

# Notable Supreme Court Decisions on Criminal Law: 2022

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## I. The Meaning of “Intrusion” in Intrusion upon Habitation (Supreme Court Decision 2017Do18272 of Mar. 24, 2022)

### *A. Facts*

An online media journalist published negative articles about the company that the defendants worked for. In an attempt to control the negative publicity, the defendants decided to bribe the journalist while secretly recording and videotaping the exchange for potential leverage. The defendants treated the journalist to a meal four times at two different restaurants and secretly recorded the meetings using recording devices they had installed inside the restaurants beforehand.

The prosecutor charged the defendants with four counts of intrusion upon habitation. The prosecution’s case was that since the defendants had entered the restaurants with the intention of installing, removing or checking the secret recording devices, they had entered the restaurants against the owners’ will and as a result were guilty of intrusion upon habitation.

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### *B. Procedural History*

The trial court found the defendants guilty of the charges.<sup>1)</sup> The court's decision relied upon a previous decision of the Supreme Court concerning substantially the same circumstances,<sup>2)</sup> in which the Court held that an individual's entry into a restaurant with the intention to secretly install recording devices could be deemed as entering against the establishment owner's will, regardless of the restaurant being open to the general public. The defendants appealed, and the appellate court overturned the convictions. The appellate court opined that intrusion upon habitation requires entry into a residence in which people inhabit or entry into a managed property without approval or against the actual or presumed will of the proprietor. Thus, even a peaceful entry or an entry with permission can constitute an intrusion upon habitation if the purpose of entry is to commit illegal acts, as such entrance is contrary to the actual or presumed will of the proprietor.<sup>3)</sup>

The appellate court then stated that "as long as a person enters a residence with explicit approval from the proprietor, and without an intention to commit illegal acts, it shall not be deemed to be against the presumed will of the proprietor."<sup>4)</sup> Since the defendants entered the restaurant with the explicit approval of its owners and because the act of surreptitiously recording the conversation between the defendants and the journalist was not in itself an illegal act, the court concluded, the defendants did not enter the restaurant contrary to the manager's actual or presumed will.

The prosecutor appealed to the Supreme Court and argued:

An act of entering a residence should be deemed to be against the presumed will of a manager if it is empirically evident that the

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1) Gwangju Jibangbeobwon Suncheonjiwon [Gwangju Dist. Ct. Suncheon Br.], Feb. 15, 2017, 2016Godan2407 (S. Kor.).

2) Daebeobwon [S. Ct], Mar. 28, 1997, 95Do2674 (S. Kor.).

3) Gwangju Jibangbeobwon [Gwangju Dist. Ct.], Oct. 25, 2017, 2017No1120 (S. Kor.).

4) *Id.*

inhabitant would not have approved the entrance if the inhabitant had known the actual purpose of such entrance, even when the purpose of entering the residence does not reach the threshold of illegality. Even when an owner of a location allows access to the general public, if the purpose of entering that place deviated from its ordinary use, the act of entering should be considered as being against the presumed will of the proprietor. In the present case, the owners of the restaurants clearly would not have approved entry if they had known that the defendants were entering to install secret recording devices. Therefore, the defendants entered the restaurants against the presumed will of the owners and should be convicted with intrusion upon habitation.<sup>5)</sup>

### C. Supreme Court Decision

In an 11 to 2 decision, the Supreme Court, sitting *en banc*, rejected the prosecutor's appeal.<sup>6)</sup> The Court's decision was grounded in a new interpretation of the element of "intrusion" in intrusion upon habitation. The Court's primary rationale is as follows:

The crime of intrusion upon habitation aims to protect the legal interest of de facto tranquility. The constituent element of "intrusion" in the crime should be interpreted in relation to this legally protected interest. Thus, the act of intrusion must be committed in a manner that harms the de facto tranquility of the residence, and whether an intrusion has occurred or not should be evaluated based on the objective and external manner of entrance. Generally, an act of intrusion that harms the de facto tranquility of the residence will be deemed to be against the will of the inhabitant. However, an act of entering a residence against the will of an inhabitant is not sufficient

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5) Daebeobwon [S. Ct.], Mar. 24, 2022, 2017Do18272 (S. Kor.).

6) Justices Jae-hyung Kim and Chul-sang Ahn issued a concurring opinion. They agreed with the majority opinion that since intrusion upon habitation is not established in the case, the prosecutor's appeal should be dismissed. They differed from the majority opinion on the concept and criteria of intrusion and the reason why intrusion upon habitation is not established in the case.

in itself to constitute an intrusion upon habitation. While the will of the inhabitant is an important factor in determining whether an action constitutes an intrusion upon habitation, it cannot be the decisive factor. The determination should be made based on whether the action harmed the de facto tranquility of the residence.

In the case where a person enters a residence with the approval of the inhabitant but has the intent to commit a crime, or it can be presumed that the inhabitant would not have approved the entrance had they known the actual purpose of the entrance, such entrance shall only constitute an intrusion upon habitation if it is established, based on the objective and external manner of entrance, as well as taking into consideration the circumstances and method of the entrance, the methods that the residence is using to restrict and manage outsiders' entrance, and the type, feature and purpose of the residence, that the de facto tranquility of the residence was harmed at the time of the intrusion. The inhabitant's will is also considered, the degree to which will vary depending on the circumstances of the intrusion, such as the methods that the residence is using to restrict and manage outsiders' entrance and the type, feature, and purpose of the residence.

If a person, with the permission of the owner, enters a restaurant where access is allowed to the general public with the consent of the restaurant owner, it generally does not constitute an intrusion upon habitation unless exceptional circumstances exist. Even if the person enters the restaurant with the intent to commit a crime or it can be established that the restaurant owner would not have allowed entrance had they known the person's actual purpose of entrance, such circumstances alone are not sufficient to determine whether the objective and external manner of entrance harmed the de facto tranquility of the restaurant. Therefore, such entrance does not constitute an act of intrusion.<sup>7)</sup>

As previously stated, the Supreme Court had previously ruled that

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7) *supra* note 5.

entering a restaurant for the purpose of installing a covert recording device constitutes intrusion upon habitation even if the restaurant is open to the public at large, since it contravenes the explicit or presumed will of the proprietor.<sup>8)</sup> The court's reasoning for this precedent was grounded in construing the constituent element of "intrusion" as denoting "entry against the will of the proprietor". With the above *en banc* decision, the Supreme Court overturned this precedent.

#### *D. Comments*

Article 319 (1) of the Korean Criminal Code prescribes the offense of intrusion upon habitation. It provides that "a person who intrudes upon one's residence, guarded residence, structure or ship or occupied room" shall be punished by an imprisonment of up to 3 years or a fine of 5 million Korean won (approximately 3,900 US dollars). There has been scholarly dispute regarding the legally protected interest in the crime of intrusion upon habitation: ① Some assert that it is the right of residence, i.e. the right to ensure the tranquility of the residence and secure safe residence from unauthorized entry by others that Article 319 (1) intends to protect, whereas ② Others maintain that the legally protected interest here is the factual peaceful control of the residence itself or the *de facto* tranquility of inhabitants. Traditionally, the majority of scholars and the Supreme Court have supported the *de facto* tranquility theory. There had been much less debate, however, on how to interpret "intrusion": scholars and the courts had mostly agreed that "intrusion" should be interpreted as "entering against the express or presumed will of the inhabitant or the manager of the property".

In light of the aforementioned interpretation, the Supreme Court had held that intrusion upon habitation is established when an inhabitant would not have allowed entry had they known the actual purpose of entry, regardless of whether the place is open to the public or the person has gained permission to enter. Consequently, courts had consistently upheld intrusion upon habitation charges in the following categories of cases: ①

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8) *supra* note 2.

when an individual enters a restaurant open to the general public to install a secret recording device for wiretapping<sup>9</sup>); ㉞ when an individual enters a building open to the general public intending to commit a crime<sup>10</sup>); ㉟ when an individual intending to take an exam on behalf of another person enters the test site while pretending to be the actual examinee<sup>11</sup>); and ㊱ when an individual enters a residence with the wife's permission in the absence of her husband with the purpose of committing adultery (because the entry of a residence against the will of one of the inhabitants is deemed an intrusion upon habitation, even if a co-inhabitant allowed such entry).<sup>12</sup>)

Recently, the Supreme Court has altered its traditional interpretation of intrusion, overturning significant precedents through a series of *en banc* decisions. The first such ruling was made in Supreme Court Decision 2020Do12630 of Sep. 9, 2021, which concerned a case involving the entry of a person into a married couple's residence with the wife's permission in the absence of her husband for the purpose of committing adultery. The Supreme Court redefined "intrusion" to mean an act of entering a residence that disturbs the de facto state of tranquility enjoyed by the inhabitants, and declared that whether there was an intrusion should be determined by the objective and external manner of entrance at the time of entry. Additionally, with this new interpretation of "intrusion", the Supreme Court ruled that if a person entered the residence in an ordinary manner with the permission of one of the co-inhabitants present in the residence at the time of entry, such entry could not be considered as an act of harming the de facto state of tranquility, except in exceptional circumstances. As a result, the precedent that held an entry into a residence with the intent of committing adultery, with the permission of one co-inhabitant and in the absence of the other, as constituting unlawful intrusion (㊱) was overturned.

The 2017Do18272 *en banc* decision, which is the subject of the present analysis, is a follow-up decision that applied the new interpretation of "intrusion" to cases where an inhabitant would not have allowed entry if

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9) Daebeobwon [S. Ct.], May 28, 1997, 95Do2674 (S. Kor.).

10) Daebeobwon [S. Ct.], May 15, 2007, 2006Do7079 (S. Kor.).

11) Daebeobwon [S. Ct.], Dec. 19, 1967, 67Do1281 (S. Kor.).

12) Daebeobwon [S. Ct.], June 26, 1984, 83Do685 (S. Kor.).

they had known the true purpose of the entry. The decision, reversing the Court's past stance, rejected the recognition of the offense of intrusion upon habitation in cases where a person entered a place open to the public in an ordinary manner with the permission of the proprietor, even when the proprietor would have disallowed entry if he had known the real purpose of entry. The Court held that in such cases, the objective manner of entry did not disturb the de facto tranquility of the inhabitant.

To summarize, the 2020Do12630 *en banc* decision eliminated the offense of intrusion upon habitation in cases falling under category (d), while the 2017Do18272 *en banc* decision eliminated the offense in categories (a) and (b). This overturning of precedents led to the rejection of recognizing intrusion upon habitation in another category of cases, where individuals enter a place that restricts entry by disguising their true purpose of entry and gaining permission (category (c)). The Supreme Court held that such entry could not constitute intrusion as long as the proprietor gave permission to enter, regardless of any fraudulent act or mistake in obtaining such permission. Therefore, the Supreme Court did not recognize intrusion upon habitation when a person entered a prison facility to secretly record a conversation during prison visit, by hiding the recording equipment and gaining permission of entry.<sup>13)</sup>

The crux of the Supreme Court's new interpretation is that "intrusion" should be interpreted to mean "an act of entering a residence by harming the de facto state of tranquility enjoyed by inhabitants" and should be determined according to the "objective and external" manner of entrance. This new interpretation, at first glance, might seem to enhance objectivity and predictability in determining intrusion, because it considers objective and external factors that are readily observable over subjective factors such as the actual or presumed will of the proprietor. However, closer scrutiny of the new interpretation and the Court's application of it in subsequent decisions reveals increased ambiguity and difficulty in determining whether an intrusion has occurred.

First, the determination of what constitutes an intrusion remains uncertain even under the current interpretation of the Supreme Court.

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13) Daebeobwon [S. Ct.], May 31, 2022, 2018Do15213 (S. Kor.); Daebeobwon [S. Ct.], Apr. 14, 2022, 2019Do333 (S. Kor.); Daebeobwon [S. Court.], Apr. 28, 2022, 2020Do8030 (S. Kor.).

While the Court has instructed that the objective and external manner of entrance should be considered and the inhabitant's subjective will is not determinative, the Court also noted that the inhabitant's subjective will can be a relevant factor and its weight may depend on various circumstances, such as the method used to restrict entry, the type, features, and purpose of the residence. Consequently, entries that are identical in terms of objective and external manner may or may not be considered an intrusion based on the circumstances, including the proprietor's will, and it is challenging to predict the weight that will be given to the proprietor's subjective will in individual cases. As a matter of fact, some may even argue that the law has become *more* uncertain and unpredictable than before. Unlike the prior interpretation which focused on entry against the inhabitant's express or presumed will, the new interpretation requires consideration not only of the proprietor's will but also the weight it carries. This creates additional complexity for individuals, law enforcement agencies, and courts tasked with determining whether an intrusion upon habitation has occurred.

Moreover, the new interpretation fails to provide a coherent explanation for the range of overturned precedents and subsequent decisions by the Supreme Court. As previously discussed, the Court overturned precedents that had regarded entering a place open to the general public against the presumed will of the proprietor, such as for criminal purposes, as constituting intrusion upon habitation (categories (a) and (b)). The Court also did not consider it to be intrusion upon habitation when a person entered a place with the manager's permission, even if access was strictly restricted, and fraud or mistake was involved in obtaining such permission (category (c)). Consequently, entering a closely guarded prison facility by concealing the true purpose of entry (to record a prison visit) and gaining access was not found to be intrusion. However, the Court deliberately did not overturn the precedent where a person who entered a test site pretending to be the actual examinee was found guilty of intrusion upon habitation (category (d)). Taken together, the Court's recent decisions and selective overturning suggest that the Court considers entry for proxy exam-taking purposes as constituting intrusion upon habitation, while entering a prison to record a prisoner's reception does not. But it is difficult to justify treating these cases differently. The objective and external manner of entrance in both cases is essentially the same, in that the entrance was



made in an ordinary manner under the permission of the proprietor, and the method used to restrict entry (identification check conducted by an authorized person) or other circumstances regarding the entry do not seem to be fundamentally different either.

In a recent case<sup>14)</sup> following the adoption of the new interpretation, the defendant entered the apartment building of the former lover by using a password to unlock the communal front door. The former lover was unaware of the visit and had not wanted to see the defendant, as the relationship had ended badly. The Supreme Court determined that this entry constituted an intrusion which disturbed the de facto tranquility of the residence, mainly based on the following reasons: the apartment restricted access to unauthorized personnel, the defendant had not been granted permission to enter, and the defendant had secretly entered without the knowledge of the inhabitants. However, the Court's ruling is difficult to justify with its newly established "objective and external manner" criteria, as the defendant's method of entry was indistinguishable from that of other lawful inhabitants or visitors of the apartment who use the password for everyday purposes. The only difference between the defendant's entrance and that of the inhabitants' everyday entrance was that the defendant lacked permission or authorization to enter, rendering the defendant's entry against the will of the proprietors. Therefore, the decisive factor in this case had to have been the subjective will of the proprietors and not the objective manner of entry. The ruling in this case suggests that the Supreme Court is effectively reverting to the old interpretation of intrusion in some cases, possibly to avoid reaching conclusions that go against the sense of justice. One could argue that this inconsistency of the Court indicates the new interpretation's inability to achieve desirable outcomes in practice.

The Supreme Court could have arrived at the same outcome in much of the overturned cases without causing fundamental changes to the existing jurisprudence by changing the definition of intrusion. Even under the former definition of intrusion as "entering against the will of the proprietor", intrusion upon habitation could still be rejected in cases where

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14) Daebeobwon [S. Ct.], Jan. 27, 2022, 2021Do15507 (S. Kor.).

the purpose of entry was against the presumed will of the proprietor (categories (a), (b), (c), (d)), by simply adding a rule that prioritizes actual will over presumed will. Under this rule, presumed will would not be considered when permission was actually granted: entering a place open to the public (which means that everyone is granted permission to enter) or entering a building with restricted access under actual permission, even when the permission was obtained fraudulently, would not constitute intrusion upon habitation.<sup>15)</sup> Also, if a rule that states “when there are multiple inhabitants, if one inhabitant consents to entry, intrusion upon habitation cannot be established even if it is against another inhabitant’s will” is adopted, then the entry of a residence for the purpose of committing adultery with the wife’s permission, even if the entry is against the husband’s will, would not constitute an intrusion upon habitation (category (d)).<sup>16)</sup> By narrowing the scope of the overruled precedents in this manner, the Supreme Court could have reduced confusion and uncertainty over the jurisprudence of intrusion upon habitation.

Nonetheless, the Supreme Court adopted a more radical approach by altering the definition of intrusion, which forms a core component in the jurisprudence. This has resulted in increased uncertainty and decreased predictability in the law, with many past cases that upheld intrusion upon habitation charges under the prior interpretive framework remaining in question. The full impact of this profound change is still unfolding, and only future rulings by the Supreme Court will bring clarity to these issues. Therefore, it will be crucial to closely monitor the Court’s decisions on intrusion upon habitation to gain a better understanding of the new interpretation’s implications.

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15) This is the position espoused by the concurring opinion of Justice Jae-hyung Kim and Justice Chul-sang Ahn held in *Daebeobwon* [S. Ct.], Mar. 24, 2022, 2017Do18272 (S. Kor.).

16) This is the approach advocated by each concurring opinions by Justice Jae-hyung Kim and Justice Chul-sang Ahn in *Daebeobwon* [S. Ct.], Sep. 9, 2021, 2020Do12630 (S. Kor.).

## II. Whether the Assignor of a Claim can be Charged with Embezzlement for Recovering and Spending the Claim before Notifying the Debtor of the Transfer (Supreme Court *en banc* Decision 2017Do3829 of June 23, 2022)

### A. Facts and Procedural History

The defendant, who operated a restaurant in a rented building, assigned the rental deposit return claim to the victim. However, without notifying the lessor of the assignment, the defendant received the rental deposit from the lessor and spent away the money. The defendant was charged with embezzlement for spending the money arbitrarily while acting as the custodian of the money. Both the trial court<sup>17)</sup> and the appellate court<sup>18)</sup> found the defendant guilty.

The prosecution's initial case, as well as the rulings of the court of first instance and the appellate court, were based on established Supreme Court jurisprudence that had been in place since an *en banc* decision in 1999.<sup>19)</sup> According to this jurisprudence, because an assignor of a claim is contractually obliged to notify the debtor of the assignment of the claim or obtain the debtor's consent and failure to do so would render the assignee unable to pursue the debtor, the assignor is considered to be a person responsible for securing the assigned claim on behalf of the assignee. Furthermore, if the assignor recovers the claim from the debtor before giving notice of the assignment, ownership of the claimed money belongs to the assignee. Consequently, the assignor is considered the custodian of the assignee's property, and arbitrary expenditure of the recovered money constitutes embezzlement. This standing jurisprudence leaves no doubt that the present case constitutes embezzlement. The defendant and his counsel probably thought the same, as they did not challenge the legal theory behind the charge but rather debated over factual matters, such as whether the rental deposit return claim had been actually assigned or not.

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17) Incheon Jibangbeobwon [Incheon Dist. Ct.], Oct. 16, 2015, 2015Gojeong1482 (S. Kor.).

18) Incheon Jibangbeobwon [Incheon Dist. Ct.], Feb 10, 2017, 2015No4040 (S. Kor.).

19) *See* Daebeobwon [S. Ct.], Apr. 15, 1999, 97Do666 (S. Kor.).

The validity of the jurisprudence was not in question by either the trial court or the appellate court.

### *B. Supreme Court Decision*

In a majority opinion of 8 to 5, the Supreme Court overturned its precedent and held that the recovery of a claim by an assignor before giving notice of assignment to the debtor and the arbitrary expenditure of the money does not constitute the crime of embezzlement.<sup>20)</sup> The reasoning of the majority opinion is as follows.

First, for embezzlement to be established, the property subject to the offense must be owned by another person. However, the mere existence of an assignment of claim does not automatically grant ownership of the money to the assignee. Furthermore, since there was no consignment relationship or act of entrusting receipt regarding the recovered money between the assignor and the assignee of the claim, ownership of the money recovered should belong to the assignor, not the assignee. Additionally, in instances where money is transferred in the form of debt repayment, ownership of the money is typically transferred to the receiving party. Consequently, in cases where an assignor recovers a claim from the debtor before providing notice of assignment, ownership of the recovered money should belong to the assignor, not the assignee.

Second, for the offense of embezzlement to be established, the person has to have custody of the other person's property based on a consignment relationship of trust. However, while the assignor has a contractual obligation to notify or obtain consent from the debtor regarding the assignment of the claim, this duty of performance arises from the rights transfer contract and does not create a relationship of trust in which the assignor is administering a financial business on behalf of the assignee. The

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20) Four justices(Justice Jae-youn Cho, Justice You-sook Min, Justice Dong-won Lee and Justice Tae-ak Rho) issued a dissenting opinion arguing that the precedent should be maintained. A concurring opinion by Justice Seon-soo Kim took the view that while the precedent that expenditure of recovered money by the assignor does constitute embezzlement should stand, exceptions to this rule should be recognized when the assignor had justifiable reason to recover and spend the money, such as when the assignor had not been paid in full by the assignee for the assignment (which was the case for the defendant in the case at hand).

assignor and the assignee are merely in a conflict-of-interest relationship stemming from a contractual relationship. Therefore, the assignor of the claim is not considered a person having custody of the assignee's property on behalf of the assignee.

### *C. Comments*

The Korean Criminal Code Article 355, paragraph 1 punishes "a person who, having the custody of another's property, embezzles or refuses to return it" as embezzlement, and Article 355, paragraph 2 punishes "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" as breach of trust. For a crime of embezzlement to be established, it is required that the property obtained by the person be "another's property", i.e., property owned by another person, and also that there is a relationship of trust between the person and the owner of the property with respect to the property's custody. Breach of trust differs from embezzlement in that the object of the crime is not property but financial gain. However, it shares a commonality with embezzlement in that it requires a relationship of trust between the person and the other party ("a person who is administering another's business").

An assignment of a claim takes effect through the mutual agreement of the assignor and the assignee, and the claim is transferred to the assignee while its identity kept intact. However, for the assignee to assert rights as a creditor against the debtor or a third party, the assignor must provide notice to or obtain consent from the debtor regarding the assignment of the claim (Korean Civil Code Article 450, paragraph 1). Until the assignor has fulfilled this requirement, the debtor is not obliged to respond to the assignee's claim and any payment made by the debtor to the assignor is valid, extinguishing the claim. If the assignor recovers the claim by exploiting the fact that the assignee has not yet met the prerequisite for being able to assert claims against the debtor, the assignee incurs a financial loss of losing the assigned claim. On the other hand, the assignor has the obligation to fulfill the requisite for the assignee, such as by giving notice of the assignment to the debtor, so that the assignee can fully exercise its

claim. If the assignor violates this obligation and recovers the claim by acting as if it still possesses the claim and spends the recovered money, one could argue that such action amounts to a betrayal of the assignee's trust. This was the position taken by the Supreme Court in the 1999 *en banc* decision, which remained unchanged for more than 23 years. The majority of eight Justices in that decision had ruled that if the assignor recovers the claim before giving notice of assignment, the money is deemed to belong to the assignee, and the assignor's unauthorized use of the money constitutes embezzlement that undermines the relationship of trust between the assignor and the assignee.

However, this view had been criticized on two aspects: ① the ownership of the money recovered, and ② the relationship of trust between the assignor and the assignee. On the first aspect, it was argued that the money received from the debtor after the assignor demanded performance of the claim cannot be deemed "another person's property" for the crime of embezzlement, as the ownership of the money lies with the assignor. On the second aspect, the assignor and the assignee, being parties to a contract of claim assignment, bear only contractual responsibilities and do not have custody of the other party's property or administer their business. In the 1999 *en banc* decision, five Justices had dissented on these grounds. And after 23 years, the majority and the dissents essentially swapped places.

The determination of property ownership should be made by civil law, which is designed to regulate such matters. The purpose of criminal law lies in protecting the property rights as they are assigned by civil law, not in creating its own independent rules of assigning property rights. Under established doctrines of civil law, if a debtor transfers money to an assignor in compliance with a demand for performance after the assignment of a claim, but before the assignee has fulfilled the necessary requirements to establish the assignment against the debtor, the debtor is fulfilling its obligations by recognizing the assignor as the rightful creditor and transferring ownership of the money to the assignor. Therefore, under civil law, it is the assignor who gains ownership of the recovered money, and criminal law should not deviate from this determination.

The issue of whether a relationship of trust exists between the assignor and the assignee is more central to the case than the issue of ownership of recovered money. Although a determination that the recovered money

belongs to the assignor and thus is not “another’s property” will exonerate the assignor from embezzlement charges, it is not enough to completely eliminate potential criminal liability for the assignor. If the court finds that a relationship of trust regarding the preservation of the assigned claim exists between the assignor and assignee, the assignor may still face charges for the crime of breach of trust. The Supreme Court’s *en banc* decision 2017Do3829, which is the subject of analysis here, is significant because it definitively clarified that there is no such relationship of trust between the assignor and the assignee in these situations, and thus neither the crime of embezzlement nor breach of trust can be established. This decision is in line with the recent tendency of the Supreme Court to narrowly interpret the element of “a person who [is] administering another’s business” and overturn precedents where it upheld breach of trust charges.<sup>21)</sup> As the majority opinion of the 2017Do3829 decision notes, the Supreme Court had recently rejected to recognize breach of trust in cases where the assignor, after already assigning the claim to an assignee but not fulfilling the prerequisites for the assignee to be able to assert the claim against the debtor, assigned the claim to another assignee and fulfilled the prerequisites for the second assignee and thereby rendered the first assignee unable to exercise the claim as a creditor.<sup>22)</sup> The Supreme Court’s reasoning in that case was that the assignor could not be determined to be in a position of administering the business of the first assignee just for the mere fact that the assignor assigned the claim. The contradictory conclusion that an assignor who has assigned the claim but has not fulfilled the prerequisites for the assignee is not responsible for breach of trust when he assigns the claim to a second assignee, but is responsible for either embezzlement or breach of trust when he recovers the claim himself and spends the money, would have been difficult for the Supreme Court to accept.

A contract of assignment of a claim is generally a contract to transfer

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21) Daebeobwon [S. Ct.], Feb. 20, 2020, 2019Do9756 (S. Kor.); Daebeobwon [S. Ct.], June 18, 2020, 2019Do14340 (S. Kor.); Daebeobwon [S. Ct.], Aug. 27, 2020, 2019Do14770 (S. Kor.); Daebeobwon [S. Ct.], Oct. 22, 2020, 2020Do6258 (S. Kor.) and other decisions.

22) Daebeobwon [S. Ct.], June 4, 2020, 2015Do6057 (S. Kor.); Daebeobwon [S. Ct.], July 8, 2021, 2014Do12104 (S. Kor.); Daebeobwon [S. Ct.], Feb 25, 2021, 2020Do12927 (S. Kor.); Daebeobwon [S. Ct.], July 15, 2021, 2015Do5184 (S. Kor.).

goods between two parties of equal footing and not a contract where one party administers the business on behalf of the other party. In exceptional circumstances, such as when the assignee mandates the assignor the recovery of the claim, a relationship of trust could be recognized. The same cannot hold true absent such circumstances. The assignee can protect himself from the risk of breach of contract by the assignor by declining payment until the assignor fulfills the requisites for the assignee to be set up against the debtor. Even when payment for the assignment has already been made, the assignee can fulfill the requisites himself by notifying the debtor of the assignment and obtaining their consent,<sup>23)</sup> or by obtaining authorization from the assignor to notify the debtor on his behalf. In a typical relationship of trust, one party's pecuniary interests are almost entirely at the mercy of the other, which justifies protecting the vulnerable party by imposing criminal sanctions when the entrusted party exploits its position of trust for economic gain. However, the balance of power, the degree vulnerability, and the risk of potential abuse of power are all clearly different in a relationship between assignors and assignees of a claim. Since the assignee's ability to fully obtain their right does not depend solely on the assignor's actions, there is little need to elevate the relationship between them to a relationship of trust protected by criminal sanctions.

In conclusion, the Supreme Court's ruling in the 2017Do3829 decision regarding the ownership of recovered money and the relationship of trust between the assignor and assignee is commendable, and the reversal of its 1999 decision marks a positive change of direction. This decision, along with other recent cases, reflects a trend towards more restrictive interpretations of breach of trust and embezzlement laws. This is an area of criminal jurisprudence where significant changes are occurring, similar to the developments in the crime of intrusion upon habitation. More important decisions regarding the law of embezzlement and breach of trust can be expected in the near future.

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23) Although only the assignor has the right to notify the assignment of the claim, the consent of the debtor can be given either to the assignor or the assignee. *See* Daebeobwon [S. Ct.], June 30, 2011, 2011Da8614 (S. Kor.).