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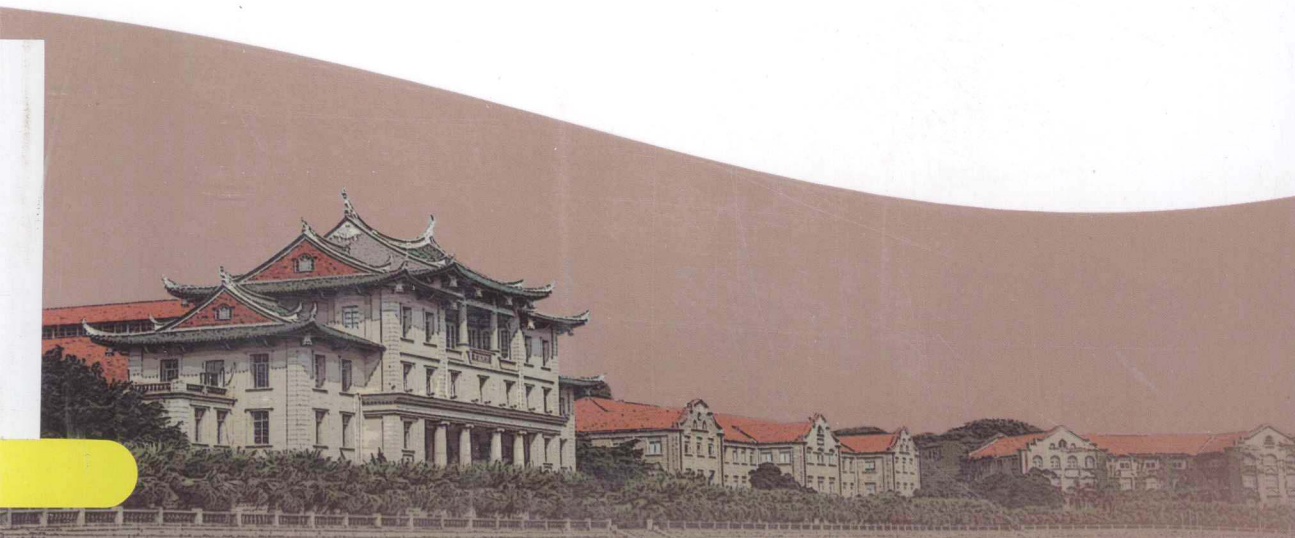
劳动诉讼制度研究

周湖勇 著



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总 序

随着市场经济的推进，经济社会快速发展，我国开始加快制定现代意义上社会立法的步伐。1994 年《中华人民共和国劳动法》是改革开放后全国人大常委会通过的第一部法典式社会法案。2006 年以来，相继通过并实施《中华人民共和国劳动合同法》、《中华人民共和国就业促进法》、《中华人民共和国劳动争议调解仲裁法》等法案，社会立法速度之快居于各法律领域之首，初步形成社会立法体系，在干预社会利益分配、化解社会矛盾、增进社会公平、促进我国经济社会可持续发展上产生了重大影响。

我国社会立法处于社会主义初级阶段。在快速成长过程中，社会立法存在种种不足和问题。第一，诸多社会立法层次较低，有的重要领域尚无法可依。第二，社会立法决策针对热点问题，立法的系统性、前瞻性有待提高。第三，社会立法质量有待提高。现行社会立法风格粗犷，原则性规定多，条款的可操作性较弱，司法适用性有待加强。第四，某些立法有部门立法之嫌，利益关联过强，社会公众参与不足。第五，社会法的立、改、废偏慢。第六，已有社会立法实施效果不尽如人意。特别是在劳动基准、劳动合同、职业灾害防治、劳资关系协调、劳动争议处理等方面，“不是无法可依，而是有法不依”，问题众多，极端事件频发，弱势群体尚未充分享受到经济发展成果。

社会法面临着一系列重大挑战。第一，如何合理界定社会法的定位与功能。社会立法是什么，能够是什么，应该是什么？从 16 世纪英国“圈地运动”时期制定《济贫法》，为资本主义原始积累与发展的直接受害者提供生活救济，到资本主义大工业时期德国创造性地制定和实施一系列社会保险法，创设社会保险制度，以增强人们在工业社会防范各种社会风险的能力，保障人的生存权和发展权，再到 1935 年美国国会通过具有划时代意义的《社会保障法》，引发西方工业发达国家纷纷修订、补充各自已有的社会保障制度，从而极大地缓和了社会矛盾，促进了社会稳定与安

全。社会立法的最直接目标就是给予社会个体以社会安全感，维护整个社会的安全与稳定。我国的社会法担负着怎样的使命？第二，我国社会呈现贫富两极分化、城乡二元结构、地区发展不平衡等社会问题。在此环境下，社会立法在衡平社会利益分配过程中，应当更加积极，更有作为。第三，社会不同阶层和利益群体对已实施的社会立法有不同认识。例如，《劳动合同法》施行曾引发较大争议。学术研究应当积极回应。第四，近年来不断发生较大规模的劳资冲突事件或者严重的劳动者利益受损事件，表明在我国社会发展新阶段中，劳资关系遇到了新问题、新情况和“壁垒”，应当加强研究相关应对策略。第五，市场经济发展到一定阶段后，社会环境发生深刻变化，人心复杂，利益取向凸现，社会立法如何更有效地化解社会矛盾，促进社会和谐。

因此，亟待加强社会法各个领域和层面的研究。探讨施行中的社会立法之制定、设计是否科学、合理？是否达到了立法当初预期的目标？存在哪些主要和突出的问题？是否有必要进行适当的调整或修正？应当从哪些方面予以补充和完善？遇到了哪些新情况和新问题，需要制定哪些新的社会立法？应当采取哪些有针对性策略和措施，才能从根本上扭转有法不依的现象？如何从质量和技术上提高立法水平，使社会立法更加科学、合理，使社会法实施更有成效？这些都是我国社会法领域当前迫切需要解决的重大问题。在深入调查、研究的基础上，借鉴其他国家和地区社会立法的有益经验，提出具有现实针对性和时效性的结论与建议，意义深远。

社会法专题研究论丛立足于社会法领域的基础理论、现实问题的创新研究，强调原创性，突出为我国社会立法、司法和社会保障与福利的完善提供有益参考。本丛书具有下列五方面特点：第一，强调学术创新。每本著作选题或大或小，提倡小题大做。充分利用国内外现有资源，运用跨学科方法，多角度地研究我国社会法领域的问题。所涉主题新颖，具有较强的理论前瞻性，涵盖社会权、救助权、劳动者人格权保护、劳动基准、劳动合同、企业规章制度、社会保险、福利权等专业领域；观察、分析、反映各种社会关系及其社会利益分配中的真实状态，发现主要问题与不足，为完善我国社会政策决策提供深度参考。第二，注重实践性。我国实行改革开放政策三十余年，经济社会高速发展的同时，社会管理和服务遇到了诸多新问题、新情况，积累了许多社会风险和矛盾。贫富两极分化、群体性事件、极端事件频发，弱势群体保护不足等这些问题，促使我们反思“效率优先、兼顾公平”的发展战略，如何促进经济社会的全面进步和可持续发展？立足中国，探寻社会立法本身设计或条款存在的不足、缺漏和问题，积极探索我国社会法建构和实施中的突出问题

和难点，在深入研究的基础上，注意衡平各方面利益，系统地提出对策建议，具有较强的实际应用价值。第三，为促进我国社会法理论系统化、体系化建言献策。虽然现代意义上的社会立法诞生于西方资本主义国家，迄今已形成了完整的价值体系、理论解释范式，西方工业化国家的社会立法极为发达。中国工业化过程中应当充分借鉴西方的成功经验，但是，对西方经验抱着纯粹的“拿来主义”态度，无疑是不能解决中国所有问题的。中国正处在传统与现代化之间、东方文明与西方文明的交叉点上，对中国问题的研究、解决，必须深入中国社会实际，切中各种社会关系调整的命脉，回应中国社会深层次的利益调整需求，提出我国自己的社会立法体系建构、理论解释范式、立法策略。第四，寻求解决司法审判和仲裁中的疑难问题的路径和方案。公民的社会权利和利益的实现有赖于完备的解决争议的救济机制。本丛书社会法的司法救济研究，分析司法实践中出现的新型案件、新问题，并对之加以理论化、体系化，社会法争议的解决提供指引和参照。第五，本丛书为开放式，作者以对社会法学有专攻的中青年学者为主，以厦门大学社会法学术队伍为基础。竭诚欢迎社会法同仁们加盟，贡献社会法精深之作。

社会对法律、权利、公正、公平的需求不断增长，法律供应的复杂性增长，对社会法提出了更多更高的要求。期待本丛书能为推进我国社会法的立法、法律适用和理论研究有所帮助。

是为序。

蒋 月

内容摘要

目前，我国正处于劳动争议多发的高峰期。为了应对劳动争议案件大幅度增长的现状，最高人民法院于2013年1月颁布了《关于审理劳动争议案件适用法律若干问题的解释（四）》（以下简称《劳动争议司法解释（四）》）。加上此前已颁布的三个专门司法解释及有关批复，我国劳动诉讼体系已经基本形成。由此，就需要处理一系列关系，如劳动诉讼与劳动法（社会法）、劳动诉讼与民事诉讼法、劳动诉讼与劳动争议调解、仲裁等关系。因此，研究劳动诉讼制度不仅具有实践意义，而且具有理论意义。就实践意义而言，有助于维护劳资双方的合法权益，尤其是维护劳动者的合法权益，实现劳动法的立法目的；有助于提高法院审理劳动争议案件的专业化程度；有助于建立和谐的劳动关系，维护社会的稳定，构建和谐社会；有助于解决民生，落实宪法，实现和保障基本人权。就理论意义而言，建立劳动诉讼制度不仅有利于拓展劳动法研究的深度和广度，而且有助于实现传统诉讼的现代转型。因此，劳动诉讼制度的研究不仅对劳动法，而且对诉讼法学，都具有重要的意义。

本书以“劳动诉讼制度研究”为选题，全书分为导论和五章。本书首先研究劳动诉讼的理论基础，这是劳动诉讼制度构建的基本前提。其后，研究域外特别是工业化市场经济国家劳动诉讼制度的立法和运行，从而为我国劳动诉讼的立法和司法实践提供借鉴。而后，研究在多元纠纷解决机制下和我国民事司法改革中的劳动诉讼制度的定位，在此基础上，探讨劳动诉讼具体制度和程序的改革与设计。

第一章，劳动诉讼制度之原理。劳动诉讼赖以建立的实体法基础是劳动法，劳动诉讼虽然具有相对独立性，但服务实体法是其重要的任务和目标。建立在传统民法基础的民事诉讼制度不能适应劳动法，构建劳动诉讼制度具有必要性。

劳动诉权从传统民事诉权中分离出来，成为一种独立的诉权。在劳动诉讼中引入劳动诉权具有必要性和可行性。界定劳动诉权对于构建劳动诉讼制度具有重大意义。为保障劳动诉权的实现，要妥善处理劳动诉权和裁审模式、劳动诉讼时效和劳

动诉权保障、受案范围和劳动诉权保障、诉讼费用及法律援助和诉权保障等几个问题。

现代诉讼法理是劳动诉讼制度立法和司法的指导思想和基本原理，是诉讼程序制度制定和执行的法理基础。程序相称原理要求劳动诉讼程序制度的设计和改革应当与劳动争议案件的性质、特点、争议的金额以及复杂程度等要素相适应，由此使劳动争议案件得到妥善的处理。根据接近正义和福利国家的理论，应当消除劳动者利用法院接近正义的种种障碍，建立和完善法律援助制度等是政府的责任。非讼法理的职权主义、书面审理等对于劳动争议快捷、便利的解决具有重要意义，因而可以在劳动争议解决中予以引入。费用相当性原理要求当事人利用劳动诉讼程序或法院适用劳动程序解决纠纷的过程中，不应使国家或当事人遭遇不必要之浪费或利益牺牲。

第二章，域外劳动诉讼制度之比较。世界各国和地区形成了具有各自特色的劳动诉讼制度，如日本和美国主要采用民事诉讼来处理个别劳动争议和权利争议，而英国、法国和德国则采取专门机构劳动解决劳动争议，德国形成了具有特色的劳动法院制度，澳大利亚的劳动诉讼机制独具特色，我国台港地区和发展中国家的劳动诉讼制度也具有其特点。

域外劳动诉讼制度为我国劳动诉讼的构建提供了借鉴。我国需要根据劳动争议类型设置不同的程序；探索建立劳动法院（庭）制度，实现劳动司法的专业化，同时也要实现劳资自治，充分发挥劳资双方在解决劳资争议中的作用；劳动审判的功能应当实现转变，不仅仅是界定权利义务以解决纠纷，更主要的是协调劳资关系，预防劳动争议的发生；要根据劳动争议案件的特点，设计符合其特点的程序制度，以妥善解决劳动争议。

第三章，劳动诉讼制度之结构。劳动诉讼体系大致可以分为劳动私益诉讼、劳动公益诉讼以及劳动宪法诉讼。要针对不同性质的争议，构建不同的诉讼形式，对私益性质的劳动争议构建劳动私益诉讼，对公益性质的劳动争议构建劳动公益诉讼，涉及宪法权益的劳动争议则构建宪法诉讼，这样才能构建一个保护劳动权益的事前、事中和事后相结合，既相互分工、又相互配合的立体的、全方位的诉讼体系。同时，劳动诉讼体系的构建要考虑中国的国情，并根据我国法治建设的进程，逐步推进。

针对我国当前劳动争议出现群体化的趋势，应建立群体性劳动诉讼体系。根据集体劳动争议的性质，设置群体性劳动诉讼体系：对私益性群体争议，可以设置共同诉讼、代表人诉讼及示范诉讼；对于公益性的群体争议，可以设置劳动团体诉讼

以及集团诉讼。

第四章，劳动诉讼制度之定位。具体包括劳动诉讼在劳动争议解决类型中的定位；劳动诉讼在民事司法改革中的定位；劳动诉讼在解决劳动争议机制中的定位。

劳动争议解决机制应根据工业化市场经济国家的普遍做法，即根据劳动争议类型的划分来进行设置。从目前而言，我国个体劳动争议主要通过调解、仲裁、诉讼予以解决。对于因签订集体合同发生的劳动争议通过调解和行政处理予以解决，而履行集体合同则通过劳动争议处理机制予以解决。从长远看，我国可以借鉴德国劳动法院的模式，将劳动人事仲裁委员会改造成劳动法院，将集体劳动争议和个体劳动争议都纳入劳动法院的受案范围。

在民事司法改革中，关于劳动诉讼的定位，从立法模式上，既要将劳动诉讼纳入其范围，又要根据其特殊性进行制度设计和安排，但劳动诉讼最终要从民事诉讼中独立出来；从其内涵而言，要走新路，不可将劳动诉讼作为传统诉讼的翻版。

在劳动争议解决机制中，既要坚持多样性的纠纷解决机制共存、共同促进和共同发展的原则，又要坚持诉讼机制在劳动争议解决机制中的核心和主导作用，其他纠纷解决方式也应当在诉讼机制的保障、示范和引导下发挥其应有的功能。在当前，要充分利用新法给予的制度空间，加强法院对非诉讼方式的支持和衔接，但也要加强对非诉讼方式的监督，以保障非诉讼方式的公正、公平。同时要创建多种形式的诉讼和非诉讼衔接方式。劳动诉讼不能成为普通诉讼的翻版，普通诉讼由于其自身难以克服的缺陷无法成为解决劳动争议的主要方式，作为新型劳动诉讼程序要体现低廉、简便、灵活的程序特征。要降低诉讼的技术性成份，具有大众化和可亲近性；要有利于促进劳资双方的进一步沟通，弥补双方因对立而形成的裂痕，以修复劳动关系。

第五章，劳动诉讼制度之改革。劳动诉讼审判组织建设是劳动诉讼制度的重要内容，是劳动诉讼相对独立的基本内涵之一，是审理劳动争议案件的组织保障。因此，应当对劳动诉讼审判组织建设进行探讨，要建立既符合我国国情、又符合世界劳动争议处理程序发展趋势的劳动审判组织。

从诉讼程序的体系来看，普通劳动诉讼程序包括诉讼程序和附属程序，诉讼程序又包括审判程序和非讼程序。审前程序现在不仅仅是为了审判程序服务或为审判程序的准备阶段，已成为分流案件、构建多元化纠纷解决方式的重要枢纽。因此，需要建立和完善不应诉判决制度、建立简易判决制度及合意判决制度等。同时应建立和完善小额诉讼程序和督促程序，以快速、简易、低廉地解决劳动争议案件。为

了保障劳动者的合法权益，需要完善财产保全制度和先予执行制度，同时还需要建立行为保全制度。

在司法实践中，出现了许多劳动争议案件无法适用民事诉讼程序的情况，劳动诉讼具体制度的改革势在必行。具体而言，要改革和完善劳动诉讼管辖制度；完善劳动诉讼举证责任分配制度，细化举证责任的分配标准；重塑劳动诉讼和仲裁的关系，改革现有的劳动诉讼审级制度；完善部分裁决制度等等。

关键词：劳动争议；纠纷解决；劳动诉讼；司法改革

ABSTRACT

At present, China is in the peak of the outbreak of the labor disputes. In response to substantial growth in labor dispute cases, the Supreme People's Court in September 2010 issued "Interpretations of Several Issues of Appling Laws to Labor Dispute Cases (c)". Coupled with two previous specialized judicial interpretations and related approvals, the labor litigation system in China has been basically formed. Thus, we need to solve a range of issues, such as relations between labor litigation and labor law (social law), labor litigation and civil law, labor litigation and labor dispute mediation, arbitration and so on. Therefore, the study not only has practical significance, but also has theoretical significance. For practical significance, the study will help to maintain the labor legal rights of both employers and employees, in particular safeguard the lawful rights and interests of employees so as to achieve the legislative purpose of Labor Law; help the court to improve degree of specialization in dealing with cases of labor disputes; help to build a harmonious labor relations and safeguard social stability and build a harmonious society; help to solve the people's livelihood, to implement the Constitution, implement and protect basic human rights. For theoretical significance, the research on labor litigation system will not only help to expand the depth and breadth of the research on labor law, but also realize the modern transformation of traditional litigation. Thus, not only for labor law but also procedural law, the research on labor litigation system is of great significance.

The author studies the research on the labor litigation system in this paper, which consists of five chapters in addition to the introduction. The first part of this chapter analyses the theoretical basis of the labor litigation system, which is basic premise of construction of labor litigation system. Thereafter, The author studies the legislation and operation of labour litigation system in industrialized market economy countries so as to render references for labor

litigation legislation and judicial practice in China. Then study positioning of labor litigation in pluralized dispute resolution mechanisms and the civil justice reform in China. Based on it, the author discusses the reform and the specific design of labor litigation system.

Chapter 1: The principles of labor litigation system. Labor litigation is based on the substantive law that is labor law. Although labor litigation is independent, it is the task and goal to suit the substantive law. The traditional civil procedures based on civil law can not meet the labor law. So it is necessary to construct the labor litigation system.

Labor right of action separated from the traditional civil right of action has become an independent right of action. It is necessary and feasible to introduce labor right of action in the labor litigation system. To define the labor right of action is of great significance to the construction of labour litigation system. In order to realize the labor right of action, we must deal well with the following issues: labor right of action and the mode of the relation between arbitration and adjudication; case range and protection of labor right of action; litigation costs, legal aid and protection of labor right of action and so on.

Modern litigation principles are the guiding ideology and basic principles of law-making and courts-administering the law, and also legal basis for the formulation and implementation of procedural system. According to requirements of principle of proportionality, the design and reform of the labor dispute system should adapt to the nature, characteristics of labor dispute cases, the amount in dispute, and adapt to such factors as complexity, thereby make labor dispute cases handled properly. According to Access to Justice and the welfare state theory, the obstacles making use of the courts to provide access to justice should be eliminated. And it is the government's responsibility to supply legal aids. The rules of written hearing in legal principle of non-adversary procedure provide a fast and easy solution to labor dispute settlement. So it should be constructed in the labor dispute settlement mechanisms. Principle of considerable cost principle requires parties and courts to avoid unnecessary waste and sacrifice of interests in the process of labor dispute settlement.

Chapter 2: Comparison of overseas labor litigation system. Foreign countries and regions have their own unique forms of labor litigation system, Japan and the United States mainly deal with individual labor disputes and right disputes through civil proceedings, the United Kingdom, France and Germany take the specialized agencies to resolve labor disputes, Germany formed the labor court system, Australia has more unique mechanism of la-

bor litigation. And developing countries, China Taiwan and Hong Kong's labor litigation systems also have their own characteristics.

Construction of overseas labor litigation system provides references for labor litigation system in China. China needs to set labor litigation system in accordance with different types of labor disputes; not only explore the establishment of labour courts system to realize specialization of labor trial, but also achieve labor autonomy and give full play between employers and employees in resolving labor disputes; the judges not just define the rights and obligations to resolve disputes, it is more important to coordinate labor relations to prevent the occurrence of labor disputes; design the labor litigation system according to the characteristics of labor dispute cases to properly resolve the labor disputes.

Chapter 3: The structure of labor litigation system. Labor litigation system can be divided into labor private interest litigation, labor public interest litigation and labor constitutional litigation. According to different types of disputes, we must construct labor litigation system in different forms. We must set private interest litigation to handle private interest disputes, set public interest litigation to settle public interest disputes, and set labor constitutional litigation to deal with disputes involving constitutional rights. So three-dimensional, comprehensive litigation system of labor right protection will be constructed, Meanwhile, the conditions including the history of China must be considered in the labor litigation system, under the rule of law it will be realized step by step.

Meanwhile, the labor dispute settlement mechanism is presenting the group trend in China. So the group labor litigation system must be constructed. And it can be set in accordance with the nature of collective labor disputes. joint action, representative action and model action can be set to handle private interest group disputes, and group action and class action can be established to settle public interest group disputes.

Chapter 4: positioning of labor litigation system. Including positioning of labor litigation in the type of labor disputes to resolve; positioning of labor litigation in the civil justice reform; positioning of labor litigation in the labor dispute settlement mechanisms.

It is a common practice that labor dispute settlement mechanism is be set according to the type of the labor dispute in industrialized market economy countries. At the present time. in China the individual labor disputes are be dealt with mainly through mediation, arbitration. But the collective labor disputes and the labor disputes caused by signing collective

labor contracts are be settled by means of mediation and administrative processing. In the long run, China can learn from the German model of labor-court. And Dispute Arbitration Committee of Labor and Personnel will be transformed into a labor-court, the collective labor disputes and individual labor disputes are included in case range of the labor court.

In the civil justice reform, not only is it necessary for labor litigation system to be introduced temporarily into its scope, but also to be designed and arranged in accordance with its characteristics. In the long run, labor litigation system will be fully independent from the civil procedural law. According to its content, traditional litigation system can not taken as a model, we must open up a new path.

In the labor dispute settlement mechanisms, we should adhere to the diversity of mechanisms which coexist, jointly develop and promote each other. Adhere to the action mechanism leading central role in labor dispute settlement mechanisms. At present, China should make full use of the system space the new laws has given, Courts should provide support and convergence of ADR. And strengthen supervision to ADR to protect justice and fairness. At the same time create various cohesion forms of litigation and non-litigation. Traditional litigation proceedings can not serve as a model for labor litigation proceedings. common action can not become the primary way to resolve labor disputes because of its shortcomings that can not be overcome. As the new type of litigation labor litigation system should possess simple, flexible program features. And reduce its technical components, possess the characteristics of popularity and approachability, help to promote further communication between employers and employees to make up for cracks parties formed, and repair labor relations.

Chapter 5: reform of labor litigation system. Construction of labor litigation trial organization is an important aspect of labor litigation system, which is a basic content of relatively independent labor litigation system. And it is also organization protection of trying labor dispute cases. So the author discusses it to establish labor trial organization consistent with Chinese national conditions and the world development trend of the labor dispute handling procedures.

Generally, common labor litigation procedure is composed of litigation procedure and ancillary proceedings. And the litigation procedure includes trial procedure and noncontentious proceedings. Pre-trial program now services not only for judicial proceedings or for

the preparatory phase of the trial proceedings, but also becomes an important hub of the diversion of cases and construction of plualized dispute resolution mechanisms. So we must construct and improve default judgement, summary judgement and consensus judgement. Also need to establish and improve the small claims procedure and supervisory procedure to supply a fast, easy and inexpensive solution to labor disputes. In order to protect the legitimate rights and interests of employees, not only need to improve the system of property preservation and the system of advance implementation, but also need to create action preservation system.

In judicial practice, there are large numbers of labor dispute cases that are unable to apply to the civil proceedings. So reform of labor litigation specific systems are imperative. Reform and improve labor litigation jurisdiction system, perfect allocation of the burden of proof of the labor litigation cases, and detail its allocation criteria. Remodel relations between arbitration and litigation to improve the existing system of labor litigation judicial level, and perfect part ruling system and so on.

Key Words: Labor Dispute; Dispute Resolution; Labor Litigation; Judicial Reform

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