Technology and Privacy Rights - COVID-19

What is the issue?

- Given the grave public health crisis of COVID-19, there is little doubt that the government is best placed to tackle it.
- However, there is a concern that the government's technology solutions in fighting this fall short of meeting the minimum legal requirements.

What are the contentious measures?

- The state's most significant responses to the pandemic have been based on an invasive use of technology to utilise people's personal health data.
- Broadly, technology has been invoked at three levels:
    1. in creating a list of persons suspected to be infected with COVID-19
    2. in deploying geo-fencing and drone imagery to monitor compliance by quarantined individuals
    3. through the use of contact-tracing smartphone applications, such as AarogyaSetu
- The measures deployed sound reasonable.
- But the mediums for implementation overlook important concerns relating to the rights to human dignity and privacy.

What are the concerns?

- **List of infected persons** - In creating a list of infected persons, State governments have channelled the Epidemic Diseases Act of 1897.
- But this law scarcely accords the state the power to publicise this information.
- These lists have also generated substantial second-order harms as the stigma attached has led to an increase in morbidity and mortality rates.
- This is because many with COVID-19 or flu-like symptoms have refused to go to hospitals.
- **Geo-fencing and drone imagery** - The use of geo-fencing and drone technologies is unsanctioned.
- Cell-phone based surveillance might be possible under the Telegraph Act of 1885.
- But until now, the 'orders authorising surveillance' have not been published.
- Moreover, the modified surveillance drones used are equipped with -

    i. the ability to conduct thermal imaging
    ii. night-time reconnaissance
    iii. the ability to integrate facial recognition into existing databases such as Aadhaar (a feature claimed by some private vendors)
- The drones deployed also do not appear to possess any visible registration/licensing contrary to the Aircraft Act of 1934 regulations.
- Indeed, many of the models deployed are simply not permitted for use in India.
- **Contact-tracing applications** - The Union government has made **AarogyaSetu**, its contact-tracing application, its signal response to the pandemic.
- Such applications promise to provide users a deep insight into the movements of a COVID-19 carrier.
- The purported aim here is to ensure that a person who comes into contact with a carrier can quarantine herself.
- Notably, the efficacy of such applications have been questioned by early adopters, such as Singapore.
- Thus far, details of the application's technical architecture and its source code have not been made public.
- The programme also shares the concerns with the Aadhaar project in that its institution is not backed by legislation.
- Like Aadhaar it increasingly seems that the application will be used as an object of coercion.
- There have already been reports of employees of both private and public institutions being compelled to download the application.
- Also, much like Aadhaar, AarogyaSetu is framed as a necessary technological invasion into personal privacy, in a bid to achieve a larger social purpose.
- But without a statutory framework, and in the absence of a data protection law, the application's reach is boundless.

What are the conflicting arguments in this regard?

- The pandemic is becoming an existential threat and so the paramount need to save lives is said to take precedence over all other interests.
- This supports the idea that if the government chooses, fundamental rights can be suspended at will.
- The judgement given by Justice H.R. Khanna at the height of Indira Gandhi's Emergency holds much relevance in this context.
- Justice Khanna was not speaking about the crushing of freedom at the point of a weapon.
- He was concerned, rather, about situations where the government used the excuse of a catastrophe to ignore the rule of law.

Why is overreach dangerous?

- When faced with crises, governments, acting for all the right reasons, are invariably prone to overreach.
- But, any temporary measures they impose have a disturbing habit of entrenching themselves into the existing system.
- Over the time, this may get to be the 'new normal' well after the crisis has passed.
- Paying close attention to civil rights, therefore, becomes critical as rights are particularly vulnerable in a crisis situation.

What caution should the government take?

- The Supreme Court's judgment in K.S. Puttaswamy v. Union of India (2017) spelt out on the guarantee of a fundamental right to privacy.
- But the Court also recognised that the Constitution is not the sole repository of this right, or indeed of the right to personal liberty.
- To be sure, the right to privacy is not absolute.
- There exist circumstances in which the right can be legitimately curtailed.
- However, any such restriction must be tested against the requirements of legality, necessity and the doctrine of proportionality.
- This will require the government to show that -
    1. the restriction is sanctioned by legislation
    2. the restriction made is in pursuance of a legitimate state aim
    3. there exists a rational relationship between the purpose and the restriction made
    4. the State has chosen the "least restrictive" measure available to achieve its objective
- In the present case, the government's technological solutions are unfounded in legislation.
- Also, there is little to suggest that they represent the least restrictive measures available.
- A pandemic cannot thus be a pretext to renounce the Constitution.

Source: The Hindu

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