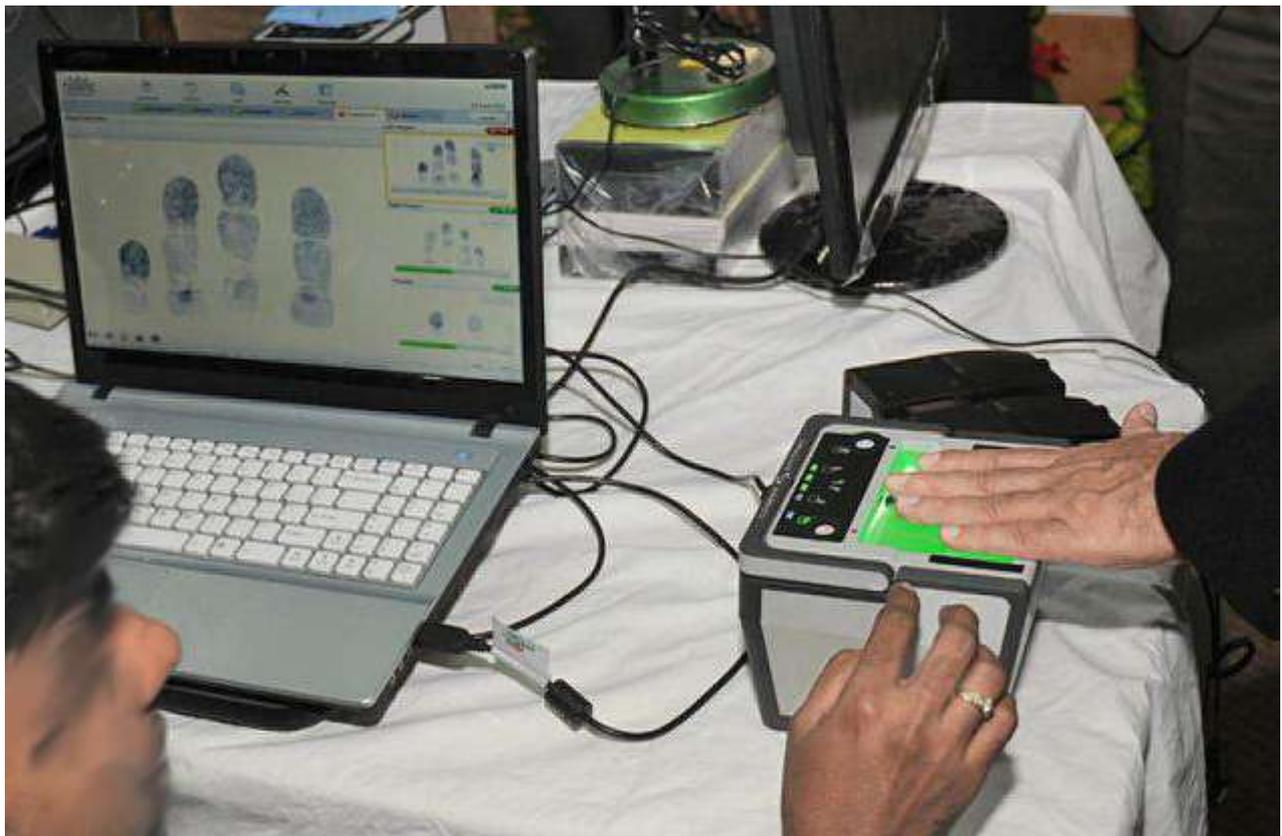


The Expanding Ambit of State Power: The Debate on Privacy



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Lead Essay

The Expanding Ambit of State Power: The Debate on Privacy

Recent events in the country have raised a host of issues pertaining to the values of individualism, liberty, free expression and association. Focused particularly on the Rohith Vemula suicide and the state face-off with the Jawaharlal Nehru University, the opposition will converge on these principles to direct the agenda of the ongoing budget session of the Parliament. Yet an issue closely related to claims over freedom that has received much less attention is the rising number of privacy violations by the government through several provisions it is seeking to institute.

Even though the government states that it will address the necessary privacy and data security concerns in its actions, the fundamental problem of the increasing state profiling of individual citizens will remain unaddressed unless a separate privacy legislation is put in place. Herein, there is an urgent need to expand the current discourse on privacy, which has, for far too long, been circumscribed within the context of the data protection paradigm. This paradigm has dominated the central arguments of the critics of the Aadhar system as well, besides the whole non-privacy related problematic assumption of subversion of identity in exchange for access to welfare schemes.

Constitutional background to Right to Privacy

The arguments in support of the Right to Privacy circumscribe two provisions in the Constitution – the right to freedom under Article 19 and the right to life and personal liberty under Article 21. Article 19(1) (a) stipulates that "all citizens shall have the right to freedom of speech and expression". However this is qualified by Article 19(2) which states that this will not "affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right ... in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".¹ Article 21 states that "No person shall be deprived of his life or personal liberty except according to procedure established by law."²

In India, the Right to Privacy has been established by three major Supreme Court decisions:

First, in the *Kharak Singh vs The State of U.P.*, the question was whether 'surveillance' under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution under Article 21. Stating that the Constitution did not underline a right to privacy, the Court, in the interests of a person's dignity held that, "an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man —an ultimate essential of ordered liberty, if not of the very concept of civilization."³

Second, In *R. M. Malkani vs State of Maharashtra*, the petitioner's voice had been recorded in the course of a telephonic conversation where he was attempting blackmail. He asserted in his defence that his right to privacy under Article 21 had been violated. The Supreme Court declined his plea, stating that the Court protection of such conversation will not be there for the guilty party, but only for the innocent.

Third, in the *Govind vs. State of Madhya Pradesh*, while dealing with the police surveillance of habitual offenders of domiciliary visits and picketing, the Court subverted the right to privacy by state that, "It is only persons who are suspected to be habitual criminals and those who are determined to lead criminal lives that are subjected to surveillance... Too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty, the right to move freely throughout India and the freedom of speech create an independent fundamental right of privacy as an emanation from

¹ Iyengar 2011.

² Ibid.

³ Ibid.

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them it could not be absolute. It must be subject to restriction on the basis of compelling public interest. But the law infringing it must satisfy the compelling state interest test.”⁴

Through all these judgements, the Court clearly took the stand whereby privacy becomes a secondary concern –not even a right –and remains a function of other considerations like a person’s dignity, tantamount to similar restrictions and implications that are placed upon Fundamental Freedoms. It also legitimizes state intervention in tacking offenders. However, with the series of proposed bills and actions undertaken by the current dispensation, there is a need to re-consider the incorporation of privacy as a separate right. This is because the basis on which the state decides the grounds for intervention is becoming a highly discretionary issue.

Revamping Aadhar

Privacy, as argued out in the context of the data protection paradigm focuses on espionage or the clandestine use of citizen information from a database by the state. There has certainly been contention over the legitimacy of such a process. And now with the government planning to expand the scope of Aadhar services to private companies and individuals for a ‘small’ fee, the Right to Privacy has emerged as an important concern that needs renewed reassurance and legitimacy. Even though the government has stated that it is planning to deploy third-party agencies to facilitate this service and will withhold critical citizen data by simply verifying rather than giving access to information, the plan will result in putting the service at the discretion of the government in the absence of a privacy law. The recent move by the government stands in direct contravention of the Supreme Court order which, in August 2015, had directed the government to restrict the use of Aadhaar to five to six welfare schemes amid concerns of privacy and referred the matter to an as yet un-constituted Constitutional bench. The suspect nature of the process is revealed by the fact that there has been no concomitant proposal by the government for ensuring that the aforementioned expansion comes under the ambit of the penal provisions of the Information Technology Act, 2000, wherein, a breach of information by anyone other than the authorized personnel is subject to a prison term of up to 10 years. Neither have any alternative penalizing provisions been stipulated.

The critical issue that is at stake here is that privacy cannot be envisaged as a saleable or transferable commodity which can be violated through the simple transaction of a small fee. Yet this is precisely what the current government directive presumes. Whether the government claims to institute a system whereby third-party access to citizen data will be limited is not the issue at hand, since the larger shift that is being signalled is the one where the privacy discourse transits from merely painting the state as a violator of privacy to the one where a collaborative arrangement ensures that such violations become acceptable part of institutional norms. The assumption that underpins such an idea is that of an individualistic-liberal society that accepts and even engages in such mutual routine violations of privacy on the argument of ensuring their safety and security.

This access to safety and security is not seen as a transgression by the state even if the privacy of other citizens is breached, since an inclusive and participatory effort will ensure the legitimacy of the process. What more – from simply macro-level violations of privacy, it will now even facilitate micro-level violations in which the private individuals and companies become collaborators of the government.

Expanding the ambit of privacy violation

As is the rising trend now, in the name of collective or national interest, we have ceased to condemn the public profiling of citizens through a violation of their privacy, through instruments such the national sex offenders registry and arbitrary surveys in states like J&K that are rife with border tensions, seen to be occurring at two levels.

First, at the level of explicit public profiling, the registry not only seeks to include all individuals charge-sheeted for all cognizable and non-cognizable sexual offences under a sex offender register, but the Minister for Women and Child

⁴ Ibid.

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Development (WCD) also suggested that even a 10 year old juvenile, “should have to report to the police where he is, and a watch should be kept on him for the rest of his life. He should report to the police every month, he should be required to say where he is working, where he is travelling.”

Second, at the level of implicit institutional profiling what is seen are the recent attempts to conduct an intrusive survey exclusively in the Kashmir region of J&K, seeking personal details such as specific details of married daughters and sectoral affiliations within a religious community, to gauge ties with militant groups.

Both of these constitute a violation of a citizen’s privacy beyond the ambit of cyber data protection. These are the initiatives that will be spearheaded by the Ministry of Home Affairs and indicate a draconian pattern in the making, which has less to do with curbing crimes and more with targeting individuals by instilling in them a fear of the state. It is because of this changing pattern that the meaning and implications of privacy in the context of cyber data protection has itself undergone a radical change. It has transited from being confined to internet tracking of user information and the dangers of its potential misuse by third parties to a using of such information as a primary source by the state to analyse people’s identities and penalize them on that basis. India already has a number of Lawful Interception and Monitoring systems installed in its communication networks to track user data. The system leverages the power of Section 69 of the Information Technology Act, 2000, which imposes an obligation on Internet Service Providers to provide all assistance to government agencies to intercept any communication, failing which may result in imprisonment for up to 7 years and fines.⁵

More recently, according to an RTI filed by the Software Freedom Law Centre (SFLC), a list of 26 companies expressed interest in collaborating with the Director General for Police, Logistics and Provisioning for providing Internet monitoring systems to the Indian state to help it in citizen surveillance.⁶

While such measures describe the states violation of internet user’s privacy through surveillance, the government is now traversing an even more dangerous path of potential violation of privacy by linking the rationale of its surveillance to monitoring citizens’ public opinion on social media with the potential to penalize them in the name of checking radicalization. The government is planning to set up a special media cell to track content online, and counter news and comments that it decides are negative or provocative. This is based on a tracking software which will generate the relevant tags to classify comments as negative, positive and neutral, and more dangerously, will also comb through a user’s past history to assess the potential for radicalization.⁷

With the government declaring this kind of a war on the citizens, there is a need to challenge the transition of privacy beyond clandestine surveillance by the state to explicit public profiling in what is an increasingly undemocratic ethos.

The way forward

The implementation of the pending Right to Privacy Bill, 2014, which penalizes non-consensual collection of personal information, would have prevented such exercises. And certainly, incorporating the recommendations of the Justice AP Shah Committee Report of 2012 will yield a multi-pronged approach to protecting personal information and data, and will be substitute to the weak penalizing provisions of the Information Technology Act, 2000 and the Information Technology Rules, 2011.

In 2011, the UPA government finalised a draft Bill on privacy, and set up a related Committee of Experts headed by Justice A P Shah. The panel recommended a new law to protect privacy and personal data in the private and public spheres, and the appointment of privacy commissioners at the Centre and in states. It listed nine principles of privacy, as

⁵ Venkat 2014.

⁶ Venkat 2014.

⁷ Ranjan 2016.

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also certain exceptions to the right to privacy — such as national security, public order, disclosure in public interest, prevention, detection, investigation and prosecution of criminal offences and protection of the rights of freedom of others.⁸

It is these recommendations that should be implemented in formulating a right to privacy, while ensuring that it addresses the institutional bias which results in exclusive targeting by easily tweaking the data and personal information protection laws. It should be remembered that a system of laws will remain inadequate if the government continues to institute a parallel regime whose moral implications facilitate the explicit and implicit violations of privacy and public and clandestine profiling of citizens.

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⁸ Chibber 2015.

Headlines

Default Approval Scheme for Projects in Naxal Zones Extended

(The Hindu, February 22, 2016)

The Environment Ministry has extended to December 2018 a scheme granting default Forest Department approval for public utility projects in Naxal-affected regions. Such a scheme has been in place since 2011 in 117 districts, including those in Jharkhand, Maharashtra and Telangana. Sunday's directive is an extension of this programme that lapsed in December 2015.

All projects require separate forest and environmental clearances, given the specific circumstances of a project. A statement by the Environment Ministry noted that the general approval was granted, "keeping in view the importance of creation of public utility infrastructure such as schools, dispensaries/hospitals, electric and telecommunication lines, drinking water projects, water/rainwater harvesting structures, minor irrigation canals, non-conventional sources of energy, skill upgrade/vocational training centres, power substations, rural roads, communication posts, police establishments like police stations/outposts/border outposts/watch towers in sensitive areas identified by the Ministry of Home Affairs.

They also include underground laying of optical fibre cables, telephone lines and drinking water supply lines in Left-Wing Extremism-affected areas."

Read more: <http://www.thehindu.com/todays-paper/tp-national/scheme-for-projects-in-naxal-zones-extended/article8265565.ece>

Date Accessed: 22.02.2016

Rural Doctors Shortage Up 200% in 10 Years

(Prachi Salve, India Spend, February 27, 2016)

"Public-health centres across India's rural areas in 29 states and seven union territories—are short of more than 3,000 doctors, the scarcity rising 200% (or tripling) over 10 years, according to government data. The data are a warning that a 15% cut in capital spending—which includes hiring more doctors and better equipping health centres—for the current year (2015-16) is likely to adversely affect India's already inadequate rural public-health infrastructure."

Read more: <http://www.indiaspend.com/cover-story/rural-doctor-shortage-up-200-in-10-years-what-should-delhi-do-42118>

Date Accessed: 28.02.2016

Governance & Development

POLITICS AND GOVERNANCE

Haryana Government Will Grant OBC Status to Jats

(The Huffington Post, February 21, 2016)

The Haryana government on Sunday decided to grant OBC status to Jats after their community leaders held a meeting with Union Home Minister Rajnath Singh, said Anil Jain, who is BJP incharge of Haryana. "It has been decided that in coming Assembly session, OBC status will be granted to Jats," said Jain.

After meeting with the Home Minister, Jat Sangharsh Samiti leader Jaipal Singh Sangwan appealed for an end to the agitation in Haryana and said that their demands have been met.

Haryana was on the edge on Sunday as fresh incidents of arson and violence shook the state with a ninth town being brought under curfew as the Jat agitation for quota under OBC entered the eighth day so far claiming 10 lives.

The Jat stir also hit Delhi with the Arvind Kejriwal government announcing closure of schools tomorrow as part of water rationing after supply from Haryana was disrupted. The national capital also witnessed big traffic jams in some parts.

Read More: http://www.huffingtonpost.in/2016/02/21/jat-agitation_n_9284694.html?utm_hp_ref=india

Date Accessed: 22.02.2016

A Social Economy Budget

(The Livemint, March 1, 2016)

The single most important budgetary initiative that will radically change the political economy of the country is the allocation of nearly Rs.3 trillion to gram panchayats. This move, which comes hot on the heels of a new devolution of finances to the state governments announced in the last budget, is a game-changer.

Read More: <http://www.livemint.com/Opinion/vtNjX7sy31hqGBGX2hNmMK/A-social-economy-budget.html>

Date Accessed: 1.3.2016

EDUCATION

Sociology of Education and Indian Higher Education Systems

(The Economic and Political Weekly, February 27, 2016)

What is critically missing in higher education in India is the continuously maintained, institution-level data, which is an invaluable database for research as well as for honing policies and monitoring their outcomes. This paper chronicles one administrative and scholarly experiment recently launched in Cotton College State University in Guwahati, Assam. The first year's results of the ongoing experiment are revealed and the future potential of this kind of research to engage with questions, such as the fairness and effectiveness of examination and evaluation systems, and the correlation of a student's academic performance with prior education and social background, is recorded.

Read more: <http://www.epw.in/journal/2016/9/special-articles/sociology-education-and-indian-higher-education-systems.html#sthash.27utFSHW.dpuf>

Date Accessed: 1.3.2016

Governance & Development

HEALTH

First Strong Sign That Zika can Cause the Debilitating Guillain–Barré Syndrome

(*The Wire*, March 1, 2016)

While the role of microcephaly is still debated, the new study by Van-Mai Cao-Lormeau, from the Institut Louis Malardé in Tahiti, and her team presents statistical evidence that GBS is indeed linked to the Zika virus. Their study is the first to assess the role of Zika virus infections in a large number of patients with GBS diagnosed during a Zika outbreak.

Read More: <http://thewire.in/2016/03/01/first-strong-evidence-that-zika-can-cause-the-debilitating-guillain-barre-syndrome-23253/>

Date Accessed: 1.3.2016

With No Day-After Pills, Women Pop Abortion Drugs

(Pushpa Narayan, *The Times of India*, February 22, 2016)

After morning-after pills virtually disappeared from pharmacies in Tamil Nadu 10 years ago, women have taken to abortion pills without medical scrutiny, leading to a surge in unhealthy, life-threatening abortions. For 10 years, Tamil Nadu has enforced restrictions that made morning-after pills virtually unavailable, forcing women to take recourse to abortion pills without prescription or medical advice.

This, doctors say, leads to complications and death. Doctors at Sri Ramachandra Medical University have taken seriously a study by a student, which found many women had ended up with complications after they took prescription pills over the counter.

“We see cases of septic abortions that make blood transfusion and surgery essential,” said obstetrician-gynaecologist Dr Nazira Sadique, Assistant Professor, Sri Ramachandra Medical University.

Several doctors' bodies such as the Federation of Obstetric and Gynaecological Societies of India and the state chapter of Indian Medical Association have urged the state to tighten sale of abortion pills and relax the rules on morning-after pills. In the absence of contraceptives, doctors say that morning-after pills are the best alternative for a woman to avoid the strain of an abortion.

Read more: <http://timesofindia.indiatimes.com/india/With-no-day-after-pills-women-pop-abortion-drugs/articleshow/51084737.cms>

Date Accessed: 22.02.2016

Necklace Aids Child Vaccination

(Suranjana Tewari, *BBC News*, February 28, 2016)

“Around 1.5 million children die around the world every year from diseases that could be prevented through vaccination. India has one of the lowest vaccination rates in the world at under 60% - well below the World Health Organization's 90% target. But in rural Rajasthan, a simple necklace - which contains a child's vaccination records in a computer chip - is helping boost the numbers protected. Khushi Baby - which means happy baby - is a plastic pendant on a black string. A computer chip embedded in the pendant stores vaccination data of the baby wearing it, along with the mother's health records.”

“By keeping the information on the child rather than on medical cards which can be lost or on paper logbooks that can become cumbersome and are almost impossible to search through, health workers can ensure babies get the right vaccinations at the right time. The chip communicates with a smartphone or tablet, allowing health care workers in remote areas to access real-time data on the child's vaccination schedule. When the health worker returns to the city, the data is uploaded to a central cloud allowing them to take the right supplies on their next field visits.”

Read more: <http://www.bbc.com/news/health-35655035>

Date Accessed: 28.02.2016

Governance & Development

TECHNOLOGY

Apple's FBI Battle is Just the Beginning of a Reality Check for the Tech Sector

(*The Guardian*, February 21, 2016)

With the rise of the internet, and companies' ability to become not just transnational but supranational, active everywhere yet arguing that their responsibilities belong nowhere, attitudes have changed. Apple's row with the FBI over access to a locked iPhone that belonged to the employer of one of the San Bernardino killers is just the latest example of technology businesses discovering that nothing they now do is without consequences.

Apple has been excoriated by presidential candidates, and backed into the tightest of corners by the FBI: the moral case for refusing to hack into a terrorist's phone is hard to make – particularly in the US over an Isis-inspired attack during an election year.

Technology companies may not create oil spills, but their effects on modern life are suddenly spreading across a gamut of topics – privacy, tax, regulation, safety, even housing. That's why the San Bernardino case could be the straw that breaks the camel's back. The FBI knows that the publicity from this battle won't be favourable to Apple, whichever way the courts rule. That worries every other technology company.

Apple, of course, wasn't looking for a row with the FBI when it improved the encryption on its phones. And that is what will worry tech companies. As their influence on our daily lives grows, the effects of new features become less predictable – but probably greater.

What if the next case involves taxis and short lets used for child trafficking? Or tax avoidance turning out to fund terrorism? Those may sound farfetched, but they're only a form of Kranzberg's first law: "Technology is neither good nor bad; nor is it neutral."

This week, the tech business is learning, to its reputational cost, just what that really means.

Read More: <http://www.theguardian.com/business/2016/feb/21/apple-fbi-battle-technology-firms-consequences-of-actions>

Date Accessed: 22.02.2016

LAW AND JUSTICE

Once Again, Seditious is at the Heart of Defining the Nation

(*Shruti Kapila, TheWire*, 28 February, 2016)

The test of popular sovereignty is not loyalty. Instead, the test of popular sovereignty is democracy. In making the 'people' sacred, the Indian constitution disallows the equation of 'people' with any partisan group, majority or religion. Popular rule, as Nehru envisioned, could change hands, but had to remain steadfast.

Read More: <http://thewire.in/2016/02/28/once-again-seditious-is-at-the-heart-of-defining-the-nation-22763/>

Accessed on 29.01.2016

Society

LANGUAGE AND CULTURE

Assam Government Makes Bodo Associate Official Language

(Times of India, February 26, 2016)

Assam Government in a recent notification has declared that the Bodo language shall be used as an associate official language in all other districts of the state having a substantial Bodo Population. “the Bodo language is one of the 22 languages recognized by the Eighth Schedule of the Constitution.

Read more: <http://timesofindia.indiatimes.com/city/guwahati/Govt-makes-Bodo-associate-official-language-before-polls/articleshow/51148883.cms>

Date Accessed: 28.02.2016

India and World

INDIA IN THE WORLD

WTO Rules against India in Solar Case

(Economic Times, February 25, 2016)

“The World Trade Organization (WTO) has ruled in the US favour and against India's domestic content requirements for solar products under the national solar mission. In its report , the WTO said the measures India has taken are "not justified" under Agreement on Trade-Related Investment Measures (TRIMs) and General Agreement on Tariffs and Trade.”

Read more:

http://economictimes.indiatimes.com/articleshow/51131378.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

Date Accessed: 26.02.2016

Opinions/ Books

OPINIONS

Besides ‘Make in India,’ How About ‘Visit India’?

(Mohamed Zeeshan, *The Diplomat*, February 18, 2016)

Tourism is a highly understated and much neglected trump card for India’s economy, particularly given the spread of Indian cultural elements around the world in recent years. Yet, the numbers in the tourism industry are underwhelming. According to the World Bank, in 2013, fewer than 7 million foreign tourists arrived on India’s shores – far less than the number of tourists who visited much smaller countries such as Denmark and Bahrain, and even below tourist arrivals in cities such as Dubai and Singapore. By contrast, China attracted a whopping 55 million tourists that year while France topped the world rankings with 85 million tourist arrivals.

There are a great many reasons for India’s poor showing. Take infrastructure. India boasts as many as 32 World Heritage Sites and two Biodiversity Hotspots, but connectivity to many of these areas is still underdeveloped. Transportation is made cumbersome by a network of roads that are badly in need of repair. Trains too are in need of upgrading and better maintenance, and waterways remain a highly neglected mode of transport despite India’s abundance of rivers. Many cities are also now severely overcrowded.

India has long neglected the potential of tourism in its economic growth plans. Tourism won’t just bring the country revenue from overseas; it will also create jobs and attract investment in sectors such as hospitality, real estate and infrastructure. All of this could be gained through a few fairly simple policy initiatives.

Read More: <http://thediplomat.com/2016/02/beside-make-in-india-how-about-visit-india/>

Date Accessed: 22.02.2016

Can the Welfare State Survive the Refugee Crisis?

(Heather Horn, *The Atlantic*, February 18, 2016)

The idea that a state should look after its citizens’ economic and social well-being – providing safety nets in the form of unemployment insurance, pensions, or health insurance – has spread widely since its first big trial run in 19th-century Europe. But can it survive in an age with fewer borders? Won’t state coffers eventually be empty if more and more immigrants start drawing on them?

The surprising answer is: not necessarily. What’s more, some of the countries most concerned about these questions at the moment are the ones most likely to profit from greater immigration. “Immigrants come in and they work and pay taxes and they contribute,” said George Borjas, an economics professor at Harvard’s Kennedy School of Government. “At the same time, some of them get sick, some of them have children who have to go to school, and all kinds of programs kick in in order to provide them services. And the question at the end is which of these two money streams is greater. There’s been a lot of work on that,” he said, and the studies are generally open to interpretation.

In a world where the refugee crisis has made immigration not just an economic issue but a moral one, this question of integration might just be the most important of them all. But with a large influx of both skilled and unskilled workers, calculating the likelihood of immigrants having a net positive impact involves more than assessing unemployment levels and the overall condition of the host economy. It also requires considering potential negative “externalities,” which are very hard to measure economically.

The stronger case is the moral one, but it’s a tough sell to voters facing short-term hardships. The honest thing for a humanitarian-minded politician to say would be, “This is going to be painful. But it’s the right thing to do. And if we play our cards right, we could reap the benefits in 15 years.” It’s a message few politicians have hazarded to deliver.

Read More: <http://www.theatlantic.com/international/archive/2016/02/welfare-state-refugees-europe/463272/>

Date Accessed: 22.02.2016

Opinions/ Books

Standing with JNU, from Around the World - Statements of Solidarity

(The Wire Staff, *TheWire*, 23 February, 2016)

Letters of solidarity with the JNU Teachers Association and the JNU Students Union, from across India, and universities from countries across the world including the United States of America, the United Kingdom, Japan, Canada, Australia are contained in this article, condemning the crackdown on dissent and disagreement with ideas propagated by the Government of India

Read More: <http://thewire.in/2016/02/23/standing-with-jnu-from-around-the-world-statements-of-solidarity-22413/>

Accessed on 29.02.2016

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