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Looking at Virtual Assets from a Criminal Perspective: The Korean Supreme Court Decision 2020Do9789, Dec. 16, 2021

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Abstract

Criminalization of breach of trust is unique to Korea and has served as an ultima ratio for the protection of property rights. Unfortunately, the Korean Supreme Court's rulings on breach of trust have been the subject of scholarly debate for various reasons, including them being against nullum crimen sine lege. In that regard, the recent Supreme Court decision on whether "not returning the mistakenly transferred virtual assets" constitutes breach of trust presents an opportunity to review the features of breach of trust in conjunction with virtual assets (VAs). The acquittal may reflect the recent shift of the Supreme Court towards narrowing the scope of breach of trust. Though not wholly consistent with the precedents, it does reflect the trend to strengthen the principle of nullum crimen sine lege. However, in light of the rising popularity of VAs in Korean society and continuous adoption of regulations on VAs at domestic and international levels, including the travel rule, there may be a room for reconsideration in future.

KEYWORDS: embezzlement, breach of trust, Korean criminal law, virtual asset, virtual asset service provider, Financial Action Task Force (FATF), transfer, travel rule

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I. Introduction

The rise of virtual assets (VAs) and its ensuing consequences continue to dominate the news.[1] VAs, also called cryptocurrency, have sometimes been hailed as a novel invention that could change the dynamics of the financial system;[2] however, they have also been seen as means of speculation.[3] The number of people in Korea currently investing in VAs is estimated to be around 15.25 million, with market capitalization estimated at around 55.2 trillion KRW.[4] While the exact reasons for VAs' popularity may only be guessed at,[5] their magnitude and impact upon society[6] merit discussion as to their legal nature.

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1) Securities and Exchange Commission v. Terraform Labs PTE, Ltd. and Do Kwon, No. 21-mc-810, (S.D.N.Y. 2021) (The Securities Exchange Commission issued a subpoena against Terraform Labs and its co-founder to investigate if they violated U.S. securities laws in creating the VA, "Terra and LUNA."); Jonghyun Lee, *Geomchal, 'LUNA satae' bongyeok susa chaksu… Terraform Labs jeon gaebalja sohwan josa [The prosecutors' office launches an investigation upon LUNA]*, Chosun Biz (May 29, 2022), https://biz.chosun.com/topics/topics_social/2022/05/29/YYMKKMP2EBESDAQGLZYA2W4WVE (In Korean). (Following a major collapse in market price of Terra and LUNA, the prosecutors' office in Korea has launched an investigation to see if there had been violations of the Criminal Code or the Act on the Regulation of Conducting Fund-raising Business Without Permission.).

2) Wolfgang K. Härdle et al., *Understanding Cryptocurrencies*, 18 J. Fin. Econometrics, 181, 181 (2020).

3) David Yermack, Handbook of Digital Currency 31-43 (David K.C. Lee ed., 2015); Tanaya Macheel, *Warren Buffett gives his most expansive explanation for why he doesn't believe in bitcoin*, CNBC (May 2, 2022), https://www.cnbc.com/2022/04/30/warren-buffett-gives-his-most-expansive-explanation-for-why-he-doesnt-believe-in-bitcoin.html.

4) Fin. Services Comm'n, 21nyeondo habangi gasangjasansaeopja siltaejosa gyeolgwa [Findings on Virtual Asset Service Providers During the Second half of 2021] (2022), https://fsc.go.kr/no010101/77446 (In Korean).

5) Isu Kim, *Bitcoinui sabeopsang jiwi-e gwanhan gochal [Legal Nature of Bitcoin in Private Law]*, 59(4) L. Rev. 75, 77 (2018) (In Korean); Rakesh Sharma, *Why Is Cryptocurrency Trading Popular in South Korea*, Investopia (July 2021), https://www.investopedia.com/news/why-cryptocurrency-trading-popular-south-korea-0 (Many attribute the popularity of VAs in Korea as a means of investment and not necessarily as a means of payment.).

6) Nat'l Police Agency, Gyeongchalcheong gasangjasan gwallyeon bulbeopaengwi jipjungdansok junggan balpyo [Midterm Report on Crackdown on VA] (2021), https://www.police.go.kr/user/bbs/BD_selectBbs.do?q_bbsCode=1002&q_bbscttSn=20210611101503481 (In Korean) (The amount of damages from VA-related crimes jumped from 213.6 billion KRW (year 2020) to 4.1615 trillion KRW (year 2021, from January to May)).

Under Korean law, VAs are defined in the Act on Reporting and Using Specified Financial Transaction Information (FTRA) as "electronic certificates (including all rights thereto) that have economic value and that can be traded or transferred electronically."[7] However, despite this definition, the legal nature of a VA has not been satisfactorily explained.[8] In that regard, a recent Korean Supreme Court decision[9] deserves discussion as its reasoning sheds light on how VAs are treated in criminal cases; moreover, it provides an opportunity to consider an interesting aspect of Korean law—the criminalization of breach of trust.[10]

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7) Teukjeong geumyunggeoraejeongboui bogo mit iyong deunge gwanhan beomnyul [Act on Reporting and Using Specified Financial Transaction Information] art. 2 subpara. 3 (S. Kor.) ("Virtual assets" means electronic certificates (including all rights thereto) that have economic value and that can be traded or transferred electronically: Provided, That the following shall be excluded herefrom: (a) Electronic certificates or information about such certificates that cannot be exchanged for money, goods, or services, etc., and the place and purpose of use of which is restricted by the issuer; (b) Tangible and intangible products obtained through the use of game products under subparagraph 7, paragraph 1 of Article 32 of the Game Industry Promotion Act; (c) Electronic prepayment means under subparagraph 14 of Article 2 of the Electronic Financial Transactions Act and electronic currency under subparagraph 15 of the same Article; (d) Electronically registered stocks under subparagraph 4 of Article 2 of the Act on Electronic Registration of Stock, Bonds, etc.; (e) Electronic bills under subparagraph 2 of Article 2 of the Issuance and Distribution of Electronic Bills Act; (f) Electronic bills of lading under Article 862 of the Commercial Code; (g) Transactions prescribed by Presidential Decree taking into account the forms and characteristics of transactions).

8) Kim, *supra* note 5, at 77-78 (For instance, when a customer "buys" VA through Virtual Asset Service Provider, it is unclear whether the customer obtains the actual ownership of or the contractual claim to VA. While the legal definition of VA in FTRA was introduced on March 24, 2020 (and became effective on March 25, 2021), this has not resolved the discussion around its legal nature.).

9) Daebeobwon [S. Ct.], Dec. 16, 2021, 2020Do9789 (S. Kor.).

10) Hyeongbeob [Criminal Code] art. 355 (S. Kor.) ((1) Embezzlement: A person who, having the custody of another's property, embezzles or refuses to return it, shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 15 million won; (2) Breach of trust: The preceding paragraph shall apply to a person who, administering another's business, obtains pecuniary advantage or causes a third person to do so from another in violation of one's duty, thereby causing loss to such person.).

II. Korean Supreme Court Decision 2020Do9789, Dec. 16, 2021

In this case, the defendant, by accident and for no reason, received a substantial amount of VAs (worth approximately 1.49 billion KRW) from the victim in his wallet, which was hosted by the Virtual Asset Service Provider (VASP). The defendant, instead of returning the VAs, transferred them to his other wallets and spent them, making cash withdrawals along the way. Prosecutors charged the defendant primarily with embezzlement and, in case his act did not constitute embezzlement, secondarily with breach of trust. The court of first instance found the defendant guilty of breach of trust, but not embezzlement.[11] The court of second instance ruled the same.[12] However, the Supreme Court decision at issue (hereinafter "*VA transfer case*") found the defendant not guilty. The pertinent part of the reasoning is quoted below:

> When a VA transfer is made by mistake or systemic error, the recipient may hold the obligation to return it to the originator as unjust enrichment. However, this is a mere civil obligation and does not make the recipient someone who is preserving or managing the VA based on a fiduciary relationship. In addition, there is no contractual relationship between the sender and recipient, and as it is unclear how the recipient came to have VAs transferred, it cannot be determined whether the person entitled to ask for return per unjust enrichment should be the victim or the VASP. Even if the defendant owed the obligation to the victim, that does not per se make the former a person who is administering another's business.
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> In regard to breach of trust, Supreme Court precedents have limited "administering another's business" to mean someone who has a relationship with the delegator that is more than merely contractual, such that the delegatee manages or preserves another's assets based on a fiduciary relationship. This refers to instances such as whole or partial delegation of asset management. In the present

11) Suwon Jibangbeobwon [Suwon Dist. Ct.], Feb. 14, 2020, 2019Gohap56 (S. Kor.).

12) Suwon Godeungbeobwon [Suwon High Ct.], July 2, 2020, 2020No171 (S. Kor.).

> case, it is difficult to establish that there exists an entrustment (or fiduciary) relationship between the defendant and the victim.
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> VA, unregulated by the State, is a digital representation of economic value and is "pecuniary advantage."[13] Some features of VA render it distinct from other general assets—only the wallet address in which a VA was stored can be identified, and the personal information of the user cannot be identified. In addition, its mechanism, namely the mutual distributed ledger, requires that non-parties to the transaction must also participate. Currently, VA is not regulated in the same way as fiat currency, and its transactions entail risk; therefore, VA does not necessitate the same level of protection as that of fiat currency by applying criminal law.
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> There is no law punishing the recipient of VA, who has enjoyed pecuniary advantage and who had no legal ground for the acquisition of the VA, yet spent it. To apply mutatis mutandis the Supreme Court judgement regarding the mistakenly wired money and find the defendant guilty of breach of trust is against *nullum crimen sine lege*.[14]

The VA transfer case may, on the surface, seem straightforward. Surely, someone who happened to have a VA fall into their lap cannot be expected to be bound by the legal obligation to keep it safe. However, a closer look at Korean criminal law shows that there is more to this situation than meets the eye.

III. Understanding Embezzlement and Breach of Trust in the Korean Criminal Code

A. Embezzlement and Breach of Trust

Embezzlement (Article 355(1) of the Criminal Code) is a crime that punishes the illegal taking of another's property. Breach of trust (Article

13) Daebeobwon [S. Ct.], Nov. 11, 2021, 2021Do9855 (S. Kor.).

14) Daebeobwon [S. Ct.], Dec. 16, 2021, 2020Do9789 (S. Kor.).

355(2) of the Criminal Code) is a crime that punishes the abandonment of trust or fiduciary duty. A contract is not necessary for fiduciary duty to exist.[15] Unlike embezzlement, breach of trust is unique to Korean criminal law, which adopted German and Japanese law; in most countries, such as the US and UK, it is not thus criminalized.[16] The Supreme Court has ruled that embezzlement and breach of trust are crimes of the same nature in that they are both based upon trust.[17] However, whereas embezzlement concerns property, breach of trust deals with pecuniary advantage, and this is where the difference lies.[18]

B. Property and Pecuniary Advantage

While there is no definition of property in the Criminal Code, it is understood to be "[something] that can be identified through visual and tactile sensation," including "energy which is subject to human control"

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15) Daebeobwon [S. Ct.], Feb. 18, 2021, 2016Do18761 (S. Kor.) ("The term "custody" as referred to in the crime of embezzlement stipulated in Article 355(1) of the Criminal Code refers to the possession of another's property in accordance with an entrustment relation, and thus in order for embezzlement to be constituted, a legal or de facto entrustment relation between a person who has the custody of another's property and a person who owns the property (or other persons who have a real right except possessory right) ought to exist. Such entrustment relation can be established by management of affairs, custom, sound reasoning, the principle of good faith, etc. as well as contracts including loan for use, lease, mandate, etc., but considering that the essence of embezzlement is to take illegal possession of another's property entrusted on the basis of a fiduciary relationship, the entrustment relation ought to be limited to that based on trust worthy of protection against embezzlement. Whether an entrustment relation exists ought to be normatively determined in consideration of whether such condition needs to be criminally protected by imposing a duty to keep the condition that the property is kept in exactly as it is upon a person who has the custody of another's property in the light of a relation between a person who has the custody of another's property and a person who owns the property, background leading up to the custody of the property, etc.".)

16) Il-Tae Hoh, *Baeimjoe haeseogui naagal banghyang [The Desirable Direction of Interpreting Breach of Trust]*, 27(1) J. Crim. L. 3, 31 (2015) (In Korean).

17) Daebeobwon [S. Ct.], Oct. 29, 2015, 2013Do9481 (S. Kor.).

18) Suwon Jibangbeobwon [Suwon Dist. Ct.], Feb. 14, 2020, 2019Gohap56 (S. Kor.) ("The Supreme Court has ruled that whether the object of economic crime is property or pecuniary advantage determines the nature of crime (Daebeobwon [S. Ct.], May 13, 2003, 2003Do1178 (S. Kor.)). Whereas the object of embezzlement is property, the object of embezzlement is pecuniary advantage, and this is where the two differs (Daebeobwon [S. Ct.], Dec. 14, 1961, 4294Hyungsang371 (S. Kor.)).

(Article 346, Article 361),[19] whereas pecuniary advantage is "anything of value that in total brings increase in monetary value except property."[20] The distinction between the two concepts is often construed as the reflection of the principle of *nullum crimen sine lege*.[21] This can be understood by looking at the example of larceny, which is defined as "stealing another's property" (Article 329 of the Criminal Code). If property included the concept of pecuniary advantage, which means anything of value, then it would not be clear whether stealing "useful information" fell under larceny or not. Such lack of certainty would inevitably lead to violation of *lex certa*—therefore, the use of the word "property" ensures foreseeability, that is, whether an act constitutes a crime or not.[22]

However, some point out that the distinction is not absolute and that the Supreme Court tends to conflate the two concepts.[23] There is a typical case of double selling real estate, where seller A entered a sales contract with buyer B, then enters into another sales contract with buyer C. Under Korean law, the real estate sales process has three stages—down payment, middle payment, and balance. At the time of the down payment, any one of the parties to a contract is free to rescind the contract either by giving up the down payment or returning double the amount (Article 565 of the Civil Code). However, once the middle payment has been made, the contract is considered to have been performed, and the parties are bound by it. The Supreme Court reaffirmed its position that:

> [O]nce the performance of the contract has been initiated by means such as the middle payment, unless the contract is rescinded,

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19) Daebeobwon [S. Ct.], Mar. 8, 1994, 93Do2272 (S. Kor.) ("[C]ontrol (as defined in Hyungbeob [Criminal Code] art. 346) refers to physical or material control, and considering the distinction in Criminal Code regarding property and pecuniary advantage, as well as that between embezzlement and breach of trust, bond or other rights cannot be interpreted to be covered under the term property.").

20) Woong Yim, *Jaesanbeomjoee isseoseo 'jaemulgwa' 'jaesansangui iik' gaenyeome daehan bipanjeok gochal [Critical Review on the Concept of Property And Pecuniary Advantage in Economic Crimes]*, 21(4) J. Crim. L. 359, 360 (2009) (In Korean).

21) Seong-jo Ahn, *Dichotomy of Property and Pecuniary Advantage*, 32(3) J. Crim. L. 211, 212 (2020).

22) Yim, *supra* note 20 at 360-361.

23) Ahn, *supra* note 21 at 230.

> the seller is bound by the obligation to transfer ownership of real estate property. Therefore, at such stage, the seller vis-à-vis the buyer is in a fiduciary relationship to preserve property in order to protect and manage the buyer's financial interest. From that point on, the seller is "administering another's business," as articulated by breach of trust. Accordingly, if the seller sold the real estate property to a third party, this is equivalent to hindering the buyer's acquisition or preservation of the real estate property, and this constitutes breach of trust.[24]

This case has brought criticism from scholars in that while breach of trust concerns obtaining pecuniary advantage, the Supreme Court is referring to the acceptance of the middle payment, that is, money as the constituent of the crime—yet, per definition, money falls into the category of property due to its tangible existence.[25] The distinction between the two concepts, while important, is sometimes controversial. There is "a tendency to stretch the scope of pecuniary advantage or property as the Supreme Court sees fit."[26]

C. Scope of Breach of Trust

As mentioned above,[27] most jurisdictions around the world do not criminalize breach of trust. The logic is easy to understand—that it is against the principle of party autonomy, and criminal measures should only be taken as a last resort (*ultima ratio*).[28] Such arguments seem even more persuasive when considering the shift in the Korean Supreme Court's position. In the past, double selling both the movable and immovable[29] constituted breach of trust. However, in 2011, through an *en banc* decision,

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24) Daebeobwon [S. Ct.], May 17, 2018, 2017Do4027 (S. Kor.).

25) Yim, *supra* note 20, at 362.

26) Tae-myeong Kim, *The Concept of Property Pecuniary Advantage and Its Distinguishment in Criminal Law*, 31(4) J. Crim. L. 295, 310 (2019).

27) Hoh, *supra* note 16.

28) *Id*. at 13.

29) Minbeob [Civil Code] art. 99 (S. Kor.) ("(1) Land and things firmly affixed thereto shall be immovables. (2) All things other than immovables shall be movables.").

the Supreme Court changed its position: In the case of movables, the seller is merely conducting their own business and is not in a fiduciary relationship; thus, they are not guilty of breach of trust.[30] In a series of decisions that followed, the Supreme Court further denied the existence of a fiduciary relationship where (a) a debtor, who had concluded a pre-contract for the transfer of real estate in lieu of performance for the purposes of claim security, whereby the debtor would prospectively transfer the ownership of real estate, sold off that property to a third party;[31] (b) a debtor registered the mortgage right on real estate registry to a third party other than the creditor who had initially acquired such right;[32] (c) an obligor placed their movable asset as security to secure a monetary debt, yet endangered the exercise of a security interest of the obligee as a result of a decrease or loss in value of the security by disposing of the collateral to a third person.[33] It may indeed be the case that Supreme Court is seeking to narrow the scope of breach of trust,[34] as discussed in more detail below.

Meanwhile, there is still strong support for breach of trust in that it is the only, and last, means of punishing economic crimes whose seriousness could endanger the foundation of society.[35] This may explain the Supreme Court's decision on the double selling of real estate, whose contradictory logic regarding the acceptance of the middle payment has been discussed above. It is noteworthy that the reasoning of the said decision[36] explicitly

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30) Jeongbin Ahn, *Baeimjoe cheobeolgwa gwanryeonhan hyungbeobironjeog nonui – budongsan ijungmaedo jaengjeomeul jungsimeuro [Dogmatics of the Criminal Law on the Punishment for Breach of Trust – Focusing on the Issue of Double Selling of Real Estate]*, 38(4) Hanyang L. Rev. 143, 157 (2021) (In Korean).

31) Daebeobwon [S. Ct.], Aug. 21, 2014, 2014Do3363 (S. Kor.).

32) Daebeobwon [S. Ct.], June 18, 2020, 2019Do14340 (S. Kor.).

33) Daebeobwon [S. Ct.], Aug. 27, 2020, 2019Do14770 (S. Kor.).

34) Ahn, *supra* note 30, at 146.

35) Yong-sik Lee, *Daemulbyunjeyeyak budongsanui ijungmaemaewa baeimjoeui hyungsabulbeobjeok gujo [Double Selling of Real Estate Property Through Accord and Criminal Structure of Breach of Trust]*, 23(1) Kor. J. Crim. Case Stud. 223, 238-251 (2015) (In Korean).

36) Daebeobwon [S. Ct.], May 17, 2018, 2017Do4027 (S. Kor.) ("(a) Breach of trust occurs when someone abandons the trust and causes loss. Whether how much trust is considered formed for the purposes of Criminal law protection would depend on the nature of contract, nature of such relationship, […] and in doing so, in determining the scope of breach of trust,

points out the policy considerations—in particular, the magnitude and importance of real estate in Korean society and how this principle has suppressed double selling, thereby protecting the general public. Such an aspect of breach of trust has also been the basis for the assertion that it should be applied to all types of crimes in a consistent manner—and that the focus should be on the structural similarity of the crimes, not mere civil law evaluation.[37] Accordingly, to properly evaluate the *VA transfer case*, an overview of Supreme Court decisions on relevant cases is necessary.

1. The Case of Mistakenly Wired Money[38]

The *VA transfer case* makes reference to the famous Supreme Court case of mistakenly wired money. The gist of the latter is as follows.

In this case, the defendant received 3 million HKD (approximately 390 million KRW) from the victim, Bank X, due to a mistake made by an employee of Bank X. The defendant then withdrew the mistakenly wired money and spent it. The Supreme Court ruled that this amounts to embezzlement, explaining that if money had been wired to the wrong person by mistake, there exists a custodial relationship between the account holder and the sender per principle of good faith, even if there had been no other pre-established relationship between the sender and account holder.

This ruling and its underlying principles have been the subject of scholarly debate for a number of reasons. First, in previous Supreme Court cases regarding mistakenly wired money, there had been some kind of pre-established relationship between the sender and the recipient, such as a sales contract. This case was unique in that there was no such pre-established relationship, which the Supreme Court explicitly ruled was not required for there to be an embezzlement.[39] Second, the Supreme Court

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one must take care not to miss out on the protection of the property rights of an individual. (b) Real estate property constitutes a big part of economy, often making up the most of individual's asset. (c) The application of this principle has suppressed the seller from double selling the real estate property and protected the buyer. This neither causes confusion in the market nor unduly limits the freedom of the seller. Therefore, the Court holds its position.").

37) Lee, *supra* note 35 at 245, 251.

38) Daebeobwon [S. Ct.], Dec. 9, 2010, 2010Do891 (S. Kor.).

39) Jin-kyung Song, *Chagoro songgeumdoen geumjeoneul imuiro sobihan gyeonguwa*

adopted a principle not set out in law and thus violated *nullum crimen sine lege*. Third, the decision adopted the "criminal ownership of money." The logic is as follows:[40] the Civil Code, which reflects a generally accepted principle, dictates that anyone who has de facto control over an article has possessory right to that article (Article 192(1)); anyone who lost their money or had it stolen does not have the right to ask for its return (Article 250). This means that anyone who acquired money may be considered its rightful owner and therefore cannot be someone who has the custody of *another*'s property. To resolve this dilemma, the Supreme Court has adopted the concept of "criminal ownership" in regard to money.[41] As a result, unlike under the civil law principle, the recipient of money does not acquire its ownership but, rather, becomes someone who is keeping it for the sender. In the same vein, there is also an issue of whether an account holder, the recipient, has received property or pecuniary advantage. Critics point out that at the time of money transfer, the account holder merely acquires the "right" to ask the financial institution for the money per deposit contract, and such right is pecuniary advantage, not property.[42]

The discussions elaborated above show that the legal doctrine adopted in the case of the mistakenly wired money is far from irreproachable. It is therefore interesting that it was expanded in the subsequent *voice phishing case*.

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jaesanbeomjoe [Property Crime on the Case of Spending Money Remitted by Mistake], 23(1) J. Crim. L. 385, 388 (2011) (In Korean).

40) Keun-woo Lee, *Chagosonggeum badeun donui imuisobiwa hoengnyeongjoe [Embezzlement About Spending Money Remitted by Mistake]*, 26(1) J. Crim. L, 265, 273-274 (2014) (In Korean).

41) Sung-hun Cho & Sun-woong Choi, *Voice phising beomjoee iyongdoen gyejwaeseoui hyeongeuminchulgwa hoengnyeongjoe [The Withdrawal of Money from the Bank Account That Is Used by Voice Phishing Criminal and Embezzlement]*, 10 Seoul L. Rev. 395, 406-407 (2020) (In Korean); Daebeobwon [S. Ct.], June 23, 2022, 2017Do3829 (S. Kor.) ("The Supreme Court, when determining whether money belongs to *another* and thus constitutes embezzlement, has in principle considered Civil Act, Commercial Act and other substantive laws; however, in certain cases *criminal ownership* of money has been acknowledged. Money from a third party, when received by one entrusted with administration of money, belongs to the trustor upon receipt unless special circumstances exist.").

42) Kim, *supra* note 26, at 310; Lee, *supra* note 40, at 276-278.

2. The Voice Phishing Case[43]

In this case, defendants A and B were charged with having conspired in (i) aiding and abetting Party C (member of a voice phishing organization) in the commission of telecommunications-based financial fraud (voice phishing) against Party D (victim) by providing the means of access to a deposit account opened under defendant A's name to Party C, and (ii) embezzling Party C's property (primary charge) and Party D's property (secondary charge) by arbitrarily withdrawing money that Party D wired as a result of the deception of Party C, using a separate means of access. The Supreme Court ruled that the withdrawal of money wired constitutes embezzlement against the victim. The majority opinion stipulated that:

> to constitute embezzlement, a custodial relationship must exist. In general, such relationship is established by contracts but may also be established by custom, sound reasoning, the principle of good faith, etc. Regardless of whether there exists a legal relationship between the sender and account holder, upon wiring, a deposit contract is established between the account holder and the bank, with the account holder obtaining the right to ask the bank for the money. As the money acquired by the account holder should be returned to the sender, the account holder is deemed to be custodian of the wired money. Therefore, the account holder's withdrawal of money constitutes embezzlement. [44]

The Supreme Court thus adopted the position taken in the mistakenly wired money case and expanded it in the *voice phishing case*, where three parties exist—the account holder, the victim who wired money, and the acquirer of means of access to the said account (voice phishing offender). Among scholars, there has been criticism as to whether the principle of good faith is sufficient to acknowledge a custodial relationship.[45] In that

43) Daebeobwon [S. Ct.], July 19, 2018, 2017Do17494 (S. Kor.).

44) Daebeobwon [S. Ct.], July 19, 2018, 2017Do17494 (S. Kor.).

45) Jae Yoon Kim, *Jeongitongsingeumyungsagi beomhaenge iyongdoen gyejwaeseo*

regard, the concurring opinion of the *voice phishing case* is worth noting, the gist of which is as follows:

> There exists no custodial relationship between the account holder and the victim. Once money is wired, the victim loses ownership of money. That there exist means for recovery does not mean that the victim still holds ownership of wired money. The account holder's withdrawal does not constitute additional damage to the victim. The current case differs from the mistakenly wired money case in the numbers of parties involved, and in that the acquirer of means of access to the account is directly involved in wiring. Considering the criticisms of the mistakenly wired case, that the entrustment relationship is deemed to exist despite the trust being unilateral and that the general principle of good faith is relied upon to expand the scope of punishment, such doctrine should not be applied in the *voice phishing case*. This could lead to undue expansion of the entrustment relationship in embezzlement. Meanwhile, [though embezzlement against victim cannot be constituted], there exists an entrustment relationship between the account holder and acquirer of means of access to the account—accordingly, the withdrawal constitutes embezzlement against the acquirer, that is, the voice phishing offender.[46]

The above concurring opinion shows that the Supreme Court is mindful of the criticism of the entrustment relationship, especially of how it may unduly expand the scope of embezzlement. As the entrustment relationship considered for the purposes of embezzlement and breach of trust is the same,[47] this is relevant to the *VA transfer case* at issue. In that regard, the recent Supreme Court *en banc* decision on claim assignment (hereinafter

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46) Daebeobwon [S. Ct.], July 19, 2018, 2017Do17494 (S. Kor.).

47) Daebeobwon [S. Ct.], Oct. 29, 2015, 2013Do9481 (S. Kor.).

"*claim assignment case*") is enlightening in that it thoroughly discusses the scope of the entrustment relationship.

3. The Claim Assignment Case[48)]

This *en banc* decision rendered on June 23, 2022 overturned the precedent on the claim assignment. In the past, the Supreme Court has considered the assignor to be someone who is in administration of the claim assignment for the assignee. The logic was that an entrustment relationship exists between the assignor and assignee, and the assignor, who receives payment from the debtor before the notice of assignment is served to the latter, may receive such payment only for the assignee; therefore, between the two, money belongs to the assignee, and the assignor has custody of it. This meant that the assignor was found guilty of embezzlement if they spent the money received. However, in the *claim assignment case*, the Supreme Court changed its position and ruled that the payment received by the debtor belongs to the assignor and that there is no entrustment relationship between the assignor and assignee—therefore, the assignor is not guilty of embezzlement. The reasons set out by the majority opinion are as follows:

> There has been no entrustment between the assignor and assignee regarding payment received by the assignor after the assignment. Between the two, only a contractual relationship exists and the ensuing obligation to perform is one's own, not another's, business.[49)] The Court has been acquitting charges on breach of trust under such premise, including the case where an obligor endangered the exercise of a security interest of the obligee by disposing of the collateral to a third person.
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> Looking at the trend of the past decade, the Supreme Court has been continuously denying the existence of embezzlement or breach of trust in mere contractual cases where the protection or management of another's property had not been an essential

48) Daebeobwon [S. Ct.], June 23, 2022, 2017Do3829 (S. Kor.).

49) Daebeobwon [S. Ct.], Apr. 11, 2013, 2013Do1079 (S. Kor.).

> component. This is in consideration of the principle *nullum crimen sine lege*.
>
> There would also be disproportionality in sanctions in punishing the claim assignment as breach of trust or embezzlement when assignments of other kinds, such as real estate rights or movables, do not constitute crime.[50)]

On the contrary, dissenting opinion points out that whether an entrustment relationship exists should be normatively determined, on a case-specific basis—and that such assessment should consider whether betrayal of trust justifies intervention by criminal measures. Interestingly, the mistakenly wired money case is mentioned:

> In the mistakenly wired money case, no contractual relationship exists between the sender and recipient. On the other hand, in the *claim assignment case*, a contractual relationship exists between the assignor and assignee. Therefore, the magnitude of the latter's betrayal is much more serious than the former. Yet the latter is not punished, whereas the former is punished. The two cases being analogous in that money had not been returned to the rightful owner, this different treatment leads to an unnatural conclusion.[51)]

It seems safe to conclude that the Korean Supreme Court is continuously narrowing the scope of breach of trust with *nullum crimen sine lege* in mind. However, the case of double selling of real estate has been upheld again, meaning that policy considerations still play an important role in determining breach of trust. The *VA transfer case* should be assessed with that in mind—especially whether it merits the expansion of the doctrine adopted by the mistakenly wired money case. To do so, understanding VAs is essential, as discussed below.

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50) Daebeobwon [S. Ct.], June 23, 2022, 2017Do3829 (S. Kor.).

51) Daebeobwon [S. Ct.], June 23, 2022, 2017Do3829 (S. Kor.).

IV. Understanding Virtual Assets

A. Features of Virtual Assets

VAs, despite their potential to spur innovation and efficiency in the financial system, have raised issues such as "consumer and investor protection, market integrity, tax evasion, money laundering and terrorist financing."[52] VAs' use as a means of money laundering is attributed to their anonymity and cross-border nature.[53] To address the issue, G20 Finance Ministers and Governors called upon the Financial Action Task Force (FATF) to review and implement FATF standards globally.[54] FATF, an inter-governmental body dedicated to combatting money laundering and countering terrorist financing,[55] has defined a VA as "a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes, but does not include digital representations of fiat currencies, securities and other financial assets." This definition has been accepted internationally and introduced into national legislation in many jurisdictions,[56] including Korea. FTRA, which first introduced the definition of VA,[57] was amended specifically to implement

52) Finance Ministers & Central Bank Governors, *Communiqué*, G20 Argentina 2018 (Aug. 19, 2022), https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/world/G7-G20/G20-Documents/Argentina/2018-04-04-communique.pdf?__blob=publicationFile&v=3.

53) Fin. Action Task Force (FATF), Second 12-month Rev. Virtual Assets & VASPs 14 (2021), www.fatf-gafi.org/publications/fatfrecommendations/documents/second-12-month-review-virtual-assets-vasps.html.

54) *Communiqué*, *supra* note 52.

55) Financial Action Task Force (FATF), *Who we are*, FATF-GAFI (Aug. 11, 2022), https://www.fatf-gafi.org/about/whoweare.

56) Fin. Action Task Force (FATF), *supra* note 53, at 10-11 (Of 128 jurisdictions that responded for the survey, the number of jurisdictions that already have or are in the process of introducing necessary legislation is 84, and the number of jurisdictions that have decided approach is 12, with undecided jurisdiction amounting to 32.)

57) The definition of VA in FTRA has been cited in other laws such as Local Tax Collection Act, Local Tax Act, Income Tax Act, Inheritance Tax and Gift Tax Act, Corporation Tax Act, Adjustment of International Taxes Act, and National Tax Collection Act.

FATF standards.[58] FATF has also imposed several preventive measures upon VASPs by revising the FATF standards.[59] One is the so-called "travel rule," which requires that VASPs "obtain, hold, and transmit the required originator and beneficiary information, immediately and securely, when conducting VA transfers."[60] In addition, FATF standards require that VASPs conduct "customer due diligence." This means that a VASP must identify its customer (i.e., user) using reliable and independent data or documentation when providing services or engaging in an occasional transaction over the threshold of 1000 USD/EUR.[61] This requirement is duly reflected in Korea's FTRA. The definition of "financial institutions, etc.,"[62] which lists obliged entities under FTRA, includes VASPs; the duties of obliged entities to collect originator and beneficiary information in conducting wire transfers (i.e., the travel rule)[63] and conduct customer due diligence[64] apply to VASPs as well.[65] While the travel rule's

58) *Teukjeong geumyunggeoraejeongboui bogo mit iyong deunge gwanhan beomnyul ilbugaejeongbeomnyuran [Proposal for the Amendment of the Act on Reporting and Use of Certain Financial Transaction Information]*, Nat'l Assembly Bill Info. (Aug. 11, 2022), https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_S1W9V1R1K2Y5J1A5K3V1Z0L4X1H3W9.

59) Fin. Action Task Force (FATF), The FATF Recommendations (2022), https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (FATF Standards refer to the 40 Recommendations for both public and private sector. FATF, after revising the Recommendation 15 (New Technologies) and adopting the definition of VA and VASP in October 2018, once again revised the interpretive note to Recommendation 15 in June 2019, thereby making it clear that all obligations upon financial institutions, subject to qualifications, apply to VASPs as well.)

60) Fin. Action Task Force (FATF), Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (2021), http://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets-2021.html.

61) *Id*. at 48-49.

62) Teukjeong geumyunggeoraejeongboui bogo mit iyong deunge gwanhan beomnyul [Act on Reporting and Using Specified Financial Transaction Information] art. 2 subpara. 1.

63) Teukjeong geumyunggeoraejeongboui bogo mit iyong deunge gwanhan beomnyul [Act on Reporting and Using Specified Financial Transaction Information] art. 5 para. 3 & art. 6 subpara. 3; Teukjeong geumyunggeoraejeongboui bogo mit iyong deunge gwanhan beomnyul sihaengnyeong [Enforcement Decree of the Act on Reporting and Using Specified Financial Transaction Information] art. 10-10; Financial Action Task Force [FATF] Recommendation no. 15 (New technologies); Financial Action Task Force [FATF] Interpretive Note to Recommendation no. 15 (New technologies) & no. 16 (Wire transfer).

64) Teukjeong geumyunggeoraejeongboui bogo mit iyong deunge gwanhan beomnyul [Act on Reporting and Using Specified Financial Transaction Information] art. 5-2; Financial

implementation is ongoing,[66] in future it will ensure the availability of information on the senders and recipients of VAs.

B. Legal Nature of Virtual Assets

However, Korea's legal framework for VAs is still incipient, as there is little clarity regarding their legal nature. Some say VAs form part of an unconventional contract, whereas others say they represent a fragmented partnership–ownership; still others assert that VAs are securities.[67] Confusion arises even over whether the user acquires the "ownership" of the VA at the time of purchase, considering that it is the computerized system that records the transaction and not any official institution.[68] The uncertain nature of VAs is not unique to Korea, however; for example, it would be hard to say that the US has a comprehensive regulatory framework for VAs.[69] While the U.S. Securities and Exchange Commission (SEC) states that a digital asset which constitutes an investment contract is a security,[70] there have been conflicting findings by the courts as to whether a VA constitutes a security[71] or not.[72]

The Korean Supreme Court has taken the view that a VA is intangible

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Action Task Force [FATF] Recommendation no. 15 (New technologies); Financial Action Task Force [FATF] Interpretive Note to Recommendation no. 15 (New technologies); Financial Action Task Force [FATF] Recommendation no. 10 (Customer due diligence).

65) Fin. Services Comm'n, Enforcement of Travel Rule on VASPs to Take Effect from March 25 (2022), https://www.fsc.go.kr/eng/pr010101/77580.

66) Fin. Action Task Force (FATF), *supra* note 53, at 36-37.

67) Moon-ho Song, *Gasang jasan chago iche wa hoengnyeongjoe·baeimjoeui seongbu [Mistransfer of Bitcoin and the Crime of Embezzlement or Breach of Trust]*, 16(1) Ne. Asian L. J. 243, 246-247 (2022) (In Korean).

68) Kim, *supra* note 5.

69) Sanford Claire, *Cryptocurrency: The Consequences of a Regulatory Gap in a Rapidly Growing Industry*, 98 SLU L. J. Online (2022).

70) U.S. Sec. and Exch. Comm'n, Statement on "Framework for 'Investment Contract' Analysis of Digital Assets" (2019), https://www.sec.gov/news/public-statement/statement-framework-investment-contract-analysis-digital-assets.

71) U.S. Securities and Exchange Commission v. Kik Interactive Inc., No. 1:19-cv-5244 (S.D.N.Y. 2020).

72) Audet v. Fraser, No. 3:16-cv-940, 57 (D. Conn. 2021).

property with economic value and can be subject to confiscation.[73] In a recent decision, the Court explicitly stated that Bitcoin, which is a type of VA that digitally represents value and allows for digital transfer, safekeeping, and transaction, is a pecuniary advantage.[74] The *VA transfer case* reaffirmed the finding that VAs are pecuniary advantages.

V. Evaluation of the VA Transfer Case

It has been noted that the *VA transfer case* is, at least in terms of structure, analogous to the mistakenly wired money case. The main difference is the object of transfer, that is, whether it was VA or fiat currency which brought about the distinction between pecuniary advantage versus property and breach of trust versus embezzlement. As the Supreme Court regards embezzlement and breach of trust as crimes of the same nature, it seems the culpability should not be different.[75] Yet in the present case, the difference between the two crimes has led to a different outcome. Accordingly, on the surface it seems there is little logical basis for the acquittal in the *VA transfer case*. As the decision enumerates a few reasons for not applying the same principle, such reasoning should be carefully assessed.

- First, the Supreme Court ruled that there is a civil obligation but not a fiduciary duty to return VAs. However, in the mistakenly wired money case, the Supreme Court had readily accepted that a fiduciary relationship had existed between the sender and recipient, despite there being no relationship between the two. Considering that the precedent of the mistakenly wired money case still stands, this may be assessed as arbitrary application of law. In addition, the Supreme

73) Daebeobwon [S. Ct.], May 30, 2018, 2018Do3619 (S. Kor.).

74) Daebeobwon [S. Ct.], Nov. 11, 2021, 2021Do9855 (S. Kor.).

75) Kim, *supra* note 26, at 316 (To be sure, "not all of the acts that constitute embezzlement can be regarded as breaches of trust, as breach of trust requires obtaining pecuniary advantage and causing loss." However, this is an irrelevant point for the purposes of this discussion, as not returning "something of value" would always cause loss to the sender and gain to the recipient.)

Court mentioned that as it is unclear how the defendant came to have the VAs transferred, the party entitled to ask for the VAs' return cannot be determined. However, this is an aspect of the uncertain legal nature of VAs that the Court could have clarified—that is, whether the user acquires the ownership of, or merely a contractual right to, the VA. The Supreme Court having the final say in the legal interpretation would unfortunately lead to further uncertainty around VAs.

- Second, the Supreme Court ruled that VAs differ from other general assets in that only the wallet address can be identified and not personal information. However, as we have seen above, the FTRA imposes an obligation, namely the travel rule, upon VASPs to collect the personal information of the sender and recipient. While the travel rule is still at an early stage, once it is better implemented the current ground for the decision would be evaluated as outdated.[76] In addition, the mechanism of the mutual distributed ledger, a unique feature of VAs, should not have any bearing upon the status of pecuniary advantage. After all, VAs represent value regardless of their mechanism.
- Third, the Supreme Court ruled that VAs are not regulated like fiat currency and that their transactions entail risk; therefore, the level of protection needed is not the same as that given to fiat currency. As we have seen above, the regulatory framework, while still at its inception, exists; VASPs are given the same obligations as those of financial institutions, at least under FTRA. In addition, the Korean government is seeking to introduce a legal framework on the issuance and listing of VAs, which would better ensure investor protection.[77] In regard to the risky nature of VA transactions, this is not a feature unique to VAs—the fluctuating futures market may seem risky to some, while others may regard it as a good investment opportunity. Nonetheless,

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76) To be fair, the decision came on December 16, 2021, whereas FTRA's travel rule came into force on March 25, 2022.

77) Seulgi Jeon & Jaeyeon Lee, *Gasangjasan 'jeunggwonseong·bijeunggwonseong' nanwo haeoe gyuje chamgohanda [Looking at foreign regulations: virtual assets, as securities and non-securities]*, Hankyoreh (May 24, 2022), https://www.hani.co.kr/arti/economy/finance/1044187.html (In Korean).

market participants are protected by the Financial Investment Services and Capital Markets Act. The level of risk cannot be the deciding factor. Furthermore, the level of protection needed in comparison with fiat currency is an interesting point, because it is not for the object of crime itself that the wrongdoers are punished. The essence of crime is the infringement of legally protected right (*Rechsgut*),[78] which, in the case of breach of trust, is the property right.[79] In the words of the Supreme Court, it is "the victim's pecuniary advantage" that the criminalization of embezzlement seeks to protect.[80] The Supreme Court having already decided that VAs constitute pecuniary advantage, the ruling that VAs do not require the same level of protection as fiat currency is off the mark.

- Fourth, the Supreme Court ruled that applying the case of the mistakenly wired money is against *nullum crimen sine lege*. While this is true, that case itself has been criticized for the same reason and yet is still upheld.

Taken together, it seems that the reasons set out in the *VA transfer case* are not entirely compelling. However, the judgment is undeniably in line with the Supreme Court's recent trend in narrowing the scope of breach of trust,[81] which is positive: The importance of *nullum crimen sine lege* and *ultima ratio* cannot be overstated. As noted by the Supreme Court, "in economic activities, where party autonomy prevails, forcing criminal measures before resorting to civil measures for dispute resolution, may lead to infringement of individual freedom and should therefore be restrained."[82] However, one must consider whether "case-specific evaluation" justifies different treatment of analogous cases. That breach of trust acts as the "only and last means of punishing the economic crimes" must also be remembered, as its unique feature dictates that focus should

78) Jong-dae Bae, Hyungbeobchongron [The Principles of Criminal Law] 9-10 (9th ed. 2009) (In Korean).

79) Jaesang Lee, Hyungbeobgakron [The Particulars of Criminal Law] 413 (9th ed. 2013) (In Korean).

80) Daebeobwon [S. Ct.], July 20, 2017, 2014Do1104 (S. Kor.).

81) Song, *supra* note 67, at 259.

82) Daebeobwon [S. Ct.], Jan. 20, 2011, 2008Do10479 (S. Kor.).

not be lost on how to fulfill the need for protection of the current era.[83]

In that regard, the Supreme Court's decision to rule the double selling of real estate as breach of trust, in consideration of its magnitude and impact upon Korean society, is well-grounded. According to Korea Statistics, in 2021, the proportion of real estate in household assets was about 73%, whereas that of financial assets was about 22.5%.[84]

While the *VA transfer case* is undeniably analogous to the mistakenly wired money case, there remains a huge difference between real estate and VAs in terms of magnitude and impact upon society. VAs, though growing rapidly in number of investors and capitalization value, cannot be said to hold the same importance in current society as real estate. Accordingly, case-specific evaluation leads to the conclusion that there are not enough policy grounds to overrule the principle of *nullum crimen sine lege*.

However, the issue of different treatment of analogous cases remains imperfectly solved, and, in that regard, a separate opinion in the *claim assignment case* which proposes the amendment of the Criminal Code is reasonable.[85] Here, the *VA transfer case* is explicitly mentioned to point out the disproportionality of sanctions—anyone who disposes of lost articles is punished per Article 360 of the Criminal Code, regardless of the articles' value, whereas a person that disposes of VAs and gains immense financial profit goes unpunished. Indeed, the most logical solution to the *VA transfer case* may come from legislative changes. Alternatively, there may, in the future, be room for reconsideration as the number of investors and capitalization value of VAs grow ever greater.

VI. Conclusion

The ever-evolving characteristics of VAs continues to elude regulators

83) Lee, *supra* note 35, at 229.

84) Statistics Korea, The Survey of Household Finances and Living Conditions (SFLC) in 2021 (2021), http://kostat.go.kr/portal/eng/pressReleases/6/3/index.board?bmode=read&bSeq=&aSeq=416398&pageNo=1&rowNum=10&navCount=10&currPg=&searchInfo=&sTarget=title&sTxt=.

85) Daebeobwon [S. Ct.], June 23, 2022, 2017Do3829 (S. Kor.).

and makes it challenging to determine their exact mechanism and nature. However, continuous efforts are being made at international and domestic levels, which should enable the issues to be better addressed. In that sense, the Supreme Court's statements on the features of VAs—including lack of personal information and regulation—may soon be outdated and require further consideration in the near future.

The Supreme Court's reasoning on how the principle of mistakenly wired money cannot be applied to the *VA transfer case* does not seem to be strong. However, the conclusion itself is reasonable—after all, criminal measures should only be employed as a last resort; the principle of *nullum crimen sine lege* should be of primary importance. While such has not been the sole basis on which breach of trust has thus far operated in Korean law, the Supreme Court is striving to strike a delicate balance, and the *VA transfer case* is a good example of such endeavor.

In future determinations on breach of trust, to quote the words of the Supreme Court, "the Supreme Court precedents should [continue to] be the starting point, with case-specific evaluation of the nature of administration, the gravity of violation of fiduciary duty and the impact on the victim's financial status."[86] In particular, legislative initiatives are needed to prevent and deter future misappropriations of VAs. This, in conjunction with other domestic and global efforts, would lead to a greater protection of the general public.

86) Daebeobwon [S. Ct.], July 20, 2017, 2014Do1104 (S. Kor.).