



# 宽容

## ——一个法哲学的命题

Tolerance: An assumption in philosophy of law

吴伟民著

- 文化是民族的灵魂
- 签订人类与生态互不侵犯条约
- 论正当犯罪
- 谁来制衡法治
- 放道德一条生路
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- 拯救信仰，亲近上帝
- 严正警告：人类正失去信仰
- 律师，为恐怖主义辩护

香港·中国法制出版社

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# 自序

## —

不宽容的法律不是真正的法律。

The intolerant law is not true law.

不宽容的法治不是真实的法治。

The intolerant rule by law is not genuine rule by law.

人治的宽容度最小，甚至不具有宽容性。它往往就是皇帝或国王或其他专制统治者依其个人意志统治着人民。

Rule by man is the least tolerant, and even it is not tolerant at all. It is sometimes the emperor or the king or other despotic governor who rule the people at their own will.

人治有时也能获得极大的成功，但是短命；绝对的人治绝对的短命。

Rule by man can also achieve great success sometimes, but this is short-lived; absolute rule by man is absolutely short-lived.

## 二

法律应当尊重每一个人的意见,法治应当关照每一个人的利益。大多数人和极少数人都应当一样得到充沛的阳光雨露。

The law should respect every individual and rule by law should take every individual's benefit into consideration. The majority and the minority alike should benefit from sunshine and rain of the law.

法律的神圣职责就是调整同在一个地球、同在一个国家、同在一个民族区域、同一种宗教信仰的人们——公平地占有资源、占有权利、占有幸福;

The holy function of law is to regulate people on the same earth, in the same country, in the same nationality region, of the same religious belief to possess resources, right and happiness fairly.

法律如果默许一些人享有极端的权利、享有充分的资源、享有快乐的生活——而让更多的民众挣扎在贫困线上,那样的法律的宽容度是很低的,或许可以称作是残疾的法律。

If the law acquiesces some few people to possession of excessive right, abundant resources and happy life with more common people struggling on the poverty line, such law is not very tolerant, or it can be called deformed law.

打开世界法制史册:一个地方犯罪率高,甚至发生暴乱,发生革命,发生战争,其根本原因就是那里的宽容度不高,要么是—方没有宽容另一方,要么是双方都没有宽容对方。

Opening the History of World Legal System, we may find: the

essential reason of high crime rate, even riot, revolution and war that take place at one place is the low degree of tolerance, either one side does not tolerate the other, or both sides do not tolerate each other.

### 三

法律是文化的产儿,不是国家的身影,更不是统治者的工具。有什么样的文化共同体就会诞生出什么样的法律。强行脱离文化的法律是法律的畸形儿。

The law is neither the shadow of the state nor the instrument of the ruler, but the product of the culture. The cultural community produces the law. The law forcibly deviated from the culture is deformed.

法律如同一块石子落入水中出现的涟漪,它存在疆界,最小的疆界是家庭,最大的疆界是宇宙。小法发展着大法,大法宽容着小法。

The law, like the ripple which appears after a stone falls into water, has its boundary, with the family the minimal and the universe the maximal. The trivial law helps the development of the more significant whereas the more significant law tolerates the trivial.

### 四

如果法律坐视一个民族只是赞美自己的民族而斥责别的民族,那么,这个法律连同这个民族同样会遭遇别的民族的耻笑。

If the law sits by and watches one nation's praising himself and reprimanding others, the law, together with this nation, will be mocked

by other nations in the same way.

如果法律欢呼一个国家去侵略另一个国家、欢呼一种宗教去进攻另一种宗教,那么,这样的法律就失去了灵魂,甚至在它的躯壳上都爬满了臭虫!

If the law cheers at one nation's invasion upon another, at one religion's attack upon another, such law loses its soul, even with bugs climbing all over its body!

## 五

法治不是人类社会完美无缺的幸福路径,它是人类无可奈何的选择。越来越稀少的物的资源与越来越强大的人的欲望——这一无法根本调和的矛盾冲突,迫使人类选择了法治。因为法治首先追求程序(虚拟)正义,每每顾及不到个案的实质(实在)正义。法治其实就是迫使一半正义落空!

Rule by law is not the perfect happy route of human society, but that human beings have no alternative. The uncompromising conflict between the decreasing material resources and the increasing human desire forces people to choose rule by law, for rule by law first pursues procedure (fictitious) justice, neglecting the actual justice of the individual case. Rule by law is actually compelling the other half justice to fall through!

法治迫使民众放弃客观事实而注重法律事实,迫使民众放弃感情而张扬理性,前者是背离人心的,后者是背离人性的。

Rule by law compels the common people to forsake the objective reality but pay attention to law facts, and compels the common people to

give up emotions but attach importance to reason. The former is deviated from human heart whereas the latter from human nature.

法治文化的外圈是道德文化，道德文化的外圈是宗教文化。她们是女儿、母亲和外祖母的血缘关系。于是，法治应当尊重道德，法治应当崇尚宗教。法治没有理由背叛道德，法治没有理由无视宗教。

The culture of rule by law is born from moral culture born from religious culture. They are kin to one another like the relationship between daughter, mother and maternal grandmother. Hence, rule by law should respect morality and uphold religion. Rule by law has no reason to betray morality and to ignore religion.

一个社会仅靠宽容的法律和法治是不行的，人类更需要道德，更需要宗教。

A society is not sound by depending on tolerant law and rule by law only. Human beings are in more need of morality and of religion.

万事万物都需要动力，也需要阻力（制衡），否则就会物极必反。人类在整个生态圈中是最强大的，唯一能够制衡人类的力量就是宗教，也就是神。

Everything on earth needs both compelling force and resistance. Otherwise, things will develop in the opposite direction when they become extreme. Human beings are the most powerful in the ecosystem. The only force that can control human power is religion, or the God.

神对人说：如果做坏事，今世或者来生就会遭遇报应；或者就会下地狱。人于是就收敛起自己恶的一面，于是就积善行德。

God says to man: if man does evil things, he will be punished in

this life or future life, or he will go to hell. Thus man restrains himself from the evil doings and does good things.

那些人说:神是不存在的。那些人于是就无所顾忌,于是就胆大包天,于是就说“20年后又是一条好汉”……

Those people say: God is nonexistent. So they care nothing and become audacious in the extreme, saying “another hero in 20 years” ...

## 六

法治的价值趋向是宽容弱者。

The value of rule by law is inclined to tolerate the weak.

法律认为:富人应当宽容穷人,强权应当宽容弱势,大国应当宽容小国,人类应当宽容万物生灵。

Law holds: the rich should tolerate the poor, the strong should tolerate the weak, the big country should tolerate the small, humankind should tolerate everything on earth.

## 七

然而,整个世界的法治现状并非如此——众多富人靠霸占资源而富,众多强者靠强制力量而强,众多大国靠强大武力而大,众多民众砍树、炸山、捕鱼、狩猎,把自己看成是万物生灵中的老大。

However, the status quo of rule by law in the whole world runs counter to this——many rich people accumulate wealth by

forcibly occupying the resources, many powerful men seize power by compulsory means, many big countries become powerful by strengthening force, and many common people, at their will, cut trees, bomb mountains, catch fish and hunt, regarding themselves number one among all things on earth.

如果老虎、狮子、袋鼠、天鹅等动物也能立法,也推行法治,恐怕同样会对人类毫不留情斩尽杀绝。

If the tiger, the lion, the kangaroo and the swan are also capable of making law and practicing rule by law, they will probably wipe out the whole lot of mankind without any mercy in the same way.

2000年1月1日1时1分,地球上所有的草木都默哀三分钟,然后发出震天动地的呐喊:人类啊人类,不要砍伐我们啦!虽然,整个地球都在颤抖,可是,法律在沉默,法治也在沉默——因为法的身上已经没有什么道德的血液,已经没有什么宗教的精神。

At the very beginning of the first day of the year 2000, every bush and tree on earth stand in silent tribute for three minutes, and then send out deafening sound of cry: oh, mankind, do not cut us down any more! The whole earth is vibrating, but the law keeps quiet and rule by law remains silent, because the law is running short of the blood of morality and rule by law is lacking in the spirit of religion.

人类宽容生态环境,就是要降低“人类中心”的特权身份。

Human tolerance of the environment is to lower the privilege status of “mankind-centredness”

《地球法》第一条应当写明：人类与其生存环境中的一切有生命体和无生命体都是平等的。人类没有权利肆意破坏生态，任意宰杀生灵！

The first item of The Law of the Earth should write: men are equal to all the animate things and inanimate things in the environment. Men are not entitled to destroy the ecosystem and kill the living creature willfully.

## 八

富人宽容穷人，就是要通过纳税和捐献的方式，把自己的资源和财富给予穷人。

The rich tolerate the poor by taxpaying and contribution, i.e. bestowing on the poor their own resources and wealth.

## 九

强权宽容弱者，就是让弱者充分表达他们的思想言论，然后按照他们的意志立法和司法。言论自由就是思想自由——它应当是人类的第一自由。

The powerful tolerate the weak by allowing the weak to have the freedom of speech and thought and by making law and administering justice of their free will. Freedom of speech is freedom of thought—it should be the foremost freedom of human beings.

如果一个政治共同体或者文化共同体设立反对派别，并且

听取反对派别的意见,那是真实的宽容。如果运用法律禁止反对派别的出现,或者禁止反对派别的言论,那还有多少宽容呢?

If a political community or a cultural community sets up opposition faction and hears their opinion, this is tolerance in a real sense. How much tolerance will remain if the exercise of law forbids the involvement of the opposition faction or prohibits their freedom of speech?

## 十

政治是相对保守的,是顾及现状的,因为政治需要维护社会稳定;学术是绝对激进的,是着眼未来的,因为学术需要引领社会进步。

Politics is relatively conservative, taking into account the status quo, since politics aims to maintain the social stability; academic learning and research is absolutely radical, having the future in mind, since academic learning and research is oriented to leading social progress.

政治家不可能成为思想家,思想家也不可能成为政治家。因为他们之间的时空距离至少是半个世纪至一个世纪。

It is impossible for the statesman to become ideologist and it is also impossible for the ideologist to become the statesman, because the space-time distance between them is at least half to one century.

迎合政治的思想绝不是学术思想,学术思想的本质就是学术理想。思想家越走在政治家的前面,其思想的学术价值就越

高！

The ideology that caters to politics is not academic thinking, for the essence of academic thinking is academic ideal. The further the ideologist walks ahead of the statesman, the higher the academic value of his ideology!

思想家应当宽容政治家,没有相对保守的政治家就没有稳定的社会秩序;而政治家则应当更加宽容思想家,没有激进的思想家就没有社会的发展与进步。

The ideologist should tolerate the statesman, for there will not be stable social order without the relatively conservative statesman; but the statesman should tolerate the ideologist all the more, for there will not be social development and progress without the radical ideologist.

但是,保守者不能刻舟求剑,改革者不能拔苗助长。

But, the conservatives can not take measures without attention to the changes in circumstances and the reformists can not spoil things by excessive enthusiasm.

倘若法治实现了政治家与思想家的相互宽容,那就是法治追求的理想世界!

Provided that rule by law actualizes the mutual tolerance between the statesman and the ideologist, that is the ideal world that rule by law seeks!

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# 第一章

## 关于言论的宽容性

卢梭在其《论人类不平等的起源》一书中写道：“读者，请撇开自己的成见或骄傲，把我的话听完——”<sup>①</sup>

摩莱里在其《自然法典》的序言中说：“为了了解我，就必须放弃你自己最珍视的偏见：请你摘掉这块面纱一分钟吧，你将愕然地发现，你认为从以往吸取智慧的地方，正是一切灾祸和罪恶之根源。”<sup>②</sup>

爱尔维修在其《论智慧》一书中指出：“……普遍的真理应该完整地表达出来：一切掩盖物都应该在公共利益面前去掉。

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① [法]卢梭著《论人类不平等的起源》42页，商务印书馆1982年版。

② [法]摩莱里著《自然法典》12页，商务印书馆1982年版。

真理是从矛盾和争论中产生的。”<sup>③</sup>

西哀士在其《试论成见》文稿中强调：“真理的道路应该是由哲学家开辟到底的。他应该走到尽头。深刻的震荡往往是必要的；为了发生永远留在人的心灵深处的强烈而激动人心的影响，真理应该和盘托出。”<sup>④</sup>

西塞罗在其《都斯摩兰对话录》的信函中说道：“没有欲望的人民是怯懦和愚笨的。它不会有力量，不会有勇气，不会有魄力，不会有决心，也不会有热情。假如他不是已经成了奴隶，便会成为征服的对象，或者成为企图奴役他的第一个大胆妄为之徒的牺牲品！”<sup>⑤</sup>

边沁在其《政府片论》一书中表述道：“在一个法治的政府之下，善良的公民的座右铭是什么呢？那就是‘严格地服从，自由地批判’，这点是肯定的；一种制度如果不受到批判，就无法得到改进；任何东西如果永远不去找出毛病，那就永远无法改正；如果我们作出一项决定，对每件事物不问好歹一味赞成，而不加任何指责，那么我们将来一旦实行这项决定，它必然会遭遇一些有效的障碍。”<sup>⑥</sup>

阿克顿在其《自由与权力》一书中认为：“正是那些产生了法律思想情感的生机与活力维系了法律的存在。如果法律得以从中生根发芽的思想信念和条件消失了，那么，法律接着也会消失。这正如托克维尔曾经说过的：舆论的状态比法律更为严重。”<sup>⑦</sup>

民主社会是以实现社会自由为己任的。而在一个自由社会里，首先是人人都有表达思想或表达意志的自由，没有这一第一自由，就形成不了体现人民意志的法律，民众的任何自由行

③ [法] 爱尔维修著《论智慧》32 页，商务印书馆 2001 年版。

④ [美] 约瑟芬·多诺万著《女权主义的知识分子传统》214 页，江苏人民出版社 2003 年版。

⑤ [法] 泰·德萨米著《公有法典》101-105 页，商务印书馆 1982 年版。

⑥ [英] 边沁著《政府片论》99 页，商务印书馆 1995 年版。

⑦ [英] 阿克顿著《自由与权力》336 页，商务印书馆 2001 年版。