

Do Legal Institutions Require Virtuous Practitioners?

Kenneth Winston
Harvard Kennedy School

Canon Institute for Global Studies, Tokyo
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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.

[2] What counts as good governance depends on the polity.

[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.

[2] Implications for teaching public managers: the case method.