

Law Reform in CHINA

Sarah Biddulph

Amending the power of detention for investigation in The People's Republic.



Publicity of an exhibiton of the results of the 'serious strike' campaign, Shanghai, June 1996.

Re-construction of the legal system has been one of the priorities of the Chinese regime ever since adoption of the policy of economic modernisation at the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party (the party) in December 1978. Among the first laws to be passed were the Criminal Law of the People's Republic of China (the Criminal Law) and the Criminal Procedure Law of the People's Republic of China (the CPL).

They were adopted by the Second Session of the Fifth National People's Congress (NPC) on 1 July 1979 and became effective on 1 January 1980.

Since then, both the Criminal Law and the CPL have been amended or added to numerous times. There is now a widely held belief that the Criminal Law and the CPL reflect neither the current state of the law, nor the current needs of society, if they ever did. Priority has been given to comprehensively revising both laws in an attempt to better reflect these 'social needs'. Revision of the CPL was completed and the revised law was adopted by the National People's Congress in its March 1996 meeting. This law will come into effect on 1 January 1997. Work on revision of the Criminal Law is currently under way.

The CPL introduces a number of reforms to the system of criminal procedure. One important reform is to permit an accused person access to a lawyer at an earlier stage of the criminal prosecution process than in the past, though still not as early as some had hoped. The accused person under the old law was entitled to seek advice of a lawyer after the case had been accepted by the people's court and set down for trial, around a week before the trial. Now the accused person may seek legal advice after interrogation by the police (also called the public security organs). Another reform is to abolish the system of 'conviction without punishment' which allowed the procuratorate (the prosecuting organ of state) to record a finding of guilty before trial, but to exempt the person from criminal punishment.

Here, I want to discuss another reform made by this legislation. It was one of the most controversial issues debated in the revision process and involves reform of a power which in fact appeared neither in the old CPL, nor in the new. That is, the abolition of the police power of detention for investigation (shourong shencha). This power has also been translated as 'shelter and investigation'. (In this article I also call it 'the power'.) Detention for investigation is coercive power exercised by the police outside the scope of the CPL. It has been classified as an administrative power. The existence and use of this power illustrates one of the most enduring features of the exercise of coercive powers of the state in China, that is, the concurrent use of 'administrative' and 'criminal' powers.

Sarah Biddulph teaches law at the University of Melbourne.

Background

The debate which preceded the decision to abolish this power reflects the growing divergence of views in China about the proper nature and scope of the state's coercive powers and the ways in which those powers should be exercised. It also gives us some insight into the growing tension between the ways in which organs of state have been accustomed to exercising their coercive powers and the development of legal norms that place limitations on both the types of powers exercised by state organs such as the police, and the manner of their exercise.

The power of detention for investigation is merely one of several administrative powers exercised by the police. This power in particular is used in circumstances almost indistinguishable from the powers exercised by the police under the CPL. One of the criticisms of this power has been that it is used by the police to avoid the more restrictive provisions of the CPL governing pre-arrest detention.

A particular feature of police administrative powers is their flexibility. The number and type of administrative powers has changed since the founding of the People's Republic. The purpose filled by one power may later be filled by another. Even though detention for investigation was created in 1961, powers used for similar purposes existed before this time. Administrative detention as a form of punishment could also be imposed by the police under the Securities Administrative Punishment Law 1957 and under its successor, the Securities Administrative Punishment Regulations 1986. Measures such as administrative 'control' and 'forced (or supervised) labour' were used in the early days of the regime. Their roles were later taken over by administrative punishments such as Re-education Through Labour (under this power a person may be sent to a labour camp for up to four years), and later, for those who had failed to reform after imprisonment, Retention For In-Camp Employment. More recently, specialist detention centres for prostitutes have been established, different to re-education through labour camps, where prostitutes are detained for re-education and treatment of disease for between six months and two years. As the war against drugs intensifies, specialist centres for the forcible treatment of drug addiction have also been established. The courts play no role in determining whether a person should be given an administrative punishment.

The content and use of any of these administrative powers may change over time. The purposes for which detention for investigation were originally used have changed significantly over its history of more than 30 years.

The formal distinction made between administrative and criminal powers in many particular instances is a distinction without substance, as the result is deprivation of personal freedom. The distinction is that criminal powers are those set out in the Criminal Procedure Law and imposed by a court, and administrative powers are those powers exercised by the administrative organs of state in their administrative capacity. One of the debates surrounding detention for investigation has been whether it should be considered to be an administrative or criminal power.

In this article I look at the issues which formed the substance of the debates leading up to the final decision to abolish this power. We might ask ourselves how effective the new CPL will be in ensuring uniform and 'fair' treatment of accused persons. Any answer to this question will depend not only on the ways in which the law itself is enforced, but also on the limits placed on the exercise of those administrative

powers which don't appear in the CPL at all. We must wait to see whether detention for investigation has been abolished in substance, or in name only.

Detention for investigation

Today detention for investigation is primarily, though not solely, used as a mechanism for investigation of suspected criminal activities by people who are transient and whose identity is unclear. Public security organs (the police) may detain specified individuals for a period of up to three months to interrogate them, gather evidence and determine whether they have committed any offence. It is a procedure taken before the police have sufficient evidence to determine whether a person has committed an offence worthy of punishment. If they discover evidence of a criminal offence then they may make a formal application to the procuratorate for arrest of the detainee. If interrogation reveals evidence of a more minor infringement then an administrative punishment, such as a warning, fine, or re-education through labour may be given. If no evidence of wrongdoing is discovered, then the person should be released.

Detention for investigation is directed at four types of person. They are:

Those people who have committed a minor offence or crime and do not tell their true name and address and whose background is unclear, or they have committed a minor criminal offence and are suspected of floating from place to place committing crime, committing multiple crimes, or forming a group to commit crime, who need to be taken in to investigate their criminal acts ...¹

The power of detention for investigation has become one of the most controversial police powers. It has passed through stages of relative obscurity, where the existence of the power was not widely known and was not able to be publicly discussed, to its current situation as a focus of public dissatisfaction about police abuse of power. In China there is now widespread opposition to this power from the general public, from academics and from the NPC and people's congresses at local levels. Detention for investigation was the focus of the NPC's Internal Work Judicial Committee inquiry into the enforcement system in 1990. The Committee found that public security organs commonly exceeded the scope and time limits of detention for investigation. It also found that detention for investigation was commonly used as a substitute for criminal investigation and punishment, as well as a substitute for administrative punishments.²

A primary reason for its notoriety is that it is one of the powers most abused by the police. There are also serious legal problems with the power which are related to abuse but also have a broader significance in that they affect the integrity of the legal system as a whole. Although the work of reconstruction of the legal system has been taking place since 1979, not all police powers have been 'modernised'. The form and use of detention for investigation highlights the tensions between recent legal reforms and the continued exercise of coercive powers of state agencies which predate the reforms.

Development of the power of detention for investigation

Detention for investigation has been used in different ways since its introduction in 1961. In November 1961 the Central Committee of the Chinese Communist Party (the 'CCP') approved and issued the 'Report concerning urgently pre-

venting the free movement of the population'. Chinese authorities have always tried to discourage the uncontrolled and unplanned movement of people. After the famine caused by the failure of the Great Leap Forward, huge numbers of people had left their homes. Peasants had drifted to cities in search of food and people in cities had drifted throughout the country, also in search of food. At that time, detention for investigation was used both as a measure to return people who had moved without permission from their place of household registration, as well as to deal with 'counter-revolutionary' and other 'criminal elements' who had 'insinuated' themselves amongst this large group of transients.³

At the end of the Cultural Revolution, a period which had also seen large population movements, the function of returning itinerants to their place of household registration was separated from the criminal investigation aspects of detention for investigation.⁴ Vagrants and beggars are now dealt with under a different power, called detention for repatriation, which is administered jointly by the civil administration and the public security organs. Detention for investigation was only used to detain people suspected of committing crime.

In August 1975, the State Council approved the Report of the Ministry of Public Security and the Ministry of Railways 'Work Meeting Concerning the Situation of the National Railway's Public Order' which proposed the establishment of centres for the detention of 'transient criminal elements'.⁵ Separate detention facilities operated by the public security organs continue to be used for people detained under this power of investigation. Between 1980 and the beginning of the law and order campaign in 1983, some moves were made to integrate the site of detention for investigation into re-education through labour camps, though the part of the rule passed to effect this integration was never implemented. Detention for investigation became an important method for implementing law and order campaigns and its use increased dramatically after 1983.

Arguments about abolition of detention for investigation

Over the last few years, there have increasingly been calls for abolition of detention for investigation and growing concern about abuse of the power. The arguments for abolition of the power have been based not only on the practical problems of the use of the power, but also the increasing disparity between the legal form of the power and the ways in which the legal system is developing.

The arguments put forward by Chinese scholars for abolition of this power are very informative at a general level, as they reveal a growing intolerance for police abuse of power and a sensitivity to the need, in form at least, to protect the integrity of the legal system. The causes for police abuse of this power are complex and I do not address them in this article. Here, I will just set out the main problems so as to give some indication of the types and magnitude of issues which law reformers in China face.

Those who argued for abolition of detention for investigation said that abuses of power were inextricably linked with the existence of the power itself. They argued that these abuses could not be rectified by stricter supervision and better legal definition of the power. Others who supported the retention of the power agreed that there were both legal and practical problems with the power.

They pointed out though, that that the power had been exercised in fact over a long time, it was very effective and

had 'Chinese characteristics'. They argued that detention for investigation should be retained but given a proper legal basis, and that the rules on which it was based be clarified.⁶

The debate about the proper legal character of the power was, to an extent, also used as a vehicle for the arguments about abolition of the power. Classification of the power as criminal in nature was primarily used as an argument for its abolition. Classification of the power as administrative on the other hand, was often used to ground an argument for retention of the power. Some acknowledged that it was in substance a criminal coercive power and suggested that it be included within the CPL. The predominant view though, was that it should be seen as an administrative power.⁷

Practical problems with the use of detention for investigation

There is good evidence that especially since 1983, detention for investigation has been widely used by the police to facilitate 'campaign style' enforcement. That is; to strike heavily and quickly against targeted groups and activities. The extremely serious abuses of this power at the local level are widely known in China and have even been acknowledged by the Ministry of Public Security. Since 1978, the Ministry has issued a series of directives to its lower level organs exhorting them to confine use of the power within the limits set by administrative regulation.⁸ These calls have been ineffective.

There are a number of main areas of abuse of the power identified by Chinese academics and the police themselves. The first is 'expanding the scope of targets'. The targets for detention, which are already framed in very wide terms, are set out above. People are detained for a range of reasons that have nothing to do with the scope of people who may lawfully be detained. They include: local people whose identity is well known to the police, mentally ill people, alcoholics, people who illegally cohabit and people who are involved in economic disputes. The last group are often detained as a means of procuring payment of the disputed amount on behalf of one party to the economic dispute.⁹ An indication of the seriousness of this problem can be found in a notice from the Ministry of Public Security entitled Notice on Immediately and Conscientiously Rectifying Detention for Investigation Work which was issued on 31 July 1986. In that notice the Ministry stated that in some areas of China the proportion of people detained under this power who actually fall within the scope of targets was less than 10% of detainees. In eight other provinces (or province level administrative units) the proportion was less than 25%. Only in four provinces was the proportion over 80%, which was the Ministry target.

Another major problem is 'lengthening the time of detention'. A significant number of people are detained for longer than the maximum of three months. Some people are held for periods of one, two, three and even five and ten years without being released.¹⁰

'Poor management of detention centres' has also been a major problem in the specialist detention for investigation centres. This includes overcrowding, poor sanitation, inadequate food, clothing, bedding, spread of communicable diseases and failure to protect detainees from being attacked and beaten by other detainees. This problem was especially pronounced at the height of the law and order campaign from 1983 to 1984.¹¹ There is also evidence that public security

officials beat, abuse and humiliate detainees and use torture to extract confessions from detainees.¹²

Legal problems with the power of detention for investigation

The legal form of detention for investigation highlights a number of problems with the current legal structure of police powers as a whole in China:

- the existence of a wide range of administrative powers exercised in parallel to the powers granted to the police under the Criminal Law and the CPL;
- the vagueness of rules defining when and how they may be used;
- the high level of overlap between them; and
- the lack of effective mechanisms for supervision of police use of these powers.

Legal basis of detention for investigation

One of the concerns about detention for investigation is that it has no proper legislative basis. This means that there is no legislation passed at the level of National People's Congress or its Standing Committee that forms the basis of this particular power.

The problems of determining which documents actually form the legal basis of the power really only became an issue when the Administrative Litigation Law (the ALL) was passed in 1989. Under that law, the people's courts are empowered to determine the lawfulness of specific administrative actions. Initially, it was unclear whether detention for investigation would fall within the scope of the acts that could be reviewed under that law. It was determined that detention for investigation fell within the scope of 'administrative coercive measures' which can be reviewed by the people's court under article 11(1)(ii) of the ALL.

The Opinion of the Supreme People's Court on Several Questions on the Implementation of the 'PRC Administrative Litigation Law' states at article two that '... citizens who are dissatisfied with the decision of a public security organ for coercive detention for investigation, can commence litigation in the people's courts'. Since then there has been a small number of people who have sued the public security organs for wrongful detention under the power and won.

The question of lawfulness of an act is to be determined on the basis of laws or regulations of the type specified in the ALL. The People's Court 'may refer' to other lower level administrative regulations and rules when making its judgment, though it is able to ignore these rules if they conflict with laws passed at a higher level.

The problem of the lack of a coherent legal basis for this power then becomes a problem for the people's court in determining what rules form the legal basis of the power and whether they are rules to which the the people's court is obliged to refer.

The rules which are now accepted as forming the standard on which a judgment of lawfulness is to be made are primarily those passed by the Ministry of Public Security itself and were designated as such by the Ministry of Public Security in the Notice of the Ministry of Public Security Concerning Several Questions About Implementation by Public Security Organs of the 'Administrative Litigation Law'. This notice was directed to the lower level public security organs and sets out the documents which were to form the legal basis of detention for investigation and some other administrative

powers. Technically, such a notice should not bind the people's courts and the rules specified in it were originally not intended to be the sole basis for determining lawfulness under the ALL.

That notice provides that the 'targets' of detention are to be determined by article two of the State Council Notice Concerning Supporting the Unification of the Two Measures of Forced Labour and Detention for Investigation with Re-education through Labour of 29 February 1980. Investigation and approval procedures and time limits for detention are to be determined in accordance with the Ministry of Public Security Notice Concerning Strictly Controlling the Use of Detention for Investigation Measures July 1985. In addition, it states that 'reference may also be had' to the Ministry of Public Security Notice Concerning Publication and Distribution of 'Notes of the National Public Security Legal System Work Meeting'.

Even in Chinese legal theory these documents are quite inadequate to form a legal basis for the exercise of this power. They consist of rules which the Ministry of Public Security passed itself and a State Council notice passed for a different purpose, which was not implemented and refers to the targets of detention for investigation as a subsidiary issue.

Legal norms are vague and inconsistent

If we accept that the Ministry of Public Security has effectively specified which notices form the legal basis of the power, the problem that follows is that these notices are vague and mutually inconsistent in some respects. There is no definition for example, of how to determine whether a person is 'floating from place to place', on what, if any, basis a 'suspicion' that the person has committed an offence must be founded on, or what is the nature of the 'minor offences or crimes' which are a prerequisite for detention.

The co-existence of inconsistent regulations defining the power adds to the uncertainty about the scope and nature of the power. It also indicates the fluid nature of the power which is changed and reinterpreted by rules passed by the Ministry of Public Security from time to time. For example, the scope of targets in the 1985 Ministry of Public Security notice referred to above is inconsistent with that set out in the 1980 State Council Notice at article 2 set out above. In the Ministry of Public Security Notice the targets for detention are described as:

... people suspected of floating around committing crimes or people who have committed a criminal act and do not tell their true name and address and whose background is not clear ...

Such a description comes far closer in substance to the targets for imposition of criminal detention under the old CPL than the targets set out in the 1980 State Council notice. As criminal detention and detention for investigation in practice have been used interchangeably, the lack of clear legal distinction between them is not surprising.

Overlap with other powers

As I mentioned in the introduction, the co-existence of criminal law and procedure with a range of administrative powers has been an enduring feature of the Chinese justice system. This distinction has been entrenched in, and justified by, the legal rules governing these powers. Police administrative powers are exercised in parallel to, and as a complement to, the punishments and coercive measures used in the criminal justice system. The law distinguishes between criminal and administrative powers and between punishments and coercive measures. Administrative powers, including punish-

ments and coercive measures, are exercised in order to protect public order in circumstances which are not sufficiently serious to warrant use of the criminal law.¹³ Coercive powers are exercised where there is no evidence to show that a person has committed a punishable offence. Detention for investigation is an administrative coercive power.

Detention for investigation has been used as a substitute both for other forms of investigation and punishment. It has been used instead of giving administrative punishments of detention under the Security Administrative Punishment Regulations 1986 and the legislation these regulations replaced. It has also been used either prior to, or instead of, employing the coercive measures of criminal detention, or arrest, which are set out in the old CPL. For example, article 41(6) provided that one ground for imposing criminal detention was:

if his or her identity is unclear and there is a strong suspicion that he or she is person who goes from place to place committing crimes.

Both criminal detention and detention for investigation address the problem of obtaining sufficient evidence to show that the person in detention has committed a criminal offence.

There have been reports made of the police coercing detainees to make statements and confessions which are later used to provide evidence in the prosecution of a criminal offence.¹⁴ It has been acknowledged that detention for investigation is commonly used as a substitute for criminal detention and arrest. One source relies on incomplete statistics which show that between 80 and 90% of people convicted of criminal offences since the promulgation of the CPL were first taken in for detention for investigation.¹⁵

Although the powers appear to be used interchangeably, in practice, detention for investigation was a much more severe form of detention than criminal detention. Detention for investigation may lawfully last for three months, whereas the maximum time for criminal detention was ten days. The degree of suspicion required for criminal detention is 'a strong suspicion' as opposed to a 'suspicion' which is required for detention for investigation. It is ironic, that on the face of the law, a higher degree of suspicion is required to impose criminal detention than that required for detention for investigation.

One of the trade offs made under the new CPL in exchange for abolition of detention for investigation was to increase the maximum period for criminal detention to 30 days for those people who would previously have fallen within the scope of detention for investigation.

Problems of supervision

The 1985 notice passed by the Ministry of Public Security provides that the exercise of detention for investigation 'should be subject to the supervision of the People's Procuratorate'. However, it appears that the procuratorate has never supervised the exercise of this power. There is an issue of the existence of the duty at all, as the Ministry of Public Security does not have the power to impose a duty on the people's procuratorate, which is actually located higher in the state structure than the Ministry of Public Security. The question of the existence of the duty, and the way in which the duty, if it exists, is to be exercised, was never settled.¹⁶

The main channel for supervision of the exercise of this power is by the people's courts under the ALL, discussed above. Even though the courts asserted jurisdiction over these cases, many public security personnel are reluctant to

appear in court as a defendant for fear of losing face and so their authority. Often the public security organs will deny the court's jurisdiction to hear cases concerning detention for investigation on the basis that they are investigating a criminal matter. These cases indicate that many public security personnel treat the power as though it were an integral part of their criminal coercive powers.

After the ALL, the Administrative Review Regulations (the ARR) were promulgated in 1990, establishing a system of review of the exercise of police administrative powers by either the people's government at the same level, or the higher level public security organ.

Broader ramifications

These legal issues raise two legislative problems at a deeper level. The first is should powers which are virtually interchangeable with those powers granted under the CPL be permitted to exist at all? The second question is about the constitutionality of the power. Should the Ministry of Public Security have the power to regulate the use of a power of this nature which its own officers exercise? Although these questions have already been resolved for detention for investigation, these arguments apply with equal force to other administrative powers, especially re-education through labour.

Undermines the integrity of the CPL

Even though detention for investigation is called an administrative coercive power for the purposes of review under the ALL and the ARR, that did not end the debate about the nature of the power. Those who argue for abolition of the power say that detention for investigation is 'criminal' in nature because it is essentially used for investigation of criminal activities and so it undermines the integrity of the CPL, which is intended to be a code. They say that the similarities between detention for investigation and criminal detention would also mean that including it in the CPL in its present form would undermine the effectiveness and integrity of the existing criminal coercive powers.¹⁷

Those who argue for the abolition of detention for investigation also say that the public security organs ought not exercise a power akin to a criminal procedure power which is not included in the CPL. They point out that a person should either be dealt with under administrative law within the scope of the Security Administrative Punishment Regulations or under the CPL. They argue that there is no justification for the existence of some middle ground represented by detention for investigation which allows a person to be channelled into either the administrative punishment system or the criminal system depending on the outcome of the investigation for which that person was detained.

Similar reasoning is now being used to argue for the abolition of re-education through labour. It is argued that a person should not be deprived of their liberty for up to four years unless convicted by a court after following criminal procedures specified by law. Re-education through labour is an administrative punishment that may be imposed by a committee on the advice of the police for infringements of the law which are not sufficiently serious to warrant criminal prosecution. The maximum amount of time for re-education is three years with a possible extension of one year for a person who has not reformed well.

Contrary to the Constitution

Both opponents and supporters of the retention of detention for investigation agree that the lack of an adequate legislative basis for the power is an issue of great concern. Those who call for the abolition of detention for investigation go further and state that the existence of the power itself is unconstitutional. They claim first, that it is contrary to the spirit of article 37 of the Constitution which guarantees freedom of the person¹⁸ and second, that the State Council does not have power to create detention powers such as detention for investigation.

The first argument rests on an interpretation of this 'fundamental right' as it is set out in the Constitution. Article 37 guarantees that freedom of the person of citizens 'is inviolable' and also provides that 'no citizen shall be arrested' unless approved by the people's procuratorate or the people's court. They argue that the words of the constitutional provision do not contemplate any form of detention other than arrest. However, as there is no specific mechanism by which individuals or groups may directly challenge the constitutionality of either actions or rules, there is no way to assert such an interpretation of the words of the Constitution. The Standing Committee of the NPC is empowered under article 67(1) of the Constitution to interpret the Constitution and supervise its enforcement. It has not yet established any specialist body to oversee the implementation of the Constitution.

Those people opposed to the continued existence of the power argue that a citizen may not be lawfully deprived of her or his personal freedom unless it is pursuant to legislation passed by the National People's Congress or its Standing Committee.¹⁹ This is the second and related argument, that is, the State Council does not have power to create a detention power such as detention for investigation. This argument has now been accepted and enacted in the Administrative Punishment Law which was also passed at the March 1996 meeting of the NPC. It provides at article 9 that only the NPC or its Standing Committee have power to pass legislation under which a person may be deprived of her or his personal freedom.

Conclusion

Abolition of the power of detention for investigation is to be welcomed. Its abolition is the result of not only the strong opposition at all levels of Chinese society to this power, but to the painstaking and dedicated work of a group of Chinese academics and officials. Apart from the extreme problems of abuse of power, the existence of a power such as detention for investigation highlights the problem of lack of substantive difference between criminal and administrative powers and between punishments and coercive measures exercised by the police in China. Especially where the person is detained, it is hard to argue that one form of detention is a punishment whilst another form of detention is not, especially where the time limits for many of the punishments of detention are shorter than the time limits for the coercive measure of detention for investigation.

Abolition of detention for investigation will go some way to clarifying those important distinctions.

The practical consequences of abolition of the power remain to be seen. The pressures placed on the police to ensure a high degree of social order are, if anything, increasing. Campaign style policing, which formed the practical incentive for increased use of this power after 1983 is still

strongly favoured. A campaign to crack down on law breakers was commenced in April of this year and is ongoing.

References

1. Art 2, State Council 'Notice Concerning Supporting the Unification of the Two Measures of Forced Labour and Shelter and Investigation with Re-education through Labour' of 29 February 1980 Guofa [1980] #56 Document; and Fan Chongyi (ed.), Xiao Shengxi (vice ed.), *Xingshi Susong Faxue Yanjiu Zongshu yu Pingjia (Summary and Appraisal of Criminal Procedure Law Study)*, Zhongguo Zhengfa Daxue Chubanshe (China University of Politics and Law Press), 1991, p.143.
2. Yang Xinhua, 'Shourong Shencha Cunzai de Wenti Ji Duice' ('Problems and Strategies for the Existence of Detention for Investigation'), (1991) 4 *Jiangxi Faxue (Jiangxi Legal Studies)* 42; Zhang Jianwei and Li Zhongcheng, 'Lun Feizhi Shourong Shencha' ('Discussing the Abolition of Detention for Investigation'), (1993) 3 *Zhongwai Faxue* 55-9 at 57-8 also argue that detention for investigation is used as an alternative to criminal detention.
3. Fan Chongyi (ed.), Xiao Shengxi (vice ed.), above, p.142; Wang Xixin 'Shourong Shencha Zhidu Ying yu Feichu' ('The System of Detention for Investigation Should be Abolished'), (1993) 3 *Zhongguo Faxue* 110-12, at 111 argues that the primary function of detention for investigation when the power was first introduced was to deal with people who were 'blindly floating' from place to place and only later did it primarily become a power for investigation of suspected criminal activities.
4. Zhang Xu, 'Lun Shoushen de Chulu yu Daipu de Gaige' ('Discussing the Way out for Detention for Investigation and Reform of Arrest') (1993) 2 *Xiandai Faxue (Modern Legal Science)* at 20 points to the change in the use of detention for investigation over time. Sun Jiebing, 'Xingshi Qiangzhi Cuoshe Fanchou Tanjiu' ('Probe into the Category of Criminal Coercive Measures') (1993) 5 *Xiandai Faxue* 27 places the date of separation of functions as November 1978 with issue by the Ministry of Public Security of the Notice concerning rectification and strengthening of the shelter and investigation work against floating criminal elements.
5. Fan Chongyi (ed.), Xiao Shengxi (vice ed.), above, p.143.
6. Jiang Bo, Zhan Zhongle eds, *Gongan Xingzheng Fa (Public Security Administrative Law)*, Zhongguo Renshi Chubanshe (China Personnel Press), 1994, pp.95-6 argue that the abuses of the power can be rectified; and Cui Ming, 'Shourong Shencha de Lishi, Xianzhuang yu Chulu' ('The History, Present Situation and Prospects of Detention for Investigation') reproduced in Cui Ming (ed.), *Zhongguo Dangdai Xing yu Fa (China's Contemporary Crime and Law)*, Qunzhong Chubanshe (Masses Press), 1993, pp.90-8 at 94-5 sets out the arguments on both sides of the debate. One part of the debate about abolition of detention for investigation in support of retaining the power been carried on by Chen Weidong, and Zhang Tao in two articles. The first is Chen Weidong, Zhang Tao, 'Shourong Shencha de Ruogan Wenti Yanjiu' ('Study of Several Problems of Detention for Investigation'), (1992) 2 *Zhongguo Faxue* 82-7. The second is Chen Weidong Zhang Tao, 'Zai Tan Shourong Shencha Buyi Feichu' ('Another Discussion of Why Detention for Investigation should not be Abolished'), (1993) 3 *Zhongguo Faxue* 113-14 at 114; Zhang Xu, above, p.20.
7. Wang Xixin, above, p.110 argued the power should be abolished. See the reply to Wang Xixin above, by Chen Weidong etc. above, pp.113-14. For the view that the power should be characterised as administrative see for example: Li Huayin, Liu Baiyang (eds), *Gongan Xingzheng Chengxu yu Xingzheng Susong Tonglun (General Survey of Public Security Administrative Procedure and Administrative Litigation)* Qunzhong Chubanshe (Masses Press), Beijing, 1992, p.180, Wang Zhengguang, 'Xingzheng Shourong Anjian de Shenli' (Trial of Administrative Detention for Investigation Cases), (1992) 2 *Faxue* 26-28; Chen Weidong etc., above, p.113; Chongqing Shi Zhongji Fayuan Xingzheng Ting (Chongqing Municipal Court Administrative Division), 'Shenli Shourong Shencha Xingzheng Susong Anjian Muqian Ying Zhuyi de Jige Wenti' ('Several current problems to which attention should be paid in the trial of administrative litigation cases involving detention for investigation'), (1993) 4 *Xingzheng Fa Yanjiu (Studies in Administrative Law)* 81-84. All characterise detention for investigation as administrative.
8. Cui Ming, above, at 94, 96.
9. Zhang Shanyu and Zhang Shuyi (eds), *Zouchu Digu de Zhongguo Xingzheng Faxue-Zhongguo Xingzheng Faxue Zongshu yu Pingjia (The Underestimated Administrative Law Studies-Summary and Appraisal of China's Administrative Law Studies)*, Zhongguo Zhengfa Daxue Chubanshe (China University of Politics and Law Press), Beijing, 1991, p.268; Cui Ming, above, pp. 90-8 at 93.

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against whom awards of damages are made generally are indemnified by the police force, and the state, meaning that the award as an instrument of specific deterrence or general deterrence of police wrongdoing is almost meaningless. A further difficulty is that in most Australian jurisdictions, those few damages awards, together with costs orders, that are made do not come directly out of police budgets, precluding even that form of fiscal accountability. The result of all these factors is that civil litigation of the kind brought in *Gordon v Graham*, particularly when the decision maker is a judge rather than a jury, does not operate as a significant means of making police accountable or of breaking up the police culture of inappropriate loyalty, resort to force and failure to respect minority individuals' rights and liberties. Change to this situation so that civil damages actions operate as a means of changing police cultures of violence does not appear imminent.

References

1. It is also relevant for the institution of such proceedings that Legal Aid Commissions understandably impose as a criterion for funding that there is a reasonable likelihood that a plaintiff will recover a sufficient amount of damages. In Victoria, this figure is currently \$5000.
2. This, of course, would also formally constitute a defence for police or the state in relation to their potential vicarious liability.
3. See, for instance, *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 216; *Carson v Citizen Finance Ltd* (1993) 178 CLR 44 at 55.
4. Stone, J., 'Double Count and Double Talk: The End of Exemplary Damages?' (1972) 46 *Australian Law Journal* 311; Luntz, H., *Assessment of Damages for Personal Injury and Death*, 3rd edn, Butterworths, Sydney, 1990, p.68ff; Mendelson, D., '*Backwell v AAA*' (1996) 4(2) *Journal of Law and Medicine* (forthcoming); see also Daniels, S. and Martin, J., 'Myths and Reality in Punitive Damages' (1990) 75 *Minnesota Law Review* 38.
5. *XJ Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 57 ALR 639 at 655 per Brennan J. See also *Backwell v AAA*, unreported, 20 March 1996, Victorian Court of Appeal per Ormiston JA, p.23.
6. The same sum was awarded to a shopper who was found to have been falsely detained by Myer employees and police and to have endured a wrongful search of his house: *Myers Stores v Soo* [1991] 2 VR 597.
7. See Clayton R. and Tomlinson, H., *Civil Actions Against The Police*, Sweet and Maxwell, London, 1987, p.367ff.
8. Compare the 29 June 1996 decision of a Victorian County Court jury in *Rupa v Harrison* where a drunk train commuter was awarded \$3500 in general damages, \$3500 in aggravated damages and \$3000 in exemplary damages for an assault by a police officer.
9. Unfortunately, in spite of the fact that the sums involved come out of the public purse, no comprehensive figures are available on the number of civil actions brought against police, their grounds, the percentage of them abandoned, settled, or proved or the amounts of damages awarded or the terms on which they are settled.
10. See Chevigny, P., *Edge of the Knife*, The New Press, New York, 1995, pp.104-5.

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10. See, for example, the Ministry of Public Security Notice on Putting in Order People Being Held in Detention for Investigation passed on 26 April 1993; and Cui Ming, above, at 93.
11. Ministry of Public Security Notice on Rectifying Living Conditions of Detainees in Watch Houses, Administrative Detention Centres and Detention for Investigation Stations, issued on 18 December 1983.
12. Fan Chongyi (ed.), Xiao Shengxi (vice ed.), above, p.145.
13. Administrative powers are used by public security personnel against people who do not carry out their legal duties, breach state regulations concerning public order or have committed a minor unlawful act which is not sufficient to constitute a criminal offence. Li Huayin, Liu Baiyang (eds), above, 174-5, Dai Wendian (ed.), *Gongan Fagui Jiaocai* (Teach-

ing Materials on Public Security Regulations), Zhongguo Renmin Gong'an Daxue Chubanshe (China Public Security University Press), 1988, Beijing, pp.133-4; Mou Shihuai (ed.), *Gongan Xingzheng Guanli yu Xingzheng Fuyi Susong* (Public Security Administrative Regulation and Administrative Review and Litigation), Zhongguo Renmin Gong'an Daxue Chubanshe (Chinese People's Public Security University Press), Beijing 1992, pp.3-4.

14. Zhang Jianwei, Li Zhongcheng, above, pp.55-6.
15. Zhang Jianwei, Li Zhongcheng, above, p.58, see also general discussion in Zhang Xu, above, p.20 and Sun Jiebing, above, pp.27-8.
16. [85] Gongfa #50 Document article 8 provides: Detention for investigation work must be directly subject to the supervision of the People's Procuratorate.
17. Fan Chongyi (ed.), Xiao Shengyi (vice ed.), above, p.149.
18. Wang Xixin, above, p.110.
19. Zhang Jianwei, Li Zhongcheng, above, p.58.



MORE MENTIONS

POLICING VICTORIA SEMINAR

On Thursday, 11 July 1996, the *Alternative Law Journal* in conjunction with the Victorian Council for Civil Liberties held the first in a series of seminars on socio-legal and civil liberties issues. The purpose of these seminars is to encourage debate about topics which are of concern and raise issues of civil liberties and human rights as well as to raise the profile of both the Alt.LJ and the VCCL.

Three speakers, Jude McCulloch, Ian Freckelton and Carmel Guerra led the discussion exploring issues such as military approaches to policing, civil liability of police, and policing youth.

The success of the inaugural seminar will hopefully lead to similar joint ventures in the future. The organisers are hoping that the next topic will be *Aboriginal People and the Justice System*. Stay tuned.

LEGALITY OF NUCLEAR WEAPONS

On 8 July 1996, the International Court of Justice handed down an advisory opinion on the legality of nuclear weapons after a sustained international campaign by peace activists.

The Court held itself required by the current state of international law to find that the use of such weapons was neither specifically authorised nor universally prohibited. It decided that '... the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict'. The Court was unable to conclude definitively whether the use of such weapons in 'an extreme circumstance of self defence' would be lawful.

While this decision was welcomed by some parts of the peace movement, others noted that it falls well short of the complete prohibition on the use of chemical and biological weapons in international law. In this context, the Court's finding that states have an obligation to pursue negotiations leading to nuclear disarmament in good faith is cold comfort, made colder still by the stalling of the Comprehensive Test Ban Treaty negotiations.