

## Legal mobilization by trade unions

Chen, Feng

*Published in:*  
China Journal

*DOI:*  
[10.2307/4127883](https://doi.org/10.2307/4127883)

Published: 01/07/2004

*Document Version:*  
Publisher's PDF, also known as Version of record

[Link to publication](#)

*Citation for published version (APA):*  
Chen, F. (2004). Legal mobilization by trade unions: The case of Shanghai. *China Journal*, 52, 27-45.  
<https://doi.org/10.2307/4127883>

### General rights

Copyright and intellectual property rights for the publications made accessible in HKBU Scholars are retained by the authors and/or other copyright owners. In addition to the restrictions prescribed by the Copyright Ordinance of Hong Kong, all users and readers must also observe the following terms of use:

- Users may download and print one copy of any publication from HKBU Scholars for the purpose of private study or research
- Users cannot further distribute the material or use it for any profit-making activity or commercial gain
- To share publications in HKBU Scholars with others, users are welcome to freely distribute the permanent publication URLs

---

## LEGAL MOBILIZATION BY TRADE UNIONS: THE CASE OF SHANGHAI\*

---

**Feng Chen**

China's economic reform has brought waves of labor disputes between workers and management over a wide range of issues, from job contracts, wages, benefits, pensions and unemployment compensation to working conditions.<sup>1</sup> The majority of the disputes are caused by management's encroachment of workers' rights. Workers have few countervailing means in the face of this. Such asymmetrical power relations partly result from state policy. In pushing for market-driven industrial restructuring, the state grants managers extensive powers, which are often abused, but denies workers the right to independent organizations to counterbalance the powers of management.

Despite this asymmetry, workers' efforts at redressing their grievances are increasing. While protests have become widespread across the country, a growing number of workers are also seeking justice through law suits.<sup>2</sup> This phenomenon can be attributed to the growth of awareness of rights in a society that has begun to stress the rule of law. Workers' legal actions occur within this same general context, but the workers' actions differ somewhat from other citizens' litigation against government bureaucrats or peasants' lawsuits against rural cadres. Legal action in those instances, whether by an individual or by a group of people, is largely taken by claimants without the backing of any organization. However, in many cases of workers' law suits, trade unions play an active role in providing legal aid to the workers and pursuing settlements in their favor. Other government organs, such as labor bureaus, arbitration

---

\* Funding for this research was provided by the Research Grants Council of Hong Kong. I would like to thank Anita Chan, Jon Unger and three anonymous reviewers for their comments and suggestions.

<sup>1</sup> See Anita Chan, *Chinese Workers under Assault* (Armonk: M. E. Sharpe, 2001).

<sup>2</sup> See, for example, Neil Diamant, Stanley Lubman and Kevin O'Brien (eds), *Engaging the Law in China: State, Society and Possibilities for Justice* (Palo Alto: Stanford University Press, forthcoming); Minxin Pei, "Citizens v. Mandarins: Administrative Litigation in China", *The China Quarterly*, No. 152 (December 1997), pp. 832-62; Kevin J. O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China", *The China Journal*, No. 51 (January 2004), pp. 75-96.

committees, and Letters and Visits Offices,<sup>3</sup> as well as NGOs and private law firms, are also involved in offering assistance to workers. But the unions' provision of legal aid is significant in that it has been adopted as a deliberate strategy to protect labor rights by an organization that has been belittled by foreign analysts.

The stereotypical image of the official Chinese trade union—the All China Federation of Trade Unions (ACFTU) and its branches at various levels—is that it is an instrument of the state designed to control industrial workers and that it is powerless when it comes to defending workers' interests. Yet union involvement in legal contentions on behalf of workers indicates that the ACFTU, China's sole lawful labor organization, is asserting a role in labor disputes, even though the basic pattern of its relationship with the state remains largely unchanged. Unions are pressing hard in workers' legal cases, representing them on arbitration committees or in court, provoking public discourse on the labor rights issue, and promoting pro-labor legislation. Although the unions' active legal role cannot significantly change labor's weak position in an emerging market economy, it constitutes part of a labor struggle in China despite the country's entrenched one-party rule that precludes autonomous, independently organized labor movements.

In the Western literature, two types of legal mobilization can be identified. One involves individuals seeking resolution of "private" disputes,<sup>4</sup> with an aim to win an immediate redress for perceived injustice. It routinely occurs in a society with a sound legal system. The other type refers to the ways in which organized movements seek broad changes in public policies and social practices. In this instance, law becomes a critical resource that movement activists mobilize to advance movement goals.<sup>5</sup> Litigation and other legal tactics are flexible tools that enable activists to employ existing statutes to challenge the status quo.<sup>6</sup> Despite their differences, in both types of legal mobilization the existing legal conventions provide some of the most important "strategies of action" through which citizens routinely navigate.<sup>7</sup>

---

<sup>3</sup> Isabelle Thireau and Hua Linshan, "The Moral Universe of Aggrieved Chinese Workers: Workers' Appeals to Arbitration Committees and Letters and Visits Offices", *The China Journal*, No. 50 (July 2003), pp. 83-103.

<sup>4</sup> Donald Black, "The Mobilization of Law", *Journal of Legal Studies*, No. 2 (1973), pp. 125-50.

<sup>5</sup> Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: The University of Chicago Press, 1994).

<sup>6</sup> Kevin O'Brien, "Rightful Resistance", *World Politics*, No. 49 (October 1996), p. 48.

<sup>7</sup> Ann Swidler, "Culture in Action: Symbols and Strategies", *American Sociological Review*, No. 51 (1986), pp. 273-86; also see France Kahn Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System", *American Political Science Review*, No. 77 (1983), pp. 690-703.

Although sharing certain characteristics of both of these two types, legal mobilization by Chinese trade unions does not exactly correspond with either. Most legal action arising from labor disputes originates with individual workers through litigation aiming to redress their private grievances.<sup>8</sup> The union's role is to provide workers with legal consultation and representation. However, as my case study in Shanghai will show, unlike ordinary legal professionals the union is more than a "third party" that is called upon to intervene in a particular dispute.<sup>9</sup> It uses workers' private cases to advocate labor rights in workplaces and to call for more effective law enforcement. By doing this, the union has turned workers' individual legal mobilization into a form of union action that represents its constituency. This is one of the few means by which the union seems to be remaking itself into a labor organization in situations of industrial conflict.

On the other hand, legal mobilization by Chinese trade unions is essentially reactive rather than proactive, aiming to correct the infringements of rights already stipulated in law, rather than pursuing new rights claims that have not already been formally recognized by China's political leadership.<sup>10</sup> The unions' assistance to law suits seeks to ensure the execution of existing legal codes that have often been ignored, rather than to use the law to push for social and political changes.

To what extent does this form of legal mobilization reflect the opportunities for and constraints on the ACFTU's role in labor relations? This paper argues that such legal mobilization is the only viable strategy today that allows the official Chinese union to confront employers on behalf of workers. Other grass-roots union strategies to redress workers' grievances are either ineffective (for example, collective bargaining or the enterprise Staff and Workers' Representative Council) or prohibited (for example, strikes). Channeling labor disputes into legal procedures is therefore the most realistic mechanism by which a district union can attempt to curb managerial power. It is true that even this mechanism should be regarded as serving the state's corporatist purpose of containing and de-politicizing worker discontent. After all, the legal system in any society tends in the aggregate to support the existing power relations. Nevertheless, the sanctioned legal mechanisms offer the ACFTU a window of opportunity to act like a labor organization *vis-à-vis* workers' rights.

The findings of this paper are based on fieldwork in 2000–2002 in Shanghai. The information derives from several sources: 1) interviews with

---

<sup>8</sup> See Mary E. Gallagher, "'Use the Law as Your Weapon!' Institutional Change and Legal Mobilization in China", in Neil Diamant, Stanley Lubman and Kevin O'Brien (eds), *Law and Social Change in China*.

<sup>9</sup> Kevin O'Brien, "Law and Society in People's Republic China", *ibid*.

<sup>10</sup> Michael McCann, *Rights at Work*, p. 7.

union cadres at different levels and with legal professionals working for the union's legal aid program; 2) field observations of the daily operations of legal service centers and of city-wide union-organized public legal consultations; 3) records of legal cases provided by the Shanghai General Trade Union (SHGTU) and its subsidiary legal service centers; 4) unpublished circulars and documents of the SHGTU; and 5) Chinese mass media reports.

### **Legal Mobilization as a Union Strategy**

The ACFTU has a double institutional identity. On the one hand, it is part of the Party-state apparatus. This institutional embedding in the Party-state sets the limits for the union's operational autonomy. It is preordained that the organization's priority is to serve the state's goals rather than labor interests, and that its actions cannot be at odds with the state's preferences. On the other hand, the ACFTU is also China's only labor organization and has been assigned the role of representing and protecting workers. Such dual roles, described by some scholars as "classic dualism",<sup>11</sup> are intrinsically contradictory, and in practice the union federation has tended to prioritize the state's goals over its representational function.<sup>12</sup> The union was forced into this uncomfortable situation, and historically there were some efforts by top union leaders, such as Li Lisan and Lai Ruoyu, to emphasize the organization's autonomy even during the time of Mao,<sup>13</sup> but nonetheless the unions' representational and protective roles were insignificant before the current period of economic reform.<sup>14</sup> The inherent contradiction in the union's dual role in the pre-reform period was, however, largely diluted by a paternalistic system in which workers were the primary beneficiaries, as well as by an ideology that emphasized the common interests of the state, management and workers. In a state that was run in the name of the workers, the union was only a symbolic bridge between the workers and the Party-state, and its representational function was irrelevant. However, the economic reforms since the 1980s have intensified the contradiction

---

<sup>11</sup> Alex Pravda and Blair Ruble, "Communist Trade Unions: Varieties of Dualism", in Alex Pravda and Blair Ruble (eds), *Trade Unions in Communist States* (Boston: Allen & Unwin, 1986), pp. 1-22.

<sup>12</sup> Jude Howell, "Looking beyond Incorporation: Chinese Trade Unions in the Reform Era", *Mondes en Development*, No. 25-99 (1999), p. 74.

<sup>13</sup> Yunqiu Zhang, "From State Corporatism to Social Representation", in Timothy Brook and Michael Frolic (eds), *Civil Society in China* (Armonk: M. E. Sharpe, 1997), pp. 127-8.

<sup>14</sup> Greg O'Leary, "The Making of the Chinese Working Class", in Greg O'Leary (ed.), *Adjusting to Capitalism: Chinese Workers and the State* (Armonk: M. E. Sharpe, 1998), p. 52.

inherent in the union's functions.<sup>15</sup> The state's retreat from socialist paternalism has broken workers' economic security, leaving their well-being to the market, while the overall state developmental strategy tends to be biased in favor of capital/management. As workers are increasingly subject to arbitrary management, their demand for unions to represent and defend them has grown. In response, voices have emerged within the union apparatus calling for a more active role.<sup>16</sup> A problem, however, concerns the amount of space and the institutional means available to the unions to play a representational role. Critics from outside the ACFTU dismiss the organization as a pliable instrument of the state.<sup>17</sup> Other observers of Chinese labor, on the other hand, have noticed institutional changes that allow unions to have more influence. Some earlier studies, for instance, found that the unions were able to play a policy-making role on labor affairs. This was accomplished through such means as "double postings", whereby union officials held simultaneous posts in local Party and government organs, and the "joint conference system", whereby the government consults with the unions on a regular basis.<sup>18</sup> Union representatives were designated to head mediation committees in workplaces that are responsible for solving labor disputes. They also sat, together with representatives of the government and management, in arbitration committees at the county, urban district, and city levels.<sup>19</sup> While these are important institutional changes that indicate an elevation of unions' political and legal status in industrial relations, to what extent such formal changes in status translate into unions' representational capability in labor disputes is not clear. Some scholars have pointed to the fact that Chinese unions are now operating in a new legal context in light of the 1994 Labor Law and the Trade Union Law,<sup>20</sup> which was introduced in 1992 and amended in 2001. From the state's perspective, these laws can channel workers' complaints into officially prescribed mechanisms for settling labor disputes, therefore preventing them

---

<sup>15</sup> Gordon White, Jude Howell and Shang Xiaoyuan, *In Search of Civil Society: Market Reform and Social Change in Contemporary China* (Oxford: Clarendon Press, 1996), Chapter 3.

<sup>16</sup> See Feng Chen, "Between the State and Union: The Conflict of Chinese Trade Unions' Double Identity", *The China Quarterly*, No.176 (December 2003), pp. 1006-28.

<sup>17</sup> The most severe criticism of the ACFTU can be found in *China Labor Bulletin* and *China Labor Watch*, published by dissident labor activists from China, based respectively in Hong Kong and New York.

<sup>18</sup> Gordon White, Jude Howell and Shang Xiaoyuan, *In Search of Civil Society*, pp. 53-7.

<sup>19</sup> Ching Kwan Lee, "Pathways of Labor Insurgency", in Elizabeth Perry and Mark Selden (eds), *Chinese Society: Changes, Conflict and Resistance* (London and New York: Routledge, 2000), p. 47.

<sup>20</sup> For example, Ng Sek Hong and Malcolm Warner, *China's Trade Unions and Management* (New York: St. Martin Press, 1998).

from being translated into open protests. The Labor Law codifies labor rights and stipulates procedures for the settlement of disputes. The Trade Union Law spells out what the unions can do in this process.<sup>21</sup> But little research has been conducted about how unions actually take advantage of these laws to defend workers.

### **Legal Mobilization in Shanghai: The Context and Institutions**

I have chosen the Shanghai General Trade Union (SHGTU) as a case study for two reasons. First, Shanghai, as the largest industrial city in China, has taken a lead in market reform. The city was selected by the central government in 1992 as a site to experimentally implement the “modern enterprise system” aimed at reshaping cumbersome state-owned enterprises (SOEs) to fit a market economy. Since then, numerous SOEs have been converted into shareholding companies, sold or leased to private hands (either domestic or foreign), merged with one another, or just allowed to go bankrupt. Such reshuffles have fundamentally changed labor relations in the city’s traditional industries. Furthermore, Shanghai is one of the major cities where the private sector is thriving. By 2001, 1.2 million people were employed in private enterprises (including 544,000 in foreign-owned ones).<sup>22</sup> In short, Shanghai has experienced drastic industrial restructuring on the one hand and fast private-sector growth on the other. These two developments are engendering new industrial relations ridden with various forms of labor disputes that have national implications.

Secondly, the SHGTU is a pioneer among local unions in seeking an active role in litigation to protect workers, and its practice was regarded by the ACFTU as an example that unions in other localities should learn from. Over twenty provincial and municipal trade unions have established Legal Aid Centers (LACs) following in the footsteps of the SHGTU. Various explanations have been offered as to why the SHGTU has been so active in this. For example, some labor scholars in Shanghai attribute it to the SHGTU’s strong leadership. Others believe that the SHGTU has always taken the lead in union work in China.<sup>23</sup>

Before 1995, mediation at the enterprise level was the chief mechanism by which to settle disputes. With the help of the SHGTU and its branches, labor dispute mediation committees (*laodong zhengyi tiaojie weyuanhui*) were established in most of the SOEs. The various industrial bureaus to which enterprises were subordinated would step in only when mediation failed. One of

---

<sup>21</sup> Some other national laws also stipulate the role of trade unions in labor relations, such as the Publicly-Owned Enterprise Law and the Joint Venture Enterprise Law.

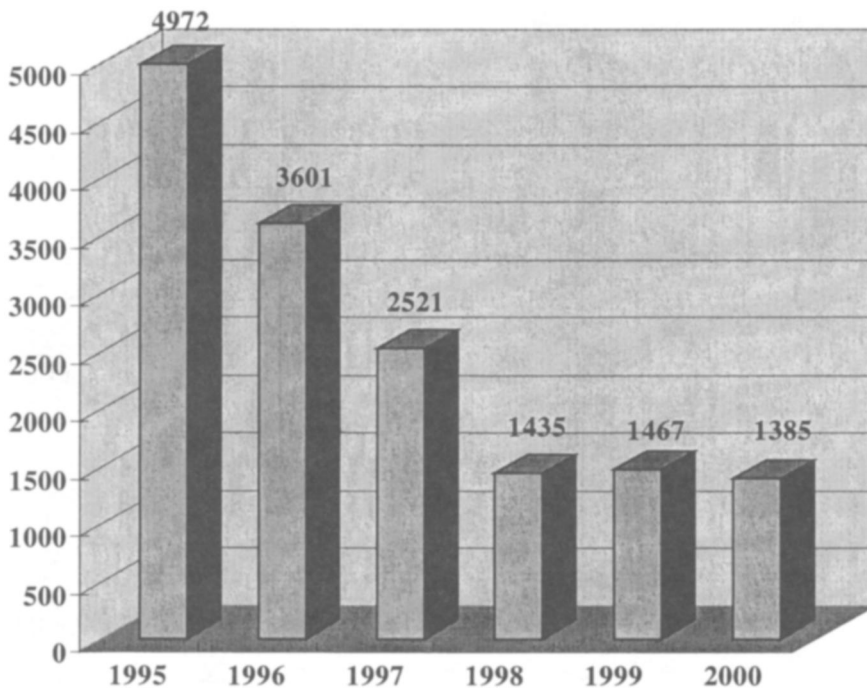
<sup>22</sup> *Shanghai tongji* (Shanghai statistics), [http://www.stats-h.gov.cn/2002shtj/tjnj/2002/tables/3\\_17.htm](http://www.stats-h.gov.cn/2002shtj/tjnj/2002/tables/3_17.htm)

<sup>23</sup> Personal communications with labor scholars in Shanghai, June 2001.

the important aims of mediation was to defuse disputes within the enterprise before they turned nasty.

However, this method began to lose its effectiveness as industrial relations became increasingly conflict-prone. The following Figure shows that the number of disputes mediated in enterprises has decreased since 1995. Several interrelated

**Figure 1: The Number of Labor Disputes Mediated at Shanghai Enterprises, 1995–2000**



Source: The SHGTU: *Shanghai laodong guanxi sanfang xieshang jizhi chutan* (A Preliminary Inquiry into the Tripartite Mechanism in Labor Relations), circular, February 2002.

factors appear to have played a role in this. First, with accelerated industrial restructuring, the numbers of labor disputes not only increased dramatically, at a rate of 30–35 per cent each year in Shanghai in the years 1995–2001,<sup>24</sup> they also became so complicated in content and scope that the enterprise-level

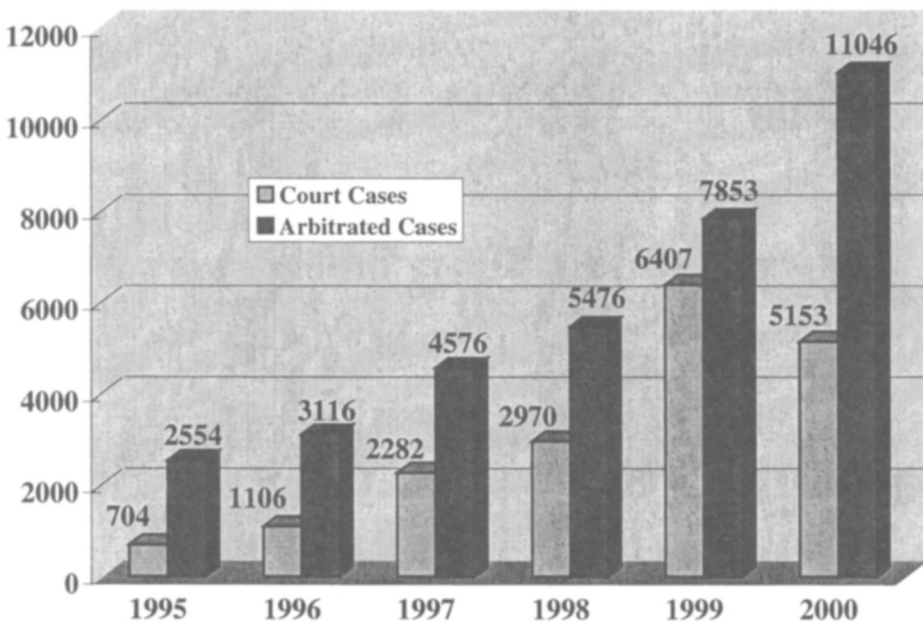
---

<sup>24</sup> SHGTU circular, February 2002.



mediation committees could no longer cope with them effectively. Especially with the Labor Law's passage in 1995, many disputes became legal matters, and handling them was beyond the mediation committees' ability. Furthermore, many workers turned away from the mediation committees because they found that their workplace unions, supposedly representing workers in the committees, were not helpful. Many of the union branches at the enterprise level were controlled by management and failed to speak up for workers,<sup>25</sup> or were weakened by restructuring and simply ceased to function. The dramatic changes in the structure of property rights in SOEs also weakened the intervening power of superior agencies that used to have direct control over enterprises.<sup>26</sup> And the private and foreign-owned enterprises, where industrial conflicts occurred most often, contained few mediation committees or mechanisms to settle disputes.

**Figure 2: The Number of Labor Disputes Arbitrated and Adjudicated in Shanghai during 1995–2000**



Source: The SHGTU: *Shanghai laodong guanxi sanfang xieshang jizhi chutan* (A

<sup>25</sup> Interview with a SHGTU official, May 2000.

<sup>26</sup> All SOEs used to be subordinate to the municipal government's industrial bureaus. With industrial restructuring aimed at separating the government and enterprises, the industrial bureaus have now turned into state holding corporations (*konggu gongsi*) whose power over enterprises is significantly reduced.

Preliminary Inquiry into the Tripartite Mechanism in Labor Relations), circular, February 2002.

While the disputes mediated within enterprises decreased, the cases that were brought to district arbitration committees and courts increased (Figure 2), and the need for legal assistance grew correspondingly. Workers who were entirely unfamiliar with legal procedures chose to directly petition higher authorities (*shangfang*) to redress their grievance.<sup>27</sup> Not infrequently, disputes led to workers' collective protests. It was against this backdrop that the SHGTU started to emphasize the union's role in assisting litigation, making it clear in 1995 that "when workers' and staff's legitimate rights are violated, the trade union should support them to appeal, apply for arbitration, file litigation, and provide legal assistance".<sup>28</sup> In 1997, the SHGTU established China's first Legal Aid Center (LAC) for workers. Thirty-four branches have since sprung up in Shanghai's districts and to serve specific industrial sectors (for example, textiles, steel, machine tools and so on).

As a section of the Legal Department of the SHGTU, the union's municipal LAC is a small entity with only six full-time staff, three of whom are licensed attorneys. But it has established an extensive legal network and is capable of mobilizing a number of sympathetic legal professionals to help, including law professors and legal professionals from private law. Currently, the unions have a total of 400 staff working for the LACs at both the SHGTU and district/industrial sectors, and over 80 lawyers from different firms can be relied upon to offer assistance when needed, either as free services or for only a symbolic fee. For example, one lawyer working for the municipal LAC helped with about a hundred cases in 2001, including litigation, consultations and the preparation of legal documents on workers' behalf, but the SHGTU paid him only 2,000 yuan (a law firm in Shanghai usually charges 3,000 yuan per labor dispute case). "They're all our friends and don't work for us for money",<sup>29</sup> the head of the municipal LAC claims. LAC charges clients 300 yuan for each case, but nothing for workers who have financial difficulties. This means that quite a large number of workers who seek help can enjoy free legal services. Although the SHGTU's municipal LAC is run on a small budget—100,000 yuan per year (not including staff salaries)—the voluntary services have enabled it to break even.

---

<sup>27</sup> For example, in a SHGTU investigation of 2,297 dispute cases, 38 per cent of workers involved expressed their intention to petition higher authorities rather than seek legal redress. *Laodong bao* (Labor Daily), 13 September 2001.

<sup>28</sup> *Shanghai shi gonghui tiaoli* (Shanghai Municipal Trade Union Ordinances), 1995.

<sup>29</sup> Interview with the deputy director of the Legal Department of SHGTU, April 2001.

### Providing Legal Aid: Three Roles

Legal aid consists of three areas: consultation, mediation and litigation.

*Consultation:* Many of the workers involved in labor disputes lack any knowledge of labor laws and relevant municipal regulations. Even if they feel strongly that their rights have been abused, they have no idea of the legal procedures for dispute settlement or which particular article of law they could resort to in order to redress their grievance. LACs set regular consultation times during which such workers can walk into their offices for free advice. The workers describe their cases and provide evidence, if available, such as contracts, salary sheets, contract termination notices, pension records and so forth. LAC staff will then help to analyze the cases for the workers in accordance with laws and regulations. While I was at the SHGTU's LAC one afternoon in August 2001, two union legal staff met about two dozen visitors. Of these, it was suggested that nine should pursue arbitration, which is the first legal procedure in labor dispute settlements. To suggest arbitration means the LAC staff is strongly convinced that workers' rights have been infringed and legal redress is needed.

The consultation is not simply an interactive process between an individual client and a legal staff member. It is also a process in which workers learn of the collective nature of their individual experiences and are exposed to broader legal knowledge not related to their individual cases. Interestingly, this has something to do with the physical space where the consultations are held. Largely due to financial constraints, an LAC usually has only a single office with no waiting room. So the conversations between a worker and a legal staff member take place not in private but in an open setting. There is always a crowd of people surrounding the table where the conversation takes place. Nobody seems to care about "privacy", as what is being discussed has been collectively experienced.

This is also the case at the open legal consultations that the SHGTU organizes in public places (for example, parks and streets) in order to make legal knowledge more accessible to workers and, in the words of a union official, to "create a social atmosphere for paying attention to labor rights issues".<sup>30</sup> Such public events are usually advertised in popular local newspapers<sup>31</sup> and often attract several thousand people.

These two types of consultations provide a "public space" for workers to discuss their cases among themselves. During my one-day observation in a

---

<sup>30</sup> Interview with the deputy director of the legal department of SHGTU, April 2000.

<sup>31</sup> For example, the SHGTU ran an ad in *Laodong bao* (Labor Daily) on 3 December 2001, announcing that its LAC, together with 20 district LACs, would hold open legal consultations for workers simultaneously at over 20 locations, including parks, cinemas, streets, workers' clubs and shopping malls.

LAC and another day at a public consultation, I found that many workers clustered together to talk among themselves about their cases while waiting to see the LAC staff. When one worker was describing his or her experiences, others listened attentively. They then commented on the case, referred to their own experiences, and “taught” the person what he or she should do to press for the case. Very often, their exchanges turned toward criticism of society and the authorities: “There is no justice at all”; “The society is too dark”; “They [referring to the government or enterprises] don’t treat us as human beings”; “They’re not going to let us live”; “They’re bringing ruin to us”. This may not be what the unions anticipated.

*Mediation:* While mediation at the workplace level has been less effective in settling labor disputes, the SHGTU still emphasizes it as an important method by which LACs can intervene in labor disputes. The official legal culture stresses mediation as a primary way to defuse social conflict, but there are more specific reasons for the SHGTU to prefer a non-litigant approach. First, many workers are still reluctant to be involved in direct confrontations with their employers in either arbitration committees or courts. This is not only because many workers are not yet used to litigation. They are afraid that, if they win the case, employers have various means of retaliation, such as shifting them to arduous or more menial posts or refusing to renew their contracts afterward—a phenomenon described as “winning the case, losing the rice bowl”. Second, there are some gray areas where no law can be exactly applied to a disputed issue. Mediation is a workable way of problem-solving which may be preferable for both employees and employers in such a case. Third, trade unions calculate that on some occasions workers benefit more from mediation than from litigation under the current labor relations institutions and that an open legal showdown is not necessarily in workers’ interests. Consequently, more cases are mediated than are brought for arbitration and adjudication (See Table 1).

Two cases illustrate when and how LACs choose mediation.<sup>32</sup> One young woman worked for a joint-venture store for four years and took maternity leave in November 1998. When she returned to the store to get reimbursed for her medical fees, she was refused and told she was dismissed. Only 1,000 yuan was given to her as compensatory payment. She turned to the SHGTU’s municipal LAC for help. During the investigation, the union’s legal staff found that the employer had never signed a contract with the woman. This meant that the woman would not be able to win the case by charging the employer with “dismissal without reasons”. She was one of a large number of victims of a poorly regulated labor market where employers take advantage of poor execution of the Labor Law to evade their responsibilities to employees. If the case was brought to court, the union reasoned, the best result would be that the

---

<sup>32</sup> I collected these two cases during my fieldwork in the summer of 2002.

employer would be fined for violating employment regulations (namely, hiring without a contract) while the victim would obtain nothing as she had no contract. In the worker's best interest, LAC staff sought to mediate by persuading the employer to reconsider its decision in order to avoid litigation

**Table 1: Legal Aid by the SHGTU's LACs**

Year	Cases represented by union LACs at arbitration committees & courts	Cases settled by union LACs through mediation	Indictments and legal documents prepared by union LACs on behalf of workers	No. of workers receiving legal advice from union LACs	Complaint letters handled by union LACs
1999	More than 200	768	134	11,000	1,949
2000	357	1,125	N/A	9,170	1,285
2001	358	1,231	165	18,500*	1,432
2002	307	785	98	1,400**	821
2003	580	1,261	151	7,539	870

*Source:* Annual work reports of the Legal Department of the SHGTU and *Shanghai gonghui nianjian* (Yearbook of the Shanghai Trade Union) (Shanghai: Wenhui Chubanshe, 2000).

\* The high number of people receiving legal advice was due to several well-publicized public consultations held by the SHGTU.

\*\* The lower number of people receiving legal advice from trade unions in 2002 might be due to the establishment that year of the Legal Service Center for Workers at the East China University of Politics and Law, a high-profile legal aid agency with funds from the Netherlands that attracted a large number of workers. The center received 40–50 people daily when I visited in April 2002.<sup>33</sup>

that would result in a fine. The employer conceded by promising to continue employing the worker and signing a contract with her.

In another case, a young man in a private enterprise who had planned to meet his girlfriend on a certain evening was notified by his employer at short notice to work overtime. The man, already over thirty, took his date seriously

<sup>33</sup> For a detailed account of China's legal aid programs, see Benjamin Liebman, "Legal Aid and Public Interest Law in China", *Texas International Law Journal*, Vol. 34, pp. 210-86.

and so chose not to work overtime. The next day he was informed that he was dismissed. Initially, the municipal LAC decided to help the worker sue the employer as this was a violation of the Labor Law, which stipulates that overtime work should be voluntary. When told of the imminent litigation, the employer responded that the enterprise would not renew the worker's contract, which was due to expire in two months, even if the worker won the case. However, if the worker gave up the litigation, the enterprise would treat his current status (of being fired) as *xiagang* (off post) and renew the contract with him in two months. The LAC considered this compromise preferable.

*Litigation:* As noted, representing workers in labor disputes is the most noticeable role that the unions have played to defend labor interests and hence to recast their own image. In China, the formal legal procedures of labor dispute settlements were established in 1995. Grievances are to be submitted first either to municipal or district arbitration committees within 60 days of a labor violation. If the parties involved refuse to accept the ruling by the arbitration committee, they can bring their cases to the district courts within 15 days after the ruling. They can further appeal to the intermediate municipal court if they disagree with the decision made by a district court. The ruling by the intermediate court will be final and is enforced by district courts.

Most workers in Shanghai press their cases on their own or by retaining lawyers from regular law firms. An official from the SHGTU noted, however, that many of these workers had consulted union LACs in one form or another before they took legal action; at least 20 per cent of the workers involved in labor disputes, he said, turn directly to unions for legal representation, while the rest go to government agencies or law firms for settlements or contend with employers on their own. The LACs have represented, at both arbitration committees and courts, only a few hundred cases in the past several years, from 200 in 1999 to 580 in 2000 (see Table 1), and these only account for a small proportion of all of the cases filed in the city. There are practical constraints in personnel and finances that limit the LACs' capacity to handle a greater number of cases, so only those where evidence of employers' wrongdoing is clear and indisputable and that are perceived to be "grave" and "representative" are selectively taken up.

These tend to fall into four categories: first, arbitrary terminations of labor contracts leading to workers' unemployment; second, arbitrary wage cuts and wages in arrears; third, failure to pay the "three insurances" for employees or compensation for industrial injury; and fourth, retaliations against plant union officials who speak out. Any particular case, however, could involve more than one form of violation. The following cases are thought to be "representative" by the SHGTU, which brought them to court.<sup>34</sup>

---

<sup>34</sup> These cases were first briefly mentioned to me by the Legal Department of the SHGTU as successful examples during my field trip in 2001–2002. To further understand the details of

*Case 1:* The Shanghai Hongxin Bearing Factory declared bankruptcy in January 1998. Many employees were either transferred to other enterprises or allowed to take early retirement. Thirty workers, aged between 30 and 54, and mostly female, left the factory with bankruptcy settlement payments of 20,000–30,000 yuan. They became jobless for half a year until opportunities turned up when the parent company of their factory referred them to Kangzheng Community Service. The latter made an offer that appeared tempting: it would sign non-fixed contracts (*wuguding hetong*) with these workers (meaning that they would be employed until retirement) at a salary of 600 yuan per month, plus 200 yuan for food and transportation, and the company would also pay three types of insurance (pension, medical and unemployment) for the workers. But this attractive offer was accompanied by a cruel precondition: the workers must hand back their bankruptcy settlement fees to the company. Desperate for jobs and expecting long-term employment, 30 workers paid 800,000 yuan in total and signed contracts with Kangzheng.

However, it turned out to be a hoax. Only three months after they began their employment, Kangzheng began to suspend the payments of salary, and by May 1999 simply stopped paying any money or providing the “three insurances” for all 30 workers. Feeling cheated, the workers lodged collective complaints with district and municipal government agencies, and in the meantime turned for help to the SHGTU and the trade union of the Machine Tool Company (*jidian gonghui*), which was the parent company of their previous factory. The LACs at the SHGTU and the company jointly decided to take the case not only because this was a grave breach of labor contracts but also because wage arrears had become a major form of encroachment on workers’ interests and constituted one-third of labor disputes in Shanghai, and withholding the “three insurances” was turning into an important source of disputes.<sup>35</sup> The union filed the case on behalf of the workers at the district arbitration committee. Two licensed legal professionals from LACs of SHGTU and the trade union of the Machine Tool Company represented the 30 workers.

At the arbitration committee, the union’s lawyers demanded that the workers’ contracts with Kangzheng be terminated; that Kangzheng return back pay as well as all the money that workers had handed in when they were hired; and that it pay the “three insurances” for the period of the workers’ employment. After tense debate, the district arbitration committee ruled in favor of the workers. Refusing to accept the ruling, Kangzheng submitted the case to the district court, on the grounds that a document had been attached to its labor contract with the workers stating that the amount of the money the workers

---

the cases, I interviewed union legal staff who represented workers in the disputes, as well as collecting court rulings and the SHGTU’s circulars on the cases.

<sup>35</sup> Interview with legal staff at the LAC of the trade union of Machine Tool Company, April 2002.

handed in should be deducted over the period of their employment and the company only needed to return what was left over. But it turned out that this attached document had never been made known to the workers. Kangzheng lost in the district court and appealed to the intermediate court, only to be defeated a third time. All of the workers' demands were met after a nine-month legal battle.

*Case 2:* The foreign manager of a joint-venture firm dismissed three workers, including a member of the firm's trade union committee, in April 1999, on the basis of dereliction of duty and damaging the firm's interests. The workers at first requested mediation within the firm. The firm's trade union contacted the manager, informing him that his decision violated the formal procedure for termination of contracts, because by law the union must be consulted in advance of any managerial decision to end workers' and especially union cadres' contracts.<sup>36</sup> The manager refused to reconsider his decision. With the support of the firm's union, the workers turned to the LAC run by the trade union of the Machine Tool Company, which in turn reported the case to SHGTU's LAC. After investigation, both LACs found that the manager's charge against the three workers was groundless and concluded that he had abused his power. Legal staff contacted the manager in an attempt to persuade him to reverse his decision. He refused again, and instead wrote to the city's mayor to complain about the "poor investment environment" and threatened to pull out his investment. Worried by this, the management of the Machine Tool Company warned the trade union that it should "stop before it goes too far" (*shike erzhi*).

But the union did not back off and filed the case with the municipal arbitration commission. In the debate, the LAC's core arguments were that the manager had violated the Labor Law and municipal ordinances—he had no exclusive power to terminate workers' contracts and the trade union should have had a say in the matter. Although the manager appeared before the committee to defend his power of dismissal, he lost the case. During the period of arbitration, the manager dismissed the head of the firm's trade union from his administrative post to punish him for his support for the three workers' legal action. The SHGTU intervened immediately and stated its determination to

---

<sup>36</sup> The firm's union cited Article 30 of the Labor Law and Shanghai's two regulations dealing with the procedures for contract terminations in joint-venture firms: Article 17 of The Ordinances on Personnel Management in Shanghai's Foreign Invested Enterprises stipulates that "the firm's trade union must be consulted when any side (namely, Chinese or foreign) decides to terminate a labor contract, and Article 6 of the Ordinances on Trade Unions in Shanghai's Joint Venture Enterprises stipulates that without the agreement of the trade union in the enterprise and approval of the superior trade union, joint-venture enterprises cannot dismiss workers who are the chairs, deputy chairs, or members of trade union committees".



protect him. Even the firm's superior managing agency thought that the manager had gone too far, and the union cadre was reinstated.

*Case 3:* Ms J was laid off by a state-owned enterprise in 1996 and hired by another company on a short-contract basis in 1997. She was severely injured in an industrial accident in October the same year. When her contract expired, the company decided not to renew it and refused to pay any compensation for her injury. Ms J took her case to the district arbitration committee on her own and the committee ruled that the company should pay a lump sum of 10,668 yuan as industrial injury compensation and 17,780 yuan as employment compensation for the injury. The company rejected both rulings, claiming that it did not have any responsibility for employees on a short-contract basis. Ms J then turned to a union LAC for help. The LAC decided to take up the case in that it represented a "typical" yet striking example of an employer deliberately disregarding the rights of short-term contracted workers. Employers were taking advantage of the fact that workers had been laid off and did not dare to demand the same treatment as regular workers when signing contracts. So the LAC lodged an appeal to the court on behalf of Ms J with the aim of highlighting laid-off workers' rights. After three rounds of trial, the company conceded that it should pay compensation for her injury but still refused to pay the employment compensation. The LAC insisted that the latter must be paid since the injury had made the worker's future employment prospects less promising. Accepting the LAC's argument, the court ruled in favor of Ms J and ordered the company to pay a total compensation of 30,000 yuan.

The unions have won a high percentage of the cases they have taken up.<sup>37</sup> Media exposure is a common strategy to bring these cases to public attention and to highlight them as widespread problems. The SHGTU's own newspaper, *Laodong bao* (Labor Daily), has frequently covered such dispute cases, and makes sharp comments against rights violations by employers. For instance, right before the beginning of the arbitration of the above-mentioned case involving the dismissal of three workers, *Laodong bao* ran an article entitled, "You [referring to the manager] are Not in a Position to Decide", asserting that, in a joint-venture firm, decisions concerning dismissal without the union's consent are against the law.

Handling legal cases has heightened the SHGTU's awareness of the loopholes in current laws and regulations and has prompted it to push to close the loopholes through new labor legislation. For instance, the SHGTU had a significant input in formulating the "Labor Contract Regulations in Shanghai", a municipal law passed at the city's People's Congress in November 2001. According to this, after a merger between companies the employers must continue to fulfill any contract with employees signed before the merger.

---

<sup>37</sup> *Shanghai shi zonggonghui falü yuanzhu gongzuo zongjie* (A Summary of Legal Aid Work of the SHGTU) circular, July 2001.

Moreover, even if an employer has not signed a contract with workers, a contractual relationship still exists. If an employer terminates a contract without notifying the worker 30 days in advance, the contract still holds. The union claimed credit for these articles.

## Conclusion

As has been seen, litigation not only allows the union to represent wronged workers as individuals or small groups but also provides it with the opportunity to advocate labor rights in the broader term. To some extent, it also helps to develop the union's autonomous voice and to promote its institutional identity as a labor organization.

However, the SHGTU's legal mobilization reveals a structural paradox: while the union's activities are considerably constrained by the state, its influence in the legal realm actually stems from its very location in the state and Party structure. Union organizations above the enterprise level are *de facto* state institutions. Moreover, union leaders at the higher levels often hold concurrent posts in Party committees, usually as members of the provincial or municipal Party standing committees. This state-agency and Party status grants the union a kind of authority that Western unions do not possess. For example, the ACFTU and its provincial and municipal branches have a role in the policy-making process. Likewise, due to their institutional status, their interventions in labor disputes within their jurisdictions have to be taken seriously by enterprises, which are confronting a *de facto* government organ.<sup>38</sup> Furthermore, as state agencies, the unions at higher levels command the necessary resources to make their voices heard in the state-controlled media. My study shows that workers in Shanghai at present are willing to seek assistance from the unions at the higher levels and expect them to redress their grievances because they view them as government agencies that have the capability as well as the obligation to rectify their legal grievances. In short, it is the unions' status as a state agency under the current political system, rather than as the representative of organized labor, that enables them to mount effective efforts in the legal arena in the area of labor relations.

This phenomenon arguably shows that, when an association is integrated into a one-party regime, this does not necessarily mean that its assigned constituency cannot benefit.<sup>39</sup> It is true that the ACFTU is more an incorporated

---

<sup>38</sup> Personal communications with a few union heads at a conference in Beijing, October 2002.

<sup>39</sup> For this argument, see Kenneth Foster, "Associations in the Embrace of an Authoritarian State: State Domination of Society?" *Studies in Comparative International Development*, Vol. 35, No. 4 (Winter 2001), pp. 84-109; also Kenneth Foster, "Embedded within State Agencies: Business associations in Yantai", *The China Journal*, No. 47 (January 2002), esp. pp. 58-60.

than a corporatist institution and has limited operational autonomy,<sup>40</sup> yet, precisely because of its institutional incorporation in the state, the union has more authority and influence *vis-à-vis* the issue areas where it is allowed to perform. As shown above, what the union can do, not just in assisting workers' litigation but in promoting a pro-labor discourse in the media regarding the litigation, is closely linked to the union's institutional status.

Clearly, unions' reliance on legal mobilization also suffers from considerable limitations. First, turning to litigation becomes an isolated tactic in the absence of a labor movement. Treating labor abuses as simply legal issues actually evades the structural cause of the abuses—the labor force's lack of any organized capacity to curb managerial power. In fact, the increasing frequency of protest incidents and the increasing number of complaints flowing into LACs clearly indicate that legal aid is insufficient to protect workers. There is no shortage of good laws on paper, but the LACs and the unions behind them lack the muscle and means to see that these get enforced in the first place.

This is due in part to the widespread ineffectual nature of union branches in workplaces. The workplace unions are part of the ACFTU structure but are organizationally subordinated to management, which often leads to their silence or even complicity in managerial violations of workers' rights. Some courageous and committed unionists in workplaces do seek legal redress for workers' grievances, but these efforts become personal crusades against injustice rather than consistent, expected organizational action.<sup>41</sup> Whether they succeed is eventually contingent upon the willingness of high-level organs of the union to intervene.

The unions find their legal role particularly restricted when facing cases of collective layoffs and other forms of encroachment against workers' interests that result from industrial restructuring, such as management shakeups, mergers, or bankruptcy of the enterprise. In the view of some union officials, industrial restructuring is a state policy and cannot be remedied through legal aid. For example, many workers have been laid off and forced to enter so-called "re-employment centers", which provide them with a minimal livelihood allowance for two years and then leave them to their own devices in the job market.<sup>42</sup> This

---

<sup>40</sup> In her analysis of the ACFTU, Jude Howell argues that a corporatist system of interest intermediation implicitly assumes that the constituent unit, such as a trade union, is institutionally distinct from the state, enjoys operational autonomy within the limits of the corporatist pact, and has the power and authority to mobilize its members. Howell, "Looking beyond Incorporation", p. 74.

<sup>41</sup> See, for example, *Gongren ribao* (Workers' Daily), 7 July 1998; 24 April 2000; 8 August 2000; and 25 August 2000.

<sup>42</sup> On how these so-called re-employment centers work in Shanghai, see Feng Chen, "Shanghai's Re-employment Project: Institutional Workings and Consequences for Workers", *China Information*, Vol. 14, No. 2 (2000), pp. 169-93.

practice, as a union official acknowledges, amounts to “using administrative power to forcefully terminate workers’ labor contracts and, strictly speaking, is against the Labor Law”. However, she continues, “Arbitration or other legal proceedings can do nothing about the labor disputes caused by this process, because it is a matter of state policy”.<sup>43</sup>

My findings in Shanghai and elsewhere indicate that the open protests caused by massive layoffs are in fact rarely settled through the union’s legal representation at arbitration committees and courts. In many cases, protesters were dispersed by the promise by local governments to provide a couple of hundred yuan of livelihood allowance. The union does not want to become involved, since lending support to the dismissed workers’ public protests creates an image of sanctioning organized mass action, which is the last thing the union wants to be part of. Thus, when workers rise up against abuses by taking to the streets, the union will not stand up for them. At the Shanghai No. 2 Leather Shoes Factory, when a union cadre came to their protest site to reprimand them and to tell them to leave the street, angry workers beat him up.<sup>44</sup>

Thus, while litigation is an attempt by the union to exert an influence in labor disputes, it also reflects the union’s own constraint on the scope and means of union actions in China. Yet some trade union officials are well aware that the roots of increased labor disputes in China are not merely legal but also political and institutional. As several union cadres interviewed in Shanghai acknowledge, relying principally on litigation involves a high transaction cost, with limited effects, as there are too many complaints and unions have to cope with these on a case-by-case basis, unable to handle most of them. The solution, they believe, is to make workplace unions autonomous *vis-à-vis* management and then grant them the capacity to carry out meaningful collective bargaining on contracts, wages, benefits and so on.

To be sure, Chinese workers would have been worse off without the unions’ legal assistance in seeking redress for their grievances. But the Chinese workers’ predicament is that, although the laws confer various labor rights, they lack effective means to protect these rights outside of bringing law suits, which can only occur after the rights have been violated, and which are expensive and lengthy to pursue. They are permitted to take legal action as individual cases after the fact, but banned from taking collective action to counteract employers. The union’s strategy of litigation would be more effective were it a tactic employed alongside more direct organizational means to affect labor relations.

---

<sup>43</sup> Interview with legal staff at the LAC of the SHGTU, March 2002.

<sup>44</sup> Interview with a labor scholar at Shanghai Trade Union School, June 2000.