, yet much progress is still needed in the way of political restructuring.

Unlike party polarization, populism plays a significant role in South African politics. South Africa has become well known as an example as one of the more intense examples of populism globally.⁵ The social movements and intermediate political groups arose from these populist sentiments. And these populist groups have formulated "anti-elite sentiments" in response to political and economic grievances as well as egregious examples of corruption and state capture. Western liberals are accustomed to viewing populism as a threat to democracy, partly because it can be imbued with an authoritarian impulse. However, theorist Kaltwasser argues that in order to move towards a more holistic approach to understanding populism, populism must be understood both as a threat and corrective to democracy.⁶ A threat, in that successful populism can erode institutions and encourage democratic backsliding in exchange for rhetorical or political concessions, or a corrective, in that it can point out the elements of a democracy that are lacking, limited, or insufficient. A successful analysis and treatment of the problems with violent unrest in South Africa must understand South African populism both as a

⁴ Ibid, 269.

⁵ Dom Phillips, Jason Burke and Paul Lewis. "How Brazil and South Africa became the world's most populist countries." *The Guardian*, May 1, 2019.

⁶ Kaltwasser, Cristóbal Rovira. "The Ambivalence of Populism: Threat and Corrective for Democracy." *Democratization* 19, no. 2 (2012): 184–208.

threat to norms and as a sign that status quo governance is inadequate.

Contesting Hegemonies

Olivia Lin argues that RJ initiatives and the Truth and Reconciliation Commission (TRC) have formed a metanarrative within South Africa, elevating the TRC and RJ into a mythological level of importance in South Africa.⁷ While RJ and the TRC were important symbolically, they have confused the national identity in South Africa in its nation building trajectory. Further, while international observers praise the TRC and RJ for its work in reconciliation, domestic audiences remain exceedingly skeptical of the material benefits yielded from the events.⁸

Antonio Gramsci founded the concept of hegemony as the set of values, norms, and ideas of the ruling class that dominates a state or society.⁹ In the case of South Africa, hegemony defines normative modes of participation, ideas of national belonging, economic systems and expectations, and pertinent to the discussion of RJ, an established norm of non-violent expression over violent expression. RJ was one of the founding frameworks conducive to the post-apartheid state formation and the confessional reconciliation of past injustices. Because of its role in state formation and its role in the mythology of the state, RJ can itself be thought of as a component of ruling class hegemony.

Due to the unrectified historical injustices that have persisted after the end of the apartheid regime, dissatisfied and radical elements within South Africa have begun to contest this hegemony with their own. These groups, as described as existing in an intermediate space

⁷ Olivia Lin. "Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context." *ILSA journal of international & comparative law* 12, no. 1 (2005): 55.

⁸ *Ibid*, 64-69.

⁹ Stephen J. Gill. *Gramsci, Historical Materialism and International Relations*. (Cambridge: Cambridge University Press, 1993): 51.

between the national and local levels of politics, have started to assert a counter-hegemony to the established ideals of the South African ruling class. These counter-hegemonic movements have violated norms of civil engagement and normative political beliefs. There is a rising lack of faith of normative sentiments in topics such as democratic politics, hegemonic conceptions of economic policy, and non-violent protest. RJ, as an element of the established order's hegemony, has been treated with a skeptical lens under this counter-hegemonic movement. Although RJ mediators may be independent of the state's actions and declare a political neutrality, assertions of non-violent engagement may come off as an unwillingness to radically oppose unjust social structures.

In order to reassert non-violent protest as the normative mode of civic engagement, RJ mediators and activists must assert a parallel hegemony coexisting with the political contest between establishment and populist social forces. Substantively, RJ must demonstrate that non-violence is more effective than violence as a means of concession extraction. In order to achieve this, the RJC must work to make this true by building institutions and organizations founded on principles of non-violence that can elevate political grievance and activism to higher levels of societal attention. The political contestations in South Africa today are endemic to the larger structural problems at play. The RJC has the ability to resolve this contest by its own means. However, the RJC has the means to control *how* this contestation is conducted; violently or non-violently. The RJC has the power to produce its own perpendicular hegemony that can project a non-violent political contestation onto both the government forces and the protestors. Fostering a hegemony of non-violence allows necessary political competition to take place but without the cost of preservation of an unjust status quo. The methods by which the RJC can implement this hegemony of non-violence will be discussed as part of the policy

recommendations.

INCENTIVE STRUCTURES FOR VIOLENCE AND NON-VIOLENCE

How the Sociopolitical Context Creates Incentives for Violence

In a 2017 survey comparing public attitudes towards peaceful and violent protests, researchers found that an increasing number of South Africans are growing more tolerant of violent protest, and more likely to see it as the only available avenue to air their desperation and discontent.¹⁰ The researchers compared public attitudes in 1995 to 2016 and discovered that “the share [of the South African public] who stated that peaceful actions were successful decreased from 61% in 1995 to 46% in 2016.”¹¹ Furthermore, the share [of the South African public] who deemed violent actions as unsuccessful fell from 81% in 1995 to 58% in 2016.¹² With the lack of opportunity for formal or mainstream political avenues for political expression and effective contestation, there has been a rise in political activity at the local and intermediate levels. Local organizations, such as the Soweto Electricity Crisis Committee, have been effective outside of conventional political channels at generating effective activism against utility shut offs and privatization. Intermediate political groups, such as the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA)—to an extent—have served as organizing alternatives to conventional political parties advocating for policies and values not commonly expressed in the ANC dominated legislature. Lack of contestation has led to a reshaping of the logic of political engagement in South Africa. In previous generations, non-violent protest and democratic engagement has been held up as the standard for South Africa and the transformation from

¹⁰ Bohler-Muller, Narnia et al. “Minding the Protest: Attitudes Towards Different Forms of Protest Action in Contemporary South Africa.” *SA crime quarterly* 62 (2017): 81–92. Web.

¹¹ *Ibid.*

¹² *Ibid.*

apartheid by political groups and the RJC alike. Though the role of non-violence in the fall of apartheid is an overstated partial account of the fall of apartheid, as multiple insurgent groups and violence also contributed to the capitulation and passive overthrow of the apartheid state, non-violence preserved legitimacy as a common value among South Africans. With increased alienation with the ANC regime and increased state despondency, non-violent protest and organization has lost its potency in extracting policy changes or attention. Our working group discussed the rationale for violent or disruptive means of protest with a South African activist, who primarily works with spreading awareness of gender-based violence in South Africa. She explained, to paraphrase, that the government doesn't notice when they gather non-violently, their protests are easily dismissed from the public view and the news doesn't cover it. However, when they engage in violent means of protest, including property destruction, the government notices and responds.¹³ Because the ANC regime has become an increasingly despondent regime (at least perceptively), activists have become incentivized to act in more provocative and intense means of political expression and contestation in order to succeed in the extraction of political concessions. Extracting political concessions via nonviolent means is difficult. In order to attract the attention of relevant authorities or media interests, the scale of organization required is greater in magnitude and messaging must be more monumental and eventful. Conversely, an act of violence is much more forceful and controversial as an act of expression and can be carried out by individuals or smaller more flippant or radical factions. The debate between violent oriented and non-violent activists hinges upon which mode of expression is believed to be most effective at extracting concessions and which method takes a greater organizational capacity.¹⁴

¹³ Anathi Tschave. (Youth Activist). Unpublished Interview. Interviewed by Diplomacy Lab group. February 3, 2021.

¹⁴ Habib, Adam. "Understanding violent protest in SA." *University of Witwatersrand, Johannesburg*, November 16, 2020.

While most activist and protest organizations in South Africa are peaceful, violent leaders and factions can undermine activist structures and incite violence because of its perceived benefit of extracting concessions. Adam Habib writes that the violent protest in South Africa occurs because “the political norms disable the incentive structure for political factions to abide by the strategic principle of peaceful social action.”¹⁵ Agreeing to settlements based on RJ frameworks may prove difficult given this logic of political contestation. What benefit would protestors and activists procure from settlements that neuter their most effective mode of contestation? RJ mediators need to account for this increased rationale that incentivizes the politically unheard towards violent expression.

In addition, the farmland attacks provide evidence of how socio-economic disparities and annihilation, incentivize violent reactions. Farm attacks and farm murders regardless of race, have increased in recent years in line with the general upward trend in South Africa’s violent crimes. These violent crimes against people living and working on farms share similarities with the crimes of house robbery, business robbery and carjacking - which are treated as priority crimes by the South African Police. Our interviews with South Africans also show more correlations between poverty, inequality and farm attacks - and less with race. Hence, farm attacks should be considered as a part of the increasing crime rates in the country and solutions should focus more on addressing systemic socio-economic disparities.

How the Law Enforcement/Legal Response to Protest Creates Incentives for Violence

Continued outbursts of violent protest across South Africa are evidence of the need to critically examine the state’s response to the violence plaguing South African society. The South

¹⁵ Ibid.

African criminal justice system is frequently criticized by citizens and researchers as being hampered by “...heavy caseloads, shoddy police work, a lack of resources, and poor communication.”¹⁶ These criticisms (and more) are attributed especially to the South African Police Service (SAPS) and the Department of Correctional Services (DCS). Additionally, South Africa’s criminal justice system was already overburdened before the COVID-19 pandemic began, but the outbreak has resulted in a backlog of tens of thousands of criminal cases.¹⁷ This backlog is unlikely to disappear anytime soon, and so creates an opportunity to consider other avenues, such as Restorative Justice. Consequently, old and new challenges facing South African society point to a need to seriously consider expanding alternatives to the current criminal justice system which is part of South Africa’s legal system.

Although South Africa’s mixed legal system allows for African customary law application in some cases, it remains dwarfed by the more frequent application of common and civil law following the Roman-Dutch and English traditions.¹⁸ African customary law (though not free from criticism) has deep roots in South Africa where it was used to broker peace between indigenous South Africans. African customary practices were greatly supplanted by the arrival of European colonists beginning in 1652. The Dutch, and later the English, implemented their own procedures towards exacting justice in place of the indigenous justice forums of the past.¹⁹ Thus, the European approach to criminal justice, as opposed to African customary practices, adopted a retributive, punitive approach whereby formal court proceedings were used to charge the accused of violating the law. Following the transition to democracy, African customary law was embedded within the South African Bill of Rights, but ultimately, “despite

¹⁶ Eliseev, Alex. "Trials and Errors: The Promises and Pitfalls of South Africa’s Criminal Justice System." *World Policy Journal* 34, no. 1 (2017): 101.

¹⁷ Regchand, Sharika. “Lockdown Will Increase Backlog of Cases.” *Witness, Witness*, 7 May 2020/

¹⁸ “South Africa : Legal Resources: Legal System.” *Oxford LibGuides*.

¹⁹ Murhula PBB and Tolla AD (2020)The effectiveness of restorative justice practices on victims of crime: Evidence from South Africa. *International Journal for Crime, Justice and Social Democracy* 10(1): 98-110.

some adaptations to suit the South African community, the vast majority of rules governing criminal conduct originates in Roman-Dutch law.”²⁰

Though South Africa’s mixed legal system may seem promising, in practice the more frequent usage of the punitive “western” approach to crime may not be doing enough to deter further protest violence from occurring, as evidenced by continued protests across the country. The traditional western approach to criminal justice is founded on the acceptance of deterrence theory. Deterrence theory holds that the threat of punishment is enough to deter a person from committing a crime. In contrast, Defiance theory (as posited by Criminologist Lawrence Sherman) holds that “defiance is likely to occur when the sanctioned individual views his or her punishment as unfair or illegitimate, is poorly bonded, and denies the shame of the punishment.”²¹ Defiance theory may be particularly relevant in the South African context because low levels of institutional trust,²² along with aforementioned challenges in the criminal justice system, may result in recurring bouts of violent public protest. South African citizens may thus be engaging in these demonstrations despite the threat of punitive consequences because defiance theory has taken precedence over deterrence theory. The result is a volatile situation, wherein continued violent protests have led to South Africa being labeled as the “protest capital of the world,” and subject to an ongoing “rebellion of the poor.”²³

The state response has arguably worsened these issues, as police brutality at both peaceful and violent protests, along with onerous municipal restrictions and the persistent relevancy of entrenched social ills can help make protest violence more palatable to everyday South Africans. A recent protest in Wits highlights this issue, as a gathering of students

²⁰ Ibid. 101.

²¹ “Sherman, Lawrence W.: Defiance Theory.” *Encyclopedia of Criminological Theory* 2010. Vol 2: Print. 839-840.

²² Institute for Security Studies “Twenty Years of Justice Reform in South Africa: What Is There to Show for It?” *ISS Africa*, 23 July 2013.

²³ Regchand, Sharika. “Is South Africa the 'Protest Capital of the World'?” *Witness*, Witness, 20 Oct. 2020.

protesting school fees on March 10, 2021 resulted in the death of a bystander, Mthokozisi Ntumba. CCTV footage released shortly after the incident shows South African Police firing indiscriminately (at close range) into a crowd of peaceful protestors mere seconds after exiting the police vehicle.²⁴ The officers then leave the scene, without offering any assistance to Ntumba as he lay dying.²⁵ Such incidents stir significant public outrage, and recall the infamous scene at Marikana in 2012, when South African police forces killed 34 striking miners.²⁶ Also further inflaming public opinion, oftentimes the official police response to these and other incidents has been to assert that “illegal” manifestations warrant a strong police response.

Though the right to peacefully protest in South Africa is protected within the Constitution, protests can still be labeled illegal or unlawful if an appropriate permit has not been awarded to protest organizers. This refusal may arise because local authorities fear that traffic disruption, violence, or property damage may occur.²⁷ These rules are enforced by the *Regulation of Gatherings Act*, which asserts that individuals seeking to protest must appeal to local authorities in order to do so lawfully. As a result, individual municipalities attach their own rules over accepted “legal” protests within their jurisdictions. In practice, this means that authorities can seek to deter protests from occurring by enforcing onerous requirements in order for approval to be granted. These requirements may include a payment of fees, sending local authorities notice at least a week in advance, and providing the names of speakers or attendees.²⁸ These municipal regulations can thus lead to even peaceful demonstrations being declared unlawful if they take place without formal approval. In turn, this can then trigger a heavy handed

²⁴ “South Africa: Police Kill Bystander at Protest.” *Human Rights Watch*, 23 Mar. 2021.

²⁵ Ibid.

²⁶ Masiangoako, Thato and Khuselwa, Dyantyi “OP-ED: Marikana Massacre: The Devastating Impact of the Narrative Painted by Business, Police and the State.” *Daily Maverick*, 26 Aug. 2020

²⁷ Duncan, Jane. “A Close Look at How the Net Has Tightened on the Right to Protest in South Africa.” *The Conversation*, 11 Mar. 2021

²⁸ Ibid.

police response and further inflame public opinion and the likelihood of violent protest

outbreaks. Indeed, in the 2018 *Mlungwana v State* ruling, Judge Tandazwa Ndita asserted that:

The criminalization of a gathering of more than 15 on the basis that no notice was given violates s17 of the Constitution, as it deters people from exercising their fundamental constitutional right to assemble peacefully unarmed...in my judgment, the limitation is not reasonable and justifiable in an open and democratic society based on the values of freedom, dignity and equality.²⁹

In addition to concerns about the state's repressive response to protests in action, there is also the question of how detained protestors are charged. When protests rise to unrest, as deemed by the police, officers will often seek arrests for the crime of public violence. Public violence is defined by the SAPS as consisting of "the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb peace and tranquility or to invade the rights of others."³⁰ What is lost in this definition, however, is the question of whether or not these protests leading to arrest were truly violent. Indeed, a 2016 study by the Institute for Security Studies (ISS Africa) found that 46% of "unrest-related incidents" described by the SAPS could be more aptly labeled as *disruptive* rather than violent.³¹ In other words, the reliance on public violence as criminal punishment for protest actions misses a significant distinction in how these actions can be carried out. This has led to a situation where a diverse range of activities can lead to charges of public violence: groups of protestors peacefully disrupting traffic flows by gathering on roads or erecting barricades are charged with the same crime as protestors who damage property, loot shops, or injure others, as well as people who engage in group brawls.³² There is, then, a possibility that these incidences

²⁹ Sylvester, Justin. "A Landmark Win for the Right to Assemble and Protest, in South Africa and Beyond." *Ford Foundation*, Ford Foundation, 20 Mar. 2018

³⁰ Common Law Offences - Definitions, South African Police Service.

³¹ Lancaster, Lizette. "At the heart of discontent: Measuring public violence in South Africa." *Institute for Security Studies Paper 292*, May 2016. 2-3

³² For examples of cases involving public violence, see: McCain, Nicole. "SANDF member among seven arrested on public violence charges in Limpopo." *news24*, April 15, 2021; "South African police arrest dozens after riots in

could be handled more appropriately through a flexible response outside the confines of public violence, both in terms of detainment and sentencing.

OPPORTUNITIES FOR RESTORATIVE JUSTICE

The Case for Restorative Justice

Restorative Justice is a promising way forward in tackling the issue of heightened protest violence. RJ is defined as “an approach to justice that aims to involve the parties to a dispute and others affected by the harm in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation.”³³ Proponents of RJ argue that the common application of traditional criminal justice is not victim-centered or rehabilitative, and thus breeds more social rupture and crime. As researchers from the University of KwaZulu-Natal write: “..the victim is one way or another neglected and forgotten [in the contemporary criminal justice system]. The participation of victims remains at the periphery, at the time of giving a complaint and during prosecution as a witness...”³⁴ RJ meanwhile encourages dialogue between the victim, offender, and other community members in order to assess needs, consider the larger context, and carve a way forward for all. These agreements are brokered by trained practitioners, who use methods such as victim-offender mediation, sentencing circles, and community group conferencing. RJ methods are thus argued to be more effective against recidivism because they refrain from demonizing the offender, and work to repair harm caused to the community and victim outside of adopting a punitive approach.

Johannesburg.” *Reuters*, Sept. 2, 2019; Harper, Paddy. “Peaceful protestors ‘pleaded guilty to get out of jail’.” *Mail & Guardian*, Nov. 2, 2018; *Le Roux v The State* (444/2008) [2010] ZASCA 7

³³ Justice/Criminal/Restorative Justice. *Department of Justice and Constitutional Development South Africa*.

³⁴ Murhula and Tolla, 99.

In a 2016 study, researchers at the University of the Free State created a qualitative study which asked 23 South African legal professionals (including judges, magistrates, prosecutors, and lawyers) their opinions on RJ in the South African context.³⁵ The researchers found that the overwhelming majority of the legal professionals interviewed expressed support for expanding the implementation of RJ practices in lieu of contemporary criminal justice approaches. Reasons given by the legal practitioners ranged from acknowledging that prisons are not necessarily conducive to rehabilitation, to asserting that imprisonment causes familial disruption, and to lamenting that prisons are too overcrowded.³⁶ This study thus illustrates that there is some support for RJ as a whole, and this support may thus extend to applying a RJ approach to those accused of participating in protest violence.

In the South African context, RJ is at a particular advantage due to the familiarity of the public with (and formal acknowledgement of) African customary law. As Murhalla and Tolla write, "...South Africa's indigenous basis of knowledge of traditional justice practices is an enormous advantage in explaining and promoting RJ in South Africa. Because the principles of RJ are not new, one can argue that the RJ movement is simply a recent return to traditional methods of African justice." One can see the overlap, as "both processes aim for reconciliation and restoring peace in the community...share the view that a crime is a harm done to the individual and the broader community, and [wherein] simplicity and informality of procedure are common."³⁷ This background helped forge the new South Africa following the end of Apartheid, as the TRC in operation from 1995-2003 adopted a RJ approach. Though the TRC has been the

³⁵ Dap Louw, Lezahne van Wyk. THE PERSPECTIVES OF SOUTH AFRICAN LEGAL PROFESSIONALS ON RESTORATIVE JUSTICE: AN EXPLORATIVE QUALITATIVE STUDY. *Social Work/Maatskaplike Werk* Vol 52 No 4; Issue 3. 490-510.

³⁶ Ibid.

³⁷ Dap Louw, 492.

subject of enhanced criticism in recent years, RJ nonetheless remains familiar, and has promise if implemented in a way which is acceptable to all parties involved.

Another advantage to pursuing a RJ approach in this context is that it is well-suited to the needs of young offenders - an important demographic to reach given that youth-led protests related to education and politics often result in violence in the form of harm to persons or destruction of property. The promise of RJ for youth offenders is well-noted, including by the RJC itself in its advocacy for RJ to have a role in the Child Justice Act. Janine N. Clark, a transitional justice scholar from the United Kingdom, has laid out this case as well, specifically in the South African context. Although young South Africans are often motivated to “lash out” due to structural/societal grievances, their turn to such behavior is also influenced by an overexposure to direct violence (as witnesses or victims) at school, at home, or within the community at large. In one sense, then, RJ is an appropriate tool for young offenders as they themselves may be acting out violently because they feel victimized or pressured to do so and restoration offers them a chance to regain (or build) a sense of dignity and control which can counter these forces - while retribution may lead to shame and further exposure to violence in prison.³⁸ Similarly, engaging in a RJ framework can work against the desensitization to violence that drives young people to commit these acts, because it confronts offenders with the impact of their behavior, showing that there is a real, human victim at the other end of their violence. It also exposes them to new forms of conflict resolution, providing “alternative norms, values, and problem-solving skills/strategies that do not revolve around conflict and violence.”³⁹ RJ therefore appears uniquely suited as a positive influence on the impressionable children and young adults who are a significant part of South Africa’s protest culture.

³⁸ Clark, Janine Natalya. “Youth Violence in South Africa: The Case for a Restorative Justice Response.” *Contemporary justice review : CJR* 15, no. 1 (2012): 77–95.

³⁹ *Ibid.*, 87

Recommendations

In light of the case that has been made for RJ as a response to protest incidents, there are a number of recommendations on how the RJC can contribute to this effort. These recommendations can be targeted at the micro, case-by-case level, as well as at the macro level within the strategic vision of the RJC. In short, the RJC can incorporate its practices on interpersonal mediation for disputes arising from violent protest incidents and can also pursue various methods to expand the reach of RJ in South African society. Building capacity in this regard will, hopefully, lead to better outcomes for all concerned parties.

Mediation of Disputes Arising from Violent Protests

The theoretical framework of RJ does not necessarily focus on the crime itself but the relationship between the victim, offender, and, if relevant, the wider community. In this way, the practices of RJ have flexibility to meet the specific needs of various types of crime, including violence at protests. The key is thus to determine which mediation method - **victim offender conferencing (VOC), community group conferencing, or sentencing circles** - is best suited to the features of the case.⁴⁰ To do this, these features themselves must be identified: Who is/are the victim(s)? The offender(s)? What harms have been caused? Who are the relevant stakeholders? Who shares in the obligation to put things right? An illustrative example of this process, in the context of violent protest, would be the destruction of property at several Clicks pharmaceutical stores in September 2020 as a response to the racially-insensitive TRESemmé advertisements displayed at these establishments. While many protests at Clicks stores remained peaceful, some stores were vandalized, looted, and petrol-bombed.⁴¹ The offenders here are easily identified as those who committed the property damage, while the primary victims can be seen as store

⁴⁰ Murhula and Tolla. 102-104

⁴¹ For example, see: Shange, Naledi. "Clicks store trashed, another 'petrol-bombed' as EFF protests over hair ad." *TimesLIVE*, Sept. 7, 2020.

employees who may have been physically, mentally, or financially impacted by the violence. There is thus a chance for VOC, should the parties volunteer to do so, that provides offenders an opportunity to confront the negative impacts their actions had on people who were not the ultimate target of protests. Additionally, community conferences could be an appropriate way to bring all the stakeholders of this case together - protestors, employees, shoppers, TRESemmé, etc. - in a structured, non-violent setting where harms, including those stemming from the advertisement, would be addressed holistically. The caveat to all this may be that the high level of public interest often arising from violent protests could create incentives for politicization or other exterior motivations to disrupt the mediation process. While this may be the case in certain instances, the fact remains that the nature of violent protest incidents and the interplay between participants is by no means incompatible with standard RJ frameworks.

Aside from the relationship between the participants and the harms involved in the incident, what else should mediators be aware of that might be a particular feature of violent protest cases? Understanding the source(s) of a conflict is essential to achieving any successful outcome, and such cases are no exception. In a protest, the source may be something more immediate, such as an in-the-moment lapse in communication between opposing protestors or with police which turns a heated exchange into a physical confrontation. However, the ultimate sources of conflict which created the volatile protest situation in the first place are likely to be driven by long-term structural and/or values-based factors. A person's attitude toward law enforcement or those they disagree with politically is the result of their lived experiences - and the same can be said for an individual's motivation to protest over a certain issue. Understanding both the immediate and structural sources of conflict producing a violent protest event is therefore essential if mediators are to facilitate participants toward sustainable resolution -

something which is already a critical part of RJ. Altogether, it is apparent that violent protest incidents can be handled in a RJ process when appropriate - there is no need to reinvent the wheel, so to speak - but again, mediators must familiarize themselves with the full context of each protest.

The extent of RJ intervention when it comes to violent protest is limited without a formal role in the legal system. While there are established processes in place to divert certain cases from traditional courts, typically at the pre-trial stage, involving gender-based violence or children toward a restorative, rather than punitive, justice resolution, no such process exists for protestors. If such an option for diversion did exist, what kinds of identifiers or features of a violent protest case might make it more appropriate for RJ resolution? Certain qualities can make a RJ response more desirable. In particular, it can be seen as an alternative when a traditional criminal justice response may only provoke more violence. For example, cases where no one is seriously injured, where property damage does not cross a certain threshold, or where police brutality has taken place. The essential matter is that diversion to RJ resolution must suit the needs of the victim - fairness, safety, assistance, acknowledgement, redress, etc. While a legal process for diverting cases may be desirable and something the RJC could advocate for, it is not necessarily achievable. Feasibility is hampered largely by a lack of capacity, as no such process currently exists, and a lack of interest on the part of the state. Does this lack of legal feasibility preclude any substantive attempts to approach violent protests through RJ? Although this limits what can be done, there are still other means the RJC could pursue to advance RJ.

Strategic Opportunities to Strengthen RJ Advocacy

In addition to the practical recommendations above, the RJC could also benefit by assessing its options at the strategic level. Put simply, efforts to increase awareness of RJ

amongst the general public and to build organizational networks advancing the cause would help legitimize the RJC's work and enhance opportunities to respond to violent protests. A straightforward way this could be achieved would be through a public awareness campaign. That is, efforts could be made to promote RJ principles to the general public by stepping up the center's online presence and/or highlighting prominent RJ advocates in South Africa. The center could also publicly release materials on how RJ can be applied to cases of violent protest, perhaps even specifically targeting protestors at events. Moreover, the RJC can create a catalogue that promotes knowledge on protests in South Africa. There is a dearth of knowledge on South Africa's protest history and creating a catalogue on it can help to bridge this gap. Considering the limited resources at RJC's disposal, the center can hire interns (out of a pool of college students who seek internship opportunities every year) to work on this project and reward them with Certificates of Honor or Commendation Letters. By creating this catalogue, the RJC could position itself to be a reference point in national and global discourse on violent and non-violent protests. These public awareness efforts would help expand the conception of RJ in the public sphere, where it is most commonly associated with the work of the TRC. In other words, increasing awareness of how RJ can apply to areas outside of what it is conventionally associated with could help to legitimize the center's work.

Familiarity with, and support for, RJ can also be built up through networks of like-minded partners. While these connections might not exist in South Africa today, they are not without precedent elsewhere. For instance, many universities in the United States have institutionalized restorative justice practices to handle student conduct. These universities provide services in conflict resolution as well as victim-offender dialogues to students, and also

offer spaces for RJ-based conferencing on difficult topics beyond disputes.⁴² Likewise, two universities in the United Kingdom piloted “Restore Respect” programs, based on RJ practices, as initiatives to address rising race-based hate crimes/incidents among the student body. Notably, these programs received positive feedback from across the university communities, with many feeling they allowed for active participation in a transparent justice process more responsive to the needs of victims and offenders as opposed to standard top-down disciplinary procedures.⁴³

Working to implement RJ practices into education thus has the potential to build support for the concept as a whole and offers participants a chance to familiarize themselves with the concept outside of criminal law. Of course, there is only so much that should be extrapolated from the legal and social contexts of these countries when considering how such programs can be applied in South Africa. Nevertheless, their existence, and apparent success, offers a foundation for advocating a space for RJ through partnerships with higher education institutions.

Aside from higher education, many young South Africans belong to local organizations and these organizations form the foundation for resistance against unpopular government policies. Working with these organizations at the educational and community levels can help to influence the mindset of violent protest. This can be achieved through joint organization of workshops, and capacity building programs. The US State Department has many programs that focus on young people - the Young African Leaders Initiative, Mandela Washington Fellowship, Study of the US Institutes(SUSI), and Fulbright Scholarship. The RJC can help, alongside others, to promote these opportunities among young South Africans and offer resources that could strengthen their applications. Similarly, the RJC can also reach out to legal practitioners

⁴² For example, see: Office of Student Conflict Resolution, University of Michigan; Office of Student Conduct, University of Kentucky; The Office of Ethical Development and Restorative Practices, University of San Diego.

⁴³ Kayali, Liyana, and Mark A Walters. “Responding to Hate Incidents on University Campuses: Benefits and Barriers to Establishing a Restorative Justice Programme.” *Contemporary justice review : CJR* 24, no. 1 (2021): 64–84.

interested in its work and invite them to visit the center or appear as guest speakers, if willing. Other organizations like Legal Aid South Africa which defend the rights of the accused or others who advocate for incarceration-impacted families (such as the South African wing of Prison Fellowship International). Should these prospective partners be willing, joint workshops can be planned and information/best practices shared amongst themselves.

CONCLUSION

In this paper, we made a case for RJ based policies to be applied to the problems in South Africa. We developed political and theoretical frameworks to form a foundational perspective for our analysis. Drawing on this foundation, we were able to articulate the role of RJ and the RJC in the current political structures and what policy actions are currently available to address problems in South Africa. Our policy recommendations note that in some ways the protest issue in South Africa is endemic to larger structural problems that are outside the resources of the RJC to address. With the view that political contestation is an inevitability of these conditions, our recommendations seek to promote non-violent political contestation and change the means of populist engagement. Our policy recommendations argue for an active RJC engagement with key stakeholders, activist groups; and advocating for RJ practices as a response to violent protests. With these recommendations, the RJC can be instrumental in reasserting a hegemony of non-violence in South Africa.

FUTURE RESEARCH

The US State Department can explore, through continued research of our diplomacy lab group, how the state department might collaborate with the RJC in order to build its capacity moving forward. The State Department implements numerous programs and initiatives in South Africa. There is a need to align these programs under a long-term framework to disincentivize

violent protests, promote de-escalation efforts and support socio-economic development. This can be done through a strong partnership with the RJC. When there is a long-term framework targeted at achieving certain objectives, it makes it easier to effectively channel resources to strategic areas of priorities and track the impact of such interventions. The next steps of our Diplomacy Lab research group at the University of Pittsburgh could be to align and map out these potential collaborations to embed RJ practices into the fabric of South Africa.

Implementation of RJ into South Africa will not be straightforward and the specific application and operationalization of these policies and principles will take additional collaborative investigation.

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