

Human Rights and the Net of Internet: Regulatory Challenges and Opportunities

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SCHEME OF SEMINAR

- 1) Human Rights and Internet**
- 2) Yahoo! and Edison Chen: A Comparison**
- 3) Right to Privacy and Internet: The Paradox**
- 4) Privacy Challenges of Internet-Dependency**
- 5) Regulation of Internet: The Way Forward**

1) HUMAN RIGHTS and INTERNET

✓ The notion of human rights has been a dynamic & evolving one, e.g., –

- evolution of new rights

- new bearers (non-human) & violators (non-state actors) of human rights



Human Rights and Internet Continued ...

✓ Various technologies are also changing the dynamics of human rights:

◆ **Digitalisation** → Freedom of speech & expression; Right to information

◆ **Biotechnology** → Issues related to GM food, or human cloning



Human Rights and Internet Continued ...

- ✓ **Internet** as a technology is also affecting the nature & enforcement of human rights
 - **Nature** → people turning from recipients to *participants*; from vertical to *horizontal* exchange
 - **Enforcement** → *private* violations; new means of human rights enforcement, i.e., *social* enforcement



2) YAHOO! & EDISON CHEN: A COMPARISON

➤ Both the cases could be analysed from a wide range of perspectives:

❖ **Yahoo!**: privacy; freedom of speech; public interest; regulation of internet; corporate complicity

❖ **Edison Chen**: privacy; gender; morality; culture; confidentiality; copyright; obscenity; freedom of press

Yahoo! Case



- Yahoo! entered the Chinese market in 1999
- In 2005, Yahoo! China was merged with Alibaba.com
- Since 2003, Yahoo! China and/or Yahoo! Hong Kong have provided personal information & electronic details of their e-mail users to Chinese authorities

Yahoo! & Edison Chen: A Comparison Continued ...

- Such disclosure of information has led to the imprisonment of several journalists or cyber dissidents such as *Shi Tao*



Yahoo! & Edison Chen: A Comparison Continued ...

- Yahoo! had done so despite having a privacy policy:
“We respect the privacy of our customers and understand that the data they provide us should be maintained securely”
- Yahoo! also takes pride in its “**Yahoo! For Good**” campaign
- Yahoo! HK was also not legally bound to comply with the request of the Chinese authorities



Yahoo! & Edison Chen: A Comparison Continued ...

- Yahoo! initially denied of any wrong doing (including before the US Congressional Hearing)
- Later on, it tried to justify its conduct on several grounds, e.g., compliance with local laws
- Finally, amidst legal actions in the US, Yahoo! not only offered public apology, but also offered compensation to victims & agreed to impress upon the Chinese government

Yahoo! & Edison Chen: A Comparison Continued ...

Edison Chen Case

- Mr Chen photographed & video taped sexual acts with several female celebrities
- In process of repairing Chen's notebook, this data was stolen
- Photographs & videos were uploaded, downloaded, and circulated through internet
- The initial suggestion was that these images might have been *digitally modified*

Yahoo! & Edison Chen: A Comparison Continued ...

- In due course, it became clear that photos & videos were real
- Edison Chen and others offered **public apologies**



A Comparison of Factual Matrix

- **Victims:** In *Yahoo! case*, the privacy of ordinary people was breached, whereas in *Edison Chen case*, the privacy of celebrities was at stake
- **Privacy violators:** In *Yahoo! case*, a celebrated company was accused of violating the privacy, whereas in *Edison Chen case*, the privacy was violated by ordinary people – non-state actors in both the cases

Yahoo! & Edison Chen: A Comparison Continued ...

	<i>Victims</i>	<i>Privacy Violators</i>
Yahoo!	Ordinary	Powerful & famous
Edison Chen	Powerful & famous	Ordinary

➤ **Medium:** In both the cases, the internet was the common medium that resulted in violation of the right to privacy

✓ This also shows the *democratic & empowering* nature of the internet in that **it allowed the human rights of powerful to be violated by relatively powerless**

Yahoo! & Edison Chen: A Comparison Continued ...

- **Response:** In both the cases, the initial response was of denial or disputation, but both ended with the admission of wrong done & apology
- **Legal remedies:** Both the cases exposed the inadequacy of existing legal regimes in regulating the behaviour on internet and protecting the right to privacy

3) RIGHT to PRIVACY & INTERNET: THE PARADOX

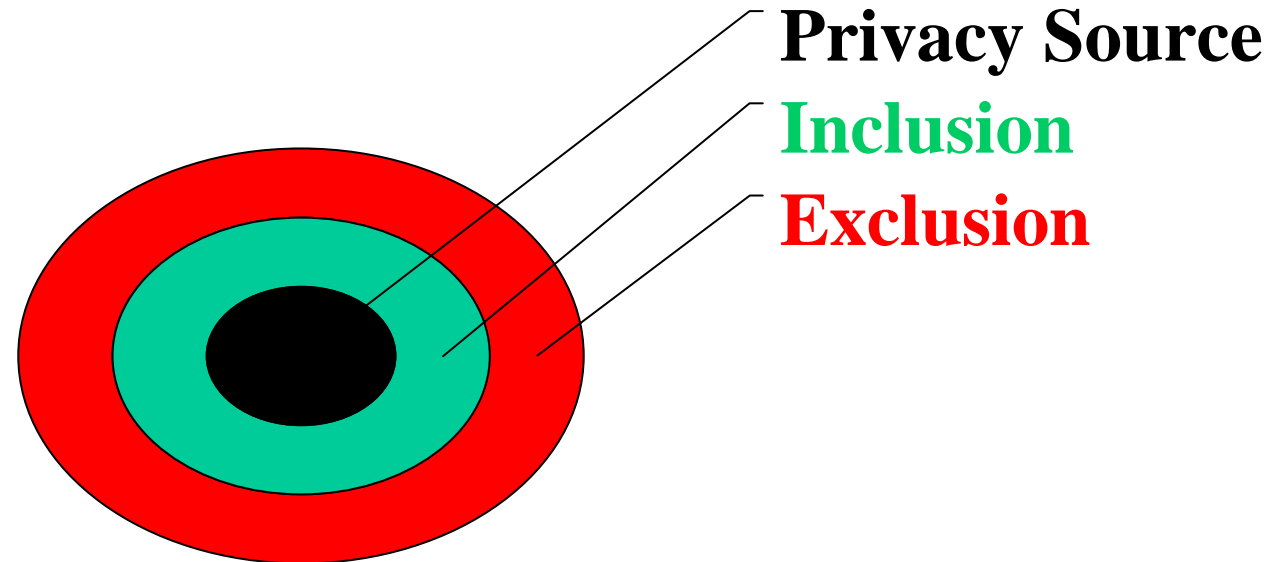
Right to Privacy

- The right to privacy concerns **individual autonomy**
- Generally speaking, privacy involves two aspects:
 - Personal information (*nature* of information)
 - Circulation of information (*access* to information)

Right to Privacy & Internet: The Paradox Continued ...

- In short, one should be able to control/safeguard – *subject to certain exceptions* – the personal information, & its circulation
- In other words, privacy implies the ***exclusion of public***
- At the same time, the right to privacy becomes **relevant in the context of public**
- In many cases, the right to privacy could **also involve *inclusion***, i.e., sharing of data/information with selected few

Right to Privacy & Internet: The Paradox Continued ...



Protection of Privacy in International HRs Law

- “No one shall be subjected to *arbitrary* interference with his privacy, family, home or correspondence, ... Everyone has the **right to the protection of the law** against such interference or attacks.” [Art 12, UDHR]
- “No one shall be subjected to *arbitrary or unlawful* interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” [Art 17, ICCPR]

Protection of Privacy in Hong Kong

- “The freedom and privacy of communication of Hong Kong residents shall be protected by law” [Art 30, Basic Law]
- “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” [Art 14, BORO]
- **Personal Data (Privacy) Ordinance** also protects privacy in relation to personal data

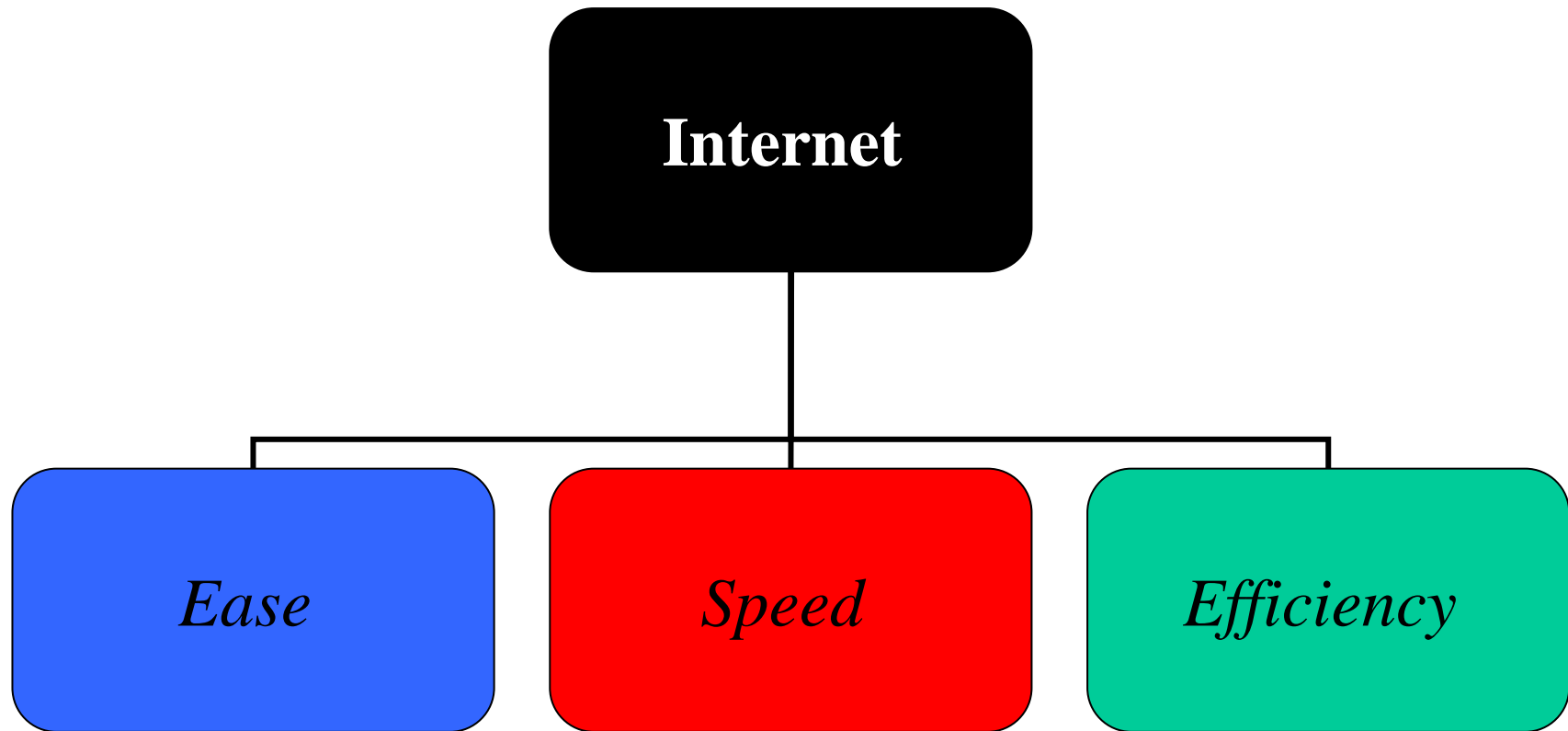
Protection of Privacy in China

- “Freedom and privacy of correspondence of citizens of the People’s Republic of China are protected by law.”
[Art 40, PRC Constitution]
- Moreover, Article 41 lays down that “Citizens of the People’s Republic of China have the *right to criticize* and make suggestions regarding any State organ or functionary.”

The Internet Paradox of Privacy

- Generally, technologies have an inherent *bias* for rich & powerful, and probably internet is no exception
- Nevertheless, internet is an empowering & largely democratic technology
- Internet also offers Ease, Speed & Efficiency (**ESE**)

Right to Privacy & Internet: The Paradox Continued ...



Right to Privacy & Internet: The Paradox Continued ...

- ESE results in an **internet-dependency** – emailing; chatting; blogging; studying; publishing; banking; shopping; gambling; socialising; marrying; adopting children; running political campaigns; paying taxes, etc.
- Many people are also employing internet to gain name and fame



Right to Privacy & Internet: The Paradox Continued ...

- Because of internet-dependency, net users provide lots of personal information to internet providers, in many cases under an **allurement of free service**
- However, net users generally do not want to compromise their privacy while surfing
- Achieving this goal is difficult because of the open & public nature of the internet
- This in turn creates a paradox for net users: to use or not to use the internet!

4) PRIVACY CHALLENGES of INTERNET-DEPENDENCY

- ✓ Because of its open & public nature, internet by definition poses challenges to the right to privacy
- ✓ Moreover, given that there are no free lunches, net providers also use personal information for commercial benefits
- ✓ Finally, internet is primarily a self-regulated enterprise

Privacy Challenges of Internet-Dependency Continued ...

- ✓ In view of these special characteristics, internet poses the following privacy challenges:
 - 1) **Exclusion of public** – how to exclude others from accessing private data or information?



Privacy Challenges of Internet-Dependency Continued ...

2) **Invisibility** – we may not even know who is watching us?

“Yahoo! automatically receives and records information from your computer and browser, including your IP address, Yahoo! Cookie information, software and hardware attributes, and the page you request.”



Privacy Challenges of Internet-Dependency Continued ...

3) **Private actors** – privacy may be breached by private non-state actors

- In some cases, these private actors could be acting in *concert with states* which are the potential regulators

Privacy Challenges of Internet-Dependency Continued ...

4) **Other regulatory challenges** – regulation is also difficult for a number of other reasons:

- Huge number of internet users
- Multiple jurisdictions
- Very fast spread of information

5) REGULATION of INTERNET: AN IMPOSSIBLE DREAM?

Existing Regulatory Avenues

- **Human rights law:** domestic & international
- **Contract:** breach of (unfair) contract terms
- **Tort:** breach of confidence (or privacy?)
- **IP law:** infringement of copyright
- **Data protection law**

Regulation of Internet: An Impossible Dream Continued ...

- **Self-regulatory codes of conduct:** Internet society; ISPs; ICANN (The Internet Corporation for Assigned Names and Numbers) – obligatory liability of ISPs
- **Self-regulation by net users:** e.g., Jingjing & Chacha



- **Market principles:** internet as an autonomous market?

Regulations vis-à-vis Two Case Studies

- Various regulatory tools were employed (or contemplated) in redressing the breach of privacy in two case studies
 - ❑ **Yahoo!:** Alien Tort Claims Act; Global Online Freedom Bill; UN Global Compact
 - ❑ **Edison Chen:** Data Protection Ordinance; IP Law
- It seems, however, that these regulatory tools did not prove very effective

The Way Forward

- 1) Internet has to be part of the problem – evolution of a **relationship of *online trust & confidence***, as we cannot rely merely on state-focal regulatory initiatives

Making ISPs responsible (both ethically and legally) will play an important role here [*Human Rights Guidelines 2008*, developed by the Council of Europe & EuroISPA]

Regulation of Internet: An Impossible Dream Continued ...

2) ***Integrated theory of regulation*** – as no single regulatory tool is adequate, it is desirable to achieve an integration between different available:

- ❑ levels of regulation,
- ❑ strategies of implementation, and
- ❑ types of sanctions

Such an integration may prove to be more effective and efficient

Regulation of Internet: An Impossible Dream Continued ...

	Strategies of Implementation		Types of Sanctions		
	<i>Incentives</i>	<i>Sanctions</i>	<i>Civil</i>	<i>Criminal</i>	<i>Social</i>
Ins- titutional	Adopting ethical practices	Demotion of employees	Dis- ciplinary action	Attributing criminal liability	Investors' proposals
National	Tax rebate	License revocation	Damages	Pro- secution	Boycott
Inter- national	Awards	Black- listing	Apology	Fine	Naming and shaming