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Handbook of Comparative Higher Education Law

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TWENTY

Analysis of Comparative Higher Education Law

Charles J. Russo

INTRODUCTION

The systems of higher education examined in this volume, representing seventeen countries on all six inhabited continents, reveal an interesting range of institutions and histories. From Germany and Great Britain, home to some of the earliest developments in university life and that serve in many ways as models of Western universities, to Turkey, which traces its roots in higher education to the Fifth Century, the authors provide insights into the systems of higher learning operative in their nations. Moreover, as reflected throughout these chapters, an array of international instruments, coupled with national laws, increasingly recognize higher education as a universal fundamental right.

This chapter is divided into two substantive parts. The first relies on the same outline employed throughout this book to address the legal status of higher education in the covered nations. The second uses these findings as a departure point, offering recommendations to make higher education more accessible. The chapter rounds out with a brief conclusion.

ANALYSIS

For the most part, the legal systems established by the countries covered in this work to regulate higher education live up to the duties imposed by international obligations, their national governments, and/or decentralized public authorities such as states or provinces. Clearly, even in the United States, home to the largest concentration of private institutions of higher learning, what occurs in colleges and universities is considered an issue of great public concern with nation-wide implications. As such, this section reviews various aspects of how institutions of higher education operate in the public sphere.

INSTITUTIONAL ISSUES

Creation of Higher Education Institutions

It is certainly stating the obvious, but the way in which governmental entities enact statutes at the national and state or provincial levels, often in conjunction with each other, recognizing the rights of higher education institutions (HEIs), whether public or private, to exist and operate varies from one nation to the next. In the vast majority of countries, national governments, states or provinces, along with private not-for-profit organizations, individuals, and increasingly, but not universally, for-profit or proprietary groups have the legal authority to operate colleges and universities as long as they meet the requisite educational and legal standards. Two nations, Australia and Mauritius, rely on the private acts or laws in order to create public HEIs, even as South Africa has discontinued this statutory practice.

Types of Institutions

All nations operate what can be described as public or state (or provincial) colleges and universities. At the same time, nations such as China and the Republic of Korea have created more prestigious national public universities that are more closely aligned with the central government while selected institutions such as Moscow State University and Saint-Petersburg State University have a special status under Federal Law as essentially *primus inter pares* among HEIs in Russia. Further, although not described as such, insofar as most decisions on educational matters from the primary, admittedly a very different dynamic, to university levels are influenced by Singapore's Ministry of Education, it is probably fair to categorize public HEIs as being a form of national institutions, too. Moreover, both Canada and the United States have created two-year, or community, colleges in which students can earn degrees in a variety of practical fields such as automobile mechanics and as licensed practical nurses while others complete many of their four year degree requirements before transferring to other HEIs to complete their studies. In addition, some HEIs in China offer two-year degrees but are not labeled as community colleges.

On the other hand, while the United States operates the largest number of private not-for profit HEIs, a sizeable number of which are, or were initially, religiously affiliated, many other nations are home to few non-public HEIs. In a new development proprietary or for-profit HEIs are springing up throughout the world. Proprietary institutions are present in Brazil, Canada, Great Britain, Mauritius, New Zealand, the Republic of Korea (even though they are not considered to be HEIs), and the United States but are not permitted to operate in China.

Governance

Needless to say, insofar as HEIs typically involve bureaucratic structures that vary in complexity depending on their sizes, all operate with some form of a governing body. Typically, HEIs have a President as Chief Executive Officer who works in conjunction with a University Council. University Councils exist in Australia, Canada, China (where it is called the State Council), Germany, Great Britain, Malaysia, Mauritius, Netherlands (where it is referred to as a Supervisory Council), New Zealand, the Republic of Korea, Russia, South Africa, and Turkey (where it is identified as the National Higher Education Council). Within its system, New Zealand explicitly calls for gender balance on its University Councils.

Institutions of higher learning in the United States are the outliers insofar as they do not refer to their governing bodies as University Councils. Rather, public American colleges and universities refer to their governing bodies as boards (of trustees) that are either elected by the citizens or, more commonly, appointed by their Governors with input from state legislature. Even within this model there is some variety, since some states create one board for all of their public institutions while others have separate ones for each public institution of higher education. Board members at American private institutions are ordinarily named by their Presidents although a small number may have a limited number of positions available for election by institutional alumni or some other manner of selection.

Accreditation—External Assessment

In an effort to ensure that HEIs are accomplishing their stated goal, there has been increased recognition of the need to have outside assessments to ensure quality control. Not surprisingly, then, the systems of higher education, in Australia, Brazil, China, Europe, Germany, Great Britain, Malaysia, Mauritius, Netherlands, New Zealand, the Republic of Korea, Russia, Singapore, South Africa, Turkey, and the United States rely on external quality control along with their own internal measures. While there is no national accrediting agency in Canada for higher education, membership in the Association of Universities and Colleges Canada serves as a kind of de facto accreditation.

FACULTY ISSUES

Non-Discrimination Provisions

It almost goes without saying that absent protections against discrimination various groups or individuals would be excluded from obtaining work as faculty members. As an initial matter, four nations, Australia, Mauritius, Russia, and the United States explicitly protect applicants and faculty members from being discriminated against due to their ages; in Canada, Canada faculty members and others are challenging mandatory retirement at the age of sixty-five. Moreover, laws in Australia, Canada, Great Britain, Mauritius, Netherlands, New Zealand, the Republic of Korea, Russia, Singapore, South Africa, Turkey, and the United States provide protections for individuals so that they are not discriminated against on their bases of their races, ethnicities, and/or countries of national origin. Yet, as with students, insofar as protections against discrimination have tended to rely on affirmative action or race conscious hiring practices to afford some form of preference for members of the protected categories, they are controversial and have resulted in litigation by those who have perceived them as a form of reverse discrimination.

In a closely related matter, the legal systems in two nations, China and the Republic of Korea, provide special protections to women who have long been discriminated against based on gender. At the same time, Australia, Great Britain, the Netherlands, New Zealand, Russia, Singapore, South Africa, and the United States outlaw sex-based discrimination. On a related concern dealing with human sexuality, Mauritius and New Zealand afford anti-discrimination protection based on sexual orientation.

As to another growing area of concern, Australia, China, Great Britain, Netherlands, New Zealand, the Republic of Korea, South Africa, and the United States offer legal protection for faculty members with disabilities. Although Russian law does not protect the rights of faculty members with disabilities as explicitly as it does students, national

legislation has established a quota of 2 to 4 percent for the compulsory recruitment of persons with disabilities in institutions numbering at least 100 workers.

In light of growing conflict throughout the world on matters of faith, it is worth noting that Australia, Mauritius, Netherlands, New Zealand, the Republic of Korea, Russia, Singapore, South Africa, Turkey, and the United States offer protection from religious discrimination.

Academic Freedom

Perhaps no issue is as crucial to the professional lives of faculty members in higher education as academic freedom, the right to write, speak, investigate, and teach freely about issues of one's choice within one's area of professional expertise, even if they are unpopular, in an environment that is open and conducive to learning. While the parameters of academic freedom are subject to a great deal of debate even where it is present, it is explicitly recognized by HEIs in Brazil, Canada, Germany, Mauritius, New Zealand, the Republic of Korea, Russia, South Africa, and the United States. Interestingly, according to the policy of the Canadian Association of University Teachers, academic freedom is only guaranteed if academics have tenure and universities enjoy autonomy.

Academic freedom is recognized but is not constitutionally protected in Australia. As something of a surprise given the long history of higher education there, academic freedom is not well defined in Great Britain. On a slightly different note, Turkey refers to the fact that faculty members have freedom of thought while academic freedom is restricted in Malaysia and Singapore.

Tenure

A cornerstone of faculty life in higher education, except in Great Britain, where it has been abolished, is tenure. Tenure stands for the notion that faculty members who have acquired such status, which can also be referred to as continuing contract status, cannot be removed from their jobs for cause unless they receive procedural due process, an often lengthy and complicated process. In addition, faculty members may be entitled to procedural due process if they are dismissed from their jobs through no fault of their own through what is known as reductions-in-force for such reasons as a decline in student enrollment, discontinuation of specific programs or courses of study, financial exigencies, and other good and just cause.

Tenure is granted explicitly in Brazil, Canada, Malaysia, Mauritius, New Zealand, the Republic of Korea, Russia, and the United States. While the term is not used explicitly, faculty members in Australia and Germany have the equivalent to tenure. Similarly, faculty members in the Netherlands have what is described as *de facto* rather than statutory grants of tenure. Finally, faculty members in China and South Africa can receive open-ended contracts that are essentially the equivalent to tenure.

Faculty Duties

Various nations include an array of miscellaneous provisions in their laws relating to the rights of faculty members. For example, candidates for faculty positions in Brazil must take part in competitive public examinations before they can be hired. However, the status of such examinations is in some debate due to the possibility of racial-based quotas for Afro-Brazilians. In a similar vein, the law in China requires candidates to have a bachelor's degree as a minimum or pass a teacher qualification examination; demonstrate instructional capability as indicated by basic quality and competency in teaching, basic

proficiency in standardized spoken Chinese (Mandarin or *putonghua*), and be in good health. If applicants have earned a Ph.D. degree or seek positions as associate professors or above, they are exempted from taking the instructional competency and Mandarin proficiency tests. Based on the citizenship requirement, although the law is silent on this point, it appears that non-nationals are ineligible to receive teacher licenses in China such that the state appears to be for qualified foreigners who teach in HEIs in China. Even so, non-nationals are hired on short-term contracts, usually of one year, and ordinarily cannot be employed continuously in China for more than five years.

As to job duties, Russian national legislation specifically sets a weekly workload of thirty-six hours for faculty members, inclusive of instruction itself as well as scientific, methodological, organizational work, as specified by local institutional acts. There is also a pure instructional workload limit of 900 hours annually.

Dismissal

When it comes to the dismissal or disciplining of faculty members for cause, individuals are afforded varying degrees of procedural due process in Australia, China, Great Britain, Korea, Malaysia, Mauritius, Netherlands, New Zealand, Russia, Singapore, South Africa, South Korea, Turkey, and the United States.

STUDENTS

Non-Discrimination and Disabilities

Unlike laws protecting the rights of faculty members, not all nations are equally as clear about the non-discrimination protections available to students. However, the most notable area of protection addresses disability, while, as discussed below, anti-discrimination provisions broadly protect individuals based on such personal characteristics as gender, race, ethnicity, and national origin.

HEIs throughout the world are increasingly conscious of safeguarding the rights of the disabled. To this end, the legal systems in Australia, Canada, Great Britain, Mauritius, Netherlands, New Zealand, the Republic of Korea, Russia, South Africa, Turkey, and the United States have instituted provisions to safeguard the rights of students with disabilities on campuses of colleges and universities.

Standardized Testing Admissions

As to entry into higher education, it is important to note that educational leaders in Australia, Brazil, Canada, China, Great Britain, Malaysia, Netherlands, New Zealand, Singapore, South Africa, Turkey, and the United States have taken steps to address the need to ensure access to higher education for all. Turning to the closely related matter of admissions, programs in Australia, Brazil, China, Mauritius, Netherlands, Turkey, and the United States place a great deal of emphasis on standardized tests. As with so many of the issues, there is a wide range here insofar as nations such as China and Turkey rely on nation-wide examinations for candidates. Another group of nations, Great Britain, the Republic of Korea, Russia, and South Africa place greater weight on institutional examinations.

An emerging issue is evolving with regard to standardized tests in the United States, in particular. Even though standardized examinations are used widely, insofar as minority students tend to do less well on these measures, they are being relied on less frequently. Instead, institutional officials are placing greater emphasis on more holistic evalua-

tions that place less value on one-time standardized tests by reviewing the entire records of those who submit materials for application.

Affirmative Action

An issue that is closely related to admissions and non-discrimination, and that was discussed briefly from a slightly different perspective under faculty issues, deals with affirmative action or race conscious admissions policies. This highly controversial practice ranges in various forms from quota system for students who are non-White in Brazil to providing (gender equality) in Singapore. An array of measures are employed in Canada, Great Britain, South Africa, and the United States where programs are ordinarily designed to assist women along with members of racial, ethnic, national origin, and indigenous minorities that have been traditionally under-represented in colleges and universities.

In another topic that can link with issues of ethnicity and national origin, both New Zealand and South Africa offer protections for the native language rights of students.

Financial Aid and Cost

Not surprisingly, insofar as the costs related to higher education continue to increase, financial aid programs play a major role in Australia, Brazil, Canada, China, Great Britain, Mauritius, Netherlands, New Zealand, the Republic of Korea, Russia, Singapore, South Africa, Turkey, and the United States.

Due Process in Discipline

As with the rights of faculty members, HEIs are generally responsive to protecting the due process rights of students who are subject to discipline and or expulsion due to disciplinary infractions whether academic or non-academic in nature. Along these lines, HEIs in Australia, Brazil, Canada, China, Germany (although not universally), Great Britain, Malaysia, Mauritius, Netherlands, New Zealand, the Republic of Korea, Russia, South Africa, Turkey, and the United States offer varying levels of substantive and procedural due process to students who face disciplinary sanctions due to their misbehaviors; the common thread is that as long as officials have followed institutional rules and punishments are not disproportionate in light of the charged offenses, then students are unlikely to succeed when asking courts to overturn the sanctions they received for disciplinary infractions, whether dealing with non-academic (such as fighting or drunkenness on campuses) or academic (such as plagiarism or cheating) matters.

Emerging Issues

The first of two emerging issues has surfaced in light of the increased awareness of how the Internet and technology continue to transform the world into a global learning village. Aware of the way in which schooling is being transformed, HEIs in Australia, Brazil, Canada, Malaysia, Netherlands, New Zealand, the Republic of Korea, Russia, Turkey, and the United States are actively involved in the use of technology to make higher education more accessible. Insofar as distance and online learning are in their infancy, it bears watching to see how these practices transform the world of higher education.

A second new issue involves a movement to confer greater rights on students by treating them as consumers of education. This status has been conferred on students in HEIs in Brazil, Great Britain, the Netherlands, New Zealand, and Russia. Further, al-

though the courts have not used the term specifically, there are suggestions that the judiciary in Canada is, at least in some disputes, adopting a position that is consistent with such an approach. Conversely, the notion of student as consumer has been rejected in Korea.

At the same time, the distantly related tort of educational malpractice is a topic that was not discussed in the chapter because as litigious as Americans can be, courts in the United States have refused to render such claims as actionable. In so doing, the American judiciary has essentially repudiated the notion of conferring rights on students that they might enjoy as customers or clients. Claims alleging the tort of educational malpractice, a charge separate from one for a breach of contract, seek to render HEIs and/or individual faculty members liable for failing to provide competent instructional services in a manner similar to what occurs in litigation against professions such as lawyers and medical doctors if students failed to achieve their learning objectives since. American courts have, as a matter of public policy, refused to move in such a direction because it is unclear who should bear the burden of proof for what should occur in academic learning environments. However, to the extent that students can make claims that university officials failed to live up to their contractual obligations in delivering programming, then courts in Canada have allowed suits to proceed and have awarded damages in some instances.

RECOMMENDATIONS

Higher education holds the key for personal growth and fulfillment in pursuit of a better life while advancing national interests such as having educated citizenries in the increasingly globalized information age of the Twenty-First Century. As such, the following recommendations are designed to offer food for thought for leaders in HEIs, lawmakers, and policymakers who are interested in improving the quality of higher education, and life, in their nations.

First, consistent with internationally accepted norms, lawmakers, educational leaders, and policy makers must recognize higher education as a fundamental human right. In other words, national leaders in various walks of life must develop laws and policies designed to protect and enhance the right to higher education for all of their people.

Second, as evidenced by concerns over the increasing cost of paying for higher education, leaders at the national and state or provincial levels must ensure that adequate funding is available in order to create tertiary institutions that can provide students with world-class education.

Third, funding must cover not only construction of facilities and purchasing instructional materials but also paying salaries designed to enhance "the best and brightest" to enter higher education. Put another way, if HEIs are to be in the forefront of creating new knowledge to design better futures for all, then leaders must take steps to attract individuals who can offer the kinds of insights needed to do so to enter the world of higher education.

Fourth, leaders at all levels must treat higher education as an integrative factor, one that can help prepare all students to become productive members of their societies rather than set them apart from one another.

Fifth, policymakers need to create re-conceptualized tertiary institutions that are open to all and that emphasize pluralistic, multi-cultural principles. While not suggesting that people should be required to comply with beliefs with which they do not agree, institutions should be open across the board to a multiplicity of perspectives such that they are inclusive, not exclusive in nature.

Sixth, leaders must work to enact policies capable of meeting the needs of underrepresented groups of students including women; the disabled; racial, ethnic, religious, and linguistic minorities; and refugees. To the extent that members of most of these underrepresented groups have been deprived of educational opportunities simply because of their status, institutions may also need to develop remedial programs to assist these students to develop, and enhance the basic skills necessary to succeed in higher education.

Seventh, officials at universities and colleges must enhance teacher and administrator preparation programs, placing them as the cutting edge of educational reform. By updating educator preparation programs, especially for lower grades, school officials will be able to use their enhanced understandings to better prepare students for the rigors of higher education.

Eighth, officials in HEIs and elsewhere must adopt pro-active roles helping to create shared values among all groups in developing educational curricular/standards.

Ninth, members of committees charged with the duty of developing curricular materials should be selected from among a broad representation of qualified stakeholders. Committee members should include but not necessarily be limited to faculty members, alumni, students, staff members of various ministries, and civil leaders who are interested in helping to ensure equal educational opportunities for all.

Tenth, in nations lacking well-developed systems of higher education, it is essential that officials in central governmental ministries maintain leadership roles. Relying on centralized planning can help to ensure that policies and practices are adopted uniformly in all HEIs and areas of nations.

Eleventh, officials in appropriate governmental and educational ministries, HEIs, should work with similar colleges and universities in the private sector insofar as such partnerships can be invaluable.

Twelfth, while taking steps to respect academic freedom, officials should develop curricular standards that are drafted primarily by appropriate professionals who can call on outside experts for assistance.

Thirteenth, educational leaders should come to the fore in helping to develop and implement curricular standards that all can accept. At the same time, without watering down or overlooking the need to provide all with a well-rounded education, college and university officials should consider ways of permitting groups to preserve their independent heritages.

Fourteenth, it would be wise to schedule conferences/meetings on the nature of higher education in order to provide a forum in which a multiplicity of perspectives can be exchanged.

Of course, all need not agree, but having intellectual diversity can be just as valuable as diversity based on personal characteristics.

Fifteenth, in light of the pace at which change occurs, leaders in institutions of higher learning, acting in concert with their governing bodies, lawmakers, and policymakers, should regularly re-evaluate and, as appropriate, update institutional goals and philosophies in order to keep them current.

CONCLUSION

Higher education is a lasting investment in the future of students, indeed of society itself, as well as sustainable development activity linked to social and economic progress in general. Insofar as education is critical to improving the lives of people by helping them both to break the cycle of poverty and to lead lives of participation in democratic societies as better educated citizens, it cannot be in short supply. If anything, higher education is

an essential governmental responsibility that must be developed in concert with leaders of private institutions. Insofar as educational leaders in the public and private sectors can work together, they can help to develop well-educated citizenries who can ensure stable economic and social conditions for all.

All of the authors who contributed to this book are dedicated to achieving universal access to quality higher education. Yet, we recognize that affording higher education the status of a fundamental human right is one of the biggest challenges of our times, especially in nations where minorities and women continue to be excluded from educational systems and are often denied basic human dignity in the face of prejudice and discrimination. To this end, we hope that our collective and individual efforts in pursuit of the study of comparative higher education law can help to spur discussions culminating in enhancing the status of the right to higher education for all.