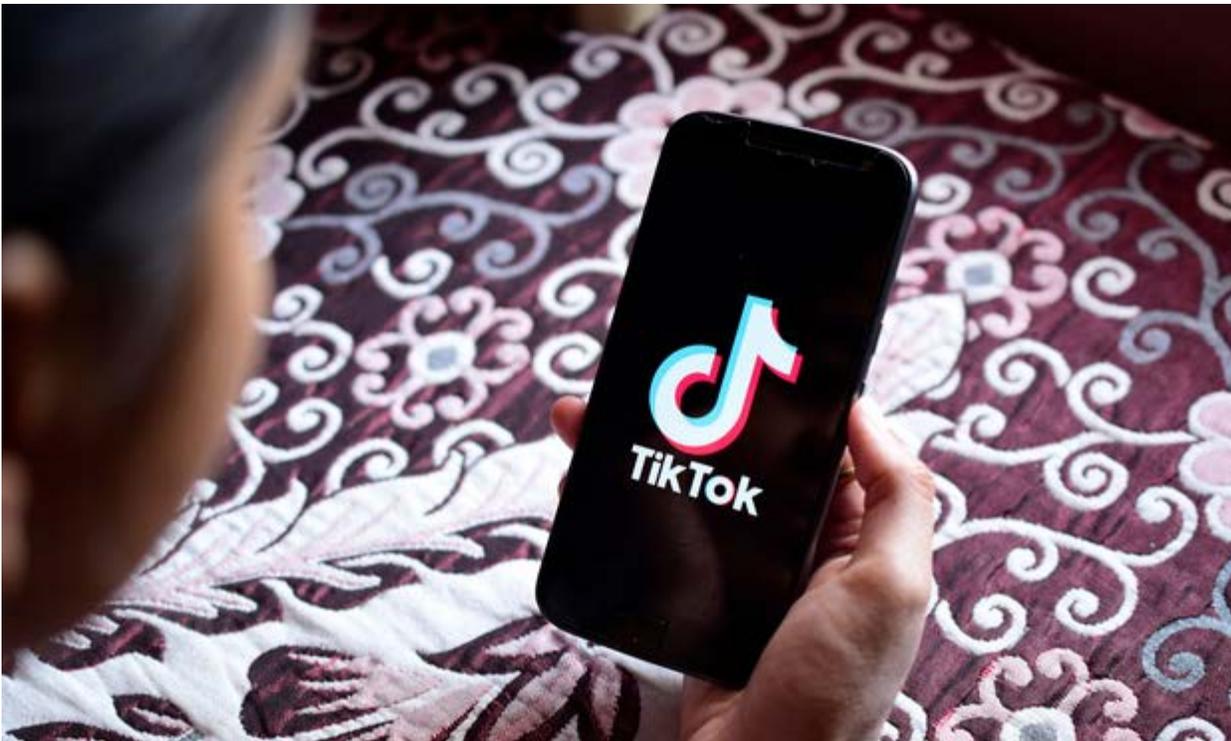


Technology Turmoil: The Impact of India Banning Chinese Apps

Given India has approximately over 574 million Internet users, a recent ban on apps such as TikTok, Helo and WeChat has a major impact. Here's how the ban occurred, and what comes next.

By Vaibhav Parikh and Yashasvi Tripathi, Nishith Desai Associates | August 12, 2020



Amidst rising tensions with China, the Indian government through its Ministry of Electronics and Information Technology recently blocked for public access the availability of 59 Chinese applications in India. Affected apps include social media apps like TikTok, Helo and WeChat; and other popular apps like ShareIT, UC Browser, CamScanner and Clubfactory.

The Ministry has banned the apps by invoking its power under Section 69A of the Information Technology Act, 2000 (the IT Act) read along with the relevant provisions of the Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules, 2009 (the Blocking Rules) reasoning apps' engagement in activities "*prejudicial to sovereignty and integrity of India, defence of India, security of state and public order.*" According to the 9Ministry, the banned apps were "*stealing and surreptitiously transmitting users' data in an unauthorized manner to servers which have locations outside India. The compilation of these data, its mining and*

profiling by elements hostile to national security and defence of India, which ultimately impinges upon the sovereignty and integrity of India, is a matter of very deep and immediate concern which requires emergency measures.”

Impacts and Responses

Given India has approximately over 574 million Internet users, the ban is a big blow leading to phenomenal loss of user base and data capital of the app more than it impacted the revenue of the Chinese firms. It is [reported](#) that TikTok had 120 million users, UC Browser had 130 million users, ShareIT had 400 million users, and WeChat had 200 million users in India.

Skepticism of Chinese companies mining and profiling data in a manner that is prejudicial to national security interests is mature. The concern seems to be borne out of two Chinese legislations: the Counter-Espionage Law and National Intelligence Law. The wording of the legislations obliges all Chinese citizens and corporations to cooperate and assist with national intelligence gathering efforts whenever asked and maintain secrecy about this.

Along with the resurgent debate about TikTok’s fate in the U.S., in March 2020, a Senator had introduced a bill banning the use of TikTok on [federal government devices](#), reasoning that Chinese state can get access to company-held data on whims and hence the app poses security risk. Similarly, Australia had banned WeChat for its armed forces, reasoning it is [not meeting](#) Australian standards.

Indian Legal Framework

Section 69A of the IT Act allows the Central Government to direct, for reasons to be recorded in writing, an intermediary to block for public access any information generated, transmitted, received, stored or hosted in any computer resource when the Government is satisfied that it is necessary or expedient to do so in the interest of sovereignty and integrity of India, defense of India, security of the State and public order.

Under Blocking Rules, a blocking order can be issued in two ways: firstly, a ban imposed post receiving a complaint, involving inquiry and notifying the affected persons about the complaint and hearing their replies (Rule 6, 7 and 8); secondly, an ‘interim ban’ imposed in emergency situations prior to giving any opportunity of hearing, however with written recorded reasons (Rule 9). Rule 16 prescribes confidentiality principles regarding complaints and actions taken under the Rules.

Section 69A seeks to restrict *information*, which is defined as including “*data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche*”, and directly implicates the fundamental right to freedom of speech and expression guaranteed under Article 19 of Indian Constitution. Accordingly, grounds of restriction in Section 69A are derived from the language of reasonable restrictions on freedom of speech permitted by Indian Constitution under Article 19 (2).

The Indian Supreme Court in *Shreya Singhal v. Union of India* has upheld the constitutionality of Section 69A of the IT Act and the corresponding Blocking Rules. The court reasoned that information can be blocked only if the central government is satisfied that it is necessary to do so, the necessity relates to the subjects permitted as reasonable restrictions under the Constitution, and the reasons for blocking have to be recorded in writing which may be challenged in a court of law. Additionally, the Blocking Rules provide for procedural safeguards, including a committee that examines the necessity to block information and provides hearings to affected parties.

The emergency measures taken by the government and subsequent set of occurrence, like the Indian government issuing a questionnaire to the affected parties seeking their clarifications, indicate that the ban has been imposed by an interim order allowed in cases of emergency where no delay is acceptable (Rule 9).

Possible Challenges and Outcomes

Persons aggrieved by orders issued under Section 69A may procedurally as well as substantively challenge it in India before the High Court under Article 226 of the Indian Constitution.

Procedurally, such a direction can be challenged if it can be shown that the procedure under the Blocking Rules was not properly followed, such as: if the order was issued by a designating officer, abidance by confidentiality, recording of reasons in the order and issuance of the order to the relevant intermediaries.

Substantively, aggrieved persons may challenge the order by alleging that it is not in accordance with the grounds under Section 69A or the imposed ban is not a reasonable restriction on the rights in the interest of 'sovereignty and integrity of India, defence of India, security of state and public order' (Article 19(2) grounds). It can be uphill task for the companies as India has no formulated policy on national security.

Foreign companies need to prove their standing before the Indian courts and that they are entitled to protection of fundamental rights under Indian Constitution. While Indian Supreme Court has held that a foreign company do not have rights under Article 19 (1)(g) (*Indo-China Steam Navigation Co. Ltd. vs. Jasjit Singh, Additional Collector of Customs*), however, avenues of other rights for foreign artificial persons can be explored, such as Article 14 rights (equality before law). Notably, previously, the Indian courts have denied Article 14 rights to foreign companies who were trying to invoke Article 19 rights (*Cosmo Tours and Travels & Others vs. Union of India and others* and *The Power Measurement Ltd. vs. U.P. power corporation ltd*). Additionally, Indian subsidiaries of the affected foreign companies and Indian citizens who have been users of these apps can challenge the ban for their affected fundamental rights under Article 19.

The aggrieved parties can argue the ban is not the least restrictive way of restricting their rights and hence is not satisfying the test of proportionality to ensure a rational nexus between the objects and the means adopted to achieve them, as required under the Indian Constitution. This proportionality analysis depends on factors like : type of apps banned, no individual reasons for banning of specific apps, a blanket ban rather than a restricted use of apps, existence of a prior inquiry and vague or specific reasons of restrictions.

Outcome of the challenge would hugely depend on the subsequent use and storage of data being collected by the companies, which is app specific, such as: the kind of data being collected, the location of the data centers, laws and authorities to which the companies are subject to, whether the companies will have to cooperate with the national intelligence gathering efforts of their state of incorporation or their parent company's state of incorporation etc. Indian courts are likely to defer to national security interests if found that the companies can be subjected to national intelligence laws of foreign nations.

Some principles enumerated by the Indian Courts in context of rights and reasonable restrictions under Article 19 in emergency situations:

1. Emergency entails events which involve or might involve serious and sometimes widespread risk of injury or harm to members of the public;
2. Public emergency is required to be of serious nature, and needs to be determined on a case to case basis;
3. Courts should not normally interfere with matters relating to law and order which is primarily the domain of administrative authorities as they are best to assess and handle the situations depending upon the peculiar needs and necessities within their special knowledge; and
4. Courts have recognized the excessive utility of the proportionality doctrine in the matters of national security, sovereignty and integrity.

Internationally, the ban can be argued to be discriminatory against a single country and hence violative of non-discriminatory principles of trading of Most-favored-nation treatment and National treatment under WTO. The WTO principles, however, allow exceptions under security exemptions clause which allows States to take certain actions when it considers necessary for the protection of its essential security interests in time of war or other emergency in international relations (GATT, Article XXI, b(iii)). The Dispute Settlement Body of WTO will likely look into if the

actions taken under the exception relates to ‘[essential security interests](#)’ that is interpreted as essential functions of the state. This analysis is again fact specific and varies with changing circumstances.

With no clear outcome, what ensues this technological turmoil is riveting to watch!

Vaibhav Parikh is a Partner and leads the practice areas of Technology, Mergers and Acquisitions, Private Equity, Blockchain and Virtual Currencies in Nishith Desai Associates. He has been ranked as a Leading Lawyer in the Mergers and Acquisitions Practice across Asia-Pacific by IFLR1000. He can be reached at vaibhav.parikh@nishithdesai.com

Yashasvi Tripathi is a member in Corporate & Securities and International Dispute Resolution teams of Nishith Desai Associates. She is a member of Arbitration Committee and Inter-American Affairs Committee of New York City Bar Association. She can be reached at yashasvi.tripathi@nishithdesai.com

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