

# ON THE LEGITIMACY OF SUBVERTING THE GOVERNMENT

BY DU DAOBIN

Civil servant Du Daobin, a prolific Internet essayist, was detained in Xiaogan City, Hubei Province on October 28, 2003, and formally charged with slander and incitement to subvert state power on November 12. Following a trial at the Intermediate People's Court in Xiaogan City on May 18, 2004, Du was sentenced on June 11 to three years in prison suspended for four years. The following essay that Du Daobin posted on the Internet was one of the main pieces of evidence that the authorities used to convict him of inciting subversion through slander of the government.

In just about every article it published before 1949, the Chinese Communist Party (CCP) openly called for the "overturn of the reactionary Kuomintang (KMT) government." In those days, the CCP never recognized the legitimacy of any actions taken by the KMT government to oppose those trying to overturn it. Nor did it have any misgivings about the chaos of war that was visited upon the whole nation as a result of its struggle to overturn the government. During the five years of civil war, the KMT and CCP armies killed more than a million of each other's officers and soldiers, and countless families were broken up and their members dispersed—all because the KMT repressed those trying to overturn the government, and the CCP had the courage to persist in its efforts to overturn it. During the civil war, the Communists were not in the least bit scared of upheaval, and struggled with heart and soul to "smash the old society to pieces." According to official Party propaganda over the past 53 years, the KMT government was finally overturned and China was "saved." The history of the CCP's accession to power demonstrates that overturning a regime<sup>1</sup> is not the same as overturning, or subverting, the nation. No matter who holds power, in the end the government has to allow this great nation to exist and the people to live and multiply. When one party replaces another in govern-

ment, China does not simply sink without trace and the life of its 1.3 billion people is not thrown into utter chaos.

Since the Shang Dynasty [1766–1122 BC], China has been under the rule of the Zhou, Qin, Han, Jin, Sui, Tang, Song, Yuan, Ming and Qing Dynasties, as well as the governments of the Republic of China and the People's Republic of China. China's governments have come and gone, but the nation has survived to this day. History demonstrates that overturning a government is altogether different from overturning a nation. Examples from around the world that prove that overturning a government does not affect the continued existence of a nation are too numerous to mention. When Bill Clinton, a Democrat, was replaced by George Bush, a Republican, the U.S. administration was changed, but the United States of America continued to stand rock firm. Britain, Germany, France, Japan, Italy, South Korea and Israel are similar cases. There are countless countries in which the government is regularly voted out of office [lit. overturned] by the people, yet none of these nations meets with disaster because of this.

Let's get back to China. There were undoubtedly many reasons why the CCP was successful in calling on the people to overturn the "reactionary KMT regime." One key reason was that the KMT government was "reactionary," corrupt and unjust, and had therefore lost the support of the people. What about the CCP today? It can fairly be argued that the CCP today is many times more reactionary than the KMT was in its day. The CCP's reactionary nature manifests itself not only in going against the current of freedom and democracy that has swept the whole world, but also in its fundamental opposition to the interests of the people. As far back as 1959, Gu Zhun affirmed the "antithesis between the state as an abstract entity and the entire peasantry." At the beginning of the 21st Century, countless ordinary citizens and laid-off workers with no recourse for appeal are finding themselves in this position of antithesis to the current government. The CCP regime is also many times more corrupt than the KMT was in its day, and corruption is practiced openly. While it may be an exaggeration to say that there isn't a single official who doesn't take bribes, there is a popular saying that "If all government officials were stood before a firing squad, there might be a few unjustly killed, but if you execute only half, many [corrupt officials] will definitely slip through the net." Even if the CCP government has not lost the support of the people to a far

greater extent than the KMT did, it surely does not enjoy more support. To dispel any doubts, an open public opinion poll should be conducted. The regime currently in power lost its ability to dispense justice a long time ago.

When the CCP overturned the previous government by violent means, there was nothing illegitimate about it. Democrats advocate replacing a savage dictatorship with a modern and civilized government, bringing about an orderly transfer of government by peaceful means, and allowing the people to vote for the government and its leaders. The history of China and foreign countries demonstrates that both in terms of the popular will and the constitutional principle that the people ought to be the masters of their own affairs, subverting a government is completely legitimate.

Translated by Paul Frank

The original Chinese essay can be accessed on the Web site of Epoch Times at: <http://www.epochtimes.com/gb/3/1/6/n263020.htm>.

#### EDITOR'S NOTE

1. The Chinese phrase *dianfu zhengquan* literally means "to overthrow a regime." However, the translation of relevant law that HRIC has adopted as standard translates the phrase as "to subvert state power," and in general parlance, dissidents convicted of offending this law are described as having been convicted of subversion.

## Du Daobin's Application for Appeal

BY DU DAOBIN AND MO SHAOPING

Following is a translation of the application Du Daobin and his lawyer, Mo Shaoping, submitted in appealing his conviction. The Hubei Provincial Supreme People's Court rejected Du's appeal on August 11.

To the Hubei Province Supreme People's Court:

I do not concede to the judgment of the Xiaogan Municipal Intermediate People's Court (Criminal Case No. 20), and now submit this appeal to the court to declare me not guilty.

1. I did not commit slander. The *Legal Dictionary* (*faxue cidian*) defines slander as the following: "To intentionally fabricate and disseminate facts for the purpose of defaming or damaging the reputation or character of another to a serious degree." Slander requires two elements: first, the subjective element of specific intent; and second, that the defendant objectively exhibit behavior that constitutes the fabrication of facts. If the information disseminated is true, even if it humiliates another person, it does not constitute slander. Therefore, given that the elements of "specific intent" and "fabrication of facts" are both required to establish the crime of slander, if either element is absent, then the charge of slander cannot stand.

The main evidence in support of slander established by the trial court was as follows: "Du Daobin disseminated slanderous statements in his articles to the effect that the national regime was 'dictatorial, violent, despotic, unjust and corrupt,' that it had 'long ago lost its ability to dispense justice,' that 'the present government is not a legitimate government,' 'subverting a government is completely legitimate,' 'it is hoped that it will soon collapse,' 'it is necessary to assist mainland compatriots in overthrowing authoritarian dictatorial rule.'" I believe the trial court has produced obfuscation rather than clarification, for the following reasons: 1) These six phrases constitute only a tiny fraction of the 1.5 million or so words I have posted on the Internet, and have been removed from their con-

text. Stringing together isolated phrases from several different articles does not prove any intent on my part, and these phrases might be more accurately described as "emotional outpourings"; 2) These six phrases, along with a subsequent one, "resurrection of the spirit of Nazism," do not in any way constitute a fabrication of facts. Taking points 1) and 2) together, the "slander" alleged in the judgment cannot be established.

The trial court clearly confused "slander" with "slandorous heresy," which are two similar yet distinct circumstances. The *Legal Dictionary* defines "slandorous heresy" as follows: "In ancient China, those who discussed the virtues and shortcomings of the authorities and exposed their mistakes." In comparison with the modern criminal definition of slander that refers to defaming someone, the name is the same, but the meaning is different. In the biography of Jia Yi in the *Hanshu*<sup>1</sup> it is written, "The loyalists consider it slander, and the conspirators consider it heresy." The Lu Wenshu biography of the *Hanshu* similarly points out, "During the Qin era, the honest considered it slander, while the gossips considered it heresy." It was not until the reign of Emperor Wen of the Han Dynasty that the crime of slanderous heresy was eliminated. The Criminal Law, Article 105, para 2, includes the phrase "or other ways" after "spreading rumors" and "slandering." It is very clear that the "slander" referred to here must include the element of fabrication of facts. My writings discussing the strengths and shortcomings of the government that have been established as evidence by the trial court could legally be designated as "slandorous heresy," but to call it "slander" is not in accordance with the law. Because slanderous heresy is a legal relic of the feudal era, it is not in accordance with the modern Criminal Law, and in fact, the Criminal Law does not include the crime of slanderous heresy. According to Article 3 of the Criminal Law, "For

acts that are not explicitly defined as criminal acts in law, offenders shall not be convicted or punished,” and I should be judged not guilty.

2. The exercise of the civil right of freedom of expression does not endanger state or social security, nor does it harm the interests of the state or society. This point has been elucidated in international agreements such as the International Covenant of Civil and Political Rights and the Johannesburg Principles, as well as in Article 33, para 3 of the Constitution of the People’s Republic of China, and there has been no evidence of endangerment to the state or society in any democratic countries that prohibit legal restrictions on free expression. The Sino-French Joint Declaration signed by President Hu Jintao declares, “[The Chinese government] promotes and protects all human rights and basic freedoms,” and further elaborates that “respecting human rights is one of the necessary conditions for the nation’s harmonious development.” If free expression bears consequences injurious to state security, is that not to say that the Chinese government and all civilized countries of the world encourage and support behaviors that endanger the security of the state and society? It is abundantly clear that that this makes no logical sense.

Not only does free expression not endanger state security, on the contrary, it promotes state security and harmonious development; it is the limitation, muzzling and deprivation of free expression that actually endangers state security. The judgment did not establish any evidence that I had endangered state security. I believe that the judgment of the trial court that I endangered state security does not stand, and I apply to the appeal court to restore my reputation.

3. The trial court ruled that my expression “exceeded the boundaries of free speech,” but the court did not designate what these boundaries were, nor can any basis be found in law; it is only a subjective and biased conclusion that the trial court reached through an interpretation of the Constitution not authorized by law, and should not be upheld.

4. The reference of the trial court to a “criminal act” is an outdated and erroneous concept. To make “incitement to subvert state power” a “criminal act” is to seriously depart from modern and civilized principles of jurisprudence. More than 200 years ago, stipulations for the “rules of clear and present danger” were introduced into practice, which required that in order to convict someone of subversive expression it was necessary to demonstrate its imminent consequences. That is to say, guilt cannot be established on the basis of language that incites subversion, but only on the basis of resulting subversive acts. To make para 2 of Article 105 of the Criminal Law into a “criminal act” is to revert back to thinking on counterrevolutionary crimes introduced in 1979, and is likewise to revert back to the “literary inquisition” of ancient times. Counterrevolutionary crimes have already been repealed, and their interpretation and related legal

principles should have been annulled at the same time— if the skin is gone, how can the hair remain? There is no reason for jurisprudence in 2004 to carry forward the principles of criminal law in 1979. Since China has joined the World Trade Organization, and has begun bringing its laws into line with international law, the appeals court should apply para 2 of Article 105 of the Criminal Law in accordance with contemporary civilized legal practice and reject it as a criminal act. Even if it is found that my articles actually do contain language that constitutes “incitement to subvert,” given that there is no evidence of consequences leading to endangerment of state security, the appeals court should find me not guilty.

5. Going back one step, even if the guilty verdict is accepted, what is the basis for determining the sentence of “three years in prison commuted to four years of house arrest”? The court judgment indicates that its conclusion does not take into account the “rumor-mongering” of which the defendant is accused, i.e. “attacking the leaders of the Chinese Communist Party and the people’s democratic political authority,” “defaming the socialist system,” “openly proclaiming that ‘subverting the government is completely legitimate’ and that the Party and the national leadership are usurpers of state power,” and other key phrases. This should be seen as tacitly consenting to the validity of my defense. I have already refuted the content of the indictment, and therefore there is no basis for finding me guilty, much less for sentencing me to three years in prison.

6. According to the newly amended Constitution, Article 33, para 3, the principle of “the state respects and safeguards human rights,” the appeals court should find that I am not guilty on the basis of protecting human rights.

7. A personal computer is private property and should not be confiscated. I purchased my computer in April of 2002 at a price of 6,300 yuan, drawn from the personal earnings of myself and my wife, and it is the common lawful property of the two of us. According to the principles protecting private property in the Chinese Constitution taking precedence over all other laws and regulations, even if I am judged guilty, on the basis of protection of private property rights, the legal property of myself and my wife should be restored to us.

Appellant: Du Daobin

Legal representative: Mo Shaoping

Translated by Stacy Mosher

This article was originally posted on the Web site of New Century Net: <http://www.ncn.org/asp/zwginformda-KAY.asp?ID=58058%20&ad=6/26/2004>

#### TRANSLATOR’S NOTE

1. *The Hanshu* was a history of China written by Ban Biao and his son Ban Gu in the first century A.D.