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“Civil disobedience as a moral response to lockdown regimes”

Dlamini, Armstrong

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"CIVIL DISOBEDIENCE AS A MORAL RESPONSE TO LOCKDOWN REGIMES"

By Armstrong Dlamini

9807538P

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ABSTRACT

In the wake of the Covid-19 pandemic, the South African Government faced the predicament of making a choice between imposing a lockdown and opening up the economy. It chose the former in line with utilitarian considerations to save as many lives as possible and subsequently promulgated lockdown regulations to control the movement of people and curb infections. However a host of lockdown restrictions were irrational and unreasonable. The public reacted through acts of civil disobedience which were premised on people's claims to civil liberties and the right to disobey laws that are irrational. This paper argues that some of the protests against the lockdown can be characterized as civil disobedience and that on Rawls' terms, it would have been justified.

DECLARATION

I declare that this research report is my own unaided work and I have endeavored to follow the required conventions in referencing the thoughts and ideas of others.

It is submitted for the degree of Master of Arts, Applied Ethics for Professionals in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.



Armstrong Dlamini

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SECTION I: INTRODUCTION

After declaring Covid-19 a pandemic, the World Health Organization (WHO) pressed countries to act swiftly to contain the spread of infections (WHO, 2020a). Latest figures from the WHO (2021) indicate that as of March 15, 2021, there were 119,960,700 global infections and 2,656, 822 deaths. In South Africa during the same period, Covid-19 cases exceeded one million and there were more than fifty thousand recorded deaths.

In response, many governments embarked on drastic measures aimed at preventing transmission of the virus. These primarily involved restrictions on the movement of persons. In that vein, on 15TH March, 2020 South Africa promulgated a National State of Disaster as part of its coordinated response to the disease. The state of disaster was enacted through the Disaster Management Act (No 57 of 2002) and the Government issued corresponding regulations (Gazette Notice No43107, 18 March, 2020) which included measures aimed at limiting contact between persons, as well as general restrictions on movement of persons. These measures were aimed at managing the disease and protecting people from the potentially disastrous effects of the pandemic.

However, some of these well-intentioned restrictions were also deemed objectionable by some members of the public, because they infringed on basic freedoms, curtailed livelihoods and were intrusive to privacy. As part of their response, the public reacted through acts of defiance. Therefore, the salient question is whether the infringements were unreasonable and whether the public response was justified.

In this paper, I will discuss an evaluation of civil disobedience as a moral response to the lockdown regime.

I will review the nature of the regulations, the public responses therein and offer a theoretical discussion of the morality of civil disobedience. I will further seek to confirm whether the acts of protests actually amount to acts of civil disobedience.

In the wake of the pandemic, the South African Government enacted a lockdown in order to protect lives, which is an important good. I will juxtapose the decision to effect the lockdown with infringements on other important goods including civil liberties and the right to earn a livelihood which arose from the lockdown restrictions. My argument is that civil disobedience is an appropriate moral response against the infringements on civil liberties which were occasioned by the lockdown regime. However my proposition is not a wholesale rejection of the lockdown measures, but certain aspects arising from deliberative flaws that failed to consider potential harms to human freedoms. I will further argue that in view of these harms, acts of civil disobedience were justified. I believe the study will contribute to how we can read into the Covid-19 era as well, to enhance the debate on what constitutes just restrictions during emergencies.

Structure

The layout of the paper is as follows:

Section I is the introduction.

Section II, is a survey of the theory of civil disobedience. I consider the Rawlsian approach as well as some of the contemporary accounts of civil disobedience. The standard definition and its grounds are also articulated.

Section III is an evaluation of the moral theory on emergencies. It examines the moral underpinning behind the Government's response and also seeks to

review the outcomes thereof. I seek to establish the sort of deliberation behind the lockdown regime as well as the harms that emanated from the response.

Section IV outlines the public response to the lockdown regime in the form of civil disobedience. I examine the evidence and narratives behind civil disobedience as well as the ensuing public discourse.

Section V is the concluding discussion which seeks to answer the main question on whether civil disobedience was a suitable moral response to the Covid-19 lockdown regime. I take advantage of both the theory and the evidence to determine whether the response was rational and justified.

SECTION II: THEORIES OF CIVIL DISOBEDIENCE

Rawls' Account

John Rawls is considered a pioneer of civil disobedience theory. In his view, civil disobedience is informed by a conflict of duties between conforming to majoritarian laws and the need to invoke one's liberty against perceived injustice. The theory seeks to articulate right action in the context of this conflict of duties as well as the role of the disobedient in promoting just schemes.

According to Rawls, "civil disobedience is a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government" (1971: 320). It is an expression of one's view that the expected principles of collaboration among citizens or between the state and citizens is not being upheld. Therefore, it gives one an opportunity to opt out of a perceived unjust scheme.

The Rawlsian account of civil disobedience obtains in states with a democratic political order, wherein arbitrary domination by the state is not tolerated. In a just or nearly just society, civil disobedience is recognised as a civic right on the same level as other rights, like that of freedom of expression. The aim of civil disobedience is to help bring attention to a particular injustice. Its claim for redress is premised on an appeal to the commonly held view of justice. Thus, it makes an appeal to the commonly held view of justice to bring attention to an injustice. In other words, it brings attention to claims of justice by a minority. This appeal, compels the majority to respond to the concerns of the minority in order to maintain a just equilibrium in the functioning of a liberal society. Thus, civil disobedience on these grounds recognises the legitimacy of the state and does not seek to revolt against the state, but simply opts out of an unjust scheme so as to attract the attention of the state. Civil

disobedience seeks to compel the just state to recognise the just cause of the minority on a particular case.

By elevating civil disobedience to the level of a right, Rawls expects society to extend tolerance to civil disobedience as an appeal to an agent's valid claims as opposed to its common conception as law breaking or trouble making. Therefore, despite its possible breach of public order, civil disobedience should not be prosecuted as a common offence because of its just ethical claim or right intention.

In Rawls' view, civil disobedience presents an agent with an ethical dilemma between complying with the law of the majority and the obligation to defend one's liberty in the wake of an injustice or an unjust scheme. Thus it is a crucial element of liberal democracy. Rawls argues that "the problem of civil disobedience is a crucial test case for any theory of the moral basis of democracy" (1971:319). Therefore, it becomes part of the architecture of a liberal state. Given its role as a test case for democracy, Rawls rates civil disobedience at par with other democratic processes such as elections. Thus civil disobedience occurs simultaneously as a right and as an integral institution of liberal democracy.

Characteristics

In Rawls' view, the major characteristics of civil disobedience are as follows:

a) It is a public act that is openly expressed in a demonstration or an overt act of political conviction or persuasion;

b) It is non-violent as it is an appeal to the majority within acceptable constitutional norms and ethos. This means that, "it expresses disobedience to law within the limits of fidelity to law…it falls between

legal protest and the raising of test cases on the one side, and conscientious refusal and the various forms of resistance on the other" (1971:322);

c) It is not militant because it does not consist of violence or rebellion. It accepts the prevailing political order and does not seek to change it;

d) It largely occurs within a "nearly just society" (1971:335);

e) It is expressed either directly or indirectly (1971:320);

f) "It is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally" (1971:321-2).

A Public Act

Civil disobedience is expressed openly to convey a specific political conviction or persuasion. Its publicity seeks to draw the attention of the majority.

Non-Violent

It is a civil protest that has no element of coercion and this civility aids to its appeal to the majority. It also occurs within the limits of loyalty to prevailing law and therefore accepts the legitimacy of the legal order to punish acts of disobedience. Civil disobedience acknowledges and takes responsibility for illegal acts.

Non-militant

Civil disobedience is not militant; it does not consist of violence or rebellion. It accepts the prevailing political order and does not seek to change it. According to Andrew Sabl, Rawls' method is "one of moral appeal rather than mere coercion" (2001:307). Therefore, Rawls' intention was to help establish the point at which it is not binding to respect the law of the majority for the sake of making an appeal to justice. Thus, civil disobedience is non revolutionary because its primary aim is to make such an appeal to the majority and therefore its intent cannot be ulterior.

Suited to Nearly Just Regimes

It occurs in just or nearly just constitutional regimes (Rawls, 1971). Rawls' civil disobedience can be justified in democratic states that uphold rule of law and conform to principles of constitutionalism. The essence of civil disobedience is the appeal by affected groups to the majority's sense of justice. All citizens of such a state are considered equals in line with the principles of the social contract.

It is Expressed Directly or Indirectly

In Rawls' view, the disobedient need not directly violate the law in question, but may in the process of dissent, violate other laws. There are instances whereby it may not even be practical to violate a specific law or policy in contention but one may express their objection by violating a different law. He gives the example of an unjust law on treason and argues that; "if the government enacts a vague and harsh statute against treason, it would not be appropriate to commit treason as a way of objecting to it" (1971:320).

According to Rawls, "it does not require that the civilly disobedient act breach the same law that is being protested" (1971:320). For example, disobedience against an electoral law could instead violate the public order legislation and this would constitute indirect civil disobedience.

It is a Political Act

Civil disobedience is based on expressly political convictions. "It is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally" (Rawls, 1971:321). For example, Bredhoff records that in 1955, Rosa Parks was arrested for refusal to obey an Alabama law that required blacks to sit at the back of a bus and to surrender seats for white passengers if the bus was full. Her arrest triggered a bus boycott which lasted over a year and also culminated in a decision by the Supreme Court (in 1956) to outlaw discrimination on public transport (Bredhoff, S, et al, 1999:207-11). Her defiance against a public law was an act of civil disobedience. The format of civil disobedience during the anti-segregation campaigns, included sit-ins, marches, consumer boycotts etc. One of the leading activists of the Birmingham campaign was Martin Luther King Jr, who claimed that men had "a moral responsibility to disobey unjust laws" (Martin Luther King, Jr. *African Studies Centre, University of Pennsylvania*, 16 April, 1963. no page number). King maintained that "an unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself" (*Letter from a Birmingham Jail*, 1963).

King's civil disobedience was partly inspired by the example and philosophy of Mahatma Ghandi, who promoted his own version of civil disobedience, self-styled as "*satyagraha"*, devotion to truth or truth-force (The Martin Luther King, Jr. Research and Education Institute, no page number). In justifying his

civil disobedience, Ghandi argued that "non-cooperation with evil was as much a duty as cooperation with good" (The Martin Luther King, Jr. Research and Education Institute, no page number).

Conscientious Refusal

In contrast, conscientious refusal is repudiation of a known sanction. It is "noncompliance with a more or less direct legal injunction or administrative order" (Rawls, 1971:323). It is not necessarily a public act and it does not appeal to a shared sense of justice. Furthermore, it can be based on various grounds which may be inconsistent with the constitutional order (i.e. on religious grounds, pacifism etc.). An example of conscientious refusal is when Jehovah's witnesses refuse to sing a national anthem on grounds of their religious belief. Similarly it occurs when ultra-Orthodox Jews in Israel refuse to enlist for national military service on the basis that it would interfere with their time for religious study and devotion.

The Fidelity to Law Condition

Due to its loyalty to the law, civil disobedience accepts punishment and does not exempt an activist from the legal consequences of their right actions. A protestor may be liable for penalisation for the law against which they are protesting or any other law that they breach in the process of protesting. In many instances, disobedients are found liable for public order offences rather than for breaking the law which constitutes their object of protest. According to Rawls, "this fidelity to law helps to establish to the majority that the act is indeed politically conscientious and sincere and that it is intended to address the public's sense of justice… To be completely open and nonviolent is to give bond of one's sincerity" (1971:322). Similarly, Charles Fried argued that by

accepting punishment, a protestor "is affirming the value of law in general, while at the same time disobeying it" (1964:1269). In his "Letter from a Birmingham Jail", Martin Luther King Jr, also subscribed to the penalization thesis. Before his incarceration in a Birmingham Jail on 12TH April, 1963, Martin Luther King was a major fundraiser for the anti-segregation movement and part of the money was used to pay bail for jailed protesters (The Martin Luther King, Jr. Research and Education Institute, no page number).

However, Kimberley Brownlee has challenged the fidelity to law condition of Rawls' formulation by arguing that the willingness to accept consequences does not always affirm fidelity to law because of the various motives an agent can have (2016). Brownlee also argues that Rawls' account does not explain the motives of protesters "who are ambivalent or hostile to their legal system" (2016:969). For instance, based on this premise, to what extent does civil disobedience by illegal immigrants (as outsiders) appeal to a common view of justice? Did Rawls anticipate a society with such diverse elements?

Grounds for Civil Disobedience

In Rawls view, civil disobedience is permissible on several grounds. Firstly, it is warranted for "infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity" (1971:326). Secondly Rawls says it is justified if minorities have suffered injustice and have attempted to get the state to address it, to no avail (1971:326). Thirdly, civil disobedience is acceptable if appeals and legal objections have failed to persuade the majority to review an unjust scheme. These grounds are deemed sufficient on their own for one to invoke the right to civil disobedience. Rawls claims that **"**by engaging in civil disobedience one intends, then, to address the sense of justice of the majority and to serve fair notice that in one's sincere

and considered opinion the conditions of free cooperation are being violated" (1971:335). Those who feel violated in spite of the social compact, ought to definitely express themselves.

For Rawls, "to deny justice to another is to refuse to recognize him as an equal" (1971:336-7). Thus in Rawls' perspective, civil disobedience provides a basis upon which "legitimate democratic authority may be dissented from in ways that while admittedly contrary to law nevertheless express a fidelity to law and appeal to the fundamental political principles of a democratic regime" (1971:338). He therefore argues that in a nearly just society, deliberate injustice justifies resistance (1971:337) and any displeasure with civil disobedience and its digression from usual norms must be directed not against the activists but to those who abuse power (1971: 342).

In a just society, civil disobedience becomes an essential institution in the same league as other democracy sustaining institutions like elections and the judiciary (Rawls, 1971:336). Thus, Rawlsian civil disobedience can be a stabilising force for the effective functioning of a liberal society and it doubles as another avenue to check against the dictatorship of the majority. Rawls therefore advances the notion of justified civil disobedience on the basis that it recognises the prevailing political democratic dispensation and is willing to bargain for more rights within the system. In this context, civil disobedience simply becomes a check against arbitrary power and prevents the proliferation of undue harm. Furthermore, acts of civil disobedience under the Rawlsian view do not extend harm to other citizens through violence and coercion.

The Role of Civil Disobedience

In Rawls' just society, civil disobedience fulfils four cardinal roles. Firstly it is a form of justice appeal for the minority. In conducting their protest, the dissenters make an appeal to the majority against what they deem as an unjust imposition and seek to compel the majority to view things from their perspective.

Secondly, civil disobedience helps to uphold justice by acting "to inhibit departures from justice and to correct them when they occur" (Rawls, 1971:336). In the Rawlsian view, it also helps to strengthen just institutions. Due to its fidelity to law premise, civil disobedience generally upholds the values of a just society whilst drawing attention to specific violations of justice. This self-correcting mechanism allows just institutions to make the necessary adjustments that remove harms and enhances public confidence in their efficacy.

Finally, civil disobedience provides a justifiable avenue for legitimate dissent. Through its appeal to justice, as well as the recognition of all people as co-equals in a liberal state, civil disobedience is not dismissive of the prevailing political order and therefore eschews violent resistance and revolution which come with unpredictable levels of adversity.

The Challenge of Civil Disobedience

Some pertinent questions arise with respect to Rawls' formulation. One key question is, whether under justified civil disobedience, the minority gets a free rein to take advantage of the majority. However, Rawls thinks this risk is mitigated by the commonly held conception of justice among equals. The minority should act conscientiously to promote just ends rather than manipulate the majority. According to Sabl, Rawls' theory encourages

cooperation between an aggrieved minority and the majority. A key ingredient for this cooperation is the shared "sense of justice" and "reciprocity" by all sides (Sabl, 2001:312). Therefore, society operates in a system of reciprocity whereby citizens "promote just schemes" with the expectation that others will also do likewise (Sabl, 2001:315). Disobedience is not a mere act of defiance but rather it is a bargaining mechanism, it "represents a demand that persons in power renegotiate the existing terms of social existence" (Sabl 2001: 319).

The second question is whether civil disobedience promotes anarchy, whereby any agent may feel justified to institute some form of dissent whenever they are unhappy over various aspects of justice in society. Rawls thinks this is unlikely because all citizens of a liberal state have political duties and obligations that they ought to fulfil in pursuit of a just society. He argues that,

> while each person must decide for himself whether the circumstances justify civil disobedience, it does not follow that one is to decide as one pleases…To act autonomously and responsibly a citizen must look to the political principles that underlie and guide the interpretation of the constitution (1971:341).

Some Objections

In prioritising non-coercion and cooperation, Rawls' approach demands protesters to exercise a high level of collaboration with authorities whilst employing civil means of expressing their discontent without resort to violence. However, some theorists (i.e. William Smith) argue that by prohibiting the use of force, justified civil disobedience falls short of the potential leverage that it would command if it included some use of violence. The use of violence is viewed as inevitable in some contexts, especially where citizens are up against unjust authoritarian states that suppress civil liberties. The "scale and severity of injustice in national, transnational and global

contexts is such that far more radical forms of disobedience can and perhaps should be undertaken" (Smith, 2019:363). Thus Rawls' theory can be viewed as very demanding on a protestor, especially in the wake of rigid policy making institutions and authoritarian regimes. Sabl further argues that the aim of civil disobedience which is the "free renegotiation of social terms" is not usually attainable (2001:324). This is partly because vested interests are often unwilling to budge or compromise and this paves the way for violent change. Critics also question the scope of justification in Rawls formulation. Further discussion will be made on this point.

However, Rawls does seem to open the door to some kind of coercion but he falls short of stipulating the conditions for doing so because the primary aim of his thesis is an exposition of civil disobedience in a relatively just society, where the majority are sensitive to claims by a minority. He argues that:

> to engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address…..Sometimes if the appeal fails in its purpose, forceful resistance may later be entertained (1971:321-2).

In view of the foregoing critique, some scholars have proffered alternative accounts of civil disobedience and some adopt Rawls' approach as their point of departure. These new approaches warrant a brief discussion.

Alternative Accounts

William Smith, proposes a deliberative model in which civil disobedience helps to bring neglected issues into the spotlight within the public sphere. By elevating hitherto unattended issues, civil disobedience repels the inertial forces that undermine the effectiveness of the public sphere. Civil disobedience aims to jolt an indifferent public sphere out of its slumber and

bring to the fore pertinent policy issues that need to capture a society's imagination. Thus according to Smith, "citizens carry out civil disobedience not with the aim of self-promotion, but with the intention to publicize discourses that identify and address problems of demonstrable and urgent import to the democratic community" (2011:156). Furthermore, it counters the inertia that militates against the norms of inclusion in the policy-making process (2011:159).

Smith's argument cites the activism of global social movements that have elevated local issues such as poverty and inequality at global levels. The work of global protests such as the occupy movement, the Yellow Vests and Greenpeace, demonstrate how civil disobedience challenges entrenched orthodoxies that are responsible for the policy inertia that hinders alternative worldviews. Greenpeace adopted civil disobedience as its primary advocacy strategy. Rex Weyler one of the founders of *Greenpeace International* argues that;

> Civil disobedience is often necessary when the relatively weak face the relatively strong. When power is out of balance, as in most cases of social justice advocacy, civil disobedience may be one of the few tactics left for citizens (2014, *Greenpeace International*, 27 February, no page number).

Greenpeace activists have successfully used civil disobedience in many of their campaigns to send their message across. For example in July 2013, "German Greenpeace activists boarded a ship docked in Hamburg and prevented it from leaving with a cargo of meat from endangered fin whales hunted off Iceland" (Kumi Naidoo, *The Guardian* 11 July, 2013).

Similarly the Yellow Vests were ordinary French citizens mainly from rural communities who heavily relied on cars. The yellow vests protests were ignited by a rise in fuel taxes and the protesters responded by blockading roads and

traffic intersections to get Government attention for their demands to reverse the fuel tax hike. They took to the streets on every Saturday for more than a year. The movement gained extensive public support and the Government was forced to concede. However, the protests were also accompanied by widespread unintended violence which was exacerbated by heavy handed response by the police (Benjamin Dodman. *France24*, 16 November, 2019).

Smith suggests that despite its seemingly non-deliberative nature, civil disobedience somehow works to impose a deliberative process because it invites the audience to some kind of moral dialogue concerning issues of law and public policy (2011: 166). Since it's a deliberative process, Smith suggests that civil disobedience can invoke violation of other laws than the one in contention in order to induce public dialogue. He states that,

> civil disobedience need not involve infringement of laws that are the object of the protest, but can involve infringement of other laws provided that such actions are rationally framed to communicate the intended opposition to law and policy (Smith, 2011:156).

However, this deliberative process is a soft approach that ought to be devoid of violence because "coercion is unlikely to facilitate the affirmation of oppositional arguments and may instead promote resentment" (Smith, 2011:160). In contrast, the chief aim of civil disobedience is to instigate deliberation rather than to compel outright capitulation to the demands of protesters.

Smith suggests that civil disobedience compels public discourse partly through the debate it generates about the punishment to be meted out to disobedients. He argues that it is, "much harder to ignore civil disobedience than lawful protest, because a judgment must be made about the merits of punishing its practitioners" (2011:162). For example, in South Africa, the excessive criminalisation of lockdown offences and the staggering number of people who

would accumulate a criminal record, stimulated a public debate about the manner in which the lockdown was being enforced. Recently, the deputy minister of Justice, John Jeffries, said "South Africa would like to see a process to expunge records for admission of guilt fines because of the detrimental effects on people" (Ernest Mabuza *DispatchLive*, 18 January, 2021).

Kimberley Brownlee proposes a rights-based approach and argues that "the right to civil disobedience is grounded in people's rights to freedom of expression and conscientious action" (2018:291). She argues that as reasoning beings, people are entitled to pursue their convictions. She further submits that,

> in my view, people have a moral right to engage in civil disobedience regardless of either the cause they champion or the regime in which they champion it. This right is rooted in a humanistic respect for people as reasoning, feeling, and expressive beings who are capable of deep commitments. In short, when a person has a deep moral conviction, she has strong interests in having some freedom to act expressively and conscientiously to manifest that conviction in her life and to deliberate with others about its merits. (Brownlee, 2016:730).

Therefore, civil disobedience exclusively derives from one's conscientious convictions which could likely emanate from a host of values and interests. For Brownlee, civil disobedience can be invoked not only on grounds of justice and equality but also on people's moral convictions. She argues that the benefit of a conscientious expression ground is that "it applies the right generally to defenders of majority and minority views alike" (2018:293).

This implies that the appeal to civil disobedience is not restricted to an aggrieved minority but it is a matter of conviction, so that even an agent who holds with the majority, may engage in civil disobedience if only to reinforce

the majority view. Thus it is conceivable to have civil disobedience by supporters and opponents of a particular argument and both parties could still be in breach of the law (i.e. public order infringements, illegal gatherings, curfew breaches etc). For example, in the context of Covid-19 restrictions, most public gatherings were not allowed, therefore, according to Brownlee's view, protesters who took to the streets to protest against mask wearing were as justified as those who took to the street to support the wearing of masks.

During Covid-19 protests, in some countries, it was a common scene to have protesters and counter protesters at the same scene. A recent report detailed how thousands of anti-lockdown protesters from across Germany converged in the city of Kassel.

> Protesters carried placards reading; *No compulsory vaccination and Democracy will not tolerate censorship*.
>
> Marchers faced counter-protesters wearing face masks, one of whom held up a placard reading, *Vaccinated* (*Reuters*, 2021).

Therefore for Brownlee, "civil disobedience has significant deliberative value in political decision-making regardless of who resorts to it" (2018:293). Brownlee's conception proposes a departure from Rawls in the sense that it appeals to the sense of justice of both the majority and the minority alike.

She further argues that "punishment of civil disobedience is not morally permissible" (2016:731). This right "provides people with defeasible normative protection against all forms of state interference with their acts of civil disobedience including penalization" (2018:291). Therefore, civil disobedience should generally be exempt from punishment save for exceptional circumstances where it collides with other key rights or significant goods. Thus whilst for Rawls, penalisation is unconditional because of the fidelity to law principle, for Brownlee penalisation ought to be a rare exception.

> Civil disobedients enjoy defeasible claim-right protection against all forms of state interference including penalization and punishment. Since these rights are defeasible, judges may sometimes justifiably intrude upon these rights (i.e. infringe upon them) when these rights conflict with either other rights or significant goods. (Brownlee, 2018:295).

Brownlee maintains that the right to civil disobedience can be over-ruled in order to resolve conflicts arising from the clash with other indispensable rights or significant goods. Therefore, when this conflict of rights arises, the judges who are compelled to intrude upon the right to civil disobedience ought to apologise to the affected protester (2018:295). For Brownlee, just like Rawls, civil disobedience constitutes a deliberate breach of a known law. However for Brownlee, this breach ought to be exempt from sanction except when it clashes with other superior rights or goods.

For David Lefkowitz, civil disobedience is premised on political participation rights. He maintains that "adequate recognition of the moral right to political participation encompasses a moral right to public disobedience" (2007:217). Thus in spite of being in breach of the law, citizens who engage in civil disobedience effectively engage in right action because the "moral right to public disobedience consists in a right to do wrong" (Lefkowitz, 2007:206). It is a moral duty to register dissent and to resist laws that are perceived to be unjust. Leftkowitz also places accent on the communicative role of civil disobedience by asserting that "morally justifiable acts of civil disobedience must be acts of public communication" (2007: 216). So though preceding from a slightly different premise, (i.e. political participation rights) Leftkowitz's view bears some convergence with Rawls.

Robin Celikates advocates a "more practice based, democratic and pluralist approach" (2016:986), in which civil disobedience also extends to changing

institutions. Civil disobedience is construed as a practice of contestation that allows citizens to participate and express themselves when the "official and regular institutional channels of action and communication are closed to them or are ineffective in getting their objections across" (Celikates, 2016:41). As a practice of contestation, it pits the power of the state with the power of its organised citizens who employ civil disobedience to augment their avenues for voice (Celikates, 2016). Celikates describes civil disobedience as;

> an intentionally unlawful and principled collective act of protest (in contrast to both legal protest and 'ordinary' criminal offenses or motivated rioting), with which citizens – in the broadest sense that goes beyond those recognized as citizens by a particular state – pursue the political aim of changing specific laws, policies or institutions (in contrast to conscientious objection, which is protected in some states as a fundamental right and does not seek change) in ways that can be seen as civil (as opposed to military) (2016:985).

The pluralist approach claims that Rawls' formulation has limited justification based on an appeal to a sense of justice and individual liberties against political majorities. It argues that, in excluding "certain forms of socio-economic inequalities, procedural and institutional shortcomings in democratic political systems" (Celikates, 2016:986), the liberal view tends to discount the role of civil disobedience "as a specifically extra-institutional form of political practice" (Celikates, 2016:40). Thus the pluralist view has a wider scope of justification for accommodating these elements.

Therefore, citizens can act outside of normative institutional settings to express themselves and contest the prevailing policy narratives. In this context, civil disobedience becomes a "democratizing force…aimed at "initiating and reopening deliberation" when policymaking is impeded by

'deliberative inertia' (Celikates, 2016:986). It is democratising because of the extra space accorded to citizens even outside established institutions of voice such as political parties (which can be part of democratic deficits in liberal states).

My Conception of Civil Disobedience

I will recognize civil disobedience on Rawls' premise and also in line with the supplementary accounts as an intentional act that seeks to change not only laws but also policies and institutions on the basis of a rights discourse beyond political participation rights. Therefore, the narratives of lockdown protests in modern South Africa can be conceptualized through this extended conception of civil disobedience.

In Rawls' account, the minority is juxtaposed against the prevailing majority in a liberal society. However with reference to South Africa, and for purposes of this paper, the minority constitutes various interest groups that seek to engage the state with regards to the various lockdown restrictions. These groups are not necessarily patterned along the socio-demographic structure of South African Society (i.e. not on racial or ethnic lines). Therefore the relevant minority comprise of various interests ranging from Cape residents, religious groups, the taxi associations, civic groups, coastal communities, booksellers associations etc. The action premise of these groups conforms to Rawlsian grounds for civil disobedience, namely; the conscious defiance of a state law or regulation that they consider unjust, violations of the principle of liberty and state obduracy against addressing an injustice.

An instructive example of this sort of civil disobedience in South Africa, is the campaign against the e-toll road levy system that was set up for Gauteng

highways. Motorists simply rejected what they viewed as an unreasonable and complicated billing system that did not transparently demonstrate how the costs are computed and shared equitably. The e-tolling system was viewed as irrational and unwieldy (and presumably unjust?) and thousands of motorists have not been paying their e-toll invoices for several years.

Therefore, due to the perennial challenges with implementing the e-tolls, the Gauteng government recently relayed its decision to revoke the e-tolls and further disclosed that the National Government would soon make a final pronouncement on the matter (SABC News, 27 May, 2021). According to the civic group, Organization Undoing Tax Abuse (OUTA):

> This is what we have been waiting for and fighting for nine years now and if that is the case we are going to have to celebrate this as a big win for civil society for a very successful civil disobedience campaign that has brought down an unjust law and rightfully so (SABC NEWS 2021,27 May).

Summary

The various perspectives underscore that civil disobedience is a deliberate and unlawful act of protest against law, policy or even institutions with a view to bring desired change. Protest actions are of themselves not inherently unlawful (i.e. picket, and protest marches are normally permitted by civic authorities on the basis of a permit to hold such gatherings). However, the threshold into civil disobedience is crossed when the agent is in deliberate breach of law. For instance, a protest march against the lack of food parcels, is absolutely legitimate, but it becomes a violation if the protest violates lockdown restrictions concerning public gatherings. Therefore in this case, civil

disobedience is not in the content of the protest, but in its execution. The strength of civil disobedience is that it generates debate, partly through a consideration of the kinds of punishment that should be meted out to protesters. It is therefore an important, deliberative resource. Whilst civil disobedience, is different from other forms of resistance by its willingness to accept punishment (i.e. Rawls, Celikates, Smith), there is contestation among scholars about whether penalisation is permissible or not.

I believe that Rawls provides a credible conception of civil disobedience as an intentional action that also appeals to the commonly accepted notion of justice. I also concur with the complementary account by Celikates which extends Rawls' theory in terms of relevance and scope of application. Rawls' theory is constrained by limited justification grounds, whereas in a liberal democracy, civil disobedience is amenable to a wider scope of justification. A broader rights-oriented discourse seems to be a legitimate premise in contemporary liberal society.

According to Sabl, Rawls' theory "makes excessive demands on disobedients because those who disobey are subject to stringent ethical constraints with respect to both means (nonviolence, non-coerciveness) and ends (cooperation with former oppressors, not something more retributive)" (Sabl, 2001:325-6). Whereas the pluralist approach (i.e. Celikates) views civil disobedience as broad based and open to both citizens and undocumented migrants to express themselves even in dysfunctional democracies where "institutional channels of action and communication are closed to them or are ineffective in getting their objections across" (Celikates, 2016: 991).

The next section will review the ethical basis for the lockdown regime in South Africa, the nature of the lockdown regulations and their moral import.

SECTION III: MORAL THEORY AND THE LOCKDOWN REGIME

Introduction

An exploration of moral reasoning during emergency situations can assist in understanding the specific moral reasoning behind the formulation of the lockdown regime and its enforcement. It is imperative to understand the intentions of the deliberators in view of the significant impact of the lockdown on human liberties and livelihoods. The South African Government's performance with respect to the Covid-19 lockdowns raises questions on the sort of deliberation that was pursued and more so because public health is considered a public good. In this chapter, I review the Government's ethical framework for the response and highlight some of the harms arising from the lockdowns. I also examine the moral theory of deliberation that was employed.

The lockdown regulations are non-pharmaceutical interventions formulated according to the Disaster Management Act No. 27 of 2002 (Government of South Africa, Gazette No43107, 18 March, 2020). These regulations are modeled on World Health Organization (WHO) guidelines developed to help decision makers with preparedness plans for dealing with influenza pandemics (WHO, 2007). According to the WHO, the guidelines seek to help political leaders to infuse ethical considerations into influenza pandemic preparedness plans (2007:2). The WHO further prescribed that regulations that restrict individual rights and liberties "must be necessary, reasonable, proportional, equitable, non-discriminatory, and in full compliance with national and international laws" (2007:3). It also emphasized that, restrictions on human rights should be based on the "least restrictive and intrusive means available; and not arbitrary, unreasonable or discriminatory" (2007:9). The WHO also proposed optimum respect for freedom of movement and emphasised that

mandatory quarantine and isolation should only occur when voluntary options are not possible (2007:9).

South Africa's Response Plan

South Africa's response model was based on five (5) alert levels, each with regulations of varying severity depending on the alert level. Level 5 was the most stringent level whereas level one (1) had relatively scaled down restrictions. The regulations were enforced by the South African National Defense Force (SANDF) and the South African Police Service (SAPS). According to the Minister for Cooperative Governance, the "key determinants of the alert levels include; community transmissions and the capacity of the health care system to cope, the rate of testing, the number of positive cases and the proportion of available and used beds" (Government of South Africa, 2020c).

The import of the restrictions was the curtailment of certain freedoms. The restraint on gatherings meant that the constitutional right to freedom of assembly would be compromised. Other affected freedoms include; access to employment and livelihood (in non-essential services), freedom of movement, right to religious gatherings, access to recreational and sporting activities, right to parental visits and family visits etc. The regulations were enacted by the Minister for Cooperative Governance and Traditional Affairs (COGTA) in consultation with Cabinet. The Disaster Management Act empowers the Minister to sanction such regulations outside the normal parliamentary approval process. The declaration of a state of disaster is an effectual policy mechanism because it enables the Minister to make regulations and directions on numerous aspects of resource mobilization (in consultation with the responsible portfolio Ministers). In giving such scope to the Minister, the

legislation sought to ensure that a comprehensive response is galvanized against disasters. An extract of the regulations are listed below and they are sourced from the Disaster Management Act Regulations (Government of South Africa, 2020 b; Government of South Africa, 2020 c).

Alert Level 5: "Drastic measures to contain the spread of the virus and save lives."

- "Every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service,"
- "Every gathering is prohibited, except for a funeral,"
- "Movement between provinces and between metropolitan and district areas is prohibited,"
- "Movement of children between co-holders of parental responsibilities and rights or a caregiver is prohibited,"
- "Attendance of funerals is restricted,"
- "All businesses and other entities are closed except for any business or entity involved in the manufacturing, supply, or provision of an essential good or service,"
- "All commuter transport services including passenger rail services, bus services, taxi services, e-hailing services, maritime and air passenger transport are prohibited, except those rendering essential services,"
- "Religious, cultural, sporting, entertainment, recreational, exhibitional, organisational activities are prohibited,"
- "Public parks, beaches and swimming pools, flea markets, open air food markets, restaurants, fetes and bazaars, night clubs, casinos, hotels, lodges and guest houses, private and public game reserves,

shopping malls closed" (Government of South Africa, 2020 b; Government of South Africa, 2020 c).

Alert Level 4: "Extreme precautions to limit community transmission and outbreaks, while allowing some activity to resume."

- "Every person is confined to his or her place of residence except those involved in essential services,"
- "Every person is confined to his or her place of residence from 20H00 until 05H00 daily,"
- "Persons are allowed to walk, run or cycle between the hours of 06H00 to 09H00, within a five kilometer radius of their place of residence; provided that this is not done in organised groups,"
- "Movement between provinces, metropolitan areas and districts is prohibited,"
- "All gatherings are banned, except for funerals or workplaces meetings,"

- "Public parks, sports grounds and fields, beaches and swimming pools, flea markets, fêtes and bazaars, night clubs, casinos, hotels, lodges, bed and breakfasts, airbnbs, timeshare facilities and resorts, and guest houses, private and public game reserves are closed,"
- "The sale, dispensing and distribution of liquor is prohibited. The sale of tobacco, tobacco products, e-cigarettes and related products is prohibited,"
- "Only prescribed Businesses (primarily essential services) may operate" (Government of South Africa, 2020 b; Government of South Africa, 2020 c).

Alert Level 3: Strict precaution to contain transmission whilst allowing limited activities.

- "Every person is confined to his or her place of residence from 22H00 until 04H00 daily, except where a person has been granted a permit,"
- "All borders of the Republic must be closed, except for ports of entry designated for transportation of fuel, cargo and goods, humanitarian operations, repatriations and medical emergencies, diplomatic travel,"
- "People who are able to work from home to do so. Phased return to work under strict health protocols,"
- "Sports grounds and fields and swimming pools limited to training of professional athletes and selected sporting codes,"
- "Restriction on sporting events except where a special permission is granted, no spectators,"
- "Hotels, lodges, bed and breakfasts, timeshare facilities and resorts and guest houses closed, except to the extent that these facilities are required for accommodation people in quarantine or isolation, remaining tourists confined therein, for work purposes, for intra-provincial leisure purposes,"
- "Passenger ships for international leisure purposes are prohibited,"
- "Restrictions on sale of tobacco and alcohol,"
- "Night clubs closed,"
- "No night vigils and after funeral gatherings" (Government of South Africa, 2020 b; Government of South Africa, 2020 c).

Alert Level 2: Regulations include p”hysical distancing and restrictions on leisure and social activities.”

- “No movement of persons between 2300 Hours and 4:00am,”
- “Closing time is 22H00 for the following establishments, whether indoors or outdoors: cinemas; theatres; casinos; museums, galleries and archives; beaches, game parks, gyms and fitness centres, Faith-based or religious gatherings; social, political and cultural gatherings, limited to 100 persons or less for indoor venues and 250 persons or less for outdoor venues,”
- “Limited capacity in restaurants, bars, taverns and shebeens”,
- “No spectators are allowed at sports venues,”
- “Partial opening of land borders,”
- “Buses and Taxis to carry not more than 70% capacity for long distance travel (200km),”
- “Sale of liquor permitted during stipulated hours,”
- “Strict enforcement on wearing of masks in public,”
- “Night vigils, after-funeral gatherings including "after-tears" gatherings prohibited,”
- “Passenger ships for international leisure purposes are prohibited” (Government of South Africa, 2020 b; Government of South Africa, 2020 c).

LEVEL 1: **"**Most normal activity can resume, with precautions and health guidelines followed at all times."

- "Every person is confined to his or her place of residence from 00H00 until 04H00 daily, unless he/she has a special permission,"
- "Attendance of a funeral is limited to 100 persons or less,"
- "Faith-based, religious gatherings; and social, political and cultural gatherings, are permitted but limited to 250 persons or less for indoor venues and 500 persons or less for outdoor venues,"
- "Spectators are allowed at the venue of the sports match,"
- "All persons who are able to work from home must do so. However, persons will be permitted to perform any type of work outside the home and to travel to and from work and for work purposes subject to compliance to health protocols,"
- "Bus and taxi services may not carry more than 70% of the licensed capacity for long distance travel" (Government of South Africa, 2020b; Government of South Africa, 2020 c).

The Government's Ethical Premise

In deliberating on the lockdown, the Government had several ethical approaches at its disposal. It could adopt either adopt the Kantian perspective or prefer a utilitarian approach. However, it appears that a utilitarian model was ultimately adopted in the formulation and promulgation of the Disaster Management Regulations and associated measures.

Utilitarianism is a consequentialist theory that considers the rightness of an action to be based on the consequences of that action. It proposes that "the right action maximizes the good" (Driver, 2005:34). Thus an action's permissibility or requirement depends on the extent of the good that it will produce. It is geared at improving overall well-being, thus bringing about the

"greatest good for the greatest number" (Shafer-Landau, 2012:120). Therefore, any action that produces the best outcome (for the greatest number) is permissible.

In contrast, deontological theories hold that consequences are not the sole determinant of the rightness of an action. Rightness can be the property of an action in itself and the intentions and motives of an agent cannot be discounted. This is premised on the fact that people are rational agents capable of right action. Deontology recognizes constraints that are agent-relative. Thus, its actions are motivated by principles such as fidelity, loyalty, friendship, gratitude and avoidance of harm to others (McNaughton and Rawling, 2007:33).

The Government's ethical stance towards the lockdown was premised on the moral duty to save more lives and reduce the spread of the pandemic. The trade-off was between the duty to save lives and the obligation to sustain livelihoods. Therefore, whilst the lockdown restrictions aimed to save lives, there was the converse risk of the loss of livelihoods and freedoms. Thus the Government was paradoxically faced with making "the agonizing choice between plague and famine" (Peter, Bruce, *Sunday Times*, 24 May, 2020). The use of utilitarian considerations is often preferred in public health emergencies because it allows decision makers to make hard choices using a simple (or not-so-simple) calculus and decisions are aimed at achieving the optimal consequences for the majority.

The initial implementation of a hard lockdown (Levels 4 and 5) enabled Government to build health sector readiness whilst ensuring that resources were not depleted prematurely. It also bought time to learn from international experience in terms of clinical trials, vaccine development and other interventions. The lockdowns also aided in creating instant public awareness about the pandemic. The lockdown approach also took into consideration, the

spatial planning exigencies of the country which rendered certain measures, like the maintaining of social distancing and self-isolation, impractical in densely populated communities. The Government also opted for a one-size fits all approach due to ensure that the response to the Covid-19 pandemic did not play out according to the pattern of historical socio-economic imbalances.

In his justification of the lockdown, President Ramaphosa argued that:

> The urgent and dramatic measures we have taken to delay the spread of the virus have been absolutely necessary. They have given us the space to better respond to the inevitable rise in infections and to thereby save tens of thousands of lives.
>
> While the nation-wide lockdown is having a devastating effect on our economy, it is nothing compared to the catastrophic human, social and economic cost if the coronavirus could spread among our people unchecked.
>
> Our foremost priority now is to intensify the health interventions needed to contain and delay the spread of the disease and to save lives (Address by President Cyril Ramaphosa, Government of South Africa, 21 April 2020 d).

In a further explanation of Government action, the Minister for Cooperative Governance and Traditional Affairs, argued that the decision to come up with the lockdown model was,

> Based on sound scientific data and predictions which motivated us to rally efforts to flatten the infections curve. We had also studied many approaches to dealing with COVID-19 and pandemics of this nature and all of them showed us that *early and more aggressive interventions*

would assist us to grow faster after the pandemic is over (Address by Dr Nkosazana Dlamini-Zuma, Government of South Africa, 2020 e).

However, the extended duration of these stringent interventions was not foreseen and the Government may be excused for having to face the brunt of public fatigue against the lockdown. Disaster management regulations are designed for brief spells during the management of the particular emergency.

Government also prepared a solid mitigation plan for dealing with the consequences of the lockdown through soft measures such as social grants and business stimulus funding. In April, the Government prepared a "R500 billion (US$ 26 billion) fiscal emergency response, which included a Social Relief of Distress Grant" to cushion the country from the economic fallout arising from the pandemic (Naude et al, 2020: 2). Other measures included, a tax relief facility for businesses, disaster relief funds, income support through the Unemployment Insurance Fund (UIF) and financial support to small businesses. The Government also promised to deliver an economic recovery strategy and announced a "R200 billion loan guarantee scheme in partnership with the major banks, the National Treasury and the South African Reserve Bank" to support businesses (Government of South Africa, 21 April 2020d).

According to Staunton et al, "only 16 per cent of the South African population has access to medical aid, with most of its population relying on the public healthcare sector that is under resourced and poorly administered" (2020:2). The plight of the population is exacerbated by the high disease burden occasioned by the Human Immuno-deficiency Virus (HIV/AIDS) and Tuberculosis. Staunton et al also note the "significant burden of tuberculosis (TB), HIV, and HIV/TB co-infection, with millions of the population on immunosuppressant drugs as well as others who are HIV positive but not

receiving treatment for HIV" (2020:2). Thus "preventing and containing the spread of COVID-19 in South Africa was a critical priority" (Staunton et al, 2020:3). Containing Covid-19 infections would help avert a new co-infection matrix whereby the Corona virus would interact with HIVAIDS and TB thus worsening the already precarious disease burden. Therefore, the Government decision to implement a lockdown by limiting the movement of people was viewed as an astute decision at the time in view of the capacity challenges of the health sector and the high disease burden.

Staunton et al maintain that, "President Ramaphosa faced making a choice between prioritizing health to slow the spread of the virus or putting the economy first and risk exposing an already weakened healthcare system and population suffering from other comorbidities to the virus. Faced with this choice, his decision to lockdown the country cannot be criticised and may prove decisive in containing and slowing down the spread of the virus" (Staunton et al, 2020: 3).

At the early stage of the pandemic, South Africa's response was seen as a trendsetter and the fiscal support package equaled about 7% of GDP (Naude & Cameron, 2020: 2). The comprehensive fiscal response was augmented by a robust health sector plan which sought to ensure that testing was well underway by August 2020. The health sector strategy also comprised of research collaboration on clinical trials with a number of international partners (Naude and Cameron, 2020).

The Minister for Cooperative Governance noted Government's early success in curbing the spread of the virus by these comments;

> Thanks to our swift action we were able to contain the virus partially through the actions related to the State of National Disaster which we declared on the 15th March. As a result, we managed to slow rate of

> infection significantly from the projected rate (Government of South Africa, 2020e).

A Bump on the Road

However, in spite of the positive start, Naudé and Cameron reported that by June 2020, the Government response had started to falter.

> By June 2020 however, the lockdown was in disarray: the number of confirmed infections continued to grow exponentially, placing the country amongst the ten most affected countries in the world, and on average eight public protest actions took place daily. Moreover, the business sector launched a campaign, supported by more than 50,000 businesses, to have government end the lockdown altogether (Naudé and Cameron, 2020:1).

Naudé and Cameron claim that by the end of August 2020, South Africa was sixth among the "ten most affected countries in the world" with over 13,000 deaths (2020:1). Government's failure was attributed to mismanagement and economic recession.

> Three months later, the "feel-good bloom" is well and truly over, and the country is failing to pull together. Two reasons are first the government's mismanagement of the lockdown, and two, the economic collapse in the country (Naudé and Cameron, 2020:3).

Mismanagement was attributed to corruption associated with Covid-19 relief funding, high levels of brutality in the enforcement of the lockdown as well as a series of irrational regulations (Naudé and Cameron, 2020:3).

Statistics South Africa (2020a) reported that "economic activity for the entire year decreased by 7% in 2020 compared with 2019." It also noted that the country had experienced the sharpest decline in activity since 1946 (Statistics

South Africa, 2020 a). The economic decline was also associated with the massive decline in the global economy. Statistics South Africa also reported that "the formal non-agricultural sector shed 648 000 jobs in the second quarter of 2020" (Statistics South Africa, 2020 b), 15 October, http://www.statssa.gov.za/?p=13690).

> The economy suffered a significant contraction during April, May and June, when the country operated under widespread lockdown restrictions in response to COVID-19.
>
> Gross domestic product (GDP) fell by just over 16% between the first and second quarters of 2020.
>
> Historical data from 1960, sourced from the South African Reserve Bank, show that the second quarter of 2020 experienced the biggest fall in GDP since that year…(Statistics South Africa, 2020 c), 8 September, http://www.statssa.gov.za/?p=13601).

Latest data (as of 27TH April 2021) from the WHO (2021) indicates that South Africa now had accrued approximately 1.5 million cases, 54, 000 deaths, about 1.5 million recoveries and 10 million tests. However, according to Naude and Cameron, one of the biggest setbacks from the mishandling of the pandemic was a "massive erosion of trust in government" (2020:4).

A Review of Government's Ethical Model

With respect to the lockdown, the Government pursued a consequentialist approach with a view to prioritize the health and physical well-being of the majority at the risk of compromising livelihoods and freedoms. Thus citizens were expected to make the trade-off between health and other goods such as earning a livelihood, free movement at night, travel across provinces, open access to religious worship etc.

Though well intended, the lockdown regulations were inevitably susceptible to some of the risks inherent in utilitarian projects. According to O'Mathuna, utilitarian schemes can be prone to several challenges that include, "uncertainty in predicting outcomes…the undervaluing of individual rights and the endorsement of overly paternalistic approaches in the name of the common good" (2016:9).

For example the Government of South Africa was accused of being a 'nanny state' based on "the notion that the state tells citizens that it knows more about what is good for them than they do" (Steven Friedman, 2020. *The Conversation*, 3 June). Similarly the Minister for Cooperative Governance, Dr Dlamini-Zuma, partly justified the ban on cigarettes by suggesting that smokers tend to share cigarettes and this habit would help spread infections. Government was accused of "undermining civil liberties in a paternalistic manner" (Anciano et al, *Mail & Guardian*, 15 May, 2020).

The lockdown was largely effective in saving lives and reducing infections. However some of the restrictions led to certain harms, including the death of citizens at the hands of law enforcement. These harm producing restrictions created permissible grounds for acts of civil disobedience.

Evidence from other countries show that there is scope for a more decentralized approach to lockdowns, whereby, industry groups, local authorities and individuals could be granted greater autonomy in decision making. Some countries were effective in pursuing a less paternalistic approach. For example, Sweden avoided a full lockdown and its approach had both voluntary (recommended) and mandatory restrictions. Alcohol sale was restricted after hours and masks were mandatory in public during rush hours.

Broadly speaking, Sweden has closed its international borders, including those to neighboring Norway, and allowed internal society to stay open.

> While there are limits on the maximum amount of people in a social gathering, these come in the form of "recommendations" rather than strict laws enforceable by fines (Guy Davies and Bruno Roeber, *ABC NEWS***,** 28 February, 2021).

A study by Cameron-Blake et al, on the Covid-19 response in Britain, found that the initial approach was a centralised lockdown initiated by Downing Street. However, the management of eased restrictions and mitigation was decentralised to the four nations (namely Wales, Scotland, England and Northern Ireland). Their decisions were guided by the number of cases and National Health Service (NHS) Capacity in each nation (Cameron-Blake et al, 2020:11). This policy's flexibility allowed room for voice and ownership of the response within the devolved nations. The United Kingdom (UK) regulations also permitted people to leave home, based on a 'reasonable excuse', the grounds of which included food and drinks purchase, family visits, hospital visits, work, moving house, child visits, recreation etc (UK, Government, 2021). It therefore appears that it was possible for the decisions on the hard lockdown to have been approached differently in South Africa.

These outcomes also lead one to ponder whether a different mode of deliberation (i.e. deontology) may have been more justifiable in the circumstances. Deontology allows agents more options from which to ground their actions other than maximising good or ensuring the best outcome for the majority. Thus, it provides room for agents to fulfil existing duties and obligations to particular people and the moral value of actions are not merely dependent on the calculus of utility maximisation. Therefore, "what seems most distinctive of deontology is the claim that we are sometimes required not to maximise the good" (McNaughton and Rawling 2007:33).

According to Immanuel Kant, "a person's duty or moral obligation is determined by adherence to a given principle that does not appeal for its

justification to actual or expected consequences to be produced" (Driver, 2005:42). By emphasizing the importance of duty to moral principles and recognising the ability of agents to reason and make right choices, Kantianism is compatible with the notion of human rights and is therefore more amenable to a rights based discourse in contrast to utilitarianism which places less recognition on the autonomy of individual agents. For Kantianism, the autonomous agent acts on the basis of some moral obligation and are therefore capable of acting responsibly. This resonates with the narratives of civil disobedients who invoked their freedom to make right choices and objected to state paternalism.

Unintended Harms Arising From the Lockdown

The promulgation of the lockdown was not effected through the normal consultative process partly due to the immediate shutdown at the onset of the pandemic that also affected Parliament. Furthermore, some of the regulations have been found irrational and illogical. However, it is the enforcement that has proved to be extremely contentious and very costly. The excessive criminalisation as well as the widespread violation of human rights through police and Army brutality has been an unfortunate dent on the noble efforts to use the lockdown to lower infections and curtail the disease. The inclusion of the Army in the enforcement of the lockdown was not adequately justified.

The Disaster Management Act grants the Minister for Cooperative Governance and Traditional Affairs authority to restrict certain rights and liberties in order to accommodate the disaster management regulations. However, the rights "cannot be derogated from, and any regulations promulgated must conform to the Bill of Rights" (Staunton, 2020:4). The regulations are also open to

judicial review as evidenced by the numerous court challenges which were instituted against the Government.

Whilst the regulations largely withstood the various legal tests that they were subjected to, there were some rulings that found against some of the regulations on the premise that they were invalid, irrational and unconstitutional (i.e. De Beer and Others v Minister of Cooperative Governance and Traditional Affairs (21542/2020); Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020).

The lockdown restrictions curtailed certain freedoms like the right to protest, which are indispensable to liberal democracy. The right to protest is associated with the right to peaceful assembly and freedom of expression. The right to peaceful assembly and freedom of expression may often be expressed through protest action. The lockdown regulations curtailed people's freedom of assembly and left it to the discretion of law enforcement officials who were sometimes irrational and unreasonable.

> The regulations governing the national lockdown up until now have limited the constitutional right to assemble peacefully, but the country has continued to experience protests…..Whilst the lockdown regulations are a national law, their enforcement seems to depend on who is protesting, why they are protesting and where the protest is taking place…Motorists in Johannesburg, for example, recently engaged in a motorcade to protest gender-based violence, which the President commended. In Durban, however, motorists experienced resistance from City law enforcement when they intended to engage in a similar action to protest the ban on the sale of cigarettes and other tobacco products (Stanley Malematja. *GroundUp*, 17 August, 2020, Opinion).

However, in Britain, lockdown restrictions recognised public protest "organised by a business, a charitable, benevolent or philanthropic institution, a public body or a political body in respect of which the organiser takes the required precautions. The required precautions were: carrying out a risk assessment and taking all reasonable measures to limit the risk of transmission of the coronavirus" (House of Commons, 2021:13). However, implementation had mixed results, due to the ambiguity of whether leaving home for a protest falls also under a reasonable excuse. This compelled legislators to call on Government to review the law to "make clear that protest is permitted if conducted in a manner that reduces public health risks to an acceptable level" (House of Commons, 2021:25). Similarly, a group of sixty (60) Parliamentarians took a stand for the right to protest and they urged the Home Office to "issue guidance to police forces on facilitating protests to clear up the legal confusion surrounding the issue" (*BBC News*, 2021).

The WHO believes that lockdown measures (i.e. restricting movement of persons, limiting gatherings and travel) could be potentially effective in curbing the spread of a pandemic (2007:9). However, there are also certain unintended harms that ensue. A notable consequence is the delay in treatment and immunization for other illnesses. The WHO reported health risks for millions of children globally due to delayed or suspended vaccination for preventable diseases like polio and measles (2020 b). A related outcome was the deferment of other non-emergency treatments and procedures. These procedures include cancer treatments, elective surgery and diagnostic therapies. Covid-19 lockdowns also resulted in a decline in HIV testing and treatment. In South Africa, there was a fifty-seven percent (57%) decline in HIV testing between March and April 2020 (Pontsho Pilane, *Mail & Guardian*, 4 September, 2020).

In their work on the 'collateral damage' caused by the Severe Acute Respiratory Syndrome (SARS) pandemic Bernstein and Hawryluck noted the "devastating psychological distress suffered by patients who were isolated from their families, those same families who could not visit their ill loved ones, patients awaiting access to various aspects of the health care system, and health care workers" (2003:269).

Another harmful outcome was the criminalisation of the pandemic, accompanied by the high number of arrests as well as incidents of police brutality. The high level of criminalisation is not consistent with the principle of proportionality. The use of disproportionate force for petty offences was in many instances unwarranted and consistent with President Ramaphosa's claim that the police became too 'enthusiastic' (Ferial Haffejee, *Daily Maverick*, 1 June 2020). Reported deaths, allegedly caused by law enforcement officials, such as the death of Collins Khosa, seem unwarranted. The excessive arrests, imply that the principle of least coercive measures was not applied to good effect.

Lockdown restrictions also compromised the quality of life through the loss of employment, loss of income and livelihoods. Restrictions on recreational activities only served to exacerbate these unpleasant circumstances. There were also reports of high levels of depression leading to the risk of illness and suicide. There was also a notable a spike in incidents of domestic violence (Amnesty International, 2021).

However, the record of these ethical infringements, some of which were unintended, also raises a paradoxical question which relates to the cost of the lockdown. Did the state anticipate the cost of the lockdown especially with regards to the mitigation of livelihoods? In its deliberation, did the state anticipate that it would afford the cost in order to reciprocate its citizens or

did it shoot itself in the foot through over-regulation? Whilst the lockdown was well intended, Government (and the entire world) did not anticipate the extended duration of the pandemic and the absence of a vaccine which further exacerbated the crisis. The Government was certainly overstretched and did not anticipate the consequent harms of a prolonged economic clampdown. Perhaps, a review of the approach may have been useful after six months when it became apparent that a vaccine (which would also be delayed) was the only ultimate remedy.

In some communities, residents under lockdown felt that there was no reciprocity in respect of duties between the state and the public. For example the protest narratives of groups like the Taxi industry, show that they felt ignored or believed that the Government mitigation measures were merely an exercise in tokenism. Reciprocity seems to have also been breached when promised food parcels would not arrive to the recipients on time, leading to protests like the ones witnessed at the Cape Flats. Failure to provide food parcels to communities in lockdown whilst asking the same citizens to give up their right to earn a living created an untenable situation in favour of disobedience. However, Government's non-reciprocity was also not an intentional harm, but rather an outcome of the sheer ubiquity of the effort required in accommodating the needs of different communities and stakeholders in a pandemic.

Staunton et al, have argued that whilst response measures such as lockdown, social distancing and quarantine were effective in curbing infections in other countries, their effectiveness were compromised by realities of the South African context (2020:3). They note that thirteen percent (13%) of households live in dense informal settlements and a large percentage of the population rely on congested public transport (2020:3). Therefore, in formulating a policy response, the South African deliberator needed to take

these factors into consideration to mitigate harm. However, this does not appear to have been fully considered. As noted by Justice Davis:

> The clear inference I draw from the evidence is that once the Minister had declared a national state of disaster and once the goal was to flatten the curve by way of retarding or limiting the spread of the virus (all very commendable and necessary objectives), little or in fact no regard was given to the extent of the impact of individual regulations on the constitutional rights of people and whether the extent of the limitation of their rights was justifiable or not (De Beer and Others v Minister of Cooperative Governance and Traditional Affairs (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020).

The Role of Civil Disobedience in Promoting Harm

In view of the unintended harms caused by the Government's response, it is also prudent to examine whether there were any harms arising from acts of civil disobedience. Although we may not accurately identify all the causal factors, it is possible to establish some linkages regarding the extent to which non-compliance with some of the regulations contributed to the spread of infection. Did altering the carrying capacity of taxis make things worse? Did the anti-brutality protests become super spreader events? These questions are also relevant for assessing the rationality of the government's lockdown approach.

Medical experts have confirmed that commuters may be at risk of infection in in heavily loaded public transport vehicles even when wearing a face mask because Covid-19 can also be spread through airborne infection (Iavan, Pijoos, *Timeslive*, July 14, 2020). Thus the decision by Santacco to unilaterally load taxis at 100 per cent capacity during the Level 3 lockdown, may have exposed commuters to increased infection.

However, in South Africa there was a drop in infections in mid-January 2021 and this came on the back of the Christmas holidays where many commuters had travelled in fully loaded public transport to and from their families across the provinces and abroad (Gabriele Steinhauser, *Wall Street Journal* 14 March 2021). In explaining the trend, medical experts inferred that this was due to the fact that "sections of the population had reached a level of immunity that made it harder for the virus to jump between different groups" (Gabriele Steinhauser, *Wall Street Journal* 14 March 2021).

In addition to the scientific evidence, the transmission pattern of the virus should also take into consideration the flawed spatial planning that was orchestrated during Apartheid with its permutations that include densely populated townships and high volumes of urban-township commuter traffic. According to Dr Dlamini–Zuma, "the virus, has exposed our deep-seated fault lines, including Apartheid spatial planning, as we have said many a time" (Government of South Africa, 2020, COGTA Minister's Press Statement, 25 April). Therefore, the effects of the lockdown may have also been informed by spatial planning dynamics.

The *New York Times* carried out an investigation into whether the protests linked to the death of George Floyd led to an uptick in Covid-19 infections in the United States. Epidemiologists reported that there was no notable uptick in infections that could be attributed to the protests. Two plausible explanations were offered for this outcome. Firstly, was that the earlier lockdowns enacted in March had possibly worked. Secondly, epidemiological data had showed that "the virus spreads far more easily indoors than outdoors and close contact indoors is believed to be the main driver of transmission" (Joseph Golstein, *New York Times,* July 1, 2020). Citing studies carried out in Japan, Goldstein noted that "the odds of transmission were 18.7 times higher in closed environments than in open-air environments" (Joseph, Goldstein, *New York Times*, July 1, 2020). Thirdly, the protests were believed to have

triggered avoidance behavior, they compelled more people to stay home thus generally limiting the spread (Joseph, Goldstein, *New York Times*, July 1, 2020). These findings suggest that outside protests by various civil disobedients such as those witnessed at Cape Town and Muizenberg Beaches, protest marches against police brutality, defiance of curfews etc were unlikely to have significantly increased the risk of infection because they were in open air environments.

Summary

In the wake of the pandemic, the Government mounted a rigorous and comprehensive response. The response, which was in the form of a general lockdown, complemented by socio-economic impact mitigation measures, was generally effective. The response plan was informed by utilitarian considerations which tend to prescribe a one size fits all approach that prioritises outcomes. Therefore, the lockdown arrangements were a sort of blanket approach that limited flexibility and voluntary precautionary measures.

Whilst relatively successful, the lockdown regime was accompanied by some unintended harms such as the excessive use of force and excessive criminalization. The heavy handed enforcement regime as well as criminalisation of lockdown violations were very glaring. The non-application of least coercive measures, led to South Africa ranking among the leading countries in terms of the number of arrests for lockdown violations. There were also unjustified restrictions on access to alcohol and tobacco. The experience of countries like Britain and Sweden suggests the viability of more flexible (and less aggressive) approaches to the lockdown.

A Kantian approach may have helped to encourage agents to make right decisions for protecting themselves and others whereas hard enforcement

compels resistance. Furthermore, a Kantian approach to decision making that treats others as autonomous rational agents may have assisted the Government deliberators to be more vigilant to harm that would likely accrue from the lockdown regime and therefore introduce more measures that mitigate such harm.

However, in view of the challenges, we also have to be mindful of South African peculiarities, such as social inequality, poverty and Apartheid era spatial planning, which served to compromise effective social distancing and quarantine measures in densely populated communities. Furthermore, the protracted duration of the pandemic was unforeseen and one can somewhat sympathise with Government's predicament in the wake of the subsequent public fatigue with the lockdowns, leading to acts of civil disobedience.

The next section will review public responses to the lockdown restrictions and the emerging public discourse. It will also detail the various acts of civil disobedience resulting from lockdown regime.

SECTION IV: THE PUBLIC RESPONSES TO THE LOCKDOWN

Despite politicians making the right noises about respect for people's rights and freedoms, some law enforcement officials (i.e. police officers, soldiers, and health workers) continued to act with impunity in 'enforcing' the national disaster guidelines. In response to such violations, the public reacted through acts of defiance on the premise that some of the lockdown rules were unreasonable, draconian or irrational.

The Institute of Security Studies (ISS) reported a surge in protest action during the Covid-19 lockdown and the enforcement of restrictions was found to be among the major drivers of the protests. (Lancaster and Malaudzi, 2020). For the month of July 2020, the ISS recorded 232 demonstrations and this represented the highest monthly tally since January 2013. It is also reported that in South Africa, there have been more lockdown related arrests than in any other country. It was reported that by the 1ST of June, 2020, "more than 230 000 people had been arrested for violating lockdown regulations, while eleven (11) people (all black) had died at the hands of the police enforcing the lockdown" (Labuschaigne, 2020:26).

By August 2020, the number of arrests had risen to 298,252 of whom 28 337 were found guilty of lockdown infringements ranging from selling or possession of liquor, illegal gatherings, transport industry violations etc (*SABC News*, 14 August, 2020). President Ramaphosa suggested that the high number of arrests was because the police had "let their enthusiasm get the better of them" (Ferial Haffajee, *Daily Maverick*, 1st June, 2020).

The consequences of the high level of arrests is excessive criminalisation of lockdown infringements. Ferial Haffajee argued that the implication of the high arrests, was that "230,000 South Africans now face having criminal records for often minor infringements such as being on a road walking but without a

till slip to prove a purchase, or smoking a cigarette without a slip to prove a historic purchase" (*Daily Maverick* , 1ST June, 2020).

Thuli Madonsela, a law professor and former Public Protector, has weighed in on the criminalisation debate by cautioning that contrary to numerous reports, police are not supposed to make arbitrary arrests without a warrant.

> Police are not allowed, by law, to arrest anyone for not wearing a face-covering without issuing a warning first; the offence is in refusing to adhere to an instruction to wear a mask.
>
> She added: If police are arresting people without first asking them to wear a mask, they are breaking the law. The regulations require the police to first warn you to put on a mask (Cebelihle Bhengu, (*Timeslive*, 26 January, 2021).

As President Ramaphosa suggested, the security forces seemed to be heavy handed in their approach. This is supported by reports of excessive use of force in enforcing social distancing and travel curfews. For example, in Alexandra, the police "used water cannons and rubber bullets to disperse people peacefully queuing outside food shops" (Katie Tripp, *Africa Source*, 24 June, 2020). *Fox News* also narrated some of the infringements that accompany the lockdown, citing abuse in spite of the predicament of the poor who live hand to mouth. "A joint police and army patrol in Johannesburg's Alexandra Township were caught on camera forcing several men to perform squat jumps or roll on their sides through muddy water puddles, after being found reportedly out of their houses without any good reason" (Paul Tisley, *Fox News*, 30 March, 2020). Yet for many of South Africa's poor the streets are their source of livelihood.

> People in the townships live hand to mouth, relying on daily wages to purchase food for their needs. They do not have a stockpile of food. For

many, staying at home means going hungry (Paul Tisley, *Fox News*, 30 March, 2020).

In response to the police and army brutality, a defiant public embarked on protests across the country to protest against police and army brutality. Therefore some acts of disobedience were in response to the heavy handed enforcement regimen**.** In Johannesburg, protesters defied the lockdown laws to march to the Constitutional Court to protest the death of Collins Khosa who reportedly died in the hands of security forces (Kim Harrisberg, *Reuters*, 9 June, 2020). Khosa was allegedly killed after being assaulted by soldiers who found him consuming alcohol at his home (Iavan Pijoos, *Timeslive*, 15 April, 2020).

Residents of Mitchell's Plain in Cape Town, took to the streets in defiance of the ban on gatherings, to demand "promised food parcels that were not delivered" (Anciano et al, 2020). In May 2020, Anita Powell reported that South African Booksellers operated shops in defiance of Level 4 lockdown regulations which only permitted selling 'books of educational value' (Anita Powell, *VOA News*, 7 May, 2020). The booksellers were of the view that the definition of educational books was subjective, rather all books were educational (Anita Powell, *VOA News*, 7 May, 2020). Furthermore, books were deemed an essential amenity whose need was even more pronounced during the lockdown. When closing bookstores, the Government was banking on e-books as an alternative route for accessing reading materials. However, for most South Africans, access to e-books is hindered by lack of electricity, lack of access to the internet and poverty (Anita Powell, 'South *VOA News*, 7 May, 2020).

In June 2020, civil society group Afriforum instituted a legal challenge against unreasonable lockdown regulations compelling people who test positive to be quarantined at a state facility. "Afriforum argued that these regulations would

have given the state the power to force people into quarantine without their permission – even under circumstances where the person may be able to effectively self-isolate." (*BusinessTech*, 3 June, 2020, Staff Writer). In response, "the North Gauteng High Court ordered that South Africans who test positive for Covid-19 cannot be forced to quarantine at a state facility if they can self-isolate at home" (*BusinessTech*, 3 June 2020, Staff Writer,).

On 29TH June 2020, the South African National Taxi Association (Santaco) ordered its member "to defy Transport Minister Fikile Mbalula's directives and to begin operating at 100% capacity" (Luke Daniel, *The South African*, 29 June, 2020). It also instructed long distance taxi operators to resume operations without the necessary permits (Luke Daniel, *The South African*, 29 June, 2020). This was in response to the losses incurred by the industry due to reduced passenger capacity and the lockdown in general. The Association also complained against undue harassment by law enforcement officers who were impounding vehicles belonging to its members.

In order to cushion the impact of the pandemic, the Government also offered a R1.1 billion subsidy to the taxi industry (Luke Daniel, *The South African* 29 June, 2020). However, Santaco felt that Government's offer was insufficient and the situation was dire as some of its members had missed bank repayments and were at risk of having their vehicles repossessed.

> This treatment from the Minister has forced us to think very deep in our unspoken frustrations cos it's clear we were sold empty shells (Santaco president Phillip Taaibosch, quoted by Luke Daniel, *The South African* 29 June, 2020).

On 13th August, 2020, *BusinessTech* reported that a consortium of business organisations with more than 50,000 members and also comprising of the National Employers Association of South Africa, Restaurant Association of South Africa, the Southern African Agri Initiative (SAAI), also weighed in on

the debate and petitioned Government to end the lockdown. They argued that the lockdown was a humanitarian disaster and its harms would "exceed even the most pessimistic Covid-19 scenarios." They called on Government to end the lockdown and "allow people and organisations to manage their unique risks by converting all Covid-19 regulations into non-compulsory recommendations" (*BusinessTech*, Staff Writer, 13 August, 2020).

In January 2021, during four (4) weeks of civil disobedience, 7, 270 people were arrested in KwaZulu Natal for flouting lockdown regulations. Out of these, "1,579 were arrested for failing to adhere to the curfew" (Nkosikhona Duma, *Eye Witness News*, 26 January, 2021). Similarly, scores of people assembled at Muizenberg Beach in Cape Town, in direct contravention of the Level 3 lockdown regulations on the closure of beaches. They defied police who were armed with riot shields, batons and stun grenades. These protests were mobilised and planned through social media. The protestors claimed that they were fed up with restrictions prohibiting visits to the beach. (Tom Head, *The South African*, 30 January, 2021).

> Among the lawbreakers were children dressed in bathing suits and underwear accompanied by parents wearing sun hats, niqabs and flip-flops. Protesters expressed a desire for more consultations on the regulations since they had a severe impact on the economy and people's livelihoods (Aron Hyman, *Sunday Times, 31 January, 2021).*

During the lockdown, protesters across the country were increasingly using social media to mobilise for civil disobedience against illogical and unfair restrictions. For example, it was reported that "a poster circulating on social media called on surfers, business people and vendors to take a stand against the ban in the Western and Eastern Cape" (Tanya Krause, *SABC News* 30 Jan 2021).

> I just feel that this has been really unfair in the sense that I now have to go to the gym to get exercise where I'm surrounded by 30 or 40 other people panting, etc. And I'm much more exposed to COVID than being in the ocean where with the kite you've got 20 meter lines, you can't come very close to other people (Tanya Krause, *SABC News* 30 Jan 2021).

These civil disobedience protests also drew support from political leaders who were opposed to the lockdown. For example the SABC reported that "both the Cape Town Mayor, Dan Plato and Western Cape Premier, Alan Winde were opposed to the ban on beaches" (Tanya Krause, *SABC News,* 30 Jan 2021).

The numerous acts of non-cooperation were being deliberately carried out by a public in defiance of restrictions that they deemed to be either irrational, unreasonable or unjust. It is further instructive to note that South Africa experienced a nuanced expression of civil disobedience ranging from deliberate defiance of curfew orders, breach of restrictions on movement by ordinary citizens, organized defiance like the decision by Santaco to load taxis at 100 percent capacity in open breach of Covid-19 regulations. Acts of disobedience were premised on concerns for livelihoods, business survival and human freedoms. The high number of arrests as well as violence by security forces, did not deter the public from continuing to violate the lockdown regulations. Although some of the grounds for disobedience were not premised on life and death considerations like access to livelihood, the vigor of the protests were based on the view that it was not essential to comply with regulations that were in principle irrational.

The cited case studies are consistent with the liberal notion of civil disobedience prominently represented by Rawls. The nature of the protests: i) were non-violent and not coercive ii) they upheld fidelity to the law (in general) and iii) they were not premised on other grounds like conscientious

objection. Civil disobedience is the prerogative to show dissent but such dissent comes with acceptance of punishment (i.e. Rawls' fidelity to law condition). A protest can be public expression of one's views which is part of freedom of expression but the protest becomes an act of disobedience if protesters willfully breach the law, such as Public Order laws, or violate the lockdown regulations.

The actions and narratives of protesters were not a wholesale rejection of the national lockdown regime, but aspects of it that were deemed irrational, unreasonable or unjustified. Thus their form of disobedience complies with the characterisation that civil disobedience is non-violent nor revolutionary and conveys an appeal to dialogue. The various protesters may not have been conscious of making an appeal to the majority in the sophisticated Rawlsian sense, however they were certainly expressing what they viewed as reasonable claims.

The various accounts of protests some which were challenging irrational lockdown rules, also represent a practice of contestation that set citizens against the vertical power of the state apparatus. Many acts of civil disobedience, (i.e. from the tobacco industry to the beach residents of Muizenberg) sought a re-negotiation of socio-economic terms.

Though they respected Government's efforts to curb the pandemic, protesters also had expectations of reciprocity. For their compliance to the lockdown regime, disobedients expected Government to reciprocate with appropriate mitigation measures to ameliorate suffering and loss of livelihoods. For example, the taxi industry suffered financial losses and its members faced the risk of their vehicles being repossessed. Therefore, they relied on Government to come up with a viable mitigation plan. They decided to defy the lockdown once they realised that the proposed relief package was woefully inadequate. Protesters therefore, were willing to engage with the state. For instance, whilst

Santaco defied the regulations after walking out of negotiations with the Government, they were willing to comply if a better mitigation package would be offered. Similarly Cape Flat residents were willing to stay in-doors provided promised food parcels were provided.

PUBLIC DISCOURSE IN SUPPORT OF CIVIL DISOBEDIENCE

Due to the prominence of the lockdown, civil disobedience became a matter of public discourse and various arguments have been advanced in support of civil disobedience. These arguments are on grounds of rationality, illogical rules, arbitrary decisions and lack of community engagement. The rationality test is a legal principle that explains justification to limits on fundamental rights. It is "concerned with the evaluation of the relationship between means and ends… whether the means employed are rationally related to the purpose for which the power was conferred" (SAFLII, 2020, ZAGPPHC. "De Beer and Others v Minister of Cooperative Governance and Traditional Affairs" (21542/2020). The Constitution (Republic of South Africa) stipulates that "rights limitations must be reasonable and justifiable, factoring the purpose of the limitation and the relationship between the limitation and its purpose" (Government of South Africa, 1996). Thus people are not obliged to consent to a law that is unreasonable as this encroaches on their fundamental rights. Therefore, in the face of irrational laws, civil disobedience is justified.

According to Deon Rossouw, too many lockdown regulations did not adhere to the rationality test and this leads to general contempt for lockdown rules:

> People tend to lose respect for regulations that seem either unfair or irrational. In the present situation there are just too many regulations that fail both the fairness and the rationality tests. This not only breeds contempt for those regulations that fail the test, but for Covid-related regulations in general (*Business Day* 27 July 2020).

The Free Market Foundation's Martin van Staden argued that civil disobedience was justified because "there was no good reason to comply with an unjustifiable or intolerable law (*Free Market Foundation*, 30 June 2020). A classic case of illogicality was the ban on e-commerce activities by the Minister for Trade and Industry, whereas "elsewhere in the world, the economic impacts of lockdowns were mitigated by an expansion of e-commerce" (Naude et al, 2020:3). The Minister had argued that "if we open up any one category, let's say e-commerce, unavoidably there's enormous pressure to do the same for physical stores, for spaza shops, for informal traders, so there is fair competition" (Duncan Mcleod, *TechCentral,* 26 April 2020). However, during the pandemic, e-commerce trade was the logical alternative for complying with social distancing and avoid gatherings in malls and shopping areas.

Former Finance Minister Trevor Manuel, also joined the clarion call by public commentators who were concerned with the irrational lockdown approach arguing that "we must ensure that the economic rules are rational, and I think that a lot of the decisions that have been taken do not pass the test of rationality." Manuel called for less heavy handed policing and proposed that Government should open up space for "ordinary South Africans [to] own the changes that are necessary to ensure that we can lower the infection rates of Covid-19" (Rebecca Davis, 2020,*Daily Maverick*, 11 May, 2020).

Professor Thuli Madonsela, reasoned as follows:

> it seems to me that the two key challenges to the lockdown are social justice and reasonableness — which are both protected in the constitution….But you need to know, Mr President, that there are increasing concerns about the reasonableness of some of the Covid-19 rules (*Financial Mail*, 4 June, 2020).

She therefore posed the question: "Can our government demand obedience in respect of Covid-19 regulations on these grounds"? Professor Madonsela also questioned the efficacy of extending the "draconian restrictions" imposed by the lockdown and whether this was the best policy path for South Africa. The *Mail and Guardian* argued that "if people cannot eat, they will not obey a lockdown; nor is there any reason, practical or moral, for them to do so." (*Mail & Guardian*, (Special Report), 17 April, 2020).

Staunton et al, contend that the push back against the lockdown was due to "the lack of public deliberation and community engagement" in the development of the regulations (2020:3-4). They further argued that the criminalisation of lockdown regulations failed to address the core issue of non-compliance. The lack of engagement was underscored by increasingly vocal opposition from political parties such as the Democratic Alliance (DA). The DA claimed that "the government was abusing its power with arbitrary rules and outrageous announcements that are increasingly met with resistance and even outright civil disobedience" (Andrew Harding *BBC Africa News*, 11 May 2020).

Acts of civil disobedience were also backed through legal challenges and there were several judgments that validated public sentiments against irrational regulations. The legal challenges mounted by civic groups like Afriforum do not amount to overt acts of civil disobedience, however these gave legal and philosophical expression to the claims and actions of ordinary citizens that were already obtaining on the ground (i.e. people were already resisting compulsory quarantine, breaching unreasonable curfews and exercise rules etc).

The views of protesters sound reasonable. The over-regulation of certain forms of leisure in a lockdown is questionable, i.e. if in lockdown, why not exercise as long as you can or want on relatively deserted roads given you

have all the time? Another plausible argument against the exercise curfew is the non-consideration of shift workers who arrive home in the morning after the exercise period has elapsed; why should shift workers not exercise during the daytime whilst of course observing social distancing?

The North Gauteng High Court found against the state with respect to forced quarantine rules after Afriforum argued that the regulations were "unconstitutional, illegal and irrational" (Staff Writer, *Business Tech*, 3 June 2020). It ordered that "South Africans who test positive for Covid-19 cannot be forced to quarantine at a state facility if they can self-isolate at home" (Staff Writer, *Business Tech*, 3 June 2020). This order proved to be a very important and rational decision because at the height of the first and second Covid-19 infection waves, home isolation proved to be a huge relief to the severely burdened health sector. Therefore, civil disobedience helped to raise issues of permissible conduct by both the state and citizens during the lockdown and it helped to mitigate the arbitrary nature of the regulations.

On 2nd June 2020, the Gauteng High Court adjudicated on the matter between DeBeers and Others versus the Minister for Cooperative Governance and Traditional Affairs. The applicants sought relief on four (4) main aspects including, the right to hold public gatherings:

a) "That the national state of disaster be declared unconstitutional, unlawful and invalid;"
b) "That all the regulations promulgated by the Minister be declared unconstitutional, unlawful and invalid;"
c) "That all gatherings be declared lawful alternatively be allowed subject to certain conditions;"
d) "That all businesses, services and shops be allowed to operate subject to reasonable precautionary measures of utilising masks, gloves and hand sanitisers. This relief was, however, only sought as an alternative

and made subject to consultation with the Essential Services Committee contemplated in Section 70 of the Labour Relations Act, 66 of 1995" (SAFLII, 2020, ZAGPPHC. "De Beer and Others v Minister of Cooperative Governance and Traditional Affairs") (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020).

In response, the court held that the lockdown was not unlawful and many of the regulations were reasonable. However the court found that a bulk of lockdown restrictions did not pass the rationality test. In his ruling, Judge Davis argued that:

9.2 "The regulations promulgated in respect of Alert Levels 4 and 3 in terms of Section 27(2) of the Disaster Management Act by the Minister in a substantial number of instances are not rationally connected to the objectives of slowing the rate of infection or limiting the spread thereof."

9.3 "In every instance where means are implemented by executive authority in order to obtain a specific outcome an evaluative exercise must be taken insofar as those means may encroach on a Constitutional right, to determine whether such encroachment is justifiable. Without conducting such an enquiry, the enforcement of such means, even in a bona fide attempt to attain a legitimate end, would be arbitrary and unlawful."

9.4 "Insofar as the lockdown regulations do not satisfy the rationality test, their encroachment on and limitation of rights guaranteed in the Bill of Rights contained in the Constitution are not justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in Section 36 of the Constitution" (SAFLII, 2020, ZAGPPHC. "De Beer and Others v Minister of Cooperative Governance

and Traditional Affairs") (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020).

Therefore, whilst the lockdown was well intended, its execution was flawed. The formulation of the National State of Disaster regulations did not benefit from the customary legislative oversight, but were rather the prerogative of a single Minister through the Disaster Management Act 57 of 2002 (SAFLII, 2020. ZAGPPHC. "Justice N Davis, 2020: De Beer and Others v Minister of Cooperative Governance and Traditional Affairs" (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020). This lack of scrutiny certainly deprived the lawmakers of the requisite ethical input into the regulations despite their significant bearing on daily life. As Staunton et al have argued, the push back against the lockdown in South Africa was due to "the lack of public deliberation and community engagement" in the development of the regulations (2020:3-4). In other countries, parliamentary scrutiny and oversight during the lockdown was maintained, through Parliamentary Committees which could meet both in small groups and through virtual conferencing. Parliaments also vested more powers in committees or reduced quorum and attendance requirements (OECD, 2020).

Emergency conditions like the state of disaster are also subject to expiry after brief intervals to avoid abuse of power and renewal would require parliamentary approval. However, in the South African context, the Disaster Management Act allows the Minister of Cooperative Governance and Traditional Affairs (COGTA) to extend the state of disaster (after consultation with Cabinet). With respect to the formulation of lockdown regulations, the COGTA Minister consults with Cabinet colleagues and key stakeholders but a separate parliamentary process is not required. However, opposition parties

have criticised Government's ability to renew the state of disaster perpetually without legislative scrutiny (*BusinessTech*, 11 March 2021, Staff Writer).

On 18TH February, 2021, Mr Cilliers Brink, a Member of Parliament from the Democratic Alliance gave notice to parliament to introduce a Private Member's Bill which seeks to amend the Disaster Management Act. The bill, proposes to place constraints on the wide-ranging powers conferred on the Minister of Cooperative Governance and Traditional Affairs under the Disaster Management Act ("DMA"), and to provide for parliamentary oversight over the exercise of the Minister's powers to declare, and extend, a state of disaster and to make subordinate legislation (Government of South Africa, 2021).

Summary

Whilst the Covid-19 lockdown was well intended, its execution was flawed. Government initiated the lockdown with good intent and it was a sensible intervention in dealing with a pandemic of this magnitude. It formulated a battery of lockdown regulations and guidelines as emergency procedures under the National Disaster Management Act. The guidelines restricted the movement of people, curtailed certain individual freedoms and shut down non-essential work. In view of the gravity of the situation, the security forces were also roped in to effectively enforce the lockdown and things got off to an optimistic start.

However, fault lines soon emerged, as police brutality became synonymous with lockdown regulations; and as the period of the lockdown was extended beyond the initial six weeks, lockdown fatigue quickly set in and the public started to question the prolonged curtailment of freedoms and livelihood opportunities. Civic groups exposed the cracks in the regulations that were

deemed irrational and unreasonable. In response, Government's sometimes paternalistic narratives did not aid the situation. A series of successful legal challenges against the lockdown served to embolden the defiant public and civil disobedience became part of the public response the lockdown. A series of questionable (irrational) decisions also exposed the limitations of a paternalistic approach to the pandemic.

Resistance to the lockdown took the form of rule defiance, protest action, and the deliberate flouting of lockdown guidelines. What is remarkable about the defiance, is the scope of actors who were involved, from ordinary citizens, to local communities, civic groups and industry groups. Acts of civil disobedience were on grounds of personal liberties, with protesters invoking the right to make individual choices including the right to earn a living. Secondly the protests were premised on the irrationality of lockdown regulations.

The acts of civil disobedience were also consistent with Rawls' notion of justified civil disobedience which recognises the prevailing political democratic dispensation and is willing to bargain for more rights within the system. The narratives of protesters assembling at state offices including Parliament and the Union Buildings were neither militant nor revolutionary and the object of engagement was to cause the state to ameliorate harms associated with the lockdown. Therefore, the legitimacy of the state was not in question and in fact some of the protests (i.e. beach protests in Cape Town) were backed by official opposition parties like the Democratic Alliance.

Civil disobedience entails the right to show dissent, but such dissent comes with acceptance of punishment to show that the disobedient accepts the import of the law and only dissents to particular aspects. Thus protesters are willing to accept punishment for their cause and such punishment inspires debate concerning the object of their disobedience. Jurgen Habermas surmised that, civil disobedience is "an element of a mature political culture"

that manifests itself on a continuum between legitimacy and legality (1983:99). He therefore frowned on a constitutional state that would treat civil disobedience as a common crime, arguing that such a state would be subject to "the spell of an authoritarian legalism" (1983:112).

The next section is the concluding chapter.

SECTION V: CONCLUSION

My main question in this essay was to establish whether civil disobedience was a suitable moral response to the Covid-19 lockdown regime in South Africa; that is, was it rational and justifiable? However we first need to confirm whether the protests against the lockdown can be characterised as civil disobedience or something else?

In terms of context, the South African state and its progressive constitutional framework, as well as robust public institutions for democratic oversight and accountability, coupled with a free press and a strong rights-based discourse in civic affairs, approximates a nearly just society of the sort assumed by Rawls and others. The acts of civic protest recorded in South Africa during the Covid-19 lockdown appear to conform to some of the notions of civil disobedience anticipated by Rawls and the contemporary theorists. They offered a platform for legitimate dissent from duly recognised democratic authority. Furthermore, the types of protests observed were non-violent and non-revolutionary and sought to bargain for more rights within the lockdown regime. The protests were not a wholesale rejection of the principle of a disaster lockdown, but were an expression that it could be handled differently.

The narratives of various publics (minorities) comprising of booksellers, e-commerce traders, the taxi industry, Afriforum, Cape Beach residents, community groups, etc, also conform to Rawls notion of civil disobedience. In juxtaposition to the larger society, these groups represent minorities or constituencies with their own specific concerns even though some of their sentiments would also resonate with the wider population. Furthermore their acts of civil disobedience were expressly based on their group interests as opposed to generalised mass action.

The National State of Disaster declaration set society in an emergency mode whereby the normal channels of consultation and consensus were limited, and civil disobedience was employed to fill this deliberative void. For instance, during the lockdown, meetings and public engagements by Parliament and civic leaders were severely constrained and public gatherings were effectively prohibited. As a result, outside these normative institutional channels, civil disobedience was an avenue for public expression of dissent or articulation of a transformative agenda against unmerited lockdown arrangements. For example, incidents of brutality set the security forces in the spotlight and civic protests compelled deliberation on transformative modes of behavior by security forces. Civil disobedience also brought to the fore of policy making debate and deliberation about arbitrary decisions that the public did not consent to i.e. ban of sale of 'non-educational books.' It was also instrumental in compelling the state to make good on planned interventions like provision of food parcels.

I contend that civil disobedience was a justified response to the lockdown regime because the protesters were promoting just schemes in the face of harms. Illogical regulations, excessive violence, mandatory quarantines and unreasonable curfews were some of the harms that civil disobedience responded to. The protests were also a reasonable response to paternalistic lockdown restrictions with questionable means-ends reasoning. According to Rawls, "in a nearly just society deliberate injustice justifies resistance" (1971:337). Therefore, any displeasure with civil disobedience and its digression from usual norms must not be directed against the activists but against those who abuse power (1971: 342). Therefore on Rawls' terms, civil disobedience against the lockdown would have been justified.

A common theme in the protests, is the heavy handed enforcement by security forces. However I contend that the impunity was an outcome of some lockdown restrictions that were developed through an uncritical lens. The limited legislative scrutiny in the promulgation of the National Disaster Regulations, further aggravated the oversight vacuum. Brutality aside, it is rather absurd for law enforcement agencies to be expected to enforce a ban on smoking or the drinking of alcohol when it is common cause that illicit trade in cigarettes and the home brewing of alcohol are part of the historical tapestry of South African society. In this context, civil disobedience both against brutality by security agencies and the corollary restrictions is justified.

Civil disobedience was also an appropriate response because it employed a rights discourse to bring to light irrational rules, criminalisation and brutality. Citizens experienced arbitrary penalisation even when no other goods were threatened; i.e. arrests for not proving a historical purchase when found with a cigarette.

Whilst the lockdown was largely effective in creating public awareness and curbing the unrestrained spread of the virus, it was compromised by paternalistic narratives and a non-people-centred approach which was attended by high levels of brutality and criminalisation. South Africa's high number of infections in Africa suggests a need for a more blended approach that pairs elements of a vertical lockdown with a people-centred approach. It is also common knowledge that community based approaches have been effective in curbing the spread of other pandemics like Ebola and HIV & AIDS. Similarly a Kantian approach treats others as rational agents and ensures that they are granted autonomy to make decisions on protecting themselves and others.

The devastating effects of delayed immunization of innocent children was most likely avoidable especially given children's low risk of Covid-19 infection. Similarly, considered exceptions could have been made for patients with outstanding non-emergency treatments, elective surgery and diagnostic therapies. As it stands, it is difficult to justify delayed cancer treatments nor remedy the potential harm incurred. However, this sort of laxity is inherent in utilitarian schemes that only place accent on outcomes for the majority. Therefore, utilitarian formulations are not the best approach for safeguarding human freedoms in a prolonged and convoluted pandemic. More sensitivity to agents' actions and intentions may have been more effective in protecting human freedoms and limiting the impunity of law enforcement officials who were simply interested in ensuring compliance at all costs. Approaches that prioritise intentions and actions (i.e. deontology), are more amenable to the kind of harm avoidance that was required during the lockdowns.

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