

# POLICE POWERS AND CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA: THE HISTORY OF *SHOUSHEN*

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## I. INTRODUCTION

In 1961, the public security bureau of the People's Republic of China ("PRC" or "China") adopted a measure called *shourong shencha* ("*shoushen*"), meaning "sheltering for examination," to deal with the increasing flow of migrants throughout China.<sup>1</sup> *Shoushen* was designed as a measure whereby the police could detain and investigate suspected criminals who had no known status or confirmed residence or suspected "itinerant criminals" (*liucuan fan*).<sup>2</sup>

In the 1960s, *shoushen* was used primarily as a means of population control. By the 1980s, it was being used to promote criminal justice and social control. More recently, *shoushen* has been used as a measure for collecting debts. *Shoushen* was never a legislatively sanctioned police power, being at all times since its inception purely an administrative measure. *Shoushen* was never officially adopted by the National People's Congress ("NPC") or by the NPC Standing Committee, but *shoushen* received favorable legal interpretations from the NPC.<sup>3</sup> As originally

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1. For a brief history of *shourong shencha* [hereinafter "*shoushen*"], see Wang Cuihua *Bufu Suxian Diqu Xingzhengshu Gongan Chu Shourong Shencha An* [The case of Wang Cuihua's Refusal to Accept Sheltering for Examination by the Su County District Government Administration Police Office] [hereinafter "*Case of Wang Cuihua*"], in ZHONGGUO SHENPAN ANLI YAOLAN [IMPORTANT OVERVIEW OF CHINESE ADJUDICATED CASES] 1183 (1992) [hereinafter "IMPORTANT OVERVIEW OF CHINESE CASES"].

2. Guanyu Jian Qiangzhi Laodong He Shouron Shencha Liang Xiang Cuoshi Tongyi Yu Laodong Jiaoyang De Tongzhi, Guofa (1980) 56 Hao [Circular Regarding the Merger of Labor Reform and Investigative Detention, State Council (1980) No. 56] (promulgated February 29, 1980) [hereinafter "*State Council Circular*"], in ZHONGGUO JINGCHA FALU FAGUI GUIZHANG SHIYI DAQUAN [COMPILATION OF INTERPRETATIONS OF CHINESE POLICE LAWS, REGULATIONS AND RULES] 618-19 (1993).

3. Chuanguo Renda Changweihui Fazhi Gongzuo Weiyuanhui, Guanyu Ruhe Lijie He Zhixing Falu Ruogan Wenti De Jieda (Er) [Regarding Answers to Certain Questions Concerning the Understanding and Execution of the Law (2)] (promulgated March 2, 1988) [hereinafter "*Jiangxi Province Answers*"], in ZHONGHUA RENMIN GONGHEGUO FALU GUIFANXING JIESHI JICHENG (ZENGBU BEN) [ANNOTATED COMPILATION OF THE LAWS AND RESTRICTIVE INTERPRETATIONS OF THE

conceived, *shoushen* had few procedural safeguards. Eventually, the State Council and the Ministry of Public Security issued a number of directives concerning the proper use of *shoushen*, including directives covering the jurisdictional scope, approval authority, time limits, and administration of the practice of *shoushen*. However, these directives were largely inconsistent, unclear, over-broad, and open-ended.<sup>4</sup> The NPC Standing Committee, the State Council, the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of Public Security all attempted to control the exercise of *shoushen*, but met with little success.

On March 17, 1996, the NPC adopted the amended Criminal Procedure Law of the People's Republic of China<sup>5</sup> ("Criminal Procedure Law"). The Criminal Procedure Law, while not mentioning *shoushen* by name, acknowledges the functional necessity of the *shoushen* type of investigative powers and accordingly provides for its regulation and control.<sup>6</sup> With this in mind, the Criminal Procedure Law places all public security coercive measures,<sup>7</sup> including *shoushen*,<sup>8</sup> under one unified procedural control scheme. Henceforth the public security authority "must

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PEOPLE'S REPUBLIC OF CHINA (SUPPLEMENT)] [hereinafter "COMPILATION OF LAWS AND RESTRICTIVE INTERPRETATIONS OF THE PRC (SUPPLEMENT)"] at 8-9 (1991) (explaining that the NPC Standing Committee has approved the use of *shoushen*, citing approvingly a circular promulgated in response to a legal issue brought forth by the Jiangxi Province People's Congress Standing Committee). See *Guanyu Yangge Kongji Shiyong Shourong Shencha Shouduan De Tongzhi, Gongfa* (1985) 50 Hao [Circular Regarding the Serious Control Over the Use of the Sheltering for Examination Measure, Public Security (1985) No. 50] (promulgated July 31, 1985) [hereinafter "1985 Public Security Circular"].

4. Chen Weidong & Zhang Tao, *Shourong Shencha De Ruogan Wenti Yanjiu* [Research Into Certain Questions Regarding Sheltering for Examination], *ZHONGGUO FAXUE* [CHINESE LEGAL SCIENCE], Feb. 1992, at 82-87 [hereinafter "Chen & Zhang I"].

5. The Criminal Procedure Law of the People's Republic of China adopted by the Second Session of the Fifth National People's Congress [hereinafter "NPC"] on July 1, 1979 [hereinafter "Criminal Procedure Law"] was amended in accordance with the "Decision on Amending The Criminal Procedure Law of the People's Republic of China" made by the Fourth Session of the Eighth NPC on March 17, 1996. For an unofficial English translation, see FBIS-CHI-96-069, April 9, 1996. For a detailed discussion of the amended Criminal Procedural Law, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, *OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW* (1996).

6. For a detailed discussion, see "Legislative response to *shoushen* in 1996" *infra*.

7. See generally Chapter VI Coercive Measures, the Criminal Procedure Law, *supra* note 5. The term coercive measure is not defined. Article 50 provides a contextual understanding of coercive measures: "People's courts, people's procuratorates, and public security organs, according to circumstances of the case, may summon a criminal suspect or defendant for detention, allow him to obtain a guarantor and await trial out of custody, or allow him to live at home under surveillance." Coercive measures thus conceived included police summon, investigative detention, home surveillance, and prosecution arrest.

8. See *supra* note 3.

strictly observe this law and relevant provisions" in investigating, arresting, and detaining suspects.<sup>9</sup>

This paper explores the historical development of *shoushen* as an exercise of police powers in China up to the present time. Part II details the historical development, abuses and control of *shoushen*. Part III describes the latest NPC effort in regulating and controlling the *shoushen* in promulgating the amended Criminal Procedure Law. Part IV concludes by observing that the Criminal Procedure Law is just the latest chapter in the PRC's continuous effort to control abuse of police powers.

## II. THE HISTORY OF *SHOUSHEN*

### A. *Developments Through 1980*

*Shoushen* was originally conceived in 1961. On November 31, 1961, the Ministry of Public Security filed a report with the Chinese Communist Party Central Committee entitled "A Report Regarding Resolutely Stopping the Free Movement of the Population," calling attention to the growing "*mangliu*" (floating population) problem facing China, and calling for effective and immediate management and control of the population.<sup>10</sup> The report noted that as a result of three years of natural catastrophes, from 1959-1961, the rural population had increasingly migrated into the cities for food, shelter, and jobs; in short, for survival and a better life.<sup>11</sup> The

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9. See Criminal Procedure Law, Chapter 1, Article 3, paragraph 3, which provides, in pertinent part: "In conducting criminal proceedings, the people's courts, the people's procuratorates, and the public security organs must strictly observe this law and relevant provisions of other laws." See also Article 14: "The people's courts, the people's procuratorates, and the public security organs shall safeguard the procedural rights that participants in proceedings enjoy according to the law."

10. *Guanyu Jianjue Zhizhi Renkou Ziyou Liudong De Baogao* [Report Regarding Resolutely Stopping the Free Movement of the Population] (promulgated November 31, 1961), in ZHA ZHENJIAN, *ZHONGGUO FAZHI SIXI NIAN* (1949-1989) [FORTY YEARS OF THE CHINESE LEGAL SYSTEM (1949-1989)] 286 (1989).

11. For a short account of the population 'tug-of-war' between urban and rural China, see Ge Xiangxian & Qiu Weiying, *ZHONGGUO MINGONG CHAO* [CHINA'S LABOR WORKER EXODUS] 167 (1990) [hereinafter "CHINA'S LABOR WORKER EXODUS"]; *Report to The Second Plenary Session of the Seventh Central Committee of the Communist Party of China* (promulgated March 5, 1949), in IV SELECTED WORKS OF MAO TSE TUNG 368-69 (1961); see also *Guanyu Quanzhi Nongmin Mangmu Liuru Chengshi De Zhishi* [Instruction Regarding Dissuading Peasants From Blindly Moving Into Cities] (promulgated April 17, 1953), in CHINA'S LABOR WORKER EXODUS, *supra*, at 178; *Jixu Quanche 'Guanyu Quanzhi Nongmin Mangmu Liuru Chengshi De Zhishi' De Tongzhi* [Circular on the Continued Implementation of 'Instruction Regarding Dissuading the Peasants From Blindly Moving Into the City'] (promulgated March 12, 1954), *id.*; *Guanyu Zhizhi Nongcun Renkou Mangmu Weiliu De Zhishi* [Directive Regarding Stopping the Peasant Population From Blindly Flowing Outward] (promulgated December 18, 1957), in RENMIN RIBAO [PEOPLE'S DAILY],

report suggested a three prong attack on the problem, including the use of *shoushen*.<sup>12</sup>

Since its inception in 1961, *shoushen* has never been formally incorporated into China's regulatory scheme concerning police powers. The 1954 Regulations of the PRC on Arrest and Detention provided the first set of regulations on police arrest powers but did not incorporate *shoushen*.<sup>13</sup> These regulations were replaced by the 1979 Regulations of the PRC on Arrest and Detention ("1979 Arrest Regulation").<sup>14</sup> On January 1, 1980, the PRC Criminal Procedure Law provided the first comprehensive legal framework for the exercise of police investigative and arrest powers.<sup>15</sup> The PRC Criminal Procedure Law was clarified by circulars and resolutions from the Supreme People's Court and Supreme People's Procuratorates.<sup>16</sup> It was also supplemented by various directives,

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December 19, 1957, at 1; *Shelun: Zhizhi Nongcun Renkou Mangmu Weiliu* [Editorial: Stopping the Peasant Population from Blindly Flowing Outward], in RENMIN RIBAO [PEOPLE'S DAILY], Dec. 19, 1957, at 1.

12. The other two measures were: (1) stopping people from emigrating; and (2) perfecting the control of transportation. See Zha, *supra* note 10, at 286.

13. *Regulations of the PRC on Arrest and Detention* (adopted at the third meeting of the Standing Committee of the National People's Congress on December 20, 1954), translated in ARREST AND DETENTION REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA in FHKP, 1:239-242 [hereinafter "1954 Arrest Regulations"]. See Zhao Cangbi, *Guanyu Xiugai 'Zhonghua Renmin Gongheguo Dibu Juliu Tiaoli' De Shuo Ming* [Explanation on the Revision of 'Arrest and Detention Regulations'] (promulgated February 21, 1979), in ZHONGHUA RENMIN GONGHEGUO LIFA SIFA JIESHI ANLI DAIQUAN [COMPENDIUM OF LEGISLATION, JUDICIAL INTERPRETATIONS AND CASE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 989-90 (1990) [hereinafter "COMPENDIUM OF LEGISLATION, JUDICIAL INTERPRETATIONS AND CASE LAWS OF THE PRC"] (explaining that the 1954 Arrest Regulations were practically abandoned during the Lin period from 1966-76).

14. *Zhonghua Renmin Gongheguo Daibu Juliu Tiaoli* [Regulations of the People's Republic of China on Arrest and Detention] (adopted at the Sixth Meeting of the Standing Committee of the Fifth National People's Congress and promulgated for implementation by Order No. 1 of the Standing Committee of the National People's Congress on February 23, 1979), in ZHONGHUA RENMIN GONGHEGUO FALU QUANSHU [COLLECTION OF LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter "COLLECTION OF LAWS OF THE PRC"] 87-93 (1989) [hereinafter "1979 Arrest Regulations"]. For an English translation, see THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) (Beijing: Foreign Language Press) 47-49. 1979 Arrest Regulations, art. 15 ("[t]he Regulations on Arrest and Detention of the People's Republic of China promulgated on December 20, 1954 shall be invalidated simultaneously").

15. Criminal Procedure Law of the People's Republic of China (adopted July 1, 1979), translated in CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PRC (1979-1982) 120-50 (1987) [hereinafter "Criminal Procedure Law"]; see RESOLUTION OF THE STANDING COMMITTEE OF THE NPC ON THE PLAN FOR IMPLEMENTING THE CRIMINAL PROCEDURE LAW (adopted April 16, 1980), *id.* at 198-99.

16. See *Guanyu Renmin Jianchayuan Dibu Juliu Renfan You Gongan Jiguan Zhixing De Tongzhi* [Circular Regarding the Arrest and Detention of Prisoners by the People's Procuracy Should Be Conducted by the Public Security Organs] (promulgated March 27, 1979), in ZHONGGUO GONGAN BAIKE QUANSHU [CHINESE PUBLIC SECURITY ENCYCLOPEDIA] [hereinafter "PUBLIC

instructions, and orders from the Ministry of Public Security.<sup>17</sup> However, except for certain circulars and directives, none of these laws explicitly sanction *shoushen*, and *shoushen* does not appear in the PRC Constitution (1982), the PRC Criminal Procedure Law, the PRC Criminal law, or the 1979 Arrest Regulations.

At the Third Plenum of the Eleventh Central Committee in 1978, the Chinese Communist Party ("Party") called generally for a more reliable and accountable legal system.<sup>18</sup> The Ministry of Public Security responded with its first attempt to restrict what had been an unstructured *shoushen* power. The Ministry of Public Security "Circular Regarding the Reorganization and Strengthening of *Shoushen* for Itinerant Criminals" provides a rudimentary procedural framework for the employment of *shoushen* by the police.<sup>19</sup> The Circular provides that *shoushen* detention should be centralized<sup>20</sup> and limited.<sup>21</sup> *Shoushen* should follow strict approval procedures<sup>22</sup> with a time limit.<sup>23</sup> The Circular was clearly designed as an interim measure to address a growing concern over the use of *shoushen*, allowing more time for experimentation and reflection.

SECURITY ENCYCLOPEDIA"] 831 (1989); *Guanyu Renmin Fayuan Jueding Juliu Renfan You Gongan Jiguan Zhixing De Juti Banfa De Tongzhi* [Circular on Concrete Measures Requiring the Police to Execute People's Court Decisions to Arrest an Offender] (promulgated March 27, 1979), *id.*

17. See *Gonganju Yushen Gongzuo Guize* [Ministry of Public Security Regulations on Examination] (adopted August 20, 1979), in COLLECTION OF LAWS OF THE PRC, *supra* note 14, at 266-74; *Gongan Jiguan Banli Xingshi Anjian Chengxu Guiding* [Stipulations on Criminal Case Handling Procedures by the Public Security Organs] (promulgated March 10, 1989), in ZHONGHUA RENMIN GONGHEGUO JIANCHA YEWU QUANSHU [THE COMPREHENSIVE BUSINESS MANUAL OF PRC PROCURATORATE] 499-512 (1990) [hereinafter "BUSINESS MANUAL OF THE PRC"].

18. See "Zhongguo gongchangdang di shiyijie zhongyang weiyuanhui disanci quanti huiyi gongbao" [Public declaration of the Chinese Communist Party, Eleventh Central Committee, Third Plenary Session] (passed on December 22, 1978), in DI SHISAN JIE SANZHONG QUANHUI YILAI ZHONGYAO WENXIAN XUANBIAN [COLLECTION OF IMPORTANT DOCUMENTS SINCE THE ELEVENTH CENTRAL COMMITTEE, THIRD PLENARY SESSION] (Zhonggong zhongyang dangxiao chubanshe, 1981 (RJ 05321)), 1-11 ("In order to protect people's democracy, it is necessary to strengthen the socialist legal system." at 11).

19. *Guanyu Zhengdun He Jiaqiang Dui Liucuan Fanzui Fenzi Shourong Shencha Gongzuo De Tongzhi, Gongfa* (1978) 87 Hao [Circular Regarding the Reorganization and Strengthening of *Shourong Shencha* for Itinerant Criminals, Public Security (1978) No. 87] (promulgated November 1, 1978), in PUBLIC SECURITY ENCYCLOPEDIA, *supra* note 16, at 224.

20. *Id.* (*Shourong* centers should be located only at local (*difang*) and city first class public security organs. Those established at the county level are to be abolished).

21. *Id.* (*Shoushen* should be used only against current *liucuan fan* or important *liucuan fan*).

22. *Id.* (*Shoushen* should first be fully documented by the local police, then endorsed by the *fenju* or county public security, and finally approved by the local or city public security bureaus. Further, complicated cases should be discussed by the *Shoushen* leadership and approved by the local or city public security bureaus.

23. *Id.* (*Shourong* should not last for more than one month).

Beginning in 1978 and through 1980, the Supreme People's Court used its constitutional interpretation power to issue eight key opinions dealing with *shoushen*.<sup>24</sup> Substantively, the Court's pronouncements served as official endorsements of *shoushen*, previously a dubious legal practice. In making explicit legal provision for offsetting time spent during *shoushen* against subsequent criminal sentences, the Court implicitly acknowledged the validity and legitimacy of *shoushen*. The Court also clarified that any illegal investigative detention measure, no matter under what name or for what purpose, constitutes a deprivation of freedom and may not be used. The Court demonstrated its concern for the abusive uses and deleterious effects of onerous powers of investigative detention, particularly during the Gang of Four era. Thus, these opinions served important education and propaganda functions.

The opinions of the Supreme People's Court affirm that by 1978, *shoushen* had captured the attention of the PRC political leadership. The political leadership was very concerned with the abuse of police authority.<sup>25</sup> It was committed to putting any unfettered exercise of police power, especially *shoushen*, under close scrutiny. The respective actions taken on *shoushen*, first by the Ministry of Public Security and later by the Supreme People's Court, should be read in the context of an overall attempt, and a coordinated effort, by the political authority to limit the use of the police power through law and education.<sup>26</sup> And, in a still larger context, they reflected the nation's attempt to introduce the "rule-of-law."<sup>27</sup>

24. See, e.g., *Guanyu Zuifan Beibu Qian Zai Kanshou Suo Geli Shencha Riqi Kefou Zhedi Xingqi De Pifu, Xian Gaofa* (1978) 18 *Hao Qingshi* [Official Reply Regarding Whether the Time Spent by Offenders During Investigative Separation in Detention Centers Can Be Used to Offset Against a Criminal Sentence, Xian Higher People's Court (1978) Request for Instruction No. 18], mentioned in COMPILATION OF LAWS AND RESTRICTIVE INTERPRETATIONS OF THE PRC, at 121.

25. The concern with police abuse of power is best expressed in Peng Zhen's address to the NPC in introducing the 'seven draft laws.' See *Guanyu Qige Falu Caoan De Shuoming* [Explanation Regarding the Seven Draft Laws] (adopted July 26, 1979), in COMPENDIUM OF LEGISLATION, JUDICIAL INTERPRETATIONS AND CASE LAWS OF THE PRC, *supra* note 13, at 55-57.

26. See RENMIN RUHE YU GONGAN DA JIADAO [HOW THE PEOPLE CAN DEAL WITH PUBLIC SECURITY] 4-6 (1990) (describing the magnitude of police powers).

27. See Li Xue, *Lun Woguo Xingshi Zhengce Yu Xingfa De Guanxi* [A Discussion of the Relationship Between Our Country's Criminal Policy and Criminal Law], FAXUE [LEGAL STUDIES], Aug. 1992, at 91-97; ZHANG YOUYU, GUANYU SHEHUI ZHUYI FAZHI DE RUOGAN WENTI [REGARDING CERTAIN QUESTIONS ON SOCIALIST LEGAL SYSTEM] (1980) (there continues to be debate about the nature and functions of law in China). For a discussion of Peng Zhen's rule-by-law philosophy, see Pitman B. Potter & Peng Zhen, *Evolving Views on Party Organization and law*, in CAROLE L. HAMRIN & TIMOTHY CHEEK, CHINA'S ESTABLISHMENT INTELLECTUALS 21-51 (1986). For a more recent study on Peng Zhen's rule-by-law philosophy, see PITMAN B. POTTER, FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM, in USC SEMINAR SERIES NO. 10 (Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, 1995). During the anti-crime campaigns (1983-

## B. *Shoushen in the 1980s*

Since the economic opening of China in the 1980s, the police have faced a sharply increasing crime rate,<sup>28</sup> as police resources have shrunk and police responsibilities have grown.<sup>29</sup> Along with market reforms, the number of economic crimes, such as theft and fraud, have increased.<sup>30</sup> One of the most pressing problems is the *mangliu*<sup>31</sup> and *liucuan* problem.<sup>32</sup>

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1987) criminal procedure rules were dispensed with to expedite the handling of criminals. See *Guanyu Xunsu Shenpan Yanzhong Weihai Shehui Zhian De Fanzui Fenzi De Chengxu* [Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security] (adopted Sept. 2, 1983), in ZHONGHUA RENMIN GONGHEGUO FALU GUIFANXING JIESHI JICHENG [COMPILATION OF LAWS AND RESTRICTIVE INTERPRETATIONS OF THE PRC] *supra*, note 24 (1990).

28. *Xin Zhongguo Fazhi Jianshe Sishi Nian Yao Lan: 1949-1988* (1990) [New China Legal System Construction: Overview of Significant Events Over 40 Years: 1949-1988] 409 (1990) (the concern with crime led to successive nationwide anti-crime campaign (1983-1987)). See *Quanguo Gaoji Renmin Fayuan Chang Zuotan Hui Jiyao* [Summary of Nationwide Higher People's Court President's Meeting] (published May 1, 1989), in COMPILATION OF LAWS AND RESTRICTIVE INTERPRETATIONS OF THE PRC (SUPPLEMENT), *supra* note 3, at 193-94. (demonstrating that overall criminal cases handled by the people's courts during the first quarter of 1989 increased by 14.75%, including an increase in major burglaries and thefts of 78.7%, robberies of 59.98%, and murders of 13.05%).

29. See *Guanyu Jiaqiang Gongjian Fa Bumen Fame Shouru Guanli He Baozheng Banan Jingfei De Tongzhi, Caiyizi* (1990) 79 Hao [Circular Regarding Strengthening the Management of Penalties and Confiscation and Guaranteeing of Case Handling Expenditure of the Police, Procuratorate, Court Departments, Ministry of Finance (1990) No. 79] (promulgated October 9, 1990), in COMPILATION OF LAWS AND RESTRICTIONS OF THE PRC (SUPPLEMENT), *supra* note 3, at 12 (cited to by the Supreme People's Court, and alluding to problems of insufficient case handling expenses leading to various illegal efforts to obtain operational funding, including the imposition of fines instead of legal punishments). *Id.* For a discussion on the changing role and responsibility of the PRC police in the economic reform, see Kam C. Wong, *Public Security Reform in China in the 1990s*, CHINA REVIEW (1994), ch. 5, 5.5 to 5.44, esp. 1-5 (explaining that the PRC Police faces changes in its mission, values, powers, structure and process).

30. Theft cases grew from 744,374 cases in 1981 to 1,122,105 cases in 1991. Serious thefts grew from 16,873 cases in 1981 to 355,201 cases in 1994. Fraud cases grew from 18,665 in 1981 to 57,706 in 1994. For 1981 figures, see LAW YEAR BOOK OF CHINA (1987), 887, Table 18. For 1994 figures, see LAW YEAR BOOK OF CHINA (1996), 1069, Table 1.

31. "*Mangliu*," meaning "blind flow," has come to signify a significant group of people, mainly younger men, who move in and out of Chinese cities looking for work. See generally Li Mengbai, LIUDONGRENKOU DUI DACHENGSHI FAZHAN DE YINGXIANG HE DUICE [EFFECT OF FLOATING POPULATION ON THE DEVELOPMENT OF BIG CITIES AND POSSIBLE SOLUTIONS] 32-74 (1991) (Statistical Analysis of the Problem); CHINA'S LABOR WORKER EXODUS, *supra* note 11, at 167-82 (humanistic account); Willy Wo, *Comment*, SOUTH CHINA MORNING POST, Aug. 10, 1993, at 3 (describing *mangliu* as civilian workers, mostly rural peasants, who go to cities en masse to look for job opportunities).

32. *Guanyu Zai Daji Liucuan Fanzui Huodong Zhong Xuyao Zhuyi Jige Wenti De Tongzhi* [Circular Regarding Paying Attention to Certain Questions When Cracking Down on Cases Involving Itinerant Criminals] (promulgated December 13, 1989), in COMPENDIUM OF LEGISLATION, JUDICIAL INTERPRETATIONS AND CASE LAWS OF THE PRC, *supra* note 13, at 601-02 (explaining that

The *mangliu* are part of an even larger group known as the “floating population” (*renkou liudong*) who move in and out of the cities for a variety of reasons, including visiting, shopping, conducting business or working.<sup>33</sup> This floating population problem is particularly serious for certain regions of China, including coastal areas such as Guangzhou, industrial cities such as Shanghai, economic zones such as Shenzhen, and transportation hubs such as Beijing.<sup>34</sup>

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economic opening and social reforms led to a huge increase in population mobility, resulting in itinerant criminals intermingling with the population and taking advantage of slack public security controls).

33. The ‘floating population’ can be defined as those people who have no proper permanent residence and stay in the city to conduct any number of activities, from social visits to business. See Li Mengbai, *supra* note 31, at 6. A survey of 74 cities and township (43 cities and 31 towns) in 1986 showed mass movement of rural people into the cities and towns since the economic reform in 1979:

Table 1: People moving in cities and towns as a percentage of local residence

Year	Big cities*	Small Cities*	Towns
1977-1978	12.5%	12.6%	6.0%
1979-1980	19.5%	20.2%	12.5%
1981-1982	9.7%	19.8%	11.3%
1983-1984	15.6%	21.1%	12.0%
1985-1986	17.0%	23.6%	16.3%

Source: *Zhongguo Renkou Qianyi Yu Chengshihua Yanjiu* [Chinese Population Movement and Urbanization Research] 8 (1988).

\*Big cities include especially big cities, and small cities include medium size cities.

34. According to one survey, the average daily population movement into Shanghai in 1988 was 2.09 million people, into Beijing in 1988 was 1.31 million, into Guangzhou in 1989 was 1.30 million and into Wuhan in 1990 was 1.20 million. Li Mengbai, *supra* note 31, at 8.



Statistically, *mangliu* are predominately male,<sup>35</sup> below 35 years of age,<sup>36</sup> and have less than average education.<sup>37</sup> They are predominantly manual laborers, and hold temporary or unstable jobs.<sup>38</sup> They predominantly congregate in city centers or on the outskirts of town.<sup>39</sup>

35. Table 2: Sex make up of mobile populations in 5 cities in 1988 (extracted from 11 cities)

Cities	Male	Female	Ratio: female = 1
Total	3804595	1487251	2.56
Shanghai	5568667	260133	2.14
Beijing	627033	192618	3.25
Guanzhou	616687	297533	2.07
Wuhan	458967	295608	1.55
Hangzhou	342264	161606	2.12

Li Mengbai, *supra* note 31, at 13.

36. Table 3: Age distribution of mobile population:

Sex	Total	< 18	18 - 35	35 - 50	> 50
Male	100%	6.32%	55.6%	30.38%	7.7%
Female	100%	15.27%	54.01%	18.25%	12.48%

*Id.*

37. Table 4: Education achievement of Shanghai residents vs. mobile population (1988)

Educational achievement	Residents	Mobile population
illiterate	7.0%	9.4%
primary school	18.8%	24.0%
junior middle school	41.3%	47.6%
senior middle school	25.3%	14.6%
university	5.6%	3.3%
university graduates	2.0%	0.6%

See Li Mengbai, *supra* note 31, at 14.

38. A Beijing survey showed that 94% of the mobile population who moved there engaged in building construction, restaurant services, agriculture trading, coal manufacturing and transportation, refuse hauling, road maintenance, and toilet cleaning. They were not entitled to social benefits and were subjected to the vicissitudes of the markets. *See id.* at 16.

39. Table 5: Beijing mobile population geographic distribution

Year	Town Center	Suburban District	Remote Suburb
1979	63.56%	30.57%	5.87%
1987	17.5%	57.00%	25.50%

See *Id.* at 18.

The *mangliu* population creates social problems as the massive influx of non-local residents burdens the cities' limited physical infrastructure — such as roads, communications, electrical utilities, and the water supply. In addition, the limits of the cities' fragile social support services such as birth control, education, medicine, food subsidies, public security, and environmental protection are challenged and often surpassed.<sup>40</sup> *Mangliu* exist outside the residential registration system.<sup>41</sup> It has been suggested that the *mangliu* problem destabilizes Chinese society and threatens the normative order, resulting in recurring social harms.<sup>42</sup> *Mangliu* criminals are also disproportionately involved in more serious crimes.<sup>43</sup> *Mangliu* are also said to be populated with petty thieves, hooligans, gamblers, drug addicts, and prostitutes, and living on the fringes of society and at the expense of local communities.<sup>44</sup> More significantly, crimes committed by *mangliu* appear to be increasing.<sup>45</sup>

*Shoushen* came to the rescue as an all-purpose crime fighting and social control device. *Shoushen* was used in the 1980s as a stop gap measure between the failing traditional social control networks and the nascent criminal justice system. A Ministry of Public Security circular recognized that *shoushen* was designed to deal with “those who reside in

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40. *Id.* at 58-73.

41. For an excellent discussion of the Chinese social control system, see MICHAEL DUTTON, *POLICING AND PUNISHMENT IN CHINA* (1992).

42. As demonstrates by the table below, they commit a disproportionate amount of crimes. Table 6: Mobile criminals as a percentage of all criminals in seven major cities.

Cities	Date	Mobile criminals as a % of total criminals
Hangzhou	Jan. - Nov., 1989	90.0%
Shenyang	1988	69.8%
Guangzhou	1989	57.9%
Chongqing	1988	42.9%
Shanghai	1989	31.4%
Wuhan	1988	33.0%
Tianjin	Jan. - July, 1989	23.0%

See Li Mengbai, *supra* note 31, at 49.

43. In 1989, *mangliu* criminals were responsible for 1/3 of all robberies, 1/8 of all murders, and 2/3 of all serious fraud and misrepresentation cases in Shanghai. *Id.*

44. *Id.*

45. In Guangzhou, crimes by *mangliu* grew from 109 criminal arrests in 1983 to 5703 in 1988, an increase of 520%. *Id.* at 48. Similarly, in Shanghai, *mangliu* criminal arrests as a percentage of the total arrests grew from 6.8% in 1983 (778 arrests) to 31.4% in 1989 (5285 arrests), an increase of roughly 520 times. *Id.* at 160. The figures over seven years figures were: 6.8% in 1983; 10.8% in 1984; 11.3% in 1985; 17.8% in 1986; 19.9% in 1987; 29.9% in 1988; 31.4% 1989. *Id.*

the village and have come to commit crimes in the cities, along the railway, and at large factories and mines."<sup>46</sup> Eventually, *shoushen* extended the reach of the traditional rural social control network into the urban centers and brought administrative control to what was considered an otherwise unruly and mobile crowd.

### C. 1980 State Council Circular

The growing use of *shoushen* as an administrative social control and crime fighting measure prompted the State Council to issue a circular ("State Council Circular") on February 19, 1980, providing for the placement and treatment of *shoushen* persons in re-education camps.<sup>47</sup>

The State Council Circular defines the permissible scope and jurisdictional reach of *shoushen* and sets forth some minimal guidelines for its use. Essentially, it addresses the question, which had previously escaped serious attention, of who the intended targets of *shoushen* are. The State Council Circular has been interpreted to require that two separate conditions be met before *shoushen* be allowed: the person must have committed a minor legal violation or criminal conduct,<sup>48</sup> and the person must belong to at least one of the following five categories: (a) one who does not give a true name or address; (b) one who is without a known origin (*laili buming*); (c) one who is suspected of committing crimes from place to place (*licuan zuoan*); (d) one who is suspected of committing

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46. Guanyu Zuohao Laojiao Gongzuo De Baogao (Jielu) [Report Regarding Perfecting Labor Education Work (Summary)], in GONGAN JIGUAN BANLI LAODONG JIAOYAN ANJIAN FAGUI HUIBIAN [COLLECTION OF PUBLIC SECURITY REGULATIONS ON HANDLING LABOR EDUCATION CASES], at 11-16 (1992) (calling for the expeditious handling of itinerant criminals, instructing against prolonged investigations and advising against requiring unnecessary evidentiary proof, calling for the preventing of suspected itinerant criminals from escaping and committing more crimes, allowing for the uninterrupted investigation of suspects, and providing for the work, education and reform of a group of economically displaced *mangliu*).

47. State Council Circular, *supra* note 2. See Guanyu Xian, Zhen Shoushen Laodong Jiaoyan He Diqu Juban Laodong Jiaoyang Changsuo Wenti De Pifu, 80 Gongfa (Jiao) 137 Hao [Official Reply to Question Regarding County, Township Labor Education Farm, and Local Area Establishing Labor Education Farm, 80 Public Security (Education) No. 137] (by which all those subject to *shoushen* were supposed to be processed at *shoushen* farms especially established for *shoushen*, set up by the respective provinces, autonomous regions, independent cities and larger cities, such that there is no separate facility for *shoushen* at the local level; the labor-education farm is to be supervised and administered by a labor-reform committee which is staffed with people from civil administration, public security and labor departments).

48. This excludes the use of *shoushen* to deal with serious criminals, who should be processed by compulsory measures under the PRC Criminal Procedure and corresponding Arrest and Detention Regulations (1979).

crimes repeatedly (*duoci zuoan*); or (e) one who is suspected of committing crimes in a group (*jiehuo zuoan*).<sup>49</sup>

Having been promulgated by the State Council, the State Council Circular is significant because it serves and has been cited as an empowering administrative regulation for *shoushen*.<sup>50</sup> While the State Council Circular does not confront directly the issue of the legality of *shoushen*, in providing for the placement of those subject to *shoushen*, it arguably legitimizes the use of *shoushen* to deal with itinerant criminals. The State Council Circular is also significant in that it provides, for the first time, a clearly articulated operational definition of *shoushen* power, defining when *shoushen* is to be used and to whom *shoushen* applies. It further functions as a jurisdictional benchmark for the regulation and control of its exercise.

However, the State Council Circular leaves many questions unanswered, such as where the legal foundation of the power comes from, whether the measure is to be regarded as criminal or administrative, how the measure is to be reconciled with existing police powers to investigate, detain, and arrest individuals under the PRC Criminal Procedure Law, and which investigative measure is preferred when alternative measures are available, as in the case with minor criminals, such that if both measures may alternatively be used, such discretionary use of powers could properly be controlled.<sup>51</sup>

#### D. 1985 Ministry of Public Security Circular

Having become disturbed by the indiscriminate and abusive use of *shoushen* in carrying out the then on-going anti-crime campaign, the Ministry of Public Security released a report in 1985.<sup>52</sup> The Ministry

49. See Case 104: "Weifa shoushen zhiren sunhai, yingdang peichang" [Harm resulting from illegal sheltering for examining, should be compensated] (Liu Jiaqiang vs. Public Security of A Certain City), in XINGZHENG PEICHANG ANLIE XUANPING (SELECTION OF ADMINISTRATIVE COMPENSATION CASES) 179-84 (1992) [hereinafter "ADMINISTRATIVE COMPENSATION CASES"].

50. Guanyu Gongan Jiguan Guanche Shishi 'Xingcheng Susongfa' De Ruogan Wenti De Tongzhi [Circular Regarding Certain Questions on the Thorough Implementation of the 'Administrative Procedure Law'], in COMPILATION OF LAWS AND RESTRICTIVE INTERPRETATIONS OF THE PRC (SUPPLEMENT), *supra* note 3, at 45-49 [hereinafter "Administrative Procedure Law Circular"] (pronouncing that before any new *shoushen* law is promulgated, the public security is supposed to follow the State Council Circular). See Guanyu Shoushen De Pifu Yiju De Fuyi Wenti [On the Question Regarding the Reconsideration of the Determination Basis for Sheltering for Examination], *id.* at 46.

51. See Chen & Zhang I, *supra* note 4.

52. 1985 Public Security Circular, *supra* note 3.

observed that *shoushen* had been inappropriately used over the past 20 years as a substitution for investigation (*daijin*), adjudication (*daishen*), and punishment (*daixing*).<sup>53</sup> In response, the Ministry of Public Security promulgated a circular ("1985 Public Security Circular"), defining *shoushen* and detailing procedural guidelines for its use.<sup>54</sup>

First, the 1985 Public Security Circular provides that the people's procuratorate is responsible for *shoushen* supervision. In addition, according to the 1985 Public Security Circular, *shoushen* should only be used against itinerant criminals and criminal suspects who refuse to disclose their true names, addresses, places of origin and backgrounds. *Shoushen* should not be used against local offenders when their status is unmistakable or the evidence against them is clearly established. Also, *shoushen* must be approved by the county level public security party section or party committee.

Regarding the timing and duration of *shoushen* investigations, the 1985 Public Security Circular provides that *shoushen* subjects must be questioned within twenty-four hours, and the family and work unit (*danwei*) of the individual subject to *shoushen* must be informed within twenty-four hours of the reasons for the *shoushen* and the location of the investigation. Further, the *shoushen* examination must be completed within one month. If the case is too complicated or involves an inter-province or inter-regional crime, the *shoushen* period can be extended to two months upon the approval of a higher level public security bureau. For a further extension, the public security bureau or department of the province, autonomous region or independent municipality must give its approval, with the maximum period of *shoushen* not to exceed three months. The time for calculating the *shoushen* period for suspects who refuse to give their names or addresses commences when the name and address have been established.

Regarding the examination itself, the 1985 Public Security Circular provides that the examination should be based on evidence, and that hitting, yelling, insults, and torture are not allowed. Those subject to *shoushen* enjoy civil rights as guaranteed by the PRC Constitution and laws. They are to be separated from regular criminals, given a right to complain against any violation of their rights, and must be given adequate food and lodging just like any other local suspect.

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53. *Id.*

54. *Id.*

Regarding the outcome of a *shoushen* investigation, the 1985 Public Security Circular provides that those who are found guilty of crimes are to be prosecuted according to the PRC Criminal Procedure Law, and should be subject to labor education or administrative sanctions if they are deemed necessary. In cases of wrongful detention, the mistake should be openly acknowledged and steps taken to ameliorate any adverse consequences (*shanhou gongzuo*).

The 1985 Public Security Circular replaced all previous circulars, instructions, decisions, and notices on the subject matter of *shoushen* issued by the national or local public security organs.<sup>55</sup> The 1985 Public Security Circular has since been accepted as the de facto "administrative procedure" for *shoushen*. It was applied by the Public Security of Railroads, the Civil Aviation Administration, and both the Ministries of Forestry and Transportation.<sup>56</sup> It has been referred to by the NPC Standing Committee,<sup>57</sup> adopted by the people's procuratorate,<sup>58</sup> cited by the people's courts, and accepted by legal scholars.<sup>59</sup>

However, the 1985 Public Security Circular continued to fuel debate over the nature, scope, interpretation and constitutionality of *shoushen*, the main contention focusing on whether *shoushen* should be considered a criminal or administrative measure, and whether there was a need to provide for a separate administrative detention power beyond the powers provided by the PRC Criminal Procedure Law.<sup>60</sup>

55. *Id.* art. 9 (providing that "[a]ll previous circulars and instructions by the Ministry of Public Security or local public security bureaus are void to the extent to which they conflict with this circular").

56. See *Guanyu Tielu Ruhe Zhixing Dui Shoushen Duixiang Yanchang Shoushen Qixian Shenpi Wenti De Qingshi Baogao De Pifu* [Official Reply to Report Requesting for Instruction Regarding How Railways Can Extend Sheltering for Examination Period for Examination Subjects] October 16, 1985, in PUBLIC SECURITY ENCYCLOPEDIA, *supra* note 16, at 879.

57. Jiangxi Province Answers, *supra* note 3.

58. *Guanyu Renmin Jianchayuan Zhijie Shouli Zhencha De Tanwu, Huilu, Qinquan, Duzhi Deng Fanzui Anjian Bushiyong Shoushen De Tongzhi* [Circular Regarding not Using Sheltering for Examination for the Crimes of Corruption, Bribery, Infringement of Rights, and Dereliction of Duty Cases Directly Investigated by the Supreme People's Procuracy] (promulgated 21 March, 1990) [hereinafter "Supreme People's Procuratorate Circular"], in ZHONGGUO FALU NIANJIAN (1991) [LAW YEARBOOK OF CHINA (1991)], at 623 (1991) (incorporating, by reference, the 1985 Public Security Circular, *supra* note 2).

59. Chen Weidong & Zhang Tao, *Zai Tan Shourong Shencha Buyi Feichu* [The Taking-In Examination System Must not be Abolished] in ZHONGGUO FAXUE, March, 1993, at 113 [hereinafter "Chen & Zhang II"].

60. Wang Xinxin, *Shoushen Zhidu Yingyu Feichu* [The Taking-in and Examination System Must be Abolished] in ZHONGGUO FAXUE, March, 1993, at 110. Chen & Zhang II, *supra* note 59, at 113.

### E. Limitation of Shoushen into the 1990s

Into the 1990s, the Chinese government has remained interested in curbing abusive uses of the *shoushen* power.<sup>61</sup> The overall trend has been toward more restrictive uses of *shoushen*, and in particular, the trend has moved away from using *shoushen* in commercial disputes.<sup>62</sup> On September 8, 1990, the Ministry of Public Security, Supreme People's Procuracy, and the Supreme People's Court issued a notice ("Notice"), summing up the general sentiment against the use of *shoushen* in commercial cases.<sup>63</sup> The Notice cited twelve reported cases of illegal detention from Shenzhen, Guangdong province in 1989, and noted that illegal detention cases had arisen elsewhere.<sup>64</sup>

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61. See Yang Yichen, *Zui Gao Renmin Jianchayuan Gongzuo Baogao* [The Supreme People's Procuratorate Work Report] (promulgated April 1, 1988), in *ZHONGGUO JIANCHA NIANJIAN* (1989) [PROCURATORIAL YEARBOOK OF CHINA (1989)], at 21-28; *LAW YEARBOOK OF CHINA* 802 (1991) (reporting on the First national Procuracy meeting on "rights violation" and dereliction of duty, held in Beijing from April 3-9, 1990); *LAW YEARBOOK OF CHINA* 720 (1992) (reporting on the Second national procuracy meeting on "rights violation" and dereliction of duty held in Beijing from May 18-23, 1990).

62. *Guanyu Gongan Jiguan Bude Feifa Yuequan Ganyu Jingji Anjian De Chuli Tongzhi*, (89) Gong (Zhi) Di 30 Hao [Circular Regarding the Fact that Public Security Organs Should not Interfere Illegally with Commercial Dispute Cases], in *COMPILATION OF LAWS AND RESTRICTIVE INTERPRETATIONS OF THE PRC*, *supra* note 3, at 22 (a circular issued by the Ministry of Public Security in April, 1989, strictly forbidding public security from using *shoushen* and other forms of detention to interfere with commercial disputes). See *Guanyu Chachu Zai Shangmao Huodong Zhong Yi Bangjia, Kouliu Renzhi Deng Fangfa Bihuan Zhaiwu Feifa Jujin Taren De Anjian Tongbao*, *Gaojainfa Fazi* (1990) Di Er Hao [Circulation of Notice Regarding Investigating and Handling Cases of Illegal Detention and Using of Kidnaping and Holding of Hostages to Coerce Repayment of Debts in Commercial Activities], *id.* (in which the Supreme People's Procuracy reinforced the general theme of the 1985 Public Security circular). See also *Gonganbu guanyu yanjin gongan jiguan chashou jingji doufen weifa zhuren de tongzhi* [Ministry of Public Security Notice Regarding Strictly Forbidding Public Security Organs in Interfering with Economic Disputes and Illegally detaining People] (promulgated on April 25, 1992) (Gong Tong Zhi (1992) 50 hao) in *ZHONGGUO JINGCHA FALU FAGUI GUIZHANG SHIYI DAQUAN*, 1327-1328. The Notice observed that the Circular Regarding the Fact that Public Security Organs Should Not Interfere with Commercial Dispute Cases has not been strictly followed. Public security organs was admonished to (1) stay away from contractual cases and commercial disputes; (2) not use *shourong shencha* in commercial cases and against foreigners; (3) not place commercial agents under custody as hostage for debt collection; (4) follow proper procedures when conducting police business outside ones jurisdiction.) *Id.*, at 1328.

63. "Circular of Notice Regarding the Situation of Illegal Detention Cases in Commercial and Trade Disputes" [*Guanyu Zai Shangye Maoyizhong Feifa Jujin Anjian Qingkuan de tongzhi*] in *COMPILATION OF LAWS AND RESTRICTIVE INTERPRETATIONS OF THE PRC (SUPPLEMENT)*, *supra*, note 3, at 20-22.

64. Four of the cases involved local people, four others involved people from other areas of Guangdong, and the rest were from outside the province. Five of the 12 cases involved public security and procuratorial officials.

After the discussion of the cases, the Notice went on to explain:

There were also some local public security officers and procurators who exceeded their legal authority by unilaterally protecting local economic interests in the handling of economic disputes. They treated what should have been mere commercial disputes as economic crimes and used illegal detention to help certain work units or individuals collect their debts. These practices violate state laws and party discipline. They severely interfere with citizens' personal freedom and destroy the normal functioning of the economic order. The public security organs, procurator offices, and courts should pay special attention and adopt effective measures to prevent and rectify the problem.<sup>65</sup>

On November 6, 1990, the Ministry of Public Security issued another circular ("1990 Public Security Circular"), expounding the abuses of *shoushen* in aiding local economic interests.<sup>66</sup> The 1990 Public Security Circular noted that public security officers violated their jurisdictional authority by treating contract and debt disputes as economic crimes involving fraud and using *shoushen* and detention to coerce the repayment of debts. In so doing, the 1990 Public Security Circular noted that public security officers applied *shoushen* to the wrong people, and often detained those people for three to four months, and sometimes even up to one or two years, which is much longer than the one month period allowed by law.

The 1990s witnessed a tightening of control over who can carry out *shoushen*, who can be made a target of *shoushen*, when one subject to *shoushen* may be interrogated, how a target of *shoushen* can complain of abuses, and what remedies were available to an aggrieved party.

On December 13, 1989, the Ministry of Public Security, Supreme People's Procuracy, and Supreme People's Court issued a Circular dealing with the handling of cases involving itinerant criminals ("Itinerant

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65. *Id.* See *Guo Debing Bufu Xinjiang Jinghexian Gonganju Shoushen Jueding* [Case of Guodebing Refusal to Except the Sheltering for Examination Determination of Xinjiang Province Jinghe County Public Security Bureau] (1990) [hereinafter "Case of Guo Debing"], in *IMPORTANT OVERVIEW OF CHINESE CASES*, *supra* note 1, at 1177.

66. *Guanyu Qieshi Jiuzheng Gongan Jiguan Banli Zhapian Caiwu Anjian Zhong De Buzheng Zhifeng De Zhongzhi* [Circular Regarding Realistically Correcting Inappropriate Style of Public Security Organs in Handling Swindling of Goods and Money Cases] (promulgated November 6, 1990), in *COMPILATION OF LAWS AND RESTRICTIONS OF THE PRC (SUPPLEMENT)*, *supra* note 3, at 103-6.



Criminals Circular").<sup>67</sup> The Itinerant Criminals Circular acknowledged the difficulties in the investigation, arrest, prosecution, and adjudication of such criminals. It called for the arrest and prosecution of itinerant criminals when the facts are clear and basic evidence exists.<sup>68</sup> On March 21, 1990, the Supreme People's Procuracy issued a circular further clarifying in what cases *shoushen* can be used ("Procuracy Circular").<sup>69</sup> This circular prohibits the use of *shoushen* for cases involving corruption, bribery, infringement of rights or dereliction of duty.<sup>70</sup> In May 1990, the Minister of Public Security issued a document admonishing public security at all levels not to extend the scope of *shoushen* at will or illegally overstep the administrative time limits on *shoushen*. The document also provides that any person subject to *shoushen* may appeal the decision to impose *shoushen* to the next level of public security authority. If a person subject to *shoushen* decides to challenge the decision to impose *shoushen*, the *shoushen* process continues except as provided by the PRC Administrative Procedure Law.<sup>71</sup>

In 1991, the Ministry of Public Security issued a circular to take further steps to exercise control over the use of *shoushen* ("1991 Public

67. See *Guanyu Zai Daji Liucuan Fanzui Huodong Zhong Xuyao Zhuyi Jige Wenti De Tongzhi* [Circular Regarding Certain Questions on the Handling of Cases Involving Itinerant Criminals], in COMPENDIUM OF LEGISLATION, JUDICIAL INTERPRETATIONS AND CASE LAWS OF THE PRC, *supra* note 13, at 601-2 (setting forth one of the most comprehensive definitions of itinerant criminals: criminals who commit crimes across city and county jurisdictions, and particularly, either those who commit a series of crimes across city and county jurisdictions, or those who commit crimes in their places of residence but escape to other cities and towns and continue to commit other crimes; itinerant criminals do not include those who are out of town tourists, businessmen, workers who commit occasional crimes and those who, while living in a local area, commit crimes in cities and towns across the border).

68. See Xu Youjun, *Zhongguo Xingshi Susong Yu Renquan* [Chinese Criminal Process and Human Rights], *ZHONGWAI FAXUE* (CHINESE AND FOREIGN LEGAL STUDIES), Feb. 1992, at 38-43 (demonstrating the tension existing between protecting individual rights and advancing social welfare).

69. *Supreme People's Procuratorate Circular*, *supra* note 58.

70. It is argued that 1985 Public Security Circular only authorizes the *shoushen* of criminals without known name, address, or place of origin. Legally, the power does not apply to cases of bribery, corruption, infringement of rights, and dereliction of duty because these offenses are usually committed by state officials with clear identity and known address. Practically, there is little need to resort to such power because state officials are not likely to escape investigation.

71. *Guanyu Yinfa "Quanguo Gong'an Fazhi Gongzuo Huiyi Jiyao" Tongzhi, Gong Fa (1990) 10 Hao* [Notice Regarding the Publication and Circulation of "Summary to National Public Security Legal System Work Meeting", Public Security Release (1990) No. 10], (promulgated May, 1990), referenced in item 3 "Guanyu Shourong Shencha De Pifu Yijiu He Fuyi Wenti" [Issue concerning the basis for approving and reviewing of sheltering for examination] in *Gonganbu Guangyu Gong'an Jiguan Guanche Shishi "Xingzheng Susong Fa" Rugan Wenti De Tongzhi* [Ministry of Public Security: Notice regarding certain questions on the thorough implementation of the "Administrative Procedure Law"] in *ZHONGGUO JINGCHA FALU FAGUI GUIZHANG SHIYI DAQUAN*, 963-967, 964.

Security Circular").<sup>72</sup> The 1991 Public Security Circular largely reiterates rules proscribed in the 1985 Public Security Circular regarding the time limits within which *shoushen* must be completed.<sup>73</sup>

On July 29, 1992, the Ministry of Public Security issued a definitive statement to clarify the jurisdictional ambiguity between the State Council Circular and 1985 Public Security Circular. In response to a query by the Jiangsu public security bureau,<sup>74</sup> the Ministry of Public Security clearly and unequivocally endorsed the jurisdictional requirement of the State Council Circular in making the *shoushen* applicable to "four targets" (*si zhong duixiang*).<sup>75</sup>

A more recent attempt to control the wrongful use of *shoushen* has been made through administrative law.<sup>76</sup> The PRC Constitution (1982) provides a cause of action for compensation against the government for administrative wrongdoing.<sup>77</sup> The PRC Administrative Procedure Law

72. See *Case of Guo Debing*, *supra* note 65 (citing *Guanyu Jinyibu Kongzhi Shiyong Shoushen Shouduan De Tongzhi* [Circular Regarding Further Steps to Exercise Serious Control of the Use of Shoushen Measure]), (91) Gongfa 37 Hao Wenjian).

73. First, those subject to *shoushen* must be examined within the first 24 hours after detention. Second, those found to be inappropriate subjects for *shoushen* should be released promptly. Third, suitable *shoushen* subjects should not be examined for more than the legal time limit, *i.e.* one month unless under exceptional circumstances; fourth, no *shoushen* should be extended over three months.

74. "Guangyu Shourong Shencha Fanwei Wenti De Qingshi Baogao" (Su Gong Ting (95) 211 Hao) ["Request (for Instruction) and Report Regarding the Jurisdictional Scope of Shelter for Examination"] in "Gonganbu Guanyu Dui Shourong Shencha Fanwei Wenti de Pifu" [Ministry of Public Security: Reply Concerning the Question of Scope in Sheltering for Examination] (Gongfu Zhi (1992) 6 Hao) in ZHONGGUO JINGCHA FALU FAGUI GUIZHANG SHIYI DAQUAN [CHINA ENCYCLOPEDIA OF LAWS, REGULATIONS AND RULES REGARDING POLICE], at 950.

75. *Id.* The Ministry of Public Security issued another clarifying statement on the jurisdictional scope of *shoushen*. In reliance to an inquiry by Sichuan province public security bureau - "Guanyu Dui Fazheng Daolu Jiaotong Shigu Taoyi De Jidongche Jiashiyuan Kefu Shiyong Shencha Shouduan Qingshi" [Request (for Instruction) Regarding Whether Sheltering for Examination Measure can Be Used Against Drivers of Motor Vehicle Accidents Who Fleed] - the Ministry of Public Security cited 1985 Public Security Circular and "Guangyu Jinyibu Yangge Kongzhi Shiyong Shourong Shencha Shouduan De Tongzhi" [Notice on Further Serious Control of the Use of Sheltering for Examination Measures] (Gong Tong Zhi (1991) 37 Hao) in issuing the opinion that only drivers who refused to give true name and address or otherwise with unknown background should be sheltered for examination, while others should be released. See *Gonganbu Guanyu Dui Jiaotong Shigu Hou Taoyi De Jidongche Jiashiyuan Shiyong Shencha Shouduan Qingshi Pifu* [Reply to Request Regarding Using Sheltering For Examination against Motor Vehicle Drivers Who Fleed from the Scene of Traffic Accident] *Id.*, at 951.

76. Wang Liming, *Lun Wanshan Qinquanfa Chuangjian Fazhi Shehui De Guanxi* [A Discussion on the Relationship Between Perfection of the Law of Tort and Building a Legal Society], FAXUE [LEGAL STUDIES], July, 1992, at 14-19.

77. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, art. 41(3) (adopted Dec. 4, 1982) ("Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law."), *translated in*

allows an aggrieved person to sue the government for administrative wrongdoing.<sup>78</sup> The Supreme People's Court has since issued comments providing that any person can challenge the public security's decision to practice *shoushen* administratively in court.<sup>79</sup>

Subsequently, the legal status of *shoushen* was put into doubt by the People's Supreme Procuratorate in an official reply to an inquiry from the Guangdong province regarding whether an escaped *shoushen* person should be prosecuted as an escapee under the Criminal Law.<sup>80</sup> The Supreme People's Procuratorate answered that one subject to *shoushen* who escapes should be prosecuted and punished as an escapee, but opined that further prosecution and additional penalties are only warranted for a guilty escapee and not for an innocent one.

In March 1996 the PRC political leadership and policy makers took a dramatic step forward to control the abuse of police powers, including that of *shoushen*, when the NPC adopted the amended Criminal Procedure Law. We now turn to a discussion of how the Criminal Procedure Law regulates and controls *shoushen* as an investigative power.

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CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA AND AMENDMENTS TO THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 11 (Legislative Affairs Commission of the Standing Committee of the National People's Congress ed., 2d ed., 1990) [hereinafter "CONSTITUTION"]; see Hu Xiaohua, *Guanyu Goujia Xingzheng Qinquan Sunhai Peichang Zeren De Goucheng Yu Xianzhi Wenti* [On the Question of Constitution and Limitation of Compensation of State Administrative Infringement of Rights], FAXUE [LEGAL STUDIES], July, 1992, at 86-89.

78. ADMINISTRATIVE PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted April 4, 1989), art. 2, translated in ADMINISTRATIVE PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (Legislative Affairs Commission of the Standing Committee of the National People's Congress ed., 2d ed., 1990) (gives citizens the right to sue in the court when their legal rights have been violated by administrative actions); *id.*, art. 11(1) and 11(2) (providing that a person can file a complaint challenging any coercive measures which deprive one's liberty or restrict one's freedom); see ZHONGHUA RENMIN GONGHEGUO BAIFA SHIJIE ANLIE QUANSHU [EXPLANATION OF 100 PRC LAWS AND CASES] (1993), at 1077-1129 [hereinafter "PRC LAWS AND CASES"]; Hu Xiaohua, *supra* note 77 (identifying the five necessary elements for the successful prosecution of an action brought under the Administrative Procedure Law).

79. GUANYU GUANCHE ZHIXING 'ZHONGHUA RENMIN GONGHEGUO XINZHEN SUXONG FA' RUGAN WENTI DE YIJIAN (SHIXING) [COMMENTS ON CERTAIN QUESTIONS REGARDING RESOLUTE EXECUTION OF PRC ADMINISTRATIVE LAW].

80. *Guanyu Shoushen Jiancha Renyuan De Taopao Xingwei Shifou Zhuisu Wenti De Pifu* [Official Reply Regarding the Question of Whether the Escape Conduct of Sheltering for Examination Persons Should be Prosecuted], in BUSINESS MANUAL OF THE PRC, *supra* note 17, at 1171. Article 161 of the Criminal Law provides that "a criminal who escapes after being arrested or held in custody according to law" will receive an additional sentence on top of that for the original offense.

### III. LEGISLATIVE RESPONSE TO *SHOUSHEN* IN 1996

The final chapter to the *shoushen* saga was written in 1996. On March 17, 1996 the NPC adopted the Criminal Procedure Law of the People's Republic of China. The law was passed to promote socialist legality as well as to protect people's rights.<sup>81</sup> The Criminal Procedure Law, while not mentioning *shoushen* by name, effectively places all public security coercive measures, including *shoushen*,<sup>82</sup> under one unified procedural control scheme. Henceforth the public security authority "must strictly observe this law and relevant provisions" in investigating, arresting, and detaining suspects.<sup>83</sup>

Jurisdictionally, the Criminal Procedure Law specifically authorizes the public security organs to detain active criminals or major suspects under the following circumstances:

"(6) If he/she does not reveal his/her true name and address or his/her identity is unclear.

(7) If there is strong suspicion that he/she is a person who goes from place to place committing crimes..."<sup>84</sup>

81. Article 2 provides, in pertinent part: "The tasks of the Criminal Procedure Law of the People's Republic of China are to guarantee accurate and timely clarification of the facts of crimes, to apply the law correctly, to punish criminal elements, to safeguard innocent people from criminal prosecution ... to protect the citizens' ...rights..." See also Article 14: "The people's courts, the people's procuratorates, and the public security organs shall safeguard the procedural rights that participants in proceedings enjoy according to the law."

82. See note 88, *infra*.

83. See Criminal Procedure Law, Chapter 1, Article 3, paragraph 3 which provides in pertinent part: "In conducting criminal proceedings, the people's courts, the people's procuratorates, and the public security organs must strictly observe this law and relevant provisions of other laws." See also Article 14: "The people's courts, the people's procuratorates, and the public security organs shall safeguard the procedural rights that participants in proceedings enjoy according to the law."

84. Article 61 provides: "Public security organs may first detain an active criminal or a major suspect under any of the following circumstances:

- (1) If he is preparing to commit a crime, is committing a crime, or is discovered immediately after committing a crime.
- (2) If he is identified as having committed a crime by the victim or by an eyewitness on the scene.
- (3) If he is discovered to have criminal evidence near his person or at his residence.
- (4) If after committing the crime, he attempts to commit suicide or to escape, or if he is a fugitive.
- (5) If he may possibly destroy or fabricate evidence, or conspire to make false confessions.
- (6) If he does not reveal his true name and address, or his identity is unclear.
- (7) If there is strong suspicion that he is a person who goes from place to place committing crimes, who repeatedly committed crimes, or who teamed up with others to commit crimes.

The above jurisdictional provisions echo the *shoushen* language in the State Council Circular<sup>85</sup> and the 1985 Public Security Circular.<sup>86</sup> These provisions are a major departure from past legal policy and administrative practice dealing with *shoushen*.<sup>87</sup> The NPC clearly and unequivocally acknowledged *shoushen* as a proper exercise of police investigative powers, and to be regulated by the Criminal Procedure Law.

Procedurally, the Criminal Procedure Law provides clear and explicit guidelines for investigative detention including *shoushen*. It prescribes the jurisdictional limits for investigative detention (Article 61), procedure for detention (Article 64), procedure during detention (Article 65), procedure for release (Article 65), procedure for arrest (Article 69), procedure for extension of detention (Article 69), procedure for challenging illegal detention (Article 75) and procedure for oversights (Article 76).

Generally, under the Criminal Procedure Law all investigative detentions must be accompanied by a detention warrant.<sup>88</sup> The police, with a few exceptions, must inform the detainee's family or work unit of his arrest within 24 hours.<sup>89</sup> The procedure during an investigative detention is strictly prescribed by Article 65:

The public security organ should conduct an interrogation of the detained person within 24 hours after detention. When it is discovered that he should not have been detained, the detained person must be released immediately and be issued a release certificate.<sup>90</sup>

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85. See note 2, *supra*.

86. See note 3, *supra*.

87. See Part II, The History of *Shoushen*, *supra*.

88. Article 64 provides:

When a public security organ is detaining a person, it must produce a detention warrant.

The family of the detained persons or his unit shall be notified 24 hours after detention of the reasons for detention and the place of custody, except in circumstances where notification would hinder investigation or there is no way to notify them.

It is clear that this provision will be of little use in protecting the rights of one group of *shoushen* targeted criminals, i.e. "a person who goes from place to place committing crimes; who repeatedly committed crimes ..." (Article 61(6)).

89. *Id.*

90. See also Article 9, para. 2 to the Police Law which provides that investigative detention by the police should not exceed 24 hours, and with the approval of the next level of public security organs, no more than 48 hours. The Police Law provides for a shorter initial detention period (12 hours) before approval is necessary.

Specifically, the Criminal Procedure Law provides strict time limits to guide the proper exercise of and effective supervisory control over investigative detention powers. Investigative detentions, under normal circumstances, should last no more than 72 hours, at which time a formal request for arrest approval should be made to the procuratorates. An extension of one to four days is possible, but only under special circumstances.<sup>91</sup> This can be further extended for 30 days in cases involving “a major suspect who is on the run and who allegedly commits crimes repeatedly.”<sup>92</sup>

The Criminal Procedure Law sets forth outer limits for investigative detention. The period for holding the crime suspect in custody during investigation may not exceed two months, with a possible extension for another one month period with the approval of the procuratorate at the next level if the case is complicated.<sup>93</sup> Beyond this outer limit, an extension can only be granted by provincial autonomous regional, and municipal people’s procuratorate for special types of cases, which include “major and complicated cases in which the suspect’s crimes have been committed at various locations.”<sup>94</sup> It is significant to observe that the Criminal Procedure Law makes clear that the procedural time clock on criminals or suspects

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91. Article 69 provides: “In cases where a public security organ considers it necessary to arrest a detained person, it shall, within three days after detention, submit a request to the people’s procuratorate for review and approval. Under special circumstances, the time for requesting review and approval may be extended by one to four days.” What constitutes special circumstances is not defined under the Criminal Procedure Law. In light of the comprehensive nature of the law, it does not appear to be the intent of the NPC to allow for a liberal interpretation of “special circumstances.”

92. Article 69, para. 2 provides: “For a major suspect who is on the run, who repeatedly commits crimes, or who partners with others to commit crimes, the time for requesting review and approval may be extended by up to 30 days.” A liberal construction of this provision will include all “*licuan fan*” who by definition are wandering criminals from place to place (itinerant criminals.)

93. Article 124 provides in pertinent part: “The period for holding a crime suspect in custody during investigation may not exceed two months. If a case is complicated and cannot be concluded before the period expires, the period may be extended by one month with the approval of the procuratorate at the next level up.”

94. Article 126: “If investigation of any of the following cases cannot be concluded within the period specified by Article 124 of this law, the period may be extended by two months with the approval of or decision by a provincial, autonomous regional, or municipal people’s procuratorate: (1) A major and complicated case in a remote region with very poor transport facilities; (2) A major criminal gang case; (3) A major and complicated case in which the suspect’s crime has been committed at various locations; (4) A major and complicated case involving a broad spectrum of crimes for which evidence is difficult to obtain.”

detained for investigation does not start to run if the criminal suspect refuses to disclose his true name, address, and identity.”<sup>95</sup>

The Criminal Procedure Law also provides for citizen challenge and official supervision of any illegal exercise of investigative detention powers. First, the aggrieved citizen has a right to file a complaint against the police.<sup>96</sup> Article 75 of the Criminal Procedure Law provides the aggrieved citizen with a statutory avenue to challenge any illegal detention:

A suspect or a defendant and his or her legal representative and close relatives, or counsels appointed by a suspect and the defendant, have the right to demand rescission of the coercive measures taken by ... the public security organ that have exceed the legal limit. The ...public security organ shall release the suspect or defendant against whom the coercive measures exceeding the legal limit have been taken...”

The people’s procuratorate is also charged with the responsibility of rectifying any illegal investigation activities in the process of reviewing and approving arrests by the public security.<sup>97</sup>

#### IV. CONCLUSION

In this paper, I have attempted to trace the historical development of *shoushen* from a well intended social control device to a much abused police power. The paper ends appropriately with the passage of the amended Criminal Procedure Law on March 17, 1996. The NPC, in promulgating the Criminal Procedure Law, effectively brought all police investigative powers under one roof. In so doing, the NPC clearly demonstrated its resolution in bringing law and order to the widespread

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95. Article 128 provides, in pertinent part: “If the criminal suspect refuses to disclose his true name, address, and identity, the period under which he can be held in custody starts from the date identity is clarified ....” If this provision is literally applied, the Criminal Procedure Law will be of little use in protecting a large group of criminal suspects against prolonged investigative detention., e.g. those from the *mangliu* ranks; this is the same problem which existed under the *shoushen* investigative system.

96. Article 14, para. 3: “Participants in proceedings have the right to bring complaints against ... investigators for acts that violate their procedural rights as citizens...”

97. Article 76: “In the course of its work of reviewing and approving arrests, if a people’s procuratorate discovers that there are illegalities in the investigation activities of a public security organ, it shall notify the public security organ to rectify them, and the public security organ shall notify the people’s procuratorate of the circumstances of the correction.”

abuse of police powers in the PRC, particularly the misuse of *shoushen*. This is a propitious beginning. What remains to be seen is how the Criminal Procedure Law will be received and applied in the field. If our own experience with legal control over police misconduct is any guide,<sup>98</sup> the Criminal Procedure Law is just another chapter in the long fight against *shoushen* abuses.

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98. WILLIAM A. GELLER (ed.), *LOCAL GOVERNMENT POLICE MANAGEMENT* (1991), 11-13. ("The police response to the High Court's rulings of the 1960s was largely one of bitterness and outrage: criminals would have all the advantage; police would be shackled and impotent to deal with serious crime..." )