

OPEN LETTER

Petition for judicial interpretation of anti-subversion law

The well-known Internet essayist Du Daobin was placed in criminal detention by public security officials in Yingcheng City, Hubei Province, on October 28. Two days after this, police authorities submitted a detention notice to Du's relatives saying he was suspected of being involved in the crime of inciting subversion against the state. According to reports, the procuratorate of Xiaogan City in Hubei Province began Du's trial on December 28. The trial documents submitted by public security officials to the procuratorate enumerated that Mr. Du had published 28 articles on overseas websites, and thereby charged him with the crime of "inciting subversion against the state". The articles referred to included "Take Action to Defend Hong Kong", "Friends, Please Make Efforts Towards Hong Kong's Freedom", and "Advice to Hong Kong's Beijing Supporters". These three articles were written in opposition to Hong Kong's Article 23 legislation.

We believe this is a case of criminalizing free speech. The expansion of the second clause of the 105th article of the Penal Code in terms of the crime of "inciting subversion against the state" infringes upon citizens' right to free speech as affirmed in the thirty-fifth article of the current constitution. Also, it is not consistent with the ruling Communist Party's recent proposal to add "Respecting and protecting human rights" into the fourth revision of the constitution. It is not consistent with a series of government efforts to conform to international standards in terms of protecting human rights, and is not helpful to the progress of the political culture in China today.

Even though the right to the "freedom of speech" affirmed in Article 35 of the current constitution currently lacks a specific legal definition and protection, the Chinese government has already entered into two international human rights treaties, the "International Covenant on Economic, Social and Cultural Rights" and the "International Covenant on Civil and Political Rights". These treaties set forth an extensive and clear definition of the civil freedom of speech, and in terms of the freedom of speech, they set forth the minimum standards for political culture. As the organization "The Global Campaign for Free Expression" stressed at a human rights conference in Johannesburg, South Africa in 1995, the freedom of speech should not be limited in the name of national security. The "Johannesburg Principles" passed at the conference strictly prescribe the protection of national security as "protecting a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source or an internal source". The "Principles" specially explained that "the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties". Also, they point out that "a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest." This means that public criticism of the government's decisions and policies falls in the range of the freedom of speech ensured by the constitution.

Therefore, we believe:

Firstly, limiting the freedom of speech of the public in the name of national security can only occur when the speech is enough to produce the reality or the real possibility of a national security crisis.

Secondly, even if speech is restricted by administrative or criminal law, this does not necessarily mean that it is speech that is “inciting subversion of the state”. The principal part of the crime of “inciting subversion against the state” must subjectively possess a motive to use violence to subvert the state and overthrow the current government; objectively, it must advocate or support the use of illegal, violent means to incite subversive actions against the state. The articles written by Du Daobin are merely the peaceful expression of certain political differences, which is far removed from the crime of “inciting subversion against the state”. “Peaceful” here refers to the fact that the articles themselves are a kind of peaceful form of expression. Clearly, Du Daobin only wrote articles, and did not engage in any type of “subversive incitement” behavior; Du Daobin’s method of publishing articles was peaceful, and he only published articles on the Internet; and the contents of Du Daobin’s articles are peaceful, and he did not in any article advocate and incite violence as charged by Hubei authorities.

The articles published by Mr. Du Daobin all carry out serious reflection on real issues from an intellectual perspective. The Article 23 legislation perfunctorily drawn up by the Hong Kong government was forcibly way-laid by mainstream opposition, and the central government has yet to thereby charge the Hong Kong residents who opposed the Article 23 legislation with any crimes against the “incitement of subversion of the state”. However, authorities in Xiaogan City, Hubei Province charged Du Daobin with having “incited the subversion of the state” for his articles criticizing Hong Kong’s Article 23 legislation. This is an insult to the 500,000 Hong Kong residents who took to the streets, and is an even greater infringement upon the human rights of the great number of Chinese citizens living outside of the Hong Kong SAR.

We believe that in charging Du Daobin with the crime of “inciting subversion of the state”, Hubei authorities were abusing the second clause of Article 105 of the Penal Code. At the same time, the conceptual ambiguity and unclear logic of this article of the Penal Code brings an uncertainty to the standards of criminal indictment. It is this very uncertainty which leaves enormous room for abusing the law, and which has resulted in the forced determination of much speech that consists of merely critical, non-violent political discussion and appeals as “incitement of state subversion”. This substantively amounts to the annulment of the civil right of the freedom of speech that is affirmed by Article 35 of the constitution.

Unfortunately, in the legislation that has been carried out recently, this is not an isolated case, indicating that the present standards of legislative mechanisms for determining “the crime of inciting subversion against the state” already completely deviate from the constitution and criminal regulations, deviate from the standards and justice of the masses, and even more so, deviate from the basic perception of the academic world toward the civil right of free speech. If Mr. Du is convicted of a crime, it will be a clear violation of the law. It can only be said that the crime of “inciting the subversion of the state” was manipulated entirely from a type of incalculable, uncertain political standard and illegal legislative standards.

Currently, there are close to 80 million Chinese Internet users, of which a great number publish comments or articles containing political criticism using different methods on various Internet forums or other Internet media. If Mr. Du is convicted of a crime, this will not only set a very dangerous precedent, it will also be a counteraction to the movement towards liberal thought that

has existed in mainland China for the past 25 years. All Internet users who express themselves on the Internet are potential “Du Daobins”, and can all be charged by the government with the crime of “inciting subversion against the state” for expressing political ideas and personal political opinions on the Internet, becoming the next “Du Daobin”.

From this we can see the unclear nature and abuse of the second clause of Article 105 of the Penal Code, which will threaten Chinese citizens and strip them of their freedom of speech, and which will also severely harm the people’s image of Chinese courts and the international reputation of the Chinese government.

Therefore, we strongly call on people at all levels of society, especially Internet users and all those engaged in Chinese writings, to pay close attention to this case, because paying attention to Du Daobin is equal to paying attention to ourselves.

At the same time, we call on the legislative authorities of Hubei Province to respect the related articles and spirit of the constitution, to respect the stipulations of the international human rights treaties our government has entered into, and to release Mr. Du Daobin without charges as soon as possible, in order to establish an image of legislative authorities protecting civil rights.

We appeal to the Supreme People’s Court to issue a relative judicial interpretation of the criminal structure of the “the crime of inciting subversion against the state” in the second clause of Article 105 of the Penal Code, as well as the boundaries of the freedom of speech clause affirmed in Article 35 of the constitution, to engender legislative criteria that has a clear meaning and can be carried out, in order to prevent the lower levels of legislative bodies abusing the clause and trampling on the rights of the people.

We also call on the National People’s Congress in the hopes that it can apply the laws and spirit of the constitution to issue a relevant legislative interpretation of the second clause of Article 105 of the Penal Code, in order to stop some local authorities as soon as possible from using “the crime of inciting subversion against the state” to attack different political ideas and to suppress the people from carrying out peaceful criticism and suggestions, in order to prevent a declining trend in the progress of China’s political culture, and thereby ending China’s legislative history of criminalizing free speech.

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