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THE SESSION TITLE.

“Understanding Access to Higher Education: How Laws, Policies, Culture, Administration, and Money Influence Accessibility and What Colleges and Universities can Do to Have an Impact.”

THE PAPER TITLE:

The context of jurisdiction, governance, policy and law: an analysis of “the widening participation agenda” in England.

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PREFACE:

It is true to say that the meta context of an analysis will have many identical features, many similar features and many points of divergence and contrast. Notwithstanding this there is much to be learnt by an overarching analysis of a problem but this must be contained within the specific parameters and cultural context of the subject of the analysis. Higher education is the meta-context for this study but the particular cultural context is (for the combination of the papers that make up this session) predominantly the United States and its constituent parts plus the United Kingdom and its constituent parts. The main focal point is of course the United States – it is a US conference and that is the operating context for

the vast majority of the delegates, but the United Kingdom is able to provide a comparative context against which to compare the US.

The paper will have three parts:

- (1) Context
- (2) Policy
- (3) Law

Why bother about admissions to universities? To have a knowledge-based economy there must be good high-level education for the greatest possible number of people (see later). Much has been done to tackle the issue of bias and to seek to ensure equal opportunity but recent U.K. reports suggest that success has not been achieved, for example the "Higher education admissions: assessment of bias" report¹ finds, after re-evaluating earlier data, that there is still a problem. The problem shows up in particular in applications to study law at "old universities" with possibly a problem in medical schools as well.

PART (1) CONTEXT:

Constituent parts of the United Kingdom? In the United States it is assumed that the context must always be looked at and analysed on the knowledge that there are both state and federal laws. The relationship must always be borne in mind as must the constitutional framework. However, the first point of comparison is immediately raised because of the construct that is the United Kingdom and more needs to be said about this in order for the true comparison to start to emerge and the context to be understood.

¹ November 2005/47 see: www.hefce.ac.uk/pubs/hefce/2005/05_47/

The United States is of course made up of 50 States and the District of Columbia. The United Kingdom is made up of England², Scotland³, Wales⁴ and Northern Ireland⁵ (plus various off shore islands, for example the Isle of Man⁶, Jersey⁷ etc). Just as there are federal (central) functions in the US there are central (quasi “federal” in nature but not fact) functions in the UK plus many devolved areas of responsibility. Higher education falls into this latter category to different extents depending upon which jurisdiction is being looked at. It is as misleading to refer to UK higher education law and expect a totally homogenous picture, as it is to refer to US higher education law and expect a similarly totally homogenous picture. Equally to refer to English law will almost certainly be misleading if one is referring to areas outside England, for example Cardiff (Wales) or Edinburgh (Scotland). The precise nature of devolution and the exact niceties of the differences between the National Assembly of Wales and the Scottish Parliament are outside the scope of this paper but are real and significant when attempting to analyse areas such as access to higher education because of, for example, different fee structures, funding mechanisms and secondary (high) school systems and examination structures.

This paper will refer to English law and policy unless a specific reference is made to another country of the United Kingdom (see footnote references to government websites supra) or to (a further complicating factor) elements of competence held by the European Union⁸ (of which the United Kingdom is one of the 25 Member

² See <http://www.parliament.uk/> for general information and links

³ See <http://www.scottish.parliament.uk/home.htm>

⁴ See <http://www.wales.gov.uk/index.htm>

⁵ See <http://www.nio.gov.uk/>

⁶ See <http://www.gov.im/>

⁷ See <http://www.gov.je/>

⁸ See <http://europa.eu.int/>

States) or, to complicate matters even more, reference is made to policies developing under the auspices of the inter-governmental process known as "The Bologna Process"⁹ with 45 signatory states across the wider geographic area commonly referred to as "Europe". The U.K. government currently holds the Presidency of the Bologna Process (until May 2007) even though Scotland has separate representation and reporting mechanisms.

This sets the scene, albeit a potentially varied scene with, without doubt, overlapping layers of competence resulting in complex, varied, divergent and yet, to a large extent, converging policies and laws.

What is governance?

It is worth exploring how universities are governed in the United Kingdom, partly because of the differences that exist between these rather large budget holding organisations and other organisations of a similar size but in other sectors of the economy, and partly because of the differences that exist between the U.K. and the U.S.

An analysis of governance must be set in the particular context. Different organisations will adopt different structural approaches to their governance and have different concepts regarding both the notion of governance and the delivery of good governance. Different organisations in different countries will also adopt, or have imposed on them, different approaches to governance. However, the idea of governance itself should be a constant.

Whether governance with its contemporary meaning has a role in higher education is not universally accepted, in the Editors'

⁹ See <http://www.dfes.gov.uk/bologna/>

Introduction to the chapter "Governance, Accountability and Personal Liability" (Higher Education Law)¹⁰ it is said:

"Governance is a rather pompous term for the total management of an HEI"

The introduction does then go on to say:

"It might well all be subsumed under the phrase: 'the taking of sound collective decisions for the overall benefit of the corporate enterprise'"

This still understates the growing need for good governance as defined by Millett¹¹:

"Within a university governance involves decisions about the basic purpose or mission of the enterprise, about policies (values) to be observed and achieved in pursuit of the basic mission, about programs to be performed, and about resources to be obtained and utilized."

This reflects that there is more to governance than legal compliance. Legality, if overly structural and formulaic, can lead to a skewing of an organisation away from the achievement of aims, to compliance irrespective of aims. In the context of access and widening participation the university has to have decided what its objectives are. In terms of bursaries are these to be allocated on a basis of social need or academic merit. The university must, through its organs of governance, have determined exactly what its core values are – mission differentiation across the spectrum of higher education enriching the portfolio of opportunity. In England the Higher Education Act 2004¹² with its provisions regarding "Access Agreements" (see later) has placed a direct duty on the governance structures of every university seeking state funding and

¹⁰ Palfreyman D and Warner D *Higher Education Law* Jordans 2002

¹¹ Millett, John D *Management, Governance and Leadership* New York AMACOM 1980

¹² See <http://www.opsi.gov.uk/acts/acts2004/20040008.htm>

the use of a variable “top-up” fee structure to determine a variety of core issues.

The rule of law can be looked at from a variety of standpoints and certainly from the viewpoint of administrative law and governance. Bergan¹³ confirms that European higher education has “embarked on one of the most comprehensive reforms it has ever known the Bologna Process ... made up of over 40 states ...played against a background of increasing internationalisation...” he goes on to highlight the “newer developmenta higher education provision that is not clearly rooted in a national education system or subject to any national legislation” in terms of transnational education in the sense of a product sold in any place around the world. This latter phenomenon necessitates strong systemic governance rooted in ideals and a philosophical understanding of the ethos of higher education not what might be viewed as a mere “Hamburger U”¹⁴, although Taylor and Paton do argue that “corporate universities are more ‘university like’ than might be expected ... [and].... assessing or testing corporate universities through comparison to a 19th. Century ideal of ‘the university’ is to fundamentally misunderstand the nature of the phenomenon”.

Governance must be looked at in context, and the context of a university is different from other forms of organisation in many respects. The “mission” of an organisation may well have an important effect upon the manner in which those entrusted to “govern” the organisation view their role. If an organisation is primarily commercial (the ultimate aim being to make a profit) then

¹³ Bergan S *A Tale of Two Cultures in Higher Education Policies: The Rule of Law or an Excess of Legalism* Journal of Studies in International Education Vol.8, No.2 2004

¹⁴ Taylor S and Paton R *Corporate Universities historical development, conceptual analysis & relations with public-sector higher education*, The Observatory on borderless higher education 2002

its overarching need will be to enable it to continue in existence, to prosper and to make money. The US higher education system with its differentiation between "for profit" and "not for profit" as well as "religious affiliation" has a greater understanding of differentiation than is the case in Europe.

Different organisational (corporate) aims will require governance to be attenuated to enable these to be met. It is over simplistic to state that the thing is an organisation, it has met various legal requirements and therefore as long as "good governance" (that being whatever standards are set at the time) has been achieved then this is to be viewed as sufficient. Hall and Hyams¹⁵ state that there is "a more corporate model of corporate governance in higher education".

However, the Lambert Review¹⁶ in the U.K. did bring together many of the concepts of purely for profit corporate governance as embodied in many of the Reports on corporate governance such as Cadbury¹⁷, Greenbury¹⁸, Hampel¹⁹ and the resulting Combined Code followed by the Higgs²⁰ Report etc. Shattock²¹ is not convinced that the assumptions of the Committee were correct. It was stated that: "a situation where universities are 'run as communities of scholars' with 'participatory governance and management structures' is not 'fit for modern times'. It was also recommended that business

¹⁵ Hall J and Hyams O *Governance, Accountability and Personal Liability* p.40 in *Higher Education Law* edited by Palfreyman D and Warner D, Jordans 2002

¹⁶ Lambert R (Chair of Panel) "Review of Business-University Collaboration, Final Report 2003, H.M. Treasury, London

¹⁷ Cadbury A (Chair of Panel) "The Financial Aspects of Corporate Governance" December 2002, Gee & Co, London

¹⁸ Greenbury R (Chair of Panel) "Financial Aspects of Directors' Remuneration" 1995, Gee & Co London

¹⁹ Hampel Committee, 1995, Corporate Governance, Stock Exchange London

²⁰ Higgs D: Report, The Role and Effectiveness of Non-Executive Directors, January 2003, HMSO London

²¹ Shattock M (2004) "The Lambert Code: Can We Define Best Practice" Higher Education Quarterley No 4 October 2004

should be delegated from committees to academic and administrative managers to have “more rapid decision making and more dynamic managers”. Is this the formulation that best matches the core values of a university? Does this pave the way for ensuring that the unique mission of a university (see Millett supra) is met or is it, rather, a method of seeking to safeguard the principal stakeholder’s money? Tapper and Salter²² analyse the relationship between governance and policy, pointing out the fact that in the U.K. universities are autonomous bodies but depend on central funds for the vast majority of their funds (in most cases in excess of 90% in one way or another). Policy can be set but cannot be imposed by central government. However, the Funding Councils that distribute the funds can establish programmes and projects and assessment exercises and the money will follow these – so too will the universities and widening participation is an example of this.

Differentiation of universities in various ways does of course take place in the UK. There are universities that are chartered (some refer to these as the old universities; others would claim that the ancient universities are Oxford and Cambridge and that all others are new [see Picarda²³ 1995 edn]). In these chartered universities the ancient role of the visitor must be noted. The general powers of the visitor remain in the sense that the visitor is charged with ensuring that the founder’s wishes are carried out and if the charter that founded a university stipulated the nature of the provision then this must be adhered to and any deviation would amount to poor governance²⁴. The powers of the visitor regarding student

²² Tapper T and Salter B OxCHEPS Occasional Paper No. 11: Understanding Governance and Policy Change in British Higher Education

²³ Picarda H *The Law and Practice Relating to Charities*, Butterworths

²⁴ Saunders N, Joint degrees the legal issues, June 2005 at www.qaa.ac.uk

complaints were removed by the Higher Education Act 2004²⁵. The role of the visitor in its broadest sense remains (not in terms of dispute resolution²⁶), and was stated by Blackstone²⁷ to be:

“For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institutions. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise

For all those U.K. universities without a charter (statutory universities) the “founder’s wishes” are not there to have their current behaviour tested against. Perhaps they therefore have to operate within a broader delivery of the philosophy of what a university is. This is beyond the scope of any formulaic notion of what a university is and as Birtwistle²⁸ stated must look at the rationale for being a university, not just a formula to be met.

In the United Kingdom the Committee of University Chairmen has published a Guide²⁹ to the governance of universities and colleges. This represents the collective views of the Committee of University Chairmen (CUC), the Higher Education Funding Council for England (HEFCE), the Higher Education Funding Council for Wales (HEFCW) and the Department of Higher and Further Education, Training and Employment for Northern Ireland (DHFETE) in co-operation with Universities UK (UUK), the Association of Heads of University Administration (AHUA) and the Standing Conference of Principals (SCOP). The Guide details the diversity of types of institution and

²⁵ op cit No 11 at section 20

²⁶ see Birtwistle T *Student academic appeals: a holistic assessment* Education and the Law, Vol. 10, No.1, 1998

²⁷ Blackstone W *Commentaries on the Laws of England*, 10th. edn, vol 1, p480, 1787

²⁸ Birtwistle T *What is a university? (The English Patient)* Journal of Education and the Law Vol 15 No 3 2003

²⁹ April 01/20 *guide for Members of Governing Bodies of Universities and Colleges in England, Wales and Northern Ireland* Committee of University Chairmen

the basic legal framework within which they must operate as well as outlining the structure of governance, the committee structure, the officers, the members, the role of the visitor (only in certain chartered universities) etc. Throughout a distinction is made between pre-1992 and post-1992 institutions. As Lambert stated (supra) there is a congruence in many aspects with registered companies, for example reference to audit and remuneration committees and so forth and this creates analogies with US law and for example Sarbanes-Oxley.

There is a summary of responsibilities and a statement³⁰ regarding the nature of universities:

“Institutions of higher education are characterised by a distinctive ethos. Despite diverse backgrounds They are united in the common purpose of the provision of teaching, and the pursuit of knowledge and research, including research which contributes to economic growth. They are also committed to the principle of academic freedom

As seen from Bergan³¹ across Europe the Bologna Process is impacting upon structures and aims of universities. Beyond Europe there are different ideals and philosophies underlying higher education ranging from the Confucian to the corporate.

The word “university” has many meanings depending upon culture, context, and jurisdiction. A variety of learned works across many centuries have sought to define a university and to ensure that a philosophy does underpin whatever creature in whatever time frame is being analysed. In many instances as time has moved on and with it the operating of a ‘university’ there have been those that, at that time, have challenged the change as being for the worse or even as destroying the ‘university’. Who should have access to the

³⁰ HEFCE Guide Introduction

³¹ op cit no. 13

university? What are they seeking access to? What do the stakeholders believe they are funding and participating in? The concept may shift and the paradigm may alter.

In Europe we use the word 'university' and believe that we have the essence of the meaning of the word captured in our history and in the developments that have taken place in the last 600 years. What we appear to forget is that that very history is a history of Christianity and the nation state. This is not the universal reality that we might like to think it is.

In the *History of the Christian Church*³² it is stated that:

"The university appears in Europe.... in the twelfth century. It quickly became the restless centre of intellectual and literary life Democratic in its constitution, it received men from every rank and sent them forth with new ideas. The universities were a product of the medieval mind They grew up on the soil of the cathedral and conventional studies They were developed graduallyinto thoroughly organized literary corporations."

Professor Simon Lee highlighted³³ the fact that 'Truscot'³⁴ in the *Red Brick University* had taken Newman³⁵ to task for misunderstanding the words *studium generale* by giving it the meaning of studying generally (that is a wide range of subjects). Perhaps this could have been a wilful misinterpretation? Indeed in the *History of the Christian Church*³⁶ it is stated that the word "general" had reference

³² Schaff S at www.ccel.org/s/schaff/history/5_ch11.htm § 90

³³ Lee S *University Language Challenge* a lecture at Leeds Metropolitan University 28 November 2003 (see www.leedsmet.ac.uk)

³⁴ Truscot was a nom de plume for Edgar Allison Peers – *The Red Brick University* Harmondsworth, Pelican 1951

³⁵ Newman J.H.(1854) *The Idea of a University* Chelsea House (reprint 1983) New York or The Modern History Internet Sourcebook

³⁶ op cit no. 32

to students not to subjects or branches of knowledge. The idea of “access”?

What will a university look like in the future? Will technology, demographic factors, funding mechanisms and a shift in what society is and what society wants alter the paradigm beyond recognition? Tapper and Palfreyman³⁷ seem to see a future of differentiated missions, global influences, trans-national mobility for those who can afford it and an ever-increasing use of technology. The CHEPS Scenarios³⁸ look at perhaps more extreme visions of how the world might alter with a very broad spectrum of possibilities under the titles of Centralia, the City of the Sun, Octavia, the Spider-web City and Vitis Vinifera, the City of Traders and Micro-climates. Each of these scenarios paints a different picture of what the future might hold.

In the U.K. the overarching body that represents universities is “UUK” (Universities United Kingdom). However, what is being increasingly seen is the divergence within the sector – mission differentiation is now not a dirty phrase or concept. There are 3 main groupings, these being firstly “the Russell Group”³⁹ of 19 “research intensive” universities, and secondly CMU (Campaigning for Mainstream Universities)⁴⁰ of more than 30 “post 1992 universities”, and thirdly “the 1994 Group”⁴¹ made up of “16 internationally recognised universities who share common aims”.

³⁷ Tapper T & Palfreyman D OxCHEPS Occasional Paper No. 14: Convergence and Divergence in the Global Model of Mass Higher Education: Predictions for 2010

³⁸ *CHEPS Scenarios; The European higher education and research landscape 2020*
CHEPS Team Enschede, CHEPS, University of Twente, 2004

³⁹ See: <http://www.russellgroup.ac.uk/index1.html>

⁴⁰ See:

<http://www.epolitix.com/EN/Forums/Campaigning+for+Mainstream+Universities/home.htm>

⁴¹ See: <http://www.1994group.ac.uk/level1/About.htm>

There has been talk of forming a “non-aligned group” but this is clearly oxymoronic.

And so the analysis of context in terms of geographic and geopolitical reference points as well as in terms of a definition of what a university is and therefore what the role of governance and those who are charged with governance must do provides a backdrop for starting to understand the terms access and widening participation. Both of these terms equally require definition.

PART (2): POLICY

What is access?

Access to higher education can be interpreted in a number of ways. In the UK we talk of “access courses” and we also talk of the “widening participation” agenda. To some extent the former is a method of addressing the latter, but perhaps only in a single dimension. Originally the focus of the debate on access was centred on looking at the age participation rate with “access courses” aimed at getting the mature learner to enter higher education. Some would be entering after a gap from learning whilst others would be seeking to enter higher education with no prior certificated learning. The focus has now shifted to a certain extent away from the narrow confine of age, to encompassing other dimensions, for example social class, gender and ethnicity:

AGE: The age participation index is seen by many to be the key guide to the success of access policies. It has historically been split into three ranges, all based on initial entrants to higher education.

The most frequently quoted index has been for under-21-year-old

home-domiciled students entering HE for the first time, expressed as a percentage of the 18 to 19-year-old population. The API (21-24) is the number of 21 to 24-year-old home-domiciled entrants as a percentage of the 21 to 24-year-old population. The API (25+) is the proportion of initial entrants to the 25 and over population.

CLASS: the classification normally used is to designate 6 classes, these being I = Professional, II = Intermediate, IIIN = Skilled non-manual, IIIM = Skilled manual, IV = Partly skilled and V = Unskilled.

GENDER: women overtook men as a proportion of the undergraduate class in the 1996/97 academic year. Is this an issue?

ETHNICITY: three broad classification are used: namely, Asian, Black and White; the former two are then broken down into more specific designations, for example Bangladeshi, Black African and so on.

The position regarding ethnicity of students is rather mixed. It had been thought, and some data supports this, that there is no problem regarding access from the point of view of ethnicity. However, recent data shows the conflicting nature of "raw data", this is in terms of the divide between the categories (self imposed, supra page 10) of universities in England. The data set is:

Number of Universities	Self classification	% Ethnic Minority Students
53	Varied	<5%
20	Varied	40%+
9	Russell Group	<30 black Caribbean each
123	Varied	<1%
50	Varied	<5 black Caribbean each
All	Varied	16% of undergraduate students (c.f. 9% of working population)

Source Hesa⁴²

⁴² See: <http://www.hesa.ac.uk/>

The raw data shows that ethnic minority students are over-represented compared with the general population. However, there are polarised pockets of concentration and under-representation, for example London Metropolitan University has 60%+ of its students from ethnic minority groupings and it has more black Caribbean students than the whole of the Russell Group (19 universities) put together. Compare with this the University of Bristol (Russell Group member) which has less than 7% of its students from the ethnic minorities even though it has been the most aggressive of its grouping in trying to widen participation and received some bad press and comments from, for example, the Head Masters' Conference (the group of heads of independent fee paying schools ["public schools" in UK parlance]).

All data then has to be looked at in the broader context of the "massification" of higher education in the U.K., with the move from an elite highly selective system to a system that still basically uses a *numerus clausus* but has seen an enormous growth in overall numbers.

In 1973 Trow⁴³ introduced his model of:

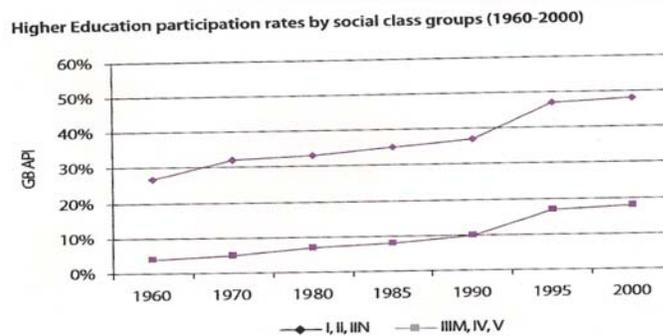
"elite – mass – universal access"

suggesting that an enrolment in higher education beyond about 15% of the age grade would require not merely a further expansion of the elite system but also the development of the system from the elite stage to the mass stage. This would in effect mean that there would be developed popular non-elite institutions. Universal access would be reached when more than 50% of the age grade was

⁴³ Trow M (1973) "Problems in the Transition from Elite to Mass Higher Education. In OECD 'Policies for Higher Education' Paris OECD

participating in higher education. This matched the concept of “more is different” as pronounced by Ball⁴⁴ in 1990. The more advanced notion of mission differentiation has only really crept into the British higher education lexicon in the 21st Century.

The so called “explosion” from 1981-1993 saw student numbers rise from 200,000 to 400,000, there was then a bit of a steady state before numbers took off again in 1995 rising from 400,000 to 1.8 million in 2000 and 2.2 million in 2004. As can be seen (figure 1) the overall numbers rose (supra) but the proportions barely changed – in fact the change was for the worse.⁴⁵



The “Young participation in higher education”⁴⁶ paper “has revealed the extent and scale of the inequality of access to higher education”. The report states that the most advantaged 20% of young people are up to six times more likely to enter higher education than the most disadvantaged 20%.⁴⁷ The difference between the constituent parts of the United Kingdom (supra page 1) is also shown (Figure 3 of the Report, figure 2 of the paper) by the report in terms of the different Young Participation Rates in Higher

⁴⁴ Ball C (1990) “More Means Different” Royal Society of Arts, London

⁴⁵ HEFCE 2003 “Widening Participation in Higher Education” (see: www.hefce.ac.uk/widen/links.asp)

⁴⁶ HEFCE January 2005 (see: www.hefce.ac.uk/news/hefce/2005/yp.asp)

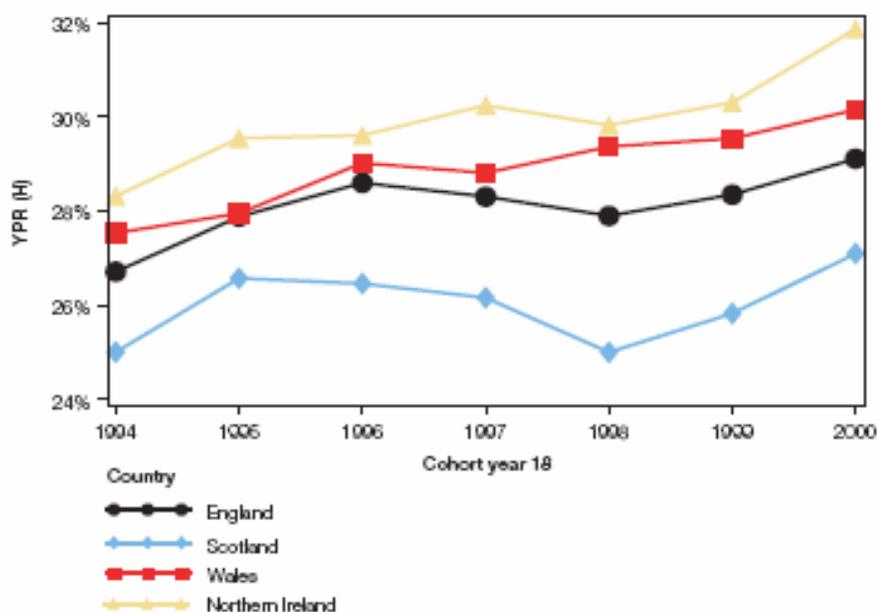
⁴⁷ Ibid at section 3.26, page 97

Education (YPR H) – the report also shows the wide divergence then within the countries as well as between the countries.

However, the policy driver of widening participation in higher education throughout the U.K. remains. This driver has funding attached to it (see later) and the combination writes a strong agenda for those charged with the governance of higher education institutions. Lewis⁴⁸ said: “The merits of widening participation in higher education have been clear for a long time and they remain largely unchanged and unchallenged”. The Dearing Committee⁴⁹ stated: “..... increasing participation is a necessary and desirable objective of national policy over the next 20 years” (p 101). The years pass by and the policy is still at the forefront of the agenda.

Figure 2 (designated 3 from the original publication notation)

Figure 3 YPR(H) rates by country for 1994 to 2000 cohorts



⁴⁸ Lewis B (2002) “Widening Participation in Higher Education: The HEFCE Perspective on Policy and Progress”, Higher Education Quarterly Vol 56 No 2 April 2002

⁴⁹ Dearing R (1997) – The National Committee of Inquiry into Higher Education, Dfes, London and numerous websites e.g. http://www.ox.ac.uk/gazette/1997-8/supps/1_4449.htm

The Trow (supra) model of defining what an elite, mass or universal system is, is predicated on a common understanding of what higher education is. Once again context may alter this assumption and hence impact upon the reality of the data. Douglass⁵⁰ claims that the U.S. developed mass Higher Education systems as early as 1940, but concedes that: "America has always taken an expansive view of what constitutes Higher Education". What is classed as Higher Education in some ways in the U.S. may well be classed as vocational or further education in other jurisdictions.

How might these disparities of participation be tackled? For age related problems there have been access courses, providing opportunities for mature learners (over the age of 21) and those with no formal qualifications. For social class what strategies can be adopted? One way has been to tackle the problem from the point of view of geography. Where do people live and what is the participation rate from that geographical location – the so called "post code approach" (zip code). Identify low participation neighbourhoods and give incentives to the universities to attract students from those areas. The figures of financial incentives are illustrated by:

2000/01	£m	2002/03	£m
HEFCE (1)	25	HEFCE	38
SHEFCE (2)	0	SHEFCE	4
WFC (3)	1.63	WFC	2.3
TOTAL	26.63	TOTAL	44.3

Note: (1) = England, (2) = Scotland, (3) = Wales

The effectiveness of such a policy' both in terms of whether the focus on geography (zip code/post code) is useful and whether

⁵⁰ Douglass J (2005) in Tapper T and Palfreyman D "Understanding Mass Higher Education, Comparative Perspectives on Access", Routledge-Falmer, Oxford

giving funding to the university rather than the student, has been called into question. Osborne and Shuttleworth⁵¹ in their analysis of such a policy in Northern Ireland (Belfast) cast doubts about the actual effectiveness of the policy and claim only very marginal changes to the patterns of participation. The question of funding must also be considered and then the policy must be put into the overall context of survival to completion (sometimes referred to as "attrition rates").

ISSUES of FUNDING.

The culture of not paying for higher education in Europe is deeply entrenched. Even in the Bologna Process documentation the nature of higher education as "a public good" is at the forefront of the agenda. The issues raised by the World Trade Organisation and the Doha Development Agenda regarding the General Agreement on Trade in Services has caused much debate about the nature of higher education and whether or not it could be included in the "bid/offer" round leading up to the Hong Kong December 2005 Ministerial meeting. The Swiss proposal⁵² that higher education institutions should be classified not as an institution but according to the particular activity (the notion of the "hybrid body") has not, as yet, been widely adopted. The mere hint that higher education might be incorporated in the European Union Draft Directive on Services caused an outcry.

But funding mechanisms do impact upon participation. The funding mechanisms operated in England have shifted with the move from

⁵¹ Osborne B and Shuttleworth I (2004) "Widening Access to HE in the United Kingdom: Questioning the Geographic Approach" Higher Education Management and Policy Vol 16 No 1 2004

⁵² WTO Communication From Switzerland "Educational Services and the GATS: the Experience of Switzerland" TN/SIW/2005

elite to mass (and close to universal) access (as per Trow supra). The reality of aspiring to a mass system but then being confronted by the cost of a mass system has hit the U.K. governments. In the elite days there was a system of means tested grants and all fees paid. The situation has altered through a number of iterations⁵³ with the latest developments only coming on-line in September 2006 when the so called "top-up" fees will come in plus deferred payment by the student linked to their subsequent earnings (see later – the Higher Education Act 2004).

Studies have shown that financial hardship does impact not only on the decision as to whether or not to enter higher education, but also as to both the ability to remain in higher education measured by assessment performance, but also the desire to stay, or leave, higher education. The DfES paper "Dropping Out"⁵⁴ reported that their research showed that students who depended on government funding rather than parental support were more likely to claim that financial problems were the main factor influencing them to withdraw from a course of studies at university, equally those who relied on loans rather than grants were more likely to drop out.

Attitudes to debt are also an important factor and research shows that this is a class related issue. Callendar's⁵⁵ research showed that debt averse people were less likely to study than debt neutral people. The debt averse more often than not came from particular social categories, namely, the lowest social classes, Muslims and

⁵³ see Pennell H and West A (2005) "The Impact of Increased Fees on Participation in Higher Education in England" Higher Education Quarterly Vol 59 No 2 April 2005 – the article gives a very good description of the changing system of student funding in the UK as well as then going on to analyse the impact of the more recent changes.

⁵⁴ Davies R & Elias P (2003) "Dropping Out: A Study of Early Leavers from Higher Education" Research Brief 386, London DfES

⁵⁵ Callendar C (2002) "Attitudes to Debt: School Leavers and FE Students" UUK, London 2003

black people. Whereas those who were not anti-debt tended to come from independent schools (private fee paying schools), from the highest social classes and were also more likely to be male.

The latest research by HEFCE⁵⁶ also shows that the more a student devotes time to paid employment the greater the apparent effect on their final grades:

“Just by engaging in paid work students are putting their results at risk”

RETENTION as an ISSUE.

Recruiting students from a broader base does tackle the issue of access and widening participation. But what is the use of recruiting students if they are merely in a “revolving door”, recruitment without retention does not in any way solve the problem, and it may of course exacerbate it by alienating those associated with the drop- outs – those who make up the attrition rates. This is of course only significant if those who leave are from a particular segment. Any loss of students is a waste of resources – resources have been used to recruit them, to teach them, to assess them and if they leave without completing the course then this is a waste of these resources and of their own resources (intellectual, emotional and financial).

⁵⁶ Hefce November 2005: Survey of higher education students' attitudes to debt and term-time working and their impact on attainment, see: hefce.ac.uk/pubs/rdreports/2005

Increasingly, because of the combined issue of resources and damage to the widening participation agenda, the government funding agencies and quality agencies in the U.K. are interested in rates of attrition and completion rates. One piece of research⁵⁷ looked at 6 higher education institutions that performed better than their benchmarks as defined by the Higher Education Funding Council for England (HEFCE). The research identified 9 areas where the HEIs contributed to the student experience in a significantly different way to other HEIs. This paper has modified the 9 areas and collapsed them into 5 in the belief that this avoids unnecessary overlap (the full 9 can be seen in the paper cited at footnote 57).

The modified, collapsed areas of activity are:

- (1) Pre-entry and Early Engagement with Students – this is in terms of outreach policies seeking to get engagement and starting academic preparedness.
- (2) Curriculum Related Matters – all aspects of the curriculum looked at in the context of the students: teaching and learning, accessibility of, and relations with, all staff, flexibility of scheduling classes and assessments.
- (3) Induction – often the student’s lack “cultural capital”: they are alienated by the premises and the norms of behaviour, dress, and relationships.
- (4) The First Year Experience – akin to Loyola’s notion that the early years are the vital years the HEIs devoted resources to the first year (Freshmen) students (diverting resources from the subsequent years).

⁵⁷ Yorke M & Thomas L (2003) “Improving the Retention of Students from Lower Socio-economic Groups”, *Journal of Higher Education Policy & Management* Vol 25 No 1 May 2003

- (5) Staff development and Research – all the staff can only participate fully in the programme if they are aware of it and have bought in to its values.

Retention and completion rates are important. The indicators are that the revolving door is a reality for “non-traditional learners”. Widening participation has costs if it is to be done whole-heartedly. If it is not done whole-heartedly the consequences will be alienation of the very people that the policy is seeking to include, not exclude.

If insufficient attention is paid to retention and yet time and energy is used on recruitment a “revolving door” can be created with all effort wasted. Weko⁵⁸ claims that there are no U.S. federal figures on completion rates and so took a sample of HEIs and analysed the figures and from this projected federal rates – this came out at 66-67% (compared with the U.K. at 82%). According to the OECD⁵⁹ the U.K. comes third out of 21 countries analysed regarding the “survival” of students (number of graduates ÷ number of entrants).

However, Barefoot⁶⁰ argues that a lot of research has been done into “dropout (or stopout)” but with the focus largely upon student characteristics or the impact of the external environment. There has been insufficient attention to look at how the HEI can cross the gap of “lack of cultural capital”⁶¹.

⁵⁸ Weko T (2004) “New Dogs and Old Tricks: What can the U.K. Teach the U.S. About University Education?” at www.hepi.ac.uk

⁵⁹ see www.oecd.org and also Lewis R (2003) “Which students fail, why and what are the consequences?”, Higher Education Digest Summer 2003 Issue 46

⁶⁰ Barefoot B (2004) “Higher education’s revolving door: confronting the problem of student drop out in US colleges and universities”, Open Learning Vol 19 No 1 February 2004

⁶¹ Op cit No 56

The most recent study in England funded by the Joseph Rowntree Foundation⁶² focuses on the perceived stigma of being an “early withdrawer” from higher education: note the language, rather than stating it as “drop out”, “wastage rate” or “attrition rate” etc. The semiotics is viewed as being an important part of the engagement. The research does mirror Yorke and Thomas’s “9 areas of activity”⁶³ but is more specific in targeting those stakeholders by whom a recommended activity should be taken up, these are, namely: government and policy makers; institutions; early leaver students; potential students; parents; schools and colleges; employers; careers service; job centres; the media. Obviously some of these are targeted at different age groups, but all are targeted at those from backgrounds where “they are first generation students” (thus removing the social class categorisation but looking at the cultural capital aspect).

What can HEIs do? Clearly the policy imperative is to widen participation, to move to a universal access model of higher education. Certainly in Europe the “Lisbon Agenda”⁶⁴ sets the stage for the need to ensure that Europe is a knowledge-based economy and the governments know that this cannot be achieved with even a near-mass system of higher education and certainly cannot with an elite system. The “middle class” is running out of children and so the other classes will have to provide the additional brainpower!

The total retention cycle can be demonstrated by:

⁶² Quinn J *et al* (2005) “From Life Crisis to Lifelong Learning: Rethinking Working-Class “Drop Out” from Higher Education” November 2005, Joseph Rowntree Foundation, London

⁶³ *op cit* no 56

⁶⁴ for the Lisbon Agenda see <http://www.euractiv.com> or http://en.wikipedia.org/wiki/Lisbon_Strategy

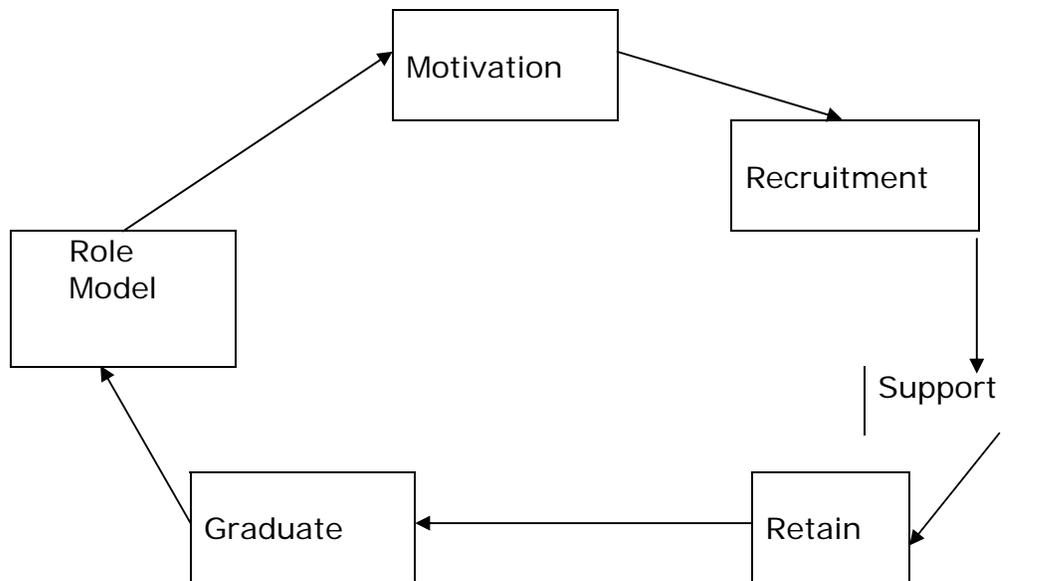


Figure 3: The Virtuous Circle of Retention

The Schwarz Report⁶⁵ has analysed and reported on the admissions process to higher education within the overall context of both the straightforward process – the fact that the majority of applicants are offered places before they sit the qualifying exams (A[dvanced] Levels) and the wider policy implications. Some disciplines at some universities are now requiring potential students to sit aptitude tests designed, it is claimed, to ascertain future performance rather than measure past performance. Law is one of the subject areas, albeit currently with only a small number of participating universities⁶⁶. Early indicators seem to show that the test is “blind” when it comes to type of previous education and social class.

So the policy of widening participation is based upon a number of drivers. These include the social altruistic egalitarian agenda of equal opportunity and also the pragmatic agenda of needing access to a bigger gene pool. Trow’s model (supra) is alive and well and the Dearing (supra) difficulty of paying for it all is in even better

⁶⁵ Schwarz S (2004) Fair Admissions to Higher Education Recommendations for Good Practice, September 2004 Dfes London

⁶⁶ see the Law National Aptitude Test (LNAT) at: <http://www.lnat.ac.uk/>

health. Policy requires action. University governance structures will be motivated by both the altruistic and the pragmatic but both will be linked to following the money. The Funder's wishes are likely to be met even though the HEIs are independent.

Does the law intervene? Well, yes it does in a variety of ways in terms of requirements placed on HEIs but also in the manner in which recruitment takes place.

The Law

The relationship between a university and its students in the United Kingdom is contractual. This was confirmed in *Clark v University of Lincolnshire and Humberside*,⁶⁷ supporting previous decisions such as that in *Moran v University College Salford (No 2)* ⁶⁸.

The direct contribution to fees has accelerated the recognition of the shift to a "consumer contract",⁶⁹ bringing into sharper focus the rights of the student regarding clarity of terms, protection from exclusion clauses and limiting the ability of the university to alter terms. Much of the framework comes from the Unfair Terms in Consumer Contracts Regulations 1999⁷⁰ giving effect to the Council Directive 93/13/EEC (as amended). Even without the direct contribution to fees the contractual position remains the same. If the contribution to fees becomes retrospective rather than pre-consumption then the consideration is still there in the form of the financial contribution.

⁶⁷ [2000] 3 All ER 752, CA – "... it is now accepted that a student starts in a contractual relationship with a university..." As quoted in *Halsbury's Laws of England*, vol 15(2), para 838

⁶⁸ [1994] ELR 187 at 194

⁶⁹ Farrington *The Law of Higher Education* (1998) Butterworths at page 307

⁷⁰ SI 1999/2083

The only direct legal intervention regarding the recruitment of students is dealt with in the Higher Education Act 2004 and this is largely in terms of the “top-up fees” and the establishment of the Office⁷¹ for Fair Access (OFFA). There is also a lot of law that impacts upon the admissions process in a variety of ways, for example various discrimination statutes, human rights legislation as well as straightforward contract law. The process for dispute resolution between a university and one of its students is regulated by the Higher Education Act 2004. This is in terms of there being an internal set of processes capped by the Office of the Independent Adjudicator (OIA) but that a party may at any time seek redress through the courts. This may count against them in that they have not exhausted the internal mechanisms and sought to lessen the legal burden and once the courts have become involved this “trumps” the OIA that cannot then hear the case. The OIA may not hear complaints brought by prospective students about the applications process: this should be dealt with by the internal mechanisms of the particular university with the ultimate course of action being to seek redress through the courts, although the English courts have shown reluctance to have any involvement in matters that can be regarded as “academic judgment”, they have hinted that this may not be the case forever⁷².

The Higher Education Act (HEA) 2004:

Section 31 of HEA creates “the Director of Fair Access to Higher Education” (OFFA). This office is to deal with the processes created by the HEA itself enabling universities in England and Wales to

⁷² Birtwistle T. (2002) “Liability for 'Educational Malpractice'”, Education Law Journal Vol 3 Issue 2 2002 pp95-107

charge fees above the “basic amount” (currently £1175) that can range up to the “higher amount” (currently £3000) if⁷³ a university submits a “plan” to OFFA which (Regulation 3) sets out what measures the university is to put into place to “attract an increased number of applications from ...groups..that are under-represented in higher education.” The Regulations⁷⁴ detail how a university will structure its plan (Reg. 4), how the plan will be enforced (Regs. 9 and 10). The Regulations deal in great detail⁷⁵ with the financial arrangements of the new scheme that will come into force in September 2006.

However, the critical aspect is the context within which any particular university places its plan. What is its “normal” gene pool for recruitment and how might the plan alter that so that the university does comply with the Regulations and in particular Regulation 3⁷⁶ and the “under-represented groups”.

The first round of plans has been submitted to OFFA⁷⁷ and the data is available to be scrutinised. It is not a statutory requirement for universities to charge “the higher amount” and if they do not intend to do so then they have no need to submit “a plan” to OFFA. 128 universities submitted plans for September 2006. Universities can submit plans to charge the “higher amount” starting from September 2007.

⁷³ according to the Student Fees (Approved Plans) (England) Regulations 2004, SI 2004 No. 2473

⁷⁴ *ibid*

⁷⁵ see Palfreyman D (2004) “Does OFFA have teeth” Oxcheps Occasional Paper N.16 (updated 22/12/04)

⁷⁶ *Op cit* No 69

⁷⁷ See: <http://www.offa.org.uk>

Of the 128 plans submitted a narrow sample can be taken of two neighbouring universities - two institutions in the same city: clearly defining their mission differentiation, whilst adhering to core values. Leeds Metropolitan University has badged itself as “low charging, high impact” in its OFFA Agreement⁷⁸ and subsequent promotional and other materials. It will charge not the “higher amount” (£3000) but £2000 and will, complying with Regulation 3, put into place a bursary scheme (detailed in the plan). The University of Leeds (same city but badged as a “Russell Group university”), will, according to its Access Agreement Submission charge the “higher amount” for its undergraduate courses. It too will, of course, have a bursary scheme and details this in the plan.

As well as changes to the fee structure for undergraduate courses (postgraduate courses are a free choice for each university as it is) as from September 2006 there will be new mechanisms for student support in terms of living costs.

Equal treatment without discrimination

Just as in many jurisdictions there are laws prohibiting discrimination on various grounds: gender, race, disability, religion or belief, sexual orientation (although with the latter two the law currently is framed in terms of employment). Further legislation will take place before the end of 2006 to ensure that the U.K. complies with all aspects of the Equal Treatment Framework Directive⁷⁹ of the European Union.

⁷⁸ Leeds Metropolitan University Access Agreement, February 2005

⁷⁹ 2000/78/EC

Hyams⁸⁰ "tentatively" suggested that all applicants to all universities should be treated in the same way. If this was subject to contract then the law of contract should apply: failing that judicial review could be used and as was shown in *Central Council for Education and Social Work v Edwards*⁸¹ there would be no need for an institution to give reasons for refusing to admit a student. Farrington⁸² also concludes that there is no requirement to give a reason for not offering a place, but also looks in some detail at non-discrimination.

Most analysis has taken place in the context of discrimination in the sense of race, gender, sexual orientation etc not in the sense of social/school background. Birtwistle⁸³ started the analysis in terms of a holistic view of discrimination within the context of admissions policy. The words of Frankfurter J in *Sweezy v New Hampshire*⁸⁴ regarding the four essential freedoms of a university, namely, who can teach, what, how and to whom are apposite regarding the admissions process, albeit buried under the great volume of policy requirements.

The range of relevant legislation is:

- (1) Race Relations Act 1976 as amended⁸⁵ imposes a general duty on higher education institutions as public bodies to eliminate discrimination and promote equality of opportunity. HEIs are now required to be pro-active regarding the need to avoid unlawful racial discrimination.

⁸⁰ Hyams O (1998) *Law of Education* Sweet and Maxwell at page 540/541

⁸¹ (1978) *The Times* May 5th.

⁸² Farrington D (1998) *The Law of Higher Education* Butterworths at page 307

⁸³ Birtwistle T (2003) "University Student Admissions - A Simple Matter of Contract?" *Education Law Journal* Vol 4 Issue 1 2003 pp 25-33

⁸⁴ 354 US 234, 263 (1957)

⁸⁵ Race Relations (Amendment) Act 2000

This will include all aspects of operation including recruitment and treatment of staff and students.

- (2) Sex Discrimination Act 1975 as amended⁸⁶ imposes duties to avoid direct and indirect discrimination
- (3) Disability Discrimination Act 1995 as amended⁸⁷ - whilst it is unlawful⁸⁸ to discriminate against a disabled person through admissions arrangements, or the terms by which a person is offered a place, it is lawful to provide less favourable treatment⁸⁹ in order to maintain:

“(a) academic standards; or
(b) standards of any other prescribed kind.”

The limited use of this provision regarding disability is illustrated in the discussions that took place as the Bill proceeded through Parliament⁹⁰, for example the illustration of professional body requirements.

- (4) Employment Equality (Religion or Belief) Regulations 2003 regulation 20 makes specific reference to admissions to a HEI.
- (5) Employment Equality (Sexual Orientation) Regulations 2003 regulation 20 makes specific reference to admissions to a HEI.
- (6) Human Rights Act 1998 – this gave effect to the European Convention for the Protection of Human Rights and

⁸⁶ Employment Equality (Sex Discrimination) Regulations 2005 came into force on 01/10/2005 s.22(3) makes specific reference to admissions

⁸⁷ Disability Discrimination Act 1995, as amended by the Special Educational Needs and Disability Act 2001; see Hay D *The Special Educational Needs And Disability Act 2001* [2001] Education Law Journal 72

⁸⁸ Ibid. s 28R.

⁸⁹ Ibid. s 28S.

⁹⁰ Special Educational Needs and Disability Bill, House of Lords Research Paper 01/29 at page 76

Fundamental Freedoms 1950 (the Convention) which did give a right to education. The complexities of the relationship between the Convention articles remains – the dominant view⁹¹ being that article 14 requires an existing Convention right to attach to and is not free standing.

If applied to higher education, bearing in mind the notion of contract and the lack of requirement to give a reason for refusing admission, then the university will remain entitled to offer a place as a matter of judgment, or judgment coupled with policy. However, Article 14 of the Convention requires that the Convention rights:

“...shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property or other status.”

Is a policy based upon “post-code” (zip), or type of school attended, or parental income, or job, contrary to Article 14 in that it is discrimination on the grounds of social origin (assuming that one is talking about a member of an identifiable social group)? To answer this question one would need to consider whether or not the policy has a reasonable objective justification.

Schools and Universities are able to select on academic grounds. Universities are able to have guaranteed places under a compact scheme, for example places linked to access courses – complete the access course and a place on the chosen degree is assured. Might universities argue

⁹¹ for example in *R (Douglas) v North Tyneside MBC* [2004] 1 All ER 709

that they are, notwithstanding Article 14, able to make a judgment on admission to their course on criteria that include type of school attended? This line of argument is perhaps bolstered by research that indicates if there are two similar candidates, one from a state school and one from a private school, then the candidate from the state school is likely to outperform the candidate from a private school on any given undergraduate programme⁹². It has been suggested that, in fact, universities which fail to have flexible entry requirements that take account of applicants' backgrounds could be in breach of Article 14 where standard entry requirements disadvantage an identifiable group without justification.⁹³

- (7) UN Covenant⁹⁴ - Article 2 (Protocol 1) of the Convention states that everyone has "the right to education" and that the education should be such that parents "have a right to choose the kind of education that shall be given to their children". In higher education it is not the parents who are choosing, it is an adult.

European Union Law

For citizens of the European Union there are various treaty⁹⁵ provisions that prohibit discrimination on the grounds of nationality.

⁹² see the *Guardian Higher* January 21st. 2003 – primary research carried out by Bekhradnia B and Thompson J Higher Education Policy Institute, further analysis of the data by Higher Education Funding Council for England see <http://www.hefce.ac.uk/Learning/whodoes/> See also report on Newcastle University students' academic performance, in T.H.E.S., 31 January 2003, p.7.

⁹³ L.Bibbings, quoted in P. Batey and A.Utley, 'Access rules raise legal fears', T.H.E.S., 31 January 2003, p.7.

⁹⁴ See <http://unstats.un.org/unsd/cr/family2.asp?Cl=9>

⁹⁵ main provisions now contained in the Treaty of Rome 1957 as amended by the Treaty of Amsterdam 1997: see <http://www.eurotreaties.com/amsterdamtext.html>

This applies to access to higher education and access to the funding associated with higher education, although the latter does require some “close connection”⁹⁶ with the country before full citizen’s rights apply. Higher education must be looked at in the context of the EU and in the even broader context of The Bologna Process⁹⁷

Article 12 EC – the first paragraph provides:

“Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

Article 18(1) EC states:

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.”

This Treaty right to move and reside freely makes the collection of data regarding the movement of those wishing to study difficult – hence the absence of any reliable data outside the ERASMUS framework.

Specific Treaty provisions regarding education are:

Article 149(1) EC which provides that:

“The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the

⁹⁶ Case C-209/03 R (Bidar) v London Borough of Ealing and another

⁹⁷ parts of this next section are references to a research project on behalf of Eversheds LLP

responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity."

Article 149(2) states what form Community action shall take. This includes "encouraging mobility of students and teachers, by encouraging *inter alia*, the academic recognition of diplomas and periods of study"; 149(4) states that in accordance with Article 251 procedures "incentive measures" shall be adopted (excluding legal harmonisation of the Member States).

There is a variety of secondary legislative measures, in the form of directives that address detailed issues regarding residence. The law is in a transitional phase with current Directives being replaced by 2006 and with the new Directive (of course) requiring legislation in the United Kingdom to give effect to it. The current general Directive is:

Council Directive 90/364/EEC⁹⁸ which gives general rights of residence as long as certain criteria have been complied with especially regarding having health insurance "to avoid them becoming a burden on [the host State's] social assistance system"

Specific rules regarding students are currently covered in:

Council Directive 93/96/EEC⁹⁹ which states in the preamble to the seventh recital that "in the present state of Community Lawassistance granted to students does not fall within the scope of the Treaty". This refers to Article 12 EC, formerly Article 6 and originally Article 7.

⁹⁸ OJ 1990 L 180, p.26

⁹⁹ OJ 1993 L 317, p.59

The new Directive, replacing, *inter alia*¹⁰⁰, both of the above, is 2004/38/EC¹⁰¹, which is to be transposed into the law of the Member States (Article 40) by 30 April 2006. The fundamental rights as laid down in the Directive regarding mobility to study are as follows:

Whereas:

- (1) "citizenship confers a primary and individual right to move and reside freely"
- (2) "free movement of person ... one of the fundamental freedoms"
- (3) "... necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons"
- (4) "With a view to remedying this sector-by-sector, piecemeal approach there needs to be a single legislative act to amend and Council Directive 93/96/EEC on the right of residence for students"
- (11) "The fundamental and personal right of residenceis conferred directly ...by the Treaty and is not dependent upon.....administrative procedures"
- (21) "...it should be left to the host Member State to decide whether it will grant social assistancefirst 3 monthsor longer [for those] other than workersor maintenance assistance for studiesprior to acquisition of the right of permanent residence...."

Article 7(1)(c): grants a right of residence for longer than three months if the citizen is enrolled (at either a public or a private establishment) "for the principal purpose of following a course of study".

Article 24(2): as a derogation from 24(1) ("equal treatment") a "host state shall not be obliged to confer entitlement to social assistance during the first 3 months of residence.....nor prior to the acquisition of the right of permanent residence, to grant maintenance aid for studiesconsisting in student grants or student loans to persons other than workers, self-employed

¹⁰⁰ for full table or correspondence see:

http://europa.eu.int/comm/justice_home/doc_centre/citizenship/movement/doc/table_correspondence_en.pdf

¹⁰¹ OJ 2004 L 229, p.35, see also at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_229/l_22920040629en00350048.pdf

persons, persons who retain such status and members of their families”

How these latter provisions are transposed into national law remains to be seen.

CONCLUSION

The mix of policy and law is at times curious. The governments in the U.K. frequently state that the universities are autonomous bodies and yet policy drivers are given impetus by the use of funding mechanisms through the various funding councils.

The role of the Human Rights Act is difficult to predict. Article 14 is viewed by “all sides” as supporting “their” case. The main controversy in England is the apparent fear by the upper socio-economic classes that their offspring will be crowded out of places at the more prestigious universities as a result of widening participation strategies and the direct statutory intervention of the Higher Education Act 2004 and the Office for Fair Access. Research¹⁰² by “the LSE Paper” does tend to indicate that money is still an over-riding driver regarding access to higher education in the U.K. The LSE does pick up on the point of cultural capital and the gap that exists.

The law is there to maintain basic human rights but there is a need for social engineering – the UK will run out of human capital if it does not access a bigger gene pool. Policy makers have identified this as necessary, now funding must allow for this to happen but so must there be put into place the cultural capital, or a support mechanism to replace lack of cultural capital, to ensure success for this new set of “first generation undergraduates”.

¹⁰² Galinda-Rueda F, Marcenaro-Gutierrez O and Vignoles A (2004) The Widening Socio-economic Gap in UK Higher Education, Centre for the Economics of Education, London School of Economics, June 2004

Failure is not an option if a successful knowledge based economy is to be put into place. Failure to achieve the Lisbon Agenda for Europe, and the equal need for the U.S. to achieve the same aims, will have dire results.