

重庆文理学院学术专著出版资助项目



On the Right of Charitable Donators

慈善捐赠人权利研究

李喜燕 著



法律出版社
LAW PRESS · CHINA

On the Right of Charitable Donators

慈善捐赠人权利研究

李喜燕 著



法律出版社
LAW PRESS · CHINA

图书在版编目(CIP)数据

慈善捐赠人权利研究 / 李喜燕著. —北京:法律出版社,2013.11
ISBN 978 - 7 - 5118 - 5673 - 9

I. ①慈… II. ①李… III. ①慈善事业—研究—中国 IV. ①D632.1

中国版本图书馆 CIP 数据核字(2013)第 277272 号



慈善捐赠人权利研究
李喜燕 著

编辑统筹 上海出版中心
责任编辑 彭雨
装帧设计 乔智炜

© 法律出版社·中国

出版 法律出版社
总发行 中国法律图书有限公司
经销 新华书店
印刷 北京京华虎彩印刷有限公司
责任印制 张建伟

开本 A5
印张 9.75
字数 231 千
版本 2013 年 12 月第 1 版
印次 2013 年 12 月第 1 次印刷

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

网址/www.lawpress.com.cn

销售热线/010-63939792/9779

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782

重庆公司/023-65382816/2908

北京分公司/010-62534456

西安分公司/029-85388843

上海公司/021-62071010/1636

深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 5673 - 9

定价:29.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

序 言

慈善事业是我国社会保障体系中不可或缺的组成部分,慈善捐赠在构建和谐社会、促进社会公平正义等方面发挥着重要作用。以往的研究主要集中在慈善本身问题及慈善资金的使用和监督等方面,慈善捐赠人的权利保障在一定程度上被忽视。由于对捐赠人权利保障不力,实施过程中又出现了各类问题,慈善事业公信力受损,严重影响我国慈善事业发展。在此背景下,慈善捐赠人权利的研究成为提高捐赠财产使用效率,推进慈善事业发展的重要课题。作者从我国当前较为引人注目且争议颇多的慈善捐赠系列事件切入,以“慈善捐赠人权利”为选题,从慈善捐赠人权利的角度探讨和分析慈善事业发展中出现的问题,为慈善领域的研究提供新的研究视角,对我国慈善事业和捐赠立法来说,无疑具有重要的理论和现实意义。

本书是我国目前研究慈善捐赠人权利最为全面系统的著作,作者在多个方面开展了有益的理论探讨,大胆地提出了一些理论观点,如作者提出慈善捐赠人权利兼具私权和社会权、财产权和人身权、实体性权利和程序性权利的性质,慈善捐赠人权利具有主体的广泛性、内容的综合性和权利的多阶段性等特征。本书对英美国家及我国慈善捐赠人权利发展不同阶段的理论和案例进行分

析,对慈善捐赠人权利进行了前瞻性思考,认为慈善捐赠人权利经历了从不受重视到逐步强化,与相关权利从相互冲突到逐步平衡的过程,为慈善捐赠人权利的后续研究提供了有益的探索。作者对各个不同的慈善捐赠进行了分类介绍,并以公益信托法律关系作为主要分析框架论证了慈善捐赠人应该享有的权利,首次提出了将慈善捐赠人权利分为与慈善目的直接相关的权利以及与慈善目的非直接相关的权利,试图全面建构慈善捐赠人权利内容体系。本书首次提出慈善捐赠人应该享有捐赠意图实现权、执行捐赠意图的诉权等观点。在慈善捐赠人权利冲突分析中,在常见的价值冲突和利益冲突理论的基础上,提出慈善捐赠人权利冲突中的双重角色,为从法律上解决慈善捐赠人权利冲突提供了新思路。在权利救济中,根据慈善捐赠本身的社会公益性,对慈善捐赠人权利救济进行了特殊化的界定,并在一般的权利救济方式之外,倡导把媒介救济作为对慈善捐赠人权利救济的重要方式。本书还对捐赠人权利保障的法律制度展开分析,提出了具有针对性的制度性建议。

本书是一部具有探索性的学术著作,尽管一些主张并不完全成熟,但整体上讲具有一定的创新性。当然本书仍然存在诸多不足,如在对不同捐赠类型中不同捐赠人的权利问题,尚需作者进一步研究。本书是在博士学位论文的基础上修改而成,对于本书的整体框架、大胆创新的思维、综合分析方法等,答辩委员会予以了充分肯定。作为作者的导师,对本书的出版感到欣慰。慈善捐赠人权利研究并不算发达和成熟,希望作者在后续研究中对尚未深入分析的问题开展更进一步的研究,为慈善事业的发展贡献更好的成果。是为序。

岳彩申

2013年9月于西南政法大学宝圣校区

内容摘要

传统的思想观念和法律制度一贯重视对于社会弱势群体的捐赠和扶助,强调社会弱势群体的生活保障权,从政府到民众都倡导对于慈善事业的一种奉献和付出,而忽略了慈善捐赠人的权利,富有爱心的各类主体总是在各种突发事故或灾难面前慷慨解囊,通过相关组织间接捐赠,然在管理周转过程中却往往被层层折扣和盘剥,公信力一落千丈,而在直接捐赠领域,如清华真维斯楼事件等情况,冠名捐赠又遭遇商业化的质疑。最近儿童慈善基金会财务数据风波又一次将慈善组织公信力问题推向风口浪尖。每每有关慈善的事件发生后,总有一石激起千层浪之势。如此下去,我国本就发展不足的慈善事业势必令人堪忧。个中缘由,究竟为何?当我们拨开谜团,找寻真因时,发现一个长期以来被忽略的事实:一味地强调慈善奉献,但是这些慈善捐赠是否真的如慈善捐赠人所愿,发挥了其应有的作用?慈善捐赠人在进行慈善捐赠以后如何确保实现捐赠意图?慈善捐赠人在慈善捐赠中应该享有哪些权益?慈善捐赠完成以后,慈善捐赠人失去对捐赠资产的控制,而慈善捐赠资产又被不适当的管理、使用,有无补救方法?慈善捐赠人能否在捐赠活动中享有与私益相关的一些权利?带着这些疑问,笔者选择了“慈善捐赠人权利研究”这个主题。全书以“慈善捐赠

人权利研究”为主题,除绪论和结语外,共7章。

第一章是对慈善捐赠人权利的一般解读。该章第一节首先从语源学角度分析了慈善捐赠的含义,然后在对学界的各种观点比较分析的基础上对慈善捐赠概念进行界定,并认为慈善捐赠不仅是私法行为,也是具有社会法性质的行为;对慈善捐赠人的概念及其外延进行分析后,对慈善捐赠人权利内涵进行分析,并提出捐赠人权利具有权利主体的广泛性、权利内容的综合性和权利的多阶段性等特征。第二节对慈善捐赠人权利的性质进行分析,认为慈善捐赠人权利兼具私权和社会权、财产权和人身权、实体性权利和程序性权利的性质。而第三节则就慈善捐赠人权利在社会伦理、社会效益和社会民主方面的价值分析,认为慈善捐赠人权利符合伦理道德规范,有利于推动社会整体效益,能够有效推进社会民主进程。

第二章是对慈善捐赠人权利的历史演进考察与前瞻。该章第一节主要对慈善捐赠事业比较发达的美英两国发展过程进行梳理,根据慈善捐赠人权利的发展过程,首次将美英等国慈善捐赠人权利发展分为四个阶段:19世纪中期以前为萌芽期;19世纪后期到20世纪中期为确立期;20世纪后期至20世纪末为其权利扩张期;20世纪末至今是其繁荣期。慈善捐赠人权利经历了从未受重视到有限肯定再到逐步扩张的过程。尽管也经历了一定的反复和波折,但是以美国史密瑟斯诉圣卢克罗斯福医疗中心一案(Smithers v. St. Luke's - Roosevelt Hospital Center)为标志,慈善捐赠人开创了成功获得执行捐赠意图诉权的先例,慈善捐赠人权利发展到了空前阶段。第二节对我国慈善捐赠人权利的历史发展过程作出分析,认为我国慈善捐赠人权利的发展还未进入繁荣阶段。第三节通过对慈善捐赠人权利的历史演进过程分析,总结归纳出慈善捐赠人的权利经历了从不受重视到逐步强化、法律规则从彼此隔离到逐步融合、与相关权利从相互冲突到逐步平衡的发展

趋势。

第三章、第四章两章对慈善捐赠人应该享有的权利进行逐个分析。而这些权利又以是否主要以慈善目的为依据划分为与慈善目的直接相关的权利及与慈善目的非直接相关的权利,从而自然也就分为了两章。第三章是对与慈善目的直接相关的权利正当性及其应有权利的分析。该章认为与慈善目的直接相关的权利主要包括捐赠意图实现权、诉权、知情权、监督权和撤销权,并结合学界对慈善捐赠人各项权利的怀疑和反对,对慈善捐赠人各项权利存在的正当性进行了分析。在对与慈善目的直接相关的权利研究中,又沿着从基本权利到派生性权利的思路展开,慈善意图实现权作为基本权利放在第一节进行研究,然后是派生性权利,而在派生性权利部分,文章又将诉权作为其中的保障性权利作为第二节内容,而把知情权、监督权和撤销权作为派生性权利中的工具性权利放在第三节。但这些权利的研究并未均匀着墨,而是针对国内鲜有提及而国外争议颇大的慈善捐赠意图实现权和慈善捐赠人诉权进行了重点分析。在对这两类权利的争议性观点进行梳理和评析的基础上,肯定了捐赠意图实现权和慈善捐赠人诉权,并对于权利适用条件、程序以及特殊情况的应对作出具体化分析。第四章是与慈善目的非直接相关的权利研究。其中争议比较大,带有人身权属性的冠名权作为第一节。该节从社会各界对于冠名捐赠的非议入手,对冠名权存在的合理性进行了分析,并对冠名捐赠给予了肯定,但是认为冠名捐赠应该严格冠名的条件和程序,而且所冠之名也不应永久存续。该章第二节对带有财产权属性的税收优惠权正当性进行分析。尽管税收优惠权已经较为普遍的存在,但是还有不少学者对其颇有微词,因此,笔者针对税收优惠权正反观点的分析,论证了税收优惠权存在的正当性。第三节是对捐赠自愿权、隐私权和返还权从应然意义上的分析。

第五章是慈善捐赠人权利的冲突与平衡。该章第一节概要分

析了慈善捐赠人权利与相关权利的冲突。这些冲突主要表现在慈善捐赠人权利与社会公益权、国家公权和其他私权方面,然后分析了这些冲突的实质是利益冲突、价值冲突和角色冲突,其冲突发生的原因在于资源的有限性、权利自身的属性和法律的不确定性。第二节在概要分析权利冲突平衡的主要学说的基础上,针对慈善捐赠人权利冲突特点,提出解决慈善捐赠人权利冲突的基本原则是公共利益优先、法律保留下的意思自治、比例原则,冲突的解决主要是通过立法和司法,并根据冲突解决原则,对慈善捐赠人权利与社会公益、国家公权和其他私权关系的权利冲突的平衡提出了相应的观点。

第六章是慈善捐赠人权利的行使与救济。第一节是权利的行使。该节提出慈善捐赠人权利意识是权利行使的前提,权利的行使首先需要培植慈善捐赠人权利意识。权利的行使还需要依据自主性与合法性相结合、目的性与工具性相结合、普遍性与差异性相结合等基本原则,遵循正当程序,并分别从慈善捐赠人的具体权利方面阐述了权利行使的方式和过程。第二节是权利的救济。本章首先分析了权利救济的含义、方式,并由此推理出慈善捐赠人权利救济的含义,提出慈善捐赠人权利救济需要把握有侵害有救济、分类救济、经济性、及时性以及司法救济终局性等基本要点。根据慈善捐赠人救济的这些基本要点,认为私力救济、媒介救济和司法救济是慈善捐赠人权利救济的主要方式。

第七章是我国慈善捐赠人权利法律保障制度现状、问题的分析及制度完善的建议。第一节在对我国慈善捐赠人权利的法律保障现状梳理的基础上,对法律保障问题进行检讨,明确我国慈善捐赠人权利保障中存在慈善捐赠法律规范散乱、政府主导捐赠模式限制、权利类型认可不足、现有权利保障机制不力等问题。第二节提出了慈善捐赠人权利法律保障制度完善的总体思路,认为慈善捐赠人权利法律保障需要遵循统一性原则、公益性原则、平衡性原

则和可行性原则,并提出理顺慈善捐赠法律适用规范、重塑政府在慈善捐赠中的角色、创设慈善捐赠市场竞争环境、法律保障因权利不同而异等宏观思路。第三节分别从与慈善目的直接相关及非直接相关的具体权利方面提出具体的完善建议。与慈善目的直接相关的权利制度完善中,提出要细化捐赠意图适用条件、赋予慈善捐赠人诉权保留资格、保障知情权适用程序、落实监督权执行机制、分类规范撤销权行使等主张;与慈善目的的非直接相关的权利的法律完善中提出要明确冠名权执行标准、改革税收优惠制度、完善相关权利规范等具体建议。

关键词:慈善捐赠 慈善捐赠人 权利

Abstract

The traditional ideology and legal systems usually paid much attention to the donations and assistance to vulnerable groups in the society, stressing the protection of the rights to life of these people. Under such conditions, both the government and the ordinary people advocate devotions to charities while neglecting the rights of donors. Those who are benevolent show much generosity in case of various accidents and disasters, donating large sums to charities through all kinds of intermediate organizations, but the donated money is usually embezzled and misused during the management process, the public trust being greatly depressed. As for the direct donation, such as the incident of Jeanswest Building of Tsinghua University, the named donation is suspected of being commercialized. The financial scandal of China Charities Aid Foundation for Children has once again challenged the public trust for charitable organizations. The facts show that every incident about charity will stir up much trouble so we need to worry about the future of China's underdeveloped charities. When we try our best to find out the reasons for such phenomena, we know that the rights of donors have not been protected in a proper way.

Therefore, the following questions are worthy of consideration: Have the charitable donations really played the role expected by the donators? How can the donators make sure that their charitable donations are used in the expected ways? What kind of rights and interests do the donators enjoy? Are there any remedial measures available to donators when their donations are handled in improper ways? Can the donators enjoy some rights in connection with private interests during the process of charitable donations? Taking these questions into consideration, the author decides to title this dissertation *On the Rights of Charitable Donators*. Besides the introduction and the concluding remarks, this dissertation is divided into 7 chapters.

Chapter one focuses on the general interpretation of the rights of charitable donators. After analyzing the meanings of charitable donation from the perspective of etymology and comparing different ideas of the academia, the author puts forward the definition of charitable donation. Charitable donation has the characteristics of both private law and social law. After analyzing the meaning of charitable donator, the author discusses the rights of charitable donators, summarizing the characteristics of such rights, namely, the right subjects are extensive, the right contents are comprehensive and the rights are divided into different stages, and so on. In essence, the rights of charitable donators are a combination of private rights and social rights, property rights and personal rights, substantive rights and procedural rights. From the perspective of social ethics, social profits and social democracy, the rights of charitable donators are in accordance with moral norms, being able to push ahead the overall social interests and the process of democracy.

Chapter two focuses on the historical evolution and prospects of

the rights of charitable donators. Based on the practices in both US and Britain, in which charities are comparatively well – developed, the author divides the development of charitable donator’s rights into four phases, namely, the forming stage (prior to the middle of the 18th century), the establishment stage (from the late 19th century to the middle of the 20th century), the expansion stage (from the late 20th century to the end of the 20th century) and the prosperous stage (from the end of the 20th century up to now). Generally speaking, the rights of charitable donators were not paid much attention to at first, and then conformed to a certain degree, and at last gradually expanded. Even though the process is full of repetitions and setbacks, the case of *Smithers v. St. Luke’s – Roosevelt Hospital Center* in United State is a landmark case, during which the cause of action by the donator is firstly acknowledged. From then on, the rights of charitable donators experienced unprecedented expansion. On the other hand, the development of China’s charitable donator’s rights has not entered the prosperous stage. From the perspective of historical development, the author finds out some development tendencies. For example, the rights of donators are not thought highly of at the beginning but are gradually acknowledged, and legal rules are at first scattered but are gradually consolidated, the donator’s rights are at first in contradiction with related rights but are gradually able to co – exist.

Chapter three and four focus on the rights of donators in detail. The rights of charitable donators can be divided into such two categories as those directly related to charitable purpose and those indirectly related to charitable purpose. Chapter three focuses on the justifications for such rights and the due rights of donators. The author thinks that the rights directly related to charitable purpose include the

right to the realization of donation purpose, the right of action, the right to know, the right of supervision, and the withdrawal right. After summarizing the doubts and oppositions from the academia, the author analyzes the justifications for donor's rights. The rights directly related to charitable purpose can be divided into fundamental rights and derivative rights. The author has not analyzed all these rights in an equal way, on the contrary, the right to realize donation purpose and the right of action has been discussed in detail. Also the author discusses the detailed contents of these two rights. Chapter four focuses on the rights directly related to charitable purpose. Firstly, the author discusses the right to name, which has the characteristics of personal rights. There is currently lots of criticism for the right to name, so the author analyzes the justifications for the right to name. The right to name shall be supported when some conditions are satisfied. And at the same time, the right to name shall not be perpetuated. On the other hand, the right to tax preference is also worthy of detailed discussion. Some scholars are critical of the right to tax preference even though such a right generally exists, so the author discusses the justifications for the right to tax preference. At last, the author analyzes the right to voluntary donation, privacy, and the right to withdrawal from the ought-to-be perspective.

Chapter five focuses on the conflicts and balance of donor's rights. Because of the conflicts of interests, values and roles, the rights of donors sometimes conflict with social rights, public rights and even private rights. In essence, these conflicts are caused by the scarcity of resources, the nature of rights and the uncertainty of law. Then the author puts forward some basic principles for the resolution of these conflicts, such as public interests being preferred, autonomy of

the will and proportionality under the guidance of law reservation. Accordingly, the conflicts can be resolved through legislation and judicial activities.

Chapter six focuses on the exercising of and remedies for the rights of donators. Donator's sense of rights is the prerequisite for the exercising of donator's rights, and besides the due process, some fundamental principles shall be followed, such as the combination of autonomy and legitimacy, the combination of purposes and instruments, and the combination of universality and differentiation. As for the remedies for donator's rights, the author firstly analyzes the meanings of such rights, and then discusses such key points as classification, efficiency, timeliness, and so on. Accordingly, the author thinks that the main remedial methods include private remedy, medium remedy and judicial remedy.

Chapter seven focuses on the legal status quo and some possible solutions. Currently the main problems are as follows: the available legal norms being scattered, the donation modes being dominated by the government, the lack of right categories, the inefficiency of right protection mechanisms. In order to protect the rights of donators, some principles shall be strictly followed, namely, uniformity, public interest, equality, and availability. At the same time, the legal norms shall be sorted out, the role of the government shall be remodeled, the competitive environment shall be created for charitable donations, and the legal protection shall be differentiated in accordance with various rights. As for the protection of the rights directly related to charitable purpose, we need to define donation purpose in detail, acknowledge the right of action, guarantee the right to know, implement the supervisory mechanism, and specify the right to withdrawal. As for the protection

of the rights indirectly related to charitable purpose, we need to specify the standards for the right to name, reform the tax preference system, and improve the concerned legal norms.

Key Words; charitable donation charitable donor right

目 录

绪论 / 1

- 一、写作动因与意义 / 1
- 二、国内外研究现状 / 7
- 三、研究思路与方法 / 15
- 四、研究创新与不足 / 17
- 五、本书的两点说明 / 19

第一章 慈善捐赠人权利的一般解读 / 25

第一节 慈善捐赠人权利的界定 / 25

- 一、慈善捐赠 / 25
- 二、慈善捐赠人 / 32
- 三、慈善捐赠人权利的内涵 / 35

第二节 慈善捐赠人权利的性质 / 38

- 一、私权兼社会权 / 38
- 二、财产权兼人身权 / 42
- 三、实体性权利兼程序性权利 / 45