

Stetson Higher Education Law Conference 2012

Scholarship, scholarship networking and emerging topics for scholarship: a view from the UK

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1. Scholarship and the development of higher education policy

The development of higher education policy in the UK is overwhelmingly a matter of party politics. Moreover, the political considerations differ substantially between the four countries within the UK (England, Wales, Scotland and Northern Ireland) as a result of the significant devolution of responsibility for education. These remarks will confine themselves to the position in England. While the higher education policies in the other countries are significantly different, the extent to which legal scholarship impinges on those policies is nevertheless broadly the same in all four countries: many would say that the extent to which UK education policy is evidence based and the result of scholarship is limited, with the impact of legal scholars being even less substantial than that of scholars of other disciplines such as economics, social welfare and the sociology of education. To an extent this is the result of the relatively low regard for lawyers as policy makers in the UK compared with the US and the long standing division between UK law teachers and legal practitioners.

It is true that a small number of well known authorities on the law of higher education such as David Palfreyman and Dennis Farrington, and some high profile higher education law practitioners, are quoted from time to time in the pages of Times Higher Education, but such comments are normally quoted as reactions to policy announcements rather than as proactive contributions to the process of policy creation.

2. Higher education law as a discipline

2.1 Teaching of higher education law

Higher education law is rarely taught as a discrete subject at undergraduate or higher levels in UK law schools. An inquiry of one of the two groups of law teachers (the Association of Law Teachers, ALT) resulted in only one law school confirming that it offered an undergraduate option in higher education law (the University of the West of England). Many UK law schools in universities providing courses of teacher education provide introductory courses on education law issues for those training to teach in schools or (possibly) community colleges, but any input into training for new higher education lecturers will be very small. Administrative staff may undertake induction training under the aegis of their professional body (the Association of University Administrators)

and this is likely to include some basic coverage of issues such as the student contract. Such staff may also undertake continued professional development through their professional body or through attending training sessions arranged by higher education sector bodies and by the leading law firms advising higher education institutions.

As a result there has been little incentive for the creation of a cadre of higher education law specialist academics and the small number who have achieved distinction in this field have done so as a result of their personal commitment to the subject rather than the interest of their institution.

2.2 Research and opportunities for publication

In the UK research priorities are overwhelmingly determined by funding considerations, in particular the Higher Education Funding Council for England's Research Excellence Framework (REF), which from 2014 will increase the weighting given when making decisions on research funding to publication in high profile journals. The writing of texts for students or practitioners and the publication of articles in less high profile journals will not be regarded highly. The small number of active higher education law researchers, such as Professor Neville Harris of Manchester University, therefore undertake a wide range of research activities, including research leading to publication in more generic, high profile publications as well as editing and writing for less highly rated education-specific journals.

In any event since the apparent demise of *Education and the Law*, there is now only one UK education-specific periodical aimed at an academic as well as professional readership (*Education Law Journal*). While there are other opportunities for education lawyers to publish (for example in *Education, Public Law and the Individual* and *Education Law Monitor*) these publications are largely aimed at practitioners rather than academics and will not provide much assistance in developing a research career focused on higher education law issues.

2.3 Higher education law and legal practice

While higher education law as an academic subject in the UK is still at a relatively early stage of development, with little obvious likelihood of development in the near future, the practice of higher education law has steadily expanded as the higher education sector has grown and required ever more sophisticated legal advice. While the market is dominated by a relatively small number of firms that have practised in this area for many years, the number of law firms seeking to compete for what appears to be an expanding area of work has increased. Many higher education institutions have become concerned at their increasing expenditure on legal advice and have started to recruit in-house

counsel, although only a very small number of UK universities currently have established substantial in-house legal departments.

3. **Scholarship networks**

Currently within the UK networks for higher education law scholars are limited. The Education Law Association (ELAS) is primarily composed of practitioners (not only lawyers but also educationists). Many of the most prominent higher education law scholars attend the biennial US/UK higher education round table. David Palfreyman has established the Oxford Centre for Higher Education Policy Studies (OxCHEPS). However the Universities and Colleges Educational Law Network (UCELNET), formally convened by Dennis Farrington, is no longer running, many of the universities which formally subscribed to it having instead subscribed to the law forum provided by the Association of Heads of University Administration (AHUA). The law forum provides conferences and seminars but again mainly aimed at university managers and covering issues from a practical rather than an academic perspective.

4. **Emerging topics**

It seems likely that issues which higher education institutions will wish to see explored will be those directly affected by the changes in funding and regulation which will affect the higher education sector in England from September 2012. The Westminster government's decision to move most funding of higher education (outside the so called STEM subjects) from funding of institutions (through the Higher Education Funding Council for England) to funding of students (via subsidised loans) will create for the first time a real market in higher education, but one which is likely still to be subject to considerable government control through a revamped regulatory structure. The private sector is likely to be given greater access to this market, but subject to regulatory conditions as the price of access of their students to publicly subsidise student loans.

Issues such as competition law, insolvency and the applicability (or not) of public procurement rules will therefore be vital to the continued existence and success of many institutions. Many institutions are already expressing an interest in developing new structures looking more to corporate law and wishing to move away from more traditional structures based on royal charters or statute. Some institutions will seek to work together in a variety of collaborative structures, most will wish to undertake further transnational activities and will need advice on operating outside the UK. However, many issues which have pre-occupied institutions in recent years (such as immigration control and equal opportunities law) will continue to be important. We may also see an increased reliance by government on long standing legal rules such as those applicable to charities as they seek to demonstrate that the opening up of the higher education market is coupled with an attempt to reduce unnecessary regulation.

Currently in most of these areas the development of legal thinking has been led by practitioners. However, these issues are too important to be left to practitioners alone, legal scholars have an important contribution to make if government policy is to be probed and constructively criticised. There is also an important opportunity for international comparisons and for those of us in the UK to learn from the experience of others, particularly in the US where many of the ideas now being explored in the UK have operated for some time. Equally it seems likely that what the UK will do this September may be followed, at least to some extent, by other European countries for whom free or virtually free higher education is no longer economically viable. Both the need for and the opportunities for comparative legal scholarship in the area of higher education will therefore abound in 2012 and beyond.