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Review of the Theory of Natural Obligations

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Abstract In general, at the relationship between claim and obligation if debtor does not fulfill its obligations arbitrarily the creditor can claim to debtor such as lawsuit. It means, despite the debtor ordered payment through the judgment, if debtor disobey that judgment, compulsory execution can be performed by the force of the country. In the end, fulfillment of obligation is enforced by national authorities in principle. However, exceptionally, even it established as a valid debt, if debtors fulfill themselves, they may not be protected from the national authorities. That is the natural obligation. The natural obligation originated from the Roman law which enforces strict type legal system and it is exceptional phenomenon in modern civil law which is made up as that all the bonds are likely to recourse. Therefore, in Korean theory acknowledge that debt is natural obligation and there is no exception. However, there are still controversy about the presence and occurrence of natural obligation. So, in this paper, want to review about its extent and effect including the concept of natural obligation.

Key Words : Natural Obligations, Debt, Unfair Profits, Reimbursement without Obligation, Performance for Illegal Cause

요 약 일반적으로 채권채무관계에 있어서 채무자가 그 채무를 임의로 이행하지 않는 경우에는 채권자로 하여금 소송의 방법으로 채무자에게 재판상 청구를 할 수 있다. 즉 판결을 통하여 급부를 할 것을 명하였음에도 불구하고 채무자가 그 판결에 불응할 경우 국가의 힘에 의해 강제집행을 할 수 있다. 결국 채무의 이행은 원칙적으로 국가기관에 의해 강제되는 것이다. 그러나 예외적으로 채권으로서 유효하게 성립하였지만, 채무자가 스스로 이행을 하지 않는 경우 국가기관으로부터 보호를 받을 수 없는 경우가 있다. 자연채무가 그렇다. 이 자연채무는 로마법의 엄격한 형식주의적 소구법체계에서 유래하는 것으로서, 모든 채권이 원칙적으로 소구가능성이 있는 것으로 구성되는 근대민법에서의 예외적인 현상이다. 이에 우리나라의 학설은 예외 없이 자연채무라는 개념을 인정하고 있지만, 아직도 자연채무가 어떤 것이고, 어떻게 발생하느냐에 관하여 학자들의 다툼이 있어 본 논문에서 자연채무 개념을 비롯한 효력과 범위에 관하여 재검토를 하고자 한다.

주제어 : 자연채무, 채무, 부당이득, 비채변제, 불법원인급여

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1. Introduction

In general the natural obligation is being understood as even if the debtor does not payment arbitrarily, the creditor cannot claim its implementation by lawsuit. And there is no objection in this. Thus, the natural obligation is incomplete debt which has no claims through lawsuit but when a debtor reimburse himself its implementation is effective. Then, it returned as unfair profits so it cannot claim to creditor. However, acknowledge the natural obligation is problem. In other words, premise the bond as obligations and responsibilities. The nature of the bond is responsibilities, debt is just dependent on the responsibility. So, the debt which has no responsibility can be recognized as legal obligations, Korean scholars claimed that the obligations and responsibilities must be separated and the obligations mean legal action. But the responsibilities are the forced realization of legal action. And they have positive reviews about characteristics of debt of natural obligation generally.

However, in Korean theory, it encountered in a number of chaoses about the discussions of the range and acceptance of recognition due to the ambiguity of debt which so-called natural obligation. It means, it recognized under the roman legal system, but in the modern legal system the substantive law and procedure law are separated. So, there are no identifications and process for applying that properly. And it is the result of that. Thus, the natural obligation is incomplete debt which has no claims through lawsuit but when a debtor reimburse himself its implementation is effective. Then, it returned as unfair profits so it cannot claim to creditor. In these reality, this paper focused that, how to interpret the nature, type and range of recognition of nature obligation. So, ultimately, to identify the nature of the nature obligation, this paper considerate the legislation case to confirm the origin of nature obligation, and then, find the relation with nature obligation of modern law and looking its scope and effects in detail. And at the same time, review the nature obligation within a reasonable range of Korean civil law.

2. The Legislation Case about Nature Obligation

Originally, the natural obligation is derived from Roman law[1]. Among the modern legislation case, the French civil code which was handed from Roman law and the Italian, Portuguese civil code from French regulate about the natural obligation, and other German civil code it is regulated in Article 814. In Anglo-American law regulated by the case law. In Japanese civil code, there is no substantive enactment, but its existence is recognized through the many theory and case.

2.1 The Roman Law

The Roman law choose only the law of lawsuit right which the agreement that only passed certain way protected by the lawsuit right. So, there is a case that the debt which has no lawsuit right is occurred. But in this case, if the debtor fulfills himself, it is counted as effective repayment. So, it is recognized as the natural obligation which is not accepted the claim of debtors' returning[2]. The case which recognized as the natural obligation in Roman law is these. First, the debt is slave(for example, if the slave get liberation, the debt of slave is bore to its owner. But freed slaves cannot claim by legal). Second, the debt between parents and children or the children each other. Third, the debt of a ward without support of legal guardian. Fourth, the interest debt in loans of consumption caused by formless agreement, etc.

2.2 French Civil Code

The French Civil Code Article 1235 Paragraph 2 "to

arbitrarily fulfill natural obligation, the returns are not accepted" and it regulate the existence of natural obligation by law[3]. Meanwhile, this regulation is just enough to not allow the claim of return about arbitrary reimbursed the natural obligation[4], and there is nothing any mention about the concept of natural obligation. In addition, the effect is regulated just simply about exclusion of demand for return. So, it can show there are many problems on interpretation to decide the range of effect and essence of natural obligation.

On the French civil code, the natural obligation is backed by law and moral law. But due to these mixed substances of natural obligation, it shows many problems to incorporate the natural obligation as the law and order. Meanwhile, understanding in terms of essential is philosophical rather than technical. The reason is that the method needs to be investigated in the light of the general theory.

2.3 German Civil Code

In German Civil code, there is no regulation about the natural obligation. In principle, at the relationship of debt, it should be able to suit. And it means only debt which has the legal force, and it made clearly whether the natural obligation can be subject to offset against. So, it does not recognize the natural obligation[5]. But, there is some mention about the incomplete duty or natural obligation. Most of the scholars also argued that the natural obligation must be recognized by German civil code. Especially, unlike the French civil code, German civil code does not regulate in express terms about the notion of natural obligation but about repayment which is not the debt, "the repayment which for the purpose of fulfillment, when the debtor fulfill without duty and who already knew about that, or the payment is appropriate ethical duty or made by formal considerations then its returns are denied". They regulating like this and they recognize the effects of the natural obligation[6]. And in German civil code, in order to describe many theories about the natural obligation, generally, the theories acknowledged the notion of the natural obligation[7].

2.4 Japanese Civil Code

A current Japanese drafter of civil code thought that the natural obligation does not need to be specified in Civil Code. So, he has delete all about natural obligation. Thus, the Japanese civil code same as German, it does not regulate as substantive enactment about natural obligation and the creditor cannot claim by suit, but when carry out arbitrarily then it can incur the valid effect of repayment as the meaning of the debt. So commonly, it shows the terms of natural obligation is using. By the one theory which claiming that does not use the concept of the natural obligation[8], this effect acknowledge that there is an incomplete debt. There was twice transition process at the legislative process of Japanese civil code about natural debt. The previous civil law of Japan mimics the French civil law and made the wide range of detailed provisions about natural obligation. But in Meiji 26th, at the 4th civil law association(June 2, 1893), it was switched to German civil code in 1887 which admit the natural obligation by only individual provision. In the end, Japanese civil code had deleted the provision about natural obligation.

2.5 Anglo-American Law

In the Anglo-American Law, as a basis for granting a binding force to the promise which configure the contract and through the theory for the weak[9] which formed by the court of Common Law, the natural obligation is being evaluated as legal debt it is very distinctive when compared with the Continental law.

On the Anglo-American Law, the expression of natural obligation is just nothing more than a convenience formation which designed to attract the moral weak to the legal system. Meanwhile, the debt

which is called a natural, it is evaluated as a moral obligation which is recognized that can cause the certain legal effect. On the Anglo-American Law, the general and own legal principles about the concept of the natural obligations are not formed and it has a legal system which gives the legal effect from moral obligation just by the theory of weak which is formed to give the binding force to contract. On the Anglo-American Law, the natural obligation is nothing more than just obligations under the definition of conscience and natural.

3. The Natural Obligation on Korean Civil Code

Likewise the German civil code, there are any regulation about natural obligation in Korean civil code. Commonly, even if the debtor does not fulfill its obligation arbitrarily, the natural obligation is defined as a debt which cannot require. In this part, this paper will describe in detail about the natural obligation, due to many theories are opposing. For example, by Korean theory, whether the acknowledgment of natural obligation is really need or if admit the natural obligation then whether limit the obligation, or other things such as moral debt, violation of social order is need.

3.1 Affirmative Theory of Natural Obligation

3.1.1 Moral Obligation Theory

The moral obligation theory set the natural obligation without limitation, and when the creditor deny the debt which fulfilled arbitrarily by under the moral duty then understand that as the natural debt[10]. Thus, the debt caused by illegal, it does not satisfied by legal also moral. So, it cannot be the natural obligation.

3.1.2 Obligation Theory by Legal

The obligation theory by legal is a majority opinion. So, it must be the meaningful obligation to acknowledge the concept of natural obligation[11]. This theory says, by the legal essential theory, originally the moral duty is not related with law. So, at the natural obligation which can be the object of discussion, limit the debt by legal is reasonable. In addition, the reason that why exclude the demand for return about fulfillment of moral obligation is politic consideration that debtor does not need to be protected not the relation with the debt. And When fulfill the debt of the violation of social order then the reason that why exclude the demand for return is the consideration of legal policy that does who want to return the result of act which has no social validity refuse the cooperation[12].

3.1.3 Return Prohibition Benefit Theory

The return prohibition benefit theory is including to the category of natural obligation from moral duty to any case which was excluded return claim[13]. This theory denies the obligation theory by legal and does not allow the legal force by the way that above the suit. Furthermore it entrust to the moral and social standard not the regulations. So when see the feature of continental law, en bloc explaining these as the concept of natural obligation looks really meaningful work.

Also, same as the moral obligation theory, this theory said when the debt corresponding to suitable not payable-repayment by moral sense of Civil code Article 744, and then basis of demand for return is natural obligation. Especially, if every return claims were excluded, then these every cases are called the natural obligation. So, acknowledging the natural obligation to the case of the performance for illegal cause that exclude the return claim and to the antisocial legal behavior debt which was denied by civil code are unusual.

3.2 Negative Theory of Natural Obligation

At the negative theory of natural obligation, whether or not the natural obligation can be the problems and these problems have the unique character that may be explained by each different point of view. So, if call the every debt as natural obligation, it is just external gathering that disparate each other and it cannot be found equally applicable rule of law to most of them. So, at this opinion, the concept of natural obligation is meaningless by law technically also it brings just confusing of think. Because of this, Take positions like it does not need to use the concept of law which called natural obligation that is not used in Korean civil code[14], or disallowing return the not payable debt which has no obligation and it was already fulfilled rather than acknowledging the natural obligation which has no suit claim force and exceptional debt to disallow a return claim it is more desirable by legal principles that[15].

4. The Effect and Occurrence Type of Natural Obligation

In this paper will prove the effect and the type of the natural obligation in detail about at the type of natural obligation, there is no problem to recognize as natural obligation or there is a problem that can apply to natural obligation.

4.1 Occurrence Type

4.1.1 The Natural Obligation which Occurred by Contract

The common theory said that someone who can make the contract which makes unsuitable debt can be recognized by freedom of contract principle, in this case occurred debt can be determined as "the natural obligation which occurred by contract". But the special agreement which is said by the common theory is the special agreement from the unclaim, these special agreement can make at the time of the contract, but it can make after that time, and the debt of latter means that the common debt change as the natural obligation. So, there are argues that recognizing as the natural obligation is unjust and which is called as "the debt with unclaimed settlement" is right[16].

4.1.2 The Case of Decision of Lose a Suit

In the lawsuit, even if the bonds are present, lose a suit can be determined. At this time, until the petition for a retrial the possibility of succor by suit is destroyed due to the effect of excluding further litigation of final ruling. Therefore, in this case, it can be the problem whether the debt is natural obligation of not. In this case, when the defendant who won the suit fulfills the obligation by himself, then the debtor cannot claim about its return. And it is consistent theory. But the problem is the reason that denied return claim. When see the debt disappears by the effect of ruling, it is generally interpreted that despite the judgment the dept persist as a condition of natural obligation rather than applying the Article 724 about repayment of no debt.

4.1.3 The Exempted Obligation from the Process of Individual Rehabilitation, etc.

If there is a decision of immunity at the process of individual rehabilitation, the debtor who received the immunity is exempted from all liability about all obligations, and in case of who received the immunity from the process of bankruptcy and revitalization are same. About this, except some scholars in Korea, almost scholars recognize the natural obligation. However, there has no effect on the guarantor who was set on the obligation that was became exemption and the debt and responsibility of surety. So, there is an opinion that is not natural obligation but it is a debt which has no responsibility[17].

4.1.4 The Obligation which Finished Negative Prescription

About the effect of finished negative prescription, absolute extinction and relative extinction are opposed to each other. Even select any theories it does not be the natural obligation. In other words, according to the former the debt is extinguished. According to the latter until the claim, it is complete debt and after claim the debt is destroyed. Article 495 of the Civil Code states that "if the extinctive prescription was completed bond could setoff, then its creditor can setoff", it means not acknowledge the natural obligation, but consider the payment was completed between bond and debt[18].

4.1.5 The Obligation of the Performance for Illegal Cause

When pay or offer the service by illegal reason then its benefit cannot be returned. Originally, the performance for illegal cause is void. So, the beneficiaries received the debt of the restitution of unjust enrichment. But if acknowledge this, finally, it means that same like protection of illegal payment person. So, the civil code is denying the demand for return as a passive realization of justice. Thus, finally, the beneficiary has no obligatory right with the right that holds the benefit. Thus, to beneficiaries the natural obligation about the return of unjust enrichment cannot be established.

4.1.6 The Interest Obligation of Exceed Limit

Under the prior Interest Limitation Act, there was an argument that whether the interest obligation of exceed limit is natural obligation or not. However, the new "Interest Limitation Act" and “Act on Registration of Credit Business and Protection of Finance Users” defining that if the debtor pays the interest that over limit arbitrary cannot demand for return. Therefore, there was no controversy about natural obligation.

4.2 The Effects of Natural Obligation

The common effects of natural obligation that cannot appeals but arbitrary payment is available. So, recipients can hold that also it is not be the unfair profits, its return not be claimed. These are minimal common effects. And to other effects about natural obligation must be determined individually.

4.2.1 The Validity of Arbitrarily Fulfillment

In general, when the debtor does self-fulfillment to creditor, the act of debtor is the valid reimbursement. And it is implemented by legal reason. Thus, it does not receive a demand for return as unfair profits. In other words, the possession force of payment to creditor through the self-fulfillment is minimal effect that generally accepted with elimination of appeals without any theory.

4.2.2 Possibility of set up the Security

The potential of creation about human and material security which has a secured claim about natural obligation, most opinions are positive[19]. Thus, there are some points of view that the human security which is set in natural obligation also be regulated as natural obligation. However by material security theory, it can be recognized but cannot run, so, there is no practical benefit[20]. Also, when the material security, such as mortgage, etc. were set, if secured debtor is natural obligation then cannot claim and compulsory execution. Just can hold the possibility of satisfaction by imputed calculate or arbitrarily. Thus, there is an opinion that the satisfaction by these security, the natural obligation can get the virtually enforceability[21].

4.2.3 Transfer for Security and Takeover of Obligation

Generally, same as other debt, the natural obligation is recognized the transferability, even though it transferred to a third party in good faith, it does not

lose the character of natural obligation[22]. However, exceptionally there is an opinion that in case of that the debtor allow to an assignee in good faith without any notice about objection, then someone cannot against the assignee with the character of natural obligation[23].

4.2.4 The Target of Countervailing

Most scholars admit that the natural obligation can be the target of countervailing. Looking at the contents detailing, at the position that limiting the range of recognition of natural obligation as the legal meaningful debt, when the creditor lose the suit even he had a bond then cannot countervailing[24]. Also, at the point of view that contain the range of natural obligation the all cases which the demand for return be excluded, if the creditor lose the suit with bond and performance for illegal cause and duty of the payment of reward by the management of administrative affairs then he cannot countervailing.

5. Review and Conclusions the Natural Obligation

Same like German civil code, the Korean civil code has no provision about natural obligation. In this situation, the common view recognizes the concept of natural obligation. Recently, however, the opposite opinion is getting brought up. The reason is that they do not have to admit the abstract concept of natural obligation. On the other hand, even admitting the concept of nature obligation, same effects are not recognized to each debt which recognized as the nature obligation. Consequently, the meaning of the concept of natural obligation is seems not huge.

5.1 Review of the Concept

The natural obligation has no appeal-force. So, it also has no legal force. And the concept of natural obligation which has no possibility of appeals like general debt can be seen that help the understanding the nature and uncover the each characteristics. Anyway, it might be good to acknowledge that concept. However, to the term itself, there are many critical opinions. And the meaning that currently being used was cleaved to Roman law which states "where have the suit right, there is the right". Because of that, in real life, there was the right which has no suit right frequently. To illustrate this, the terms that natural obligation was appeared. However, the term was unfamiliar also it was not matched with the emotion of Korean language. So, defining as "the debt which has no possibility of appeal" will be more preferable.

5.2 Review the Scope of Accreditation

Until now, Korean theory defined the debt which has no appeal-force as the natural obligation and to its scope of accreditation, determining only "legally meaningful" debt was the prevailing view. Therefore, the content that "it has the means by legal" make many questions, if it can be the basis of the renewal of the contract or the quasi-loan for consumption and it has the legal means then, the effects of a range about natural obligation was already set.

And see the various provisions of the Korean civil code which was established foreign legislation case, even without counting the concept as the natural obligation, the effect that the exclusion of return claims to already fulfillment can leads equally.

5.3 Review the Nature

In other words, it is the problem that approves the natural obligation as the legal debt or leave to the not legal effect. Until now, stance of Korean scholars approve as legal debt. However there almost no such like detailed description. Thus, when viewing historical basic about the concept of natural obligation and background of admit, in order to accept the natural

obligation as the legal debt, the debt which at the true right-relation must be pre-existing. And the appeal-force, in other words, the requirement that the possibility which can make the goal of bond have been deprived must be met through the law suit.

5.4 Review the Effects

By recognizing the natural obligation as legal debt which shows the presence of debt and shortage of appeals in the claim-obligation relationship and when see the functional sight and assuming that it can expand the principle of freedom of contract, And it seems as it must admit the most effect of complete debt to natural obligation. Meanwhile, admit the self-fulfillment effectively, the fulfilled claims for the return are excluded and it can be the basis of quasi-loan for consumption, etc. Therefore, the reason why the set of security is possible for the fulfillment of natural obligation and it seems to that may be deemed to be recognized generally. However, in order to generally recognize the effect that not meet the characteristics that the absence of force of compulsory execution which is elimination of appeal-force and its conclusion, it may need the review by depending on the each case.

5.5 Conclusion

As mentioned above, this paper tried to review about the natural obligation. The natural obligation which is not regulated in Korean civil code by terms is corresponds to duty of conscience and moral. Even though it is not protected by any legislation, steady legal effect is given. Because of this reason, its legal status can be a problem. In fact, identifying the legal relationship with morality is really difficult problem.

But at least the standard of law has to assist to the establishment and annulment by the principle of freedom of contract and each opinion of parties.

Until now, most opinions of major theories and precedent in Korea admit the concept of natural obligation and identify as one legal duty. And above the exclusion of demand for return, extend its range of effect which can be granted within the range that not conflict with it natural can be a solution which can solve the confusion in the distinction between moral and legislation.

And at the concept of natural obligation in Korean civil code, there were many opinions about its effect, selection and range of acknowledgment. Most claims of scholars are acknowledging its concept, and about its range of acknowledgment and effect is common opinion. And these were acknowledged the common effect that the debtor who already fulfilled cannot claim the return of fulfillment to creditor.

Thus, see the main problem about natural obligation as a practical point of view, the effectiveness which has the essentially and philosophical meaning about debt must be considered.

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