Title: Locking Down on Rights: Surveillance and Administrative Ambiguity in the Pandemic

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ISSN (Online): 2349-8846

Published by: Economic and Political Weekly (Engage)

Article URL:

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Articles published in EPW Engage are web exclusive.
Locking Down on Rights: Surveillance and Administrative Ambiguity in the Pandemic

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Abstract: As the third chapter of the COVID-19 lockdown in India unfolds, the guidelines provided by the central and state governments remain ambiguous, unclear, and vague. The authors argue that such ambiguity could be strategic. Combined with instances such as the voluntary-but-mandatory use of technological solutions to contain the pandemic, this could effectively put in place a surveillance state that holds in scant regard the civil rights of the citizens it seeks to govern.

Welcome to the surveillance state. In the name of contact tracing and disease surveillance (which is vitally important in controlling the spread of the COVID-19 pandemic), governments around the world are putting into place the necessary apparatus for intimate surveillance of individuals that is likely to outlast the pandemic. As of 3 May 2020, Indian citizens officially welcomed a more formalised version of the surveillance state. The national government guidelines read together with individual state government guidelines issued to regulate the third phase of the lockdown are ambiguous, unclear, and vague.[1]

The classification of regions into different zones (designated by colour) with different levels of activities being allowed comes eerily close to another form of social and territorial classification of Indian society—in its manifestation as a caste-based society—that everyone is far too familiar with (Shepherd 2020). People remain uncertain about what is permissible and what is not. Can I step out for a run? Do I need an e-pass to visit the grocer? What accounts as essential? Can I visit my workplace between stipulated timings? Does a visit to my old parents count as an essential visit? Citizens are left in a swirl of question marks, which may eventually turn into exclamation marks if and when they seek to pursue clarity.
Ambiguous by Design?

Speculations about how long lockdown measures may have to continue and in what form vary, but in any case indicate no conclusion of this state of affairs any time soon (Devlin 2020; Patel 2020). But how does one control a population of more than a billion people and ensure they remain indoors? How long will it be before the threat of the coronavirus begins to seem exaggerated? Windows will be forced open, doorknobs will be lightly turned, and a slow hum of activity will resume. But a state of “official lockdown” will continue. This could be any democracy’s worst nightmare.

Those conversant with the law and lawyering will know that within this ambiguity could be strategy. Besides lending scope for loopholes for those seeking to navigate laws, ambiguity further blurs the already fuzzy boundaries between the legal and illegal and makes way for the use of discretion by those in power. The state gains part of its legitimacy through the regulation of the illegal. Such regulation is evidently outside of the law and invariably involves the use of discretionary powers that state officials possess. In this way, the state retains power and increases the dependency of society (some sections more than others) on it, sometimes even exploiting this. Based on her ethnographic work in a low-income neighbourhood in Delhi, Das (2007: 174–77) explains how the regulation of the illegal often transforms into negotiations involving petty bribes, votes and/or other services that are linked to the underlife of politics.

Between the formality of the national lockdown and the informality of people’s activities, state officials, and in particular lower level state officials, will have to use the power of discretion in responding to “situational exigencies” that they will constantly be confronted with (Jauregui 2013). These officials will be tasked with deciding what is permissible and what is not, what amounts to essential and what does not, who gets to move and who does not. The events of the past 12 months have already made many of us familiar with such use of discretionary power by police personnel that bestowed—if not burdened them—with the use of force (Jauregui 2013). Such force has often been motivated by factors that were not (or could not be) clearly regulated by law, including class, caste, religion and gender-based biases to name the least (Engineer and Narang 2006; Scroll 2020; Tully 2020).

The confusion over the number of shops that could remain open in a single lane in Mumbai is a case in point. The Maharashtra government’s lockdown order of 2 May 2020 allowed five stand-alone shops selling non-essential items to remain open for business. How these shops will be chosen has not been detailed. This has caused much confusion on the ground, with many shopkeepers opting to keep their establishments shut, rather than face hostile police action (Chitnis 2020). As citizens straddle these fuzzy boundaries of uncertainty, we see the state making use of this uncertainty to enforce schemes—both on the ground and through digital applications—that are fraught with issues of privacy, chain of command, and the possibility of redressal.
Voluntary, but Mandatory

Take, for instance, the Indian government’s insistence on the use of Aarogya Setu application (Banerjea 2020). Given that India has no data protection laws at the moment, an app that tracks every movement of every user, while also possessing intimate details of their health, their mobile numbers, and other sundry data is certainly a threat to individual privacy (Ananth 2020). The app has now been made mandatory in several places, even though central government guidelines are clear that it is mandatory only for employees in the public and private sector. In Noida, the police has instituted a punishment of six months imprisonment or a fine of 1,000 for not having the app on your phone (Butani 2020). Besides imparting clarity on how and whom this app is meant to benefit, it also remains unclear how those without smartphones or those without phones at all are expected to follow such mandates. Local governments, police, and even resident welfare associations appear to have stepped up to fill in the gap of ambiguity left by the central guidelines that allow for states to strengthen lockdown guidelines issued by the centre, but not to dilute them. “Strengthening” here appears to have essentially been interpreted as tightening restrictions across authorities.

In the case of using digital applications such as the Aarogya Setu app, there has been no real attempt to address the security concerns raised over the data that is collected. A French security researcher conducted a technical analysis of the app, and concluded that the app could potentially compromise the identity and movement of the millions of Indians who use it (Alderson 2020). In the absence of laws detailing what data can be collected, how it should be stored, processed, analysed, or shared; an app that collects and stores the location and health details of millions of Indians is a huge cybersecurity risk. Alderson also managed to reverse engineer the app and extract from it data that should have been inaccessible. The triangulation of every individual whose information has been collected leaves practically every person using the app vulnerable to attacks by cybercriminals. The other danger of such a vast database is the possibility of linking and collating this data with other data sets that can be procured from data brokers; and that can potentially reveal intimate details of individuals to anyone who comes looking.

Another database that has been revealed to be vulnerable several times in the past few years; and has had its usefulness and efficacy repeatedly questioned by security as well as policy researchers is Aadhaar (Bhatia and Bhabha 2017; Dreze et al 2017; IndiaSpend Team 2019; Ramanathan 2018; Thikkavarapu 2016; Whittaker 2019). Nevertheless, many state officials and essential service providers, both public and private, continue to compel the submission of Aadhaar details as a precondition to provision of services. In the context of the lockdown, citizens are left at the loose end as access to essential services has only become more precarious with fewer providers to choose from, stringent rules on movement and the threat of an eventual breakdown in the supply chain of essential goods. Despite volunteering Aadhaar details being no longer mandatory, except under certain circumstances that have been clearly
laid out by the Supreme Court ([Justice K S Puttaswamy [Retd] & Anr v Union of India & Ors 2018; Hindu 2018], actual practice involves submission of Aadhaar details being made compulsory in a variety of contexts.

An example is the application for a digital e-pass, which in certain constituencies requires the mandatory submission of an Aadhaar number. In order to curtail the possibilities of COVID-19 transmission, state and district authorities across India require citizens to apply for an e-pass in order to move beyond permissible limits during the lockdown. Such a requirement interfaces directly with one’s right to move freely (incidentally, the e-pass is called the “movement pass” on the portal of the Delhi Police), which is certainly not listed under the Justice K S Puttaswamy (Retd) & Anr v Union of India & Ors (2018) as one of the circumstances mandating the submission of Aadhaar details. Presently, the application for an e-pass is entirely online. It would be preposterous to expect that everyone from the lowest rung of police constables to the mix of government employees handling this digital platform of granting e-passes will have and, moreover, be able to provide an alternative to citizens who do not possess or are unwilling to submit details of their Aadhaar, but are seeking permission to move.

As these examples elucidate, using the context of the lockdown and taking advantage of the systemic deficiencies of the structure of the Indian state, the government is driving political and economic agendas at the expense of people’s rights. The Aarogya Setu app was also introduced as an app to “help” with efforts of disease surveillance, but has now become a mandatory app that might even be used as a passport to travel from one district to another or enter certain buildings, etc (Hindustan Times 2020). Those who choose to not own a smartphone or are unwilling to download the app will have to contend with denial of even basic freedoms, exactly as has been people’s everyday experience with Aadhaar (Awasthi 2019). This voluntary-yet-mandatory uncertainty has been used to the benefit of the surveillance state since the introduction of Aadhaar-based KYC (know your customer) forms and linking of Aadhaar with various essential services.

In ordinary circumstances, there would be an appellate procedure where some authority would ultimately be able to settle the issue. However, given the extraordinary state of circumstances we have been placed in, moving the courts—besides being an inconvenient, expensive, and extreme measure for such an issue—is not even a realistic possibility at the moment. This is also because, like many other state institutions, the courts too are, and may continue to, function only on an urgency basis because of the national lockdown.

In Conclusion

The issue is not just the sorry plight of millions of migrant and non-mainstream workers faced with the uncertainty of when the lockdown will end and when paying work can resume.
(Pandey 2020). It is not just the alarming dip in medical services in non-COVID-19 related health sectors (Shelar 2020). It is not only the brutality meted out to some of those seen as “breaking” lockdown norms by the authorities, who are themselves probably unsure of how to regulate this unprecedented situation (Sircar 2020). The threat to democracy lies in the simultaneity of all of the above tragedies, compounded by our collective inability to effectively understand or deal with any of them. The constant talk of “war” against the virus, and treating the issue as a law-and-order problem rather than a public health crisis lies at the heart of the issue. In this state of emergency, we are witnessing a suspension of civil rights, judicial oversight, and a lack of informed public debate. COVID-19 or not, the lockdown has definitely set the tone for the Indian state under the present regime, with regard to what it deems essential; one wonders whether civil rights is one of them.

Endnotes:

[3] The digital form for e-pass on the website of the Pune Police is an example. See https://punepolice.in/.

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