Do Legal Institutions Require Virtuous Practitioners?

Kenneth Winston
Harvard Kennedy School

Canon Institute for Global Studies, Tokyo
November 2, 2012
Opposing flaws in Confucianism & Legalism:

**Kongzi:** personal virtue is sufficient for governance

The Master said: “If a man can steer his own life straight, the tasks of government should be no problem for him.” [13.13, Leys tr.]

**Mengzi’s amendment:** virtue + laws/institutions

“Goodness alone is not sufficient for government; the law unaided cannot make itself effective.” [IV.A.1, Lau tr.]

When elites have no virtue and commoners have no laws, it is only good fortune if a state survives. [IV.A.1]

However, for Mengzi, virtue is still understood as personal virtue.

Hence, limits to Confucian political program.
Han Feizi: law is sufficient for governance (no need for virtue)

“[T]he most enlightened method of governing a state is to trust measures [i.e., laws] and not men [i.e., Confucian ministers].”
[v2:332, Liao tr.]
Thus, the ruler can be mediocre. [v2:204]

However, reliance on virtue is evident (if usually unnoticed).

E.g., “[The ruler] establishes the standard [and] abides by it.”

Official faithfulness provides guidance and predictability for effective governance. [Watson tr. 36]

Thus, no punishment of the innocent, or failure to punish the guilty.

Han Fei’s standard is the good (benevolent) ruler/lawmaker, not the good person. Hence, focus is on public not personal virtues.
The core question:

*Which competences (virtues) are required for the tasks of governance?*

Clarifications:

[1] Virtue is excellence conducive to achieving a distinctive end.
[3] In a democratic polity, certain relationships between rulers and ruled are (most) highly valued.

Two approaches to the question:
First: Examine specific legal offices and how institutional design promotes, but also does not eliminate the need for, virtue.
Second: Identify generic moral competences = virtues of the good practitioner.
Specific legal offices, virtue, and institutional design

Legislators: virtue in deliberation and lawmaking
   Mechanism: campaign finance reform

Prosecutors: virtue in case management [e.g., false confession, politics]
   Mechanism: civil service career

Police: virtue in use of authority [e.g., deadly force]
   Mechanism: public accountability boards

Judges: virtue in interpretation of laws, exercise of discretion
   Mechanism: appointed v. elected (cf. civil service in Europe)

Lawyers: virtue in advice and advocacy
   Mechanism: dual responsibility enforced by courts

In sum, each office has its own internal morality (= set of moral duties), which requires not only apt institutional structures but appropriate professional attitudes (virtues).
Generic moral competences (= virtues)

[1] **Civility**: personal v. public conscience
   
   E.g., Surgeon General Koop

[2] **Dual responsibility**: clients/constituents v. professional norms/public good
   
   E.g., Truman and the use of atomic bombs

[3] **Respect for responsible agency**: two conceptions of power—directive v. facilitative
   
   E.g., Chief Minister Naidu in Andhra Pradesh, India
[4] **Proficiency in social architecture:**
   Enabling citizens’ capacity to exercise choice together

   E.g., legislation, election, mediation, etc., as processes

[5] **Prudence:** ultimate ends v. ethic of responsibility
   (rule-centeredness v. reasonableness)

   E.g., “The Prison Master’s Dilemma”

[6] **Double reflection:** what something could mean to others, and
   the contestability of one’s own view

   E.g., the Jesuit mission to China
Conclusions:

[1] **Features of good governance** (leadership).
   Governance is about sustaining a moral order (moral relationships),
   not simply the efficient coordination of activities.
   It involves a commitment to 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; to adopt a
   pragmatic and experimental approach to policy formation and
   implementation.
   Leaders are conveners, catalysts, monitors, funders, deliberators.