

**November 2, 2012, 14:30-16:30**

**Venue: CIGS Meeting Room 3**

**CIGS Seminar :**

**"Rethinking of Compliance: Do Legal Institutions  
Require Virtuous Practitioners?"**

**by Professor Kenneth Winston**

**< Speech of Professor Kenneth Winston >**

I would like to start by thanking Mr. Jun Kurihara, the moderator of today's seminar, for inviting me to speak at the Canon Institute for Global Studies. This is my first time in Tokyo, although I have visited Japan quite often, and I am delighted to be here today.

Jun has raised the question why we talk about ethics now, and my general response is that ethics is always an issue. It is not as though now is different; it is not much different from any other time. At any given time, there are always very pressing issues we have to deal with. They may not always be the same type or be in the same areas of activity. Nonetheless we always have ethics to deal with.

I am very glad that Jun gave you some examples from a Japanese perspective because my expertise is not in Japan. My training is in western philosophy. I knew very little in my early teaching years about this part of the world, but recently I have been trying to compensate for that. In the last 10 to 15 years, I have traveled a great deal in Asia and engaged in many teaching activities in Asia, particularly for mid-career government officials who are people of special concern at the Harvard Kennedy School.

My plan for today is to go through some slides and then I will open the discussion for question and answer.

**(Slide 2)** Let me begin by making reference to two Asian traditions, in particular Chinese traditions, for thinking about ethics. I want to make some

reference to Confucius or Kongzi as the leading figure in the Confucian tradition, which for many centuries was enormously influential in China as well as in the neighboring region including Japan.

Kongzi is very well known for believing that personal virtue or the virtue of an individual is sufficient for being competent in governance. A characteristic quotation is, *"If a man can steer his own life straight, the tasks of governance should be no problem for him."* There are many passages in the Confucian Analects which suggest that there is nothing else we need to know besides being personally virtuous in order to know how to govern. Confucius says, *"I know nothing about agriculture, I know nothing about the military,"* and he suggests, *"I do not need to know about those things and yet I could govern, why, because I am a virtuous person."* The idea seems to be that personal virtue is all we need and is sufficient.

His major disciple and follower Mengzi or Mencius amended this idea. Mengzi realized that personal virtue was not really going to be sufficient. In a characteristic statement he says, *"Goodness alone is not sufficient for government; the law unaided cannot make itself effective."*

The law does not apply itself. It takes human beings to apply the law. Therefore, there is a human element in the administration of law and in governing. That is where we need to worry about what kind of person is administering the law. Both elements are crucial.

Mengzi said, *"When elites have no virtue and commoners have no laws, it is only good fortune if the state survives."* What is interesting here is the contrast between elites having virtue and commoners having law. It was characteristic for much of the Confucian tradition that elites needed only virtue and they did not need to be governed by laws. It was commoners who needed laws because they were not going to be virtuous. There was a kind of class division built into this way of formulating the issue. Even though the statement is that both virtue and laws are needed, it looks like they are needed by different classes of people.

Virtue is still thought of as personal virtue in terms of how a person conducts his/her own life. This shows to me the limits of the Confucian program. That is

why I am very eager to turn to Han Fei Tzu as a way of balancing our thinking about what is needed in public life.

**(Slide 3)** Han Fei Tzu goes in the opposite direction and suggests that law is sufficient for governance; there is no need for virtue. He says, "*The most enlightened method of governing a state is to trust measures (that is, laws) and not men.*" By men, he meant Confucian ministers of whom he was very distrustful because they were committed to this class difference between themselves and common people. He was very much a critic of the class division. So what we need are laws, not men.

Interestingly, this is in Han Fei Tzu's document in the third century BCE. It is a fairly explicit formulation of the *Rule of Law* idea already that early in Chinese history. Yet it was not picked up in the course of Chinese history, and was in fact neglected.

Han Fei Tzu was putting the emphasis on law primarily or at least for one reason because he recognized that rulers could be mediocre or incompetent in a variety of ways. So it is crucial to get the law right and then we could have mediocre rulers or leaders. Nonetheless, if we read the Han Fei Tzu carefully, we can see in a variety of ways that he brings in the idea of virtue.

One of the ways in which that becomes evident is in this statement, "*The ruler establishes the standard and abides by it.*" Establishing the standard is the law part, but abiding by it is the virtue part. Once the law is issued, the leader or ruler is committed to following the law. It is a constraint on the leader.

The virtue part comes out. This fits somewhat indirectly but nonetheless it is quite explicit. Han Fei Tzu says, "*Official faithfulness provides guidance and predictability for effective governance.*" The virtue of the leader or ruler is crucial to effective governance.

No punishment of the innocent, for example; in other words one cannot be a whimsical leader and cannot do anything one wants. If someone is guilty, then we punish that person. The idea here is that there are constraints that the ruler needs to recognize. The law will be effective only if the ruler has these competencies to implement the law in the way that it should be implemented.

The standard that Han Fei Tzu uses for the good ruler—he often refers to the benevolent or sage ruler. The good ruler is what is important, not the good person. The idea of virtue is present, but it is public virtue or virtue in his/her public capacity, not personal virtue. This idea was present in the leading ancient documents which indicate an Asian way of thinking about ethics. It is this idea that I want to develop further.

**(Slide 4)** We can just go directly to the key question which I am interested in: *Which competencies or virtues are required for governance? Which virtues are required for legal or public institutions?*

To clarify the question, I am thinking about virtue in a very straightforward way which goes back to Aristotle but is also consistent with Confucius. *Virtue is excellence conducive to achieving a distinctive end.* The importance of this way of thinking about virtue is that we need to figure out what the distinctive ends are. We are pursuing the goal, but what are the goals? It is necessary to figure out which excellences are conducive to those ends.

That leads to the second point which is *what counts as good governance is going to depend on the nature of the polity.* I want to know what kind of political society we are interested in. Then, we will be able to figure out which particular forms of excellence are conducive to that particular polity.

We are interested in democratic polities, so we will need to talk about what is crucial in a democratic polity. I am going to take the development of certain relationships between rulers and ruled as the most highly valued aspect. What exactly are the relationships between rulers and followers or rulers and citizens that are most valued in a democratic society?

I will take two approaches to this question. First, examining particular legal offices to notice how institutional design promotes virtue. It does not eliminate the need for virtue and we need both good design and virtuous practitioners. Then, I will identify specific moral competencies or virtues of the good practitioner.

**(Slide 5)** I am not going to go over every item listed on this slide, but I will illustrate the main points that I want to make.

If we start with *Legislators*, think about the question of institutional design for a legislature. We can start with the United States as a case in which we can think about institutional design and virtue.

In the United States one of the key issues about the Congress has to do with campaign finance. You may know that the US Congress has the lowest favorability rating of any public institution in the United States. It is because there is a widespread perception that the US Congress is in some basic ways a corrupt institution. I think that perception is right and the primary reason is the way campaign financing is done.

Donors are given extraordinary access to members of Congress. They are privileged in a variety of ways. Campaigns for the US Congress are very expensive. The members of the legislature need money from their donors. So a relationship develops during a campaign through direct donations. It continues even while they are in office through lobbying. Lobbyists are able to channel large sums of money to members of Congress.

There is an institutional structure which has a profound effect on what the Congress does. Simply speaking, what the Congress does is to favor the interests of people who are the source of campaign money, i.e. the donations that they receive. There is a lot of nuance to this story; nonetheless, the general picture is correct. There is a very important need in the United States to try to correct this problem. That would require campaign finance reform. That is, reform of the institutional mechanism; how could we bring about some institutional change to eliminate this profound influence that money has on what the Congress does?

Out of a variety of proposals on the table, the one that seems to be the most reasonable and most plausible is one that would involve federal control of financing for campaigns. But there are very few people in the country who favor the proposal because it would give more power to the federal government. As you may have noticed in recent campaigns, there is a strong anti-federal-government sentiment which feeds a lot of the support for the Republican Party. So, those kinds of obvious reforms are not going to be implemented anytime soon. Even if reform occurred, it would not do away

with the problem that individual legislators have in arguing the merits of legislation directly and not being diverted by other interests.

So, that is where virtue would be necessary even if the institutional mechanisms were changed. But it is especially important, given that the institutional mechanism has not changed. There is even more of a burden on individual members of Congress to do the right thing with regard to their job. They should be deliberating on the merits of legislation and deciding on that basis rather than on the basis of the financial interests at stake. That is illustrative of the way in which virtue and institutional design interact with each other and indicate how we need both of these.

We could go through each of the positions or offices within legal institutions listed in this slide, and I could make similar arguments. In each case, we are dealing with a different institutional design and a different mechanism by which more institutional control could be established. But I will not go through these others. Rather I will concentrate on general questions about generic moral competencies.

**(Slide 6)** Here again I will not discuss all of the items listed in the slide.

Let me start with *Civility*. In a democratic society, one thing that we are interested in is having government based on the consent of the people. That means that members of public institutions, i.e. people who play a key decision-making role in public institutions, have to gain some authority from the people for what they do. They cannot just do what they want. It has to be legitimized by people's consent. That raises a special kind of burden. It poses a problem for people in government who may have their own ideas about the public good.

People who enter government usually have some definite ideas about the public good, things that they want to achieve and things that they think are right for the country. But in a democracy, since it rests on the consent of the people, we have this balancing act that we have to pay attention to between what we believe is right and what the people believe is right, which may not necessarily coincide. We may have to moderate our own views and this is a particularly acute problem for the people whose ideas about the public good

are based on religious beliefs. This is a special issue in the United States. I suspect that there are equivalent problems in Japan.

If we have very strong religious beliefs in the United States and enter public service, what authority do we have to act on the basis of our religious beliefs? Strictly I would say none at all. Yet our religious beliefs are very crucial to who we are as individuals. We have to moderate our commitment to our own religious beliefs because when we are in public office we have a larger perspective that we have to adopt. This can create a kind of tension between our own personal commitments and what we have to do in public office.

I have tried working through this idea and make a distinction between personal and public conscience. What an individual in public life needs to do is not to abandon the idea of doing what is right on the basis of one's own personal beliefs, but to enlarge the conception of what is right beyond his/her personal beliefs. This is, if I may say so, Han Fei's critique of Kongzi that we need to move beyond personal virtue in order to think about public virtue because in a democratic society we have new responsibilities and we have to think about larger constituencies especially beyond ourselves.

In some of the literature in the United States, the word '*civility*' is used to identify this characteristic of public virtue. That is why I have put up the idea of civility.

I will briefly mention the story of C. Everett Koop who was the Surgeon General under President Ronald Reagan. His story is quite remarkable in a number of respects.

The Surgeon General of United States has basic responsibility for public health facilities and uses the position as a kind of bully-pulpit to talk to the public about general public health issues. For example, smoking is one of the public health issues Koop took on, and abortion as well. When he came into office Koop had very strong religious beliefs especially regarding abortion. He was strongly anti-abortion. That was why President Reagan appointed him to office. He had been on the lecture circuit, had written books, and had engaged in other kinds of activities against abortion.

But when Koop became the Surgeon General, he realized that he had a broader responsibility and that the Public Health Service was a professional organization. He needed to think about the standards of the profession, not just his own personal beliefs. In the course of his eight years in public office (it is surprising that he survived for such a long period), there is this amazing transformation from personal to professional virtue as he takes on these larger responsibilities. He realized that he had to change his views in accordance with this larger conception. His story is quite remarkable and illustrates this idea of civility that I am trying to get at.

You may not be interested in talking about Truman and the use of atomic bombs though it happens to be one of my favorite cases. But I will skip over it and we can come back to it in the discussion session if you are interested.

Perhaps the most controversial of the virtues I identify is *respect for responsible agency*. Even within a democracy, there are different conceptions of how public officials should exercise the power that they have. Should they be making public policy as opposed to the people? Democracy is after all supposed to rest on the consent of the people. In a democracy policy-making power belongs to the people rather than to public officials, even though the people, broadly speaking, do not have the competencies that public officials have.

This is a very interesting and difficult issue that one needs to deal with in thinking about democratic government. I make a distinction between two ways of exercising power: directive and facilitative. The basic idea is whether to have a top-down conception of the exercise of power or a bottom-up conception about power.

In the top-down, the people at the top, such as rulers, leaders, policy-makers, set the policy. They issue directives and command everyone else to implement them. It is pretty much a hierarchical model. This might resonate somewhat in a Japanese context where there is a top-down model.

The opposing view is from the ground up, that we try to empower common people to make the crucial decisions that affect their lives. The role of policy-makers or leaders changes in this empowering view. They do not make



the crucial decisions alone but help ordinary people make the decisions or at least help ordinary people participate in the decision-making. That is the crucial distinction between these two ideas.

One of my favorite examples is ex-Chief Minister Naidu in Andhra Pradesh in India. He took a very active role in trying to curb population growth in a top-down way. He decided what people should be doing with regard to population growth. He tried to use various kinds of incentives to manipulate people into making the decisions that he thought right. The story about what happened in Andhra Pradesh is in great contrast to what happened in several other places including the state of Kerala in India, where control of population growth was achieved much more indirectly. It was done not by the Chief Minister issuing directives but rather specifically by enabling women to become educated and enter the labor force.

Essentially by enabling women to participate more in public life, the fertility rate went down to a level that was regarded as more socially acceptable. That is a perfect illustration of the facilitative method as opposed to the directive method that Chief Minister Naidu used in Andhra Pradesh. So, respect for responsible agency of ordinary people is a particular virtue that I am interested in and think is important.

**(Slide 8)** Just drawing a few conclusions from what I have said. The way I think about governance or leadership is in moral terms. I think of governance as all about sustaining a certain moral order. What we are interested in are moral relationships, i.e. the relationships between leaders and followers.

For example, are we empowering or enabling people to do what they want or are we telling them what to do? This is a relationship at stake in whether we do it one way or another way. Do we implement policy on the basis of our own religious beliefs regardless of other people's religious beliefs or do we take a broader view and try to implement policies that respect other people's religious beliefs? Those are all about relationships. What we are trying to do is get the relationships right when we are exercising moral leadership.

This involves a commitment of broad public participation in decision-making facilitated by well-designed institutions. It emphasizes the willingness of

leaders to inquire and learn from experience, to be transparent and accountable, and to adopt a pragmatic and experimental approach to policy formation and implementation.

I would like to think of leaders as conveners, catalysts, monitors, funders or deliberators rather than as people who issue commands or decide the policy. I realize this is controversial, but that is the direction I would like to go. One implication has to do with how we teach people to be leaders or public managers who have these virtues.

My method for trying to teach people these kinds of virtues is to use the case method of teaching which involves getting into the details of particular stories of individuals who found themselves in difficult situations and had to deal with them in some way. By helping students to work through the details of specific cases of ethical conflict, one begins to bring their consciousness to bear. They can develop the sensitivities and a sense of the techniques that are needed in order to resolve specific ethical conflicts.

The virtues that I have identified have emerged in the course of looking at specific cases. You have noticed that for each of the competencies I have identified one case. What I do in my classroom is to talk about each of those cases in great detail so that students learn the lesson of each of those cases. That is the technique that I use.

Well, at this point, I have provided you with quite a lot of material. I am delighted to talk to you more informally about any particular questions or issues and to try to engage in comparison with the Japanese situation. Thank you very much.