

## **Consolidation of Higher Education's Legislation: An Appraisal and Revision of the Legislation in Force**

Several years went by after some legislation on higher education had been passed. One may refer for instance to the Educative System Fundamental Act (Law 46/86, of 14th October), the University Autonomy Act (Law 108/88, of 24th September), the Statute and Autonomy of Polytechnic Higher Education Institutions Act (Law 54/90, of 5th September), the Evaluation of the Higher Education System Act (Law 38/94, of 21st November), the Funding of Higher Education Fundamental Act (Law 113/97, of 16th September), the Statute of Private and Cooperative Higher Education (Decree-Law 16/94, of 22nd January, which was subsequently altered (Law 37/94, of 11th November and Decree-Law 94/99, of 23rd March), and by the law on the Flexibility of Public Universities Management (Decree-Law 252/97, of 26th September).

The experience derived from practical implementation of the legislation on higher education demonstrates that, in parallel with many positive features, there were also some negative consequences or objectives not completely fulfilled. Moreover, there have been very important changes in the higher education system's context: massification, decreasing number of candidates, funding stringency, increased expectations of society on higher education, increased emphasis on the relevance of higher education for their graduates' employability, increased emphasis on the role of knowledge in the societies economic competitiveness, and so forth..

The aforementioned arguments indicate that it is time for doing a critical appraisal and consequent revision of the legislation in force, with a focus on elimination of the less positive features and better harmonisation with societal changes.

The objective of this paper is only to provide a modest contribution by emphasising some of the most important features that should be the objects of public debate. It is believed that this objective will be fulfilled if this paper contributes in some way to the raising of attention to this important initiative and to pinpointing the interest of higher education's participants in what is believed to be some of the key questions in the harmonious development of the system of higher education.

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Alberto M. S. C. Amaral

## 1. The Structure of the Higher Education System

As higher education systems moved from elitism to massification, diversification assumed an increasing role in the management and steering of the systems and the institutions. In general, diversification is seen as a positive asset. Several authors list arguments in favour of diversification, such as:

- Responding better to the needs of students
- Promoting social mobility
- Responding better to labour market demands
- Responding to demands of very diversified groups
- Increasing higher education institutions' efficiency

This explains why in, general, governments assume diversification as a positive characteristic of higher education systems. However, there are no clear recipes for implementing or increasing diversity, and governments in different countries have used a myriad of policies for reaching this objective. Those policies fall mainly into three different categories:

- Implementation of binary systems with universities and polytechnics (or their equivalents), the latter offering shorter degrees with more vocational emphases.
- Unification of binary systems followed by measures that aim at implementing diversification through the use of market type mechanisms (competition), most specifically in the allocation of research funding.
- Creation of diversity inside already existing institutions (universities) by allowing them to simultaneously offer traditional long degrees and shorter, more vocational degrees.

All those policies offer some advantages, but they also generate problems. Policies of the first type may be unstable in the medium term, both because of academic drift of polytechnics in search of social standing vis-à-vis universities and due to professional drift of universities responding to societal pressures to become more “relevant” and to respond to increasing demands for employability of their graduates.

Policies of the second type, instead of promoting diversity, may result in the stratification of higher education systems between first and second-class institutions.

Policies of the third type apparently have a good tradition in some countries such as Spain. Their implementation in other countries, however, has been fraught with difficulties.

Available statistical data show that in Portugal approximately 30% of those students completing secondary education enter the labour market directly. Students abandoning the educational system after completion of secondary education are in general older than the average 22 to 24 years old, and their families have a lower

relative education background (75% of those students come from families where parents at most have completed primary education). The decision to impose minimum marks in the examinations for access to higher education will increase the number of students unable to enter directly into traditional higher education, thus raising the need for new short cycle, post-secondary and strongly vocational study programmes.

Within this context, there are some pertinent questions:

- 1.1 Does the present binary structure of the higher education system with universities and polytechnics offer an adequate answer to the future needs of higher education?
- 1.2 The 26/2000 Act (recently revoked) established a very rigid separation of the two sub-systems (universities and polytechnics). Taking into account the pros and cons of the different policy options for increasing diversity, should a more flexible system be implemented?
- 1.3 The University of Aveiro and the University of Algarve integrate some polytechnic schools. Should the regional association of a university with polytechnics in its area of influence be encouraged, even without formal integration, as in the case of those universities?
- 1.4 Should any higher education institution be allowed to offer the new short cycle technological programmes<sup>1</sup>? Alternatively, should these short cycles be reserved for polytechnics?
- 1.5 What kind of mobility mechanisms should be implemented between both sub-systems and also the technological programmes?

## **2. Degrees and diplomas**

The Bologna Declaration recognises an organisation of higher education essentially based on two main cycles, undergraduate and graduate. The first cycle must be internationally recognised as conferring appropriate qualification for the labour market. The second cycle has two variants, a shorter Masters' program and a longer that is equivalent to a doctoral degree. Some instrumental objectives of the Bologna process are the adoption of a system of easily readable and comparable degrees, and the establishment of a system of credits – such as European Credit Transfer System (ECTS) - as an appropriate means for promoting student mobility.

The Bologna process presents two obvious challenges to the Portuguese higher education system. First, there are four degrees: bacharel, licenciado, mestre and doutor; second, there is an enormous anarchy in the names of study programmes. There currently exist an excessive number of different programmes. Even worse, in many cases, the name of the programme has much more to do with 'marketing' (attracting students with appealing designations such as Engineering of... or

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<sup>1</sup> This refers to short cycle vocational education leading to level 4 qualifications.

Management of... ) than with the legibility and transparency of educational provision, which is one of the Bologna's objectives.

This raises the following questions:

- 2.1 What kind of degrees should be offered in the future?
- 2.2 What kind of institutions can offer the different degrees?
- 2.3 What should be the structure of educational provision – with regard to its duration in order to comply with the Bologna process?
- 2.4 Is it acceptable that different institutions can offer similar study programmes, but with different durations?

### **3. Governance of higher education institutions**

The University Autonomy Act (Law 108/88) and the Statute and Autonomy of Polytechnic Higher Education Institutions Act (Law 54/90) regulate the governance of Portuguese public higher education institutions. In universities, governance is characterised by collegiality and democracy, with the full participation of academics, students and non-academic staff. Election is the source of legitimation for the use of power, and the presence of external representatives is optional. In polytechnics, the idea of a closer relationship to the national industrial and economic situation and of stronger regional emphasis prevails. As such, participation of external representatives is compulsory in the General Council and for the election of the president, but is optional in the Scientific Councils. However, legislation still sees polytechnic institutions as an association or federation of schools rather than as a real institution.

As both laws were passed more than a decade ago, it is important to analyse how far the governance modes and structures are adequate for the present situation. Over the last years criticisms became frequent, originating from different sectors, and mostly from inside the institutions. Some believe that the autonomy acts restrict excessively the models of internal organisation of institutional governance. Some hold the position that management should be left to professionals, intimating that higher education cannot be left in the hands of academics without management training. Others believe that the election of the Rector makes him or her hostage to electoral commitments and promises. There are also those who consider it inappropriate to allow participation in institutional governance of non-academic staff, and mainly of students. A recent case at the University of Coimbra has reinforced this trend. There are people supporting a stronger participation from society, but also those who remind us that "boards of trustees" are alien to our traditions. There are people favouring a stronger market intervention, but also people warning that market regulation leads to short term strategies, which are not suited to the more stable, long term environment of higher education institutions.

This raises the following questions:

- 3.1. The Rector or President of the institution
  - 3.1.1. Who is eligible for the position? People from outside the institution? Which ones? Why?
  - 3.1.2. Should one keep the present electoral system?
  - 3.1.3. Should the election have a more universal character?
  - 3.1.4. Should the election be replaced by appointment, using a ‘search party’? What should be the composition of the search party? What should be the role of institutional governing bodies in selecting the candidates?
  - 3.1.5. What powers should be conferred upon the Rector/President?
- 3.2. Participation of society
  - 3.2.1. What kind of meaningful participation and accountability should society have in the governance of higher education institutions?
  - 3.2.2. Do you favour the establishment of “boards of trustees”? With what powers?
  - 3.2.3. Do you favour a bicameral system (as it is characteristic in Anglo-Saxon institutions) with a Senate for academic matters, and a Council with external representation for input regarding matters such as financing and strategic orientation?
  - 3.2.4. Should the external representation hold a majority?
- 3.3. Management of Schools/Faculties/Departments
  - 3.3.1. Do you favour a uninominal management system, for instance a Director?
  - 3.3.2. The Director is elected? Or appointed by the Rector in consultation with the School?
  - 3.3.3. Should some collective decision-making bodies be maintained? Which ones?
- 3.4. Participation of institutional bodies
  - 3.4.1. What should be the relative weight of the different bodies (academics, students and non-academic staff)?

#### **4. Access**

The government has used access to higher education as a regulatory tool. The total size of the system is controlled by changing the rules of access with the effect of governing the total number of candidates permitted to enter higher education. Over the last years, there has been a consistent decrease in the number of candidatures to higher education as a result of the combined effects of a persistent decrease in birth rates with more difficult requirements of access to higher education. The fall in demand has initially affected the private sector, but is currently impacting public

polytechnics and some public university sectors. In the 2002/03 academic year, after the second phase of students' placements, the public sector had 16 study programmes without candidates and about 200 study programmes with less than 50% of the available openings filled.

The recent passing of legislation aiming at creating even more demanding access rules – minimum marks of 9.5 in all access exams – will increase and exacerbate the decline in demand. A simulation made using the data of the 2002/03 candidatures after the first phase of students' placements and imposing the minimum marks reveals drastic consequences for some institutions and some study programmes, with special significance for polytechnics.

Within this context of excessive offer relative to falling demand, the following questions are raised:

- 4.1. Does the present context favour the elimination of the *numerus clausus* system in most study programmes, being maintained only for some special areas such as Medicine, Dental Medicine or Architecture?
- 4.2. How can those institutions located in the interior be protected from the results of eliminating the *numerus clausus* system?
- 4.3. Are the present requirements for access to higher education adequate and reasonable?
- 4.4. Does access to short technological programmes (level 4) represent an adequate alternative for students prevented from competing directly for access to higher education?
- 4.5. Should more vocational study programmes taught in higher education institutions lead alternatively to granting level 4 diplomas?

## **5. Autonomy and regulation**

The Constitution of the Portuguese Republic explicitly protects the autonomy of universities. However this constitutional protection has never been extended to polytechnics.

The University Autonomy Act (Act 108/88) confers statutory, scientific, pedagogic, administrative, financial and disciplinary autonomies to public universities and identifies their assets. It is considered that pedagogic autonomy is very complete in that public universities are allowed to initiate, suspend and cancel study programmes. The role of the Ministry is specifically limited to registration of new study programmes in such a way that real pedagogic decision power lies with the universities.

The [Public] Polytechnics Autonomy Act (Law 54/90) is far more limited than the University Act. It overlooks the scientific and pedagogic autonomies and leaves with

the Ministry all decisions about institutional proposals to initiate, suspend, and cancel study programmes. The private sector has very large administrative and financial autonomies. It does not have pedagogical autonomy, since these institutions still need ministerial approval of their proposals to initiate, suspend, and cancel study programmes.

The fact that the autonomy of public universities is granted by the Portuguese Constitution has allowed for an important development of their financial autonomy authorised by Decree-Law 252/97 of 26th September. In this Decree's foreword, it is stated that "...the lack of complementary legislation to the University Autonomy Act, which was actually referred to in the Act, ..." has resulted in a situation of blockage of the universities' financial management. This must be solved by specific solutions adequate to each institution's particularities as recognised in the Constitution and in the University Autonomy Act. These solutions, without putting at risk the national budgetary policy, which by definition lies within the prerogatives of Parliament following a Governmental proposal, will allow those institutions to fully pursue their aims as determined by Constitution and law. Article 2 of Decree-Law 252/97 states that "The legal provisions of the present decree constitute special law and as such will prevail over opposite provisions of general laws". However, it must be pointed out that the objective of this legal provision - to grant stability to the provisions of the Decree - has not been a success.

The Law 26/2000 of 23rd August, determines that no new study programme may be initiated before publication of a Ministerial decree granting that the programme has been registered, in effect decreases the pedagogic autonomy of public universities to the level of autonomy of public polytechnics and private institutions.

More recently, the Law 1/2003, of 6th January, has revoked the Law 26/2000, while maintaining the conditions for registration. The new Law creates a system for accreditation of study programmes and implements measures that may result in cancellation of funding or vacancies for study programmes without demand.

Under these circumstances it is important to define the future equilibrium between institutional autonomy and regulation:

- 5.1 Is the present level of scientific autonomy adequate?
- 5.2 Is the present level of pedagogic autonomy adequate?
- 5.3 Is the present level of administrative autonomy adequate?
- 5.4 Is the present level of financial autonomy adequate?
- 5.5 What assets should be transferred to the institutions and under what legal provisions? Were the results of the application to public universities of Decree-Law 252/97, of 26th September satisfactory? Should this Decree be extended to other institutions?
- 5.6 What model and forms of regulation should be implemented in the future? Is it possible to rely solely upon institutional self-regulation capacity and market regulation?

- 5.7. Can the CRUP, the CCISP and the APESP<sup>2</sup> play a role as regulation bodies?
- 5.8. A new regulation body should be established? A body representing established institutional interests (CRUP, CCISP, APESP, etc.) or representing also the broader interests of society and/or representing professional organisations? What degree of dependency on the Government should that body have?
- 5.9. Does one run the risk of establishing a new body that in the medium term will reveal itself as extremely conservative or alternatively as a body with a vision of immediacy, and of short term instead of long term strategy?

## **6. Funding sources**

Higher education has the responsibility for educating the total individual — intellectually, aesthetically, ethically, socially and physically. It is obvious that, to do this, education has a cost and that someone has to bear this cost. It seems also evident that costs should be shared by three main sources: taxpayers (as higher education is a strategic component of the country's economic development), parents (they share a responsibility in the upbringing of their descendents) and students (as for many students higher education is a profitable private investment, offering them real economic returns above those of many other long term investments). A basic corollary of these hypotheses is that decreasing the contribution from one source needs to be met by an equivalent increase from the other sources, otherwise the situation will result in more fundamental changes, such as reducing the size or quality of the system, reducing students' social support or changing the socio-economic profile of enrolled students.

The problem consists of finding a fair allocation of costs between parents, students and taxpayers. This is an equity problem, a concept that economists associate with the way resources are allocated by society. It is common practice to distinguish between horizontal equity, meaning granting equal treatment to equal individuals, and vertical equity, meaning granting different treatment to individuals who are different. This last concept is very meaningful for education, since one of its missions is offering equal opportunities to children and youngsters from different socio-economic backgrounds.

But there is also an intergenerational equity, meaning the allocation of resources and the sharing of burdens between generations. This is relevant for the sharing of costs of education, and this includes the wretched problem of tuition fees. This is obviously another difficult dilemma because on the one hand the public contribution to higher education is a burden supported by those who are active workers today in favour of future generations, and on the other hand new generations will be asked to pay the pensions of those who are active today.

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<sup>2</sup> CRUP – Council of Rectors of Portuguese [Public] Universities; CCISP – an equivalent Council for Presidents of Public Polytechnics; APESP - an association of the presidents of the co-operative societies which own private higher education institutions.

Some relevant questions are:

- 6.1. Should the contributions from parents and students towards the costs of higher education be increased?
- 6.2. In case of an affirmative answer to the previous question, should those additional contributions be compensated by grants or tax exemptions?
- 6.3. Should grants be replaced by loans or should both systems coexist?
- 6.4. Should loans be paid through additional contributions in the IRS or through additional contributions to Social Security?

## **7. Allocation of funding**

There are three traditional models for allocation of funding:

- The historical model.
- The use of funding formulae.
- The signature of contracts.

The historical model is not convenient, as it tends to perpetuate an allocation of resources that does not follow institutional change. The use of a funding formula has the advantage of transparency, while preventing the emergence of distortion due to political factors or to the different lobbying capacities of institutional leaders. However, funding formulae need to be periodically revised to take into account changes in the systems' development and in general are more adequate for running expenses than investments.

The signature of contracts has the advantage of allowing for better matching of funding to the negotiated development of institutions, particularly with respect to investments. However, it may create distortions due to political factors or to the different negotiation abilities of institutional leaders and further, may not be compatible with the idea of inter-institutional competition.

The following questions are raised:

- 7.1. Should the funding allocation be based on a funding formula?
- 7.2. If the answer to the previous question is affirmative, should funding be given for each institutional activity (education, research, service, etc.)? What parameters should be included in the formula? Should the level of funding be linked to the results of quality evaluation? Should the level of funding be linked to performance? Should the level of funding be used to encourage good institutional management, even if it produces a budget

surplus<sup>3</sup>? Should the level of funding be used, for instance through matching funds, to encourage the search for alternative funding?

- 7.3. Should funding be allocated by contract? Or alternatively, should contracts be signed only for defining the medium term expansion of institutions and investments, while current funding continues to be defined on a yearly basis by a formula, which would depend on the quantitative (and qualitative?) development of the institution?

## 8. Research

Education and research, specifically at the level of higher education, are today recognised not only as factors of social equity, but also as vectors of micro and macro-economic efficiency. The concept of endogenous development has induced the European Commission to consider education and research as very efficient tools of a macro-economic policy indispensable for solving the European unemployment problem. Today, it is taken for granted that the improvement of education's quality has had an important effect over the rate of return of education in terms of expected salaries for each additional year of education, and that the national investment on education and research is fundamental for granting social and economic development.

The Committee of Ministers of the Council of Europe has recently approved a very important recommendation to member states on research and higher education (recommendation R (2000) 8 of 30th March 2000). Considering that universities "...while sharing the responsibility for academic research with industry and specialised institutions have a particular responsibility for the development of knowledge through free and fundamental research, for the training of new researchers and for the maintenance of a healthy balance between the different types of research...", the Committee proposes amongst several others the following recommendations:

- Universities should conduct research in a broad range of disciplines and ensure well-organised contacts with active research in disciplines in which they offer study programmes without a strong research base
- Governments should seek to develop and maintain trust between the state and society on the one hand and the universities on the other and, notwithstanding the fundamental principle of university autonomy, to leave the universities with the responsibility for their choice of research priorities
- Governments should aim at creating conditions for universities where teaching and research are equally integrated into their organisation and structure
- Governments should ensure that permanent academic staff have duties in both teaching and research

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<sup>3</sup> This refers to the fact that in general the Ministry of Finances usually considers that a budget surplus reveals situations of overgenerous public funding.

- Governments and universities should be encouraged to design their study programmes with a view to bringing students into close contact with research as early as possible
- Joint appointments and part-time employment should be facilitated. Research theses could be prepared in co-operation with industry and public administrations
- Governments and universities should be encouraged to base the recruitment and career advancement of teachers on competition and good performance in both teaching and research, and
- Funding of research should as a general rule be subject to independent expert evaluation

Questions on the theme of research:

- 8.1 What is the desirable relationship between higher education institutions and scientific research?
- 8.2 What measures should be taken for promoting cooperation between public, private and co-operative institutions in order to foster the development of science, technology and culture with particular emphasis in the interest of society? What measures should be taken for promoting post-graduate education with good quality?
- 8.3 What measures should be taken for promoting the establishment of inter-institutional partnerships?
- 8.4 What degree of flexibility should be allowed for employment of people linked to research contracts?
- 8.5 What level of matching funds should be granted by the State relative to research projects funded by the community?
- 8.6 What strategy should be implemented by the State for promoting the participation of national institutions in the new EU research framework programme?

## **9. Evaluation and accreditation**

The evaluation of Portuguese higher education institutions is regulated by Law 38/94 of 21st November. Later the CNAVES<sup>4</sup> was established and evaluation became widespread to all higher education institutions. The concept of accreditation was introduced in Portuguese legislation by Law 1/2003 of 6th January but still needs further regulation before being implemented. So far evaluation has only been used for study programmes. Although the law also implies institutional evaluation no steps were yet made in this direction, with the exception of some pilot exercises.

The present evaluation of study programmes has been well received both by

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<sup>4</sup> This council was established for coordinating the three sub-systems of quality evaluation: public universities, public polytechnics and private sector.

institutions and the public at large, although there are demands for increased clarity of the evaluation reports' conclusions, thus allowing for further transparency and comparability of the evaluation's results.

Within the present context of great multiplicity of higher education institutions, it is urgent to establish a system for evaluation/accreditation of other academic degrees, such as masters' and Ph.D.s. Most countries that have relations with Portugal have established [quality] systems, sometimes very demanding, and the credibility of our system will depend on the introduction of these kinds of systems. Since its introduction in Portugal around 1980, Masters' have in practice been downgraded from a very demanding programme for full time students into a part-time programme with very dubious academic standards. There are obvious exceptions but this is the general rule. Although the legislator's intention aimed at 90 to 120 units (in terms of ECTS), current practice has reduced academic demands to 45 to 60 credits. (60 ECTS units are equivalent to the normal yearly workload of a full-time student). Although there is still some decorum in the case of Ph.D.s, Portugal needs to follow the general trend towards more formal standards as are in place in other countries. This need is reinforced by the fact that there are now large numbers of Ph.D. holders, some of them not always scientifically active, who may be tempted to supervise dissertations and participate in academic juries.

The so-called post-graduation programmes are now proliferating, both in higher education institutions and in other kind of institutions that have discovered a new "calling" for this new area of "services". It is important to decide if "post-graduation" stands for an academic degree "above" the first degree [graduation], or if it only implies any kind of training offered by any agent with the aim of attracting whatever student market is most seducible and available at the moment.

Questions for consideration:

- 9.1. What proposals will increase transparency and legibility of the evaluation system?
- 9.2. What should be the concept of post-graduation?
- 9.3. Should a mechanism for Masters' evaluation be established?
- 9.4. Should a mechanism for Ph.D.'s evaluation be established?