# The Human Rights-Based Approach to Higher Education

*Why Human Rights Norms Should Guide Higher Education Law and Policy*

JANE KOTZMANN

OXFORD

# The Human Rights-Based Approach to Higher Education

# The Human Rights-Based Approach to Higher Education

## *Why Human Rights Norms Should Guide Higher Education Law and Policy*

Jane Kotzmann

OXFORD
UNIVERSITY PRESS

The Human Rights-Based Approach to Higher Education. Jane Kotzmann.
© Oxford University Press 2018. Published 2018 by Oxford University Press.

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

© Oxford University Press 2018

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form
and you must impose this same condition on any acquirer.

Library of Congress Cataloging-in-Publication Data

Names: Kotzmann, Jane, author.
Title: The human rights-based approach to higher education : why human rights norms should guide higher education law and policy / Jane Kotzmann.
Description: New York : Oxford University Press, 2018. | Includes bibliographical references and index.
Identifiers: LCCN 2017044264 | ISBN 9780190863494 ((hardback) : alk. paper)
Subjects: LCSH: Education, Higher—Law and legislation. | Human rights.
Classification: LCC K3755 .K68 2018 | DDC 344/.074—dc23
LC record available at https://lccn.loc.gov/2017044264

9 8 7 6 5 4 3 2 1

Printed by Edwards Brothers Malloy, United States of America

**Note to Readers**

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

*(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)*

**You may order this or any other Oxford University Press publication by visiting the Oxford University Press website at www.oup.com.**

*To my husband Ben, who is my rock. And to our daughter, Georgia, and our son, Jonathan, who I hope will be able to enjoy all their human rights.*

# CONTENTS

List of Figures xiii
List of Tables xv
List of Abbreviations xvii
Preface xix
Acknowledgements xxi

Introduction 1
A. Education and Educational Disadvantage 1
B. Historical Perspectives in Relation to Higher Education Delivery 3
C. Importance of Policy and Law for Higher Education 5
D. Purpose of This Book 6
E. Limitations 7
F. Where to from Here? 10
Reference List 11

**PART ONE The Human Rights-Based Approach and the Market-Based Approach**

1. The Human Right to Higher Education 17
A. Introduction 17
B. Sources of the Right to Higher Education 20
C. Scope of the Right to Higher Education: Article 13 ICESCR 22
1. Introduction 22
2. The Duty Bearer 25
3. The Rights Holder 26
4. The Meaning of 'Higher Education' 27
(a) Broad Interpretation 27

(b) Rights Respecting Education 27
(c) 'Higher' Education 28
(d) Certification 29
5. The Purposes of Higher Education 31
(a) Full Development of the Human Personality and the Sense of Its Dignity 32
(b) Strengthen the Respect for Human Rights and Fundamental Freedoms 33
(c) Participate Effectively in a Free Society 33
(d) Promote Understanding, Tolerance and Friendship among All Nations and All Racial, Ethnic or Religious Groups, and Further the Activities of the United Nations for the Maintenance of Peace 34
6. The Requirement of Equal Accessibility 34
(a) Religion 35
(b) Citizenship or Residence Status 36
(c) Economic Circumstances 37
(d) Language 40
(e) Prisoners 40
7. Limiting the Provision of Higher Education to Those with 'Capacity' 40
8. The Requirement of 'Progressive Introduction of Free Education' 43
9. Obligation to Develop a System of Schools, Establish a Fellowship System and Continuously Improve the Material Conditions of Teaching Staff 46
10. Obligations in Relation to Higher Education 47
(a) Immediate Obligations 47
(b) Progressive Obligations 48
(c) No Retrogressive Measures 49
11. Accountability and the Right to Higher Education 51
(a) Violations 51
(b) Justiciability 52
D. Conclusion 53
Reference List 53

2. Theoretical Approaches to Higher Education 61
A. Introduction 61
B. The Market-Based Approach 63
1. Introduction to the Market-Based Approach 63

2. Principles of a Market-Based Approach 65
(a) Competition 65
(b) Privatisation 66
(c) Absence of Government Intervention 67
3. Strengths of the Market-Based Approach 67
(a) Quality, Productivity and Innovation 67
(b) Efficiency and Responsiveness 68
(c) Prioritisation of Government Subsidies 69
(d) Equity 69
4. Weaknesses of the Market-Based Approach 70
(a) Lack of Service Information 70
(b) Undermining Academic Quality and Focus 70
(c) The Notion of Human Capital Devalues Human Beings 71
(d) Impact on Equity and Social Justice 72
(e) Ignores Other Purposes of Education 73
5. Conclusion: Market-Based Approach 74
C. The Human Rights-Based Approach 74
1. Introduction to the Human Rights-Based Approach 74
2. Principles of a Human Rights-Based Approach 76
(a) Integration and Mainstreaming of Human Rights Norms 77
(b) Accountability 77
(c) Non-discrimination and Equality 78
(d) Participation 79
(e) Dignity 80
(f) Interdependence and Indivisibility 81
(g) Cultural Sensitivity 82
3. Strengths of the Human Rights-Based Approach 82
(a) Normative Basis 82
(b) Well Established Approach 83
(c) Empowerment and Accountability 83
(d) Attention to Process 84
(e) Challenging the Power Imbalance 84
4. Weaknesses of the Human Rights-Based Approach 84
(a) Focus on Law 84
(b) Lack of Support for the Right to Education 85
(c) Translation into Policy 86
(d) Empty Words 87
(e) Conflict Producing 87
5. Conclusion: Human Rights-Based Approach 87
D. Conclusion 87
Reference List 90

**PART TWO Evaluation of State Approaches**

3. Evaluating Higher Education Policy and Legislation 99
A. Introduction 99
B. The Purposes of Higher Education 100
1. Introduction 100
2. Education for Individual Transformation 103
3. Education for Social Mobility 104
4. Education for a Better Society 107
5. Education for Employment and the Economy 110
6. Conclusion: Purposes of Higher Education 111
C. Evaluating Higher Education Policy and Legislation 112
1. Introduction 112
2. Preliminary Comments 114
(a) Measuring the System 114
(b) The Inadequacy of Existing Rankings 115
3. Signs of a Successful Higher Education System 118
(a) Signs of Individual Transformation 118
(b) Signs of Improving Society 120
(c) Signs of Social Efficiency 123
D. Methodology for Evaluating Systems 124
1. Introduction 124
2. Individual Transformation 125
(a) Student Survey Responses 125
(b) Personalised Learning 126
(c) Resources per Student 126
(d) Institutional Autonomy 126
(e) Commitment to Teaching and Learning 127
3. Improving Society 128
(a) Integration of Values 128
(b) Teaching for Citizenship 129
(c) Equal Opportunity 129
(d) Freedom for Teaching and Research 131
(e) International Assistance 132
4. Social Efficiency 133
(a) Vocational Orientation 133
(b) Graduation Rates 134
(c) Employability Prospects and Skills Shortages 135
(d) Research Quality 137
(e) Global Connectivity 138
E. Conclusion 139
Reference List 140

4. Practical Approaches to Higher Education 147
A. Introduction 147
B. Market-Based Approaches 150
1. Chile 150
(a) Political Context and Approach 150
(b) Evaluation 152
(i) Individual Transformation 152
(ii) Improving Society 155
(iii) Social Efficiency 158
2. England 160
(a) Political Context and Approach 160
(b) Evaluation 163
(i) Individual Transformation 163
(ii) Improving Society 166
(iii) Social Efficiency 169
3. United States 171
(a) Political Context and Approach 171
(b) Evaluation 175
(i) Individual Transformation 175
(ii) Improving Society 178
(iii) Social Efficiency 182
C. Human Rights-Based Approaches 184
1. Finland 184
(a) Political Context and Approach 184
(b) Evaluation 187
(i) Individual Transformation 187
(ii) Improving Society 191
(iii) Social Efficiency 194
2. Iceland 196
(a) Political Context and Approach 196
(b) Evaluation 199
(i) Individual Transformation 199
(ii) Improving Society 201
(iii) Social Efficiency 204
3. Sweden 206
(a) Political Context and Approach 206
(b) Evaluation 208
(i) Individual Transformation 208
(ii) Improving Society 211
(iii) Social Efficiency 215
D. Conclusion 217
Reference List 220

Conclusion 243
A. Purpose and Findings 243
B. The Challenges of Advocating for a Human Rights-Based Approach to Higher Education Policy 244
C. Utility of the Discussion 245
D. Towards a Higher Education 'Utopia' 246
Reference List 248

Appendix A: Signs and Measures of a Successful Higher Education System 251
Appendix B: Evaluation of State Higher Education Policy—by Country 252
Appendix C: Summary Country Comparison 258

Index 259

# LIST OF FIGURES

4.1 Individual Transformation 217
4.2 Improving Society 218
4.3 Social Efficiency 219
4.4 Overall Performance 219

# LIST OF TABLES


3.1 Assessment Criteria for Student Survey Responses 125
3.2 Assessment Criteria for Personalised Learning 126
3.3 Assessment Criteria for Resources per Student 127
3.4 Assessment Criteria for Institutional Autonomy 128
3.5 Assessment Criteria for Commitment to Teaching and Learning 128
3.6 Assessment Criteria for Integration of Values 129
3.7 Assessment Criteria for Teaching for Citizenship 130
3.8 Assessment Criteria for Equal Opportunity 131
3.9 Assessment Criteria for Freedom for Teaching and Research 132
3.10 Assessment Criteria for International Assistance 133
3.11 Assessment Criteria for Vocational Orientation 134
3.12 Assessment Criteria for Graduation Rates 135
3.13 Assessment Criteria for Employability Prospects and Skills Shortages 136
3.14 Assessment Criteria for Research Quality 138
3.15 Assessment Criteria for Global Connectivity 139
A.1 Signs and Measures of a Successful Higher Education System 251
B.1 Chile 252
B.2 England 253
B.3 United States 254
B.4 Finland 255
B.5 Iceland 256
B.6 Sweden 257
C.1 Numerical Summary Country Comparison 258

# LIST OF ABBREVIATIONS

| | |
|---|---|
| ARUFA | *Arbeitssituation von Universitäts- und FachhochschulabsolventInnen* |
| ARWU | Academic Ranking of World Universities |
| AUSSE | Australasian Survey of Student Engagement |
| CADE | *Convention against Discrimination in Education* |
| CBI | Confederation of British Industry |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CROC | *Convention on the Rights of the Child* |
| DAC | Development Assistance Committee |
| ECHR | *European Convention on Human Rights* |
| ECtHR | European Court of Human Rights |
| EEA | European Economic Area |
| EU | European Union |
| GDP | gross domestic product |
| ICESCR | *International Covenant on Economic, Social and Cultural Rights* |
| NSS | National Student Survey |
| NSSE | National Survey of Student Engagement |
| OECD | Organisation for Economic Cooperation and Development |
| SCIE | Science Citation Index-Expanded |
| SSCI | Social Science Citation Index |
| TAFE | Technical and Further Education |
| TEQSA | Tertiary Education Quality and Standards Agency |
| UDHR | Universal Declaration of Human Rights |
| UK | United Kingdom |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNICEF | United Nations Children's Fund |
| US | United States |

# PREFACE

Although this book was the product of many years of research, its origins may be traced back many more years. Fundamentally, this research has been driven by a passionate and deep-seated interest and belief in justice. It was my passion for the concept of justice that motivated me to study law as an undergraduate student, and in particular to study human rights-related subjects in the Netherlands as part of that degree. Over the years, I have learned that law is not synonymous with, or even necessarily related to, justice. In realising this, however, I have also developed an understanding of the ways in which law can be used in the pursuit of justice. This understanding underpins the ambition for this book: to determine whether and how human rights law can be used to help create a fairer higher education system.[1]

The second major impetus behind this book was my experience as a secondary school teacher. Following the completion of my law degree, I went into practice as a commercial lawyer. The stark contrast between my idealistic notions of law as justice and the reality of commercial legal practice, however, prompted me to engage in much soul-searching. I felt that I needed a change of career, and the idea of teaching appealed to me. A couple of friends mentioned Teach First, and through some internet searching I realised that Teach for Australia was to launch in Victoria in the coming year. It seemed somewhat like fate, and I applied for, and was fortunate to be accepted into, the Teach for Australia program.

1. Note the principles of equity in higher education provided by McCowan: '(1) There must be sufficient places so that all members of society who so desire, and who have a minimum level of preparation, can participate in higher education. (2) Individuals must have a fair opportunity of obtaining a place in the institution of their choice'. Tristan McCowan, 'Expansion without Equity: An Analysis of Current Policy on Access to Higher Education in Brazil' (2007) 53 *Higher Education* 579, 582.

My experience working with Teach for Australia gave me insight into the meaning of disadvantage, and particularly educational disadvantage. Many of the students I taught were bright and hardworking, yet because of their socio-economic situation they were less likely to enjoy the opportunities often enjoyed by students from better circumstances. Following the two years that I worked with Teach for Australia, I taught for a year at a high-performing public school located in eastern metropolitan Melbourne. This experience highlighted for me the educational disadvantage that exists in Australia. I taught students with similar ambitions at each school, who I felt had similar levels of intelligence and work ethic, and yet who ended up with vastly different Australian Tertiary Admission Ranks as a result of their different circumstances.

Educational disadvantage exists at all levels of education. Although this issue is significant at primary, secondary, higher and adult education levels, I decided to focus my research on addressing educational disadvantage at the higher education level. Higher education is unique in that there is no general consensus that all individuals are entitled to higher education. Further, over the past few decades, higher education has been in a state of change. Many states are moving away from a welfare state approach to higher education, perhaps as a response to the massification and thus increasing cost of higher education provision. Instead, many states are embracing a user-pays model of higher education delivery. Yet this model has been criticised, particularly because it generally reinforces social inequality. Despite this state of affairs, attaining higher education has become more important than ever before. Higher education is a prerequisite for many jobs, and those who have attained higher education enjoy improved life circumstances.

This book is interdisciplinary in nature, spanning law, education and discrimination studies. Nevertheless, it is best approached from the disciplinary perspective of law, as the overarching question relates to the most effective legal framework to apply to the higher education sector.

# ACKNOWLEDGEMENTS

Although I am the author of this book, I could not have completed it without the assistance and support of others.

I owe greatest thanks to my husband, best friend and soulmate, Ben. I am so grateful for his encouragement and interest in this book, as well as his patience with the time sacrifices and head space that it has required of me. I cannot thank him enough. I also thank my daughter, Georgia, who arrived in this world mid-way through completion of the book and who sat with me through many hours of writing and reviewing. I am grateful too, to our dogs Teddy and Dasha, who (against their will) have forgone walks and park visits to allow me to continue work and look after Georgia. I must also thank my family, particularly Nana, Auntie Erin and Oma, and our friend Jules, who enabled me to complete this book and care for Georgia at the same time. Credit must also go to family and friends for their interest, support and ideas.

I am fortunate to have received extensive and constructive feedback in relation to this book. Thanks in this respect must go to Professor Mirko Bagaric, Professor Kay Souter, Dr Claire Macken, Dr Neera Bhatia, Professor Doug Hodgson, Professor Kathleen Lynch, and Dr Tristan McCowan, as well as a number of anonymous reviewers. Thanks also to Professor John Tobin and Professor Mirko Bagaric for the initial inspiration behind this book. Of course, any remaining errors are my own.

A version of Chapter 1 of this book was first published by LexisNexis in the *Australian Journal of Human Rights*. (This journal is now published by Taylor & Francis.) The relevant citation is Jane Kotzmann, 'Lifting the Cloak of Conceptual Confusion: Exploring the Meaning of the Human Right to Higher Education' (2015) 21(1) *AJHR* 71. Many thanks to the publisher for providing permission to include this chapter in the book.

Table 3.9 was adapted from Terence Karran, Klaus Beiter and Kwadwo Appiagyei-Atua, 'Measuring Academic Freedom in Europe: A Criterion

Referenced Approach' (2017) 1(2) *Policy Reviews in Higher Education* 209, 213, published by Taylor & Francis Ltd (see www.tandfonline.com). Many thanks to the publisher for providing permission to include this table in the book.

I am also grateful to the following who provided assistance: Elite Editing; Jarkko Päivärinta and User Services, Finnish Social Science Data Archive; Anette Gröjer, Swedish Higher Education Authority; Silvia Gantner, Central Registry of the Swiss Federal Supreme Court; Marko Niemi, Universities Finland UNIFI; and Helen Wood, Angela Kirk and Michelle Bendall, Deakin University Library. Thanks to Teach for Australia, for giving me the opportunity to work with them. A big thanks also to my editor, Blake Ratcliff, and to Oxford University Press, for agreeing to publish the book, for their encouragement and for being so delightful to work with.

Finally, there are, of course, many others to whom I owe thanks. The authors of existing research in this area, acquaintances with whom I have discussed the book and many others who have participated in some form in the dialogue that underlies this book have all contributed to the research that follows. Many thanks to them all.

# Introduction

## A. EDUCATION AND EDUCATIONAL DISADVANTAGE

Higher education is important. This has been highlighted in recent years by mass student protests and political responses in a variety of world contexts.[1] Student demonstrations in Chile prompted its president, Michelle Bachelet, to commit to the introduction of free higher education.[2] In South Africa, the #FeesMustFall movement beginning in 2015 saw students across the country violently protest an increase in tuition fees; it was subsequently joined by unity protests in London

1. See Lorenzo Cini and César Guzmán-Concha, 'Student Movements in the Age of Austerity. The Cases of Chile and England' (2017) *Social Movement Studies* 1, 1.

2. Maria Elena Hurtado, *Transforming HE from Consumer Good into Social Right* (25 April 2014) University World News <http://www.universityworldnews.com/article.php?story=20140425093353226&query=michelle+bachelet>; Maria Elena Hurtado, *Start of Free Tuition Opens A Pandora's Box* (29 May 2015) University World News <http://www.universityworldnews.com/article.php?story=20150529123109404&query=michelle+bachelet>; Max Radwin, *Students in Chile Are Demanding Free Tuition, and Protests Are Turning Violent* (3 June 2016) Vice News <https://news.vice.com/article/students-in-chile-are-demanding-free-tuition-and-protests-are-turning-violent>; *Thousands of Chilean Students Take to Streets Demanding Education Reform* (11 April 2017) teleSUR <http://www.telesurtv.net/english/news/Thousands-of-Chilean-Students-Take-to-Streets-Demanding-Education-Reform-20170411-0022.html>.

The Human Rights-Based Approach to Higher Education. Jane Kotzmann.
© Oxford University Press 2018. Published 2018 by Oxford University Press.

and New York.[3] United States presidential hopeful Bernie Sanders promised to introduce free college education, and according to polling data has since become one of America's most popular politicians.[4]

This political context should draw attention to the reality that education is of critical importance to all. Education holds intrinsic importance, in that it allows people to learn about themselves and the world they live in.[5] Education also holds significant instrumental importance. People who have attained secondary education are more likely to obtain employment and command higher incomes than those who have not. Similarly, people with higher education are more likely to be employed and enjoy higher incomes than people with only secondary education.[6] Education also has an impact on other aspects of individuals' lives. It is related to improved levels of health, interpersonal trust, participation in volunteering activities and the belief that one can have an impact on the political process.[7] The importance of education in these respects is well expressed by Katarina Tomaševski, who asserts that '[e]ducation operates as multiplier, enhancing the enjoyment of all individual rights and freedoms'.[8]

Education is also essential to social progress and cohesion.[9] Through education and skills, societies are able to increase their available human capital, thus

3. Rosa Lyster, *The Student Protests Roiling South Africa* (21 October 2016) The New Yorker <http://www.newyorker.com/news/news-desk/the-student-protests-roiling-south-africa>; Nuran Davids and Yusef Waghid, *#FeesMustFall: History of South African Student Protests Reflects Inequality's Grip* (10 October 2016) Mail & Guardian <https://mg.co.za/article/2016-10-10-feesmustfall-history-of-south-african-student-protests-reflects-inequalitys-grip>.

4. Bernie Sanders, *Make College Free for All* (22 October 2015) The Washington Post <https://www.washingtonpost.com/opinions/bernie-sanders-america-needs-free-college-now/2015/10/22/a3d05512-7685-11e5-bc80-9091021aeb69_story.html?utm_term=.c127e64d780e>; Joanna Walters, *Bernie Sanders: Free Public College Tuition Is the 'Right Thing To Do'* (23 October 2015) The Guardian <https://www.theguardian.com/us-news/2015/oct/22/bernie-sanders-free-public-college-tuition-higher-education>; Jonathan Easley, *Poll: Bernie Sanders Country's Most Popular Active Politician* (18 April 2017) The Hill <http://thehill.com/homenews/campaign/329404-poll-bernie-sanders-countrys-most-popular-active-politician>; Michael Sainato, *Poll Confirms Bernie Sanders Is the Most Popular Politician in the Country* (11 July 2017) Observer <http://observer.com/2017/07/bernie-sanders-most-popular-politician/>.

5. See Tristan McCowan, *Education as a Human Right: Principles for a Universal Entitlement to Learning* (Bloomsbury Academic, 2013) 121–2.

6. See Organisation for Economic Cooperation and Development ('OECD'), 'Education at a Glance 2014: OECD Indicators' (OECD, September 2014) 13–14.

7. Ibid 14.

8. Katarina Tomaševski, 'Removing Obstacles in the Way of the Right to Education' (Right to Education Primers No 1, 2001) 9.

9. OECD, 'Education at a Glance 2014' above n 6, 13.

enabling improved economic growth.[10] Further, because educated individuals are more likely to gain employment and command higher incomes, education has a significant impact on the level of inequality and inclusion in society. Where levels of inequality are significant, the benefits of education are distributed unequally. Whereas some highly educated individuals will enjoy strong employment opportunities and other life circumstances, poorly educated individuals are likely to experience poverty and social exclusion. Such a state of affairs constitutes a significant threat to social cohesion, and thus to society in general.[11]

In recent times, there has been a trend towards increasing educational disadvantage, or inequality in access to education. The impact of education and skills on life chances has increased, which in turn has increased inequality and disadvantage in many societies.[12] More particularly, data from the Organisation for Economic Cooperation and Development (OECD) indicates that the income gap between people with high levels of education and those with average or poor levels of education has significantly increased,[13] suggesting that the relatively wealthy are increasing their wealth at the cost of the socio-economically disadvantaged and middle classes.

## B. HISTORICAL PERSPECTIVES IN RELATION TO HIGHER EDUCATION DELIVERY

The delivery of higher education must be understood in a historical context. Historically, higher education was provided to 'an elite few'.[14] The 1970s, however, saw the commencement of a trend towards a massification of higher education, in which more and more people continued their studies.[15] This trend was related to the increasing prominence of welfare state ideology and concepts of

10. Theodore W Schultz, 'Investment in Human Capital' (1961) 51(1) *American Economic Review* 1, 1. See also Michael Peters, 'Re-thinking Education as a Welfare Right' (2002) 13(5) *School Field* 79, 87.

11. OECD, 'Education at a Glance 2014' above n 6, 14.

12. Ibid 13.

13. Ibid 14.

14. Ibid 13. See also Rebecca Schendel and Tristan McCowan, 'Higher Education and Development: Critical Issues and Debates' in Tristan McCowan and Elaine Unterhalter (eds), *Education and International Development: An Introduction* (2015) 275, 281.

15. See Tristan McCowan, 'Expansion without Equity: An Analysis of Current Policy on Access to Higher Education in Brazil' (2007) 53 *Higher Education* 579, 579.

social mobility.[16] In this context, higher education was frequently subsidised by the state. More recently, concepts of the knowledge economy have led to a view of higher education as being integral to economic growth and competitiveness.[17] Further, the increasing influence of neo-liberal ideology together with a need to finance the massification of higher education has instigated a trend towards the marketisation of higher education. Rather than higher education being subsidised by the state, many countries have implemented reforms designed to shift its cost to the student consumer.[18] Such reforms have been criticised for their negative impact on access to education.

Today, although most countries share a general consensus that primary and secondary education should be provided by the state,[19] debate continues in relation to how to best deliver higher education. Central to this debate is the purposes for which higher education is provided and thus who should be responsible for financing its delivery. Where higher education is considered to be primarily a public good, arguments may be made that the state should subsidise its provision. The issue then becomes how this is to be achieved in the context of massification. However, where higher education is considered to be primarily a private good, it is reasonable to expect individuals to pay for their own education. In this respect, however, policymakers need to consider the impact on access to higher education, inequality and disadvantage, and ultimately the influence of these factors on society.

Discussion around how best to deliver higher education in today's society must take into account the changed historical context. Yet although it is critical to consider the problem in light of contemporary conditions, many arguments made in decades past in relation to higher education delivery may equally apply to today's context. To this extent, consideration of the question of how best to deliver higher education must take all relevant arguments and considerations into account.

16. Jens Jungblut, 'Partisan Politics in Higher Education Policy: How Does the Left-Right Divide of Political Parties Matter in Higher Education Policy in Western Europe?' in Gaële Goastellec and France Picard (eds), *Higher Education in Societies: A Multi-Scale Perspective* (Springer, 2014) 86, 90.

17. Ibid.

18. For example, see Chapter 4 for a description of higher education reforms in England. See generally, Leo Goedegebuure, Frans Kaiser, Peter Maassen and Egbert de Weert, 'Higher Education Policy in International Perspective: An Overview' in Leo Goedegebuure, Frans Kaiser, Peter Maassen, Lyn Meek, Frans van Vught and Egbert de Weert (eds), *Higher Education Policy: An International Comparative Perspective* (Pergamon Press, 1993) 1, 1.

19. For a summary of reasons for this consensus, see Tomaševski, 'Removing Obstacles', above n 8, 14.

## C. IMPORTANCE OF POLICY AND LAW FOR HIGHER EDUCATION

Policy frameworks, and the legal means by which they are implemented by states (policy), have a significant impact on access to higher education and educational disadvantage. Some policies are more effective at enabling access to education than others. As Angel Gurria notes, '[d]ifferent policies produce different outcomes, and this is also true with regard to education and skills'.[20] In this respect, consideration of other states' higher education frameworks will be beneficial for policymakers.

The policies that states implement to frame the delivery of higher education teaching and learning are critically important. This is for a number of reasons. One of the key reasons is that higher education policy frameworks have an impact on access to higher education, and access to higher education is linked to improved life chances. Conversely, educational disadvantage has a negative impact on the life chances of the particular individuals who face obstacles to access. It also increases the levels of inequality in society and as a result undermines the cohesiveness of society. A higher education system that excludes or impedes access on the basis of gender, race, nationality and so on, will create a society in which those excluded groups are further marginalised, and will likely create tension between society's haves and have-nots as a result.

Higher education policy also has an impact beyond questions of access. A significant issue, related to that of access, is the charging of fees for higher education. Free provision of higher education is likely to generate a view that higher education is a public good: one which is subsidised with public funds and from which there will be a contribution back to the public. Nevertheless, where regulation requires that higher education is freely provided, there may be insufficient incentive for students to work hard and the public tax burden will be significant. In contrast, requirements for higher education institutions to impose fees may contribute to a perception that higher education is an investment that will primarily benefit the individual and for which the individual should therefore pay. Further, imposition of fees for higher education may lead students to view themselves as consumers who are able to purchase education or certification rather than engage in an ongoing process of learning.

Higher education also makes an important contribution to societal values. In this context, higher education is an important influence on the development of individual personality, values and behaviour. What and how people learn as a result of their experience in education influences the way they see the world and how they act within it. For example, the exclusion of humanities subjects

20. OECD, 'Education at a Glance 2014' above n 6, 15.

from higher education curricula may suggest that only commercially valuable knowledge is worth pursuing. This may have flow-on effects in terms of the value attached to certain types of knowledge, work—and therefore people—in society.

Higher education should thus be viewed as a microcosm of society. The policies that are implemented in relation to a higher education system will impact that system, and that impact will flow on to the broader society. Understanding the effectiveness and consequences of different policy frameworks will enable policymakers to implement policies that improve access to higher education and, more broadly, contribute to a harmonious society, one that is viewed as ideal by the general populace.

## D. PURPOSE OF THIS BOOK

This book attempts to identify whether a policy framework for higher education, based on the human right to higher education, might have more to offer in terms of meeting the purposes of higher education teaching and learning than an approach based on market principles. To answer this question, the approach taken is to evaluate first each theoretical model (Chapter 2) and then selected state higher education policies (Chapter 4) in terms of their substance and some of their effects. In pursuing this question, this book seeks to encourage policymakers to ground frameworks in research. Rather than making decisions on the basis of ideological beliefs about the proper role of the state and the rights (or lack of rights) of individuals, this book contends that ensuring policy is research based will result in the development of more considered, sophisticated and ultimately successful higher education systems.[21]

The primary contention of this book is that an approach to higher education that is based on the human right to higher education (a 'human rights-based approach') is more likely to enable the state to meet the purposes of higher education than one based on market principles. Although the relevant international legal provisions are only binding on states parties to the relevant

21. See Linda Hantrais, *International Comparative Research: Theory, Methods and Practice* (Palgrave Macmillan, 2009) 11; Anthony Welch, 'Evidence-Based Policy: Epistemologically Specious, Ideologically Unsound' in Helen Proctor, Patrick Brownlee and Peter Freebody (eds), *Controversies in Education: Orthodoxy and Heresy in Policy and Practice* (Springer, 2015) 63, 69. In relation to current policy development practices in Australia, see Tom Clark, 'Under No Circumstances Resolve the Main Problem: Higher Education Policy Overview in Australia' (2004) 46(2) *Australian Universities Review* 12, 13. It is noted that in pursuing this research question, this book is adopting a consequentialist position on human rights: that the adoption of human rights can be justified by the positive consequences they bring about. In taking this position, it is not suggested that a human rights-based approach to higher education cannot also be justified from a deontological point of view. Nevertheless, such justification is outside the scope of this analysis.