

学校编码: 10384

分类号\_\_\_\_密级\_\_\_\_

学号: 13620110153521

UDC\_\_\_\_\_

厦 门 大 学

博 士 学 位 论 文

我国集体协商权研究

The Right to Collective Consultation in China

王培君

指导教师姓名: 葛洪义 教授

专 业 名 称: 法 学 理 论

论文提交日期: 2016 年 月

论文答辩时间: 2016 年 月

学位授予日期: 2016 年 月

答辩委员会主席: \_\_\_\_\_

评 阅 人: \_\_\_\_\_

2016 年 月

厦门大学博硕士学位论文摘要库

## 厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为( )课题(组)的研究成果,获得( )课题(组)经费或实验室的资助,在( )实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称,未有此项声明内容的,可以不作特别声明。)

声明人(签名):

年 月 日

厦门大学博硕士学位论文摘要库

## 厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

1. 经厦门大学保密委员会审查核定的保密学位论文，  
于 年 月 日解密，解密后适用上述授权。

2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人（签名）：

年 月 日

厦门大学博硕士学位论文摘要库

厦门大学博硕士学位论文摘要库

## 内容摘要

本文以“我国集体协商权研究”为题，其目的在于通过研究集体协商制度的实效状况以展示我国法治建设中所存在的问题，也就是说，以集体协商权的现实有效性为例来分析我国的法治建设亟需解决的问题。要回答这一问题，必须进行这几个方面的追问，即集体协商权在立法中是怎样的、在实践中是怎样的、两者为何有偏差，以及如何解决。有鉴于此，本文由这几个部分组成。

导论部分先是简要地交待了本研究主题的必要性和研究现状，以及本研究的构想与方法。

第一章分析了我国集体协商权的由来。本章主要以劳资关系为主线来介绍集体劳动关系理论、外国法的集体谈判权以及我国法的集体协商权的概念、沿革以及功能。本文提出，集体劳动关系是个别劳动关系发展到一定阶段的产物，在这个阶段产生了对个别劳动关系做集体化调整的必要性。劳动关系集体化调整的最终目的是实现个别劳动关系的正义。集体劳动关系的价值内涵是以团体力量补充个体在劳动关系中的劣势，它的规范内涵是将众多劳动者的诉求作统一安排，以达致化解众怒、化繁为简的效果。从历史流变上看，集体劳动关系是在劳资关系从冲突转向合作的过程中逐步产生的。集体劳动关系的调整机制有共同协商与集体谈判两种。外国法的集体谈判权的产生、发展是以劳动力的商品化程度作为源动力的。它是对劳动力商品过度市场化的纠偏，是市场经济本身所必须的宏观干预手段。集体谈判权有效运行的决定因素是工会的议价能力与劳动者的集体行动力。我国法的集体协商权在功能上与外国法的集体谈判权是可以互换的，这两个概念的内涵基本一致，这两类实践也交织在一起。民国时期、革命战争时期、解放战争时期以及建国初期都有集体谈判的立法实践，资本主义工商业社会主义改造完成后的一二十年，集体谈判制度一度消失。1978 改革开放后，集体协商权、集体合同制度重现于法律文件之中。

第二章分析了我国集体协商权的立法构造，对集体协商权的制度背景、制度价值以及具体规则做了详细阐述。本文认为，我国的劳动力商品化程度已经极为严重，劳资矛盾激化且已成为我国当前最主要的社会矛盾，以集体协商的方式来



决定劳动报酬的额度, 纠偏劳动力过度市场化显得极为紧迫。但是, 从制度设计上看, 我国集体协商权立法并未为工会的议价能力和劳动者的集体行动力增加筹码, 因为我国法强调和平协商, 不允许有过激行为, 变相禁止了罢工、怠工等产业行动, 消除了劳动者的集体行动力; 而法律并未能周全地保护职工协商代表、在企业不予协商、拒绝披露信息时未设置有效的制裁措施, 也影响了工会在协商过程中的议价能力。劳方在劳资关系中的劣势由政府的全程监督与随时介入来帮扶。这种制度设计是由我国集体协商制度所贯彻的价值理念所决定的。我国集体协商权的制度价值是劳资共赢或劳资互利。而劳资共赢、劳资互利的理念来源于毛泽东的“劳资两利”思想。因为劳资两利的劳资政策要求劳动者重长远利益而轻眼前利益、淡化斗争, 集体协商制度并没给予劳动者足够的法律武器以对抗用人单位的优势地位。

第三章着重分析了我国集体协商权的地方实践, 以实证方法对集体协商权的地方立法、具体实践以及现实有效性进行分析。就地方立法与具体实践而言, 我们发现集体协商权从立法到实践经历了两次疏离。其一, 地方立法加强了地方政府对劳资关系的干预与控制, 增设了消解群体性事件的立法。这是地方立法对中央立法的疏离; 其二, 在落实各地关于集体协商的立法或政策的实践中, 对于政府推动的集体协商, 许多法律规则形同具文; 而对于职工发起的集体协商, 立法尽显滞后, 而任由地方政府、地方总工会等行政力量见机行事。这是实践对立法的疏离。这种疏离使得我国集体协商权几乎失效, 因为政府是在以集体协商之名行要求企业增加工资之实, 集体协商的法律规则被架空了。

第四章分析了导致我国集体协商权失效的原由。面对集体协商权的失效问题, 学者纷纷进行一番理论探索以追寻其原因。总体而言, 主要有三种观点, 即劳动者的自我弃权、企业工会缺少独立性以及政府角色错位。相应地, 持前述观点的学者也提出三种解决方案, 即个体增权、企业工会直选以及政府角色回归。本文认为, 劳动者自我弃权、基层工会未实现直选都不是导致该权利未能充分实现的主要原因, 因为新生代农民工权利意识很强, 不会自我弃权, 而直选出来的基层工会也会因企业管理层操控选举而丧失议价能力。实际上, 我国集体协商权的困境源自于我国当前所选择的法治化道路模式自身所具有的矛盾。政府推进型法治化道路模式是我国法治建设的选择, 因为这种法治化道路符合了我国为了缩

小与西方国家的差距而进行的赶超型现代化建设的要求，而且市民社会、公民意识等实施法治所要求的社会条件也不成熟，只好由政府凭借其行政权以推进法律制度的运行。然而，在此过程中，政府权力却乘机膨胀，反过来架空了法律规则的适用，在一定程度上损害了法治本身。在集体协商权的运行中，尽管政府的助推具有合理性，但却为政府权力的膨胀留下缺口。可以说，导致集体协商权失效的主要原因是政府在助推过程中以各种法外措施干预集体协商，架空法律规则的适用。

第五章分析了集体协商权的发展路径。从我国的法治进程来看，大体上经历了一个从法治政府到法治社会的演进过程。前一阶段以建设法治政府为主，以实现政府依法行政为主要目标，后一阶段以建设法治社会为主，以培育社会力量为主要目的。前一阶段是国家权力的自我约束，后一阶段则以社会力量制约国家权力，同时在一定程度上实行社会自治。1978年以来的法制建设、法治建设主要是法治政府的建设，2012年底提出的“法治国家、法治政府、法治社会一体建设”则表示我国的法治进程开始以法治社会的建设为主。就集体协商权而言，集体协商是劳资双方的自主博弈，而展开博弈是以劳资双方的议价能力为基础的。由于劳方的议价能力的欠缺，当前的集体协商权的实现仍然主要依靠政府的助推。不过，政府的干预措施应当是制度化的、常规化的；未来的集体协商权的实现则是协约自治的，国家权力要退出该领域，并培育社会力量以助推集体协商权的实现。

**关键词：**集体协商；集体劳动关系；劳资共赢

厦门大学博硕士学位论文摘要库

**ABSTRACT**

Entitled as THE RIGHT TO COLLECTIVE CONSULTATION IN CHINA, this article's purpose is to show the problems on the course of constructing the rule of law in China through the study on effective status of collective consultation system. In another word, the realization of the right to collective bargaining as an example analyzes the problem on the rule of law constructing in China. To answer this question, these several aspects be examined minutely, that is, what is the right to collective consultation in the legislation in China, how it works in practice, why it is different between the legislation and the practice, and how to solve these. For that reason, this article is made up of the following parts.

INTRODUCTION briefly explains the necessity of the research of this topic, this research's present situation, as well as the ideas and methods of this research in this study.

Chapter I analyzes the source of the right to collective consultation. This chapter, mainly through taking labor-capital relationship as the thread, introduces the theory of collective labor relationship, the right of collective negotiation under the foreign laws and the concept, history and function of the right of collective consultation under Chinese laws. In this article, the collective labor relations is the product of individual labor relationship development to a certain stage, at this stage it incurs the necessary collectivization adjustment to individual labor relations. The ultimate purpose of collectivization to adjust labor relations is to realize the justice of individual labor relations. The value connotation in collective labor relationship is making up the disadvantages of individual in the labor relations with the group power; and the normative connotation is collecting the demand of the several laborers and making a united arrangement, in order to resolve the public wrath and make hard things simple. Looking back to the history, the collective labor relationship gradually emerged in the process of labor-capital relationship from conflict to cooperation. The adjustment

mechanism of collective labor relationship contains common consultation and collective negotiation. The emergence and development of the right of collective negotiation under the foreign laws make the commercialization degree as the source motive force. It is the adjustment to excessive marketization of labor power as a commodity, and macro-control mean which is necessary to the market economy itself. The determinants of the effective operation of the right of collective negotiation are the union's power for bargaining and the labor's power for collective action. The right to the collective consultation under Chinese laws have the same function with the right of collective negotiation under the foreign laws, the meaning of these two concepts mainly consist and these two types of practice are interweaved. During the period of the Republic of China, the revolutionary war, the liberation war and the early days of new China, the legislative practice of collective negotiation existed, and disappeared for a long time in a decade or two after the completion of capitalist industry and commerce socialist transformation. After the reform and open in 1978, the right of collective consultation and collective contracts appeared in law documents again.

Chapter II analyzes the legislation structure of the right of collective consultation in China, and expounds the system background, system values and specific rules of the right of collective consultation in detail. In this article, the commercialization degree of labor power has been very serious and the acuteness of labor disputes has been the leading social contradiction in present China; it is extremely urgent to determine the wages by the form of collective consultation, and to rectify the labor power market determined by wages. However, from the point of view of legal system designing, the legislation of the right to collective consultation in China does not increase negotiation power of the union and collective action power of labor, because the Chinese laws emphasize the peace negotiations, forbid the acute behavior, disguised banned the industrial actions, such as strike and sabotage, and eliminate the collective action power of labor. The poor legal protection to the employee consultation representative and the lack of effective legal punishment measures to refusing consultation or disclosure also influence the union negotiation power in the

consultation process. The disadvantages of labor in the labor relations shall be made up through whole-process supervision and intervention at any time by the government. This system design is determined by the value ideas implemented in the collective consultation system in China. The system value of the right of collective consultation is labor-capital win-win or mutual benefit of labor and capital which comes from the benefit both labor and capital idea of Mao Zedong. Because the policy of benefit both labor and capital require that labor shall focus on the long-term interests and fade conflict away, collective consultation system does not give enough supports to the labor to against the employer.

Chapter III analyzes the local legislation, specific practices and realistic validity of the right of collective consultation with empirical approach. In terms of local legislation and specific practices, we found that the right of collective consultation has experienced two separations from legislation to practices. Firstly, local legislation to strengthen the local government intervention and control of industrial relations, and increasing legislation of mass incidents. This is the separation from the local legislation to the central legislation. Secondly, in the local practice of implementation the legislation or policies of collective consultation, the rules of collective consultation from bottom to top exist in name only; the legislation of collective consultation from top to bottom are outdated, so that the administrative authorities, such as local government and local union, play it by ear. This is the separation from practices to legislation that makes the right of collective consultation in China almost failed. The collective consultation system has been overhead because the government in the name of collective consultation to demand the employee to improve the labor wages.

Chapter IV analyzes the reasons why the right of collective consultation failed in China. Facing the problem of the failure of the right of collective consultation, scholars had some theoretical exploration to search for the reasons. In general, there are mainly three opinions—self-abandonment of right by labor, non-independence of union and malposition of government role. Accordingly, scholars who hold the said

opinions put up three solutions—increasing rights by individual, direct election for union and normalization of government role. In this article, both self-abandonment of right by labor and failure of direct election for union are not the main causes that lead to insufficient realization of such right. The new generational of peasant-workers could not self-abandon their rights because of the strong right consciousness, as well as the union at grassroots level generated by direct election could lose collective action power because of the election control by employers. Actually, the trouble of the right of collective consultation in China comes from the contradiction of the road of rule of law that China chose nowadays. The road of rule of law promoted by government is the inevitable choice of the rule of law construction in China, because such road of rule of law meets the requirement of overstepping Modernization in order to narrow the gap between China and western countries, as well as the civil society and civil consciousness such as required by the implementation of the rule of law social conditions are not mature, so by the government with the administrative right in order to promote the operation of the legal system. However, in this process, the government seized the opportunity to expand its power, in return, overhead application of the legal rules that damage the rule of law to some extent. In the operation of the right of collective consultation, although it is reasonable for the promotion by government, it also leaves gaps for expansion of government power. So to speak, the main reason leading to the failure of the right of collective consultation is the government in the process of promoting with all sorts of extrajudicial measures to intervene the collective consultation, overhead applicable legal rules.

Chapter V analyzes the development path of the right of collective consultation. From the process of the rule of law in China perspective, it is actually a evolution process from a law-based government to a law-based society. The former stage to the construction of a law-based government is given priority to, in order to realize the government administration according to law as the goal; the latter stage is given priority to the construction of a law-based society, in order to foster social forces for the purpose. The former stage is the self-discipline of state power, and the latter stage is limiting the power of state power by social forces as well realizing social autonomy

to some extent. Since 1978, the construction of legal system and construction of the rule of law is mainly the law-based government construction. “The integrated construction of a law-based state, a law-based government and a law-based society” theory which put forward at the end of 2012 shows the process of the rule of law in China is given priority to the construction of the law-based society. In terms of the collective consultation system, collective consultation is the independent game of both sides of Labor and capital, and the game is based on the power for bargaining between the labor and the capital. Due to the lack of the labor’s power for bargaining, the implementation of collective bargaining rights still rely on the government's help currently. However, the government intervention should be institutionalized and normalized. In the future, the realization of the right to collective bargaining is a collective autonomy. The state power has to withdraw from that area and cultivate social forces to help the realization of the right to collective bargaining.

**Keywords:** Collective Consultation; Collective Labor Relationship; Labor and Capital Win-win



Degree papers are in the “[Xiamen University Electronic Theses and Dissertations Database](#)”.

Fulltexts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to [etd@xmu.edu.cn](mailto:etd@xmu.edu.cn) for delivery details.