

The Creation of Defence in China
Revisiting the Trial of the Gang of Four
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The trial of the Gang of Four, which included Mao Zedong's wife, took place after the end of the Cultural Revolution, during the winter of 1980-81. In the West, it is usually seen as a show trial; in China, however, it constitutes the founding act of defence, throwing light on the particular way in which contemporary Chinese lawyers focus on technique and impartiality.

At the end of April 2012, Chen Guangcheng, a blind man and an icon of resistance through law in China, escaped from his home where he had been under house arrest since completing his prison sentence. The case drew renewed attention to the role of lawyers in social movements in China. An American study¹, inspired by the theory of 'cause lawyering' seeks to show that lawyers are at the forefront of these movements by putting forward a typology of Chinese legal activists. The results may need qualifying, however: on the one hand, the link between the legal profession and political liberalism – traditionally accepted – is not proven, even in the West²; on the other hand, in the case of China it is necessary to first examine the role of lawyers in the judicial field.

In reality, the profession is strictly regulated within a regime that proclaims its social characteristics, the Party's authority and the absence of separation of powers. Under this framework, an annual review of licences is carried out, which may or may not be granted to lawyers and their firms, and defence rights are limited essentially to the sentencing phase.

Most importantly, China has no tradition of a legal profession. The profession made an appearance in the late 19th century in Western concessions before developing in large cities during the Republic, although that development was clearly hampered during wartime. Before 1979, the People's Republic of China had no lawyers except for a brief period of experimentation between 1954 and 1957. The profession was immediately discredited within a Marxist system based on a rejection of the neutrality of law and its servants: defending an enemy of the people was to be an enemy of the people oneself. Most lawyers were categorised as rightists after the Hundred Flowers Campaign in 1957. It was not until August 1980 that defence was established by a provisional regulation.

Before then, no place was given to lawyers in China, particularly considering that trials were a rare occurrence. Most of the sentencing powers were delegated to local Party activists and leaders in self-criticism sessions and struggle sessions in which, as researchers Isabelle Thireau and Hua Linshan explain, the population was mobilised against the accused,

¹ Fu Hualing and Richard Cullen, "Weiquan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-interest Lawyering", *The China Journal*, n°59, January 2008, pp. 111-127.

² See Liora Israël, *L'arme du droit*, Presses de la fondation nationale des sciences politiques, 2009.

who were deprived of the right to defend themselves or to be defended. The only option available to them was to confess³. Under such circumstances, how did Chinese lawyers reinvest in that stolen right to defend in order to create a right of defence at the beginning of the 1980s?

To gain a clear picture, we must revisit the trial of the Gang of Four and Lin Biao's generals in the winter of 1980-81. While the West generally considers it to be a show trial, in China it is nevertheless the founding act of defence. During the trial, the lawyer Zhang Sizhi⁴ coordinated the work carried out by the defence team. This man is a key figure in the history of Chinese lawyers. His manual *The Legal Profession and Lawyering in China*, published in 1985, and his journal *Chinese Lawyers*, created in 1988, have been vital references for generations of young lawyers. Above all, Zhang Sizhi paved the way by defending the Gang of Four and Lin Biao's generals, and then political victims of the 1989 movement.

Based on his account, recorded between September 2009 and April 2012, three main stages in the creation of defence can be identified, the first of which is the consent to defend the indefensible.

The complex task of forming a defence team

Deng Xiaoping, who had returned to power in December 1978, wanted to use this trial to formally bring an end to the struggle of Mao Zedong's succession within the Party. His aim was to bring to justice – without tarnishing the image of the deceased President – Mao's widow and her supporters: Jiang Qing, Wang Hongwen, Yao Wenyuan and Zhang Chunqiao, more commonly known as the Gang of Four. The victims of the Lushan Conference in 1969, who had fallen out of favour for defending the idea that the position of President of the People's Republic should remain in the Constitution, have to be added to this group. This included Chen Boda, released in October 1970, and five supporters of Marshal Lin Biao, including General Li Zuopeng, who lost their positions after their champion's fatal plane crash in September 1971.

The trial, unlike that of Nuremberg to which it is often compared in China, sought to restore the credibility of the system by appropriating Mao Zedong's legacy from before the Cultural Revolution. Having rejected any rule that characterised Mao's permanent revolution, it then had to demonstrate a return to the construction of the socialist State by establishing a monopoly of legitimate violence. From then on, state institutions alone had the power to impose custodial sentences, whether administrative or judicial, .

So, there was a return to rules, but it took place through a justice of exception. A special court, whose establishment was approved at the end of September 1980 by the Standing Committee of the National People's Congress, was set up for the historic trial, and its rulings were to be final. In March 1980, the decision was made to create a steering committee, led by Peng Zhen⁵. The structure had to combine functions of legal proceedings, investigation of cases and rulings under the Party's control. At the same time, the decision was made to give the accused the right to 'speak and explain themselves'. And so, after the trial came the second split from previous styles of justice. According to Zhang Sizhi, it was

³ Isabelle Thireau and Hua Linshan, *Les ruses de la démocratie, Protester en Chine*, Le Seuil, 2010.

⁴ Born in 1927. His biography will be published by Bourin Éditeur in spring 2013 (France).

⁵ Peng Zhen was then chairman of the Legal Affairs Committee within the Standing Committee of the National People's Republic.

Peng Zhen who, in August 1980, had the idea of extending the right to self-defence to the right to be defended. Two reasons lay behind his desire to have lawyers intervene:

First of all, Peng Zhen had long-term experience as Secretary of the Political and Legal Affairs Commission of the CPC Central Committee and Mayor of Beijing. There was also a direct link with what he had experienced during the Cultural Revolution. He was one of the first to experience the joys of being purged. (...) When he was able to return to Beijing at the end of the Cultural Revolution, he confided, "When we were arrested, we would have been better off if there had been lawyers to defend us, that is certain".

August 1980 was the month in which the provisional regulation on lawyers was adopted. At that time Beijing had around 20 specialized practising lawyers. Zhang Sizhi, who had just been rehabilitated, led the No. 1 Legal Advisory Office. The few months he had spent practising law in 1956 made him one of the most experienced lawyers in the city. He was therefore elected, in 1980, as Vice-President of the Beijing Lawyers' Association.

At the end of 1980, the Chinese people did not know what a lawyer was. They made the discovery during the trial, which attracted unprecedented publicity: the courtroom had a capacity for 1200 spectators and hearings were broadcast live on the radio and television with a short time lag.

The care taken over publicity indicated a show trial. However, it was still necessary to find people who would agree to take on the role of defence lawyer. For it was a thankless task. The accused were indefensible, not only because the entire country hated them but also because their conviction was in no doubt. It was a dangerous mission: to accept meant exposing oneself to the risk of committing a moral fault against the people and a political fault against the Party. The Ministry of Justice had to review its demands in the light of the series of refusals it encountered:

[The idea of the Ministry of Justice] was that we had to create a balance. What did that mean? It meant that we needed to find lawyers whose renown was equal to the red mandarin status of the ten defendants and the reputation of the magistrates, all Revolution veterans (...) Put simply, justice officials wanted big names, great figures. (...) The officials had never imagined that none of those figures would accept the mission. They all gave the same response, "Plead? I shall do so happily for anyone, but not the Gang of Four. For them, it's absolutely impossible. If I take this on, my reputation will be sullied for ten thousand years, not to mention the danger I would be facing. If I make the slightest mistake political troubles are sure to start all over again.

The Ministry of Justice resolved to place specialized lawyers in the front line. The profession had just been re-established and so the team had to be made up with law professors. Once again, they encountered resistance and had to negotiate hard to secure the teachers' secondment:

What the justice people had not considered was that each university would have to give its permission. The China University of Political Sciences and Law, the People's University of China, the University of Beijing, all of them wanted to add their two cents. Why have you chosen Mr Zhang? Mr Li would be better. And so on...

Seventeen people finally gathered in bureau no. 2 of the State Council on 12 October 1980, the date on which the defence team was officially formed. Following a withdrawal, Zhang

Sizhi found himself entrusted with leading the team. He accepted the job out of duty and, above all, out of professional dedication:

I was Vice-President of the Lawyers' Association. As such, I had to set an example and show that all the accused, including the bad elements and counter-revolutionaries, had the right to be defended.

By establishing the right to defence, the new leadership of the CPC chose to turn its back on struggle sessions. Implementing that decision proved laborious, but they had overcome the first hurdle – a small group of people had finally agreed to defend the indefensible. Quite how they would do so remained to be seen.

Developing a strategy of neutrality

Negotiations over the formation of the defence team gave Zhang Sizhi an important advantage: the big names had been dropped, and there remained only criminal law professionals in the team.

We, the lawyers, were all legal experts, professionals, unlike most of the magistrates who knew nothing of law. Those people were used to class struggles, not courtrooms.

While the magistrates had been selected for their revolutionary credentials, the lawyers could assert their technical skill, which was a rarity considering that the teaching of law had only just been resumed after being discontinued in 1958. Furthermore, there was no questioning their expertise, given the existence of the 'Recommendations on the work of the defence'. This text, which was examined during the first meeting of the defence team on 17 October 1980, had been issued by the Party cell of the Ministry of Justice; Peng Zhen had countersigned it. It gave the lawyers the role of technical advisors. The team's purpose was to facilitate the hearing procedure for the accused:

The lawyer, when he meets the accused, shall give them legal explanations, preventing any attempt on their part to cause an obstruction or disturb the order of the hearing.

The team also carried out this advisory role for the magistrates, prosecutors and judges. On 18 October 1980 the team was handed a preliminary draft of the indictment to be revised and a draft statement of conviction in mid-December. The 'Recommendations' also contained the definition of defence, as established by law, and its practical interpretation for the trial:

The defence must be based on the facts, using the law as a guide. The prosecution files have been checked numerous times, the criminal facts recorded in the indictment are clear and there is a large amount of solid proof. The lawyers at the trial will not be able to plead not guilty.

This rule stripped the role of defence lawyer of all its meaning, argues Zhang Sizhi.

The entire purpose of defence is to argue the facts and their legal classification. If the debate is said to be closed on those two points even before it has been opened, what is the point of the lawyers speaking? (...) Requesting a lighter sentence according to the charges and the defendant's behaviour, well anyone could do that.

It was on the grounds of their technical legitimacy that the lawyers sought to restore some meaning to their role in the trial. Between the meeting of 17 October and the 10 November, the lawyers had no access to the documents of the court file. Zhang Sizhi decided to use those days of waiting to raise a debate: should they continue to fulfil the role of technical advisor that had been assigned to them? After many days of debate, the team concluded that they must comply with their legal obligations, not the Party's orders.

[This debate] was imperative, because the team was made up of intellectuals who had suffered in the Cultural Revolution and had barely recovered from it. Some were afraid of making a mistake, which might damage the lawyers' image. Others feared that the masses would reproach them for having defended these individuals. And others were frightened that the same masses would believe the defence work had been inadequate and that the lawyers were puppets.

On that basis, some suggested that the solution was to adhere strictly to the will of the Centre (...) Conversely, others held that, since we had been ordered to participate in the trial, we should fulfil the role assigned to us by the law: to protect the legal rights of the accused.

The law was seen as a protection against the spectre of a political fault. But what of the moral fault? What distance should they maintain from the accused in order to be accepted by them while avoiding being tainted? Against their own will, the lawyers are still bound by the justice of class.

To the question, 'What do we do if a defendant wants to shake our hand?', we replied, 'Refuse, to make our class position clear!'

They tried to imagine delicate situations they might face, and the manner in which they should react. During that whole period, Zhang Sizhi drafted numerous memos to the group. In each, his proposal was to brandish the shield of the law.

[In the vademecum on the meeting with the accused], we even envisaged a scenario in which the defendant might show contempt.

- To the question 'Are you capable of defending me?', we can answer, 'As a lawyer, naturally I can defend you, by using the facts and the legal rights granted to you by the law'.

- If the accused exclaims, 'You have been ordered to do this!', we can reply, 'That is one way to see things, and each to his own. For my part, I would say that the special court has appointed us, as prescribed by the law, to defend you and protect your legal rights.'

- If the accused says, 'In any case, you are lawyers of the system', we must answer, looking at the accused straight in the eye: 'Chinese lawyers are legal workers of the State (...)'

- If the accused says, 'What good is a strictly formal defence?', we should explain, 'The right to defence is established by law; to defend you is to act in accordance with the law'.

Looking beyond the case of Jiang Qing and her companions, who, as Zhang Sizhi recognises today, were seen as 'adversaries', the issue at hand was the lawyer's position in relation to the client. In fact, lawyers could not follow political orders without putting themselves in danger. Therefore, their strategy was to emphasise absolute impartiality, which stemmed from their position as legal experts. In short, the legal debate ended where political confrontation began.

In practice, the dividing line was sometimes blurred. At the beginning of September 1980, at a meeting of the Political Bureau, Deng Xiaoping established the focal point of the trial: the indictment would not address the errors made by Mao Zedong or Zhou Enlai. The lawyers debated this. Could that strategy be sustained? They decided to comply, not out of any ideological loyalty but out of strategic necessity.

One day, a lawyer said to me, 'Hey, Zhang, let's be serious, we need to be clear on this – is this the Gang of Four or the Gang of Five?' He was talking

about Mao Zedong, of course. ‘Let’s stop here, then, because otherwise – this stays between us – this won’t be about the Gang of Four or the Gang of Five at the trial, but about you and me, the Gang of Two. We’ll all be lumped together’. Even so, I kept thinking, how can Jiang Qing be convicted for counter-revolutionary crimes without it reflecting on the Great Helmsman?

These conversations reveal the state of mind that prevailed among the defence team: they calculated risks before taking them. The lawyers, if they wanted to have the right to speak without exposing themselves to the risk of moral or political condemnation, had to resort to a strategy of neutrality: lawyers are neutral, as is the law. This strategy, which the defence team perfected through trial and error, was based on a two-fold legitimacy – a legitimacy of expertise and a legitimacy of impartiality. Would it stand the test of a real-life situation?

Testing the strategy of neutrality in a real situation

On 10 November 1980, during the presentation of the indictment, the defendants were reminded of their right to use a lawyer, with six out of ten stating that they wished to do so. They then needed to be distributed amongst the lawyers. Within the team, nobody wanted to represent Jiang Qing. The Ministry of Justice had to make a decision: Zhang Sizhi and professor Zhu Huarong would meet with Mao Zedong’s widow. The interview took place on the morning of 13 November, seven days before the trial. Zhang Sizhi had written countless memos, but the meeting quickly became a dialogue of the deaf, for Jiang Qing refused to sign the authorisation.

- At the hearing, I’ll be upset, and I’ll have trouble speaking. I’m going to need a legal advisor to speak for me. I have little knowledge of the law. (...)
 - Your request has no legal basis. It is not the lawyer’s task to speak for you, I replied.
 - What I want is an advisor, not a lawyer who turns me into the accused. (...)
- If you believe what is written in the indictment, how can you defend me? You are on their side; you cannot be my lawyers!

Mao Zedong’s widow, who embodied the revolutionary spirit, rejected out of hand the possibility of professional impartiality, supported by a State judicial system. For her, everything was political. Jiang Qing, to whom two other lawyers were later assigned, eventually decided to represent herself.

Zhang Sizhi had a second opportunity to prove his impartiality. After the failed meeting with Jiang Qing, he was asked to defend Li Zuopeng, the main defendant of Lin Biao’s clan. On 16 November, the old general created no problems and immediately agreed to sign the authorisation.

In the end, five out of ten defendants received help from a lawyer. Among them, the main defendants Yao Wenyuan and Li Zuopeng were defended by the two representatives of the Beijing and Shanghai lawyers: Zhang Sizhi and Ms Han Xuezhong. On 21 November 1980, the day before the hearing began, the lawyers finally gained access to the 15 volumes of proof. As the Criminal Division No. 1 took more time to examine witnesses and present evidences, the lawyers had more time to prepare for defence.

The team got down to the job of reading the files. In his meeting with Ms Han Xuezhong, Yao Wenyuan denied being involved in the attempted armed uprising in Shanghai. His lawyer found, when going thoroughly through the documents, that there was insufficient

evidence to support the accusation. Nevertheless, tells Zhang Sizhi, she was in doubt over whether or not to deny such a serious charge.

Han Xuezhong was a friend. In private, I asked her:

What is bothering you, exactly?

– If I raise that kind of question, I'll be committing a fault, won't I? In general terms I would be going against the recommendations of the Party cell of the Ministry of Justice.

– This is what I suggest. On behalf of the team, we shall write a note to the steering committee explaining our conclusion and the reasoning by which we have reached it. We shall see how they react.

What was the steering committee's response? It agreed.

The method consisted in preventing the risk of committing a political fault by justifying this lapse with technical motives. To give itself room for manoeuvre, the team addressed the steering committee directly in order to bypass the rules decreed by the Party cell of the Ministry of Justice. The defence therefore developed among the gaps⁶, based on an exploitation of the game being played out between two emanations of the Party.

In his plea on behalf of General Li Zuopeng, Zhang Sizhi, having reminded the court of the leading role played by the accused in Lin Biao's counter-revolutionary clan, asked the court to carefully examine the General's degree of responsibility in the schemes of which he was being accused. Zhang Sizhi divided the charge of the attempted murder of Mao Zedong into two phases: as he had been entirely unaware of the plot, General Li Zuopeng could not have wanted to trigger the incident when he recounted the words of Mao Zedong announcing Lin Biao's imminent purging.

In this collective crime, committed by a group, Li Zuopeng's responsibility was irrefutable. However, after examining the proof, it was found that he had not taken part in putting together the plot, known as Project 571. There was nothing to prove that he had directly taken part in or instigated the attempted counter-revolutionary coup d'État.

According to the charge, Li Zuopeng had committed the crime of recounting to Huang Yongsheng what Mao Zedong had said during his trip to southern China. When investigating the case for the hearing, there was nothing to prove that he had recounted those words with the aim of encouraging Lin Biao to decide to carry out the plot to kill Chairman Mao Zedong. During the judicial enquiry, no evidence was presented to show that Li Zuopeng had taken part in the plot to kill Mao Zedong.

In fact, Zhang Sizhi reviewed the facts in order to undermine the interpretation that was made of the way in which they were connected. Admittedly, he did not openly state that the version of the charge had resulted from that interpretation *a posteriori*. Nevertheless, he clearly went beyond the limitations set by the Party cell of the Ministry of Justice at the start of the trial: he challenged the strength of the evidence and criminal facts.

The wording of the defence was sober and technical. The idea was not to stir the jurors with a lengthy speech that appealed to their emotions, but rather to convince the judges and, above all, the steering committee, by writing a short text that read more like a technical report. In fact, the decision was made outside the courtroom.

⁶ See the developments of Yves Chevrier on democratic practice – specifically, the defence of fundamental rights – as an interstitial activity in China in the introduction of *Citadins et citoyens dans la Chine du XXe siècle*, Éditions de la Maison des sciences de l'homme, 2010.

Nevertheless, the trial was an important step for the profession. Zhang Sizhi was aware of that.

In any case, the officials could say whatever they liked, but I was the one who was actively working on the case. Yes, it was a historic trial, and it was also historic because the lawyers were going to appear on television for the first time in China. The image of the profession was at stake.

While preparing for the trial, Zhang Sizhi took advantage of the dress rehearsal held on 13 November, at which lawyers were invited to sit as spectators to fill the lawyers' ranks.

At the dress rehearsal, the weakness of our ranks in comparison with those of the prosecution was immediately apparent. The power balance was out of all proportion, with 23 against 5. I therefore requested and was given ten lawyers to sit at the hearing.

At the hearing, the fear of committing a political fault caused some blunders: professor Gan accused Chen Boda, whom he was supposed to be defending. Zhang Sizhi had to intervene in order to rectify the situation.

When professor Gan arrived in the courtroom he was trembling with fear, to the extent that he became a second prosecuting lawyer. He threw accusations against Chen Boda.

Of course, this gave a terrible impression, for it went entirely against the mission with which the Centre had entrusted us. (...) I talked with Gan privately and began by reminding him of the role of a lawyer. He broke down in tears, completely panic-stricken. He kept saying, 'I've made a huge mistake, I apologise to the Party'. I might add that he was not punished later.

Finally, explained Zhang Sizhi to professor Gan, it was only out of obedience to the Centre, which had entrusted them with the task of defence, that the Centre's principles would be contravened. They were asked to be lawyers, and they would do so effectively. Zhang Sizhi kept the matter strictly professional, separate from any moral or political consideration.

The verdict was announced on 25 January 1981. The heaviest sentences were imposed on the civilians: the death penalty with a suspension of execution for Jiang Qing, who continued to defend the Maoist revolution wholly and despite everything, and for Zhang Chunqiao, who had withdrawn into silence. Wang Hongwen, on account of his cooperative attitude, was sentenced to life imprisonment. Yao Wenyuan and Chen Boda, both represented by lawyers, were handed prison sentences of 20 years and 18 years respectively. For Lin Biao's generals, there was no obvious difference between those who had been defended by lawyers and the others: their sentences varied between 17 and 18 years imprisonment.

The defence team succeeded in obtaining the revocation of 7 charges out of 48. For Zhang Sizhi, however, the results were mixed. Firstly, because the team had been unable to plead for Jiang Qing. Secondly, because, according to the elderly lawyer, the defence was under control. This led him to feel that the trial had been halfway between a struggle session and a judicial trial: a political trial.

Nevertheless, the show trial had a real impact: it was during the trial of the Gang of Four and Lin Biao's generals that defence was established in China. This was largely due to the personal initiative of those involved. By making concessions, they had laid down principles. Today, Zhang Sizhi states:

I do not believe I committed any heroic act by agreeing to lead the defence in the trial. However, I do know what I won from that. I won a role for Chinese lawyers.

That role was established by developing a strategy of neutrality that broke with the Marxist concept. It also broke with the Western concept that forces lawyers to adopt the point of view of the clients they defend. Chinese lawyers are not actually bound by the word of the person they represent; they are, as is laid down by a 1996 law, in the service of society and, primarily, in the service of the law.

Unlike American ‘cause lawyers’, ‘whose stated aim is to politicise their professional practice’⁷, specialist Chinese lawyers have endeavoured to drive the political debate out of the judicial sphere. In order to allow the law to work against the prosecution, they must use it as a technical instrument wielded by a strictly impartial agent. Their role as experts, which economists and other specialists have also proclaimed, is strongly encouraged by a government that wishes to break with violence and Maoist voluntarism by emphasising the supremacy of objective laws and institutions. The strategy of neutrality has prevented them from playing a leading role in social movements, because, if they openly defend a cause other than that of the law, their word shall be discredited in the trial, and their licence may even be taken away. The job they have done of neutralising the law was pivotal in the emergence of a militant use of the law outside of the courts in China during the 2000s. The release of Charter 08 by Chinese intellectuals in December 2008, modelled on Václav Havel’s Charter 77, is the best example of this: the law, because it is a neutral language, is a vehicle for laterally addressing a political field saturated by the Party.

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⁷ Liora Israël, “Usages militants du droit dans l’arène judiciaire : le *cause lawyering*”, *Droit et société*, 2001/3, n°49 p. 798.