

SYNOPSIS

The Petitioner has been constrained to approach this Hon'ble Court under Article 32 of the Constitution, seeking an appropriate writ, order or direction to quash the Request for Proposal (the "**impugned RFP**") bearing RFP Ref No: BECIL/Social Media/MIB/02/2018-19 dated 24.04.2018 as modified/revised/amended vide addendum/corrigendum dated 28.04.2018, 16.05.2018, 23.05.2018 as well as 30.05.2018 as being violative of Articles 14, 19(1)(a) and 21 of the Constitution. The impugned RFP is purportedly for "SITC of Software and Service and Support for function, operation and maintenance of Social Media Communication Hub, Ministry of Information and Broadcasting, Government of India". In other words, the impugned RFP invites proposals to select a bidder for the Supply, Installation, Testing and Commissioning (SITC) of software to Social Media Communication Hub of MIB and provision of service and support for function, operation and maintenance of Social Media Communication Hub, Ministry of Information and Broadcasting, Government of India.

The impugned RFP has been issued by Respondent No. 2 herein i.e. Broadcast Engineering Consultants India Ltd. ("**BECIL**"), calling upon interested parties to submit their bids/proposals for selection as an Agency to inter alia set up, operate and maintain a

Social Media Communication Hub ("**SMCH**") on behalf of Respondent No. 1 i.e. the Ministry of Information & Broadcasting, Government of India.

The Petitioner is a member of the Trinamul Congress and is presently a member of the West Bengal Legislative Assembly from Karimpur constituency. As such, she is a public figure who is active on several social media platforms and has a large social media following. The grievance of the Petitioner is that the impugned RFP violates her fundamental rights guaranteed under Articles 14, 19(1)(a) and 21 of the Constitution, in as much as, the same aims to establish an SMCH which is being set up with the clear

objective of surveillance of activities of individuals such as herself on social media platforms. Such intrusive action on the part of the Government, is not only without the authority of law, but brazenly infringes her fundamental right to freedom of speech under Article 19(1)(a) of the Constitution. Such action of the Government also violates her right of privacy. The entire scheme/mechanism of SMCH intended to be established through the impugned RFP is in the teeth of the judgment laid down by this Hon'ble Court in **K.S. Puttaswamy v. Union of India**, (2017) 10 SCC 1, wherein a bench of 9 Hon'ble Judges of this Hon'ble Court recognised privacy as a fundamental right under the Constitution.

Therefore, as would be averred in detail in subsequent paragraphs, the entire scheme/scope of the SMCH as sought to be set up through

the impugned RFP is violative of Articles 14, 19(1)(a) and 21. That being so, the impugned RFP along with its addenda and corrigenda deserves to be quashed and set aside as being arbitrary, illegal and unconstitutional.

THE SCOPE OF WORK AS PROVIDED FOR IN THE RFP INDICATES THAT THE PROPOSED 'SOCIAL MEDIA COMMUNICATION HUB' IS A BRAZEN ATTEMPT AT MASS SURVEILLANCE

A perusal of the 'Scope of Work' in the impugned RFP would reveal the extent of intrusion sought to be made by the Respondents in the lives of individuals such as the Petitioner. Though each and every aspect of the scope of work is beset with far reaching abilities of surveillance which intrude upon the fundamental rights of individuals, the Petitioner is highlighting some of the major concerns raised by specialists in the field, as are available in the public domain. The same are as follows:

- a. The proposed Social Media Communication Hub seeks to create a technology architecture that merges mass surveillance with a capacity for disinformation.
- b. It aims to create a technology platform "to collect Digital media chatter from all core Social Media Platforms as well as digital platforms". Such mass collection of data is collected right up to a granular, individual level and the RFP further states in the second para that the platform, "should

also support easy management of conversational logs
with each

individual with capabilities to merge it across channels to help facilitate creating a 360 degree view of the people who are creating buzz (sic) across various topics” (page 28 of the RFP). The technology is required to have the capability to “listen” for and collect data not only from social media platforms but also from email (page 29 of the RFP). Specific capabilities mentioned include live search, monitoring, collecting, indexing and storage of personal data including location-based data and “meta-data”. The ability to “Monitor individual social media user / account” is a specific mandate being given to the service provider (page 32 of the RFP).

- c. The software is required to have the “Ability to crawl social media and World Wide Web for data mining. Crawling should be comprehensive and should cover all the major websites and social media handles” (page 31 of the RFP). Based on this, the software should be able to “identify influencers” and “see historic conversation of each user in a reverse chronological manner along with the ability to merge conversations across channels” (page 30 of the RFP).
- d. This data is to be fed into a “New Media Command Room”, which according to the RFP “basically means the platform should have the ability to analyse as well as visualise large volumes of data across diverse platforms in real time”.

Separately in the portion titled, "monitoring social media sentiments" (Page 32 of the RFP), it is mentioned that, "The analytics tool should have the capability to categorise social media conversations and other references on the World Wide Web into positive, negative and neutral as viewed/considered by Ministry of Information and Broadcasting". This goes to the extent of requiring a granular, "micro-level categorisation for mentions around topics"

- e. Data which is gathered and analysed is to be prepared into reports. It is indicated that this will be done by an automated process as well as manually. It is stated that, "the platform is expected to provide automated reports..." and in addition to it manually by a "team of 20 social media analytics executives" (SMEs), subject to a minimum of six reports per day, "on sentiment, reach, details related to trending about topics and hashtags as instructed by Ministry of Information and Broadcasting". It is again generally stated that, "Reports should be generated as per requirements regarding the various activities happening in social media space". In addition to this, 716 Social Media Executives (SMEs) across the country for each of 716 districts in the country are expected to create, "Daily analysis report incorporating local sentiment

to be sent to ADG (region) and Media hub (Command Centre).”

- f. It is further proposed that the data which is collected will be gathered and stored in a Knowledge Management System (KMS), which essentially becomes an intelligent database. This should not depart from the functionality of the software for real time queries where it, “should perform like a search engine”. Some worrying features of the KMS database include profiling of conversations and individuals, where it should have the functionality for, “creating, capturing, managing, delivering and archiving large volumes of documents and contents”. Such storage is to be effected at a, “private data centre” (page 28, 39 of the RFP) with an offline archival set up to be managed by the vendor that will provide a, “seamless view across all data platforms”. Therefore, the data that is going to be collected is going to be in the possession and control of a private agency.
- g. One of the most worrying features is that there is a desired functionality of deleting access logs and removing any audit trail whereby it is proposed that the, “admin module shall provide for purging old audit trail and do selective logging” and, “the system shall give flexibility to administrator to do selective

logging i.e. suspend and resume audit trail generation for specific system and user activities” (page 38 of the RFP).

- h. It is also noteworthy that the platform is not only going to be used for collection of data but also for uploading content. The RFP states that the, “platform maybe used to disseminate content and hence should support publishing features”. This is further substantiated in the section on “Pre and Post establishment support”, which states that the team of the SMEs are expected to, “create and publish content on various social media platforms of Ministry of I&B”. Appendix 4 which further contains their roles and responsibilities states that it includes, “publishing content as assessed [by the] Ministry of Information and Broadcasting”. In addition to this, SMEs in the 716 district are expected to conduct, “social media publicity”.
- i. Further, the stated intent is to try to influence social media conversations. This purpose is clearly set out in the RFP in the part titled as, “predictive analysis” as, “how could the public perception be moulded in positive manner for the country, how could nationalistic feelings be inculcated in the masses, how can the perception management of India be improved at the world, how could the media blitzkrieg of India’s adversaries can (sic) be predicted and replied/neutralized,

how could the social media and internet news/discussions be given a positive slant for India" (page 33-34 of the RFP).

- j. In this context, the repeated use of the word "competitors" is deeply disturbing. For instance, the RFP states that the software must "Measure the effectiveness of hashtag campaigns and compare the performance of brand campaign with competitors by ingesting relevant keywords" (page 30 of the RFP) and the Social Media Command Centre should provide real-time monitoring of competitors (page 30-31 of the RFP). If the platform was intended to be used only by the MIB solely for the purpose of monitoring social welfare schemes, the question of competitors would not arise.

- k. As mentioned above, the vendor is expected not only to create the software but also execute it through manpower deployment that extends beyond technical support to various functions of collection of data, analysis and publication. This is implemented by a team of 20 Social Media Analytics Executives (split in a team of 8 for analytics and 12 for knowledge management services) and 716 Social Media Executives (SMEs) across the country for each of 716 districts in the country. The particular services to be rendered by SMEs is further disclosed as per Addendum No. 1 dated April 28, 2018. These SMEs are to be private persons employed by a third party service provider

handling sensitive personal data of individuals including their 360 degree profiles who are to act under the guidance and directions of the Ministry of Information & Broadcasting.

THE PROPOSED 'SOCIAL MEDIA COMMUNICATION HUB' AND ITS SCOPE OF WORK AS PROVIDED FOR IN THE RFP VIOLATES ARTICLE 19(1)(a) OF THE CONSTITUTION

State surveillance by itself constitutes a restriction on the fundamental right to free speech and expression guaranteed under Article 19(1)(a)

The very act of surveillance in and of itself constitutes a "restriction" on free speech and expression and does not satisfy the requirement of reasonableness. A citizen cannot exercise her right to free speech with the knowledge that the State and its agents are monitoring every word uttered by her, maintaining records and logs of the same and using them to profile her. The question of whether mere surveillance constitutes a restriction on the freedoms guaranteed by Article 19 was examined by this Hon'ble Court in *Kharak Singh v.*

State of U.P., (1964) 1 SCR 332. Justice Subba Rao's opinion, which has emerged as the correct position of law after the majority opinion was overturned by this Court in *K.S. Puttaswamy v. Union of India* (Privacy-9 J.), (2017) 10 SCC 1, extensively deals with this question and concludes that the freedoms under Article 19 and the right under Article 19(1)(a) in particular cannot be separated from its psychological content. The right to free speech cannot be exercised under the constant surveillance of agents of the State, and

surveillance would reduce the entire country to a jail for the citizen under surveillance. This Court observed:

29. This leads us to the second question, namely, whether the petitioner's fundamental right under Article 19(1)(d) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint. This argument ignores the adverb "freely" in clause (d). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom. Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automaton. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in clause (d) therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the entire Regulation 236 offends also Article 19(1)(d) of the Constitution.

30. Assuming that Article 19(1)(d) of the Constitution must be confined only to physical movements, its combination with the freedom of speech and expression leads to the conclusion we have arrived at. The act of surveillance is certainly a restriction on the said freedom. It cannot be suggested that the said freedom is also bereft of its subjective or psychological content, but will sustain only the mechanics of speech and expression. An illustration will make our point clear. A visitor, whether a wife, son or friend, is allowed to be received by a prisoner in the presence of a guard. The prisoner can speak with the visitor; but, can it be suggested that he is fully enjoying the said freedom? It is impossible for him to express his real and intimate thoughts to the visitor as fully as he would like. But the restrictions on the said freedom are supported by valid law. To extend the analogy to the present case is to treat the man under surveillance as a prisoner within the

confines of our country and the authorities enforcing surveillance as guards, without any law of reasonable restrictions sustaining or protecting their action. So understood, it must be held that the petitioner's freedom under Article 19(1)(a) of the Constitution is also infringed.”

(emphasis supplied)

The surveillance by the Social Media Communications Hub contemplated by the RFP is without authority of law

Even assuming without admitting that the restriction imposed was found to be reasonable, Article 19(2) clearly provides that reasonable restrictions can be imposed by the State on exercise of the right under Article 19(1)(a) only by a valid law. It is well settled that “law” to meet the requirement of Article 19(2) must be an Act of Parliament or State Legislature or subordinate legislation under the authority delegated by an Act. No restrictions can be imposed on the fundamental rights guaranteed under Article 19 by executive action.

In the present case, widespread surveillance amounting to restriction of the right under Article 19(1)(a) is sought to be mounted without any law permitting such surveillance. For this reason alone, the RFP is illegal and the process of setting up surveillance architecture in the garb of a Social Media Communications Hub must be stopped at the earliest.

The stated object does not fall under of the permitted grounds on which restrictions can be imposed under Article 19(2)

Under Article 19(2), reasonable restrictions can be imposed on the exercise of the right under Article 19(1)(a) in the interests of:

- ✦ The sovereignty and integrity of India
- ✦ The security of the State
- ✦ Friendly relations with foreign States
- ✦ Public order
- ✦ Decency
- ✦ Morality

Or in relation to:

- ✦ Contempt of court
- ✦ Defamation
- ✦ Incitement of an offence

It is ex facie evident that the purported object of developing a social media analytical tool that can “act as the guiding tool for Ministry of Information & Broadcasting to understand the impact of various social media campaigns conducted on various schemes run by the Government of India. In addition, the tool should have the capacity to provide inputs to the Ministry on how to improve the reach of various social media campaigns, how to make a particular topic trending and for the overall general improvement of social media campaigns” does not fall under any of the permitted grounds on which restrictions can be imposed on the fundamental right to freedom of speech under Article 19(1)(a). On this ground alone, the impugned RFP is unconstitutional and deserves to be set aside.

THE ENTIRE ‘SOCIAL MEDIA COMMUNICATION HUB’ PROJECT AS WELL AS THE RFP/TENDER INVITING BIDS FOR

ITS OPERATION AND MAINTENANCE IS ULTRA VIRES AS IT INFRINGES FUNDAMENTAL RIGHT TO PRIVACY

The Fundamental Right to Privacy has been recognised as being interspersed in the various Articles found in Part III of the Constitution

This Hon'ble Court in K.S. Puttaswamy v. Union of India (Privacy-9 J.), (2017) 10 SCC 1, speaking through Justice Chadrachud while tracing the constitutional protection of Privacy as primarily emanating from the guarantee of life and personal liberty under Article 21 also recognised the elements of privacy in other facets of freedom and dignity guaranteed by other fundamental rights contained in Part III.

The Court observed:

"320. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III."

Hon'ble Justice Chelameshwar in his concurring opinion was more precise when it came to recognising liberty, and in extension privacy, as taking within its sweep the freedoms mentioned under Article 19(1). He held as follows:

"362. The expression "liberty" is capable of taking within its sweep not only the right to move freely, guaranteed under Article 19(1)(d); but also each one of the other freedoms mentioned under Article 19(1). Personal liberty takes within its sweep not only the right not to be subjected to physical restraints, but also the freedom of thought, belief, emotion and sensation and a variety of other freedoms. The most basic understanding of the expression "liberty" is the freedom of an individual to do what he pleases. But the idea of liberty is more complex than that.

Abraham Lincoln's statement [Gettysburg Speech] that our nation "was conceived in liberty" is equally relevant in the context of the proclamation contained in our Preamble; and as evocatively expressed in the words of Justice Brandies:

"37. Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."

— Whitney v. California [Whitney v. California, 1927 SCC OnLine US SC 126 : 71 L Ed 1075 : 274 US 357 (1927)] , SCC OnLine US SC para 37 : US p. 375"

Hon'ble Justice Bobde, in his concurring opinion, highlighted the importance of an individual's liberty to do things privately without being disturbed, observed or spied upon in the following words:

"402. "Privacy" is "[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions" [Black's Law Dictionary (Bryan Garner Edition) 3783 (2004)] . The right to be in this condition has been described as "the right to be let alone" [Samuel D. Warren and Louis D. Brandeis, "The Right To Privacy", 4 HARV L REV 193 (1890)] . What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.

403. Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place. Privacy has a deep affinity with seclusion (of our physical persons and things) as well as such ideas as repose, solitude, confidentiality and secrecy (in our communications), and intimacy. But this is not to suggest that solitude is always essential to privacy. It is in this sense of an individual's liberty to do things privately that a group of individuals, however large, is entitled to seclude itself from others and be private. In fact, a conglomeration of individuals in a space to which the rights of admission are reserved—as in a hotel

or a cinema hall—must be regarded as private. Nor is the right to privacy lost when a person moves about in public. The law requires a specific authorisation for search of a person even where there is suspicion. [Narcotic Drugs and Psychotropic Substances Act, 1985, Section 42] Privacy must also mean the effective guarantee of a zone of internal freedom in which to think. The disconcerting effect of having another peer over one's shoulder while reading or writing explains why individuals would choose to retain their privacy even in public. It is important to be able to keep one's work without publishing it in a condition which may be described as private. The vigour and vitality of the various expressive freedoms guaranteed by the Constitution depends on the existence of a corresponding guarantee of cognitive freedom."

(emphasis added)

Further Hon'ble Justice Bobde described Privacy as a travelling right which offers a springboard for the exercise of freedoms guaranteed by Article 19(1), in the following words:

"Privacy as a travelling right

412. I have already shown that the right to privacy is as inalienable as the right to perform any constitutionally permissible act. Privacy in all its aspects constitutes the springboard for the exercise of the freedoms guaranteed by Article 19(1). Freedom of speech and expression is always dependent on the capacity to think, read and write in private and is often exercised in a state of privacy, to the exclusion of those not intended to be spoken to or communicated with. A peaceful assembly requires the exclusion of elements who may not be peaceful or who may have a different agenda. The freedom to associate must necessarily be the freedom to associate with those of one's choice and those with common objectives. The requirement of privacy in matters concerning residence and settlement is too well known to require elaboration. Finally, it is not possible to conceive of an individual being able to practise a profession or carry on trade, business or occupation without the right to privacy in practical terms and without the right and power to keep others away from his work."

(emphasis supplied)

The sequitur to the aforesaid observation is that not only has the element of privacy been recognised in the freedoms guaranteed

under Article 19(1), but the Hon'ble Judge has gone a step further in recognising that privacy itself forms the basis upon which the freedoms guaranteed under Article 19(1) can be exercised.

Hon'ble Justice Nariman, in his concurring opinion, espoused that different forms of privacy can be related to different fundamental rights guaranteed under Part III of the Constitution in the following terms:

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relating to his physical body, such as the right to move freely;
- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

522. We have been referred to the Preamble of the Constitution, which can be said to reflect core constitutional values. The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed.

525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual. [In 1834, Jacques-Charles Dupont de l'Eure associated the three terms liberty,

equality and fraternity together in the Revue Républicaine, which he edited, as follows: "Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity." Many of our decisions recognise human dignity as being an essential part of the fundamental rights chapter. For example, see Prem Shankar Shukla v. Delhi Admn., (1980) 3 SCC 526 at para 21, Francis

Coralie Mullin v. UT of Delhi, (1981) 1 SCC 608 at paras 6, 7 and 8, Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 at para 10, Maharashtra University of Health Sciences v. Satchikitsa

Prasarak Mandal, (2010) 3 SCC 786 at para 37, Shabnam v. Union of India, (2015) 6 SCC 702 at paras 12.4 and 14 and Jeeja Ghosh v. Union of India, (2016) 7 SCC 761 at para 37.] The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted."

(emphasis supplied)

It is amply clear that this Hon'ble Court has recognised that the fundamental right to privacy has various facets and depending on a case to case basis, the constitutional protection to privacy can be traced to various different Articles under Part III of the Constitution.

In the present context, the infringement of privacy, occasioned by the establishment of a SMCH, is relatable to Article 21 read in conjunction with Article 19(1)(a). While Article 21 affords an individual the personal liberty to develop to the full extent of her

potential, given the changing times and the leaps made by technology and particularly the social media technology, such achievement can only be possible if the individual's privacy in expressing her views, speeches and expression before a select audience, is respected and secured from intrusion as the same emanates from Article 19(1)(a).

The Union Government through the Social Media and Communications Hub project aims to achieve the opposite of what it was expected to do by this Hon'ble Court in K.S. Puttaswamy v. Union of India (Privacy-9 J.), (2017) 10 SCC 1

Hon'ble Justice Chandrachud in his elaborate judgment discussed in detail various facets of privacy and after acknowledging the protection afforded by Part III of the Constitution to an individual's privacy, observed specifically in the context of information privacy in the age of the internet that any restriction on the privacy of an individual can only by a valid law. He observed:

"310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess

the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.”

(emphasis supplied)

Justice Chandrachud then held that while collection of data concerning an individual may at times be necessary in pursuance of legitimate State interests, the State must first put in place a regime to ensure data protection of individuals. He observed:

“328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the State but from non-State actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the State. The legitimate aims of the State would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union Government while designing a carefully structured regime for the protection of the data. Since the Union Government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B.N. Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union Government having due regard to what has been set out in this judgment.”

(emphasis supplied)

This recommendation was reiterated by Hon'ble Justice Kaul in the following words:

"Data regulation

637. I agree with Dr D.Y. Chandrachud, J., that formulation of data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of privacy concerns and legitimate State interests, including public benefit arising from scientific and historical research based on data collected and processed. The European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data may provide useful guidance in this regard. The State must ensure that information is not used without the consent of users and that it is used for the purpose and to the extent it was disclosed. Thus, for e.g., if the posting on social media websites is meant only for a certain audience, which is possible as per tools available, then it cannot be said that all and sundry in public have a right to somehow access that information and make use of it."

(emphasis supplied)

Thus, without putting in place a law to strengthen the data protection regime in the country, the Union Government has hastily proceeded to implement a project which is aimed to defeat the avowed values of privacy recognised by a bench of 9 Hon'ble Judges of this Hon'ble Court.

The SMCH project as well as the impugned RFP are a manifestation of the fears expressed in K.S. Puttaswamy v. Union of India (Privacy-9 J.), (2017) 10 SCC 1, of a snooping government attempting to downsize its critics

The SMCH project robs the individual of her identity. It is clear from its self-proclaimed scope that it seeks to establish a subservient populace deprived of its natural ability to express itself. The project seeks to customise the expression of free speech by citizens, particularly speech intended to be critical of the government, by creating and maintaining profiles of individuals the Government finds to be of interest to it and following it up to inculcate 'nationalistic feelings'. It is clear that the Union Government's understanding of 'nationalistic feelings' is limited to an individual's submissiveness to the diktats of the incumbent government.

It is submitted that these were precisely the fears expressed by this Hon'ble Court in the **K.S. Puttaswamy** judgment. This Hon'ble Court has discussed privacy concerns of individuals against the State at great length, while upholding privacy as an inherent and inalienable right protected under Part III of the Constitution. Hon'ble Justice Chadrachud while elaborating on what is constitutionally meant by Privacy stated thus:

"323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

....

326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual."

(emphasis supplied)

Thus this Hon'ble through the judgment of Justice Chadrachud has made it amply clear that once privacy has been recognised, the State is under an obligation to both refrain from intruding upon it as well as to take active steps to protect such privacy. The freedom of speech and expression, guaranteed under Article 19(1)(a), as exercised by individuals on social media is more deserving of protection than any other. The Respondents on the other hand, are attempting to erode any such protection that exists by streamlining a mechanism where individual profiling would be carried out based on their conduct over social media.

Hon'ble Justice Chelameshwar decried the historical attempts made by government to condition the thought process of its subjects in the following words:

"372. History abounds with examples of attempts by Governments to shape the minds of subjects. In other words, conditioning the thought process by prescribing what to read or not to read; what forms of art alone are required to be appreciated leading to the conditioning of beliefs; interfering with the choice of people regarding the kind of literature, music or art which an individual would prefer to enjoy. [Stanleyv. Georgia, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)]"³. ... that the mere private possession of obscene matter cannot constitutionally be made a crime.^{***9}. ... State has no business telling a man, sitting alone in his own house, what books he may

read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving Government the power to control men's minds.” (SCC OnLine US SC paras 3 & 9)] Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which Governments do not approve. [Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615] Insofar as religious beliefs are concerned, a good deal of the misery our species suffer owes its existence to and centres around competing claims of the right to propagate religion. Constitution of India protects the liberty of all subjects guaranteeing [**“25.Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.”]** the freedom of conscience and right to freely profess, practise and propagate religion. While the right to freely “profess, practise and propagate religion” may be a facet of free speech guaranteed under Article 19(1)(a), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty. There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief, etc. which form part of the liberty under Article 21.

373. Concerns of privacy arise when the State seeks to intrude into the body of subjects. [Skinner v. Oklahoma, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942)“20. There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority— even those who have been guilty of what the majority defines as crimes.” (SCC OnLine US SC para 20)—Jackson, J.] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life

prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right to privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there is a huge debate on those issues though it is still a grey area. [For the legal debate in this area in US, See Chapter 15.11 of American Constitutional Law by Laurence H. Tribe, 2nd Edn.] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy. Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision-making process. The right to travel freely within the country or go abroad is an area falling within the right to privacy. The text of our Constitution recognised the freedom to travel throughout the country under Article 19(1)(d). This Court has already recognised that such a right takes within its sweep the right to travel abroad. [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] A person's freedom to choose the place of his residence once again is a part of his right to privacy [Williams v. Fears, 1900 SCC OnLine US SC 211 : 45 L Ed 186 : 179 US 270 (1900)—“8. Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty....” (SCC OnLine US SC para 8)] recognised by the Constitution of India under Article 19(1)(e) though the predominant purpose of enumerating the abovementioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. The choice of appearance and apparel are also aspects of the right to privacy. The freedom of certain groups of subjects to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right to privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling under Article 25. Informational traces are also an area which is the subject-matter of huge debate in various jurisdictions falling within the realm of the right to privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tapings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect biometric data regarding all the residents of this country. The abovementioned are some of the areas where some interest of privacy exists. The examples given above indicate to some extent the nature and scope of the right to privacy.

374. I do not think that anybody in this country would like to have the officers of the State intruding into their homes or private property at will or soldiers quartered in their houses without their consent. I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or

whom they should be associated with either in their personal, social or political life. Freedom of social and political association is guaranteed to citizens under Article 19(1)(c). Personal association is still a doubtful area. [The High Court of A.P. held that Article 19(1)(c) would take within its sweep the matrimonial association in T. Sareetha v. T. Venkata Subbaiah, 1983 SCC OnLine AP 90 : AIR 1983 AP 356. However, this case was later overruled by this Court in Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90 : AIR 1984 SC 1562.] The decision-making process regarding the freedom of association, freedoms of travel and residence are purely private and fall within the realm of the right to privacy. It is one of the most intimate decisions.”

(emphasis added)

The observations of Hon'ble Justice Kaul in the **K.S. Puttaswamy** case in respect of privacy concerns against the State are far more direct and applicable to the instant case.

“A. Privacy concerns against the State

585. The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable. Edward Snowden shocked the world with his disclosures about global surveillance. States are utilising technology in the most imaginative ways particularly in view of increasing global terrorist attacks and heightened public safety concerns. One such technique being adopted by the States is “profiling”. The European Union Regulation of 2016 [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-42016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] on data privacy defines “profiling” as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements [Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-42016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such

data, and repealing Directive No. 95/46/EC (General Data Protection Regulation).] . Such profiling can result in discrimination based on religion, ethnicity and caste. However, "profiling" can also be used to further public interest and for the benefit of national security.

....

634. People change and an individual should be able to determine the path of his life and not be stuck only on a path of which he/she treaded initially. An individual should have the capacity to change his/her beliefs and evolve as a person. Individuals should not live in fear that the views they expressed will forever be associated with them and thus refrain from expressing themselves."

(emphasis added)

Thus, it is amply clear that the profiling of citizens as is sought to be done in the present case, is in no manner to further public interest or for the benefit of national security. The profiling is to be carried out in the most brazen manner whereby technology architecture is being put into place by which the social media personality of an individual, critical of the government, can be used by the State in the most arbitrary manner to cut her to size and force her to kowtow to the State. Such a project has long term implications and is likely to damage the democratic setup of our country. It is submitted that this is nothing but a novel attempt to circumvent the recently recognised fundamental right of privacy by this Hon'ble Court. As such any such attempt needs to be quashed and set aside as being violation of the fundamental right to privacy.

THE SOCIAL MEDIA AND COMMUNICATIONS HUB PROJECT AS WELL AS THE RFP IS ALSO VIOLATIVE OF ARTICLE 14 AS IT LACKS STATUTORY BACKING AND IS REplete WITH ARBITRARINESS

This Hon'ble Court in the **K.S. Puttaswamy** case has held that in this age of information, information is power. The SMCH as contemplated in the RFP is an attempt by the State to aggregate this power in its hands without authority of law and without any corresponding checks and balances on that power in the form of a data protection regime. It is settled law that the placing of unguided and uncontrolled discretionary power in the hands of the executive is violative of Article 14 of the Constitution. It is further submitted that the extent, nature and scope and data collection about individuals contemplated in the RFP bears no rational nexus to the purported object sought to be achieved i.e. understanding the impact of various social media campaigns conducted on various welfare schemes run by the Government of India, and therefore suffers from the vice of manifest arbitrariness.

Though the stated aim of the project is to enable the Respondents to understand the impact of social media campaigns on welfare schemes and improve the reach of said campaigns, behind all the fancy terminology, the project clearly comprises two aspects:

- a. One is a massive surveillance apparatus that aims at collecting and analysing huge volumes of data, and profiling people based on that.
- b. The second is the utilising this data to predict the mood of people online and issue responses, including those targeted at

individuals or groups. This is in addition to 'activating' influencers - those who have a lot of followers online - to push the agenda of the government.

The social media analytical tool is expected to 'listen' to conversations on all major digital channels, including Facebook, Twitter, Instagram, LinkedIn, Tumblr, as well as blogs and news channels. More significantly, it is also to be able to monitor email, which clearly points to the fact that this is no mere exercise in identifying the response to schemes. The entire scheme of the SMCH bears no nexus whatsoever with its stated object.

It is submitted that the entire exercise is intended at targeting voices which are critical of the government. The tender in fact clearly defines "Monitoring individual social media user/account" as one of the 'features' of the project. This new project that aims at a fine-tuned analysis of users and sentiments is very likely to turn into a tool to direct more virulence at those who criticise the policies and methods of the government.

The fact that the proposed platform will also have the capability to publish heightens this risk. This is to be seen alongside the deployment of predictive analysis to "mould public perception" in a "positive manner" for the country and inculcate "nationalistic sentiments", as well as counter the "media blitzkrieg" of India's adversaries. An automated system that crunches vast amounts of

data and uses its results to stage interventions online will inevitably lead to furthering this trend.

The preparation of reports and the staffing are key questions as nearly 800 employees will be deployed across the country, including one in each of the 716 districts. These contracted employees on the rolls of a private third party service provider will wield considerable power, associated as they are with a system that is so intrusive. The aggregation of such unbridled power in the hands of private persons at the behest of the Government reeks of manifest arbitrariness. It is now a settled proposition of law laid down by this Court that even a policy decision can be challenged on the ground of manifest arbitrariness.

LIST OF DATES

DATES	PARTICULARS
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23.01.2018	<p>A Request for Proposal (RFP) was floated by BECIL on behalf of the Ministry for Information & Broadcasting, Government of India, bearing RFP Ref. No: BECIL/Social Media/MIB/01/2017-18 for selection of an Agency to operate and maintain a Social Media Communication Hub. The last date for submission of proposals/bids was 13.02.2018.</p>
10.02.2018,	<p>Thereafter Corrigendum No. 1 was issued on 10.02.2018 extending the due date for submission of Proposal/Bid in respect of the aforementioned RFP (BECIL/Social Media/MIB/01/2017-18) from 13.02.2018 to 19.02.2018.</p>
13.02.2018	<p>Corrigendum No. 2 to RFP No. BECIL/Social Media/MIB/01/2017-18, was issued on 13.02.2018 amending/revising various clauses of the RFP.</p>
25.04.2018	<p>Thereafter, a fresh Request for Proposal was once again floated by BECIL, bearing RFP Ref No: BECIL/Social Media/MIB/02/2018-19 for selection of Agency to inter alia operate and maintain</p>

	<p>a Social Media Communication Hub on behalf of the Ministry of Information & Broadcasting, Government of India. The last date for submission of Proposal/Bid was 17.05.2018.</p>
28.04.2018	<p>Addendum No. 1 was issued, in respect of RFP Ref No: BECIL/Social Media/MIB/02/2018-19, adding Appendix 8 which provided a list of 'Roles and Responsibilities of Media hub team' as well as qualifications of Social Media Executives (SME) in 716 districts across the country.</p>
16.05.2018	<p>Corrigendum No. 1 to RFP Ref No: BECIL/Social Media/MIB/02/2018-19 was issued by BECIL revising the last date for submission of proposal/bid from 17.05.2018 to 24.05.2018.</p>
23.05.2018	<p>Corrigendum No. 2 was issued by BECIL inter alia once again extending the last date for submission of Proposal/Bid in respect of RFP Ref No: BECIL/Social Media/MIB/02/2018-19 from 24.05.2018 to 31.05.2018</p>
30.05.2018	<p>Upon receiving no response, once again Corrigendum No. 3 was issued by BECIL extending the last date for submission of Proposal/Bid in respect of RFP Ref No:</p>

	BECIL/Social Media/MIB/02/2018-19 from 31.05.2018 to 18.06.2018.
____.06.2018	Hence, the present Writ Petition.

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. OF 2018

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ms. Mahua Moitra

D/o Dwipendra Lal Moitra

7A Judges Court Road

Alipore

Kolkatta – 700027

... PETITIONER

AND

1. UNION OF INDIA

Through its Secretary,

Ministry of Information & Broadcasting,

Room No 655, A-Wing, Shastri Bhawan,

New Delhi – 01

2. BROADCAST ENGINEERING CONSULTANTS INDIA

LTD. (BECIL)

Through its Chairman & MD,

14-B, Ring Road, I.P. Estate,

New Delhi-110002

... RESPONDENTS

ALL ARE CONTESTING RESPONDENTS

WRIT PETITION UNDER ARTICLE 32 R/W ARTICLES 14, 19(1)(a) & 21 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF A WRIT, ORDER OR DIRECTION QUASHING THE REQUEST FOR PROPOSAL BEARING RFP REF NO: BECIL/SOCIAL MEDIA/MIB/02/2018-19 DATED 24.04.2018 AS MODIFIED/ REVISED/ AMENDED VIDE ADDENDUM/ CORRIGENDUM DATED 28.04.2018, 16.05.2018, 23.05.2018 AS WELL AS 30.05.2018

TO,

HON'BLE THE CHIEF JUSTICE OF INDIA AND OTHER COMPANION JUSTICES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF
THE PETITIONER ABOVENAMED

MOST RESPECTFULLY SHEWETH:

1. That the Petitioner has been constrained to approach this Hon'ble Court under Article 32 of the Constitution, seeking an appropriate writ, order or direction to quash the Request for Proposal (**'impugned RFP'**) bearing RFP Ref No: BECIL/Social Media/MIB/02/2018-19 dated 24.04.2018 as modified/revised/amended vide addendum/corrigendum dated 28.04.2018, 16.05.2018, 23.05.2018 as well as 30.05.2018, being violative of Articles 14, 19(1)(a) and 21 of the Constitution.
2. The impugned RFP is purportedly for Supply, Installation, Testing and Commissioning (SITC) of Software and for service and support for function, operation and maintenance of a Social Media

Communication Hub for Ministry of Information and Broadcasting, Government of India. In other words, the RFP has been floated by the MIB to select a Bidder, who will be responsible for SITC of Software and service and support for the functioning, operation and maintenance of a Social Media Communication Hub.

3. The Petitioner, Ms. Mahua Moitra, is a citizen of India and is an ex-investment banker turned politician from the State of West Bengal. She is presently a member of the West Bengal Legislative Assembly from Karimpur constituency. As such, she is a public figure who is active on social media and has a large social media following.
4. The Respondent No. 1, Ministry of Information and Broadcasting (MIB) is a branch of the Government of India responsible for formulation and administration of the rules, regulations, laws and policy relating to information, broadcasting, the press and films in India.
5. The Respondent No. 2, Broadcast Engineering Consultants India Limited (BECIL), is a PSU under the MIB which has been given the mandate for setting up the Social Media Communications Hub (SMCH). On behalf of the MIB, BECIL has invited proposals from eligible bidders/Agencies for the SMCH project. BECIL has been engaged by the Ministry of

Information and Broadcasting to undertake the bid process management and execute the project involving functioning, operationalization and maintenance of the SMCH.

RELEVANT FACTS IN BRIEF:

6. On 23.01.2018, a Request for Proposal (RFP) was floated by BECIL on behalf of the Ministry for Information & Broadcasting, Government of India, bearing RFP Ref. No: **BECIL/Social Media/MIB/01/2017-18** for selection of an Agency to operate and maintain a Social Media Communication Hub. The last date for submission of proposals/bids was 13.02.2018. A true copy of RFP Ref. No: **BECIL/Social Media/MIB/01/2017-18** dated 23.01.2018 is annexed hereto and marked as **ANNEXURE P-**
7. Thereafter Corrigendum No. 1 was issued on 10.02.2018 extending the due date for submission of Proposal/Bid in respect of the aforementioned RFP **(BECIL/Social Media/MIB/01/2017-18)** from 13.02.2018 to 19.02.2018. A true copy of the Corrigendum No. 1 dated 10.02.2018 is annexed hereto and marked as **ANNEXURE P-**
8. On 13.02.2018, Corrigendum No. 2 to RFP No. **BECIL/Social Media/MIB/01/2017-18**, was issued on 13.02.2018

amending/revising various clauses of the RFP. A true copy of the Corrigendum No. 2 dated 13.02.2018 is annexed hereto and marked as **ANNEXURE P-**

9. Since there was no response to the RFP/Tender, a fresh Request for Proposal dated 25.04.2018 was once again floated by BECIL, bearing **RFP Ref No: BECIL/Social Media/MIB/02/2018-19** for selection of an Agency to inter alia operate and maintain a Social Media Communication Hub on behalf of the MIB. The last date for submission of Proposal/Bid was 17.05.2018. A true copy of the **RFP Ref No: BECIL/Social Media/MIB/02/2018-19** dated 25.04.2018 is annexed hereto and marked as **ANNEXURE P-**
10. Addendum No. 1 was issued on 28.04.2018, in respect of RFP Ref No: **BECIL/Social Media/MIB/02/2018-19**, adding Appendix 8 which provided a list of 'Roles and Responsibilities of Media hub team' as well as qualifications of Social Media Executives (SME) in 716 districts across the country. A true copy of the Addendum No. 1 issued on 28.04.2018 is annexed hereto and marked as **ANNEXURE P-**
11. Corrigendum No. 1 to **RFP Ref No: BECIL/Social Media/MIB/02/2018-19** was issued by BECIL on 16.05.2018 revising the last date for submission of proposal/bid from 17.05.2018 to 24.05.2018. A true copy of Corrigendum

No. 1 dated 16.05.2018 is annexed hereto and marked as

ANNEXURE P-

12. Corrigendum No. 2 was issued by BECIL on 23.05.2018 inter alia once again extending the last date for submission of Proposal/Bid in respect of **RFP Ref No: BECIL/Social Media/MIB/02/2018-19** from 24.05.2018 to 31.05.2018. A true copy of Corrigendum No. 2 dated 23.05.2018 is annexed hereto and marked as **ANNEXURE P-**

13. Upon receiving no response, once again Corrigendum No. 3 was issued on 30.05.2018 by BECIL extending the last date for submission of Proposal/Bid in respect of **RFP Ref No: BECIL/Social Media/MIB/02/2018-19** from 31.05.2018 to 18.06.2018. A true copy of Corrigendum No. 3 issued on 30.05.2018 is annexed hereto and marked as **ANNEXURE P-**

14. It is submitted that the aim of the SMCH project is to create an advance surveillance infrastructure in the country, whereby the Government through an appointed private agency would not only monitor the social media activities of individuals at a micro level, but would further profile individuals based on their online activities. The project aims to condition the thought process of individuals and inculcate 'nationalism'. The entire mechanism is a brazen attempt to spy/snoop on the citizens of this country, such as the Petitioner herein, profile persons critical of the government

and cut them to size in order to compel them to toe the government's line. The Petitioner being a politician and a member of one of the strongest opposition parties that has been critical of the policies of the present Government at the Centre is at a greater risk of being targeted through the SMCH project surveillance mechanism.

15. The cause of action arose on 23.01.2018 when the Request for Proposal was first floated. It arose again on 10.02.2018 when the last date for submission was extended. A fresh cause of action arose on 25.04.2018 when a fresh/new Request for Proposal was floated by BECIL since there was no response to the previous RFP. The cause of action arose again on 16.05.2018, 23.05.2018 as well as on 30.05.2018, when upon receiving no response, the last date of submission of proposal/bid was extended till 18.06.2018.
16. That the Writ Petition has been filed without any delay or latches and there is no legal bar in entertaining the same. That the Petitioner has no other efficacious alternative remedy except to file the present Writ Petition before this Hon'ble Court by invoking Article 32 of the Constitution.
17. In these circumstances the Petitioner is moving this Hon'ble Court under Article 32 of the Constitution beseeching this

Hon'ble Court to intervene, quash and set aside the RFP Ref No: BECIL/Social Media/MIB/02/2018-19 dated 24.04.2018 issued by Respondent No. 2 on behalf of Respondent No. 1, along with its modification /revision /amendment vide addendum/corrigendum dated 28.04.2018, 16.05.2018, 23.05.2018 as well as 30.05.2018 as being violative of Articles 14, 19(1)(a) and 21 of the Constitution.

18. That the Petitioner has not filed any other Petition on the same subject matter or seeking similar reliefs either in this Hon'ble Court or any other High Courts except this present petition.
19. That the Annexures are true and correct copies of their respective originals.
20. That in the circumstances mentioned hereinabove this Writ Petition is being preferred by the Petitioner inter alia on the following amongst other grounds without prejudice to each other:

GROUND

- A. FOR THAT any form of State surveillance by itself constitutes a restriction on the fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution.
- B. FOR THAT surveillance of the nature contemplated in the RFP constitutes an unreasonable restriction on the exercise of the

fundamental right under Article 19(1)(a). this Hon'ble Court speaking through Justice Subba Rao in *Kharak Singh v. State of*

U.P., (1964) 1 SCR 332 has extensively dealt with the question of State surveillance and concluded that the freedoms under Article 19 and the right under Article 19(1)(a) in particular cannot be separated from its psychological content. The Court held that the right to free speech cannot be exercised under the constant surveillance of agents of the State, and surveillance would reduce the entire country to a jail for the citizen under surveillance. The said opinion of Justice Subba Rao has emerged as the correct position of law after the majority opinion was overturned by this Court in *K.S.*

Puttaswamy v. Union of India (Privacy-9 J.), (2017) 10 SCC 1.

- C. FOR THAT assuming without admitting that the restriction imposed was found to be reasonable, Article 19(2) clearly provides that reasonable restrictions can be imposed by the State on exercise of the right under Article 19(1)(a) only by a valid law. It is well settled that "law" to meet the requirement of Article 19(2) must be an Act of Parliament or State Legislature or subordinate legislation under the authority delegated by an Act. No restrictions can be imposed on the fundamental rights guaranteed under Article 19 by executive action. In the present case, widespread surveillance in the guise of the SMCH

amounting to restriction of the right under Article 19(1)(a) is sought to be mounted through purely executive action without any law permitting such surveillance.

- D. FOR THAT the stated object of developing a social media analytical tool that can "act as the guiding tool for Ministry of Information & Broadcasting to understand the impact of various social media campaigns conducted on various schemes run by the Government of India. In addition, the tool should have the capacity to provide inputs to the Ministry on how to improve the reach of various social media campaigns, how to make a particular topic trending and for the overall general improvement of social media campaigns" does not fall under any of the permitted grounds on which restrictions can be imposed on the fundamental right to freedom of speech under Article 19(1)(a). Under Article 19(2), restrictions on exercise of the right under Article 19(1)(a) can only be placed 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. The stated object does not fall within any of the permissible grounds.

- E. FOR THAT the SMCH project intrudes upon the right to privacy of an individual, which right is protected under Part III of the Constitution as held by this Hon'ble Court in K.S. Puttaswamy v. Union of India (Privacy-9 J.), (2017) 10 SCC 1.
- F. FOR THAT the SMCH project curtails the individual's personal liberty in the social media space, in as much as it creates an infrastructure for government appointed private parties to snoop over individuals and categorise them through profiling. This is in stark violation of Article 21 which forms the bedrock of the right to privacy and also takes in its ambit the dignity of the individual.
- G. FOR THAT the SMCH project contains no checks and balances that can prevent it from being used as a tool to conduct surveillance of individuals and spread disinformation, which violates the fundamental rights to privacy and free speech.
- H. FOR THAT the software to be created is supposed to be able to collect "digital chatter" all major social media platforms, which can be used to create a 360-degree view of people "who are creating buzz across various topics". This kind of 360-degree profiling is an affront to the privacy and dignity of a citizen and creates an atmosphere in which the freedoms contained in Article 19 become illusory.

I. FOR THAT the data collected by the software is supposed to be analysed and thereafter the publication and communication tools will be used for the stated purpose of moulding public perception in a positive manner, inculcating “nationalistic feelings” and improving perceptions of India around the world.

This is nothing but a brazen attempt to condition the thoughts of individuals who are critical of the government.

J. FOR THAT the SMCH project is supposed to generate daily reports about what’s trending on social media, and district-level operatives are to send in reports on local sentiment from each of India’s 716 districts. The entire surveillance architecture is to be placed in the hands of private persons employed on a contract basis who will be on the rolls of the service provider who emerges successful in the tender process. While surveillance by agents of the State is itself violative of the right to privacy, in this case, the privacy of the citizens of this country is sought to be placed at the mercy of non-State actors which reeks of manifest arbitrariness.

K. FOR THAT the data collected is to be stored in a single database, which will include profiling of conversations and individuals, without any appropriate law in place for data protection.

L. FOR THAT the platform is supposed to have the ability to “disseminate content”, “create and publish content on various

social media platforms of Ministry of I&B” and the district-level operatives will need to conduct “social media publicity”. There is a clear intent to interfere with the freedom of thought and expression of the citizens through State propaganda.

- M. FOR THAT the creation of the Social Media Communication Hub is without statutory basis and amounts to severe curtailment of fundamental rights by executive action.
- N. FOR THAT as described in the RFP, the SMCH project is nothing but an attempt to conduct mass surveillance on social media, and even contemplates collection of information from emails of individuals.
- O. FOR THAT there is no clearly defined purpose, no distinction between legal and illegal content, nor any safeguards in the process.
- P. FOR THAT the aim of building a 360-degree view of influencers on social media, and the maintenance of a database, violate multiple aspects of the fundamental right to privacy, and the scheme contains no protections for individuals or their data.
- Q. FOR THAT the posting and publishing of content on the basis of surveillance amounts to aggregating unbridled power against citizens with no legislative backing or purpose restriction and is a clear violation of Article 14, 19 and 21.

- R. FOR THAT India still doesn't have a data protection law, and the government's plans for the Hub include no oversight or accountability. In addition to this, the specifications for the software include the ability to erase and manipulate logs and delete audit trails, which compromises transparency and allows for misuse of the Hub to be shielded from scrutiny.
- S. FOR THAT the SMCH project lacks statutory backing and is replete with manifest arbitrariness and as such is violative of Article 14 of the Constitution.
- T. FOR THAT the placing of unguided and uncontrolled discretionary power in the hands of the executive is violative of Article 14 of the Constitution. This Hon'ble Court in the K.S. Puttaswamy case has held that in this age of information, information is power. The SMCH as contemplated in the RFP is an attempt by the State to aggregate this power in its hands without authority of law and without any corresponding checks and balances on that power in the form of a data protection regime. The entire scheme is therefore violative of Article 14 as it vests unbridled discretion in the hands of the executive which is susceptible to misuse.
- U. FOR THAT the extent, nature and scope and data collection about individuals contemplated in the RFP bears to rational

nexus to the purported object sought to be achieved i.e. understanding the impact of various social media campaigns conducted on various welfare schemes run by the Government of India, and therefore suffers from the vice of manifest arbitrariness.

- V. FOR THAT it is a settled proposition of law laid down by this Court that even a policy decision can be challenged on the ground of manifest arbitrariness.
- W. FOR THAT the Petitioner craves leave of this Hon'ble Court to amend/alter its grounds at appropriate stage, as and when required.

PRAYER

In these facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to:-

- a. Issue an appropriate writ, order or direction to quash the Request for Proposal bearing RFP Ref No: BECIL/Social Media/MIB/02/2018-19 dated 24.04.2018 as modified/ revised/ amended vide addendum/ corrigendum dated 28.04.2018, 16.05.2018, 23.05.2018 as well as 30.05.2018 as being violative of Articles 14, 19(1)(a) and 21 of the Constitution;
- b. Pass such other order or direction as it deems fit in the facts of the present case and in the interest of justice.

AND FOR THIS ACT OF KINDESS THE PETITIONER AS IN DUTY
BOUND SHALL EVER PRAY

DRAWN BY:

SETTLED BY:

FILED BY

PLACE: NEW DELHI **FILED**
ON: