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# **THE NEED FOR AN UPGRADED EMPHASIS ON AN INTERNATIONAL DIGITAL LAWFARE STRATEGY BY INDIA: A NOD FOR/ AGAINST AN IMPACTFUL CHANGE?**

AUTHORED BY - JOHN MARIADAS

## **Introduction**

India and her usage of lawfare in the international arena has been a question of concern in multiple scenarios where the invoking of an international lawfare was evident and visible in situations where the government decided to counter the prevalent tensions between nations like Pakistan and most recently against China. India, being a nation that is emerging to be one among the strongest global powers, therefore has been attempting to wage lawfares with the ultimate intention to combat the combat further tensions and thereby take due care of the national security. India's one among the most remarkable steps towards international lawfare, alongside the abrogation of Article 370 is the banning of Chinese apps in India and the furthered recommendation of the Ministry of Home Affairs to ban a yet another set of 59 Chinese mobile applications, attaching the same to the national concern over its security post the Galwan Valley strike.<sup>1</sup>

Irrespective of understanding the impact of such a step taken by the nation on the economic relations, prioritising national interest and security turns out to be landmark move in the international perspective and representation. Although the demands over Chinese products and machinery stands high with a bilateral financial connection of around USD 125 M in 2020<sup>2</sup>, the lawfare initiated on the digital arena makes the same even more challenging and noteworthy. In order to counter, a national like China with the immense power and influence it holds globally, more than a geopolitical move, India has chosen a strategic approach<sup>3</sup> which is apparently a green

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<sup>1</sup> Akhil Oka, 'India acts tough amid LAC faceoff, to ban 54 Chinese apps over threat to national security', *Republic World* (New Delhi, 14 Feb 2020) A1.

<sup>2</sup> Kiritka Suneja, 'China accuses India of discriminatory trade measures during a meeting at the WTO', *Economic Times* (New Delhi, 04 Oct 2020) C3.

<sup>3</sup> Ryan Sean, 'Under-Mining Public Trust: The Rhetoric of Lawfare' (2017) 4(88) *Australian Quarterly* 43.

signal towards the future possibilities of an effective lawfare by making the best use of its domestic laws and constitutional back up in instituting a digital warfare, which would automatically lead to the empowering of the nationally developed applications, their developers and the scope of India in the forefront of digital era, adding on to the multiple possibilities and nuances in future<sup>4</sup>.

## Why India needs to wage a digital lawfare?

Lawfare, is a strategic approach or a movement against the adversary, in this case the nation who is on the counter side as a non-ally where the legislations underpinned and prevalent, whether domestic or international is used or deployed. This is the straightjacket understanding of the term as coined by Charles Dunlap Jr.<sup>5</sup> The usage of legislations makes it even more comprehensive and adhering to the peaceful strategy of countering the counterpart with the aim of addressing any motive or motion against the national interest and security as and when concerned. The aspect of making law as a prime weapon in the warfare has been evident and in use by multiple nations. Speaking of lawfare may contemplate the thought process to imperialism, where the strategy has been equipped by nations like the US and China where a manipulative usage of the UN Charter was visible in a sinister expansion attempt over nations such as Iran, Libya and towards the South of China Sea respectively. The international community has been addressing this to an extent where such usage of the prevalent stance in multiple attempts. The nature of lawfare is normative and hence could bring about multiple impacts and implications over nations.

The International Court of Justice via its most recent judgement had re-embarked the aforesaid scope by preventing the cross-border data transfer from the EU to the US in Schrems-II<sup>6</sup> by identifying the prevalent hypocrisy and ambiguity in the understanding of the digital privacy and data protection of its citizens as assured in their well-established constitution. The decision of the ICJ and the stance of EU brought about the relevance the EU provides to its citizens when it comes to personal data protection and privacy and its upheld stance on human rights and constitutional values when it comes to putting nation at first. The cross-border data transfer was undoubtedly non-consonant with the EU convention on Human Rights and hence invoking or

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<sup>4</sup> Arindrajit Basu, Gurshabad Grover, 'India needs a digital lawfare strategy to counter China', *The Diplomat* (Beijing, 08 October 2020) C2.

<sup>5</sup> Luban David, 'Lawfare and legal ethics in Guantanamo', (2008) 6(60) *Stanford Law Review* 1986.

<sup>6</sup> Arindrajit Basu, 'Extraterritorial algorithmic surveillance and the incapacitation of international human rights law' (2019) 12(189) *NUJS Law Review* 190.

waging a digital lawfare by the EU against the US by questioning and challenging the data transfer, being specifically against the national interest and security could nonetheless be prevented and stopped by rather ignoring the counterpart in possible strained relations in the upcoming future. Hence, at multiple facets and tenets, lawfare on a digital perspective is justified. The India-China scenario is a major example of how the banning of apps and other levelled stands followed by the objections raised by China against India at the WTO is moving towards a digital lawfare in its inherent and innate nature. India however, has not succumbed to the aforementioned accusations thrown at and has defended the same by stating the act of India was within the ambit and purview of the GATS (General Agreement on Trade in Services) and hence has not stepped beyond any reasonable restrictions that were expected to be followed and adhered to. Moreover, India similar to EU's stand in the previous scenario stated on the importance to give priority to the fundamental right of its citizens to privacy as enshrined by the constitution. The central government has hence relied on the bi-argument of (1) Privacy concerns of its citizens (2) Chinese relations with the international organizations, alongside the concerns raised over the national security where we are left at a scenario to handle with a hostile neighbour.

The situation with China is only one among the multiple scenarios India might face in future. In a situation like what EU had to undergo when the relation involving transfer of data with the US was concerned, even India would be left with no option but an equipped lawfare with questioned violations from the grassroot level.<sup>7</sup> When the surveillance of the citizens and their private data is concerned, a lawfare is the prime option prevalent. Now, in a case where the data dealt with the citizens of the nation are concerned, one among the prime ways in which the dilution and leakage of data might possibly happen is via the concerned foreign mobile applications and software. There are global examples of spying, data leakage which had panicked the major nations under the developed line and thereby creating tensions on security with the initiations of a cyberwarfare.<sup>8</sup>

## **Chinese apps' ban in India and the impact in the digital lawfare strategy**

While developing a strategic toolkit with the ulterior motive of a digital lawfare, India needs to

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<sup>7</sup> Winckler, H., Godement, F., & Kratz, A., 'China: Waging 'lawfare' on NGOs' (2015) 1(22) European Council on Foreign Relations 33.

<sup>8</sup> Ryan Sean, 'Under-Mining Public Trust: The Rhetoric of Lawfare' (2017) 4(88) Australian Quarterly 43.

succumb to multiple consequences and possibilities in balanced state before taking another major leap. However, for a matter of fact, the same has the biggest scope and necessity as a demand of the day. In addition to the prevailed scenario, the change of stance India chose to step ahead in the Huawei and its participation in the 5G trials along with restraint on the Foreign Direct Investments of India in China. Now, the aforementioned balance is to be struck in countering legally the in-return defence China chose at WTO where the impact post ban and stance in FDI where the nation was apparently accused of discriminatory behavioural practice against China. On a counter scenario, India is justified in the strained and limited relationship it intends to maintain with a hostile country like China by cutting ties in the digital platforms.

When the dependence the banned apps and the immense FDI investments created had an apparent development of both digital and economic dependence where the action of such immense magnitude will have apparent direct impact on the prevailing economic conditions over the nation, the scrutiny if the effects in consonance with the need to check upon national security becomes validated and effectuated. There is multiple internationally accepted and expected standard of behaviours to which nations including India, which has an extensively immaculate constitutional basis need to keep up and keep pace with. As far as the digital warfare in its entirety is concerned, banning of Chinese mobile applications is only one among the major leaps taken by the nation alongside the FDI decisions and the Huawei strategy.

## **Restrictive entry to 5G network- Huawei & ZTE- Another strategy?**

The case of deciding whether the permitting or restricting Chinese supported Huawei and ZTE has been a concern due to the changing conclusions brought forward by the Department of Telecommunications where the impact of the same on the Indian 5 G market was initially identified to be non-threatening and later otherwise. The Chinese espionage being assisted by the said companies where the initial concern and later was identified to be a non-effective aid to the Indian market. The steering committee<sup>9</sup> established on this regard had earlier identified that these companies apparently did not create a threat in the 5G high level forum observation according to 2018 thereby leading to the situation where these companies were invited to be a part of the 5 G

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<sup>9</sup> The Steering Committee, GoI, 'Making India 5G ready' (Report of 5G High Level Forum 23 August 2018) <[https://dot.gov.in/sites/default/files/5G%20Steering%20Committee%20report%20v%2026\\_0.pdf?download=1](https://dot.gov.in/sites/default/files/5G%20Steering%20Committee%20report%20v%2026_0.pdf?download=1)> accessed on 15 Aug 2022.

trials that followed in the year 2019. However, things have twirled up where the ministry has now brought about its statement on the possibility of avoiding or omitting the involvement of the companies being deployed with the telecoms in India in the 5G venture and further developments creating a tension between the nations, apparently becoming one among the arguments made by China in the WTO forum against India, accusing for discriminative treatment.

However, the Indian government has not expressly reacted to the claim, neither via the ministry or the government directly. Hence, such proposal was not recognized from the very initial stage. It is ideal for the nation to look into the security concerns of these products internally considering the impact the same could have on the Indian and international markets. The manufactured products, hence to be on a safer side should be subjected to precise scrutiny and study. The security audit so involved, which calls for both certification and a security testing as required and mandated by Indian Telegraph (Amendment) Rules, 2017. This scrutiny followed by the certification and recognition become relevant and a necessity when such procedures are effectively undertaken rather than causing unnecessary delays and procedural failure whatsoever. Therefore, since, the procedural verification has not yet been completed and fulfilled as procedurally required, the restrictions that possibly may or may not be imposed upon the assumed espionage cannot be categorized as a waged attempted lawfare.

India on the choice of moving ahead to counter national dependence upon hostile nations in the arenas of technological and economic purviews is an effective opening towards digital lawfare that is nowhere restricted or restrained except the matter of fact of possibility where the relations between two nations that apparently become the adversary and decider. However, when aspects like national security and citizens' interests are concerned the same will be prioritized above. Unless, the nation initiating a digital lawfare stands within the bilateral and multilateral agreements to which it is a signatory to and is not against the domestic legislations to which the adherence is expected alongside the constitutional perspective of it. Hence, one the prioritising of agenda concerned is fulfilled without countering or going against its own principles there is no reasonable objections in choosing digital lawfare.<sup>10</sup> The answerability and accountability come into picture when there has been an identified violation of internationally followed and accepted principles alongside the decisions of the signatory nations involving the said agenda.

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<sup>10</sup> Frederick, Kara, 'The New War of Ideas: Counterterrorism Lessons for the Digital Disinformation Fight' (2019) 8 (19) Center for a New American Security 33.

## Chinese Foreign Direct Investment- An economic vis-à-vis digital lawfare strategy toolkit

The unencumbered Chinese influence in the Indian markets attempts to be restrained with the added restriction on the Foreign Direct Investment of the Chinese companies in India. Since, the same has also been countered by Beijing in the WTO, the same will also have future prospects in becoming a lawfare model developed by India against China. According to the said restraint precisely, a prior handed state approval is required by the foreign companies in order to establish their entry into Indian markets.<sup>11</sup> This has been officially declared as a mandate by the Ministry of Commerce via an official press note. There have been no specific references on China but the same action of the Government has been taken up by China as an indirect blow against their FDIs, nonetheless for a matter of fact that the same will have direct impact on the economic relations with China. The decision has not been reasoned although the decision was specific on the agenda. But questions on why or why not are not yet addressed. The impact if the said regulation will have a very potential impact on multiple international investments India, for that reason not just China that has enumerable stakes in nations worldwide.<sup>12</sup>

The consistent and integral investments made by Chinese companies are notable high in count and number and hence the impact is mostly felt on the Chinese companies which have put in multiple noteworthy investments in the Indian companies with an unavoidable hand in most of India's industry unicorns.<sup>13</sup> Reports suggest that the Chinese Tech investors have had investments amounting to approximately \$4 B upon India via the start-ups. India till date does not have an internal committee that has been set up for the mere purpose of looking into the reviewing of the foreign investments combating to national security and related aspects concerned and hence this has been one among the moves that could effectively substitute the never ending need to have had an internal committee that could effectively look into the matters inter-related to the FDIs. Further, if India could set up committee with experts and departmental heads who could exclusively deal with the foreign investments via an impact analysis taking lessons from the US where a committee on Foreign Investment has been in force for a long time.<sup>14</sup> The power of the

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<sup>11</sup> Burwell F G, Propp K, 'The European Union and the Search for Digital Sovereignty: Building 'Fortress Europe' or Preparing for a New World?' (2020) 5(19) Atlantic Council 89.

<sup>12</sup> Brandão, C., 'Lawfare (or, simply, War)' (2018) 9(32) CLACSO 35.

<sup>13</sup> Maxwell, Neville, 'Sino-India Dispute: A variant view' (2000) 2(4) The Journal of International Issues 150.

<sup>14</sup> Amit Bhandari, Blaise Fernandez, Aashna Agarwal, 'Chinese Investments in India' (Gateway House Report No. 3 07 Feb 2020) <[https://www.gatewayhouse.in/wp-content/uploads/2020/03/Chinese-Investments-in-India-Report\\_2020\\_Final.pdf](https://www.gatewayhouse.in/wp-content/uploads/2020/03/Chinese-Investments-in-India-Report_2020_Final.pdf)> accessed on 15 Aug 2022.

committee to explicitly and outrightly reject the investments if in case the same stands against national interest and security is an effective measure and mechanism with no-direct requisite of a lawfare per say.

## Impacts of digital lawfare & criticisms

India, if chooses to move ahead with digital lawfare as suggested to be an effective lawfare measure should primarily look into the domestic affair with similar agenda before invoking international attention. This can be explained by looking inwards and introspecting into India's internal stance when whatever challenged and equipped internationally occurs within the nation. The attempts to reduce technological and economic independence on a nation with hostile relation with India today, the Ministry of Information Technology declared the banning of Chinese apps and access to users in India. Reasoning of the same is the possible abuse of citizen information and threat to the national security.<sup>15</sup> Now coming to India, where the arbitrary restrictions upon the citizen's fundamental right to freedom of speech and expression is checked upon by banning provisions like that of Section 69 A<sup>16</sup> of the IT Act, where right to information is also inculcated right, the people of the nation are still left in the awe of the all of a sudden ban with no reasonable transparent production of risks of data security or privacy that is concerned or involved that could turn out to effect the citizens in the matter concerned or whether it was a mere geo-political move. Also, at a point where India is yet to come about with a legislation that could counter the data leakage or misuse via a data protection statute and privacy legislation, the mere ban of the apps and the impact of the same in countering what is aimed remains as a lacuna. Hence, beyond constitutional purview indirectly, India will be required to answer in whether it has primarily addressed the domestic data handling mechanisms before dwelling into another nation's involvement in its affairs. Also, the prevalent ambiguity in the Personal Data Protection Bill (Section 35), 2019 where there are multiple exemptions that could be granted to the government in the name of threat to national integrity, security, sovereignty, friendly relations with other states, national security raises concerns over the democratic accountability and leviathan control in the form of surveillance over general public. Hence, when something of this extent is levelled against a nation like India, which is remarked as a major leap, India should also be prepared to counter the arguments that come in this regard. The uncertainty developed in such regulations

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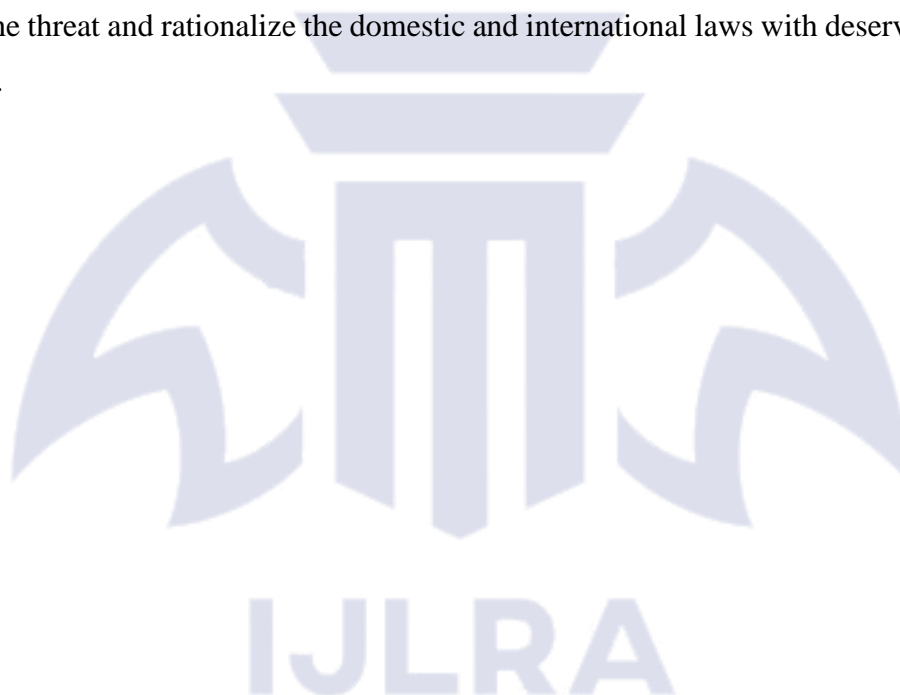
<sup>15</sup> Wallace, D., & Visger, M, 'Responding to the Call for a Digital Geneva Convention: An Open Letter to Brad Smith and the Technology Community' (2018) 6(2) Journal of Law & Cyber Warfare 54.

<sup>16</sup> Ünver, H. Akin, 'Politics of Digital Surveillance, National Security and Privacy' (2018) 1(1) Centre for Economics and Foreign Policy Studies 32.

needs to be looked upon and precisely legitimized nevertheless the chosen digital lawfare.<sup>17</sup>

## **Conclusion**

Digital lawfare has been a proven tool of combat for every nation that have opted so and for India as well in all plausible sense. The need for digital lawfare comes into picture only when a nation like India is provoked by means that effectuate a counter attack considering the possible impact on its security and constitutional backdrop. Rather than fancy rejection of digital lawfare in a digital era where people depend on digital platforms, software and application for one need or the other, the same cannot be ignored or beckoned for the name's sake of friendly relations with adversary nation and hence all the possible measures should be effectuated with the best efforts to counter the threat and rationalize the domestic and international laws with deserving relevance and priority.



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<sup>17</sup>The Transatlantic Digital Dialogue, 'Extraterritorial Access to Data' (2015) 3(56) German Marshall Fund of the United States 12.