



Introduction to Membership Rights

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Abstract

Ever since Mr. XIE Huaishi proposed that membership rights should be recognized as an independent kind of rights in 1990s, the research of membership rights has remained at the initial stage which only focuses on its definition and concept. This paper tries to give preliminary answers to membership rights' nature, powers and functions, and realization, etc. so that to inspire scholars and researchers in investigating new kind of rights.

Key words: Membership rights; Commune members' rights; Powers and functions

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1. DEFINITION

Chinese scholars started to use the definition of membership rights in 1990s and quite a lot of them call the membership rights as "commune members' rights". This paper uses "members" and "membership rights" to refer to "commune members" and "commune members' rights" respectively. The reasons are: First, the word "commune members" were widely used in Chinese rural areas between 1950s and 1970s. It is recognized as a fixed appellation that has special meaning for members of people's commune in China. The usage of the word "commune members' rights" in private laws may bring unnecessary misunderstandings and obstructions. The newly issued "Law of Farmers' Specialized Cooperatives

of the People's Republic of China" adopts the concept of "members" and "membership rights". Accordingly, most scholars in Chinese mainland use "members" and "membership rights" nowadays; Second, in traditional civil law countries' or regions' civil law theories, commune member is used for calling people of a corporation, while "corporation" is usually recognized as the short form for corporation aggregate. Chinese civil law has divided legal persons into corporate entities, official organs, institutions, and public organizations. Although this classification method has been criticized by various scholars, different from other civil law countries' or regions' meanings, corporation aggregate in Chinese civil law has its unique implication. In this way, directly introducing the concepts of civil law countries' "commune member" and "commune members' rights" may strike Chinese current civil law system. Obviously, the concepts of "member" and "membership rights" are more suitable for China.

There are different voices in how to define the concept of membership rights among scholars. Some of them define it as "general term of community members' rights and obligations to the community"; some think that membership rights are merely "all rights of community members"; and some insist that membership rights are just a kind of qualification but not real rights. Normally, most researchers agree on the following aspects:

1) Membership rights are obtained when set up an organization or after joining in a community. They can be gained by members' positions or a series of legal nexuses generated between membership and the community. Therefore, membership rights exist with membership qualification;

2) Membership rights are set up by treating the community or organization as the opposite party. There are a lot of differences between membership rights and organization's or community's rights.

3) Membership rights follow the organizations or

community's regulations or laws when there are no regulations. Private laws can regulate membership rights when do not limit members' freedom of association.

In this connection, this paper defines membership rights as: based on the membership qualification or position members have after joining in the community or organization (no matter in the establishment stage or the operating stage), a general kind of rights that members have according to the regulations of the organization or community or laws.

2. NATURE OF MEMBERSHIP RIGHTS

People have always thought that "the concept of right is one of the basic concepts of private laws; there will be many troubles without this concept." The categorization and systematization studied by scholars on this private law concept can also be traced for a long time. The real benefit of systematizing civil rights is to place complicated rights to where they belong to and make them show their characteristics so that to help civil law beginners get a clear understanding on the panorama of civil law. In order to arrange various civil rights into a system, first of all, classification issue is inevitable. According to different standards, civil rights can be divided into different classification. For instance, in accordance with the contents of rights, civil rights can be divided into property rights and non-property rights; or in according to civil rights' functions, they can be divided into the right of domination, right of claim, right of defense, and right of formation; we can also divide civil rights into absolute right and relative right on the ground of civil rights' scopes and so on (XIE, 2007, p. 54).

Thereinto, the classification made according to the content of rights is generally regarded as the basic classification (WEI, 2007, p. 40). The normally talked civil rights system is set up in accordance with this classification. The classification of dividing civil rights system as property rights and non-property rights has been recognized by scholars until recently. Property rights are divided into right in rem and right in personam, etc. while non-property rights are sorted as right of personality and rights of status, etc.. Since rights like intellectual property right and right of succession can be sorted in neither property right category nor non-property right category, scholars have called them the "hybrid rights" and also suggested establish separate chapter for them in civil code or set up independent codes or regulations outside the civil code (LIANG, 2001).

Scholars have controversies upon the nature of membership rights. Some think membership right is a status right of personal rights. According to Hu Changqing, "it is very difficult to agree with the opinion that the nature of membership right is right in personam since members do not have the right to ask for distribution

of earnings; it is still also unacceptable that membership right is the right in rem for the property of the organization or community belongs to itself but not its members. Therefore, membership right is a status right (HU, 2003, p. 132)." Another point of view recognizes membership right as a hybrid right and some others think membership right should be treated as independent right outside of property rights and personal rights (XIE, 2007, p. 68).

This paper agrees that membership rights is a type of rights but not a hybrid type because the concept of hybrid rights does not have its clear content and scope. Every right which does not belong to property rights or personal rights are generally called the hybrid right. However, the real benefit of the classification of rights is to conclude characteristics of same type rights and construct an applicable and unified standard so that to help legal researchers understand the logical relationship between regulations. However, the so called hybrid rights obviously have differences. For example, right in succession and intellectual property right are typical hybrid rights. Apart from not belonging to either property rights or personal rights, they are totally different in other aspects.

Of course, the characteristics of membership law has determined that it cannot be completed contained by the current property rights or personal rights. First, membership is the foundation of membership rights which exist and lose along with the membership. Civil subjects that enjoy civil rights ability of civil subject must obtain membership to enjoy membership right which is likely with personal right. However, membership right only has connection with membership but not members' personal status. Besides, right of status and right of relative has the same meaning in civil law. There is no conclusion on whether membership right is status right of family law or not (XIE, 1996; LI, 2004, p. 110). Second, the unique content of membership right law does not blend into current property right system. For instance, as the core right of membership rights, right of management and participation does not belong to property right and its structure is inconsistent with the right in personam. It looks more like a right or a power derived from the right of formation and the difference between them is that the right of management and participation is not a pure self-interested right but belongs to a kind of "organizational rights". It does not solely generate certain legal relationship by the subject of the right but make the common willingness possible by mutual influence of the subjects of right (Larenz, 2003, p. 288).

In conclusion, membership right is a special and independent civil right which cannot be contained by personal right or simply incorporated into property right. Besides, it is not a hybrid right after all. It is a unique right and must be treated as a type of independent civil right.

3. POWER OF RIGHT

Power of right is specific content derived from right; it is specific effect of right; it is behavior and method used by obliges under different situation around their anticipated profits. According to Karl Larenz, there is no need to strictly divide power of right and right because if there is no independent significance of the power of right in certain right, then it is purely power of right; if the power of right is of great importance, then it can be an independent right such as the right of formation (Larenz, 2003, p. 289). Therefore, no matter right in rem, right in personam, or membership right, in a broad sense, are all a group of rights but a single right, for instance, right in personam in a narrow sense is right of obligatory claim while in a broad sense it means all rights held by the creditor based on his or her position in debtor-creditor relationship. These rights include right of obligatory claim, right of defense, right of cancellation, right of termination, right of set-off, and right of claiming cancellation and so on.

It is important to emphasize that sometimes the expected interest of the creditor must be obtained by remedy, therefore, scholars have different opinions upon whether power of right should include all means for realizing right. The author thinks rights involved in right in rem, right in personam, and membership right are original rights which should not include relieve right. Thus, the power of membership rights must be used as behavior and means for realizing members' rights but not means or behavior for protecting and relieving rights. In detail, membership rights have the following four powers:

3.1 Participative Management Power

Members' participation is the key stage for forming group ideas; therefore, participative management power is the fundamental power of membership rights. Similar with right of formation, participative management power influences other subjects of rights by its legal conducts. Specifically speaking, participative management power can be divided as: right of attending group meetings, right of calling for group meetings, right of hosting group meetings, right to vote, decision making power, and the right to be elected. For example, the right to vote, the right to be elected, decision making right, meeting host and organization right of shareholders in "Company Law", villagers in "Organic Law on Village Committee", property owners in "Real Estate Management Regulations" are all practices of applying participative management power in membership rights.

3.2 Rights to Know

It is different from individual behavior mode, group behaviors and conducts are usually controlled by most members' thoughts. Individual's participation and management right is usually ignored by the group whether intentionally or unintentionally. In addition, based on

different preferences of each member in the group or organization, many members may "reasonably" give up their rights in participating and managing group or organizational affairs automatically. However, the results of group actions are always undertaken by all members. Whether or not use the right of participation and management, members all have the right to get the information about the group's actions clearly, completely, and accurately. No wonder the right to know has the most closely connection with the right of participation and management but also an independent in itself. It is reflected in detail in rights such as the right of looking up groups' office-copies and account book by shareholders, villagers, and proprietors and right to propose questions and suggestions and other detailed rights.

3.3 The Power to Utilize and Demand for Benefits

Whether profit or non-profit groups may have income which can be embodied in the form of money or other material or may also be embodied in non-material credit or reputation and so on. No matter in what form, group or organization members must have the power to utilize and demand for these benefits equally according to laws and regulations.

3.4 The Power to Disposal

Since the object of membership right is not material but certain conduct acted by the subject, thus, the power to disposal membership right are usually realized by members' legal behaviors. This kind of behaviors can both pointing at membership rights, for instance, members give up some rights by signing regulations, and aiming at membership of membership rights such as behavior that members transfer membership to others so that to let other people become one of the members.

4. REALIZATION OF MEMBERSHIP RIGHT

If various kinds of membership right related main subject can perfectly follow requirements of laws and regulations and insist on mutual cooperation according to altruism, the following discussion will be meaningless. Unfortunately, human desire has torn this beautiful ideality into pieces. Civil law has to stop the evil of human nature growing only by system design (Xingyeyingyi, 2000, p. 375). Apart from the above mentioned the series of rights derived from the four powers which provide basic guarantee for membership rights, the law has to offer related system for preserving and relieve membership rights and rights for promoting the realization of membership rights. These rights include:

4.1 Related Rights for Preserving Membership Rights

(1) Cancellation right. Members of a group have the right

to ask the court to cancel groups' decisions that damages members' legal interests, violates laws, regulations, or group regulations. Article 22 of the company law, Article 63 and 78 of the property law, and Article 12 of the real estate management regulation have also stipulated this right.

(2) The right of filing derivative suit. Members' interests are closely connected with the groups' interests. When the group takes no action upon damages to the group, in order to guarantee the group's interests, group member can file a derivative suit in his or her own name. Derivative suit derives from company law but its concept should be accepted by all groups as a sharp tool for protecting membership rights.

4.2 Related Rights for Remediating Membership Rights

(1) Right of self-reliance. Group members choose to make decisions on some issues instead of seeking for public protection under certain urgent situations when they cannot or are difficult to realize membership rights so that to protect the whole group's interests. For example, under emergent conditions, members detain group's files or properties.

(2) Right of action. Right of action is the last guarantee for protecting members' rights by filing a lawsuit to the

court or asking arbitration organization to give judicial remedies. Every group or organization should protect the right of action.

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