Supreme Court of Korea
Re Case No. 2023 Do 18308

I. Introduction

The International Justice Clinic ("IJC") at the University of California, Irvine School of Law, directed by former United Nations ("UN") Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Professor David Kaye, respectfully submits this brief as amicus curiae to the Supreme Court of Korea. IJC promotes international human rights law at corporate, regional, national, and international levels, both within the United States and globally.

Open Net Association, Inc. ("Open Net") is a non-profit organization based in South Korea that promotes free expression, privacy, network neutrality, and other digital rights in South Korea, Asia, and globally. Open Net has monitored and acted as a party, amicus, or legal representative on several important speech restrictions enforced by the executive branches of the world's governments, including on behalf of prosecutors. It has also participated in proceedings of the UN Human Rights Committee and worked with the special mandates on free speech of international human rights bodies in various countries, especially in Asia.

Kang Hyo-sang faces a sentence upheld by an appellate court of six months in jail, suspended for one year, and one year of probation for receiving a call from a friend about the contents of a call between the leaders of South Korea and the United States. The information was about plans for President Trump and President Moon Jae-in to meet in South Korea. This criminal punishment fails to account for the facts that: (1) Kang Hyo-sang was not the original source of the information, (2) the leak of this information was ultimately harmless, and (3) the punishment's severity is disproportionate when considering the requirements of freedom of speech protections. We at the International Justice Clinic of the University of California, Irvine School of Law and Open Net submit this amicus brief to demonstrate the violation of international human rights law standards that we believe this sentence inflicts on Kang Hyo-sang.

II. Anyone has right to share lawfully acquired information with their peers

"[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, (1979). A penal sanction for publishing lawfully obtained, truthful information requires the "highest form of state interest" to sustain its constitutional validity. *Id.* at 101–102.

A publisher enjoys First Amendment protection even if the source unlawfully acquired the information, so long as the publisher did not participate in the illegality, per the seminal Supreme Court case *Bartiniki v. Vopper*. *Democratic Nat'l Comm. v. Russian Fed'n*, 392 F. Supp. 3d 410, 435 (2019). In *Bartnicki v. Vopper*, the respondents Yocum and Vopper violated federal and state wiretapping statutes by willfully disclosing the contents of an intercepted wire or oral communication, which they knew or had reason to know were illegally intercepted. 532 U.S. 514, 525 (2001). Here, an unknown person intercepted and recorded a call concerning teacher union negotiations and put the tape in Yocum's mailbox. *Id.* at 519. Yocum delivered the tape to Vopper, a radio commentator, who played the tape on his show. *Id.* The Court found that the respondents obtained the information lawfully and did not participate in the illegal interception, but did have reason to know that the interception was unlawful. *Id.* at 525. The Court found a clear violation of the wiretapping statutes, but explained that their application to these respondents "implicates the core purposes of the *First Amendment* because it imposes sanctions on the publication of truthful information of public concern." *Id.* at 533–534. Ultimately, the Court held that the government's interests in "removing an incentive for parties to intercept private conversations" and "minimizing the harm to persons whose conversations have been illegally intercepted" were insufficient to remove First Amendment protection for the respondent's speech because of the illegal actions of a third party. *Id.* at 529.

The Supreme Court has refused to impute the illegal acts of a source to a publisher even where national security interests are implicated. After Daniel Ellsberg, a military analyst, copied and distributed a top-secret study about the Vietnam war and gave it to members of the media, the government sought to enjoin the publication of the Pentagon Papers*,* insisting that its disclosure would not be in the nation's national security interest. *New York Times Co. v. United States*, 403 U.S. 713, 723 (1971). But the Supreme Court overrode the government's proffered national security justifications and "upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party." *Bartnicki*, 532 U.S. at 528. The Court found that First Amendment considerations outweighed the government's national security interests and held that the government could not enjoin the newspapers from publishing the Pentagon Papers. *New York Times Co.,* 403 U.S. at 714. Now, several members of the court indicated that the newspapers might be subject to post-publication prosecution under federal espionage laws. However, there was no post-publication prosecution because the prosecutors could not prove the harm. This means that the knowledge of illegal acquisition on the part of the subsequent publisher itself does not impute guilt to the publisher. Once the media defendant acquired otherwise secret information lawfully, whether the subsequent disclosure may violate secrecy should be legally examined independently or regardless of the fact that the initial acquisition of the information was against the law.

A publisher does not lose First Amendment protection simply by communicating with the source or requesting the information. In *Nicholson v. McClatchy Newspapers*, the court held that liability could not be imposed upon a publisher for obtaining newsworthy information through routine reporting techniques. 223 Cal. Rptr. 58, 65 (Ct. App. 1986). Routine reporting techniques

encompasses "asking persons questions, including those with confidential or restricted information." *Nicholson*, 223 Cal. Rptr. at 64. *See also Smith*, 443 U.S. at 103 (noting that "respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of the government to supply it with information."). In *Democratic National Committee v. Russian Federation*, Russian intelligence agents hacked the Democratic National Committee and created a fictitious online persona, Guccifer 2.0, to disseminate the stolen documents. 392 F. Supp. 3d at 422. WikiLeaks contacted Guccifer 2.0 directly and asked Guccier 2.0 to send some of the stolen documents to WikiLeaks. *Id.* WikiLeaks then published the stolen documents. *Id.* The court found that "like the defendant in *Bartnicki*, WikiLeaks did not play any role in the left of the documents." *Id.* at 434. Nor was it relevant for the purposes of First Amendment protection, that WikiLeaks knew the documents were stolen or that WikiLeaks solicited the stolen documents. *Id.* at 434–35. Ultimately, the court held that WikiLeaks could publish without liability because "they did not participate in the left and the documents are of public concern." *Id.* at 436.

Also, First Amendment protection for the publication of truthful information of public concern is enjoyed by all persons, not just members of the professional press. In *Branzburg v. Hayes*, the Supreme Court highlighted the inclusive nature of press freedoms:

> [L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets…The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

408 U.S. 655, 704 (1972). The wide scope of First Amendment protections is reflected in *Bartnicki* where the Supreme Court did not distinguish between the two respondents – one of whom was a media professional. *See Boehnerv. McDermott,* 484 F.3d. 573, 586 (D.C. Cir. 2007) (Sentelle, J., dissenting) ("Lest someone draw a distinction between the *First Amendment* rights of the press and the *First Amendment* speech rights of nonprofessional communicators, we would note that one of the communicators in *Bartnicki* was himself a news commentator, and the Supreme Court placed no reliance on that fact.")

When the publisher/disseminator is a government official who has "special duties" imposed upon them. United States v. Aguilar, 515 U.S. 593 (_____); Boehner v. McDermott, 484 F.3d 573 (_____). In *Boenher*, the defendant was a member of the Ethics Committee which imposed a duty of confidentiality on the defendant, and even the information came to the defendant because of his such position. In our case, Defendant Hyo Sang Kang is a "member of the National Assembly Steering Committee and the Environment and Labor Committee of the Liberty Korea Party." Unlike the defendant in Boehner, he was not under any occupational duty of confidentiality.

III. There was no proven harm that resulted from Kang's publication

Applying punishment to a third-party publisher of information should be closely tied to the consequences or other effects of that publishing. In the U.S., the Espionage Act, the closest analog to an official secrets act, looks as if it allows for conviction without demonstrating actual harm. However, the leaked information must be closely held by the government and "the type which, if disclosed, could threaten the national security of the United States." United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006), amended, No. 1:05CR225, 2006 WL 5049154 (E.D. Va. Aug. 16, 2006), and aff'd, 557 F.3d 192 (4th Cir. 2009).

United States v. Rosen is a prime example of this United States free speech standard in action, as it highlights the stringent requirements in the U.S. for proving actual harm to national security in order to justify criminalizing leakage of classified information. Steven J. Rosen and Keith Weissman, former employees of the American Israel Public Affairs Committee (AIPAC), were charged in 2005 with conspiring to obtain and disclose classified information.[1] They allegedly received sensitive national defense information from Pentagon analyst Lawrence Franklin and passed it on to Israeli officials and members of the press.[2] The prosecution faced significant challenges in demonstrating that their actions had caused concrete harm to U.S. national security interests.[3] The challenges in proving that Steven J. Rosen and Keith Weissman's actions caused actual harm included the difficulty in demonstrating a direct, concrete impact on national security from their disclosures.[4] Additionally, the prosecution struggled to show that the information they passed on was both critical and damaging enough to compromise U.S. interests.[5] These difficulties ultimately led to the dismissal of charges in 2009.[6]

This is consistent with a broader doctrine of clear and present danger that speech cannot be punished unless it presents a clear and present danger of causing substantial evils and that the content of speech alone cannot be the basis of punishing it. Most recently, in United States v. Alvarez, the Court considered the constitutionality of a federal law that made it a crime for a person to falsely claim to have received military honors or decorations. The plurality opinion concluded that the law imposed a content-based restriction on speech and thus had to meet the most "exacting scrutiny." The opinion explained that the government failed this test because it did not prove any harm from false claims of military honors and because the government could achieve its goals through less restrictive alternatives.

This principle has shaped the prosecutorial practice in the US on the Espionage Act. In *New York Times Co v. United States* ("Pentagon Papers"), discussed earlier, several members

[1] Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists*, N.Y. TIMES (May 1, 2009), https://www.nytimes.com/2009/05/02/us/politics/02aipac.html?_r=1.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

of the court indicated that the newspapers might be subject to post-publication prosecution under federal espionage laws. Justice Stewart, the final Justice in the majority, concluded that the executive had failed to justify the need for the prior restraint in this case, stating "...I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation..." The Court's decision ultimately rested on the failure of the government to point to materials in the historical study that needed to be kept secret in order to protect national security.

When applied to Kang Hyo-sang's case, United States standards would likely not permit a criminal prosecution of Kang Hyo-sang because of the complete lack of proven actual harm.

Across the Atlantic, the European Court of Human Rights does not require proof of actual harm to uphold a criminal conviction for speech, but a harm assessment is still considered. An example where the ECHR found that public interest in information disclosure outweighed any potential harm is *Guja v. Moldova*, in which a press official for the Moldova Prosecutor General's Office published confidential documents implicating local political leaders for being involved in corruption relating to police misconduct.[7] While no proof of actual harm is needed to criminalize the distribution of confidential information in European human rights law, harm is weighed against public interest.

In the case of Kang Hyo-sang, there is no proof of actual harm, and further, public interest is implicated. The Grand Chamber in *Guja* specifically mentions sparking public political discourse as an important public interest, noting that information within the scope of public debate is a legitimate interest in a democratic society.[8] The information spread by Kang Hyo-sang was regarding the actions of a political leader, published with the purpose of allowing the public to evaluate this leader and potentially to sway the public toward his own political party. Political discourse is public interest, and the outcome is clear when weighed against the lack of proven harm. ECHR jurisprudence would thus likely indicate a violation of the freedom of expression under Europe's standards by interfering with Kang Hyo-sang's right to impart information because there is no proven harm to weigh against the public benefit of political information for democratic decision-making purposes.

To sum up, there is no proof of actual harm in this case. While international standards to not strictly have a necessity in showing this proof, it is absolutely examined in both the United States and Europe when determining a punishment based on freedom of speech or expression. The Court specifically notes that Kang Hyo-sang's publication created no special diplomatic problems. The complete lack of any proven harm in Kang Hyo-sang's case should weigh heavily upon a decision of a fair and just criminal sanction for this leaked information.

Specifically, the Court seems to think that leak of *any* information will undermine trust in the confidence of diplomacy given by other governments talking to the SK government. Such thinking makes sense when an employee handling classified information all the time makes a leak since such leak will cause Korea's diplomatic partners to hesitate in confiding to the Korean

[7] *Guja v. Moldova*, App. No. 14277/04 (Feb. 12, 2008), https://hudoc.echr.coe.int/eng?i=003-2266532-2424493.
[8] *Id*.

government. Therefore, the official making the leakage should be punished even if the leaked information does not pose a threat to national security. But Kang is not one of the officials who made a leakage. The likelihood that other governments will not confide to the South Korean government just because a third party who received the leak will share with yet other third parties is too remote to justify criminalization of the publisher regardless of the sensitivity of the information published. Any legitimate interest in protecting trust and confidence in diplomatic communications can be protected sufficiently by criminalization of the officials making the leakage, and criminalization of a civilian who has lawfully received that information is not the least restrictive means.

IV. Argument re punishment/severity

Even if Kang Hyo-sang should be found guilty of criminal conduct, the level of punishment he is receiving is far too severe and constitutes a violation of his human rights. While United States jurisprudence tends to focus on a black-and-white determination of whether the speech can be punished rather than being penalty-sensitive, the case is much clearer under European international law.

The European Court of Human Rights has provided guidance under Europe's Convention for the Protection of Human Rights and Fundamental Freedoms on the question of a proper level of punishment for the press publishing information against the interest of the state in *Stoll v. Switzerland*.[9] In *Stoll*, the information was a report on Swiss diplomatic strategies by a high-ranking diplomat, which is similarly diplomatic in nature to the case at hand but significantly more consequential for the Swiss government, and the Grand Chamber explicitly acknowledged the state interest in "protecting diplomatic activity against outside interference."[10] Stoll published a sensationalist article painting an ambassador in an antisemitic light, and he was sentenced to a fine of CHF 800, the smallest sanction available under Swiss law.[11] The Grand Chamber upheld this punishment as proportionate to the reasonable aim pursued of protecting against the dissemination of important diplomatic information.[12] Thus, a journalist publishing a report about the country's diplomatic strategies was considered proportionately punished by only the smallest fine available.

Kang Hyo-sang, on the other hand, has been sentenced to six months in prison, suspended one year, for publishing an ultimately inconsequential statement about a meeting that would be public. This level of punishment is not proportionate by the standards of the European Court of Human Rights because the information is less consequential than the report in *Stoll*, yet the punishment is much stricter. The punishment faced by Kang Hyo-sang would thus be too severe under international standards in Europe.

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[9] App. No. 69698/01 (Dec. 10, 2007), https://hudoc.echr.coe.int/eng?i=001-83870.
[10] *Id.* at ¶ 125.
[11] *Id.*
[12] *Id.*

The Grand Chamber tends to find a violation of the right to freedom of expression in cases where more than a fine has been imposed, even when a legitimate interest of a state is impugned. Specifically, the imposition of a prison sentence for political speech or debate on an issue of public interest has been expressly declared a violation of international human rights in Europe by the Grand Chamber in *Otegi Mondragon v. Spain*.[13] Even a degree of hostility and the potential seriousness of certain remarks "do not obviate the right to a high level of protection, given the existence of a matter of public interest" under *Morice v. France* if the journalist's publication is sufficiently based in fact.[14] The current standard for levels of punishment in freedom of expression cases set forth by the European Court of Human Rights is specifically defined in *Morice v. France* as:

> [T]he nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference. As the Court has previously pointed out, interference with freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression.[15]

Under this standard, even a moderate fine can be overly punitive for political publications by the press. Looking back at *Stoll*, the Grand Chamber explicitly notes the importance of avoiding the concept of honor as a protected interest when looking at the publishing of confidential diplomatic information, noting that the addition of this element would be at odds with a legitimate aim.[16] In other words, the punishment must be based on the actual legitimate aim of protecting national security in cases of publishing classified information, rather than being based on the manner and nature of the publication.

Yet, in the case of Kang Hyo-sang, the Court specifically emphasizes the gravity and criminality of the defendant's act because of the nature and manner in which the defendant disclosed the diplomatic secrets at hand while the Court notes that the publication did not create any special diplomatic problems. If the state's legitimate interest was not ultimately affected by the defendant's publication, then the punishment of six months in prison cannot be proportional to the state's interests. Thus, when evaluated under the international human rights standards in Europe, the punishment faced by Kang Hyo-sang is not proportionate to a legitimate state interest and violates his right to enjoy the freedom of expression.

V. Conclusion

Kang Hyo-sang's position as a member of the National Assembly must be distinguished in terms of obligations from the other defendant, Gam Woon-an, who is an official of the Korean Embassy in the United States. This distinction shows that the defendants had different obligations with respect to the confidential information, and as a third party to the information

[13] App. No. 2034/07 (Mar. 15, 2011), https://hudoc.echr.coe.int/eng?i=001-103951.
[14] App. No. 29369/10 (Apr. 23, 2015), https://hudoc.echr.coe.int/fre?i=001-154265.
[15] *Id.* at ¶ 127.
[16] *Stoll*, App. No. 69698/01.

publishing it to the public, Kang Hyo-sang should be given similar protections to the press. Ultimately, Kang Hyo-sang, as a third-party member of a rival political party, *was* the public with respect to diplomatic information when compared to the embassy officials who had an obligation of confidentiality and reached it. His publishing of that information was dissemination of already-leaked information, rather than being the one to leak the information himself. Yet, Kang Hyo-sang faces a much more severe sentence than his codefendant Gam Woon-an.

Even when failing to consider the different roles of the defendants, Kang Hyo-sang was not the original source or leaker of the information. Though diplomatic in nature, the actual confidential information at issue in this case did not cause any specific threat to national security. Its publishing was therefore ultimately harmless. Any erosion of trust in the confidentiality of diplomatic communications can be sufficiently addressed by criminalization of the officials making the leak but criminalization of the members of the public like Kang is excessive and unnecessary to prevent Korea's diplomatic partners' reluctance in speaking to the Korean government.

Finally, the sentence that Kang Hyo-sang faces is far too severe of a punishment for the exercise of free speech, especially when considering the previously discussed mitigating circumstances. Ultimately, we urge the court to rethink the conviction and sentencing of Kang Hyo-sang due to the implications within the framework of international human rights law, particularly free speech standards in the United States and Europe.