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APrIGF 2017
"ENSURING AN INCLUSIVE AND SUSTAINABLE DEVELOPMENT IN ASIA PACIFIC: A REGIONAL AGENDA FOR INTERNET GOVERNANCE"
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>> MARK WALLEM: Okay. If we can call this to order. Can everyone hear me? All right. Okay.

Good morning, everyone. My name is Mark Wallem. This is a joint undertaking. I'll be turning it over to Dr. Park in a few minutes who will introduce his organization, but I wanted to say just a few words at the beginning to introduce the panel and to also introduce our organization. We have several panelists, so we'll be trying to move through this topic as quickly as possible, and then so that you have time so that we have time for questions from both people here and remotely.

Just to say a little bit about this, I'll just read from the -- and I want to introduce my colleague, Oliver Reyes, who is an attorney in the Philippines and worked with me at ABA, who helped develop this panel in conjunction with

Open Net Korea. Digitalization is bringing challenges to the understanding what is private and public and what criteria should be used to decide this. While the discussion on privacy in the digital age is hitting its peak, particularly the discussion on the right to be forgotten is being wrongly placed in a privacy context discussion, which actually it is a discussion about the visibility of public information, which is in the realm of the freedom of expression and the right to know.

Therefore, enforcement of the right to be forgotten creates tension between privacy and publicness. Media and public interest groups collect and publish personal information in the course of their civic duties are especially at risk of being wrongfully censored in the name of the right to be forgotten.

Courts in Asia will increasingly be called upon to negotiate these tensions. In wider tension on the legal implication of the right to be forgotten is warranted to ensure that all perspectives are considered.

Right to be forgotten is an enforceable right -- as an enforceable right is finding wider application across Asia. The need to discuss and understand the different conventions and expectations on publicness is essential, and that is what brings us here today.

The American Bar Association is an organization of 400,000 American lawyers. Just think of that. And so we have, as part of that association, the rule of law initiative works internationally to promote the rule of law. We've worked in over 100 countries around the world and currently have programs in about 60 countries.

Our international programs were established first in 1990, and we began our work in southeast Asia in 2003. We are conducting an Internet freedom program based out of Manila and we're working very closely with us is a newly formed organization, although it's been conducting activities for some time, it just formalized just at the kick off of this IGF, and they formalized and I'm very pleased to be working with the advocates for freedom of expression coalition southeast Asia.

They represent six countries at this time, Cambodia, and the Philippines included, and they are newly elected chair Gilbert Andres is here. He will be addressing you to make a statement about the right to be forgotten and introduce it to you. It's a very exciting organization of lawyers, journalists, and other advocates for freedom of expression around Southeast Asia.

I want to introduce -- before I turn it over to Dr. Park, I'll introduce the panelists that are being presented by ABA. I'd first like to introduce Katie Townsend. She is from the Freedom of the Press, an unincorporated nonprofit association of reporters and editors based in Washington, D.C. Katie oversees the direct litigation work of reporters committee attorneys and represents the reporters committee news organization and journalists, including investigative filmmakers, freedom of information, and other First Amendment and press freedom matters.

To my left is attorney Francis Acero. He is the chief of the complaints and investigations division of the National Privacy Commission of the Philippines. He is a founding member of the Philippine Internet Freedom Alliance and is a member of the Internet Society Philippine chapter, all of which are initial organizational signature holders.

We would start the presentation.

>> KS PARK: My name is KS Park. I'm supporting Open Net Korea, a digital rights organization of the country working on freedom of expression, privacy, intellectual property, open data, Internet Governance, etc. I'll be speaking and Kelly Kim, to my left, is a staff lawyer of Open Net Korea. She also contributes to the discussion by presenting a regional case study of Korea.

She is a lawyer specialized in privacy and technology and freedom of speech and has engaged in many high publicity cases working for Korean courts.

The second panelist that I'll be presenting remotely is Toshiki Yano. For the transcribers, T-o-s-h-i-k-i, Y-a-n-o. It is a private sector in this discussion.

With that, I'll turn over to Mark so that he can turn over back to me.

>> Mark Wallem: Our first reference panelist, Dr. Park.

>> KS PARK: Could we have the presentation on? I can start while they're fixing. I gave you the slides. Yeah.

Right in this room we talked about freedom of expression in Asia in the previous session. We talked about how criminal laws are used to suppress Internet freedom in the region. I also worked -- I also -- I also achieved my fame in the country as a freedom of speech advocate. You saw the reality in Asia where definition laws -- next slide -- defamation laws and also laws inserting authority, also the

laws of blasphemy are used to suppress freedom of speech or expressions not yet proven to be false. These are the laws, even if you are speaking truth, you can be punished or your statement be suppressed.

Comparing the reality against international standard, one international document is 2010 UN human rights on freedom of expression; specifically said truth shall be a defense to any form of defamation law. If you are speaking truth, you cannot be punished, even if it is bad for another's reputation, or even inserting the king or inserting the religion.

Many of these laws have exception. Many of these recognized truth as a qualified defense saying true statements will be exempt from punishment if it is for public interest, but I checked with the human rights committee that it should not be qualified. It should be complete. As long as you are stating truth, even if it is not proven to be geared toward public interest, you should be able to speak that.

People are worried about privacy and truth and sexuality, marriage. But for privacy you need another law, not defamation law, otherwise employers not paying wages will claim privacy on their conduct can suppress and then can suppress employees or prohibit employees from criticizing them for nonpayment of wages. This has happened in Korea because Korea has truth defamation law. An employee was actually punished for complaining aloud that his employer has not paid wages.

In general, people committing crimes secretly and usually people commit crimes secretly, will claim privacy upon their conduct. You do not -- you cannot use defamation law to protect privacy.

Next. Then in 2014 came this right to be forgotten jurisprudence. It was about a Spanish lawyer wanting to be forgotten by his peers about the fact that he fell behind on his Social Security tax payments, so behind that his house got auctioned. He requested to delist auction information from search result when search is done based upon his name. I'm going to talk about what it is not. It is not about punishing people for statements. It is just punishing statements. It's suppressing circulation of statements. It's not about punishing all true statements. It's about suppressing just statements that are quote "no longer relevant." It's not about taking down all no longer relevant statements. It's about delisting from search results.

It's not about the listing from that information

also, but just on the searches using the data subject's name. Even so, even with all these limitations, it's still a new theory upon which truthful, nonprivacy infringing statements could be suppressed. That's why it hits Asia in a very negative light. It really provides very negative background upon which Asia's freedom of speech can be demoted once again.

Now, these are justifications for right to be forgotten. People say right to be forgotten is a need for privacy. They cite formal prostitute who wants to have a second chance on their lives. They talk about children who have posted self-nudity. I have no problem with that. You don't need the right to be forgotten to suppress those images and those texts, because the classical rules of privacy can protect, can allow the former prostitute children to take down those images and text because prostitution by nature is a private profession and a child by law doesn't have Internet power to consent to disclosure of his private information.

But the right to be forgotten applies not just to private information, but it applies to public information, to be accurate information voluntarily made available to the public. I'm not thinking about just information that's actually made the public, but also information that's made constructively public.

For instance, if you commit some conduct and attract attention from police, hospitals, and media, you cannot expect to be kept private on your conduct. The second justification usually provided is people should be given second chances. And the right to be forgotten is really about right to be forgiven. But is it really a proportionate and effective measure of seeking forgiveness to prohibit your peers from talking about your past? Or will the society progress more if people can -- people can freely talk about those things and actually gauge the actual value of this conduct.

The third justification is that it is digital age and we need data protection, but can you really own data about you? Can data really be owned? Think about Jane, the wife, and Jim, the wife beater. Let's say the data about the wife beater. Who owns the data? Jane wants to talk about it. Jim wants to suppress it. Who should own it?

Also the fourth justification is it applies only to the information that's no longer relevant and that if the information is publicly interested, then it would not be subject to right to jurisprudence, but not relevant to what? I mean, the information -- whoever uses the information can

be very creative about for what purpose the information will be used. Also, in Asia, there are many remnants of former dictatorship and former regimes that affect the society to properly redress those injustice and oppressions. You need the whole truth, not partial truth. Many times you cannot really find out whether somebody is a public figure or not unless you get the whole picture. And right to be forgotten suppresses that investigation into the whole truth.

The final justification usually given for right to be forgotten is that it's not really redacting the original information. It's not really harming the original information, but it is suppressing availability of that information through the Internet.

My answer to that justification is this: Internet is a gift whereby control over data transfer is distributed to a myriad of terminals controlled by individuals. So it gives everyone freedom to make your message available to the whole world and gives everyone freedom to choose what message to view and receive.

In this sense, right to be forgotten is against the Internet, because if information is allowed to exist, but not allowed to be searched online. You know how debilitating that can be to the availability of the information, because Internet is a sea of information where if the information becomes not searchable, it might as well not exist. So we will be -- if Internet -- if information on the Internet is censored this way through right to be forgotten, we'll be back to the pre-Internet age where only the people with the resources will hire other people to go through the different websites and databases because the search function cannot be used, and the individuals will have to use only -- will have to rely on manipulative search results.

So we have to think about this new concept of publicness. Data protection law, I believe, I strongly believe in the data protection law. I believe every country should have the protect law. But it is a temporary measure, because it allows -- it relies on extremely Libertarian idea that you own data about yourself. It is still needed to protect the privacy of people who are turning over their data to governments and the companies, but it should be limited to the information that they have had confidential. It should not be applicable to the information that was voluntarily made public or that was made available to the public by reason of the data subject's conduct.

So right to be forgotten fails in that regard, because it applies to publicly available information.

What is publicness? Responsibility to allow space for others to approach you and contact you. You cannot expect others not to perceive you as you -- when you share physical space in which you form society, you form relationship. It creates ethical space. Another way of looking at it is publicness is a collective right to evaluate one another, to perceive one another, share in the feelings of one another.

We should think about publicness as a concept before we jump onto right to be forgotten. At global IGF, a dynamic coalition of publicness was formed, and we are working on a statement on right to be forgotten. If you are interested, you can Google about it. You'll find it and if you like the statement, you can sign on.

Thank you.

[Applause]

>> Mark Wallem: Okay. Dr. Park is expert in a wide range of issues related to Internet Governance, and always gives a thought-provoking presentation. So we thank him for that. And I know we'll have lots of questions and lots of things to talk about.

I'll turn now to Katie Townsend.

>> Katie Townsend: Thank you. And I'm very pleased to be here. As a lawyer who represents journalists and news organisations of the United States, I very much approach these issues from a U.S.-based media perspective. So I'm getting that out there from the beginning in the interest of full disclosure. I think it's useful to think about the right to be forgotten in sort of quotations. The issues surrounding them are in two major buckets. The first is the substantive policy questions, and what is the right to be forgotten? I think there is -- is it a right to demand delisting from an Internet service provider or a search engine like Google. That's the sort of European Union view of what it is.

Is it right to demand that an ISP or a publisher in the first instance remove content that is -- that they have published or that they're hosting on a site in the case of an ISP. There have been cases in Belgium, for example, and in Italy, where news archives were found to be sort of liable -- I shouldn't use the word libel, but the right to be forgotten demand for removing a news article that was, I think, very tellingly in the words of the Italian court expired in the same way that milk expires. It was irrelevant precisely because it was sort of dated, old news. That's a

threshold question when we talk about the right to be forgotten. Also, what is the content that this, quote/unquote, "right" reaches?

As Dr. Park said in the EU, it is a sort of irrelevant content, although he made the point excellently, what does that mean to be irrelevant, sort of irrelevant for what? I think these are the tough sort of substantive policy choices that really go to the heart of what I think is at the core of the right to be forgotten, which is attempting to strike a balance between two competing interests. On the one hand, you have privacy. On the other hand you have free speech, free expression, which, of course, includes the fundamental right to gather and receive information.

With respect to the U.S. approach, I think it's fair to say that the Internet itself, the sheer availability and ease of availability in obtaining information about individuals through the Internet has really created an anxiety about privacy rights. Certainly in the United States we are not immune to that anxiety. I think for the most part it has manifested itself in different ways. So the U.S. has a very different conception of privacy than countries of the European Union. Indeed, I would say probably every country in the world other than the United States.

That being said, the U.S. has not been immune, again, to these concerns about privacy that are really driven by use of the Internet.

We have seen, for example, increased use under freedom of information laws by the government of privacy exceptions designed to protect information that the release of which would cause an unwarranted invasion of personal privacy, for example. In fact, there have been state legislatures within the United States that have dabbled in their own versions of right to be forgotten-ish legislation. California in 2015 passed an eraser statute, which is quite narrow in the EU right to be forgotten, but it is only applicable to minors and gives minors the ability to request that information that they posed on social media be removed. The legislature in the state of New York has proposed a bill that mirrors more closely what we think about of when we think about the right to be forgotten, more of a delisting type right. None of these challenges -- they're real questions whether they would pass constitutional muster under the First Amendment. I think as a person who practices First Amendment law, that I would not think that they would. But, again, they have not been tested.

These are sort of isolated pieces of legislation

throughout the state. So I think that I'll pause there on the sort of substantive policies, but I think it's very important to think about these issues from the outset. Not to say that sort of the American approach which, again, I recognize is very different from other countries with respect to privacy. When it comes to expressing the balance between privacy and free expression, it's important to recognize that the right to be forgotten, whether you're talking about delisting, i.e., making links to content inaccessible, and when you're talking even more so about removing content itself, you're affecting free expression in a very real practical way.

I think the second bucket of considerations and concerns felt by the media in the United States is the potential extraterritorial applications of first right to be forgotten type laws, and other types of Internet restrictions as well. The reporters committee, the organization I work for, and a group of media organisations of the United States, for example, filed amicus briefs with French regulatory authorities. When they took Google Spain and required Google to delist links not simply on the EU domain, but on the Google top level domains, Google.com, what would be in a user in the United States and around the world? This is very deeply concerning because obviously the standards that the French regulatory bodies are applying to making the determination as to what should had been delisted very different than what would be applied in the United States if the United States government attempted to require Google to delist information or links in the same way. That would most assuredly be contrary to the first amend and an unconstitutional act by the government. It's a very real concern.

I think that decision, coupled with other decisions that affect sort of the extraterritorial application of one's jurisdiction's law across the board globally have sort of heightened that concern. I think just very recently the Supreme Court of Canada issued a ruling not in a right to be forgotten case, but rather in sort of a trade secret case requiring that Google remove or delist links to a website that was essentially selling counterfeit goods related to the company that was the plaintiff. The case is Google against Eqwise.

The Canadian Supreme Court determined it could enforce an injunction requiring them to remove the links globally, meaning on Google.com, including the Google.ca. That's a deeply troubling development. Even if you think of Canada as

a country with very strong human rights and protections for freedom of expression, which it is, it's still a very troubling.

In fact, Google earlier this week filed a challenge to that in the United States in the Ninth Circuit challenging that injunction under the First Amendment to U.S. law. These are concerns I think Google -- the best way to sort of characterize what this sort of underlying concern here is, I think Google characterized it the best in its briefing to the French regulatory authorities with respect to right to be forgotten, to say that this would encourage repressive regimes. One salient example you might think of is European blogger writing about LGBTQ rights or advocating those rights directed as a European audience. That would be in violation of Russian law. Does that mean that Russia can demand that Google delist that site from Google.com.

These are very serious concerns. The biggest concern from the U.S. perspective, the sort of impact to territoriality rights to be forgotten and other laws.

There are other procedures we can discuss as well. For example, whether or not in a delisting contacts, Google search engines need to notify publishers that the material is being delisted or even permitted or prohibited from doing so or permitted to do so. I don't want to spend a lot of time on that. So I'll send it back to Mark.

>> Mark Wallem: Go ahead.

>> Toshiki Yano: Thank you. Operator, please mute. Okay. Can you hear me?

>> Mark Wallem: Everyone can hear you, not just me. Go ahead.

>> Toshiki Yano: Can you hear me?

>> Mark Wallem: Yes, we can hear you. Go ahead.

>> Toshiki Yano: Okay. Sorry. My screen is frozen, so first of all, I'd like to say thank you for the moderator and KS Park especially for inviting me by attending through online. I really wanted to go to Bangkok, but at this time I have difficulty, so please allow me to attend by this online.

So I'm Toshiki Yano working for Google. I'm public relations counsel for Asia-Pacific as a whole. I'm now overseeing Asia-Pacific region in privacy and relevant issues. So today I'd like to tell my observation from private company, in particular from Google about the right to be forgotten discussion in Asia-Pacific.

So from private company's perspective, I think

Asia-Pacific policymakers, lawyers, are trying to strike the balance between free speech or public's benefit and privacy or people's demand to list the list from such results. I think APAC people are smart enough, very well to consider how to strike the balance, so not to try to just import European right about the notion in a simple way. They try to adopt the new notion based on their own culture, their own understanding of the privacy.

For example, there is a new law in Indonesia that can order electronic system providers to and take down the information from certain individuals, but if there is a court order. Without court order there is no such right to delete. So following that passing of the law, the ICT minister commented the -- I'm sorry -- the range of the application of the new law will be limited.

But the country is now discussing how to implement this law, so it's not clear about that yet, but I think initial discussion Indonesia is very much considered.

In Korea, for example, April 2016, the Korean communication commission issued a guideline regarding right to be forgotten. But when you see the content of the guidelines, it's not legally binding by any way. Such administrative guidelines, says go to Web master first when you want to delete some information, because it's defective. Ultimately, if you successfully delist information from such results, still your information will be remained in the Web master's website so that the Korean guideline indicates first go to the Web master first principles, which is, I think, where we're concerned to strike the balance.

The third, in Japan, the Supreme Court in January issued a decision in the so-called right to be forgotten in Japan. The Court clearly states there is no need to create any rights code. And then show the very balancing test, whether it's a public figure information, any public benefit to access such information, any harm against the individuals by listing such information and so forth. And then the courts concluded in the case there is no need to delist. And the Court also stressed the freedom of speech of search engines as well as search engines social role infrastructure to distribute information to the public.

So the Court showed a well-balanced approach, then how such court decision would be implemented in Japan would be the future discussion. But the judge and justices of the Supreme Court showed clear balancing test.

So when you look at outside Asia in Latin America, in particular, there is some if court cases you can

consider. So which is, for example, how do they -- the Columbia, Argentina, and the Chile, there are some court cases. Some come from their own Supreme Court and then it shows a search engine should not be responsible for any delisting request and so forth. So I have haven't read we can see how they are trying to strike the balance, and not just the European laws.

The additional information is the European themselves are very much striving for how to strike the balance between free speech and the privacy. For example, latest news from Spain is the Spanish national courts dismissed decision by the local data protectional authority for the right to be forgotten on the public figures professional conduct. The Court also said the right to be forgotten is not a right to rewrite one's past. It's from Spain.

Spain has the right to be forgotten, so still they are striving how to strike a balance. So we should consider our own notion of right to be forgotten if necessary to arrange how that would be. So we should be super careful about not to just looking at European practices as a kind of textbook for ours, because we need to do it by ourselves. That's what I'm saying.

If we can split the discussion into two, maybe from my perspective first stage is whether we need right to be forgotten in APAC. And if we need it, how the range of application. But I observe we are only on stage 1, whether we need the right to be forgotten, include Japan's Supreme Court decision, we APAC people are still trying to slow the issues by using existing legal principles. So probably we can solve any arising issues by our own laws, existing laws, with minimum improvement.

So my point is that we should have seen by ourselves just looking at Europe, not just looking at Europe. That's my point.

>> KS PARK: Thank you. All right.

>> Mark Wallem: Great. Thank you so much for that presentation. It was great to have you with us, even if remotely.

Let's turn now to the Philippines and to our friend attorney Francis Acero.

>> Frances Acero: I'll be talking about the Philippine concept. We don't have the specific right to be forgotten statute. It's in our privacy law. I think -- well, see if the slides can catch up. All right. So while we're waiting for them to catch up, I guess we can talk about

it first.

Inside our privacy law we have what's considered to be the right of the data subjects. The specific right is to have the right to have an inaccuracy or an error in your record corrected. And if the controller is not able to correct that record, the data subject has the right to have that record erased or blocked.

So the text of the law does provide that. It would be better if it was there: Two more screens forward, please. The law says when we talk about the right to ensure blocking, it's for incomplete, outdated, false, used for unauthorized purposes or no longer necessary for the purposes that has to be given at the moment of consent. You cannot expand on that purpose for any other reason than what you already told the data subject.

Next slide.

So when we interpreted that in our implementing rules, next slide. So data subjects have the right to demand from the controller, the right to suspend, withdraw, or blocking or removal of personal data. And they can also demand that the controller acquire people who have received that information down the line to change that information.

You can see there are two forms, two rights that are actually within this right. The first right is the right to accurate information. When the data is wrong, you can have it changed. If they can't do it, they have to take you out.

The second part is properly the right to be forgotten. So if the data subject says I withdraw my consent, please remove me from any record that you have of me, then for any reason, then that record has to be expunged.

The second part is when the data is prejudicial to the data subject. And then there is a big caveat. Our caveat is unless justified by freedom of speech expression or of the press or otherwise authorized. There are concerns that I heard earlier about public interest requiring that data to be kept longer for in terms of professional or ethical standards. We think that it's best kept to the regulatory agencies to determine what kind of information that is, so that that's otherwise authorized.

In terms of free speech or expression of the express, we refer to the public figure exception. So if you are a public official and it's the scope of the data is within your competence as a public official or goes into your public service, then that had been an issue. That shouldn't be subject to blocking.

We have that public figure exception in our jurisprudence. That's the senator of the Philippines. In 1986 there was a TV movie starring Gary Bucey. He was one of the characters in that, and in that production he wasn't portrayed in a good light. So he tried to have that movie blocked. And in Supreme Court said it adopted the book on torts of all false subjects. Public figures cannot keep their right to privacy. You cannot invoke the right to privacy to resist publication and that should not insist on the right to have negative information about them blocked because he's already a public figure. Our public figure expression is so broad, it more or less says if you are news worthy, you don't have that right anymore, which brings up questions of if you do insist on right and then it's kind of a chicken and egg question at the moment. But the idea is if you are a private person and that information reflects something that isn't you anymore and you stayed out of the light, why not?

Now, we've had one case involving a right to be forgotten involving a rape case. Just before I passed the bar, there is a law passed called Antiviolence Against Women and Their Children Act. And in that law, the records of victims are supposed to be kept confidential. So anyone who has published the name, or any identifying information, long before the data protection act, it will be subject to contempt proceedings. The Supreme Court noted this in a later case. It's People versus Cabalquinto. They found that victims needed to be protected. They shouldn't prejudice them just because their case makes it all the way through the judicial system.

The problem is when we have a hundred years of -- well, at that time 90 years of a tradition where in rape cases the names and the details and all the salacious is fully reported in the case. The Court said from this point on the names and other personal details will hide them with initials. And so all victims from that point on have become initials.

There was this lady that called us up just after we were formed last year. And she asked that she be taken out of an online database or online court decision database. The problem is her case came out in 2000. It's way before the application of the 2006 case. So she wanted her details changed from her name to AAA, because she said that she's been having a tough time moving on. She's around 41 now. This happened when she was 15. So she was having a really tough time.

So the Supreme Court already changed their reporting. So her case is now initials. Her name is gone. But other case reporting websites, which take data from the Supreme Court website and put it on their own have kept their name. So we reached out to those websites. Some complied. Some changed her name, but there's still one holdout. And we -- the only checking we did after this is a Google check. She noted that once the changes were made, her name quickly disappeared. And that was complied for a couple months and then we saw again the data, as I checked this morning, her case had back up. We'll open a file and investigate that further.

So that's it.

[Applause]

>> Thank you.

>> Mark Wallem: The software freedom law center out of India, Prasanth Sugathan.

>> Prasanth Sugathan: Good morning, everyone. My organization is software freedom law center in India. We filed an amicus brief in the Google case in France. We were part of 14 organisations that filed an amicus. The problem is this is an evolving area. Any decision in any part of the world definitely is going to affect other jurisdiction. Yes. In current case, we know when Spain has it, the rest of the world will catch it. India, we are no exception to this.

We have now seen a sprint of cases involving the so-called right to be forgotten. And it is really interesting. In India we live in interesting times. In the litigation before the Supreme Court, where the national unique ID project was being challenged, our highest law officer appeared before the Court that we Indians do not have a fundamental right to privacy. That would be saying you don't have a fundamental right to privacy. Yes, that is being debated now.

A nine-judge bench of the Supreme Court, constitutional bench, is debating whether Indians have a fundamental right to privacy. In this scenario we also find lawyers and courts who are enthusiastic to invoke the Google case and its doctrine onto the Indian scene.

The funny part is we don't even have a data protection law. So if you look at what we were explaining, the Google case is especially based on the data protection law in Europe. The section that was concerned with the controller, as far as India is concerned, we don't even have a data protection law. But still there have been many cases where people approach the courts asking their content to be

taken down, the search to be moot.

So far we have in cases we have various high courts. We had one in the Canada high court, one in Delhi court, so this has been going across the country.

In fact, in one specific case, again, I think in some cases the media also is to blame. Everything sometimes gets as a right to forgotten. It's just not the truth. As the person in Philippines was mentioning, even in India we have a law that specifically deals with rape victims. They have a right that their name not be revealed. One person pertaining to that, it was not a specific prohibition in the Penal Code which provides that a person, a victim in a rape case, her name cannot be revealed. So even if it's in a judgment. But what could happen is there could be some related cases where her name is revealed.

The cases in the high court pertaining to that, but even that gets often reported as a right to be forgotten matter, which is not true. Then there are other cases, I think there are a couple relating to marital disputes where the husband wants his name to be removed from decisions relating to his marital disputes with his wife. He wants it be removed from search engines. In most cases nowadays, the decisions are reported online. Most of the high court decisions are available online. These are then in text. There are law reporters which in you can index them. You can also Google search them.

As I said earlier, even this is without a data protection law. So currently they want to extend the right, as I said. This is a debate which is currently going on. But they want to extend the right to privacy to include the right to be forgotten in that.

But this definitely has to be seen from a different perspective all together of right of people to know of, in fact, actually, there was a decision of the Supreme Court from India. This is a different matter altogether. The petition was for stay on the release of a movie relating to the period of when emergency was imposed in India. The person wondered everything and events related to that, it was not a documentary. She wondered the release of the movie to be stayed. The Supreme Courted well, a person's right to reputation cannot override the right for people to know. I think that applies very much here.

We cannot see this purely from a privacy perspective. And it has to be seen from a perspective of the right for people to know; otherwise, we will soon have situations where search optimizations, we will have online

optimization agencies coming up all over the world, where the price they ask for and you could clean your slate. I'm sure developers want that.

Thank you.

[Applause]

>> Mark Wallem: Thank you so much, Prasanth. Last but not least, let's turn to Kelly Kim of Open Net Korea.

>> Kelly Kim: Thank you. So I will focus more on me Korean situation. So according to the decision it is more concerned with the right to -- a person's right to his or her own data; however, you know, we are in the APrIGF, I want to focus on how the right to be forgotten and the right to be understood is being enforced in South Korea.

First of all, I'm talking about South Korea, obviously. Korea is a country with a very strong data protection law regime. Data subject already have powerful tools to enforce their right on their personal information, at least in theory. So according to the Personal Information Protection Act and the Information and Communications Network Act, a data subject may request a data processor or data controller to correct or delete his or her personal information that's been collected.

We don't have restrictions like those in Philippines data protection law does. The definition of personal information is very broad. It's like it seems to be forever expanding. So, therefore, in South Korea, the right to be forgotten is more about rights to personal liberty, especially one's reputation. And reputation is only formed in a public realm. In the debates on the right to be forgotten, we are around the issue of how far a person's right to request cleaning of unsavory or unpleasing information on the Internet stretches.

So there are many mechanisms to cleanse the information. There are ways to be more powerful in the sense that it allows the original information, not just the indexing or the listing. So for the defamatory information, as KS Park said, which includes true statements and inserting statements, is considered illegal in Korea. And the Korea communications, KCC, has a power to order such illegal information to be deleted. Apart from criminally charging the defame, and any person who finds online information defamatory may request intermediaries to take down the information.

It's not just the indexing or the listing. The scope is very broad as the defamatory information includes

true statements, and also privacy infringing information includes information that contains personal information such as names and titles so if certain contents includes people's names or, it's considered personal information and it can be privacy infringing information.

The intermediaries tend to comply with this takedown request from the persons most of the time. More than 500,000 online postings have taken down and deleted annually.

Apart from use media facing defamation or lawsuits, the press arbitration and remedies act the right to request for report on contradictory statement so the news media must report -- if the article contains something wrong or like defamatory, they have to report according to the test and they have to report again those statements or correct statement.

Moreover, Supreme Court acknowledges for the articles themselves. So the problem is these mechanisms protects one's personal liberty are largely abused by public figures and private entities like professionals, companies, or religious groups.

We don't have a court case specifically dealt with the right to be forgotten in Korea yet; however, the administrative bodies have been trying to catch up with the trend. So Mr. Yano already mentioned the Korea communications commission guideline. Sorry, I have a problem with my computer. KCC has the power to assist with the guidelines. They're not legally binding per se, but the companies nonetheless follow. Therefore, we are really concerned when the case is announced a plan to introduce the right to be forgotten guideline in year 2014. Initially it seemed like an adaptation of the decision, which concerns the linking or the indexing of information from the search research. However, facing extensive criticism from academia and Civil Society, the KCC is changing its approach.

Another one is bill proposed by the press arbitration commission. The bill allowed a person to request deletion of news articles not only from the search research, but also from the use media. While the bill didn't get to pass, but to sum up, at least in Korea the right to be forgotten is not much about data protection or privacy, it's about how much control a person should have about information that the person doesn't like that is already on the Internet in the public realm or in the public domain. And I have a very different opinion from Mr. Yano that the balance between the public interest and the private interest and the public

interest is well made in Korea. And I think this broad application or recognition of the right to be forgotten will kill the Internet eventually. When you think about how the Internet has provided a public realm or public arena for anyone to fully share their expression and information, you know. Think about it. If only positive information or nice information about somebody is allowed to survive, that's the Internet anymore. So I'm very against the notion of obtaining this right to be forgotten, especially in Korea and especially in the Asia-Pacific region.

Thank you.

In that sense, please -- that's why we created Dynamic Coalition, we also have a joint statement on the website. So if anyone is interested, please write your names and e-mails on this paper so that I can collect them after this session finished.

Thank you.

>> Mark Wallem: Thank you so much, Kelly. We have heard from everyone and we'll take your comments and question from the floor. With those panelists being lawyers, I think they showed great restraint. Let's have a round of applause for all our panelists.

[Applause]

So let's start off we'll hear from Gilbert Andres from the advocate of freedom of expression in Southeast Asia who is some observations regarding this. Please prepare your questions. We want to hear from you. Please introduce yourselves giving your name and organizational affiliation if you have one.

>> Gilbert Andres: Actually, Mark, I have a question for panel. I'll just reserve it for later on. I'm Gilbert. I'm from advocacy for freedom of expression of Southeast Asia. And I'd like to talk about the Southeast Asian context. How many of you here are actually from Southeast Asia? I'm just curious. Thank you very much.

So I want to talk about three points on the Southeast Asian context. First are the challenges. This is one of the moments where I'm not a panelist. I'm just listening. I'm listening and it's depressing for me knowing what our challenges are in Southeast Asia. For example, we have a strict liability regime in Southeast Asia, liking, sharing, or even tagging is dangerous in Southeast Asia. There is a strict liability even for intermediary Web masters.

So it's a bit sad in Southeast Asia. But I

don't want to dwell on the sadness and the depression. We should be aspirational, which leads me to my second point. Human rights integration. Last year, January 2016, we had the establishment of the community wherein there is a free movement of goods, services and people from one Asian country to another. An Asian is composed of ten member nations. If you look at it, sometimes we have the logical fallacy being presented by very authoritarian regimes is a western concept. Our friends in IGO, you should have universal human being rights in Southeast Asia. I think it would be better and more powerful if it's a Southeast Asian who will tell that, yes, human rights is a universal right. Freedom of expression is a universal right. The problem in Thailand and the Philippines is also the right problem in Singapore. Hence, we have this notion that the grave concern in one Southeast Asia nation is not just the concern of that one southeast Asia nation. It's a great concern for the rest of the region. That's what we call human rights integration.

We stated this principle in the declaration last September 2015. In the Sibu declaration, it really states why human rights is a fundamental human right, where freedom of expression is such a fundamental human rights. It was signed by 10 NGO from six countries, Indonesia, Malaysia, and an NGO from Cambodia. I'd like to recognize some of our NGO members. So from Indonesia, we have IJR, we have Arasmos. And from Malaysia, we have the Empower Women's Feminist Rights Movement. We have the MCCHR Malaysia constitutional rights.

We have Luis and my friend from the Philippine. We have Philippine freedom alliance, and me the Philippine center for international law Philippines. We have to do advocacy and we want to do that through amicus briefs and file in our sorts in Southeast Asia. We want to do that through advocacy, and yes, from the lawyers network, our young-at-heart representative.

We want to do that. We want to file amicus briefs before our courts, although that's also challenging here in Southeast Asia. And we want to also make position statements before our legislatures.

I would like to end with the third principle. Why do we even talk about FOE. I would like to end with the Subu declaration. It states that freedom of expression is a fundamental human right since as human beings we want to express our own humanity.

Thank you.

[Applause]

>> Mark Wallem: Thank you, Gilbert. That's inspiring. Yes, please, go ahead.

>> Audience: Thank you so much. My name is representing UNESCO. I found the panel very interesting. They have very divergent ideas. Some support the right and some not. I know UNESCO and we've been exploring the very complicated relation between the two rights. Firstly, I want to share that I think we need to recognize that free expression and the privacy are friends. They support each other. Not always in conflicting situation. For example, in journalism, the right to anonymity and the right to freedom of expression. Now if you look at the search protection for journalism, it's a framework to help journalism to function properly.

So if even right to be forgotten, we need to recognize the very powerful component that it would really help to save communication on the Internet. That's my -- one observation. And the secondly, I think on the Internet now is the Internet age, something cannot be searched, it doesn't exist. So as the right to be forgotten, although it's actually right to be delisted, but it does profoundly impact the access to information.

I'm not a lawyer. I like to look at it more from a larger social context, larger social implications. Imagine those people with individuals or institution empowers. They don't like some part of the records, archives, to be searchable, to be accessible on the Internet. The part of story just to disappear from human's memory. That's part of the history. That's part of the cultural heritage, digital heritage and we need to preserve for the future generation. So I think if you think about the larger social implication, you will realize that right to be forgotten should be really very carefully examined.

We had several people that the public interest need to be prevailing. And I raise this question to GDPR, one of the expert groups and the former Spanish data protections commissioner. I ask them how did you strike the balance in the GDPR between the freedom of expression and privacy. Article 72, I don't really recall, they have a safeguard in that global protection framework. In reality, he said it doesn't -- it isn't feasible to have an overarching law, because you do need to look at them case by case. In every balancing cases, there are no one solution for all. So that's one of the things this discussion was very interesting. With lawyers, with judges, jurisdictions, they also imagine -- keep in mind the national standard and

the public interest. We do need to take a case by case approach.

>> Mark Wallem: Thank you. Thank you. The woman behind you.

>> Audience: Thank you. Hi. My name is Bishaca. I work with a nonprofit called Point of View in India. I wanted to make an intervention, because this is one of the hardest issues. I'm not sure where I stand on the right to be forgotten, but based similarly on what you were talking about. So I would like to say, first of all, that I agree with Professor Park on certain things. The right to be forgotten is being used in context where privacy legislation, etc., would actually work equally or more effectively. In the early days after the Spain case, I looked up and did some research on a number of cases and found that the right to be forgotten was being used also to correct journalistic errors. So you might have a journalist who made a mistake in reporting something, and then the person instead of going to the newspaper, perhaps feeling they couldn't get redress from the newspaper were now using the right to be forgotten.

So I agree on the one hand that we can't have this kind of umbrella right which makes up for all supports errors that should be corrected by other things. At the same time, I do want to say there are certain things that I think of which are not merely reputational, but are actual harms. And I think here we are talking about nonconsensual Internet images being circulated. Some of the examples like the rape one, etc. And here for me, I would say that in that context like in the country I live in in India, if you were to try to go to court to get something removed, it might take you ten years. And that is not at all meaningful in terms of justice, or in terms of what I as an end user might want, which is my nonconsensually circulating images. They can't keep circulating for six years, ten years, etc. So in those contexts, I would -- where harm is involved, not just reputation, but sort of harm leading to reputation, I would strongly support measures which give us redress. I want to say one thing, actually. I was thinking about it, because we talk so much about human rights and I think we often focus on right part of it and we forget the human. The truth is there are human beings on the other side of this.

For some of us we can't wait for what is the sort of intellectually or conceptually best solution. We have to go on leading our lives and why can't we have not just the toughest solution in the planet, but why can't we have these easy solution for justice.

>> Mark Wallem: Thank you. The gentleman at the mic there.

>> Audience: Thank you. Is it on? Yeah. My name is Winston Roberts. I'm speaking not for a government here, but I do -- I work in the area of national libraries, national archives: I'm concerned about the preservation of the record in any country. Part of the official record is in the national archives, record of legal decisions. And a part of the legal record of the country is the cultural record, which is in publications and letters of news media, which may be also held in the national library. These things we are encouraging them to digitize, especially where there are national disasters which might lead to destruction of heritage documents or when there should be too much information to be accessible by physical means, digital access to information is faster and more just and more equitable do anyone to find information that they need. The laws of many countries do specify that information should be made available to private citizens, and these laws should be restricted and taken to account, matters like defamation and privacy and so on.

The situation we're discussing in this workshop is so fluid, evolving in so many different ways that I would hesitate. I'm not a lawyer. I cannot possibly comment on these matters, but I would caution you against neglecting the importance of maintaining an official record of the country. Whatever happens in the country is part of that history.

It occurs to me, I agree with from the lady from UNESCO said, and the speaker from India. I forgot your name, madam, but I agree with what you both said. All of that is important. It occurs to me maybe what we need is to remember the laws on defamation and laws on privacy and maybe we need to study the possibility of having limitations and exceptions for private information to be preserved, but at the same time the public interest to be preserved, to strike a balance. Maybe there needs to be some sort of commission of inquiry into the balance between privacy and public interest.

That's all.

>> Mark Wallem: Thank you. The gentleman at the mic beside you.

>> Audience: Hi, everyone. I'm from the University of the Philippines. I'm a journalism student and am one of the youth fellows of this program. So basically my question is I'm a journalism student. I'm balancing the right to access information, but I believe that as you can see, the case of the Philippines, the public figure is -- the

definition of public figure that it currently is defined as anything that is newsworthy. And what is newsworthy? What is public figure? Those are two sweeping terms that I wasn't able -- I don't know if you guys defined public figure or what they call this public figure, but I wasn't able to get it if you were able to define it. But if not, I'd be glad to know if there are international standards on what is the limitations of a public figure.

The woman from India said that while there are humans on this side, there are also humans on the other side. While we have our freedom, while we have our right to access information, they also have access for their private information. So what should be the limitation of public figure? How should we define it? Thank you.

>> Mark Wallem: Thank you and very interesting question, I think with a wide variety of definitions. As the point was made sometimes in trying to not be a public figure, you also become one.

Let's hear from Luis and then we'll go to the panel to wrap up.

>> Thank you, Mark. I'm Luis from Human Rights Center for Malaysia. The concept of the right to be forgotten is still very foreign in Malaysia. It has not been tested in courts nor in the legislature. But for me just to say is a story to put in context what we are discussing today. There is a boy 19 years old who made a rape joke in a group chat about his classmate. And then another member of the group chat screen shot that conversation and put it on Facebook. There is a real case scenario in Malaysia. That post went viral overnight. Lots of shares. Media likes very hot topics, so they shared this story. And then since then, because that post was accompanied with his name, now every search engine about his name would come up with that story about him making a rape joke.

And he's a 19-year-old boy. And that would stick with him for the rest of his life. As far as I know, he is a law student and he wants to become a lawyer. And that will, I believe, has affected his life entirely. His prospects of getting into university as well as getting employment is affected. It has been derailed entirely. I believe that a lot of social media vigilante condemned on it, give their opinion on it because it cannot be tolerated. I don't see any way that he could defend himself without the right to be forgot. Defamation laws cannot help him. And I think this perspective has to be put in our focus because it

is an infringement on freedom of expression, but how about a boy's life that may be affected if he's not granted the right for delist from the Google engines.

>> Mark Wallem: We'll turn to our panel and wrap up.

>> KS PARK: I agree with the intervention from Malaysia just now when child posting, and also posting of posting about sexual crime victims and images of sexual activities.

These are harmful information at source. They need be redacted -- they need to be redacted at source. Suppressing circulation doesn't help abating those problems. If only some people have access to that information, they will wield power over your lives. So whether it's made available widely, whether it's made available in a limited circle, your life will be ruined. You need to take action at source. And in some sense, if only small number of people have access to the information, it will be a greater threat to you than when everyone else knows about it. So I think that that should be the approach that we should take. For instance, we heard about the Philippine case of a rape victim. If criminal privacy law doesn't have a provision allowing redaction of the names of rape victims, then it is those laws that have to be upgraded. Korea has that provision.

Once the name makes it into the public records, it is harmful information that can affect the rape victims even from the beginning. There the victims should either testify in an anonymous capacity. There can be various ways that the information can be controlled at source. Once we know that, it is harmful information.

And trying to go back in time or trying to suppress circulation in only certain media, we're not really -- will not be a proper way to address those harms. And at the same time, I have no problem applying right to be forgotten to those exceptional cases about sexual crime victims or children's postings. I included that in my presentation that children legally don't have right to consent -- don't have power to consent to disclosure of private information about them. And sexual crime by nature takes place in -- takes place in a private context. Prostitution by nature is geographically a private profession. There are these privacy arguments that can be made about those contexts.

Right to be forgotten is not about that. Right to be forgotten is about the information that is made

available to the public either voluntarily or by your conduct that necessitated a public information. Prime example is criminal activity. So that's why we do not need a right to be forgotten. We should sharpen our conceptions of privacy.

>> Katie Townsend: I think I would adjust briefly to that. I think from the U.S. perspective, we're probably the least tolerant of regulations of speech in general. And I would say that with respect of the right to be forgotten, specifically, that it shouldn't necessarily be used as a tool to address. I think as Dr. Park was saying, other societal issues. For example, it is not uncommon in the United States, even though there is absolutely no legal requirement, no right to be forgotten or no legal requirement that information be taken down, it is not uncommon for news organisations to receive requests from individuals, particularly about older stories to remove them or to change information in the stories. This is typically arises in the case of criminal convictions that are quite dated. You may have an individual comes back 10 or 15 years later and says it's difficult for me to find a job because when you Google my name this Washington Post story about this crime I committed is the first thing that comes up.

It's certainly not difficult at all to feel sympathy for a person in that situation. I think the news organizations in the U.S. that I work with take a bright line approach to that. They do not take a case by case approach. They take a bright line approach, no, we do not remove content from our news archives. We might add a correction. If appropriate, we might add additional information to help supplement the record if that's an appropriate thing to do. We're not going to remove that information which has been part of the public domain from the public domain.

Isn't a better solution societal perspective to remove some of the stigma of having a criminal conviction on the record, which is a pretty common thing in the United States? Isn't that better than sort of wiping away this one instance of a criminal transgression from the past? So I think it is important to question whether or not at the outset whether a government regulatory approach is the right approach to add some of the problems that are at issue here, particularly if there is a nongovernmental approach. I think, for example, that the posting of revenge porn is a violation of almost every term of service of every ISP of every social media provider that they will willingly remove that content if requested, because it's a violation of their Terms of Service. There is absolutely no need for a

governmental mandate in that way. So I think it's important to not use a sledgehammer to kill a fly, particularly on the other side of that when you're dealing with access to information and free expression.

>> Mark Wallem: Toshiki, are you there?

>> Toshiki Yano: Yes. Can you hear me? Okay. All right. We are doing our own work. In particular, we are -- we think -- we believe education for students and consumers or users is very much important and how to maintain online safety, including how to act on the Internet is also important. So we are doing some kind of a program called Web ranger and so forth. I don't have time to explain the whole program about this, so research after the session. But we are working with students, teachers, to know about the risks in online behavior and so forth. So that people can avoid troubles.

Regarding criminal conviction, apart from that education, I think there is some demand to rehabilitate criminals in society, but I think it's something like more cell rehabilitation policy. It's not something like making a right on the Internet. So the narrowing down the policy issue is important and still effective and concentrate on some issues is important for that.

Because I was a lawyer before joining Google, I have some experience to say the criminal convictions, too. And through defending activities, the news on the Internet is pretty much useful for me in particular collecting evidences or how to the prosecutors and the police and why I'm working for these criminal victims. So that's my two cents. So based on my experience.

>> Mark Wallem: Thank you so much. Francis?

>> Frances Acero: Right. We've seen that there are concerns when it comes to the boundary for right to be forgot. A proper regulatory approach allows for more dialogue at these edges ask that we need to talk more about what those boundaries are. Does -- do those boundaries need to be set by society? Do they need to be set by professional organisations? Where does this happen?

We also have to realize there are people that do not have access to these remedial measures. That's where we come in. Hopefully we find the balance later on. But realize something has to happen in the meantime. We can't just leave things hanging.

>> Prasanth Sugathan: Definitely there is a need to strike a balance. There are laws like in the case of

sexual offense victims. We don't need the right to be forgotten bucket for that which you could catch everything. I'm sure none of us want a sanitized Internet where we only have good things. We will only have cat videos on the Internet. I'm sure we don't want that. Thank you.

>> Kelly Kim: I understand that there are extreme cases where the information circulation should be protected. As I already said, in Korea we have being measures that a victim can attend to. So I want to point out that this right to be forgotten or these laws or regimes that protect persons or a person's reputation tend to be abused by those public figures or people in power, or like professionals or like companies to wipe the Internet out of their, like, bad reviews about them or criticism about them. Most of the time I think it's more than 90% of the time the people or the entity that make those kind of right to be forgotten claim or the defamation claim are those powerful people or public figures.

So I think especially in Asia-Pacific region, where the reputation is very well recognized, I think we should be careful not to broadly apply the right to be forgotten, especially in our region. Thanks.

>> Mark Wallem: Well, we hope we have given you some food for thought. I think it's now time for food for our stomachs. We will break. Thank you all for coming. It was a great turnout. Thank you again to our panelists. Thank you.

[Applause]

(Concluded.)