Technology Law Forum, NALSAR University of Law

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To,
Shri Ajay Prakash Sawhney,
Secretary, Ministry of Electronics and Information Technology

The Technology Law Forum is a student-run group from NALSAR University of Law, Hyderabad. The Forum was formed with a view to foster an environment of open discussion in the field of technology law, and aims to fulfil its mandate by supporting collaboration and enhancing access to the field. To this extent, we have pushed for greater accountability in decision-making in the field of technology law, with regard to policy as well as regulatory matters.

Through this letter, we request the Secretary, Ministry of Electronics and Information Technology, Government of India, to reconsider the recent decision to impose a ban on 59 Chinese applications.[1] We make this request on the grounds that the decision fails to pass the procedural safeguards laid down under the Information Technology Act, 2000 (and associated Rules) as well as the Treaties to which India is a signatory. We have also learnt that the ban is an interim measure, which we believe provides the space necessary for a deliberation of its effects on relevant stakeholders prior to a final decision.[2] To this end, we request that the Ministry involve and engage with the users of the relevant applications, who hail from vulnerable sections of society and deserve to be heard before the introduction of such a drastic measure.

Blocking Regime Under IT Act

We submit that the procedure followed for the present ban is inconsistent with the legal regime in India. The power under Section 69A of the Information Technology Act, 2000 is limited to content-based restrictions on the internet. This is made evident by the framing of the Information Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules, 2009. Rule 7 provides that the committee shall examine the request for blocking along with the **printed sample content of the offending information**. This is also echoed in the emergency procedure under Rule 9, wherein the Designated Officer shall examine the request as well as the **printed sample information** to determine whether it falls within the scope of Section 69A.[3] Therefore, the said power was meant to be exercised for online *content* that may prove to be a threat to national security, public order, etc.

The present ban, however, is not based on the content of the 59 apps. The press release regarding the same points towards data security & its connection to national security as the primary reason behind the decision, rather than the specific **content** of the blocked apps.[4] Data protection is outside the scope of Section 69A. The grounds for blocking access to information under the said provision are "*sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public*

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[1] https://pib.gov.in/PressReleseDetailm.aspx?PRID=1635206.
[2] https://techgraph.co/news/chinese-app-ban-government-invites-tiktok-to-submit-its-clarification-on-the-ban/.
[3] https://meity.gov.in/writereaddata/files/Information%20Technology%20%28%20Procedure%20and%20safeguards%20for%20blocking%20for%20access%20of%20information%20by%20public%29%20Rules%2C%202009.pdf.
[4] https://pib.gov.in/PressReleseDetailm.aspx?PRID=1635206.

order or for preventing incitement to the commission of any cognizable offence relating to above".[5] Therefore, the present ban cannot be justified based on concerns regarding data security, which ought to be dealt with by a data protection law.

While **other** grounds enumerated in the press release, such as sovereignty and integrity of India, security of state and public order, are valid grounds for the ban, the order must still meet the standard of reasonableness under Article 19, and be in accordance with the procedure laid down by the Information Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules, 2009. Presently, it is unclear if the said procedure has been followed, since information regarding the same has not been made public. Further, while the rules require the reasons for blocking information to be recorded in writing,[6] without access to the written order, it is unclear whether the requirement of reasonableness has been met. To this end, we request the Ministry to share the written order with the public.

Need for a Cogent Data Protection Law

We request that the Ministry provide a clarification on the threats posed by Chinese applications in India. The Press Release published by the Ministry does not provide clear reasons for the ban of Chinese applications, the criteria for the ban of applications, and the privacy threats that they pose.

Several Chinese applications do have data privacy concerns, including applications such as WeChat which monitor and censor even non-Chinese users,[7] and UC Browser which transmitted user data, geolocation data and search queries to the Alibaba analytic tool without encryption.[8] Companies such as Weibo, Alibaba and Tencent have been shown to have a clear connection with the Chinese government, and affiliations with the CCP.[9] Under the present ban many Tencent applications and websites continue to operate, which appears to be inconsistent with the objective of the Ministry. In contrast, applications such as TikTok owned by ByteDance, despite having a significant history of content moderation, have not been proven to have major privacy concerns. Multiple applications such as Kwai have not had any history of data leaks or surveillance, and their privacy policies are on-par with apps designed in other countries. We submit that while certain applications with serious privacy concerns are being allowed to continue, other applications that are relatively secure have been banned.

We believe that a blanket ban on Chinese applications is an arbitrary and relatively temporary solution. A data protection law that can enforce necessary privacy standards ensures greater security for data of Indian citizens. Such a law with coherent guidelines for applications allows the government to monitor

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5 https://meity.gov.in/writereaddata/files/Information%20Technology%20%28%20Procedure%20and%20safeguards%20for%20blocking%20for%20access%20of%20information%20by%20public%29%20Rules%2C%202009.pdf.

6 https://meity.gov.in/writereaddata/files/Information%20Technology%20%28%20Procedure%20and%20safeguards%20for%20blocking%20for%20access%20of%20information%20by%20public%29%20Rules%2C%202009.pdf.

7 https://citizenlab.ca/2020/05/we-chat-they-watch/.

8 https://citizenlab.ca/2015/05/a-chatty-squirrel-privacy-and-security-issues-with-uc-browser/.

9 http://dangjian.people.com.cn/n1/2018/0326/c117092-29889441.html.

compliance, and protect the interests of Indian citizens. It would also have allowed for a far more targeted and proportional solution to the issue of data security of Indian citizens.

Compliance with International Law

In addition to the aforementioned concerns, we believe that the ban raises issues pertaining to India's Treaty obligations. To that end, we request the Ministry to address concerns pertaining to the General Agreement on Tariffs and Trade ('GATT') and General Agreement on Trade in Services ('GATS').

Presently, the Press Release does not clarify whether the applications have been banned under the GATT or GATS. This is required as the banned applications encompass provision of goods as well as services, and a case-by-case classification of the same is required to establish the applicability of the relevant Treaties. Further, we request the Ministry to clarify whether this decision is based on the national security exemptions of the GATT and GATS. Under the relevant provisions, a Member State can take action on the basis of a perceived threat to national security, but is required to justify the action on grounds of "*protection of its essential security interests*" or on the basis that it is being carried out for the "*purpose of provisioning a* [foreign] *military establishment*". An added burden is cast by the Treaties to establish that the actions have been taken "*in time of war or other emergency in international relations*".

The relevance of clarifying whether it is the GATT or GATS that applies lies also in the fact that under the GATT, the Dispute Settlement Body established by the World Trade Organisation has the jurisdiction to whether an action was taken in "*time of war or other emergency in international relations*". This makes it necessary for the Government to clarify whether the applications have been banned on the basis of the GATT, as similar powers have not been accorded to the WTO's Dispute Settlement Mechanism under the GATS. Due to the different burdens that are imposed by the two Treaties, it is necessary for the Ministry to clarify the Treaty under which the ban has been imposed. Given that the Indian Government has unilaterally opted to ban the applications, it is necessary for the Government to justify the ban and show that it operates in a non-discriminatory fashion. Therefore, we urge the Ministry to clarify its position regarding the basis of the decision, as it is necessary for the Indian Government to remain in compliance with its Treaty obligations.

Disproportionate impact on Marginalised Communities' Freedom of Expression

Finally, we wish to emphasize that access to technology for marginalised communities is always envisaged by the more privileged sections of the society in ways that essentialise use of technology for economically productive activities. They tend to discount the use of technology as a means of entertainment and self-expression for the marginalised. This perspective ignores that these are the primary drivers for acceptance of technology.[10] TikTok, Kwai and other such related apps provide a much-needed outlet for several of the most marginalised communities in India. These apps are extremely popular in semi-urban and rural areas as they provide an easy to use interface to which there

[10] https://journals.sagepub.com/doi/abs/10.1177/1527476418806092.

are no comparable alternatives.[11] Additionally, LGBTQ+ users who do not find acceptance easily on other social media outlets lose out on one of the most important mediums of self-expression.[12] In many cases, these apps form the sole source of income for users, through which they have amassed followers over years of hard-work and effort.[13] Given the reach of these platforms, they are not substitutable with other platforms. As it stands the ban severely restricts the Freedom of Expression and Speech of these users. To this extent, we believe that there is a need for the Ministry to invite responses and consult with user-stakeholders, before arriving at a final decision on the same.

As laid down by the Supreme Court in *Anuradha Bhasin v. Union of India* (2020), when the government restricts free speech, it must justify the same and explain why lesser alternatives would be inadequate.[14] On the face of it, a blanket ban on 59 apps without considering their specific activities appears to be a disproportionate restriction of speech and expression. Also following the Supreme Court's judgement in *Shreya Singhal v. Union of India* (2015),[15] users have the right to access information online, and subsequently must be given the right to challenge decisions restricting the right. To this end, the written order banning these apps ought to be made public in order to enable all stakeholders to exercise their rights.

We hope that you consider the concerns raised by us through this letter.

Thank You,

Respectfully Submitted By,
Technology Law Forum,
NALSAR University of Law, Hyderabad

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[11] https://theprint.in/opinion/pov/tiktok-made-rural-india-into-diy-eklavyas/452787/.
[12] https://www.thequint.com/podcast/tiktok-ban-a-loss-of-expression-for-millions-of-indian-users.
[13] http://www.deccanchronicle.com/lifestyle/culture-and-society/010720/ban-on-tiktok-is-a-huge-blow-to-influencers.html.
[14] https://main.sci.gov.in/supremecourt/2019/28817/28817_2019_2_1501_19350_Judgement_10-Jan-2020.pdf.
[15] https://main.sci.gov.in/jonew/judis/42510.pdf.