Mikael M. Karlsson[1]

Legal Education

Summary

In this conference lecture, Professor Mikael M. Karlsson reflects on how diverse legal educational frameworks around the world may be used to inspire and define the foundation for a Faroese legal education. Professor Karlsson then elaborates on three relevant principles which he argues should be used when establishing new educational frameworks. The first principle is "One Size Does Not Fit All" which suggests that both in practice and in theory it is essential to maintain a clear and critical perspective when transferring existing institutional frameworks to new contexts. The second principle "Education for What and for Whom?" suggests that in any legal framework it is important to understand the contrasts between practical legal tasks and projects (løgtøkni) and the normative legal challenges (løgfrøði) generated by any legal system both internally and externally. The third principle is "Size Matters", which highlights the fundamental importance of taking size into consideration when structuring or assessing legal frameworks.

Úrtak

Í hesum fyrilestri lýsir Mikael M. Karlsson hvussu ymiskar løgfrøðiligar útbúgvingarskipanir kring heimin kunnu verða brúktar sum íblástur til at leggja grundarlagið undir eina føroyska útbúgving innan lóg. Karlsson professari vísir í tí høpi á tríggjar týðandi meginreglur. Fyrsta meginreglan er „One Size Does Not Fit All", sum í stuttum merkir, at bæði í verki og hugsjónarliga, er av grundleggjandi týdningi at vísa varsemi og hegni, tá longu kendar skipanir verða fluttar yvir í nýggj høpi. Onnur meginreglan er „Education for What and for Whom?", sum merkir, at fyri einhvønn løgfrøðiligan karm, er umráðandi at skilja sundurbýtið millum praktiskar løgfrøðiligar mannagongdir (løgtøkni) og meira normativar løgfrøðiligar avbjóðingar (løgfrøði) sum

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einhvør løgfrøðilig skipan skapar bæði innanhýsis og úteftir. Triðja meginreglan er „Size matters", ið viðmælir at taka atlit til støddina á løgfrøðiligu eindini, har løgfrøðiligir karmar skulu tulkast og skipast.

Introduction

As I understand it, this conference is conceived not as a memorial event for my dear, and too-soon-departed, friend, Kári á Rógvi, but rather an academic conference held in his honor. Still, I cannot help mentioning that it was ideas about legal education that brought Kári and me together in the first place – perhaps rather than „ideas", I should rather say „personal visions", for these were, for both of us, matters of conviction, dedication and, indeed, passion.

Background

Since I have now made my subject a bit personal, it may help to provide – very briefly – some personal background. My academic training is in philosophy, and during the course of an academic career spanning some fifty years, I have spent considerable effort working in the field of philosophical jurisprudence, of which a large part, but still a part, is aptly called „legal theory". Shortly after starting to teach at the University of Iceland in 1973, I found myself teaching, every now and then, courses in this field, often together with colleagues from the Faculty of Law and the wider legal community. I mention, in particular, Garðar Gíslason, now recently retired from the Icelandic Supreme Court, with whom I shared, in the old days, many exciting teaching hours. And I spent a lot of time working with Sigurður Líndal, our Icelandic dean of legal history, so to speak, and a fine legal mind. But there were others, and I was often invited to teach in the Faculty of Law, and indeed, I continue to be invited. All in all, I taught, over the years, many hundreds of Icelandic law students, and I counted at least two generations of Icelandic law professors among my friends, colleagues and – often – collaborators.

Being a philosopher, I pursued the annoying habit of reflecting upon what I was doing – to the activity to which I had devoted my life. This was, most fundamentally, teaching; but teaching that consisted of more than simply shaping minds in the classroom, but in other things gave my classroom teaching much of its point: such things as the design of programs and curricula and the institutional structures that make all that I have just mentioned possible. An early challenge was the design of the philosophy program at the University of Iceland. Philosophy had only been approved as a degree program in the year before I began to teach there and the program of teaching was still largely

unformed. Together with the two colleagues who were then teaching philosophy – both are now departed from this vale of tears, but how young we all were then! – we formulated what proved to be an excellent program that introduced such shocking innovations as mid-term examinations and sequenced courses.

Despite this early adventure, my reflections progressed rather slowly. But they were helped considerably by the guest teaching that I began to do rather frequently in the 1980's and that became a very large part of my career, as it still is, although I have nominally been put out to pasture. Teaching at a large variety of institutions, each of which exists within its own special context, gives one a rich sense of the contingency of one's own way of doing things and provokes one into thinking how things might be changed and hopefully, improved. So long as one remains within one's own, familiar context, this is likely to remain a banal thought, even if more or less everybody thinks it and may nod their heads at appropriate moments; but experience brings it to life. A particularly striking experience for me was that of teaching for a semester at Jilin University in Changchun, China, where I taught two courses within a foreign relations institute and one course in the University's Law Faculty. In the law faculty, I was teaching jurisprudence to fourth- or fifth-year Chinese law students, while in the foreign relations institute, I was teaching master's-level students from all over Africa (mostly sub-Saharan): students who worked, or planned to work, in the foreign offices or diplomatic services of their own countries and with whom the Chinese wanted to establish good contacts.

Well, I suppose that it's very easy to see that, confronted with such a mission, one would be driven furiously to think about *how, and even what, one should teach these various students*. It would not have been clever to use Danish cartoons of Muhammad as visual aids. One's repertoire of Icelandic jokes would clearly not be of much use, nor illustrative examples from last week's *Morgunblaðið*, nor textbooks aimed at neo-liberal business students. In fact, the question of readings (and thus of material) was a real problem, since one could not build confidently upon common educational or cultural background, *Lebensform* or *Zeitgeist*, or, for that matter, first (or even second) language. And so on – I needn't belabor the obvious. I think that, in the event, I at least managed to turn Mission Impossible into Mission Improbable.

But to get closer to my main point, from all of these various experiences and my at-home reflections, a number of conclusions impressed themselves upon me pertaining not only to legal education, but to institutionalized tertiary

education in general. To be specific, I will restrict myself here to a selection of conclusions (which I shall call „principles“) concerning the structuring of academic programs and the institutional frameworks that support them. I will, at various points, pay special attention to legal education, and even to the development of legal education at Fróðskaparsetrið, which was Kári's special project.

One Size Does Not Fit All

The first and most important of my conclusions is this: Insofar as it is possible, do not copy existing models unreflectively, but think very hard about the structures that will best fit your objectives in your particular context and, once you have clear and cogent reasons to back up your ideas, try to implement those structures in concert with colleagues who are on board with the plan. One size or shape does not fit all.

This is a principle that is extremely hard to follow. The primary obstacle, in most institutions, is that there are already established structures in which people have entrenched interests, and these are almost impossible to change. Thus, this principle is most salient in application to new institutions, at early stages in their development, like Fróðskaparsetrið. Even in such institutions, many academics are in the unrecognized grip of deep-seated assumptions that may be nearly impossible to deal with. In France, a courtly old professor who had been put in charge of international exchanges (!) asked me politely how the *agrégation* was organized in Iceland and assumed that I could explain it to him. For those who do not know, the *agrégation* is a national competitive examination for civil service posts, which include almost all teaching posts from kindergarten through the universities and *grandes écoles*. This examination was instituted by Napoléon and is, as far as I know, a uniquely French institution. For many French academics, an educational system without the *agrégation* is as inconceivable as a village without a bakery.

Kári thought very much in terms of this first principle – or analogues of it – in various contexts, not only in connection with the development of legal education at Fróðskarparsetrið but also in connection with the Faroese judicial system and how that might develop, and, of course, in connection with the draft constitution. Indeed, he wanted me to collaborate with him on a paper about the Danish constitution, which he liked to describe as a „Belgian boilerplate“, since – as he pointed out – it was hastily copied from the Belgian constitution, without much reflection about its suitability to serve as the higher law, or legal framework, of the Danish realm.

A further difficulty following this principle – especially in regard to the structuring of academic programs – are the expectations of students, employers, other educational institutions, professional associations, politicians, and bureaucrats. Structural innovation, however sound and rational, tends to make such parties nervous and pigheaded. I taught for five years at Northeastern University in Boston and, as a junior faculty member, proposed a rather far-reaching revision in the University's academic calendar. Here, I met the argument that „if this were really a good idea we would already be doing it". After a year of intensive committee work, the project was eventually killed by the administration. But long after I had left Northeastern, it was discovered that even though they weren't already doing it, it was a terrifically good idea, and it was implemented and led to what everyone agreed were tremendous improvements in the academic programs and working conditions of the institution.

But perhaps I digress; I was talking about the limits upon structural originality imposed by pre-existing expectations. It is important to recognize that many – perhaps most – of these expectations are perfectly justified and need to be met, even if, in the grip of well-meant enthusiasm, one thinks that this restricts or compromises a plan that is otherwise much to be desired. One must never lose sight of this. And, as far as tertiary education goes, I must give it as my opinion – not likely to be popular – that the widely vaunted Bologna Process, while having praiseworthy goals and many good features and effects, and imposing a welcome discipline on European institutions of higher learning, is, when all is said and done, a one-size-and-shape-fits-all affair that attempts to quantify the unquantifiable and standardize the unstandardizable, and falls into conceptualizing education as the mediation of standardized chunks of „information": for, after all, this is the Information Age, is it not?

Education for What and for Whom?

Another of my principles is that: *One must always take as basic the question* '*education for what and for whom?'*. This may seem obvious, but it is seldom well enough considered. Moreover, it is a question to which one must periodically return in designing and maintaining good educational structures.

This principle came particularly into play when I took on the challenge of designing and implementing a law program at the University of Akureyri in 2003. Having by that time taught, on and off, for nearly thirty years in the Faculty of Law at the University of Iceland – although this was of course not my main mission – I had become critical of various features of legal education as it was structured there.

From the standpoint of the classical model for legal education in Europe, the University of Iceland's Faculty of Law was – and still is – impeccable. And if you have a certain traditional and, in its way, reasonable view of what and whom legal education is for, this model makes perfect sense. The problem from my perspective was that the guiding, tacit assumptions as to what and whom legal education was for had hardly been dusted off and re-examined since the Icelandic Lagaskólinn – established in 1908 in order to educate „Icelandic lawyers" – was incorporated into the University of Iceland as its Faculty of Law on the 17th of June, 1911, the University's founding date. The felt need for Icelandic legal education, and for „Icelandic lawyers", derived from the granting to Iceland of its first constitution in 1874, under which Alþingi gained legislative powers – although Icelandic legislation was subject to the assent of the Danish Minister of Justice and the Danish King – and more particularly from the granting of Home Rule in 1904, under which the Danish Ministry for Iceland was transferred from Copenhagen to Reykjavík, and Iceland, in that sense „acquired its own government".

Be that as it may, Icelandic law, and Icelandic legal, governmental, and administrative institutions, were for the most part copied, rather unreflectively, from Denmark; and legal education accordingly. Law is, of course, a *profession*, like nursing, medicine or accounting; and what society requires is trained practitioners. This has been, traditionally, the sole focus of legal education. The assumption was, quite realistically, that the „what" of legal education was to produce functionaries who would perform certain necessary tasks for government offices, public institutions, business enterprises (public and private), and private clients, within the context of a hierarchical, top-down system of institutions ultimately directed *in fact* by the instant executive powers, whether monarchs or „governments", although *mythologically* by the „lawgivers" as the – again somewhat mythological – representatives of the popular will. What is taught, on this idea, is what Sigurður Líndal liked to call *lögtækni*, in contrast to the usual Icelandic label for law as a discipline, which is *lögfræði*. The *lögtæknir* is trained in how to get certain things done within a certain system, which is given. He or she is taught to understand the system – a system of laws and institutions, and taught to think analytically and strategically so as to be able to get done, within that system, the sorts of things that a lawyer is expected to get done – the drafting of wills and contracts, serving as advocates to parties in legally mediated disputes, litigating in court, advising clients as to how to work within legal and regulatory frameworks or about legal risks, carrying out the tasks of governmental administration, and so on. And, let us make no mistake, these things need to be done, and legal education is supposed to train people in how to do it; so it is in large part devoted to *lögtækni*. But Kári

believed that lawyers also needed to understand the law as an evolving and developing system, based upon principles but at any given moment contingently organized and socially, culturally and historically contextualized, and that lawyers needed to be able to think critically and reflectively about the law as a phenomenon of that kind as well as technically and strategically. And he believed moreover that this perspective – call it theoretical – was especially important for Faroese lawyers to have, because he had a somewhat different answer to the question, *´legal education for what and for whom?*, than most people trained in, or training others in, the law.

In particular, Kári had in mind that Faroese lawyers – lawyers in a society aiming at more robust political autonomy within an ever-changing political and legal context on the global scale – needed to be prepared to participate in the shaping of legal and institutional development: to construct and reconstruct the Faroese legal system – say, for example, to develop Faroese labor law and introduce a Faroese labor law court – and not only to work as *lögtæknir* within it. That lawyers need to be able to contribute to the shaping and reshaping of legal systems – of legal structures and institutions – is an idea resisted by many, since it is thought that this is the proper business of politicians and legislators as representatives of the people, and not of lawyers, who should function merely as mechanics. But Kári understood that lawyers, in working within a legal system, are the ones best positioned to think creatively about the ways in which the system might be reshaped, and why; and, moreover, that they are *inevitably* drawn into that role, and moreover actively reshape the legal system within which they work *in the very course of carrying out their recognized tasks*. The practice of law turns out to be something more and different from the mechanical business that it is often conceived to be.

If a legal education is to prepare lawyers to participate in legal and institutional development, then „theoretical“ – that is to say *fræðileg* – subjects such as legal history, legal culture, legal sociology, comparative law, and what is called „legal theory“ must be viewed as important, relevant, and even essential, elements of a legal education, and not as decorative, or „hobby“ subjects for intellectual dabblers. It is true that these subjects may seem irrelevant if, as a lawyer, one spends his or her time working as a real estate agent, but they turn out to have real significance – a „payoff“ as my friend and colleague, Bárður Larsen, might say – for even rather modest legal functions, not to mention such thickly contextualized functions as adjudication, for these turn out not to be as „mechanical“ as they are imagined to be from the absurd, albeit pervasive, perspective of extreme legal formalism: a position that only appears plausible when wrapped in a cocoon of far-fetched fictions. Lawyers have to be

trained, Kári thought, in *lögtækni*, and that will necessarily be the center of gravity of a legal education, for that is a thing that society needs and that students of the law typically expect to be engaged in – and why not? But Kári thought that *lögfræði* was as important, because what lawyers need to be educated for is more than carrying out the tasks of functionaries and more than a law student may expect, and, in addition, because from an enlightened point of view, *lögtækni* is in itself not divorced from theory.

Given Kári's way of answering the question, *´legal education for what and for whom?´*, he proposed to develop and structure legal education at Fróðskaparsetrið rather differently than on the traditional model. Hopefully, this project will succeed in the absence of his guiding light. I had somewhat similar ideas in developing what might be called an alternative plan for legal education at the University of Akureyri, about which my friend and colleague, Ágúst Þór Árnason, will be talking shortly.[2] Kári was evidently inspired by what was done in Akureyri, but wisely understood, in conformity with my first principle, that this was not a model to be copied at Fróðskapasetrið – which is a different institution, in a different situation and a much different context, and which must define itself on its own premises – but rather a model from which one might draw some nourishment.

Size Matters

My third principle – the last that I shall discuss here – is that, to answer a question often raised in the racier women's magazines, size matters. Structure must be appropriate to size, as Galileo Galilei emphasized long ago. I published a little article on this some years ago which has been fondly received by some of my Faroese friends. In that article, I mentioned as an aside that the Icelandic constitution of 1944 – our legal and governmental framework – had been heavily copied from that of Denmark (itself a piece of Belgian boilerplate), apparently without giving much thought to the fact that that structure might not be a good one for a nation of much smaller size. Of course, there are many other reasons besides size that might suggest that the Danish structure might not be a fitting one for Icelandic law and government, but size does matter. Kári was very aware of this in his efforts to draft a constitution appropriate for the Faroe Islands.

Here in this very small nation, we are all very much aware of the various effects that mere size has on various arrangements: on *how* you can do things

[2] Sadly, Ágúst passed away, in his 64th year, on the 11th of April 2019.

and even on *whether* you can do them. We in Iceland are well aware of this, too, despite having a population 6–7 times bigger than that of the Faroe Islands. We are still very small. Some structures are adapted to size simply by nature – for instance the skeletal structure of larger and smaller vertebrates. But other structures, like constitutions, legal systems, and the structure of educational institutions and programs, are human artifacts, and may be constructively adapted to contingencies, such as size – or not. The structure of the University of Iceland was not adapted to size. Its organization, both administrative and academic, was merely taken over from much larger, traditional institutions of higher learning serving much larger populations, and never re-examined. I believe that the University suffers from having built up a mouse around the skeleton of an elephant. And even more unfortunately, the much smaller University of Akureyri has done the same thing. I must say that my colleagues and I tried, in some respects, to structure our Faculty of Law and Social Sciences with an eye to size; but one can not get very far once the overall structure of the institution has been established and become frozen. Of course, universities throughout Europe, at least, and perhaps more widely, have recently undergone restructuring; but this has been done upon one-size-fits-all "management" principles that perceive no difference between an educational institution – particularly a university – and a cookie factory, and the results have typically been disastrous for education. In any case, these are not constructive adaptations to size; I am afraid that it is Belgian boilerplate all over again.

We denizens of dwarf societies have typically focused upon the disadvantages of diminutive size. But there are also many potential advantages, and these can be utilized by thinking of how to structure our institutions appropriately, which requires the will to innovate and should always be treated as an experimental process. This applies to educational institutions as to others, and to legal education as much as to higher education of other kinds. So it has nothing specially to do with legal education; but, on the other hand, those who are developing legal education to serve a small society, and within a small institution, must have the adaptation of structure to size particularly in mind. I say again, as should be obvious, that size is only *one* of the important contextual contingencies relevant to structure, but it is one whose importance can hardly be exaggerated. To my mind, the structure – and most especially, the academic structure – of Fróðskaparsetrið will need to be radically different from the structure of the University of Copenhagen, or its clone, the University of Iceland, in order to provide the Faroese community with quality education in the variety of academic and professional fields that would make it worthy of the title of a university, and the danger is that the institution will wind up structured in the

more or less usual way as an artifact of the way in which a university can be built up to bring in various disciplines, one by one, given perceived opportunities to convince politicians that such-and-such can serve society – or can serve particular political agendas – in one or another way. Each new discipline will come, of course, with its baggage of preconceptions. I have learned from what I conceive to have been the mistakes made in building up both the University of Akureyri and the University of Iceland, and I am pleased to see that there are numerous clever and creative people here at Fróðskaparsetrið who are well aware of the fact that this particular beautiful little mouse needs something other than the skeleton of an elephant, or even of a rat, if it is to succeed as an educational institution of excellence in its rather special nest of contingencies.

Final remarks

This is something that Fróðskaparsetrið must explore itself, on its own premises, wherefore it must studiously resist the temptation to grab onto, or absorb by default, the ever-present Belgian boilerplate and must have faith in its own originality and the courage to correct its own inevitable mistakes. I am proud to have been asked to contribute my own ideas and experiences to this effort, most especially in the development of legal education, in the spirit of Kári – whose genius is fortunately recognized – but also to the development of Fróðskaparsetrið as a university.