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Responding to Covid-19 in India: Reducing Risk or Increasing Domination?

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Introduction

In times of global health crises, governments have a special obligation towards their citizens to respect, protect and promote their welfare. On 11 March 2020, after the World Health Organisation (WHO) declared the corona virus (SARS-CoV-2) outbreak a global pandemic, many governments around the world started responding to the needs of the hour. Some notable responses included implementing temporary and mandatory non-pharmaceutical emergency interventions under the proviso of “risk-containment measures”.

These measures included, but were not limited to, nation-wide and regional lockdowns, mandatory quarantines and physical distancing, and obligating wearing of masks in public areas. The stringency, duration and

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scope of these measures varied across countries, but their enforcement was intended to achieve several public health safety goals. Some of these goals included mitigation of the global risk of human-to-human corona virus spread, ensuring protection of population and individual health in both the long and short term, and preventing the increase of infections and fatalities, amongst others.

The imposition of these measures was initially met with harsh criticism, scepticism and sometimes even conspiracy theories. While some sceptics doubted their apparent effectiveness, others pointed out the harmful impact these measures were starting to have globally such as rampant violation of human rights, increase in stigmatisation and discrimination of certain groups, as well as the impact on privacy and censorship (Amnesty International, 2021). Another major concern that was persistently and sometimes even fiercely voiced—both in academic and public discussions—pertained to the impact these measures had on individual freedom. For instance, several anti-lockdown movements emerged around the world to voice opposition against the restrictions imposed on people's freedom to move, travel, socialise, organise, access public and private goods, and continue non-essential work and businesses.¹ Some political leaders even publicly announced their opposition to forcing people to wear masks as they “want people to have certain freedom”.²

While risk-containment measures are deemed necessary and important for tackling the pandemic, the concerns listed above are quite serious in nature. They pose several challenges for governments such as fostering public acceptability and compliance with these measures, ensuring and promoting democratic justifiability of imposing them on their citizens, preventing additional harms such as human rights violations from occurring, providing people with necessary resources and compensation for the harms and losses they may have incurred, to name but a few. How democratic governments ought to address these challenges—efficiently and ethically—remains a very difficult question and not one that I aim to

¹Over the course of the pandemic, a number of anti-lockdown protests emerged in cities like London, Leipzig, Rotterdam and Berlin to name a few.

²In an interview with an American News channel, ex-US president Donald Trump expressed his disagreement over the usefulness of mandatory mask-wearing policies on grounds that individuals should have certain freedoms.

resolve in the following chapter. Instead, my aim is to add to this list by introducing a different and often overlooked issue: whether, and in what ways can the government's enforcement of risk-containment measures conflict with preservation and promotion of a particular kind of freedom we value and care about as citizens, namely, freedom understood as non-domination?³

During times of emergency like the pandemic itself, governments are often seen as exercising "exceptional power" when they impose measures like mandatory quarantine and lockdowns over their citizens. However, given the state of growing urgency in responding to the pandemic, there is a worry that governments may resort to exercising their exceptional power *arbitrarily*. When power is exercised by states or even by non-state actors arbitrarily over a person or group, that is, at their own will in the absence of appropriate institutional checks and balances, neo-republican theorists argue that we are confronted with a threat to our freedom as non-domination (Pettit, 1997; Lovett & Pettit, 2009). Accordingly, what matters to justifiability of governments imposing risk-containment measures, amongst other things, is that their imposition does not constitute or entail wrongful exercise of arbitrary power—or so I will argue in this chapter.

In what follows, I explore how the notion of freedom as non-domination can contribute to existing discussions surrounding the ethics of pandemics and, in particular, the ethics of imposing and regulating risk-containment measures. I will develop these themes through five remaining sections in this chapter. In "Introduction" section, I offer a brief overview of the theoretical framework I will use, namely, a neo-republican conception of freedom as non-domination developed by Frank Lovett (2010, 2012). Next, I motivate the relevance of non-domination to the current discussion in "Freedom as Non-domination" section. In "A Neo-Republican Outlook on Risk-Containment Measures" section, I discuss a case study focussing on India's early response to the Covid-19 pandemic and, in particular, zoom in on the legislation underlying the

³Note that I am focussing on a very specific aspect or feature of states' response during the pandemic. The scope of state governance and jurisdiction in addressing the pandemic goes beyond making decisions about risk-containment measures.

risk-containment measures imposed by the Union government. Next, in “[India’s Lockdown 2020: A Case Study](#)” section, I present my argument for why imposition of these measures could be considered procedurally arbitrary and, thereby, potentially dominating for some, whilst intensifying existing domination for others. “[Problem of Domination](#)” section concludes my discussion.

Before proceeding, however, I should highlight some important limitations of the discussion that follows. First, I am not able to cover all of the different possible ways of thinking about domination in the context of the pandemic. While I intend mainly to highlight the idea that states and citizens ought to recognise freedom as non-domination, this is only one amongst many other important normative and political ideals which are pertinent to risk-containment measures during times of crisis. Thus, a focus on non-domination is not meant to provide an exhaustive moral or political analysis of the situation. Second, the discussion is not meant as an argument against enforcing risk-containment measures, but as an argument against specific ways of enforcing and regulating these measures that threaten domination of citizens, thereby undermining their pro tanto ethical and political justifiability to those who are forced to comply with them. And finally, I draw upon examples from India’s response to Covid-19 only because they seemed useful for illuminating the main ideas of this chapter, with space limitations restricting me from extending the discussion to other cases.

Freedom as Non-domination

It is commonplace in discussions of political philosophy to distinguish between two contrasting notions of freedom: one as non-interference and the other as non-domination.⁴ The former notion stems from a liberal tradition of thinking about freedom. It concerns the absence of actual interferences with one’s possible options for actions, where the interference can be external or internal (Berlin, 1969; Carter, 1999; Kramer,

⁴I leave out the discussion of other notions of freedom such as positive freedom (Taylor, 1979), freedom of the will or metaphysical freedom, freedom as non-frustration or non-interference (Berlin, 1969)

2003). On this notion, to be free is to not have one's options interfered with. The latter notion stems from a (neo)republican tradition of thinking about freedom. It concerns not only the absence of *actual* interference, but also the absence of the "possibility of arbitrary interference" (Pettit, 1997, p. 149). In contrast to freedom as non-interference, the notion of freedom as non-domination is a relational one: what matters is not only the outcome, that is, whether or not an individual or a collective agent actually interfered with you, but the fact that someone you stand in a socio-political relationship has the mere capacity to interfere with you by exercising their power at their own will or whim, with impunity.

To be a free person in the republican sense, then, is to be "one who does not live under the arbitrary will or domination of others" (Lovett & Pettit, 2009, p. 12). Someone who is dominated lacks the assurance that their actions, decisions or choices are secure from arbitrary interference. This has negative consequences for the person insofar as it affects their well-being and creates uncertainty that makes planning and living one's life difficult (Pettit, 1997). Others think that the negatives of domination go beyond that—it counts as a failure to respect the moral standing of the dominated. Being in a relation of domination forces people to adjust their behaviour and ingratiate themselves in order to avoid being interfered with, even if their dominator chooses not to interfere, or acts in ways that in fact promote the well-being of the dominated.

To be dominated, then, is clearly morally problematic for the above reasons. But what exactly qualifies as domination? Capturing its precise meaning is a difficult task, and there is a large variety of accounts on offer (Pettit, 1997; Lovett, 2010; Laborde, 2008). For the purposes of this chapter, I follow Frank Lovett's influential account of domination as it covers key general features of domination. According to Lovett, an agent is in a relation of domination with someone, when three conditions are met:

1. *Inequalities in power*: Relations that are characteristics of domination involve agents who hold superior or greater "social power" over others who—relative to them—occupy a subordinate position. As long as one enjoys the unconstrained capacity to wield their superior power over others in the absence of any external or systematic constraints, the relationship remains problematic. Some paradigm examples of

such relationships include dictators passing laws that force a particular group to wear badges or else face risk of punishment, or slave-owners locking their slaves on the condition that they would otherwise not be allowed to eat. In both cases and ones alike, one agent has the capacity to wield power over another that entails a specific ability to control those under their subordination, even if one never chooses to do so.

2. *Dependency*: Relations of domination are characterised by problematic relations of dependency. For instance, a woman in an abusive marriage is more vulnerable to domination in a society that bans divorce since she cannot leave the relationship with her husband. Similarly, in other paradigmatic cases of domination, such as ones involving slaves and slave-owners, the former are in a relation of domination with the latter insofar as they are trapped in such a relationship, and any attempts to free themselves come with extreme social costs such as the threat of being killed, tortured or punished. Although relations of dependency are not necessarily dominating (think of a child and parent relationship), they amplify domination in situations where an individual cannot extricate themselves out of the relationship without facing high costs (Lovett, 2010).
3. *Arbitrariness*: Inequalities in power and dependency are necessary but not sufficient condition for domination. A relation of domination is marked by an individual's or a collective's *arbitrary* use of their power in the absence of any appropriate external or systematic constraint on her will, even if she decides never to use it. Exactly what kind of external constraint makes power less arbitrary?⁵ On procedural accounts like Lovett's, power is arbitrary if it fails to be "constrained by effective rules, procedures or goals that are common knowledge to all persons or groups concerned" (ibid., p. 101).⁶ For the exercise of power to be less arbitrary, and thereby non-dominating, it must be procedurally constrained.

⁵For criticism of Lovett's account of arbitrariness, c.f. Arnold and Harris (2017).

⁶In contrast, on some substantive accounts, theorists understand the arbitrariness of power as the extent to which it fails to be controlled to ensure that it respects the "politically avowable interests" of those over whom it is exercisable (Pettit, 1997).

As an illustrative example, consider the regulation of police power (Smith, 2013). Police personnel and law enforcement authorities at large have considerable superior power over citizens. They enjoy this power by virtue of the conventions of the institutions they are part of, amongst other things, such as differential social status, training and expertise. However, law enforcement authorities and agencies do not dominate, at least in principle, if their power is constrained and held publicly accountable via a number of formal or informal mechanisms or procedures. These may include clearly defined public laws that delineate the appropriate scope of their power, independent judiciaries for oversight and evaluating use and misuse of power, external and internal investigators and citizen boards and committees. These constraints play an instrumental role in facilitating citizen's knowledge of exactly where they stand with respect to those who have power over them. Moreover, these constraints allow individuals to develop and pursue their life plans based on reliable expectations of how and when power may be exercised over them, and whether and how they should guard against it.

Thus, these procedural devices must be part of common knowledge, their various provisions carefully instantiated, and their enforcement must be consistent and impartial. They should, most importantly, be effective and reliable. When can we say that procedural constraints on power are reliable and effective? On Lovett's account, effectiveness is a measure of the extent to which constraints on power *actually* restrict how that power is exercised (2012, pp. 139–140). That is, the state is effectively constrained to wield its power in a particular manner if it is common knowledge that the chances of them wielding their power in that manner are relatively high. By contrast, reliability is a measure of how robustly effective the constraints on power are. That is, a constraint is reliably effective insofar as it is common knowledge that the chance that it will be respected in constraining one's power is high in a suitably wide range of nearby possible worlds (ibid, p. 139).

Effective and reliable procedural constraints on power thus play a crucial role in setting boundaries for use of power and keeping a check on its exercise. Being subject to power that is in fact effectively and reliably constrained is partly constitutive of what it is to be a free citizen or to be

part of a minimally just society. As we'll see later, it is this lack of effective and reliable procedural constraints that underlies the case for domination in India's enforcement of risk-containment measures during the pandemic.

A Neo-Republican Outlook on Risk-Containment Measures

With this brief overview of freedom as non-domination, we may ask: why focus on the republican ideal of non-domination in justifying enforcement of risk-containment measures during the pandemic?⁷ There are at least three reasons.⁸

The first reason comes from the nature of power exercised during the pandemic. Emergency powers are often a deviation from the usual powers of the state—often to the extent that sometimes permits them to take actions without complying with statutory duties they are otherwise obligated to comply with or simply take actions that restrict valuable freedoms and violate rights for the sake of collective goods like public health safety. However, with great power comes great worries of which a republican account warns us: enactment of such unusual and exceptional authority often risks constituting “tyranny” or “dictatorship”.

As Laborde (2020) suggests, increase in a state's power to interfere during emergencies like pandemic does not preclude or diminish the potential of this power from consolidating or concentrating in the hands of a select few, just like in situations where the rule of dictators was justified as a temporary concentration of power during war with the aim of releasing that power and restoring liberties after the war. Thus, just and democratic institutions must abide by the political goal of ensuring that individuals are protected from the arbitrary or uncontrolled power of their government even during emergencies.

⁷ Besides Lovett's, there are distinct conceptions of domination available in the literature. The discussion that follows from here may differ depending on which conception one adopts.

⁸ This list is in no way exhaustive. Due to space constraints I refrain from discussing more reasons.

The second reason comes from the extent of power exercised during the pandemic. In present-day constitutional democracies, it is well acknowledged that states exercise considerable power over its citizenry. Situations of emergencies like terrorist attacks, war, pandemics and so on call upon states to exercise considerably even *more* power that allows them to interfere in various aspects of one's life. The very fact that states can force individuals to comply with mandatory stay-at-home orders or potentially criminalising the ordinary act of entering a shop without a mask is illustrative of this. In ordinary circumstances, a just democratic state or any of its member cannot wield such power absent proper justification.

One impact of this is that when states enforce these measures, it has the element of them making sure people do what they deem necessary, namely, act or behave in ways that ensure that these measures are in fact effective. People are nudged into changing their behaviour in ways that echoes the ingratiation aspect of domination, as observed in paradigmatic master-slave relationship whereby the slave is forced into servility towards the powerful in order to avoid being interfered with. Obeying lockdown rules and staying home or wearing masks in public could, but need not, count as ingratiation if one is forced to do so in fear of being violently attacked by state authorities if they don't follow their rules.

The final reason comes from the nature of emergency itself. It is well acknowledged that the pandemic is characterised by ever-changing, unprecedented situations. Given the urgency and the short time frame for tackling newly arising problems, new rules, regulations, measures, plans of action are often needed to be decided upon quickly under conditions of uncertainty. The time pressure along with the evolving and unpredictable nature of the situation means that the legislative frameworks for internal checks on how these actions are being authorised and undertaken might be easily outdated or rendered unhelpful, and the time and effort taken to update, revise or review them is often too long and too much, respectively. This holds the potential of undermining the very mechanisms of contestability and accountability of government's actions which, from a republican outlook, is essential for citizens to check that their exercise of power is in fact non-arbitrary.

India's Lockdown 2020: A Case Study

So, might there be a reason for thinking that a government's enforcement of measures regarding strict lockdowns during the Covid-19 pandemic could have posed a threat to our freedom as non-domination? To answer this question, I will make use of a case study. In what follows, I begin with an overview of the constitutional legislature underlying the use of *executive* powers⁹ by the Union government of India in imposing national risk-containment measures during the Covid-19 pandemic.

On 24 March 2020, state governments and district authorities, on the direction of the Union Ministry of Home Affairs, ordered a nation-wide lockdown for 21 days as a preventive measure against the pandemic, with further extensions and easing of restrictions in later months. Other measures included closing of all non-essential governmental, commercial and private establishments, hospitality services and business, industries, transportation, public educational institutions as well as places of worship.

Two legislative pieces in particular, namely the Epidemic Diseases Act, 1897 (EDA), and the Disaster Management Act, 2005 (DMA), were used as the statutory basis for imposing these measures and laying out guidelines for the suspension of services and freedom of movement. Both these laws are intended to arm the Union government with powers required for addressing the pandemic and, at the same time, serve as an internal check constraining their power by defining their scope and nature. Thus, evaluation of the risk-containment measures imposed by the government requires that we briefly look into the details of the two legislative components that formed the statutory basis of their imposition.¹⁰

Consider the EDA. It is a British colonial Act with only four statutes. It was enacted in 1897 by a colonial power under an imperial institutional set-up. It enabled the Victorian government at the time to impose temporary measures to be observed by the public during the on-going

⁹Note that India did not declare an official state of emergency and, hence, did not employ emergency powers.

¹⁰Throughout my focus is on Union's power and exercise thereof rather than the State governments because the lockdown was imposed as part of executive power exercised by the Union. Generally, Union and State governments have executive power for anything that Parliament and State Assembly have power to legislate on as mentioned in Articles 73 and 162 of the Indian Constitution.

plague. The broader objective of the EDA is to “to provide for the better prevention of the spread of Dangerous Epidemic Diseases” (Government of India, 1897, p. 1). In its current formulation, it specifies the power of both the Union and the state governments to take special measures and prescribe regulations when faced with the outbreak of epidemic diseases.

The EDA, however, does not define what an epidemic disease is, let alone providing sufficient or necessary conditions for determining whether the Covid-19 pandemic itself qualifies as one. At the time of its enactment, the Act only made provisions to empower the central government for:

inspection of any bus or train or goods vehicle or ship or vessel or aircraft leaving or arriving at any land port or aerodrome. (Article 2A, p. 3)

Moreover, the provisions do not explicitly state that the powers allowed for by the EDA can be used in violation of any other law under the current constitution system of present-day India, nor do they establish clear roles of various levels of the government, nor do they delineate the rights and responsibilities of the public in a pandemic (Bhatia, 2020; Ghose, 2020; Ghose & Jetley, 2020). In the absence of these concrete features, the EDA has been widely deemed insufficient as a directive tool for precisely how and to what extent the Union is allowed to act in responding to the pandemic.¹¹ For now, I refer to this as the problem of action guidance.

To make up for these gaps, the Union government referred to the Disaster Management Act of 2005 (DMA). This statute provides the action plan or a legal framework for taking measures to deal with a “disaster” at the national, state and district levels. Disaster here refers to a:

catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a

¹¹This point has been recently acknowledged in the Standing Committee Report of 2020.

nature or magnitude as to be beyond the coping capacity of the community of the affected area. (Article 2d, p. 4)

The focus of the DMA, then, is on specifying plans and policies for combating disasters like earthquakes, fires, floods, but not public health emergency. It only specifies how to delegate power for restricting people's movement, deploying military power, requiring disaster experts to provide advice and assistance for rescue and relief, coordinating with international help and so on only when a "disaster" strikes.

Recognising that pandemics like Covid-19 are out of its direct purview, the Indian "Ministry of Home Affairs" abruptly declared the pandemic as a "notified disaster" (rather than an epidemic or a pandemic) to allow for provisions of the DMA to apply under "[Conclusion](#)" section of the Act, as well as for delegating powers to different ministries, departments, state and union territory governments, enabling them to act under the DMA. Some criticised this move as the government "prompting an ad-hoc response and stretching available legal provisions to authorise improvised executive action in the absence of proper public health emergency legislation" (Vidhi Centre for Legal Policy, [2020](#), p. 4).

Maybe "necessity knows no bounds", as the saying goes—the state may be justified in expanding its power and further stretch the existing legal constraints to address an unprecedented situation like Covid-19 when existing laws fall short. The state could, in principle, use *ejusdem generis* to justify that "*catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes*" (Article 2d, p. 4) extends the scope of DMA to pandemics such as Covid-19. However, given the nature, complexity and severity of a public health disease outbreak, such an extension would seem to function beyond the usual conceptual and practical boundaries of the legislation.

For instance, catastrophic events like disasters usually involve large-scale destruction of infrastructure and displacement of people, whereas the pandemic has constituted the spreading of illness and breaking down of healthcare systems, amongst other things. Moreover, disasters are usually short-lived localised events with trickle-down effects at a global level,

whereas the pandemic was and continues to be a long-lived globalised phenomenon requiring extensive regional, national and international coordination and response to contain the spread. These differences give us a *prima facie* reason to think that the directives issued by the DMA do not strictly dictate the means and mechanisms required for responding to the pandemic, and therefore, its applicability remains suspect. For now, I refer these failings as the problem of commensurability.

Before engaging with these two problems, let me briefly note how the lack of directives and concrete guidance played out practically in the actual imposition of risk-containment measures. The 21-day lockdown, for instance, was announced four hours before its implementation, giving very little time for citizens to prepare. While the lockdown had far-reaching effects on the society at large, its biggest impact was felt by nearly 40 million migrant workers, who were instantly left stranded with little food and financial relief from the government.¹² According to the Parliamentary Standing Commission Report (2020), the sudden imposition of the lockdown caused unprecedented economic disruption, fear and anxiety among these workers, leading to large-scale movements of migrants back to their home states, as well as increases in domestic violence and the trafficking of women and children.¹³

Moreover, the effects of ill-preparedness were also made evident in the healthcare sector. The government failed in providing support to public and private hospitals to deal with supply shortages of beds, ventilators, support staff, among many limitations. Most importantly, lack of proper equipment like PPE kits led to a number of health and sanitation workers on the front line—who tend to be from some of the most marginalised castes—to be put at higher risk of becoming infected.¹⁴ The aftermath of the first lockdown triggered ripple effects that are still unfolding. At the time of writing (Spring 2021), the current estimates for total Covid-19

¹² <https://www.epw.in/journal/2020/32-33/commentary/reverse-migration-labourers-amidst-covid-19.html>

¹³ <https://www.epw.in/journal/2020/44/editorials/pandemic-eyes-world-bank-and-imf.html>

¹⁴ <https://www.thehindu.com/opinion/lead/making-the-private-sector-care-for-public-health/article31241291.ece>

infection cases that were reported have crossed 30 million and counting, with over 3 million deaths.¹⁵

A Problem of Domination

So far, I've noted that the two-part framework utilised by the Indian Union Home Ministry in orchestrating a national-level pandemic response suffers from two problems: the problem of commensurability and the problem of action guidance. The former is the problem of failure of legal statutes to be proper or appropriate pieces of legislation for handling the pandemic—partly because they do not directly apply in the context of the pandemic, and partly because their provisions are too vague and unclear. The latter problem, which is a symptom of the former, underlies how the statutes have failed in offering the required legal guidance and backing of precisely what powers the state can or cannot employ in responding to a fast-changing and unprecedented public health emergency. In what follows, I argue that both problems, when considered together, constitute an overarching problem of domination.¹⁶

Recall that on Lovett's (2012) account, power is arbitrary and thereby problematic to the extent that its exercise is not externally constrained by reliable and effective rule of law, procedures or goals. So, we can now ask, is the arbitrariness condition satisfied in the Indian case so described? Here I return to the problem of commensurability. It highlights how the content and scope of both the DMA and EDA neither make provisions for, nor legally sanction the various risk-containment measures imposed by Indian government during the pandemic, such as the quarantine, lockdown, restriction of movement, shutting down of essential businesses. Despite new amendments to the EDA that took force from 22

¹⁵<https://www.nytimes.com/interactive/2021/world/india-covid-cases.html>

¹⁶It is usually acknowledged that during an emergency like the pandemic, states can deviate to some extent from the rule of law, along with bypassing ordinary processes of law making and suspending liberties of individuals (Fatovic, 2020). In fact, a number of countries including Spain, France, New Zealand, Estonia, Latvia to name a few declared a national state of emergency to tackle Covid-19 outbreak. In the case of India, however, the measures were not implemented as part of a state-declared emergency because the Indian constitution provides no provision for declaring an emergency during a public health crisis).

April 2020, nearly a month after its enactment, the scope of the Union's executive powers remained limited, yet extended beyond this limitation in its *actual* exercise.

For instance, new changes included extending the Union government's power to take measures "as it deems fit and prescribe regulations for the inspection *of any bus or train or goods vehicle* or ship or vessel or aircraft leaving or arriving at any land port or aerodrome" (Article 2A, my emphasis in italics). This extended power did not cover the regulation of private individuals using their personal modes of transport—even though the lockdown measures implemented under its enactment restricted such movement.¹⁷ Moreover, these directive powers did not, still, allow for imposition of lockdown, social distancing and isolation measures, stay-at-home orders at large that was deemed necessary as first immediate response to the pandemic.

In these regards, the EDA (together with the DMA) is quite unlike comprehensive legislation enacted by other countries in responding to the pandemic. For instance, the Public Health Service Act (1944) used by the United States, or the Emergency Management Act (2005) used by Australia, or the Coronavirus Act (2020) used by the United Kingdom, or the Infectious Disease Regulations (2020) used by Singapore, legally authorises their respective governments to respond to a public health emergency like Covid-19; determines when the emergency exists; and clearly establishes the discretionary power and authority required at various levels for regulating, intervening and assisting in a range of areas for limiting transmission of the disease, closure of institutions, power to restrict gatherings, assistance to healthcare industry, and the like.

By contrast, power exercised by India's Union government in imposing risk-containment measures has been over and beyond what the enacted statutes have allowed for. What do we make of this from the standpoint of domination? It seems clear that the statutes themselves neither legitimise the exercise of the state's power in imposing the lockdowns, nor statutorily back it, nor place any limits on its scope and extent. Moreover,

¹⁷ More recently, a review of the DMA published by the Government of India in 2013 confirmed that the existing legislation, policy and institutional arrangements within the scope of DMA are "not conducive for carrying out the tasks it has been mandated to perform under the Act" (Report of the Task Force 2013, p. xviii).

we might question whether and how legislations that are in principle intended to guide state action in circumstances pertaining to threats of “disasters” can also adequately and legally guide and check the exercise of power in the case of the current pandemic.

As an effective constraint, the statutes themselves do not procedurally constrain the power exercised simply *because* they do not apply in the context. As a reliable constraint, they fail to ensure that imposition of these measures, viz. exercise of unauthorised power, procedurally arbitrary prevents or protects people from being vulnerable to further domination. The state and various state authorities can thereby interfere, at will and with relative impunity, in the exercise of the basic freedoms of people. This is not just a theoretical concern but, as we’ll see, one that was also practically instantiated.

At this juncture, one might object that the inapplicability or inappropriateness of the legislative statutes for responding to the pandemic makes the *enactment* of the statutes arbitrary, and not the *power* exercised by the state under their purview. This objection, however, risks confusing distinct understandings of arbitrariness that apply to two different objects of concern—one in the sense of being “random” that applies to the former, and the other in Lovett’s sense as described that applies to the latter.

It is one thing to say that the statutes were arbitrarily enacted to handle the pandemic, barring any justification. But it is another thing to say that power exercised in imposing lockdowns is procedurally arbitrary when it is used in the *absence* of effective and reliable rules of law that are supposed to serve as legislative system of checks and balances on its exercise. In the present case of Indian lockdown in March 2020, the following statement holds true: enacted statutes failed to be effective and reliable checks on constraining executive power and its exercise, and power, as a matter of fact, has been arbitrarily exercised in the *absence* of appropriate laws constraining and regulating its exercise. This makes the Union’s action of enforcing strict lockdown worrying from the lens of freedom as non-domination.

Another sense in which the statutes in question might be considered as contributing towards domination has to do with their lacking specific virtues. In republican contexts, a rule of law is characterised as embodying or exhibiting certain formal qualities or specific virtues such as

generality, clarity and consistency, amongst others (Lovett, 2020). As noted earlier, both the DMA and EDA fail in these respects. While the vagueness and lack of clarity are certainly objectionable features of these statutes, they are not unique in this regard. It is widely accepted that no legal systems ever live up to the ideal of a perfect law. Some degree of vagueness and indeterminacy in law is inescapable (Fatovic, 2020). Moreover, we cannot demand legal regulations to be too specific—if they were too specific, it might make it harder to apply them when the situation at hand changes rapidly and the law takes time to be updated. This brings me to the second problem, namely, the problem of action guidance.

Even if we accept that legal systems might fall short in fulfilling the formal or substantive requirements of the rule of law, we might still object to how much room this creates for exercising discretion without any restraint. As the enacted laws are ambiguous over how and what kind of power can be exercised in regulation or monitoring of these measures and individual's compliance with them, it created space for state or local state authorities' immense discretion as to what kind of measures they can take. Take, for instance, the EDA. The Act allows the state to:

take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by, the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed. (p. 2)

As noted earlier, there is no clarity over what constitutes a “disease” and whether Covid-19 qualifies as one. Even if definitional issues regarding what qualifies as a disaster or a pandemic and, accordingly, what comes under the scope of the EDA or DMA can be set to one side, they still entail significant practical problems. For instance, the provisions for ordering isolation and quarantine measures are not specified in these statutes, and there are no applicable constraints on controlling or overlooking interferences with fundamental human rights and freedoms once the law is in place. Furthermore, the Act authorises “any person” to exercise power and pass any regulations they deem fit, thus equipping the state with significant

discretionary space and reactionary powers, which can be employed in any way government ministers want, even if they choose not to do so. Evidently, this is problematic from a republican perspective: it suggests constraints on power do not necessarily generate reliable expectations about its exercise and increase the risk of procedural arbitrariness.

As an illustration, consider the following. In addition to the EDA and DMA, restrictions imposed by the Union government were complemented with provisions under India's Criminal Procedure Code (CrPC). The CrPC is the main piece of legislation on procedure for investigating crime; regulating individual conduct; determining guilt, innocence or punishment of the accused; and collection of evidence. The full extent of the measures imposed by the government at the local level came into force under the provisions of the CrPC. For instance, Sections 151 and 129 of the code empower the police to arrest those found in violation of the lockdown without any warrant and to use civil force for dispersing unlawful gatherings. Meanwhile Section 197 grants local governments wider impunity for any acts done in the discharge of their official duty. While those deemed to be in violation of the lockdown can be lawfully prosecuted under appropriate provisions of the CrPC, the increased impunity of police offers undermines the security of individuals from the use of excessive force against them.

However, what involves excessive force or what constitutes violation of the lockdown is left to the discretion of what the state authority deems necessary and appropriate. In many states in India, the police were reportedly targeting people for venturing out to buy essential goods or medicines or travelling to go back to their homes, often beating them with sticks, assaulting them and, in certain instances, forcing them to crawl on the road.¹⁸ In some instances, the police chose push-ups as a form of punishment to publicly shame violators, while other state leaders threatened them with "shoot at sight" orders if they continued to breach lockdown rules (Lasania, 2020). In two particularly tragic incidents, an essential service provider was shot dead, and two shopkeepers were tortured and beaten by the police for not complying with the lockdown

¹⁸ <https://qz.com/india/1826387/indias-coronavirus-lockdown-brings-police-brutality-to-the-fore/>

measures.¹⁹ Worse still, the EDA in principle gives protection to these police officials implicated in the misuse and abuse of power:

Protection to persons acting under Act. No suit or other legal proceeding shall lie Against any person for anything done or in good faith intended to be done under this Act. (Article 4, p. 5)

The arbitrariness in exercise of power was realised in different ways, too. Consider how discretion permitted under the EDA posed a serious threat to violation of digital privacy of individuals. It is a well-known fact that, to-date, India lacks proper legislation governing data protection and privacy in general. The EDA too makes no provision for providing security or ensuring deterrence against arbitrary interferences involving infringement of an individual's right to privacy. In the absence of strict laws to protect right to digital privacy, and in the absence of statutes that sanction and overlook the legality of measures such as digital contract tracing, the government released the "Aarogya Setu App" in order to tackle the increase in Covid-19 cases, making it mandatory to use for citizens living in containment areas and government and private sector employees.

The app allowed authorities to collect sensitive medical information and upload it on a government-owned and operated server, providing this data to persons carrying out medical and administrative interventions necessary to tackle a rise in infection cases. However, a number of problems immediately surfaced: one, the app was neither legally sanctioned nor embedded within adequate legal framework designed with clear procedures or guidelines regarding privacy and security²⁰; two, experts criticised the app for having technical flaws that allowed the government to share the data with practically anyone it wants; three, the app does not inform users how the data, that is collected every 15 minutes, is being used. In the absence of any legal constraints, individuals have no assurance that their data is not be used for monitoring and surveilling

¹⁹ <https://indianexpress.com/article/cities/delhi/man-beaten-in-delhi-on-suspicion-of-conspiracy-to-spread-covid-19-6354586/>

²⁰ C.f. Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011. Also see, Information Technology (Electronic Service Delivery) Rules, 2011.

their movements. In one particular incident involving privacy breach, the state government of Kerala was caught in a legal battle for entering into a contract with an American firm for collating and handling data of 175,000 people under quarantine without taking their individual consent, and risking sharing details of their symptoms and underlying health conditions with pharmaceutical companies.

As the above examples show, even unclear and non-specified laws like the EDA and DMA can be implicated in domination when they enhance discretion insofar as state authorities are able to utilise the lack of clarity or vagueness in adhering to the law or expanding their power as they see fit. This also has the dominating effect of failing to provide security against future illegitimate arbitrary interferences. From the republican point of view, this is highly worrisome in the light of the disturbances brought about in people's lives, especially for those who belong to the most vulnerable section of the society. Below I explore an example.

A few weeks after the Indian government imposed the lockdown in March 2020, reports of spreading of the virus linking it to a large gathering of a Muslim religious group (called *Tablighi Jamaat*) in New Delhi flooded the news.²¹ Various state authorities including the Indian health ministry blamed the members of the minority group for their failure to comply with risk-containment measures. Soon after, powerful dominant groups, including state and non-state actors, engaged in anti-Muslim hatred, targeted violence, social boycotting, discrimination, openly lynching Muslim individuals, spreading false information about them being super-spreaders, accusing them of inciting "corona terrorism",²² forcing Muslims out of their homes on suspicion of being coronavirus carriers, denying them treatment on the grounds of their religion,²³ attacking mosques as well as banning them from entering certain neighbourhoods. By contrast, similar religious gatherings around the time of the lockdown organised and attended by those belonging to powerful

²¹ <https://www.nytimes.com/2020/04/12/world/asia/india-coronavirus-muslims-bigotry.html>

²² <https://www.hrw.org/news/2020/04/18/indias-steps-contain-covid-19-have-failed-curb-anti-muslim-rhetoric>

²³ <https://slate.com/news-and-politics/2020/04/tablighi-jamaat-india-muslims-coronavirus.amp>

Hindu religious groups were not only excused but did not receive any political or media notice—let alone violent treatment.

Looking back at Lovett's conditions for domination, members of this minority group, then, already live in structurally dominating relationships with those who have superior power over them, for their dominators enjoy the capacity to interfere with them at their own discretion. They already suffer from a number of historical harms done to them at the hands of powerful religious groups and fundamentalist political parties on communal grounds. They live in a socio-political environment where anti-Muslim propaganda, violence, discrimination, marginalisation and stigmatisation are rampant. They do not enjoy equal social status, and their lives are constantly at risk of harm bereft of any assurances or security that they will not be interfered with. Moreover, they lack the power to participate, or to voice their opposition or contest any action or policy—even ones issued in response to the pandemic. Enforcement of risk-containment measures with an arbitrary legal basis thus has a *compounding effect* for these vulnerable classes: not only are they subject to dominating risk-containment policies, but their existing vulnerability to both public and private domination is also intensified during their enforcement.

Even though we might think the lockdown itself is intended to serve legitimate goals, namely, saving people from becoming infected and preventing the health crisis from worsening, this does not guarantee that such measures will not be used as a political tool by state and non-state dominators to exercise abusive and exploitative control over those powerless groups who find themselves in pre-existing relationship of domination with the state and other powerful groups. In due course, depending on how the pandemic unfolds, the state may be required to impose even more aggressive or drastic measures and punishments on the citizens with much higher degrees of severity and intensity to tackle the pandemic. Given this possibility, there is a legitimate worry that both the statutes will simply fall short in delineating and legitimising the powers of relevant state and non-state authorities and the government may expand its power still further unconstrained by the two enacted statutes. Without proper limits and appropriate procedures of redress, the lawfulness, or lack thereof, of executive authority exercised will continue to fail in serving the ends of non-domination for all citizens equally.

Conclusions

In this chapter, I've tried to achieve two things. First, I explained why ethical and political justifiability of risk-containment measures during Covid-19 can be assessed through the lens of domination. Using India's response to the pandemic as my case study, I've argued how an absence of appropriate and concrete legislation mandating enforcement of risk-containment measures can be a source of domination. Second, I explained that thinking about enforcement of risk-containment measures through the lens of non-domination brings to light concerns about protecting individuals from becoming vulnerable to domination, as well as intensifying domination of those who already suffer. Addressing these concerns in the times of pandemic is significant insofar as governments should aim to promote and preserve the free status of citizens, establish and uphold institutional and legal structures that recognise and respect equal status of all citizens, remove or replace the conditions of mastery that might seep in through legal loopholes, amongst other things.

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