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Rights at School

Regulation in a Changing Normative Field

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RIGHTS AT SCHOOL – REGULATION IN A CHANGING NORMATIVE FIELD

1 Introduction

Bureaucrats are known to sabotage public policy and laws are occasionally described as ‘paper tigers.’ Both public policy and law as instruments of social control and social change have been argued, discussed and researched yet new public policy programs are introduced to replace old ones and legislators continue to pass new laws.¹

Sweden as many other countries has looked to law, policy and regulation to make schools safe from abusive behavior. This contribution analyzes why law and regulation fail in this endeavor. Reactions to processes of globalization by deregulation, increased privatization of the public sector as well as decentralization of responsibility to local levels of government together with changes in legislation from detailed rules to goal steering, makes the legal regulation of the social dimension in everyday life at school an interesting area for analysis of the theory of law as normative patterns in a normative field.²

The theory of law as normative patterns in a normative field, proposed by Anna Christensen, is a functionalist theory. The main assumption of the theory, as interpreted by Ann Numhauser-Henning is that normative fields reflect and codify basic normative conceptions and practices in society. Thus when Christensen attempts to analyze law within a framework of the social

¹ A Etzioni, ‘The political economy of imperfect competition’ (1985) *Journal of Public Policy* Vol 5 Issue 2, 169–186; R Baldwin, *Rules and Government* (Oxford, Clarendon Press 1995); I Ayres and J Braithwaite, *Responsive Regulation: Transcending the deregulation debate* (Oxford: Oxford University Press 1992), N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (New York: Oxford University Press 1998), R Baldwin and J Black ‘Really Responsive Regulation’ (2008) *Modern Law Review* Vol 71 Issue 1, 59–94; J LeGrand, *Motivation, Agency, and Public Policy: of Knights and Knaves, Pawns and Queens* (Oxford: Oxford University Press 2003).

² A Christensen, *Hemrätt i hyreshuset* (Stockholm: Juristförlaget 1994), A Christensen, ‘Normative Patterns and the Normative Field: a post-liberal View on Law’ in T Wilhelmsson and S Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot: Ashgate 1999); A Numhauser-Henning and M Rönmar (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford: Hart Publishing 2013)

dimension, she strives to reveal the very cultural values essential for the existence of society. Christensen's theory of law sees normative fields in various areas of law as structured by competing basic normative patterns within the field. Christensen identifies three competing normative patterns: 1) protection of the establish position; 2) the market-functional pattern; and 3) the just distribution pattern.³

When law is treated as an empirical fact and not an absolute norm, the significance of regulation becomes questionable. Then again, according to Christensen's theory of law, competitive normative patterns hold a normative field in a state of flux because of their built-in tension. Between themselves the normative patterns become a force propelling change. What might look like a legal or regulation led process of social change might well be a result of an upheaval of basic normative patterns within the normative field.

According to Oliver James, regulation inside government (RIG) looks at regulators that set standards for public sector organizations, monitors them and seeks to bring about compliance with those standards.⁴ Regulation in schools is intended to curtail the leeway allowed school administrators for discretionary behavior.⁵ Christensen's theory of law suggests that the very idea of RIG, if not aligned with dominant normative patterns in the normative field is bound to fail.

Special characteristics of Sweden make it an internationally interesting case for analysis of abusive behavior at school. While many other countries share

³ A more detailed explanation of the theory of law of normative patterns in a normative field can be found in the Introduction to Numhauser-Henning and Rönnmar (2013).

⁴ O James 'Regulation inside government: Public interest justifications and regulatory failures' (2000) *Public Administration* Vol 78 No 2, 327–343; C Hood and C Scott, 'Regulation Inside British Government: The Inner Face of the Regulatory State?' (1996) *Bureaucratic Gamekeeping Discussion Paper No. 1*; C Hood, C Scott, O James, G W Jones and A Travers, *Regulation inside government* (Oxford: Oxford University 1999); C Hood, O James, G W Jones, C Scott and A Travers, 'Regulation inside government: where new public management meets the audit explosion' (1998) *Public Money and Management* Vol 18 No 2, 61–68; C Hood, O James and C Scott, 'Regulation in government: has it increased, is it increasing, should it be diminished?' (2000) *Public Administration* Vol 78 No 2, 283–304; M Lodge and C Hood, *The Politics of Public Service Bargains: Reward, Competency, Loyalty – and Blame* (Oxford: Oxford University 2006); M Lodge and C Hood 2010, 'Regulation inside government: retro-theory vindicated or outdated?' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford: Oxford University Press 2010) 590–611.

⁵ In 2007 Sweden was the subject of an OECD Review of Regulatory Reform. The review looked specifically at the area of regulatory reform and the environment or where market failure or other public policy objectives such as health and social concerns call for attention by public authorities. Thus although the review was more interested in regulatory of RABC (Regulation applied to businesses and citizens) than RIG, there are policy interventions with respect to the environment that are shared with other public policies that are not market-driven, such as social and equity issues. (OECD 2007:9)

some of characteristics of Sweden that make it special, it is the combination of each of the following that contributes to an empirical contextual backdrop for analysis of why law fails: 1) Decentralization of power and responsibilities to the local level; 2) Delegated responsibility to agencies for implementation; 3) Increasing role of courts; 4) Co-operative (rather than adversarial) relationship between regulator and regulatee; 5) Importance of consultation and stakeholder participation; 6) Introduction of independent schools provided by private actors and financed by tax revenue.

A brief look at the background for recent change 2010 of Sweden's Education Act shows that the justification for change of the Education Act was defended by the national Swedish government on pragmatic grounds and situated contextually in several of the characteristics mentioned above. The Swedish government pointed out that a) the prior Education Act of 1985 was out of date and did not reflect actual conditions in the school sector, above all as regards the position of independent schools; b) the new Act was better adapted to a management by objectives approach in the school system; and c) the new Act was better adapted to the current division of responsibilities between central and local government. Moreover, the new Education Act d) had a clear and simple structure with rules that as far as possible are common to all types of schools and the legal bodies responsible for schools. These justifications for changing the Education Act, twenty years after transferring responsibility for education to the municipalities refer to a period where policy, goals and regulation were not sufficient to bring about equal education in a safe environment at all schools in Sweden.

I argue that the latest changes in the Education Act bring the effect of law back to the same situation that existed 50 years ago. Schools answer as to why they cannot curtail bullying and abusive behavior by blaming the student or the family.

My analysis starts with examining the concept of policy and social regulation within the RIG literature. I look at the arguments for developing government policy within school environments. Even if arguments can be found situated in utility goals of health and safety, they also appeal to social justice, democratically shared values and human rights. Part two of the contribution deals with the central governments legitimacy in establishing national goals for schools.

The third and fourth part of the contribution looks at the development of school policy, legislation and regulation. The expansion of the field of responsibility at the local level is examined as well as government tools used

to regulate schools. The number of formal complaints sent for resolution to the School inspectorate (SI) and a brief overview of increasing number of complaints is presented. The complaints about abusive behavior at school as well as the responses by school administrators from 350 cases are presented for the patterns shown in framing and processing of complaints. The patterns can be seen as empirical indicators of competing normative patterns within a changing normative field.

The concluding section of the contribution discusses the expanding role of the intervention of the nation state in the social dimension of everyday life and the limitations of law and regulation. The central argument of the contribution is framed within the hypothesis of the decrease in power of the nation state. It is argued that extending the power of regulative agencies renews the question of the role of state governance. Absorbing conflict by increase use of regulative agencies diffuses difficulties of regulating abusive behavior. However, the consequences are that the increased protection of the legitimacy of the state is obtained at the expense of unintended consequences being negotiated within the shadow of the law. The unintended consequences reflect changes in the relationships of competing normative patterns present within the social dimensions of regulating schools. Using Christensen's theory of law allows us to take a focus off a discussion of the power of the state or the reformulation of the structure of regulation and return to social processes of upheaval between the competitive normative patterns present in the everyday life of schools. In order to accomplish this, I see a necessity to take a step beyond Christensen's theory of law and normative functionalism to discover why values assumed in law are not realized.

2 Public policy and social regulation

The elusive nature of public policy as a concept results in a wide variety of definitions. Peters definition of public policy includes even the effects of policy in the definition, 'the sum of government activities, whether acting directly or through agents, as it has an influence on the life of the citizen.'⁶

Despite the elusiveness of public policy, both public policy and regulation are governmental interventions and must be justified. Current literature shows a tendency in social science arguments to use Jürgen Habermas elaboration between three types of argumentation for using or not using policy that are

⁶ B G Peters, *American Public Policy: Promise and Performance* (Chappaqua NY: Chatham House 1999).

based on different rationality principles of justification. Justifications for policy can be based on the logic of an action, that is on its utility and is typically used in explaining regulations applied to businesses and citizens (RABC). Ethical and moral arguments are based on normative appropriateness of an action and therefore are depicted as related to rationality based on the logic of appropriateness.⁷

Justification of public policy is crucial for the legitimacy of government action. Ethical and moral or normative arguments are looked at as pertaining to the ‘input’ of governance while utility or pragmatics arguments relate to the ‘output.’ We use the term ‘governance’ to mean ‘new theories and practices of governing and the dilemmas to which they give rise’.⁸ Much of the literature concerning justification of government intervention or development of policy and regulation is focused on the changing nature of state-society interactions and the legitimacy of supranational organs such as the European Union Commission and the European Court of Justice.⁹ The current interest in practices of governing points out that there is a shift from input-oriented focus to an output oriented focus.¹⁰

The legislative goal of providing an education for students in a safe environment is a normative goal and based on what are assumed principles valued in society. According to Christensen’s theory of Law, intervention of the law is following normative patterns that exist within the normative field. As such, we would expect compliance with the law and with the actions of regulative agency.

Two laws, the Swedish Education Act (skollag 2010:800) and the Swedish Discrimination Act (diskrimineringslag 2008:567), are the legal instruments

⁷ J Habermas, ‘On the Pragmatic, the Ethical, and the Moral Employments of Practical Reason’ in J Habermas, *Justification and Application: Remarks on Discourse Ethics* (translated by C Cronin) (Cambridge: MA: MIT Press 2013); J Flynn, ‘Communicative Power in Habermas’s Theory of Democracy’ (2001) *European Journal of Political Theory* 3 (4), 433–454.

⁸ M Bevir, ‘Public Administration as storytelling’ (2011) *Public Administration* Vol 89 Issue 1, 183–195.

⁹ F W Scharpf, *Governing in Europe: Effective and Democratic* (Oxford: Oxford University Press 1999); A Moravcsik and A Sangiovanni, *On Democracy and the “Public Interest”: in the European Union* (2003) CES Working Paper, No 93 (working paper).

¹⁰ R Lafores and S Phillips, ‘Input and output Legitimacy in Governance Regimes’ (Work-in-Process), paper presented at the Canadian Political Science Association Conference, Victoria, Canada, June 2013; M Crozier *The Bureaucratic Phenomenon*, 2nd edn (New Brunswick, NJ: Transaction Publishers 2010); F W Scharpf, *Governing in Europe: Effective and Democratic* (Oxford: Oxford University Press 1999); B G Peters, *Politics of Bureaucracy. An Introduction to Comparative Public Administration*, 6th edn (London: Routledge 2009); B Rothstein, ‘Creating Political Legitimacy: Electoral Democracy Versus Quality of Government’ (2009) *American Behavioral Scientist* 53 (3): 311–330.

designed to protect children and students from discrimination and degrading treatment. In essence, the responsible school legal authorities or charged with seeing that prohibitions against discrimination and degrading behavior are observed.

3 Changes in policy and school legislation in Sweden

Sweden is known as one of the Social Democratic models of the Welfare State.¹¹ Basic social securities are available to all residents of Sweden. Compared to other countries social rights are well developed in Sweden. A model of ideal-typical education systems, developed by Hudson and Lidström (H/L), termed policy paradigm¹² and used by Lundahl et al sketches out a cultural framework governing educational policy process and regulation.¹³ The Hudson/Lidström model of educational systems is based on dimensions of 'value' and 'instrumentality'. This can be compared to the justifications of state policy intervention as either normative appropriate or utility directed discussed above. The poles in the H/L model construction are based on a pole that runs from Comprehensive versus market values and the other dimension from social/cultural versus economic functions. Lundahl et al mean that the four ideal education systems constructed by the H/L model yield two ideal types of educational types, – the broad strategy education (BSE) and an the economic élite education (EES) – which correspond to what can be seen as social democratic and neo-liberal education policy paradigms.

Lundahl et al argue that as a heuristic device, Sweden fits well within the 'broad strategy education' policy paradigm. They point out that Sweden's social democratic policy focuses on equality, fairness and public service, and providing equal educational opportunities to promote social justice. There is little individualization, streaming and tracking in Sweden's comprehensive education but instead an emphasis on social cohesion.

Christensen's theory of Law and competing normative patterns fit very well in both ideal types recognized in the H/L model of the cultural framework identifying policy paradigms. It also functions well with Lundahl et al argument that Sweden and educational policy of tradition belong to the BSE system

¹¹ G Esping-Andersen, *Welfare States in Transition – National Adaptations in Global Economies* (London: Sage Publications Ltd 1996).

¹² C Hudson and A Lidström (eds), *Local education politics. Comparing Sweden and Britain* (Basingstoke, England: Palgrave 2002).

¹³ L Lundahl, I Arreman, A-S Holm and U Lundström, 'Educational Marketization the Swedish Way' (2013) *Educational Inquiry* Vol 4, No 3, 497–517.

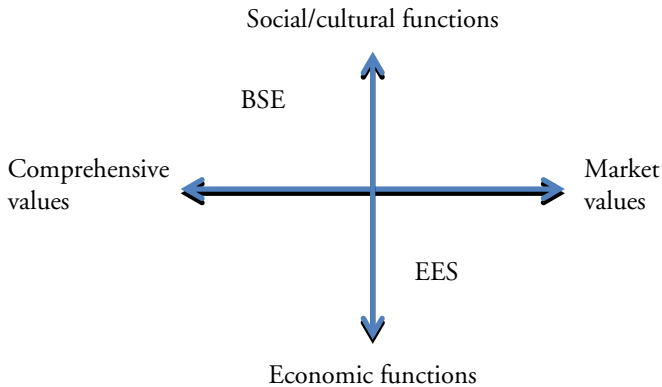


Diagram 1:
Ideal Education System (based on Hudson and Lidström)¹⁴

according to principles of a Social Democratic welfare regime but are being strongly influenced by what they term internal and external marketization more likely to be found in liberal welfare states EES system.

Christensen's theory of law contributes to an understanding of the process of change within the normative fields. Applying Christensen's theory of law would say that tension between normative patterns of market-function compete with patterns of just distribution. Lundahl et al concludes that Sweden has traveled far in both external and internal marketization but that the old social democratic comprehensive paradigm is still visible. We can trace some of the changes in Swedish education policy below. By framing the changes in relationship to legislating and regulating against abusive behavior, we can clearly see where the tug between competing normative patterns are not only pushing Sweden into another policy paradigm but also are creating difficulty for old standards and established authorities to maintain their position within schools.

¹⁴ C Hudson and A Lidström (eds), *Local education politics. Comparing Sweden and Britain* (Basingstoke, England: Palgrave 2002). The Broad Strategy Educational model can be seen as focusing on leveling out differences, school for all, social equality and inputs while the Education Élite Strategy focuses on social advancement, individualization, choice and outputs. See C Hudson, 'Governing the Governance of Education: The State Strikes Back?' (2007) *European Educational Research Journal*, Vol 6 No 3, 269.

3.1 Basic legal structure of Swedish schools

Schools in Sweden are governed by the Education Act (2010:800). The Education Act is formed as a frame law specifying the national goals of education. The Education Act (passed by Parliament) is not the only regulating instrument in Sweden. There are also ordinances. An ordinance contains regulations and is decided on by the government.¹⁵ The National Curriculum is an ordinance. The curriculum gives the fundamental goals and guidelines for the school. Among other things, the curriculum includes norms and values, knowledge goals and pupils' responsibility and influence. The curriculum includes syllabuses that set up the goals for teaching in each specific subject. These two bits of legislation, the Education Act and the National Curriculum, are surrounded by a variety of rules, regulations and guidelines issued by the Swedish National Agency for Education (SNAE). In addition the SNAE is also charged with producing the Code of Statutes regulating daily procedures within the school. Every municipality is required to have a school plan that shows how municipal schools are to be organized and developed. The municipal school plans should state what the municipality is thinking of doing to ensure that schools achieve the national goal.

Sweden introduced obligatory national elementary school in 1842 and in 1861 commissioned an elementary school inspector and later an Elementary National School Board for supervising the schools. In 1958, the Elementary National School Board set up a County School Commission for a better supervision of schools. In 1991, Sweden municipalized its compulsory school system and abolished both the County School Commission and the Elementary National School Board replacing it with the Swedish National Agency for Education.

3.2 Municipalisation

Regulation of the Swedish schools changed with municipalisation in 1991. The Swedish state's ambition was to de-centralize and to de-regulate the schools. The argument by the Swedish government was that it was not possible to detail regulate schools at a national level. The Swedish state should not govern schools through the use of centrally instituted laws but instead by the use of goals that should be reached by each school. By the middle of the 1990s a new curriculum for the compulsory school system was introduced. The new curriculum did not

¹⁵ There are a number of ordinances for the compulsory school including an ordinance on the child's and pupil's participation in the work of establishing a plan for equal treatment.

have any directives about what teaching should contain or how teaching should be organized. Instead the 1994 National Curriculum described the goals and the results that should be reached by the schools. The National Curriculum allowed for substantial leeway on the part of the local municipalities. Fulfilling the national goals in each local municipality would be nationally controlled and evaluated.

This rather radical change in the organization of Swedish schools was accompanied by a parallel development to increase rights of participation and choice for the users of schools (parents and students). The Independent School reform of 1992 resulted in a dramatic increase in the number of independent schools. The Independent School reform also introduced the use of a voucher system. A student that chooses an independent-school would take with him the amount of money his education cost the taxpayer from the municipal budget. This was thought to promote the free choice of the citizen but from another perspective was seen as opening the gates for a new way of resolving conflict at school. If a student was having problems at school, it could be solved easily by changing schools.

3.3 Regulation

De-centralisation of the responsibility for the Swedish school system from a national to a local level also brought about a de-facto de-regulation of schools. It was originally thought that the Swedish state could control schools through setting national goals for schools and regulating the achievement of the goals through follow-ups, evaluation and supervision. It soon became apparent that in reality there was very little national supervision and what supervision was carried out was usually a reaction to something drastic that had occurred. Both the Swedish parliament and the government wanted a better supervision of the schools and eventually the SNEA expanded what was a minimal supervision.

A step-by-step minor increase in national control was not acceptable by the new Swedish government that came into power 2006. School results for Swedish pupils in international comparisons had begun to slide; there were worries that schools varied in quality and national results both within and between the different municipalities were difficult to explain. The government decided that it was necessary to create an independent agency charged with School inspections. SNEA who had responsibility for producing universal norms for all schools both municipal and independent and also had the responsibility for the national school development was deprived of the responsibility of supervising the schools. The new national agency, The

Swedish Schools Inspectorate, (SSI) since 2008 is the agency charged with ensuring that the municipalities and the independent schools comply with school legislation.

4 Policy, law, bullying and abusive behavior

It was over 50 years ago, in 1958, that all forms of corporal punishment were abolished in Swedish school and 40 years ago Sweden started its fight against bullying in Swedish schools.

Views on bullying, its causes and how it can be tackled in schools can be found as early as 1969 in the National Curriculum.¹⁶ The problem identified at that time was not defined as bullying but that certain students were isolated from others. The solution was thought of as being best handled by the school's health personal and the student.

The concept of bullying showed up first in the rules governing the National Curriculum in 1980. The National Curriculum legislated that schools create a school environment free from *violence and harassment*. Specifically, bullying among students was made visible. The remedy was to change the classroom through collective work forms, increased student democracy and teacher training. But even if anti-bully practices should be seen as a concern emanating from classroom behavior, curative work was still thought of as within the province of the school's student health personal or by a special group formed together with student health personal to deal with individual cases of bullying. Such groups were termed the school anti-bullying team.

The Education Act from 1985 had been amended several times in the direction of increased clarity concerning the school and employees of the school in their work with anti-bullying and abusive behavior. In 1993 the law was amended and the concept of 'abusive behavior' was formally introduced. The law stated that: *Specially, those employed within the school shall endeavor to obstruct every attempt from students to expose another for abusive behavior*. A new National Curriculum in 1994 stated that the schools' responsibility was to work actively in the prevention of bullying, harassment and discrimination. Teachers should be attentive and in consultation with other school personal take the necessary measures to prevent and obstruct all types of abusive behavior. At this time bullying had become a part of a bigger area of problematic behavior at school. Abusive behavior was used as a more

¹⁶ Lgr 69, Läroplan för grundskolan 1969. Skolöverstyrelsen, Stockholm.

encompassing concept outlawing all behavior that could be thought of as degrading, and in some way affecting the dignity of the student.

In 1999 the 1985 Education Act was amended once again by adding that school employees should actively obstruct all types of abusive behavior such as bullying and racist behavior. By introducing the concept of abusive behavior into the Education Act in 1993 and by clarifying the responsibility of employees of schools in creating an environment without abusive behavior (1999), control of abusive behavior was no longer an intern matter for the school but had become a legal concern.

In 2006 Sweden went one step further and introduced a new law, Children and Student Protection Law (2006:67) prohibiting discrimination and other abusive treatment of children and students. This law increased and clarified the responsibility by law of the local authority for schools in relationship to children and students. For the public school this increased the focus on the local municipality and for independent schools the responsibility of the school owner and the school's board of directors.

If the responsible authorities did not take active measure against discrimination and other abusive behavior they were libel to be sued for damages. Most schools only had an action plan at their schools against bullying. The 2006 law demanded that the every school in Sweden also had an Equal Treatment Plan where the school was obligated to state a plan for their systematic work against discrimination, harassment and other abusive behavior.¹⁷

The current legal steps against abusive behavior are present in Education Act from 2010 (2010:800) effective in July 2011 and the Curriculum 2011.^{18 19} The Education Act specifies that if a teacher or other employee receives informa-

¹⁷ An ombudsman position was also created at this time, the Office of the Children and Student Ombudsman (BEO). The ombudsman was formally the person that could file a case with the court on behalf of a student to sue responsible authorities for failure to take active measures to stop or prevent abusive behavior. BEO became a part of the Swedish School Inspectorate in 2008.

¹⁸ Lgr 11, Läroplan för grundskolan, förskoleklassen och fritidshemmet. 2011. Skolverket, Stockholm.

¹⁹ As of January 1, 2009 the Child and Student Protection law was replaced by the Discrimination Law (2008:567). The Discrimination Law combined and replaced seven different laws against discrimination (gender, gender identities, ethnic belonging, religion, disability, sexual preferences and age). The sections of the Child and Student Protection law that referred to grounds of discrimination were transferred to the Discrimination Law and those the governed other abusive behavior were written into a new section of the Education Act. In this way the law separates bullying and abusive behavior by reason of discrimination and by reason of other abusive behavior. Abusive behavior in general includes the concept of bullying but is a wider concept than bullying. Abusive behavior does not have as a condition that it has happened more than once. One occasion is enough for an individual to experience that his dignity has been abused.

tion that a student believes him/herself to be a victim of harassment or other abusive behavior the school employee is obliged to report this to the principal. The principal in his/her turn is obliged to send the information to the municipality or school owner. These laws were in the earlier legislation but are more clearly stated. The aim is to put even stronger responsibility on the schools' employees to increase their preventive work against bullying and abusive behavior in schools.

The Curriculum 2011 strengthens student's rights against abusive behavior even further. The Curriculum defines the goal of the school as responsible to see to it that every student and employee repudiates the behavior of any individual that is repressive and/or abusive. The curriculum also states that all employees in a school are to actively work against discrimination and abusive behavior of an individual or of a group. A teacher together with other employees is now obliged to take necessary measures to prevent and obstruct all types of discrimination and abusive behavior.

As one idea is discarded in favor of the next in Sweden, it is possible for us to see that inability to cope with bullying and abusive behavior does not lie within the individual or even within the classroom and the individual teacher. The pattern used by Sweden during their 50-year fight against bullying and abusive behavior at school was to focus first on the characteristics of a student subjected to bullying. When it became obvious that abusive behavior did not depend on certain characteristics of the student bullied, focus changed to the classroom and the organization of teaching and lack of classroom democracy. Abusive behavior continued even with increased student democracy and changed work forms. The next step was to blame the entire school. Increased need for more school democracy, students and parents voices in how the school is operated, was drawn forward as well as school accountability as measures to insure the end of abusive behavior at school. But legal ambitions translated into a formal type of New Public Management behavior with endless documentation and reporting and a continuing of abusive behavior.

Schools produce bullying and abusive behavior but it is impossible for any national state to abolish schools. School administrators countered accusations of failure to control abusive behavior by complaining that they could not stop abusive behavior because they lacked economic resources. Thus it was the fault of the municipality because they did not allot the school sufficient resources.

The shifting of responsibility to the local municipalities allows the school to wash their hands of failure to stop bullying and abusive behavior. However, the

'pass the buck' to the administration of the municipalities does not solve the problem. A municipality found liable for failure to correct a damaging situation in time, weighs light against a task of insuring that no abusive behavior occurs at any time and at any place within a school.

As municipalities adapted to paying damages for not being able to stop individual cases of abusive behavior, complaints of abusive behavior at school continued to increase. The last step in Sweden's fight against abusive behavior is to turn to market functional measures. In 2011, SSI economic coercive power was increased against schools found in noncompliance with the Education Act. Although the SSI could use a court injunction with an attached heavy fine against a school, they were restrictive in using this possibility. In 2015 the law was changed to make it mandatory for the SSI to impose an injunction in every case where it was discovered that one or more shortcomings were found during a school inspection that could have repercussions on students learning. The number of injunctions filed with the court increased 400 per cent from 2014 to 2015.

4.1 Complaints

Both the legislative and regulative changes had an effect on an increase in the number of complaints filed against schools and the number of criticisms meted out to schools. There was a direct increase in the number of criticisms meted out to schools as soon as the SSI was established in late 2008. The increase in filed decisions between 2003 through 2007 was only 16 per cent. Once under the total jurisdiction of the SSI in 2009, the number of complaints against schools started a rapid increase that is still continuing 2015.²⁰ 38% of complaints registered with SSI 2015 were complaints by a student against abusive behavior. This was an increase of 17 percent compared with 2014. The SSI and the BOE levied criticism against the schools in 60 percent of the cases involving abusive behavior.²¹

More complaints are being filed and more criticism is meted out to schools for not reaching the goals of the law in preventing abusive behavior. However,

²⁰ In 2009 there were 1542 complaints filed and in 2015 the number had increased to 4035.

²¹ If a school is found as failing to falling the law, the SSI/BOE can issue a criticism if the shortcoming was not found as serious. The school would be admonish to correct the shortcoming pointed out in the criticism/or in an audit. The next step for the SII is an injunction with threat of a fine that is issued when serious faults are discovered in an audit. If a situation at an independent school is found unacceptable the school can lose its permit as an independent school and must be closed. In cases of wrong-doing by a municipal school, the SII is not able to close the school even if the school has serious faults. Instead, ISS can go in and take the steps necessary to remedy the situation and the municipality is forced to pay the costs.

regulating abusive behavior involves a law that can be seen as controversial and ambiguous. In order for law and regulation to be totally responsive to the patterns of abusive behavior in schools through case processing of complaints, they have to be attuned to the cognitive cultural and normative elements surrounding schools and their local environments instead of relying on coercive methods of criticism and fines to induce new solutions.

4.2 *Cognitive concepts and complaints*

In a detailed analysis of 350 randomly selected complaints registered with SSI between 2010 – 2015, I found three recurring patterns in the written accounts submitted by parents on behalf of students when filing a complaint of abusive behavior at school.²² A brief look at the patterns I found apparent in the cases can present a glimpse of how complaints are used in everyday life at schools. They give an example of how students, parents and school officials act and are seen by each other when working in the shadow of the law.

One pattern I found showed why the SSI closed a case investigation or a case was withdrawn. Another pattern showed how the behavior became more acute simply because nothing was being done to solve the situation at an earlier time. A third pattern revealed a stereotype casting of the situation not shared by the complaining party. I named these three patterns as the ‘*disappearing case*’, ‘*the accelerating case*’ and the ‘*trouble-maker case*’.

The ‘disappearing case’ is opened and closed. Some of the cases had already started an investigation when they were closed. At times, the person who had filed the case would give an explanation to the inspectorate. Usually, the explanation was that the school had taken measures to alleviate the wrongdoing. In these cases it looks as if there is an exchange. The school offers the parent something if the parent withdraws the case. As one mother put it, ‘I want to “freeze” our request, the school has put more guards out during recess and it feels more secure for us, but I want to be able to reactivate the case if the school backs-down in the future.’ In another case the school threatened to file a report to social authorities if the parent did not retract the complaint.

The situation at school had been *normalized* until it was reported. By reporting an incident, parents felt that schools would take the case more seriously. Thus the legal system was being used as a bargaining point between parents and schools to strength one or the others position in a controversy. The

²² See A Hetzler, ‘From Anti-Bullying Legislation and Policy to Everyday School Reality – Why Law Fails’, Gothenburg – Workshop in Social Policy, November 2012 and A Hetzler 2014, ‘Trouble in School’ (2014) *Resultat Dialog*, Vetenskapsrådet, Stockholm.

case is withdrawn when the controversy is resolved.

The ‘accelerating’ case usually shows that something that has been reported to school authorities is *minimalized* and continues until there is no choice for a parent but to file a complaint. In one such case a principal replied to a parent, ‘If you are so upset with the schools way of handling conflict, why don’t you take your daughter out of this school’. In another case the school authorities answered, ‘It is just conflicts and disagreement between the girls and they were sometimes friends, sometimes not friends.’ Minimization of the situation by the local school authorities of a situation that is reported continues and in many cases becomes more serious and eventually results in filing a complaint with the SSI.

The third pattern I observed in filed complaints are cases where the school *pathologizes* a student. One principal in answering a complaint stated, ‘M is too sensitive and she overreacts and exaggerates. She makes herself an outsider.’ A principal reacted to a complaint from a girl of abusive behavior by saying, ‘She has not been subjected to abusive behavior. Instead she has involved others in troublesome psychological situations such as threatening to commit suicide... she threatens them, if someone falls, she laughs, she makes comments everyday.’ A teacher, in one case, told the principal, ‘Either that kid goes, or I go.’

Thus in the social domain of abusive behavior at school it is possible to see patterns of normalizing behavior, minimalizing behavior and pathologizing a student or a parent.

5 Discussion and conclusion

Sweden has made it very clear that school should be a safe and equal environment for all students yet for over a half century has been unsuccessful in stopping bullying and abusive behavior at schools.

School is one of society’s most closed institutions. When the school bell rings, the doors are closed. Parents, friends and relatives are left with stories of what happened at school either by the youth or by a teacher, principal or friend that sends a message.

If we return to the competing normative patterns developed by Anna Christensen in a theory of law, we can see that the normative patterns of protection of established position can be seen to defend the view of the educator, the professional, as knowing not only most but also of knowing ‘best’. A teacher can argue that children never are abusive to each other in the

classroom but instead in the schoolyard or perhaps in the school corridors or in locker rooms or in social media. Teachers can also react by blaming students or their parents.

The tension of expanding school administrations areas of responsibility threatens the position of the educator and spills over into competition with another normative pattern. This is the pattern of market-functionalism. Schools are a core area of the public sector. Educators can complain that they are not allotted needed funding to accept additional responsibility. Municipal administrators or even law-makers can argue that they are not getting enough education or correct societal socialization of youth for the money paid to schools. Or parents and students can take the position of a consumer and threaten to take their 'business' to another school.

In fact, it is easy to see that the creation of independent schools in Sweden 1992, one year after de-centralizing control of schools to the municipalities, was a decided move to make schools competitive by backing a normative market-functional model for improving schools. By giving students and their parents the possibility of choosing a school and taking their 'school-money' with them, bad schools would simply cease to exist since students would want to be in a good school. The normative market-functional pattern becomes strengthened and at the same time the right to choose schools as opposed to be assigned a municipal school in the municipality can be seen as normative fairness.

Yet when we look at the day-to-day life at schools as revealed in the complaints found and the defenses invoked by school authorities we see a different picture. We see that complaints are increasing every year. Students and parents do not think that schools are abiding by the laws and guaranteeing safety at school to all students. Given the number of complaints investigated that yield a criticism against schools, it is obvious that regulation authority, the SSI share this opinion. Parents, to raise power or to strengthen their bargaining position, against teachers also use complaints. Teachers and school administrators, on the other hand, argue that the fault of continuing abusive behavior is not their fault but something is wrong with the student and/or the parent. They argue that the law is hiding the 'real' fault of continuing abusive behavior.

Thus what we are witnessing is a very messy law-in-action with very real unintended consequences of hard regulation of the student's right to a safe school environment void of abusive behavior.

What we needed is a supplement to Anna Christensen's theory of law and

the normative fields with competing normative patterns. We need, in the words of Lon Fuller, to turn to an analysis of the social processes that constitute the reality of law.²³ It is common in legal scholarship to ask if law reflects some goal that the society values. And as long as we limit ourselves to a normative analysis we do not need an empirical approach. However, we need to ask ourselves if law and regulation, once established is something apart from processes in the normative field. How is the purpose of law thwarted or changed? We have to examine what is the constant tension between the competing patterns. Is it in fact, the difference between power and reason or tradition and progress? Anna Christensen, Ann Numhauser-Henning and all the scholars working in the Norma project have shown clearly that the nature of law is context-dependent. The next step is to move beyond functionalism to an examination of the functions or ends and discover why values assumed in law are not realized.

²³ L I Fuller, *The Morality of Law* 62 (rev ed 1969) 242 as cited in S Macaulay, 'A New Legal Realism: Elegant Models and the Messy Law in Action' in E Mertz, S Macaulay and T W. Mitchell (eds), *The New Legal Realism: Volume 1: Translating Law-and-Society for today's Legal Practice* (Cambridge: University Press 2016).

