

Legal Education at Work: The Impossible Task of Teaching Law

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1 Observing Legal Education at Work

1.1 Law, Legal Practice and Legal Education

Recently, a colleague in law school summarized his observations on legal education in Australia in a paper, for which terms like “angst, anomie and excellence” provided the conceptional cornerstones². His paper is an intense and provocative account of the problems which apparently inextricably besiege legal education. However, two points strike the reader as remarkable: first, these observations of legal education “at work” made by a law school insider as a “participant observer” are not following any particular systematic pattern or research design (i.e. theory) but are eclectic, and are guided by what the author of the paper would probably consider to be “practical common sense”. Secondly, the categories which offered themselves as explanatory stepping-stones are by and large all psychological, or at best psychologically interpreted social categories, ergo: angst, anomie and excellence.

Of course, there is nothing wrong with such an eclectic approach for observing legal education at work by someone who is seriously

committed to the issues of legal education, especially if no sociological analysis is intended – not all social science discoveries need sociological theory to be helped along, and not all sociological theory has led to social science discoveries. Rather our point is that eclecticism is in itself an indicator of the difficulties which one encounters when one wants to assess the “performance” of legal education, and that pragmatic approaches are the typical, and perhaps the only possible observational technique of “legally trained” scholars if they attempt to assess what constitutes social reality for them³.

The problem with this sort of pragmatism is of course not that lawyers are not aware of social issues and their complexity. The problem is that in order to analyze social issues lawyers resort to, and normally can only resort to, conceptual categories which are provided by their socialization as lawyers⁴, i.e. through legal education. As we will attempt to show, this socialization tends to reduce any social theory to a theory of legal practice⁵, and it forces the lawyer – wittingly or unwittingly – to interpret everything, including those phenomena which cannot be decoded by strictly legal-practical conceptual or dogmatic references, through the concepts supplied by such a theory of legal practice. This theory of legal practice provides excellent, albeit reductionist, classificatory schemes and it provides also a highly adaptable, flexible form of practical knowledge, but it does not offer a handle for social analysis.

Neither is the problem that lawyers are not aware of the circumstances which interrelate legal education with its social environments, and here not only with the academic environment but also, and perhaps above all, with that of the professional organization of lawyers. The problem is rather that lawyers, in being left without a valid social theory, tend to address social issues as individualist issues and that this covers up more than it reveals. Such an approach avoids the issues of social structure which are at the very core of legal education.

The issue, then, with which we are faced when we want to observe legal education at work, seems to be an odd paradox which puts a group of educators in charge of legal education who – by virtue of legal education applied on them – do not only lack an elaborated dogmatic grammar for the problems of education as such (which probably goes for most teaching on all levels⁶) but who have no explanatory grammar for the social process which has made, among other things, legal education an academic enterprise. Along with

engineers, natural scientists, and medical academics who could remain, until fairly recently, relatively indifferent towards any social definition of their respective educational subject matters, lawyers – and especially academic lawyers – have always been closer to the fact that the law is substantially and centrally a social construct, and that any theory of legal practice cannot really replace any social theory about the law. What is puzzling is that after decades of growing sociological consciousness, after many years of socio-legal agitation and many curricular zig-zags towards more “interdisciplinarity” or at least more “social relevance” of teaching legal doctrine, legal education is still dishing up pretty much the same hotch-potch of legal training as before.

Our hypothesis is that this resilience of legal education, to teach always – in essence – what always has been taught, is a function of, i.e. related to, the social organization of both the law and education and as such structurally inevitable. Our hypothesis is further that for both legal organization and legal education science inputs (i.e. explanatory knowledge) are, in contrast to the rhetorics of the importance of “interdisciplinary” teaching, largely only relevant to satisfy the voracious eclectic appetite of both legal dogmatism and legal practice for the flavor of the month “buzzwords”. Explanatory knowledge cannot be used here to change things because legal education has no proper place for change through explanatory knowledge.

Such a hypothesis does not propose, however, that thinking about and teaching “the law” should be left to the lawyers, and in the contrary it will be argued that to assume such an exclusivity of lawyers in the domain of legal reasoning would be as unrealistic as the belief that they are devoted to interdisciplinarity. Rather the proposition is that the explanation for the limited receptivity of both legal education and legal organization, as far as science inputs – and especially social science inputs – are concerned, must be mainly produced outside and apart from legal education, and as a part of the explanation of the operation of law in society, e.g. in the form of a sociological theory of law. Such a sociological theory of law will interpret, for instance, the observed limited receptivity of legal education as a functional prerequisite for the operation of law. Informed by such a theoretical concept we shall be reluctant to decry the indifference of legal education towards social science inputs as a “serious deficiency of legal education”, and we shall be equally reluctant to promise quick fixes if there was only enough resolve to

put them into action. We are not so sure that these quick fixes exist or even, whether they are desirable, and we shall spell out in the following, why one cannot be so sure.

Law faculties, or law "schools" as they are typically called in the traditional Anglo-American common law context, are clearly tied in with the mentioned paradox whereby academic (law) teachers are educating without having much evidence as to the relevance of what they are actually doing. In this situation law teachers generally "play it safe" by resorting to the theory of legal practice as a meaningful and helpfully convincing framework of legal education, i.e. the law in the books. Law students, on the other hand, learn quickly to respond to the uneasiness of their teachers when they operate in the "soft" fringe areas of the "living law" and in uncomfortable interdisciplinary approaches. The concerns for promotion, the social dynamics in the classroom and examination routines do the rest to coerce law teachers to provide the bare essentials of "hard" legal knowledge only, and for students to sequester expertly the "relevant" from the "irrelevant" study materials.

While not doubting for one moment that such a picture is a rather oversimplified account of the multifaceted social reality of law schools at work, we propose that it is the necessary typical result of the structural design of legal education. In order to understand this structural design adequately we must replace "angst, anomie and excellence" by "structural deficit, power and selectivity" as the sensitizing concepts of our inquiry.

1.2 Legal Education in a Context

In order to observe legal education as a context in which socialization processes "produce" lawyers, we have to cast our net wider than an assessment of the educational climate in a law faculty can do. Even without going into much detail it is fairly obvious that any attempt which wants to observe legal education as a social happening rather than as an intentionalized (normative) program must sketch a fairly comprehensive scenario. Such a scenario must be able to distinguish between various spheres of social organization in which the happening takes place. Most importantly, while the "finished product" of the intentional program is said to be the individual "competent lawyers", the process of socialization is made up largely by communication processes inside of and between social

units⁷. Processes of this sort take the control over the outcome away from any one of these social units. In view of such a rather more complicated picture, it is interesting to see, how the promise of legal education can be made with such a confidence.

As it appears, law faculties, or law schools and the students in them are at the receiving end of what could be pictured as a stack of "Chinese boxes", in which each smaller unit is contained in a larger unit which – in turn – "mediates" the contact/relations with further and larger units. Obviously, societies are not Chinese boxes, and their dynamic interrelations can hardly be described in the mechanical terms of enclosure, so we have to account for the actual dynamics later⁸. However, for the purpose here of gaining an overview of what is minimally required in order to observe legal education "at work" (i.e. empirically) such a concept of boxes may be helpful.

The largest "box" which we want to consider here is society at large, however, seen here as a selective unit with regard to an even wider international context, or even the "world community", in respect to which a society establishes and sustains its own historical and eventually "national identity". This is the point where we have to part with our introductory general observation of a legal education "as such". Clearly societies establish their own histories of legal education, and the observation of legal education in each case has to account for such a historical and socio-cultural variance of socializing lawyers differently.

The operation of the "national identity" of societies, in our crude picture, is mediated, or better: made operational by social "sub-units". As these "sub-units" refer to the larger unit (and any other sub-units) in terms of their own internal ordering – this is the only way they can communicate – we can leave aside the question of any order between them, and we restrict our observation to the state organization, the science or knowledge-production organization, the economy organization and the legal organization. These organizations seem to stand out in performing tasks, the achievement of which is generally attributed to society at large (e.g. the Australian Commonwealth, the U S economy, the Swedish sciences, U S Federal law, (Australian) N.S.W. state law, etc) and these organizational sub-units derive their "speciality" from referring their operations to the performance of such special tasks. All of them are vital for the observation of legal education because each of these organizations is involved – with reference to the specific "terms of trade" of that organization – in the communication process of producing a defini-

tion of what society expects from a "competent lawyer". They typically differ, when the historical variance of socio-cultural differentiation is observed (e.g. the difference between legal education in England in 1810 and in 1980, or between legal education in England 1985 and Denmark 1985), in the resulting mixture, or overlap, in which each of these organizations is more or less successful in referring such a communication of what "society expects a competent lawyer to be" to the own terms of trade at the expense of the power of definition of the other organizations which are involved in these communication processes.

On a level of further bi-furcation (specialization of tasks), we can see the organization of the legal profession as a differentiation of the economy organization in a given society. This sub-unit of the economy organization does not only organize work for exchangeable returns, as is the special task of economy organization generally, but it supplies moreover, as a special "task-force", specialized work. The organizational unity of the legal profession is established and sustained by the reference of all activities to that "special work". Its speciality is not constituted by any different, or "higher order" quality of the work that lawyers do (e.g. as "officers of the law") but by the mere fact that this work can be organized in, and identified particularly well (referred to!) as a special (separate) organizational unit of work which is seen to be done in a given society.

In essence, we have so far given a cursory but nevertheless historical account of the development of social structures, and we can now shift our observation to the level of on-going everyday activities. In the most general terms, we recognize that each of these more or less specialized units strives to sustain the identity of special task performance and that it makes this pursuit its primary organizational objective. To preserve this identity (unity) is vital for each social organization because it constitutes the focus for both the internal and external communicative references to the operation of the unit as a unit.

In this sense most of the operations of the science, legal and legal professional organizations can be observed and interpreted as reproductive operations⁹: scientific research appears to be the reproduction of the science organization in the communication of (standardized) research methodology for the observation of observations, legal decision-making appears to be the reproduction of the legal organization in the communication of (normative) technology for case

handling, and lawyering appears to be the reproduction of the legal professional organization in the communication of (restrictive) professional practices and exclusive work standards. Clearly all of these organizations are involved in legal education by the references which they make to it in order to "survive" both as a communication process and as an organization which needs, physically and socially, members who can sustain such a communication process.

Law faculties, or law schools are the structural expression for this institutional intention to control access to membership and communication processes, and they clearly straddle the intersection of communicative references to – at least – the state, the legal system (law), the science (academic) system and the economic system, in form of a specialized legal profession organization. Again only a more accurate historical "close up" analysis can help to make out the actual mix of communicative references which shape the institutional arrangement of law faculties or law schools for each society and at any given historical stage.

The law student enters the scene at this level of our scenario. Far from being a "raw product" which law faculties, by virtue of the educational skills which have been amassed in these institutions, turn into a sparkling jewel of academic excellence and achievement, he or she has gone – before ever setting foot in a lecture theater – through untold sequences of socialization events which all together have been successful enough for the student to eventually achieve enrollment in a law school. However, the more restricted such an intake is, or at least appears to be, the more incisive or drastic, both in quantity and quality, the socialization events which lead up to enrollment will have been, and the more selected the student body will be. Conversely, the less restricted the intake of the institutional arrangement of legal education is, the less specific the passed socialization events of the students will have been, and the less the study body represents a selected part of the population at large. Irrespective of how little or how much restricted the intake is, those who "make it" are already high achievers in terms of social skillfulness even before legal education is unleashed on them. However, the more selective the intake is the more this form of legal education will be presented (communicated) as the "pursuit of excellence" – irrespective of, and unrelated to, the particular educational practices observed in this highly selective environment. Actually education here may be "better" or "worse", or it may be just more or less the same as in any other, less selective legal education institution or, for that matter, in any other education institution.

The point, then, of a wider conceptual framework is that it enables us to observe social structures at work which make that properties are attributed to legal education which it does not have and effects which it does not produce all the while they are removing its actual mode of reproduction from our view. In other word, such a framework enables us to see that legal education is protected from any easy and direct observation of its educational efficiency or otherwise¹⁰ by its successful institutionalization as a selective agency. In order to understand such a paradoxical concept of legal education as a systematic combination of the indifference towards scientific information about the educational practice and the successful dogmatic operation as a highly selective social agency, we have to qualify our scenario further.

1.3 Structural Deficits and Legal Education

There are good, empirical reasons for the suspicion that societies seem to solve their "problems" with a great number of organizational designs which do nothing or little to actually alleviate the perceived problems, and which are nevertheless as a social organization quite successful, i.e. acceptable for further reference and, as we shall argue, largely indispensable. As such they communicate the reference that "problem-solving" has been more or less achieved, or is attended to, or is at least "on the way" and basically achievable. This is most clearly the case, for example, in the organization of mystical belief systems which establish spiritualist or magical practices, e.g. of tribal "medicine men" or shamans, who attend to – at least organizationally successfully, as is evidenced by their institutionalized, i.e. accepted practice – the needs of protection against the mischief done by evil spirits. Similarly, and only organizationally in a more sophisticated way, religious organizations, assist their clientele in battling with sin or Satan, of course not without considerable organizational effort to define the special delicacy of such a task. Evidently these evil spirits, and likewise sin and Satan, are hard to define, not to mention to locate, other than through the organizational efforts which profess to deal with them – a Cheyenne Plains (Red) Indian has little problems with the evil spirits which plague an Australian Aboriginal from the Pitjantjatjara group, and an atheist is immune against sin.

Conversely and equally evidently, the specially organized task of dealing with evil spirits and sin gains its unity/identity largely, and possibly only, by producing evil spirits and sin organizationally as a problem concept, or "mission statement" in modern econo-managerial speak, which deals with the material continuum of hunger, pain, sexual frustration, disaster, etc by organizing the reference to perceived deficiencies.

The term structural deficit defines such an organizational design in which, on the one hand, the organizational core problem cannot be solved – there is plenty of evil spirits and sin to go around, too many for ever getting rid of them – and in which, on the other hand, the organizational unity/identity of reproductive operations is preserved by not solving, and being unable to solve the core problem (Luhmann 1987:64): as soon as one can pay one's way out of sin, one does not need the church any more, and as soon as "justice" is achieved, e.g. by ending the exploitation of people by other people, the law will wither away.

It is worth nothing, however, that in all cases in which organizations operate with such designs of a structural deficit they can do so only by operating in the same reproductive way as any other social organization in that society does – the Roman Catholic church may promote civil rights, and a Labo(u)r government may become a major proponent for privatization in order to survive the daily struggle for the reproduction of communicative references. Accordingly, the "confidence gap", or legitimacy of social organizations, is not a "reflection" of the instrumental use of "distorted" or "manipulative" communication resulting in "false consciousness". They all are but indicators for the immunization of the successful operation of organizations, by specialization (differentiation) against any accurate information about the necessary inefficiency with which that organization operates.

We refer to this type of organizationally successful but with respect to the mission statement necessarily inefficient operation as *acritic action*¹¹, and it is important to stress that this type of action is successful because it manages, while referring to the structural deficit, to divert the observer from asking the vexing question whether declared goals are actually achieved and directs him or her to the appreciation of the reproductive operation of the organization: "justice" – never mind what it is – must be seen to be done¹².

Legal education is related not only to one but to two kinds of a structural deficit, and it has to be concerned with two sets of acritic

operations in order to deal with the references to these deficits. One set of acrotic operations is education in itself (Luhmann 1987, Tenorth 1987), the other set of operations is the social technology which legal education professes to teach: the practice of law (Ziebert 1987e, 1988a).

1.3.1 The Mission Statement of Education

Education is the intentional, specialized attempt to deal with the problem of knowing too little about the complexity of the world, i.e. "ignorance"¹³. It duplicates as such organizationally, and in this sense artificially, a process which inevitably, and partly unintentionally, always and everywhere produces learning "naturally": socialization. Clearly, with respect to the complexity of the material continuum with reference to which human life takes place, there can never be enough "learning" in a society, or – in other words – perfect knowledge can never be achieved. This leaves a scholarly organization which reproduces its unity/identity with reference to learning, i.e. as the learning of learning, with an "impossible task" (Tenorth 1987:702). In practical terms it can impress only with the institutional apparatus which is set up to pursue this special task¹⁴, and not with its educational achievements which will always be "too little, too late". This institutional apparatus forces socialization decisions to be made in a specially designated environment. Specialization and institutionalization of learning are, in themselves, no guarantee for more learning or better learning, which both depend on the socialization decision (to learn/not to learn) of the learners, nor can they demonstrate evident effectiveness of methods for "better" learning. Societies, however, gain – at least – an organizational handle for dealing with the open-ended problem of socialization through the institutionalization of education. The organizational thrust of education is thus, not accidentally similar to that of legal systems, eminently practical – the task is to develop educational techniques and practices which can be said to make people learn. In this way educators can design, politically, special objectives and goals (values) for learning contents, and they can design special procedures for integrating an expanding spectrum of subject matters and the opportune change of the social relevance of these subject matters into a more or less consistent framework of educational reference. This consistency is achieved here with reference to the pragmatic interests of the educators (doctrine), and not with reference to expla-

natory knowledge (theory). Because such an organization of references does not allow either for a systematic observational knowledge about the (pedagogical) practice in its own right nor systematic (scientific) knowledge about the world at large, educational organizations seek the (problematic because doctrinally confusing) contact with the sciences and the academic "universe". The problem of education is, then, not the lack of a consistent dogma but the oversupply with too many incompatible dogmas between which no scientifically valid choice can be made (Tenorth 1987:702). This selective contact with scientific knowledge production – at arm's length – explains the crucial eclecticism of educational practice which is both vital for the reproduction of educational organizations and a defense against a "loss of identity" in that operation: "In this practice consistency of theories is not only not relevant; it would be outright disruptive" (Tenorth 1987:706).

In the degree in which this organizational framework of formal education grows, it can take on board further tasks, and then often not related to learning¹⁵. And in the same degree in which the institutional organization of education grows in sophistication (differentiation), it is immunized against, or removed from, the possibilities of the direct observation of the eclectic capriciousness of the way in which education deals with the basic problem of "ignorance", and the inescapable observation that this problem ultimately cannot be resolved, i.e. that education is an "impossible mission". All educators know that the problem persists, but they all have learned to direct their uneasiness, which derives from this basic problem to perennial convulsive fits of "education reforms" in which curricula are reviewed, teaching methods are swapped, institutional structures redesigned and national education programs reformulated, all only to be followed by a new wave of education reforms under a new set of political exigencies¹⁶.

All these organized, educational efforts notwithstanding, socialization remains to be decision-making which has to be done by the pupils and students themselves and which is dependent on them, and on their familial environment, more than on anything else (Luhmann 1987:64). We can propose, with respect to such an observation of formal education that the difficulties of legal education are partly not a specific problem of law faculties but that they are the result of the common and typical approach of all forms of organized (formal) education to provide operational solutions to an undefined, and basically undefinable material problem.

1.3.2 *The Misson Statement of Legal Education*

It could be argued that law faculties, in fact and in line with other "vocational" faculties like e.g. medicine, veterinary science or pharmacy, are in a more favorable position than less specialized educational institutions because their mission statement seems to be clearer and is comparatively well-defined by the reference to legal practice. Obviously, this reference helps to limit the organizational scope of educational activities undertaken in law faculties – they could restrict themselves to equip the law student only with that knowledge "that a lawyer needs in practice"¹⁷, or at least, and that seems to happen, they can organize their educational priorities more clearly with regard to this reference. However, this reference to legal practice helps little or nothing to alleviate the basic problem to have to define practically what "legal knowledge" is and to have to find ways to make students know it. Here the reference to "practising the law" is not only of little help but, to the contrary, may compound the educational difficulties of law schools by referring to a social organization which has its own, "home grown" structural deficit to deal with. In this respect the reference of legal education to legal practice as a pool for practical educational knowledge only adds to the precarious eclecticism which is the trademark of education overall.

The practical problem of law or the structural deficit with which legal systems try to come to terms are the references to "order" and/or "justice" in society. Also this is, in view of the "chaos" of the material continuum, a never-ending deficiency and a principally insoluble problem. As "order" and "justice" appear to be of central concern for societies, more so than e.g. education¹⁸, attempts at defining the problem have been more comprehensive, and the declarations of mission statements have been more emphatic. However, conspicuously and typically, all these attempts at defining the problem(s) which law should solve as a social organization have not strayed markedly from the commonsensical notions of the diffuse demands of what the law should do for society, namely provide "law and order", "justice" and "security" (Ziegert 1987b, c, f, 1988a). This nebulous notion of observers what the law is actually doing when it is achieving what it is said to achieve, has been blissfully substituted by the enormous "success story" of the organization of modern law overall which seems to be unrelenting in spite of all the alarmist interjections which have observed an "over-" or even "hyper-legalization" of all arenas of modern life [*Verrechtli-*

chung], an “avalanche of statute law” [*Gesetzesflut*] “overproduction” of lawyers [*Juristenschwemme*] and “mega-lawyering”, and which have in turn, maybe naïvely, called for “alternatives to law”¹⁹. The law is, of course, here to stay because rather than dealing with the questions of “justice” or “law and order” which principally cannot be resolved, lawyers have established an organization which derives its unity/identity by a consistent reproduction of its references to a practical handling of norms (Ziegert 1980, 1983, 1987e), and they have achieved practical results of ordering which can be tendered as achieving (or at least very soon now) “justice” and “order”. Even if the legal system in this way provides “order” and “justice” to some degree, it is justice and order by default. The legal system cannot, and actually does not attempt to control the social effects it has. Also for law, as a dogmatic enterprise just like education, “the consistency of theories is not only not relevant but outright disturbing”. Also law is basically “a solution to an unknown problem arrived at by unknown means” (Bittner 1975). However, as an answer of sorts to the problems caused by the references to the structural deficit of “order” and “justice” the organizational set-up of legal decision-making has outdistanced any other organizational arrangement in modern society when it comes to providing normative certainty and reliability. As an organization, legal practice is extremely successful, and this includes its immunization against information about how effective this goal achievement actually is. While lawyers, as the functionaries of the organization, can be observed to be effective, as is measured in remuneration, prestige and power, we cannot be so sure about the effects of law, and in fact know very little about them (Ziegert 1975, 1983). As it turns out with acratia operations, knowing little or nothing about actual effects need not detract from successful, and in fact for societies vital, organizational reproduction of communicative references in the daily case-loads of the courts of the country²⁰.

A subject matter of such elusive qualities is obviously difficult to handle in an educational environment in which “knowledge formation” and not social action is the prime organizational concern, and which has – as pointed out above – no internal means nor intentions for producing explanatory knowledge in its own right. Different from other “vocational” education environments – such as, for instance, medicine or engineering, legal education cannot, or can only marginally, satisfy its appetite for knowledge by seeking contact with the scientific production of knowledge. Here the “exact” natu-

ral and applied sciences are readily exploitable for medicine and engineering respectively. Legal education is referred more or less exclusively to the organizational, "practical" knowledge supplied by how the legal system observes its internal legal operations.

This has the consequence that the necessary eclecticism of legal education references the (acratic) legal practice rather than the knowledge production of any empirical (natural or social) science – as "ordinary" education does. Evidently such a reinforced reference to practice (action) rather than theory (reflection), i.e. educational practice as legal practice, must stabilize legal education on a high level of dogmatic flexibility (pragmatism). On the other hand, such an organization of references poses the problem of the reproduction of dogmatic consistency of the educational operation even more severely than in "ordinary" education organizations and in education at large.

Our proposition is then, that legal education is even more difficult to organize than education in general, irrespective of the actual performance of legal educators, by its peculiar structural arrangement of the mutual reinforcement of the references to the acratic operations of education and legal decision-making. As a result legal education, more than education in general, is at risk to surrender the orientation of its reproductive activities to external references, here to the legal system which has its own delicate arrangements of how to produce practical knowledge. But legal education shares with educational institutions in general that the "pinch" of it all, i.e. the socialization which actually takes place, is only felt by the students.

2 Students in Law School

The events, then, which are "really real"²¹ in our scenario of legal education are the many situations in which people make decisions, consciously or unconsciously, to accept or reject the expectations of (organized) others to respond in a proposed fashion. Strung together in form of a personal biography (history), these events take him or her into law school. In this perspective, the reality of the socialization histories of law students begin long before institutional legal education sets in, and in fact long before any formal (intentionalized) education is applied to students. The socialization decisions which law students make in law schools are made, above all and le-

gal education notwithstanding, with respect to the personal history of the socialization of students and they derive their consistency for the students from such selective reference. It seems appropriate, therefore, to start an empirical observation of what law faculties are "actually" doing with the observation of the personal histories and the patterns of the socialization decisions of law students. The results of such an observation are contained in a report which we have detailed elsewhere (Ziegert 1988b). Here we are, in concluding, only concerned with the social pattern of the selective reality of legal education.

2.1 The Self-Reference of Socialization Events

We have described socialization here as a process in which individuals refer selectively to the socially constructed environment around them and in which they integrate these references into their consciousness (organized by the psychic system or cognitive system). This process can only be controlled by the learning individual²². More precisely we can say that the consciousness of an individual controls socialization events by her/his decision to select or not to select whenever s/he incurs what is perceived by her/him to be different with respect to what s/he has learned earlier. Such a selection cannot be made by socialization agents (e.g. parents and family members), or educators (e.g. teachers and instructors) for the learner. However, socialization agents and educators can obviously command a preselection of the quality and the intensity of the differences which are allowed to impinge on the individual, i.e. socialization agents can control the environment in which learning is supposed to take place. Seen as a history of socialization decisions, socialization cannot be interpreted easily as a mere accumulation of knowledge and/or skills which, with good luck, increases over the years of the life course of an individual, and which can be tapped on demand, for instance in an examination. Rather socialization appears to be a complex process which derives its consistency for the individual, and only for the individual, by the selective concatenation of socialization events in which the selection is made through the reference to earlier socialization decisions. In this way socialization always refers (back) to its own history of socialization decisions. This means, in other words, that socialization processes are self-referential and allow re-entry to the socialization process as a

whole: socialization is the social memory of an individual²³. When such a complex on-going operation is interrupted, the risk of losing its consistency may jeopardize the process of human development for the learner, e.g. when he or she suffers from an exogenous or endogenous psychopathological defect, or is neglected/rejected by his/her parents.

From such a perspective of learning through differences, which present themselves as a re-entry problem for the individual, we can expect that there are limits both in human physiology and social organization with respect to successful learning, and that it is tempting to deal with the re-entry problem on the social level, on which consistency checks can be organized with a superior capacity of available "memory".

Such a solution for the re-entry problem on the social level can be seen in the attempt to keep variety (differences) low, rather than to attempt solutions on the (individual) cognition level, e.g. by "widening the mind" (i.e. by being more tolerant or "flexible"). It is here where norms have their social function, and the success of socialization is enhanced considerably where normative structures manage to contain, or even reduce the variety of alternatives, i.e. "neutralize" or exclude possible differences²⁴. As follows from our arguments, socialization in a strongly normative environment is not making learning "better" – on the contrary it could be argued that such a normative-"protective" environment makes learning more difficult²⁵ – but it makes re-entry to the (personal) socialization history easier. It is this re-entry to consistency which is experienced by the learner and interpreted by the outside observer, e.g. a possible socialization agent, as a success²⁶ or the proverbial "aha-effect".

The crucial distinction, then, between different courses of personal socialization histories is given with the differentiation of the encouragement or the discouragement provided by the social structure, or the "culture" in terms of human development, to either tolerate learning as a primarily open-ended process of (personal) cognitive systems (encouragement to learn) or to close learning as a highly secure rehearsal of re-entry moves (discouragement to learn).

Encouragement is first of all experienced in the consistency with which the individual (i.e. his/her cognitive system) can link socialization events with each other. Empirically we can distinguish between configurations which promote consistency of socialization histories (e.g. a stable family situation) and those which jeopardize such a consistency (e.g. parental neglect, but also move into a new

neighbourhood, relocation in other school etc). As we have pointed out above, re-entry to the socialization history in the form of non-selection (i.e. "non-learning", e.g. as the endorsement of norms) is also a socialization decision which can be made consistently, and which is achieved by the (normative) closure of the socialization process. Here learning is experienced as a success not only because norm-conformity and obedience are rewarded but because consistency, in the form of trust, confidence, self-assurance, or just blissful ignorance, is a valuable, and indispensable part of socialization histories²⁷.

However, such an encouragement to learn is also experienced in the selectivity with which the individual (i.e. his/her cognitive system) can link socialization events with each other. Also here we can observe empirically configurations which either promote pro-selectively the selectivity of socialization histories (e.g. families in which parent interaction with children is high), or jeopardize, contra-selectively, such a selectivity (e.g. peer-group pressure, or a fundamentalist-religious environment). Selectivity is achieved by the (cognitive) openness of the socialization process to select information (i.e. "learn") rather than to reject selection in socialization events. Here learning is experienced as a success not only because new options can be integrated in socialization histories but because selectivity, in the form of flexibility, adaptability, alertness, interest, curiosity, inventiveness, or just plain playfulness, is valued as the crucial part of socialization histories – as long as "too much" curiosity is not experienced as disquieting by others or out-right dangerous for their "peace of mind".

Formal education in all its forms of historical development appears to be one of many organization vehicles which channel socialization histories. Societies specialize (differentiate) here institutionally the "learning of learning", and organize in this way a selection of socialization processes which are valued according to the (historically) given "terms of trade" of educational organizations²⁸ in the spectrum between closure and openness of socialization processes. This selective operation of formal education organizations (including some references/excluding others) is experienced on the individual level primarily as a competition with other individuals in aspiring to the educationally selected references ("good handwriting", "proficiency in literature") to which s/he is subjected. The "excellence" of individual virtuosi of learning is in fact the result of selection of those particular references which define what individu-

als are seen to excel in; it is given because other references are excluded from the operation of the educational organization. In attributing "excellence" educational organizations confirm their own selectivity.

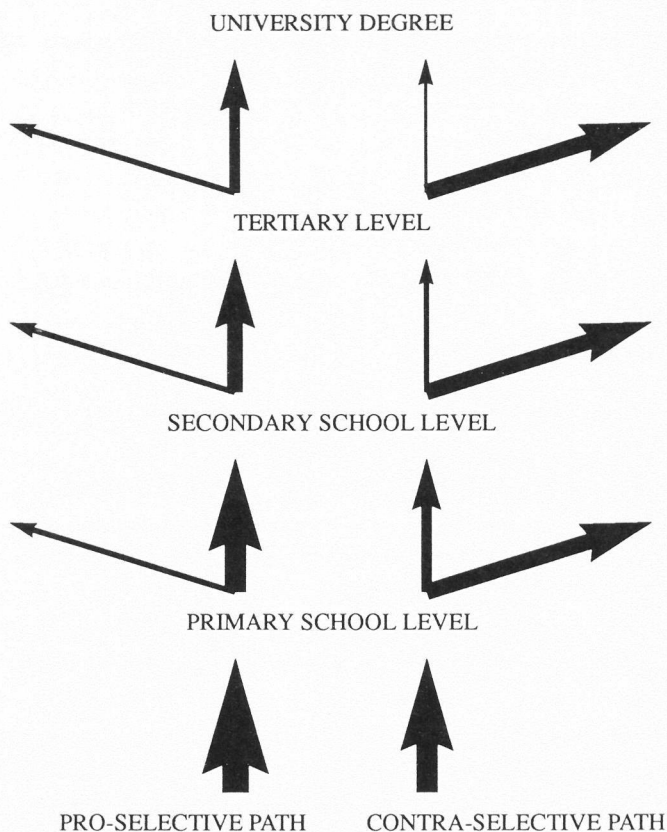
In a historical sense selection is contrary to the official mission statement of the institution of public education, where the indiscriminate inclusion of the whole population through equal access and equal opportunity in the form of a right for every child to receive the same education is a goal. However, factually such a non-selective (or: non-discriminating) operation of formal education meets formidable barriers in all societies. It is organizationally simpler to promise outright selection as a service in the organizational mission statements, and to make recruitment to elites the normative goal of formal education.

Schematically and for modern societies, we can identify such a selectivity of formal education with two types of socialization paths (cf Graph 1).

One path, which we can call pro-selective path, links socialization events for individuals in which selectivity as a socialization decision is encouraged and in which consistency supports all socialization decisions which refer to selectivity. On this path the organizational offer/choice of formal education is, at crucial entry stages, consistent with a socialization history which has continually reinforced pro-selective decisions, and also the selective pressure of formal education is consistent with the socialization history. Individuals experience here the offer/choice of the formal education organization as the "normal" course to take and to stay on that course is the preferred option throughout. In a typified definition we can refer to this group of students as "achievers".

The other path, which we can call contra-selective, links socialization events for individuals in which selectivity as a socialization decision is discouraged and in which consistency supports all socialization decisions which refer to (normative) consistency. On this path the organizational offer of formal education is, right from the beginning and at all possible further entry stages, contra-selectively consistent with a socialization history which has continually reinforced contra-selective decisions. Individuals experience here the offer of the formal education organization, and especially its pressure for selectivity, as an uncomfortable course to take, and opt for other directions, of the socialization path which are more consistent with their socialization histories (i.e. to make money, to get a job, to

Graph 1 *Length of socialisation paths and selectivity of formal education*



support the family of origin, to “stand on own’s feet” i.e. to be independent from the family of origin, to get married etc). In a typified definition we can refer to this group of students as “battlers”. Clearly, the effect of the selectivity of formal education is in this way the reinforcement of stratification or class patterns which already exist in a given society, and it produces this effect the more clearly the more differentiated formal education is and/or the longer it takes. This means that “the longer an education takes the more skewed is the social composition of those who are recruited into it” (Hansen 1986:13). It is remarkable but typical, however, that even in societies where this effect is recognized as a problem, and where its removal has been adopted as a goal for the official mission statement

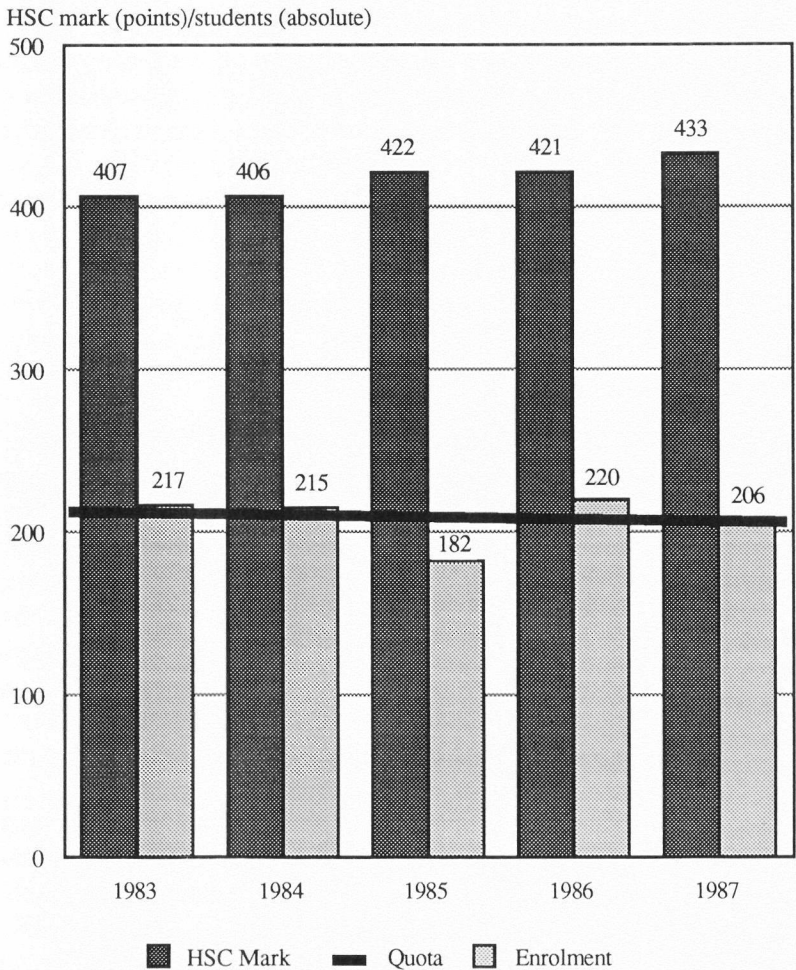
of formal education, most notably e.g. in the Scandinavian and in the Socialist societies, formal education has made only little headway in not operating actually in a selective fashion (Hansen 1986, Ruban et al 1983). Therefore one must expect that it will operate even more comprehensively selectively where the selective effect of formal education is a desirable outcome for educational organizations in order to distill "excellence" (e.g. private schools, selective public schools), or in order to ward off the "contamination" with ideologically suspicious references (e.g. religious schools or educational organizations of political parties) and/or where education organizations are funded in order to provide this selective effect (private schools, religious education organizations, public and private universities with restricted access through central admission quotas and/or fees, etc). As our socialization paths show, however, this selective result of formal education must be seen in all cases as an outcome of the selective quality of (individual) socialization histories which begin much earlier. With respect to these socialization histories, formal education is only one, relatively late and comparatively ineffective environment among many in which socialization takes place.

This observation points into the direction of family structures which give the first (biological) and second, "socio-cultural" births to children, and which include here also the patterns with which children are brought up. These patterns are intimately linked with the social practice of the adult family members and the other siblings, and reflect through the class bias of such a social practice, above all at the work place, a socializing communication with children which basically either nurtures a consistently pro-selective openness(innerdirectedness) of children, as is typically the case in middle and upper-middle class families, or installs a consistently contra-selective, normative closure (outerdirectedness), as is typically the case in lower middle-class and working class families (Kohn 1974, 1977).

2.2 For Example: Sydney University Law School and Selectivity

The Sydney University Law School is an educational institution which due to its historical conditions and according to its mission statement is highly selective. In having retained the monopoly to

Chart 1 *HSC-Aggregate Cut off, Quota Trend and Enrolments. Faculty of Law, Sydney University*



control the recruitment to roles at the top of the legal profession over a long time²⁹, entry to the Law School is highly desirable and difficult. The dynamics of such a selectivity are reflected in the intake of students (cf. Chart 1).

The observation of the HSC aggregate cut-off mark³⁰, the set quota and the actual enrolment of students show that the organizational preference of fixing the quota at c. 210 students per yearly intake of first year undergraduates for the combined degree³¹ has meant that the “market value” of the degree has continually increa-

sed during the observation period (from 407 in 1983 to 433 in 1987, 435 in 1988), while the actual intake of students overall has slightly decreased. This makes the combined law degree of Sydney Law School the second most "scarce"³² course for students in N.S.W., ranking after medicine at Sydney University but before any other courses in any other university or tertiary education organization in N.S.W. We can expect, therefore, that the law student population here exhibits by and large the socialization patterns of a population which has followed, over a considerable period of time, the course of linking consistently pro-selective socialization events, i.e. in our simplified reference the academic "achievers", and that it represents in a "minority group" the socialization patterns of a population who has followed this protracted course of pro-selective socialization against the odds of discouraging environments, i.e. in our simplified reference the academic "battlers".

This means, first of all and following our general statements on the length and quality of formal education paths, that we can expect that the student population here is heavily skewed not only as compared to the general population in N.S.W., but also as compared to the overall student population in N.S.W. But this means also, and also this follows from our general statements on socialization paths, that we can expect that the law students here are a highly homogeneous group of students who have achieved, as a result of their histories of socialization, a high level of socialization skills with respect to both consistency and selectivity in making socialization decisions.

As an acritic operation, legal education refers to this process of selection as producing "excellence" or "quality products". Moreover, legal education dishes its eclectic hotch potch out to an audience which is more than qualified to lap it up and get on with life. This, if any, is the profile of legal education.

Notes

- 1 This paper is a modified version of the introductory chapters to a research report on the student population of Sydney University Law School, based on a study conducted under five consecutive years (1983-1987).
- 2 Cf. John Wade, *Legal Education in Australia – Anomie, Angst and Excellence*, Discussion-paper, University of Sydney, 1987; even if these headlines are used there in an, admittedly, more light-hearted fashion they are nevertheless

- employed as the guiding "sensitizing concepts" of the paper.
- 3 A more widely publicized case in hand on the Australian scene is the official "Pearce Report" on legal education in Australia (*Australian Law Schools. A Discipline Assessment for the Commonwealth Tertiary Education Commission* by D Pearce, E Campell and D Harding, Canberra 1987) produced by legal academics for the (Australian Commonwealth) government in a fashionable "management" attempt to assess the "efficiency" of academic legal education. Here we find an impressively laborious compilation of isolated observation, data and figures related to haphazardly chosen classificatory schemes, but no relevant material which could relate the performance of academic institutions to social structure or on-going social processes, cf. Ziegert 1987d.
 - 4 As we shall demonstrate in the following, socialization is a far more complex social process than and different from education, as used in "legal education". It is precisely such a social process and not the institutionalized arrangement of education in the law school which makes lawyers "different" from other academically trained graduates.
 - 5 We should make clear, right from the beginning, that we do not share the observation that legal education and legal research are basically a-theoretical, or non-theoretical. Neither can we draw an empirically well-founded line between "skills" and "knowledge" as a distinction which permeates the legal education discussion, often with the merely classificatory assertion that the former is "less" academic and more practical (cf Pearce et al 1987:Vol 4 135 ff). Rather we differentiate between, on the one hand, a specific, eclectic and dogmatic theory of legal practice, as the meaningful frame of reference for the systematic production of knowledge about the law to which internal observers of the legal system (i.e. generally: lawyers) refer – often in the assumption that it is a theory of law – and, on the other hand, other theoretical framework for producing knowledge about law to which those observers refer who are outside the legal system (i.e. generally: non-lawyers).
 - 6 Cf infra section 1.3.1 on the problems of education generally.
 - 7 We shall argue that such communicative processes are the (only) basis for the reproduction of social life and we call the self-reproductive units which are emerging as a result "social systems". This includes that principally all units, with no apparent hierarchical or other order between them, communicate with others through "outside references" for any one of them. In using the term 'system' we are mainly concerned with making the best use of the progress which has been made by modern general systems theory (Luhmann 1984) and which, especially when used in jurisprudence (Ziegert 1975, 1980), goes beyond epiricist accounts of law as the operation of social control, e.g. in terms of the 'semi-autonomous social fields' recommended in sociology of law by Moore (1973) and Griffiths (1986), then confining the term exclusively to the description of the normative ordering of such units.
 - 8 The great risk of using such a picture is that the fundamental feature of social structure, communication, appears in it as a static enclosure. While such an impression is not altogether wrong – communicative structures can be traps – any possible static quality of social structures is itself the result of communication. In strict analogy to our picture of Chinese boxes we would have to imagine several stacks of boxes with each sub-unit belonging to separate stacks. Evidently, social systems communication surpasses human imagination.
 - 9 More precisely, these are self-reproductive operations because social systems "survive" from day to day only by re-organizing continually their internal structure under the control of the references to the consistency of the, already

existing, structure. This self-reproductive process is discussed in sociology under the heading of "autopoiesis" (Luhmann 1984, 1985, Ziegert 1987b).

- 10 We will argue from here and in the following that a "discipline assessment", such as undertaken by the Pearce Commission in Australia (cf supra Fn 3), or any other attempt to measure educational success is not only technically difficult but in principle impossible. Results of such attempts are invariably descriptions of organizational performance, mainly in economist terminology, but not a qualification of education which must remain elusive.
- 11 From Greek 'akrasia', originally in the moral meaning of being without self-discipline, or lacking control over one's virtuous behaviour (Luhmann 1987:64).
- 12 NB. the operation of dealing with declared structural deficits cannot be interpreted as appearing as "irrational", "wrong" or "false" in the eyes of observers: "(These actions) are designed as a 'causal scheme', and they serve their purpose. Nevertheless, they are based on some kind of beneficial self-deception without which action may be impossible. This self-deception subdues any attempts to collect more, and more accurate information which actually would be necessary – it reduces the complexity of causalities and so can draw a veil over all the adverse circumstances" (Luhmann 1987:64) (my translation from the German original).
- 13 In historically more refined (but also reduced) terms such a mission statement reads for example (here Royal Charter of the University of Sydney, 1858): "Now know ye that we, taking the promises into consideration, and deeming it to be the duty of our Royal office, and for the advancement of religion and morality and the promotion of useful knowledge to hold forth to all classes and denominations of our faithful subjects, without any distinction whatsoever, throughout our dominions encouragement for pursuing a regular and liberal course of education, and considering that many persons do prosecute and complete their studies in the Colony of New South Wales, on whom it is just to confer such distinctions and rewards as may induce them to persevere in their laudable pursuits..." (University of Sydney, Calendar 1987, p 107).
- 14 Cf the special function of such an institution "to grant or to confer" degrees on individuals in our example of the Royal Charter of the University of Sydney, Fn 16.
- 15 For example the "advancement of religion and morality" in the University of Sydney Charter, or supply with status in a society through certification of formal education (degrees); in this respect the course of the industrialization of Western societies through education, mainly gaining momentum in the 18th and 19th century, is currently followed by the societies in Asia and Africa, if e.g. the investment in a "good" (formal) education of daughters optimizes the (endogenous) marriage options for families (Abdelrahman and Morgan 1987). However, such an acritically-uncontrolled side-effect of formal education (supply with prestige) leads in turn to a public which is increasingly susceptible to and necessary for the widespread communication of new knowledge-concepts, and lies at the basis of so-called "paradigm changes" in scientific theory. Paradigm changes are in this light not so much the achievement of innovative scientific research but the achievement of public education, or more precisely the inclusion of a larger public for the communication with reference to scientific knowledge production.
- 16 For instance in times of public expenditure restrictions, educational institutions can be asked to reorganize under the aspect of "social relevance"; this seems to be a reference to another, or at least reformulated, structural deficit (what is irrelevant for a society?) in addition to the "ignorance" problem whi-

- ch clearly sets off a new series of acrativ reproductive activities: organizing "social relevance".
- 17 Significantly law faculties and law schools cannot, and in fact do not, do this because there is no established knowledge as to what the quality of knowledge is that a lawyer needs in practice – but whatever it is, law graduates would like to have learned it in law school once they are out in practice. Cf Pearch et al 1987, Vol 4, and results from a survey on the opinions of graduates after having entered the legal work force, pp 135-204.
 - 18 Educationists contend, therefore, that law as a system of practical knowledge while having the same problems of eclecticism and reference to practical interests, is easier to identify and promote (including the interests of the professionals) than education at large because society and, especially state organization refer more centrally to this type of practical knowledge production (Tenorth 1987:699).
 - 19 Which, in fact and ironically, are constituting only a further differentiation of the legal system in providing it with new sets of case-loads, new groups of "clients" and new fields of professional activities (Abel 1980, Ziegert 1987b).
 - 20 The reference to the reluctance of court administrations to keep meaningful statistical records about the actual results of court actions, and the reference to the difficulties of the administration of justice organizations to deal with information concerning the execution and/or implementation (e.g. in relation to the penitentiary system, or with respect to maintenance orders or debt collecting) may suffice here to underline this point (Ziegert 1984, 1987a). Most socio-legal researchers will agree that criminal law courts statistics are extremely unsatisfactory (and certainly unrelated to the question of the "effectiveness of law") and that meaningful civil law courts statistics are practically non-existent. In this respect the response given by the lawyers in the French appellate courts with regard to the question of how effective maintenance orders are, could be a legal universal: they have the impression that "the non-compliance with maintenance orders has reached a worrying level" but they "have no or only very little information about compliance in civil matters" (Boigeol 1987:61). This non-information will, and of course and typically does not stop judges from making further orders.
 - 21 in the sense of Clifford Geertz and his anthropological observations of the cultural cosmos built on cock-fighting in Bali; in this culturally constructed cosmos the fighting cocks are the only "really real" reference (1979:213).
 - 22 Human development scholars describe this crucial "teachable moment" more melodramatically: "When the body is mature enough, the culture is pressing for and the individual is striving for some achievement, the teachable moment has come." (Duval 1988:131).
 - 23 In a similar sense, from a neurological point of view, memory is not a mere (static) data storage but a consistency check (Luhmann 1987:337) and an indistinguishable part of the cognitive system which has to be activated in every new instance through sensual input in such a fashion that it allows re-entry to its history of earlier experience through this consistency check (Baecker 1987:520). It is, of course, this interpretative evaluation of sensual inputs (in contrast to the poor sensual outfit of humans compared with (other) animals) which accounts for the evolutionary "superiority" of the human brain compared with that of other living organisms and which can only be achieved by a massive increase of the evaluatory neurons in relation to the sensory neurons (this relation is between 1:1 and 10:1 in the lower vertebrates and between 100,000:1 and 1 000,000:1 in humans, Roth 1987:413). Clearly the "social dimension" of humans is directly linked to this evaluatory potential of human

brain development and is factually an expansion of the individual "memory", i.e. an enormous increase of available references which society at large provides in the events of "consistency-checks".

- 24 This is most clearly evident in environments like families with strong family traditions, religiously oriented schools, traditional professional organizations, trade unions, ethnic minority groups, etc. but is generally the case with all forms of social organization as they obtain their stability at the expense of reducing normatively the actual complexity of what is going on in "real life".
- 25 As e.g. in the extreme the development of psychopathological eating disorders (anorexia, bulimia), predominantly of daughters, in the environments of excessively protective middle-class families.
- 26 Probably because this success is so easily identified in circus animal acts they are so appealing. Similarly and typically examinations do not actually measure learning potential in students but only their re-entry skills. Consequently rote-learning/cramming in order to perfect re-entry automation is an effective normative design for students to reduce the re-entry pressure by habitualization rather than by actual (open-ended) learning. It is often argued that lawyers typically need this type of re-entry skills in their professional practice, and that examinations as an assessment of the learning performance of law students are not only justified but valuable in this regard.

We are inclined to argue that, apart from the fact that it is easier for the educational institution and the educators to operationalize and measure "learning success" normatively through examinations (also here by keeping variability low and (personal) interpretative consistency high, cf animal acts supra), examinations show above all the considerable social competence of the law student population to adjust effectively to this type of test, and that the legal practice itself, as any other social practice, provides the lawyer with a different but then much more powerful habitualization which cannot be learned by cramming for law school examinations. We discuss this issue of the social competence of law students shown in cramming with the help of our data material (Ziegert 1988b).

- 27 In this way the subjective factors of self-esteem seem to be more incisive with respect to the life satisfaction of individuals than the 'objective' factors of educational and occupational attainment, especially in environments which do not "live up to the expectations" which are induced by references to the value of formal education as a precondition for good employment prospects, i.e. in rural and deprived areas (Wilson and Peterson 1988).
- 28 In order to make the context of social differentiation clearer sociology distinguishes between institution and organization. The institution of education is referred to in the sense of generally accepted forms of "doing things with education" (e.g. public education, primary education, etc.) and education organizations are referred to as the empirically observable separate units of educational operations (e.g. Sydney university, Greenwich High School, Illawong Primary School, Canberra College of Advanced Education, etc.).
- 29 In the setting of the legal system in N.S.W. this means above all recruitment as a practitioner (solicitor) to the city law firms, recruitment as a barrister and, eventually – at the top of the prestige scale – recruitment as a judge in the higher courts of N.S.W. and of Australia (Federal Courts and High Courts). On all these counts graduates of the Sydney University Law School are, as yet, disproportionately successful (Neumann 1973, Sexton and Maher 1982, Pearce et al 1987).
- 30 The High School Certificate aggregate formula in N.S.W. computes performance during the last year (12) in High School and in the final examinations

out of a maximum of 500 points. The cut off mark can be seen as the "market value" of a degree, in that it is the official rate at which the central admission agency (Universities and Colleges Admission Commission) measures the competition of students for available places in courses as given by their preferences.

The history of the "reforms" of the HSC is by itself an example for the point made above, cf section 1.3.1, about the indirectness of educational reforms caused by the structural deficit of learning: following the Wyndham Report, 25 years ago, the HSC was intended to select for tertiary education entry, which was followed, in 1983, by the Swan-McKinnon Report which recommend the HSC as a general school leaver's certificate and scaled down the exclusive "academic" aspirations of the 6 high school years. As a result the HSC mark, as administered in 1986 and 1987, contained three components, the final examination marks, a school assessment mark for performance in years 11 and 12, and a mark for the school-assessed vocationally oriented "other approved studies" (like child care, photography, etc). The University of Sydney responded to this broader based assessment with a self-styled assessment procedure of "scaled aggregates" to the effect of giving more weight to the "academic" subjects of high school leavers. The Liberal government, elected in 1988, is set to adopt this scaling method as the general HSC assessment procedure.

- 31 I.e. Bachelor of Arts/Laws, Economics/Laws, Science/Laws. The studies for this degree constitute by far the most important sector of the overall student population at the law school.
- 32 In economic terms of "market availability", which means in "real" terms either most difficult or most attractive to enroll in.

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