

# **Legislating Education: Finding the Right Model...But Not in Sweden!\***

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## Abstract

Law-making is always a difficult task: it involves forcing general models of behavior, which are normally supposed to be valid over time and space, upon a vast population of individuals and articulated organizations of human beings. This undertaking means that the activity of legislating implies forcing a general solution upon specific and often extremely differentiated individual situations; in the best-case scenario, this solution might be valid for a majority of individuals, but could definitely be troublesome for an extensive minority of the targeted population.

If one looks in particular to the legislation on education, this “flaw” becomes even more tangible due to the delicate and specific nature of the field that the legislation is expected to regulate. First, formal education is the central component for modern society: at least in its advanced capitalistic form, the applicable motto is still “knowledge is power.” Second, despite its crucial role in society, legislating education is also difficult because the positions tend to diverge enormously in terms of how education and other fundamental components of contemporary society should be structured.

By looking at the Swedish legislative example (and its failure), this paper illustrates the necessity of choosing the right model of legislative policy. The right model, as it will be argued in this paper, is one that moves the legislative law-making process closer to the direct target of the education, namely the students (and, to some extent, the teachers). More specifically, this reduction of distance between regulators and recipient should be done by opening the way for direct and increased involvement of the school administration in the creation of regulatory processes.

**Keywords:** Legislative Policy, Education, Sweden, Legislative Models, Politics

## I. INTRODUCTION

Law-making is always a difficult task: it involves forcing general models of behavior, which are normally supposed to be valid over time and space, upon a vast population of individuals and articulated organizations of human beings. This undertaking means that the activity of legislating implies forcing a general solution upon specific and often extremely differentiated individual situations; in the best-case scenario, this solution might be valid for a majority of individuals, but could definitely be troublesome for an extensive minority of the targeted population. In other words, to a higher degree than other forms of law-making (e.g., judicial activism), legislating tends to reveal the basic “flaw” of the legal phenomenon: law attempts to impose general solutions on society for specific (and often context-related) problems.<sup>1</sup>

If one looks in particular to the legislation on education, this “flaw” becomes even more tangible due to the delicate and specific nature of the field that the legislation is expected to regulate. First, formal education is the central component for modern society: at least in its advanced capitalistic form, the applicable motto is still “knowledge is power.” Via highly regulated educational paths, society fashions the knowledge bricks it needs to assure its future existence and development: doctors, engineers, technicians, educators, politicians, natural scientists and, last but not least, lawyers.<sup>2</sup> By regulating formal education, legislative bodies intervene and shape the future of the community they intend to represent; thus, to a greater extent than for other areas, the regulation of education is a long-term project affecting the very foundations, existence, and development of a community.

Despite its crucial role in society, legislating education is also difficult because the positions tend to diverge enormously in terms of how education and other fundamental components of contemporary society should be structured. First, there is a complete lack of consensus as to the nature of a “good education

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1 See Herbert L. A. Hart, *The Concept of Law*, 120-132 (Oxford: Clarendon Press 3d ed.1961); Katharina Pistor & Xu Chenggang, *Incomplete Law*, 35 N.Y.U. J. Int'l L. & Pol. 931, at 932-935 (2003); and Stephen Laws, *Giving Effect to Policy in Legislation: How to Avoid Missing the Point*, 32 Stat. L. Rev. at 6 (2011) Stephen Laws See also Friedrich A. Hayek, *Law, Legislation and Liberty –Volume 2: The Mirage of Social Justice*, 124-128 (1973); and Roscoe Pound, *My Philosophy of Law*, 256-257 (1941).

2 See David W. Livingstone, Harry Smaller, & Rosemary Clark, *Teacher Learning and Power in the Knowledge Society*, 1 (2012) (“In the school systems of modern societies, [teachers] have the primary responsibility to transmit formal knowledge to the next generation of workers and citizens”). See also Peter F. Drucker, *Management Challenges for the 21st Century*, 116 (1999).

model” (besides the obvious and empty idea that it should create “good doctors, good engineers, or good scientists”). In contrast with other areas of human life regulated by legislation, when it comes to education, there is a lack of general acceptance even as to the arena in which the conflicting ideas should battle.<sup>3</sup> For example, when looking at the regulation of economics, it is quite clear that both ideal-typical ideologies, namely the free market vs. the state-controlled market, tend to debate within the same investigative framework, i.e., the issue of “how much state should we allow into the market?”. The same can be said when it comes to criminal law and the highly controversial idea of whether society should allow capital punishment: here, the generally accepted question is whether or not capital punishment is socially, legally, and morally acceptable for a society. If one shifts attention to the regulation of education, it is difficult even to find a framework in which such a discussion can begin (regardless of any solutions the participants may choose). For instance, there is still a deep divergence of opinion in terms of whether the educational system should be structured around the matter of how to better fulfill the needs of a society (e.g., by establishing a certain *numerus clausus* for certain professional education) or around the individual desires or predisposition of the students (e.g., by allowing younger students admission into any university they want, regardless of the choice of high or middle school they might have made).<sup>4</sup>

This absence of consensus around the framework for discussion is in turn the product of a third feature that makes creation of regulatory regimes on education so difficult. This feature concerns a potential (and as reality often shows us, extremely current) internal conflict of the educational system, and it deals with the very nature of education in modern society, i.e., its roles as one of the fundamental regulatory tasks endorsed by the contemporary state (regardless of

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3 See Richard Pring, *Philosophy of Educational Research*, 24 (3d ed. 2015). See also John White, *Exploring Well-being in Schools A guide to making children's lives more fulfilling*, 27 (1<sup>st</sup> ed. 2011). See, e.g., Amy Gutmann, *Democratic Education*, 3-19 (1987).

4 See Jonas Aspelin, *What really matters is 'between'-Understanding the focal point of education from an inter-human perspective*, 2 *Education Inquiry*, at 127 (2010) (as to “the two dominating approaches within contemporary educational theory: First, what we might call ‘the societal approach’ in which the main aim of education is understood in terms of students’ adjustments to the social order. Second, what might be labelled ‘the individualistic approach’ in which values such as rationality and autonomy are emphasised and the improvement of individuals is set as a central goal of education”). See also David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 *Am. Educ. Research J.* at 60-64 (1997) (pointing out, within the ultimate goals of education, a fundamental clash between a more privately oriented “social mobility” and the collective expectations of “social efficiency”). But see Colin Power, *The Power of Education: Education for All, Development, Globalisation and UNESCO*, at 47-51 (2015) (where the authors aspire to overcome this dichotomic approach).

whether the educational system is operated by private or by public actors). On the one hand, education aims at offering a certain degree of knowledge and expertise to individuals; therefore (at least since the end of the 19<sup>th</sup> century) the major pedagogical criteria have been built on the principle that education should be structured around individuals' capacities, predisposition, and background knowledge.<sup>5</sup> On the other hand, from a social and political perspective, education is merely a sub-system, which serves the needs of the larger societal system. Education is then perceived and used as a tool to “mold” its recipients (namely the students) according to certain models (*e.g.*, by acquiring a minimum degree of knowledge or some specific type of reasoning) – models which will make students “useful” for society once they start to work.<sup>6</sup> This molding according to pre-established models implies that the fundamental operational criterion for legislative policy is not based on students' individual capacities (*i.e.*, the legislative policy will somehow disregard what they are), but instead on the insertion of the students in pre-established patterns of both content-knowledge and methods of reasoning (*i.e.*, the legislation will focus instead what the students should become).

This brief paper has not been written with the ambition of solving the fundamental strategical dilemmas – a task for which lawyers most likely do not have the necessary knowledge (*e.g.*, in terms of pedagogy or organizational studies or psychology). This work has instead a much humbler task of a more “damage-control” character: its aim is to propose what lawyers, and in particular legislative lawmakers, can do to minimize damages. This limited goal of “damage control” is particularly important since the wrong form of legislation can produce serious, long-term consequences for a society, especially when the legislative lawmaker is dealing with such sensitive and, at the same time, central issues as the regulation of the educational system of a certain community.

By looking at the Swedish legislative example (and its failure), this paper illustrates the necessity of choosing the right model of legislative policy. The right model, as it will be argued in this paper, is one that moves the legislative law-making process closer to the direct target of the education, namely the students (and, to some extent, the teachers). More specifically, this reduction of distance between regulators and recipient should be done by opening the way for direct and increased involvement of the school administration in the creation of

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5 See John Watt, *Individualism and Educational Theory*, at 121-185 (1989). See, *e.g.*, Aviv Cohen, *Teaching the Land of Israel as Civic Education: A Historical Exploration*, at 117 *J. Geo.* 57-58 (2018).

6 See Watt, *supra* note 6, at 235-240. See, *e.g.*, Cohen, *supra* note 6, at 55-57.

regulatory processes.

## II. THREE POSSIBLE MODELS OF LEGISLATING

The first task in tackling such a complex issue is to briefly sketch three possible (and highly ideal-typical) models of legislative policy that can be used to regulate education in a certain national community. This ideal-typical typology is based not so much on the content of the legislative processes, but rather on the division of labor among the three main actors traditionally participating in the regulatory process in a rule of law-state: legislative, executive, and judicial actors.<sup>7</sup> In other words, the main criterion used for the modelling is grounded not so much upon the substantive qualities of legislative law-making, but rather on its procedural aspects (though each procedural model of legislative policy brings with it certain relevant substantive consequences for the legislative measures it produces, as will soon be shown).<sup>8</sup>

The first model of legislative policy can be defined as “statutory”: this expression means that the actors in charge of the legislative law-making of a certain area are the national (or local) representative assemblies and the main task of regulation is then left to the legislative bodies. For various reasons (history, political opportunity, constitutional provisions etc.), certain areas have been placed under the full, in-depth of the elected members of the national community (or of the local community, in the case of a federal system).<sup>9</sup> It should be noted

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7 See Martin H. Redish, *The Constitution As Political Structure*, 140-141 (1st ed. 1995). See, e.g., Juan J. Linz & Alfred C. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe*, 14 (1996). But see Tim Koopmans, *Courts and Public Institutions: A Comparative View*, 247 (2003) (as to the contemporary shifting towards a regulatory regime based on two main actors, i.e., the courts and the legislative/executive).

8 In this respect, though several overlapping, the modelling used in this work differentiates itself from the classifications traditionally used in legislative studies, e.g., “principle based legislation” vs. detailed legislation. See Pauline C. Westerman, *Breaking the Circle: Goal-Legislation and the Need for Empirical Research*, 1 *The Theory and Practice of Legislation* 395 (2013); and Julia Black, *Forms and Paradoxes of Principles Based Regulation* 13-17 (LSE Legal Studies Working Paper No. 13/2008, 2008), available at <http://dx.doi.org/10.2139/ssrn.126772>. See, e.g., John Avery Jones, *Tax Law: Rules or Principles?*, 17 *Fiscal Studies* 80 (1996); and Eur. Parl. Res. (2007/2095(INI)), at point 17, or Regulatory Reform Committee Inquiry (UK Parliament), *Themes and Trends in Regulatory Reform*, available at <https://publications.parliament.uk/pa/cm200809/cmselect/cmdereg/memos/trends/ucm4402.htm> (as to the practitioners’ traditional distinction between principle based and detailed legislation).

9 See John D. Huber & Charles R. Shipan, *Deliberate Discretion?-The Institutional Foundations of Bureaucratic Autonomy*, 79-81 (2002); or Keith Dowding, *Rational Choice Theory*, in Mark Bevir (ed.), *The SAGE Handbook of Governance*, 41-42 (2011) (as to potential reasons behind the choice in favor of an in-depth

that in contrast with the model that bestows regulatory competence on the courts (as discussed below), this model is constructed around the basic assumption that any behavior or action not covered by the detailed legislative regulation becomes irrelevant for the regulatory regime in question (and therefore a free-action area for recipients). For example, in Sweden, due to legal restrictions (both at the constitutional level and in terms of the general principles of law), the regulation of criminal and taxation matters is generally determined through very detailed statutory provisions, leaving the other actors (namely public agencies and courts) very little room to maneuver when it comes to the creation of regulatory regimes.<sup>10</sup>

When the statutory model of legislative policy is applied, it results in very detailed statutory provisions covering all possible scenarios. The application of this model is usually accompanied by provisions or principles strictly limiting leeway for non-legislative actors. Examples include statutory provisions stipulating that whatever is not explicitly regulated in the statutory provisions is allowed, or a legal principle put in force with respect to implementation and dispute resolution in a certain field – principles which maintain the textualist approach as the exclusive interpretative guideline when it comes to statutory provisions.

Moving on to the second ideal-typical model of legislative policy, this archetype can be defined as “administrative”, since the legislatures shifts production of regulatory regimes towards the executive actors of a legal system and in particular national and local public agencies. Either for internal factors (*e.g.*, a high level of conflict within the representative assemblies) or for external reasons (*e.g.*, the necessity of a flexible law-making regime due to the very nature of the area to be regulated), the legislative bodies may delegate a consistent law-making power to the administrative apparatus.<sup>11</sup> The public agencies, though formally

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legislation); and Ronald Dworkin, *Law's Empire*, at 217-218 (1986) (arguing the possibility of a statutory legislative policy for the sake of justice).

10 See Sveriges Riksdag, *The Constitution of Sweden - The Fundamental Laws and the Riksdag Act with an Introduction by Magnus Isberg*, 27 and 38 (2016) (available at <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>). See also Fredrik Sterzel, *Legalitetsprincipen*, in Lena Marcusson (ed.), *Offentlighetsprinciper*, 75-94 (3d ed. 2017). See, *e.g.*, Katarina Fast, Peter Melz, & Anders Hultqvist, Sweden, in Hans Gribnau and Melvin Pauwels (eds.), *Retroactivity of Tax Legislation -EATLP International Tax Series*, Vol. 9, 357-359 (2013).

11 See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, at 439 (1998); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 *West European Politics* 77-101 (1994); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 *Cornell L. Rev.* 21-36 (1982). See also Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism*, chapters 2 and 3 (2012) (for a more historical comparative analysis of the issue of delegated legislation). See, *e.g.*, Kern Alexander & David M. Alexander,

having only the task to “implement” the statutory provisions (as in most of democracies), in reality, have been assigned (or have taken upon themselves) the fundamental task of “operationalizing” the general provisions laid down by the national or local assemblies.<sup>12</sup> Swedish child law is an example of this model of legislative policy. This area of law has a specific nature and history: since the 19<sup>th</sup> century, the legislative barycenter of child law-making has moved from how the adults (in particular those with legislative power) considered the children as functional to society, to instead focusing upon the children *per se* and their own perceptions. As a result, the main legislative policy has been in the direction of moving the regulatory burden to specialized public agencies, where child psychologists often play a decisive role in trying to grasp and translate “what children want and think.”<sup>13</sup>

This “operationalization” by public agencies of general principles set out in legislation is usually activated by the use of directional frameworks in the statutory provisions, indicating (often in vague terms) the general principles according to which the public agencies should operate and direction that the regulatory regime should take.<sup>14</sup> For instance, Swedish child law is structured around the

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*American Public School Law*, at 134 (8th ed. 2012) (“Changes in the nature of modern government and the increasing complexity of society necessitate that public agencies have more general authority to assume broader prerogatives”). It should be noted that, in the US, a classical distinction is made between legislative and adjudicative lawmaking by administrative agencies, where legislative law-making by the public agencies identifies the issuing of regulations while adjudicative lawmaking focuses upon the creation of new legal rules in the context of an adjudication. See, e.g., Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 255 (1986). In the administrative model of legislative policy of this work, focus tends to be upon the legislative law-making by the public agencies. See also David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 972 (1965) (questioning the possibility of this very classification when applied to everyday work by the administrative bodies).

12 See Cornelius M. Kerwin, *The Element of Rule-Making*, in D. H. Rosenbloom and R. D. Schwartz (eds.), *Handbook of Regulation and Administrative Law*, New York: Marcel Dekker, 345 (1994) (“Rule-making is law-making”). See also Robert D. Putnam, *The Political Attitudes of Senior Civil Servants in Western Europe: A Preliminary Report*, 3 *British Journal of Political Science* 257 (1973) (as to the central role of the administration in regulating modern democracies). As to the embedded contradiction within the idea of this administrative model of legislative policy (i.e., its being an “anomaly” for a parliamentary democracy, which is used so frequently that it is considered to be the norm), see Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, 257-258 (2014). See also George A. Krause and Neal D. Woods, *State Bureaucracy: Policy Delegation, Comparative Institutional Capacity, and Administrative Politics in the American States*, in Donald P. Haider-Markel (ed.), *Oxford Handbook of State and Local Government*, 2014, Oxford: Oxford University Press, 371-372 (considering the “legislative capacity” of the political actors as a fundamental criterion in order to investigate the causes of an high or low level of delegated legislation).

13 See, e.g., Pernilla Leviner, *Rättsliga dilemman i socialtjänstens barnskyddsarbete*, 26-31 (2011).

14 See Xanthaki, *supra* note 12, at 269-275 and Huber & Shipan, *supra* note 9, at 3-8 (as to the specific way of drafting this kind of legislation).

idea that each decision involving minors should be taken with a view to “what is best for the child.” This rather vague guideline then leaves public agencies with the discretionary power to decide not only what is “best for the child” – a decision which is often based upon non-legal consideration; more importantly, the administrative bodies also have the freedom to “operationalize” the principle, i.e., to structure the regulatory regime around their discretionary interpretation of such a guideline.<sup>15</sup>

It should be noted that the various actors comprising the institutional backbone of modern democracies operate under the dogma of separation of power. Therefore the choice of this administrative model of legislative policy implies not only a will of the legislators to devolve a considerable piece of their law-making power to public agencies; it also requires a certain degree of collaboration (or at least the absence of interference) on the part of the third actor, namely the courts.<sup>16</sup> In other words, this model works as long as “discretion” is supported by the courts which, in case of disputes, assume that the “creative” interpretation made by the public agencies is by default the one that is consistent with the (vague) letter of the statutory provisions. This alignment of the courts to this shift from the legislative to the administrative branch can be based either on tradition, e.g., the Swedish courts’ notion that administration is merely the long arm of the representative assemblies, or on more structural reasons, e.g., the courts’ lack of knowledge about matters of child psychology and therefore their reliance on the “objective” experts operating within and for the public agencies.

Finally, the third ideal-typical model for legislative policy can be defined as the “judicial” model. Here, the major tasks of law-making are performed by the judicial actors and their reconstruction of a general and (at least from a legal perspective) consistent regulatory regime based on the scattered and fragmented statutory provisions offered by the legislators.<sup>17</sup> Just as with the other models, in

15 See, e.g., Johanna Schiratzki, *Barnrättens grunder*, 33-42 (6th ed. 2017).

16 See Philip Hamburger, *Is Administrative Law Unlawful?*, 499-500 (2014) (criticizing the tendency of the courts to be deferent to the administrative law-making). See also Cass R. Sunstein, *Designing Democracy: What Constitutions Do*, 145-146 (1st ed. 2001); James M. Landis, *Administrative Policies and the Courts*, 47 *Yale L. J.* 519-537 (1938); and Alan Wahram, *Judicial Control of Delegated Legislation: The Test of Reasonableness*, 36 *Modern L. Rev.* 622-623 (1973).

17 See Aharon Barak, *The Role of a Supreme Court in a Democracy*, 53 *Hastings L. J.* 1206 (2002) (“The judge of a supreme court is not a mirror, passively reflecting the image of the law. He is an artist, creating the picture with his or her own hands. He is ‘legislating’-engaging in ‘judicial legislation’”); and Eva Steiner, *Judicial Rulings with Prospective Effect – From Comparison to Systematisation*, in E. Steiner (ed.), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, 14 (2015). See also Benjamin N. Cardozo, *The Nature of the Judicial Process*, 113-114 (1922); and Alec Stone Sweet, *Judicialization and*

this case there can be several reasons why representative assemblies adopt this model of legislative policy: the political actors' motives can range from being historical (*e.g.*, an unwillingness of the legislative body to produce a uniform code in certain areas of law or to address politically infected issues) to more institutional reasons (*e.g.*, a presence of a strong constitutional review, allowing courts to constantly undermine any attempt to legislate certain areas covered by constitutional provisions).<sup>18</sup> Regardless of the underlying motives, the result is that a choice is made to regulate only specific and limited areas of a certain field, while the legislators extend the judicial bodies (and in particular the highest courts) the possibility to offer a consistent regulatory structure for the entire field through the force of precedents and an active dispute resolution approach. Taking again an example from Sweden, one could name the issue of "unjust enrichment," to which the national assembly has decided to legislate only specific and scattered aspects (*e.g.*, in some cases when property has been improved by someone who never was the owner or who lost ownership) while the regulation of the issue at large has been left to the courts.<sup>19</sup>

Opting for this model of legislative policy entails extensive use of a kind of "patchy" legislation. With this legislative drafting technique, legislative bodies intervene with statutory provisions in order to cover only limited aspects of the area to be regulated, while leaving the judges (explicitly or implicitly) with the task of deriving or constructing the general principles regulating the entire field

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*the Construction of Governance*, in M. Shapiro & A. Stone Sweet, *On Law, Politics, and Judicialization*, 69 (2002) (pointing out the judicial work as directed to offer an "authoritative reconstruction of the lawmaker's law").

18 See John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *Law and Contemporary Problems* 55-57 (2002). See also Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, 71-72 (2002). See, *e.g.*, Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, 119-139 (1992); Timo Idema & Daniel R. Keleman, *New Modes of Governance, the Open Method of Co-ordination and Other Fashionable Red Herring*, 7 *Perspectives on European Politics and Society* 115 (2006); and Ronald Dworkin, *Law's Empire*, 391-392 (1986) (as to the legislative role played by the Courts in the US desegregation process).

19 See, *e.g.*, Ch. 5 Section 1 (dispossession of real estate), Ch. 9 Section 21 (rural lease) and Ch. 12 Section 55 b (commercial and dwelling tenancy) of the JORDABALKEN (1970:994), Ch. 4 Section 14 of the Konkurslagen (1987:672), and Section 65 of the Köplagen (1990:931). See also Jori Munukka, *Är obehörig vinst en svensk rättsprincip?*, 3 *Ny juridik* 26-34 (2009); Mårten Schultz, *Nya argumentationslinjer i förmögensrätten. Obehörig vinst rediviva*, 2009 *Svensk Juristidning* 948-959 (2009); and Annina H. Persson, *Obehörig vinst som grund för betalningskrav*, Det 38. nordiske juristmøde i København 2008, 2008, s. 422-443, available at [http://jura.ku.dk/njm/38/38\\_19\\_uberettiget\\_berigelse.pdf](http://jura.ku.dk/njm/38/38_19_uberettiget_berigelse.pdf).

(for instance through extended use of the *ex analogia juris* method).<sup>20</sup> It should be noted that by making use of this targeted legislative policy, political actors offer a certain informal power to legal scholarship, which tends to have a stronger influence upon the judicial actors than on the other actors. In particular, this power of legal scholars expresses itself through their bringing to surface (or “reconstructing”) the underlying legal principles in force in an area otherwise characterized by scattered and ad-hoc regulation.<sup>21</sup>

Before applying this three-model typology to the case of the Swedish regulatory regime of education, some brief clarifications are necessary. First of all, this is an ideal-typical typology and therefore, it does not exactly mirror the reality of the phenomenon under investigation (indeed, the models actually tend to overlap and cross each other). However, the modeling can be a valuable and helpful analytical tool for revealing certain fundamental streams or tendencies within the legislative processes taking place in the real world. Moreover, these ideal-typical models in legislative regulation can contribute to tackling highly complex issues, particularly by finding the potential problems caused by using the “wrong” legislative policy model in certain areas of human life.<sup>22</sup>

The second clarification concerns the nature of choice made by legislators in terms of the model. As also pointed out by various socio-legal studies, the choice of a regulatory model by the political actors can be of an “intended” or “unintended” character.<sup>23</sup> The model of legislative policy is an intended choice

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20 See Reed Dickerson, *The interpretation and application of statutes*, 26 (1975); and Alessandro Pizzorusso, *The Law-Making Process as a Juridical and Political Activity*, in A. Pizzorusso (ed.), *Law in the Making A Comparative Survey*, 57 (1988) (who correctly points out how “judicial law-making is generally restricted to certain areas of law, often referred to as lawyer’s law, and occurs far less frequently in other sectors where political law-making leaves less room for the judge to intervene”). See also Kenneth Diplock, *The Courts as Legislators*, 6 (1965); and Neil MacCormick, *Legal Reasoning and Legal Theory*, ch. VII (2003). See, e.g., Trevor Hartley, *The Foundations of European Union Law*, 133 (5th ed. 2003).

21 See Edmund W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*, 4 (2005) (“It is the underlying theory, and nothing else, which provides judicial law-making with its legitimacy”); Raoul C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History*, 87-88 (1993) (though limiting this role of legal scholarship towards the judicial law-making only to civil law countries); and Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 *Columbia L. Rev.* 842-845 (1961). Cf. Richard A. Posner, *Divergent Paths: The Academy and the Judiciary*, 362-368 (2016). But see Neil Duxbury, *Jurists and Judges: An Essay on Influence*, 17-22 (2001).

22 See Max Weber, *The Methodology of Social Sciences*, 99-100 (1949). See also Henrik Jensen, *Weber and Durkheim: A Methodological Comparison*, 69-73 (2012); and Hans Henrik Bruun, *Science, Values and Politics in Max Weber’s Methodology*, 208 (2016).

23 See, e.g., Natalina Nheu & Hugh McDonald, *By the People, for the People? Community participation in law reform*, 100 (2010), available at [http://www.lawfoundation.net.au/ljf/site/articleIDs/CC42E4B3179EC-C48CA2577EB000460AF/\\$file/ByThePeopleForThePeople\\_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/CC42E4B3179EC-C48CA2577EB000460AF/$file/ByThePeopleForThePeople_web.pdf). See also Niklas Luhmann, *Law as a*

when it focuses on the modalities that legislators want the legislation to have (“how the legislating is thought to work”). The unintended choice of a certain legislative model aims instead to point out the actual modalities through which the legislation operates (“how the legislating operates”). In other words, while the intended choice refers to the legislative policy endorsed by a certain legal system as an explicit model of creating a regulatory regime, the unintended choice of model focuses upon the type of structure in which the legislation really operates. This article is designed as a contribution in legislative policy and not in legal sociology (or socio-legal studies): it aims therefore to offer guidance in the choice a certain legal system should make to find the optimal legislative procedure to regulate certain areas of community life. This paper focuses therefore on the intended choice of model, i.e., on the model that the legal (and political) actors should opt for.<sup>24</sup>

Finally, as can clearly be seen, this typology of legislative policy models can have a different nature when considered from a time perspective. This typology can be used in observing reality from a diachronic perspective, i.e., by focusing on the various models of legislative policy which have been chosen over time to regulate a certain area. For example, it sometimes happens that the model of judicial legislative policy turns into a statutory model, in particular when national assemblies codify the current judicial praxis in a certain area. This three-model typology of legislative policy can also have a more synchronic nature, i.e., it shows how the intended model should operate in a specific area during a certain, limited period of time.<sup>25</sup> In this respect, the choice here is to leave aside the diachronic perspective, which may be too complex for such short work and tends to be particularly fruitful in comparative studies, and to take instead a synchronic approach, in particular by focusing exclusively on the intended policy choice Swedish legislators have made when it comes to today’s regulation of education.<sup>26</sup>

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*Social System*, 166 (2004). These different characters of the legislation (i.e., how it ought to operate and how it actually operates) can be considered as consequence of the more general distinction between the normative and social functions of the law in general. See Joseph Raz, *On the Functions of Law*, in B. A. W. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)*, 280 (1980). See also Stephen Laws, *Giving Effect to Policy in Legislation: How to Avoid Missing the Point*, 32 *Statute L. Rev.* 3-4 (2011).

24 See John Gardner, *Some Types of Law*, in D. Edlin (ed.), *Common Law Theory*, 57 (2007). See also Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, 274-275 (2009).

25 This distinction between synchronic and diachronic approaches is molded from the field of linguistic analysis. See Anna Giacalone Ramat, Caterina Mauri & Piera Molinelli, *Synchrony and Diachrony: Introduction to a dynamic interface*, in A. Giacalone Ramat, C. Mauri, and P. Molinelli (eds.), *Synchrony and Diachrony: A dynamic interface*, 17-18 (2013).

26 See Bruce I. Oppenheimer, *How Legislatures Shape Policy and Budgets*, 8 *Legislative Studies Quarterly*

### III. LEGISLATING EDUCATION: THE SWEDISH EXPERIENCE

Moving on to the contemporary regulation of education in Sweden, like in many other countries the legislative framework is extremely complex, with both general statutes and specific legislative measures, which often interact in a non-frictionless way. There are two major statutes that on a general level regulates the Swedish education; one for basic education, the Education Act (2010, in Swedish *Skollag*) and one for higher education, the Higher Education Act (1992, in Swedish *Högskolelag*).<sup>27</sup> This article will focus on the legal framework that regulates the basic education and not the higher education since this part of the education legislative framework is the one that most clearly demonstrates the path that the legislator has chosen for the contemporary regulation of education in Sweden.

The Education Act is the fundamental law on basic education in Sweden. It states general requirements for several different forms of education, from pre-school to upper secondary school and special school for children with functional impairments. Apart from this general legislation, there are several, more precise statutory provisions which regulate specific forms of education. For example, the School Ordinance (2011, in Swedish *Skolförordning*) and the curricula (in Swedish, *Läroplaner*) which are produced by the Government and education directives which are produced by the Swedish National Agency for Education (in Swedish, *Skolverkets föreskrifter* or *SKOLFS*).<sup>28</sup> The School Ordinance develops themes in the Education Act and specifies things like the length of a school year and the grading system. The curricula contain overreaching goals for education, basic values, and the syllabus for different forms of basic education. The education directives hold regulation on a number of things and are more detailed than both the Education Act and the School Ordinance, there are, for example, education directives on such things as which professional skills are required to be able to

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553 (1983); and Giuseppe Martinico, *Time and Comparative Law Before Courts: the Subversive Function of the Diachronic Comparison*, 3 *The Theory and Practice of Legislation* 197-206 (2015).

27 See *Skollag* (2010:800), 2010, available at <http://rkrattsbaser.gov.se/sfst?bet=2010:800>, and *Högskolelag* (1992:1434), 1992, available at <http://rkrattsbaser.gov.se/sfst?bet=1992:1434>.

28 See *Skolförordning* (2011:185), 2011, available at [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skolforordning-2011185\\_sfs-2011-185](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skolforordning-2011185_sfs-2011-185); and, e.g., *Skolverket, Curriculum for the compulsory school, preschool class and school-age educare -Revised* 2018, 2018, Stockholm: Norstedts Juridik, available at <https://www.skolverket.se/getFile?file=3984>.

teach in a subject or fees for students in the special school.<sup>29</sup>

Even though the legal framework is complex from an outside perspective, it is still possible to detect one clear trend that characterizes the contemporary Swedish legislation on education. This clearly discernable trend is that the statutory model has become the model that is most frequently used by the Swedish legislatures when it comes to the legislative policy concerning education.<sup>30</sup> Even though the model has already been applied in the legal framework of education for a long time, the last thirty years have shown an exponential growth of detailed regulation in legislative form, from pre-school to upper secondary school and adult education. This is evident by the sheer number of new articles and chapters that the legislator has added to the Education Act over the years. The previous Education Act that was introduced in 1985 contained fifteen chapters while the present Education Act contains twenty-nine.<sup>31</sup>

A distinctive feature in the development of the Swedish school system is that of gradual progress toward centralization and uniformity. This development started as far back as the 19<sup>th</sup> century and was ongoing until the end of the 20<sup>th</sup> century when a vast decentralization of the Swedish educational system took place.<sup>32</sup> This new philosophy of decentralization meant that the government took a step back from formally administering the education and instead took to establishing overall goals while the counties inherited the task of governing, supported by government grants.<sup>33</sup> The decentralization led to a form of governance where

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29 See Skolverket, Skolverkets föreskrifter om vilka yrkeskunskaper som krävs för att undervisa i ett yrkesämne -SKOLFS 2012:4, 2012, available at <https://skolfs-service.skolverket.se/api/v1/download/senaste-lydelse/2012:4>, and Skolverket, Skolverkets föreskrifter om ersättning för elever i specialskolan -SKOLFS 1997:1, 1997, Stockholm: Skolverket.

30 See Susanne Fransson, *Juridifieringens konsekvenser på skolans område -en översikt av begrepp och principer*, 25 *Utbildning och demokrati* 40 (2016). See also Gunnel Colnerud, *Skolans juridifiering -Om styrning av lärarprofessionen*, 2014-02-06, Skola & Samhälle, 1, available at <https://www.skolaochsamhalle.se/flode/skolpolitik/gunnel-colnerud-skolans-juridifiering-om-styrning-av-lararprofessionen/>.

31 See SKOLLAG (1985:1100), 1985, available at [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skollag-19851100\\_sfs-1985-1100](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skollag-19851100_sfs-1985-1100).

32 See Anna Wildt-Persson & Per Gunnar Rosengren, *Equity and Equivalence in the Swedish School System*, in W. Hutmacher, D. Cochrane, and N. Bottani (eds.), *In Pursuit of Equity in Education -Using International Indicators to Compare Equity Policies*, 302 (2001) ("At the end of the 1980s and the beginning of the 1990s, the education system went through great changes. The school system was decentralized, with the idea that, the school system would become more receptive to change and more sensitive to its interest groups."); and Gunnar Richardsson, *Svensk utbildningshistoria -skola och samhälle förr och nu*, 159 (8th ed. 2011).

33 See Richardsson, *supra* note 32, at 159. See also Henrik Edgren, *Folkskolan och grundskolan*, in E. Larsson and J. Westberg, *Johannes (eds.), Utbildningshistoria*, 125 (2nd ed. 2015).

the education today is administered by the counties while the educations form and content are regulated in detail nationally by legislative or quasi-legislative provisions. This should not be taken to mean that the state has given up control over the schools however.<sup>34</sup> The state decides, through legislation, when a reform should be made and leaves it to the counties or the individual schools to implement the changes on a local level.

The wholehearted endorsement of the statutory model by the Swedish legislatures can be showcased by two examples from recent history. First, in 1962 and 1969, the curriculum was partly produced by the public agency School-Over-sight Board (in Swedish, *Skolöverstyrelsen*), but in 1980, this became a task for the government, which it has retained ever since.<sup>35</sup> Second, in the last twenty-five years, the political climate in Sweden has been varied and the political majority in the national assembly has moved back and forth between the right block and the left block. These shifts have naturally brought with them, like a pendulum, correspondent changes to the content of the regulation of education, i.e., as to what legislate. However, regardless of radical changes in the political orientation of the Government and Parliament and their policies-content on education, when it comes to the way to legislate the various legislatures have always kept the statutory model as a preferred channel of regulation, i.e., a detailed regulation via statutory provisions with very limited law-making power to both the public agencies and the judicial bodies.<sup>36</sup>

There are several reasons why Sweden has oriented its legislative policy on education so strongly towards a statutory model. The first reason is of a purely political nature: regardless of political orientation, the idea of offering a good

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34 See Mikael Holmgren, Olof Johansson & Elisabet Nihlfors, *Sweden: Centralisation and Decentralisation as Implementation Strategies*, in Leif Moos (ed.), *Transnational Influences on Values and Practices in Nordic Educational Leadership -Is there a Nordic Model?*, 77 (2013). See also Lisbeth Lundahl, Inger Erixon Arreman, Ann-Sofie Holm & Ulf Lundström, *Educational marketization the Swedish way*, 4 Education Inquiry 511 (2013); and Caspian Rehbinder, *Släpp kommunerna fria -Det kommunala självstyret som aldrig fanns*, 10-13 (2018), available at <https://timbro.se/app/uploads/2018/04/slapp-kommunerna-fria.pdf> (as to a general failure of the decentralization process in Sweden).

35 See Kungliga Skolöverstyrelsen, *Läroplan för grundskolan -Lgr 62*, 1962, Stockholm: Emil Kihlströms Tryckeri, and Skolöverstyrelsen, *Läroplan för grundskolan -Lgr 69*, 1969, Stockholm: Svenska Utbildningsförlaget.

36 See Agneta Hult and Christina Segerholm, *The process of juridification of school inspection in Sweden*, 25 Utbildning & Demokrati 96 (2016), available at <https://www.oru.se/globalassets/oru-sv/forskning/forskningsmiljoer/hs/humus/utbildning-och-demokrati/2016/nr-2/hult--segerholm--the-process-of-juridification-of-school-inspection-in-sweden.pdf> (“the closer to the present time we come, the greater the tendency to approach the issue of quality in schooling as a formal, legal problematic. The language used in the texts more and more takes on a legal terminology that seems to displace a more pedagogical discourse”),

education for future generations appeals to both young and old voters. Education is, in other words, a good propaganda tool both for the political block in charge and for the opposition; this consideration is valid in order to gain support not only during the election period, but also during the term of the legislature.<sup>37</sup> Being so central for the political game, it does not come as a surprise that the political actors, once they have gained the majority in the national and local assemblies, tend to opt for the model of legislative policy that allow them to have a direct control on education, namely the statutory one.

The second reason that factor into Sweden's choice of adopting a legislative policy assigning the major role to the legislative bodies have more of an economic nature. Looking at it from a state finances' perspective, education covers a consistent part of the state expenses.<sup>38</sup> Because of this, one can understand why political actors sitting in the legislative assemblies are reluctant to leave the regulatory regime of such a financially loaded area to actors other than themselves. Moreover, while requiring huge financial investments, education does not offer economic welfare returns in the short period and not even in the medium terms, i.e., the economic terms that tend to be more relevant for the political arena. A reform of the education system, if successful, can take a time span of 2-3 generations in order to produce economic and welfare outcomes clearly perceivable by a community.<sup>39</sup> Education requires huge financial investments out of the current term's state budget but the beneficial effects will be enjoyed by the long-into-the-future state budgets, for instance in the form of well-educated engineers, teachers or doctors. For this reason, political actors tend to treat education as an extremely "dangerous" field and therefore keeps it within a detailed regulatory framework, often in a very restrictive direction from a state-finances' perspective.

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37 See Maria Jarl and Linda Rönnerberg, *Skolpolitik: från riksdagshus till klassrum*, 225-228 (2nd ed. 2015); and Per Hedberg, *Svenska folkets bedömning av skol-och utbildningsfrågor som viktigt samhällsproblem 1987-2008*, (2009)

38 See, e.g., Regeringen, Budgetpropositionen för 2017 -Förslag till statens budget för 2017, finansplan och skattefrågor 2016/17:1, 2016, 18, available at <https://www.regeringen.se/4a6d8d/contentassets/e926a751d9eb4c978c4d892c659ebc8e/forslag-till-statens-budget-for-2017-finansplan-och-skattefragor-kapitel-1-12-bilagor-1-21>.

39 See Eric Hanushek and Ludger Woessmann, *The Knowledge Capital of Nations: Education and the Economics of Growth*, 2015, Cambridge: The MIT Press, 157; David Bell, *State of the Nation: impact of education reforms will take decades to play out*, available at <http://theconversation.com/state-of-the-nation-impact-of-education-reforms-will-take-decades-to-play-out-39526> ("For the biggest societal, political and economic reforms do not fit into neat five-year electoral cycles"). See, e.g., Larry Cuban, *How Teachers Taught. Constancy and Change in American Classrooms 1880-1990*, 1993, 2nd edn., New York: Teacher College Press, 272-290.

Finally, there are also reasons of a more social nature that have oriented the Swedish legislatures towards the choice of statutory model in regulating education. In particular, one of the most important and prominent goals of the Swedish education system is equality. This is evident both in the preparatory works and in the Education Act itself.<sup>40</sup> In the beginning of the 20<sup>th</sup> century, the Swedish school system was divided, both in terms of gender, with separate schools for girls and boys, and class where children from working-class homes were very limited in their choice of education.<sup>41</sup> The old system was felt to be unfair and after many years of reform work that started in the 1930's a uniform, compulsory school was introduced and finalized with the introduction of the 1969 curriculum for basic education.<sup>42</sup> The political reason for merging the old, divided school forms and creating a uniform, compulsory school was to create unity among the people and to enable social mobility, something that has been (and still is) an important question for politicians representing both the liberal, social democratic and left party. The political inclination toward the statutory model in regulating education is thusly grounded in an ambition to build a school system that gives an equal opportunity to all children to take part in education regardless of social class, gender, ethnicity and other factors.<sup>43</sup>

Before one moves on to the last part of this work, it is worth noting how factors of legal nature have played no fundamental role in the choice of the legislative policy model for regulating education in Sweden. This “absence” does not have to mean that the legal structure of a certain society (in particular at the constitutional level) does not play an important role when it comes to the choice among different models of legislative policy. For example, Swedish taxation law-making tends to be dominated by the statutory model because of the

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40 See Regeringen, Den nya skollagen – för kunskap valfrihet och trygghet 2009/10:165, 2010, 228, available at <https://data.riksdagen.se/fil/260C002E-E714-4F41-9619-8D1F5A9A8D13>. See also Björklund, Anders, Melissa A. Clark, Per-Anders Edin, Peter Fredriksson & Alan B. Krueger, *The Market Comes to Education in Sweden: An Evaluation of Sweden's Surprising School Reforms*, New York: Russell Sage Foundation, 3-4 (2005).

41 See Richardsson, *supra* note 32, at 89-90; Richard Tomasson, *From Elitism to Egalitarianism in Swedish Education*, 38 *Sociology of Education*, 208-210 (1965). See also Leon Boucher, *Tradition and Change in Swedish Education*, 15-20 (1982).

42 See Richardsson, *supra* note 32, at 114-116. See also Boucher, *supra* note 41, at 74-76.

43 See Skollag (2010:800), chapter 1, article 8 (“Everyone must have equal access to education in the school system regardless of geographical residence and social and economic conditions”). See also Wildt-Persson & Rosengren, *supra* note 32, at 301-302; Henrik Román, Stina Hallsén, Andreas Nordin & Johanna Ringarp, *Who governs the Swedish school? Local school policy research from a historical and transnational curriculum theory perspective*, 1 *Nordic J. Studies in Educational Policy* 82 (2015); and Richardsson, *supra* note 32, at 99-100 and 104-105.

principle of legality (as expressed in the Constitution).<sup>44</sup> The principle of legality requires that all the taxes that are put upon the citizens have to be clearly expressed by legislation. Moreover, the legal culture among public agencies and the judicial tend to implement this constitutional principle in a pretty restrictive way. As a result, legal factors play a decisive role by pushing the legislatives to produced extremely detailed tax legislation so that they can be sure to reach the desired results (i.e., to get the money from the tax-payers).<sup>45</sup>

However, in the case of education, the picture is pretty different and it makes legal considerations not as decisive for the Swedish opting for a statutory model of legislative policy. In difference from other areas (as seen right above), when it comes to education the general Swedish legal culture is that the weight of constitutional considerations in law-making is pretty light except for when it deals with restrictions on individual rights and certain procedural principles.<sup>46</sup> Moreover, the constitutional provisions on the education are extremely general and do not set any specific legislative policy direction to the representative assemblies: the Swedish Constitution simply indicates very general (and almost self-evident) goals in education that the legislatives must reach, not the regulatory modalities by which to attain them.<sup>47</sup>

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44 See The Instrument of Government, 1974, CH. 8, ART. 2, available (as the official translation in English) at <http://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>. See also Mats Tjernberg, *Legal certainty in taxation at authorities and courts of law: a nordic view of specialization and unbiasedness*, 1 Nordic Tax J. 19 (2016).

45 See Peter Melz & Jérôme Monsenego, *Sweden*, in H. J. Ault, B. J. Arnold, and G. S. Cooper (eds.), *Comparative Income Taxation: A Structural Analysis*, 198-199 and 205-206 (4th ed. 2020). See also Mats Tjernberg, *Skatterättslig tolkning på inkomstbeskattningens område*, Skattenytt 170 (2016); and Anders Hultqvist, *Legalitetsprincipen och lagtolkning*, Skattenytt 15 (2013).

46 See, e.g., Wiweka Warnling Conradson, *Hedvig Bernitz, Lena Sandström, and Karin Åhman, Statsrättens grunder*, 230 (6th ed. 2018); Viola Boström & Kjell Lundmark, *Skoljuridik*, 91, 98-100 (4th ed. 2016); or Fredrik Engström & Peter Hellman, *Myndighetsutövning i skolan*, 34 (2013). See also Fransson, *supra* note 30, at 38.

47 For example, the central constitutional provision concerning education state as follow: "All children covered by compulsory schooling shall be entitled to a free basic education in the public education system. The public institutions shall be responsible also for the provision of higher education. The freedom of research is protected according to rules laid down in law." The Instrument of Government, 1974, Ch. 2, Art. 18.

#### IV. WHY THE ADMINISTRATIVE MODEL IS PREFERABLE WHEN IT COMES TO EDUCATION

If one considers the actual situation of education in Sweden, it is possible to see how the quality of education has dropped slowly but constantly in recent decades. Despite a slight improvement in the recent years, the quality of the Swedish educational system is generally considered to have regressed considerably or, in the best-case scenario, to have been stagnant in the 21<sup>st</sup> century.<sup>48</sup> Evaluations coming from international organizations (e.g., the OECD's *Programme for International Students Assessment* (PISA) for the skills of 15-year-olds in math, reading and science, PIRLS for reading capacities, and TIMSS for math and sciences) confirm this negative trend, as do the data of Swedish national organizations.<sup>49</sup> As openly admitted by the very Swedish legislator, “[a]ccording to international studies, learning outcomes in Swedish compulsory schools have been declining for several decades.”<sup>50</sup> Moreover, this downward spiral appears to be

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48 See Skolverket, *An Assessment of the Situation in the Swedish School System 2015*, 7 (2015), available at <https://www.skolverket.se/download/18.6bfaca41169863e6a65bba5/1553966393937/pdf3551.pdf>; S.O.U., *Det tar tid-om effekter av skolpolitiska reformer*, SOU 2013:30, 41, available at <https://www.regeringen.se/49b716/contentassets/05d0adf0f94d4bd3a6f0be062fdb6b08/det-tar-tid---om-effekter-av-skolpolitiska-reformer-sou-201330>; and OECD, *IMPROVING SCHOOLS IN SWEDEN: AN OECD PERSPECTIVE*, 2015, 27-31, available at <http://www.oecd.org/education/school/Improving-Schools-in-Sweden.pdf>. See, e.g., Skolverket, *TIMSS 2007 - Svenska grundskoleelevers kunskaper i matematik och naturvetenskap i ett internationellt perspektiv*, 2008, Stockholm: The National Board of Education, 6, available at <https://www.skolverket.se/getFile?file=3707>; or Skolverket, *Rustad att möta framtiden? PISA 2009 om 15-åringars läsförståelse och kunskaper i matematik och naturvetenskap*, 2010, Stockholm: The National Board of Education, 128-130, available at <https://www.skolverket.se/getFile?file=2473>. As to the slight improvement in the last years, see, e.g., the data from the 2018 OECD's Programme for International Students Assessment (PISA) for the skills of 15-year-olds in math, reading and science, available at [https://www.oecd.org/pisa/publications/PISA2018\\_CN\\_SWE.pdf](https://www.oecd.org/pisa/publications/PISA2018_CN_SWE.pdf) (“After a rapid decline until 2012, mean reading, mathematics and science performance in Sweden recovered fully or almost fully between 2012 and 2018, returning to a level similar to that observed in the early PISA assessments,” at 3).

49 See Anne-Berit Kavli, *TIMSS and Pisa in the Nordic Countries*, in D. Reimer, B. Sortkær, M. Oskarsson, T. Nilsen, M. Rasmusson, and K. Nissinen (eds.), *Northern Lights on TIMSS and PISA 2018*, 2018, Copenhagen: Nordic Council of Ministers, 14-19 and 22; and Skolverket, *PISA 2012 –15-åringars kunskaper i matematik, läsförståelse och naturvetenskap*, 2013, 8-9, available at <https://www.skolverket.se/getFile?file=3126>. See also S.O.U., *Samling för skolan -Nationell strategi för kunskap och likvärdighet 2017-35*, 2017, Stockholm: Statens offentliga utredningar, 92, available at <https://www.regeringen.se/498092/contentassets/e94a1c61289142bfbcfdf54a44377507/samling-for-skolan---nationell-strategi-for-kunskap-och-likvardighet-sou-201735.pdf>. As to the national data, see, e.g., the statistics of the Swedish National Agency for Education, available at [https://siris.skolverket.se/siris/sitevision\\_doc.getFile?p\\_id=549303](https://siris.skolverket.se/siris/sitevision_doc.getFile?p_id=549303), showing how in 2019 about 25% of Swedish ninth-year students had not the grades to qualify for a further education in high school.

50 S.O.U., *supra* note 49, at 13. See also Jan-Eric Gustafsson, Sverker Sörlin, and Jonas Vlachos, *Policyidéer för svensk skola*, 2016, Stockholm: SNS Förlag, 17-33, available at [https://snsse.cdn.triggerfish.cloud/uploads/2020/02/policyideer\\_for\\_svensk\\_skola.pdf](https://snsse.cdn.triggerfish.cloud/uploads/2020/02/policyideer_for_svensk_skola.pdf).

valid not only for basic education; it has started to affect the quality of education (and research) offered by institutions of higher education. For instance, according to the most recent ranking provided in 2020 by the Center for World University Rankings (CWUR), only one Swedish university is ranked among the top 100.<sup>51</sup>

These data show that the decline of the quality of the Swedish education system has been (and still is) a widely debated subject in Swedish news media. The data is discussed extensively, on many levels in the Swedish society, because they confirm a negative trend (within primary school, high schools, and universities) that teachers, parents, and students noticed well before the numbers corroborated it.<sup>52</sup> With this said, it should be clarified that this paper does not, in any way, claim that the use of the statutory model as the legislative policy has generated the problem of declining quality in Swedish education. Other non-legal factors could be at the root of this development, *e.g.*, misguided management-based pedagogical choices or the decreasing status of teachers.<sup>53</sup> The aim of this brief work is to clarify that the use of the statutory model as the legislative policy is not a practical way of solving the underlying problems that the Swedish education system is struggling with. In other words, while the sources of Sweden's current educational problems probably is located somewhere else, the use of the wrong procedural legislative model definitely contributes to the persistence of the problems, regardless of the different contents which are (and will be) given to the various legislative reforms set by the changing political majorities in the national assembly.

In this situation, legislators are presented with two directions of the legislative policy when attempting to solve the educational problem in Sweden. First,

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51 See CWUR - World University Rankings 2019-2020, 2020, available at <https://cwur.org/2019-2020.php>.

52 See Christina Wikström, *Sweden: The Intersection of International Achievement Testing and Educational Policy Development*, in L. Volante (ed.), *The Intersection of International Achievement Testing and Educational Policy -Global Perspective on Large-Scale Reforms*, 2016, London: Routledge, 97; Johanna Ringarp, *PISA lends legitimacy: A study of education policy changes in Germany and Sweden after 2000*, 15 *European Educational Research Journal* 453-454 (2016); and *The Economist*, *Fixing Sweden's schools*, 2013, November 2, available at [www.economist.com/news/europe/21588959-swedish-pupils-have-fallen-behind-their-international-peers-fi-xingswedens-schools](http://www.economist.com/news/europe/21588959-swedish-pupils-have-fallen-behind-their-international-peers-fi-xingswedens-schools). 17 Dec 2013. See also Silvia Edling and Johan Liljestränd, *Let's talk about teacher education! Analysing the media debates in 2016-2017 on teacher education using Sweden as a case*, *Asia-Pacific Journal of Teacher Education* 8-11 (2019), available at <https://www.tandfonline.com/doi/pdf/10.1080/1359866X.2019.1631255?needAccess=true>.

53 See, *e.g.*, Deborah Nusche, Gábor Halász, Janet Looney, Paulo Santiago & Claire Shewbridge, *OECD Reviews of Evaluation and Assessment in Education -Sweden*, 25-28 (2011), available at <https://www.oecd.org/sweden/47169533.pdf>; or Swedish National Agency for School Improvement, *Improving school leadership-Background report Sweden*, 16 (2017), available at <https://www.oecd.org/sweden/38613828.pdf>.

they can continue to endorse the statutory legislative policy, but offer new content: the national assembly can simply promote reforms of Swedish education via new, deep-detailed legislation. However, this direction has already been taken as standard legislative policy in recent decades: each new political majority in the Parliament has brought with it a new wave of reforms in education (and often, within the same term, one could see the attempts at several reforms), but the quality of Swedish education continues inexorably into decline (or at least to stagnate).<sup>54</sup>

The Swedish legislator has another option for solving this problem, and it is a policy that on the whole has been left unexplored: the legislators can change the modalities of regulation or, in other words, adopt another model of legislative policy. In particular, it seems that the most suitable model for legislating education is the one previously defined as “administrative legislative policy.” The choice of this model entails granting public agencies (from the highest, *e.g.*, The Swedish National Agency for Education, to the lowest administrative bodies, *e.g.*, the Head of the School) new rule-making power.<sup>55</sup> This increased regulatory capacity will allow the agencies to “operationalize” the framework of the regulation outlined by the legislative bodies in the statutory provisions, general lines expressed often in terms of broad principles according to which the agencies should operate.

There are several reasons that support the choice of this legislative policy model, at least when it comes to the regulation of education in Sweden. In particular, one can detect two overlapping reasons of a structural nature, *i.e.*, dealing with the structure of modern Sweden and the role of education in it, and two motives with more institutional feature, *i.e.*, focused on the characteristics of Swedish public agencies.

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54 See Eva Forsberg & Ulf P. Lundgren, *Sweden: A Welfare State in Transition*, in I. C. Rotberg (ed.), *Balancing change and tradition in global education reform*, 181-200 (2nd ed. 2010); Skolverket, *Vad påverkar resultaten i svensk grundskola? Kunskapsöversikt om betydelsen av olika faktorer*, 15-16 (2009), available at <https://www.skolverket.se/getFile?file=2260>; Hans Albin Larsson, *Efter 50 år av reformer*, *Forskning & Framsteg* Oct. 1, 2003 at 7, available at <https://fof.se/tidning/2003/7/artikel/efter-50-ar-av-reformer>; and Ulf P. Lundgren, *Utbildningsforskning och utbildningsreformer*, 2 *PEDAGOGISK FORSKNING I SVERIGE* 240 (2002).

55 See S.O.U., *supra* note 49, at 108. See also Jonas Höög, Olof Johansson & Anders Olofsson, *Swedish successful schools revisited*, 47 *J. Educ. Admin.* 751 (2009) (as to the key role, at least in the Swedish context, the administrative figure of the school principals play in the success, or failure, of a school).

## A. STRUCTURAL REASONS FOR THE ADMINISTRATIVE MODEL OF LEGISLATIVE POLICY IN SWEDISH EDUCATION

Starting with the first structural reason, a centralized detailed regulation is certainly positive for other areas (*e.g.*, criminal matters) but cannot be considered appropriate for the field of education. The social, economic, and cultural circumstances where educational activities take place play a fundamental role: contexts shape the backgrounds, the potential, and the knowledge tools that the students have; these are the material that educational structures work with. For example, different pedagogical approaches and goals must be chosen based on whether the students come from a low-income or a high-income background, or whether they come from a first- or second-generation immigrants' milieu, or whether they live in an urban, suburban, or rural area.<sup>56</sup> Different contexts mean students will have different problems, different conditions, and different needs. This diversification is difficult for a general tool of intervention such as statutory provisions to recognize and tackle, however detailed and articulated these provisions may be. Instead, it would be better to endorse a legislative model (such as the administrative one) which leaves considerable room for maneuver – particularly in rule-making – to public agencies, and specifically to local public agencies. The latter are somewhat more structurally connected to the differentiated local realities they must regulate; for example, the personnel of local public agencies often share the same cultural background of students and their parents.<sup>57</sup> Public agencies can therefore “operationalize” the general principles for education, which have been established in the national statutory framework, in closer proximity to the reali-

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56 See Hanna Dumont, *Adaptive teaching: Students' differences and productive learning*, 13-14 (2018), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=EDU/WKP\(2018\)8&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=EDU/WKP(2018)8&docLanguage=En); and Marohang Limbu, *Emerging Pedagogies in the Networked Knowledge Communities: Interweaving and Intersecting Global Communities in the 21<sup>st</sup> Century Global Village*, 63 (2013). See also Andreas Helmke & Franz E. Weinert, *Bedingungsfaktoren schulischer Leistung*, 71-176 (1997). See, *e.g.*, Skolverket, *Vad påverkar resultaten i svensk grundskola?*, *supra* at 86-120 (where the students' backgrounds, and in particular the ethnic one, are shown as significantly affecting their performances in Swedish schools); or OECD, *PISA 2009 Results: Students On Line Digital Technologies and Performance (Volume VI)*, Ch. 4 (2011), available at <http://www.oecd.org/pisa/pisaproducts/48270093.pdf>.

57 See, *e.g.*, *Alaska Native Knowledge Network, Alaska standards for culturally responsive schools*, 19 (1998) available at <http://www.ankn.uaf.edu/publications/culturalstandards.pdf> (“A culturally-responsive school has a high level of involvement of professional staff who are of the same cultural background as the students with whom they are working”). For a similar way of reasoning, see Ernest Freund, *Administrative powers over persons and property; a comparative survey*, 438-440 (1928). See also Höög, Johansson & Olofsson, *supra* note 55, at 751 (“We also consider the fact that the relations with the local community is of importance for... a sustainable culture with positive attitudes to education among parents and students”).

ties in which these principles are supposed to operate.<sup>58</sup>

This administrative-based approach to the legislative policy on education, with its attention to the “diversities” in conditions and needs of the students, will particularly benefit contemporary Sweden. Since the 1990s this country has witnessed increased differentiation in many components of society: economic life (with a shift towards a more “liberal” approach to the economy and, consequently, an increased differentiation in the distribution of wealth), cultural life (with an increased flow of immigrants coming from different, but definitely not the worst, educational backgrounds), religious life (with a growing presence of non-Christian students), and also in the sexual landscape (with the surfacing of other kinds of sexuality than traditional heterosexuality, as well as various types of gender identity).<sup>59</sup>

As to the second structural reason for endorsing an administrative model of legislative policy, one should consider a basic distinction in the legislative process between targets of legislation (i.e., the reality the legislator wants to address) and goals of legislation (i.e., the ideals the legislator intends to reach). As seen earlier, the goal of structuring an educational system can switch between a more “societal” aspiration (i.e., aiming at the creation of the “perfect” citizen) and an ambition of a more individual nature (i.e., aspiring to bring out each and every student’s best specific qualities). Regardless of the goal chosen, the target of education is nevertheless always of individual nature: whether the goal is to enhance individual qualities or create good citizens, the starting point for each legislative process dealing with education is the reality that education deals not with a fictional “student” or “teacher” but with concrete, individual students and teachers.<sup>60</sup>

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58 See Betty Malen, Rodney T. Ogawa & Jennifer Kranz, *What Do We Know about School-Based Management? A Case Study of the Literature - A Call for Research*, 289-290 (1990), and Carl I. Candoli, *Site-Based Management in Education: How to Make It Work in Your School*, 1 (1996) (as to the idea of “school-based management” and its rule-making implications). See also Noel McGinn & Thomas Welsh, *Decentralization of Education: why, when, what and how?*, 36-42 (1999), available at <https://unesdoc.unesco.org/ark:/48223/pf0000120275>. See, e.g., UNESCO, *Open school: a step-by-step guide for implementation of the Open School Programme: education and culture for peace*, 24 (2009), available at <https://unesdoc.unesco.org/ark:/48223/pf0000191906>.

59 See Forsberg & Lundgren, *supra* note 54, at 191 (“Sweden... is a more divided and polarized country today than it was ten to fifteen years ago to respect to income, wealth, living conditions, and housing segregation, in part because of increased immigration”). See also Johannes Lindvall & Bo Rothstein, *Sweden: the Fall of the Strong State*, 29 *Scandinavian Pol’y Stud.* 55-56 (2006); and Bo Rothstein & Lars Trägårdh, *The State and Civil Society in a Historical Perspective: The Swedish Case*, in L. Trägårdh (ed.), *State and Civil Society in Northern Europe: The Swedish Model Reconsidered*, New York: Bergbahn Books, 235 (2007).

60 See Nevitt Sanford, *Self and Society: Social Change and Individual Development*, 41 (1966). See also Verker Lindblad, *Curriculum Codes and International Statistics*, 120 (2014); and Janice Arcaro, *Creating*

In this the situation, the administrative model of regulating education appears to be the most appropriate choice. By shifting the large burden of law-making towards public agencies (and in particular local ones), the administrative model fulfills one of the principles that legislative processes should always observe in a democracy: to always involve the addressees of a certain legislation in the procedure leading to such legislation. In other words, this model of legislative policy promotes a more democratic approach by reducing further the distance between law-makers (the local public agencies) and the target of law-making processes (in this case the individual students and teachers).<sup>61</sup>

The choice of the administrative model will structurally realign the legislative policy on education to the Swedish welfare model of organizing society. One of the primary goals of the Swedish welfare state has always been the reduction (often by law) of the substantial inequalities among individuals in society, *e.g.*, in terms of different economic or cultural backgrounds.<sup>62</sup> This process of eliminating differences takes its starting point in the reality of each and every individual, his/her conditions and needs, to then generate by law the concrete conditions allowing all individuals to start their participation in community life on the same premise, regardless of economic, social, or cultural background. Looking at the sector of education, one can generally say that Sweden really succeeded – especially during the 1960s and 1970s – in creating a system where the discrepancies between the substantive premises for each student were significantly reduced.<sup>63</sup> For instance, substantive differences between individual students were reduced

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*Quality in The Classroom*, 42 (1995).

61 See John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XIX -Essays on Politics and Society Part 2 (Considerations on Representative Government)*, 534-545 (1861]. See also John Loughlin, *Subnational Democracy in the European Union: Challenges and Opportunities*, 480-481 (2001) (as to the “local” as an essential component for the modern idea of democracy).

62 See Norman Ginsburg, *Sweden: The Social Democratic Case*, 200-209 (2nd ed. 2001). See also Bo Stråth, *The normative foundations of the Scandinavian welfare states in historical perspective*, 41-43 (2005).

63 See Luciano Benadusi, *Equity and Education -A critical review of sociological research and thought*, *supra* note 32, at 49 (“more than any other country, Sweden passed through a process of progressive equalization, embracing both lower secondary and upper secondary education. This equalization process was particularly pronounced from 1930 to 1970.”); Jan O. Jonsson, *Persisting Inequalities in Sweden*, 101-132 (1993); and Robert Eriksson & Jan O. Jonsson, *Ursprung och utbildning: social snedkrytering till högre studier -huvudbetänkande*, 149-178 (1993). See also Vincent Vandenberghe, Vincent Dupriez & Marie-Denise Zachary, *Is There an Effectiveness-Equity Trade-off? A cross-country comparison using TIMSS test scores*, *supra* note 32, at 246-247; and Lundahl, Erixon Arreman, Holm & Lundström, *supra* note 54, at 501 (“By regarding education as a common good, social democratic education policy traditionally focuses on fostering equality, fairness and public service. Providing equal educational opportunities is seen as crucial both for promoting social justice and for enhancing economic, social and individual development. Thus, free, high quality education should be provided, regardless of the student’s background”).

by automatically granting a state loan to each high school and university student so that they could gain a certain financial independence from their family of origin and economic background.<sup>64</sup>

However, in particular during the 1990s, this goal of ensuring that all the students should have equal opportunity was so extensively endorsed by and embedded in the legislative (and political) culture that it was somehow considered as “already reached”: it became an “assumed-reality” from which to start the legislating process.<sup>65</sup> Therefore, when legislating education, the legislators opted for a policy model (the statutory one) focused on how to approach such an assumed-reality of the Swedish student (as independent from family conditions) rather than on keeping the legislative process closer to the factual reality of differentiated backgrounds.<sup>66</sup> By endorsing the administrative model of legislative policy (and its greater focus on “individual” conditions), the Swedish legislator could then restructure the legislative process in education in a way that was more consistent with the roots of the still-existing (and fairly well-functioning) Swedish political welfare state model. The administrative model, with its potential to use local public agencies as a vehicle to shift the regulatory process closer to its targets (the students), would be capable of better implementation of the original welfare-state idea in the legislative processes: legislation should start by identifying where individuals “really” are located in the social, economic, and cultural landscapes, and then build structures guaranteeing these individuals equal opportunities, i.e., opportunities truly based on the actual citizens’ location in such landscapes.

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64 See Eriksson and Jonsson, *supra* note 63, at 280-285.

65 See Björn Åstrand, *From citizens into consumers: The transformation of democratic ideals into school markets in Sweden*, 76-78 (2016); and Wildt-Persson & Rosengren, *supra* note 52, at 299 (“Sweden has tried to promote equity through a variety of educational policies... [I]nequalities in Swedish society have diminished over the last century in the sense that the influence of a number of background factors important for educational attainment -parents’ class or social position, cultural capital, type of community and gender- have been reduced”). But see Anders Björklund, Melissa A. Clark, Per-Anders Edin, Peter Fredricksson & Alan B. Krueger, *The Market Comes to Education in Sweden: An Evaluation of Sweden’s Surprising School Reforms*, 127-128 (2005) (as to the “assumed” nature of such a reality).

66 See Åstrand, *supra* note 65, at 78-84 (critically pointing out how, from the 1990ies, Sweden has witnessed a school legislative policy based on the idea of “the” student as a rational actor within a market-based system). See, e.g., *Regeringens Proposition 1991/92:95, om valfrihet och fristående skolor*, 8 (1992), available at <http://data.riksdagen.se/fil/5277FE6D-7C0B-47CB-AE25-7B2234DE5FBE>.

## B. INSTITUTIONAL REASONS FOR THE ADMINISTRATIVE MODEL OF LEGISLATIVE POLICY IN SWEDISH EDUCATION

The institutional motives speaking in favor of an administrative model for legislative policy on education relate to features of Swedish public agencies – entities that (to some extent) can be considered embedded in their administrative nature (as opposed to the political nature of legislative bodies). First of all, Swedish public agencies tend to be more “conservative” than political actors; however, note that this term definitely does not aim to qualify the Swedish administrative apparatus in a political way. The “conservative” character of the Swedish administration simply identifies its institutional quality of tending to be path-dependent with respect to established practices. In other words, for various reasons (for which the space of this article does not allow discussion), Swedish public agencies tend to adhere as much as possible to previous and established practices when it comes to regulatory regimes, even when confronting new phenomena.<sup>67</sup>

In this respect, the administrative model of legislative policy is able to offer more stability and continuity than the statutory model. The latter is the product of an elected Parliament, and, therefore, it tends to mirror (at least in the content of the detailed legislation being produced) the shifts of the political majorities that happen to win the elections each term. This constant change in the political landscape (and the subsequent detailed statutory-based regulation) can endanger the features of stability and continuity that are particularly relevant when regulating education. This potential instability of the political arena is especially important in the Swedish case, where the legislator seldomly implements new legal reforms based on a thorough investigation of what the results from the previous reform were (and whether or not they led to the desired outcomes).<sup>68</sup> As pointed out pre-

67 See Jon Pierre, *Administrative Reform in Sweden: The Resilience of Administrative Tradition?*, 191-201 (2010). See, e.g., Tomas Bergström, *Organisationskultur och kommunal förnyelse. Förändring i gamla hjulspår?*, 23-25 (2002). See also Christopher Pollitt & Geert Bouckaert, *Public Management Reform – a Comparative Analysis*, 33 (2004); and Ellen M. Immergut & Karen M. Anderson, *Historical Institutionalism and West European Politics*, 31 *West European Politics* 358 (2008) (as to the embedded need in Western European administrations of operating according to “policy paradigms”). But see Jon Pierre, *Parallel Paths? Administrative reform, public policy and politico bureaucratic relationships in Sweden*, 127-136 (2001) (where the author advances the thesis of a Swedish administration more flexible, though in hidden forms, to societal changes in its regulatory provisions).

68 See Peter Wahlgren, *Lagstiftning – rationalitet, teknik, möjligheter*, 5 and 236 (2nd ed. 2014); and OECD, *Regulatory Policy Outlook 2018*, 232 (2018), available at <https://www.oecd-ilibrary.org/docserver/9789264303072-en.pdf?expires=1566910601&id=id&accname=ocid195437a&checksum=-415184FA4216FA4D0699AAD3D66EC5F0>

viously for most other countries, for example, also in Sweden education investments financed by the state budget are quite high, but any positive outcomes they generate can be evaluated (and enjoyed) by the community only after a fairly long period of time – usually two to three generations – and thus a period covering several changes of the political majority in charge.<sup>69</sup>

Moreover, one should also consider the specific Swedish constitutional principle stressing the superiority of the Parliament above all the other powers, namely the prevalence of the representative assemblies over the judicial and administrative branches.<sup>70</sup> Due to this specific trait of the Swedish constitutional culture, even when Swedish public agencies operate as law-making actors they feel traditionally bound to the legislative provisions in a stronger way than political actors do.<sup>71</sup> This feature of the legal culture of the administrative bodies, in particular the lower-level ones, can thus contribute to a more stable and continuous operationalization of the general principles laid down in the statutes according to the administrative model of legislative policy.

As to the second institutional motive for favoring the administrative model of legislative policy, its origins can be found in the specific trait of the Swedish public agencies working with education. These agencies usually have highly qualified personal dealing professionally with educational issues (*e.g.*, child psychologists, pedagogues, child-law experts), a professionalism that is rarely found among the political representatives sitting in the legislative assemblies.<sup>72</sup>

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69 See Anders Nilsson, *Ting tar tid -Kommentarer till Utbildning och ekonomisk utveckling*, 69-73 (2005), available at <https://www.regeringen.se/49bb33/contentassets/6070de731ecd41b186b5afce54381530/utbildning-och-ekonomisk-utveckling---vad-visar-den-empiriska-forskningen-om-orsakssambanden>. See also S. O.U., *supra* note 48, at 28-30; and Peder Haug, *Om kvalitet i förskolan. Forskning om och utvärdering av förskolan 1998–2001*, (2003).

70 See The Instrument of Government, Ch. 1, art. 1 (“All public power in Sweden proceeds from the people... It is realized through a representative and parliamentary form of government and through local self-government”). See also Christopher Pollitt & Geert Bouckaert, *Public management reform: a comparative analysis: new public management, governance, and the neo-Weberian state*, 63 (3rd ed. 2011); and Joakim Nergelius, *Konstitutionellträtthetskydd: svensk rätt i ett komparativt perspektiv*, 133 (1996).

71 See Håkan Strömberg & Bengt Lundell, *Allmän förvaltningsrätt*, 95 (26th ed. 2014); Ulrik von Essen, Alf Bohlin & Wiweka Warnling Conradson, *Förvaltningsrättens grunder*, 27 (3rd ed. 2007); and Joakim Nergelius, *Constitutional Law in Sweden*, 15 (2011). See also The Instrument of Government, Ch. 12, art. 1 (“The... State administrative authorities come under the Government, unless they are authorities under the Riksdag according to the present Instrument of Government or by virtue of other law”); and Jane Reichel, *God förvaltning i EU och i Sverige*, 309-310 (2006) (as to the central role played by the political actors in controlling the legality of the operation by the Swedish public agencies).

72 See Jane Reichel, *Svenska myndigheter som EU-myndigheter*, 104-105 (2007) (as to the Swedish dualist model, where there is a clear division in both organization and accountability between the government and the public agencies); B. M. Jones, *Sweden*, 153 (1990); Anna Jonsson, *Förvaltningens självständighet och*

It is true that most of the Swedish statutes are written in collaboration with professionals, particularly in the drafting committees and through the referrals (in Swedish: *remiss*) by experts to the tentative draft.<sup>73</sup> However, the final product of the legislative process is heavily affected by the nature of the actors enacting it, namely the political representatives. Because the Parliament is the decisive stage for the making of statutes, the final product usually brings with it the political tactics, *e.g.*, in terms of influence exerted by various lobby groups, at the cost of professional quality in the statutes regulating education.<sup>74</sup> A classic example in Swedish education is the regulation of private schools during the past 30 years, where considerations of a purely political nature have played a decisive role in shaping an educational model which – at least from a pedagogical perspective – has been pretty problematic.<sup>75</sup>

Moreover, professionals working for public agencies dedicated to education have a culture of giving priority in their work to the community and specifically the students and teachers. In contrast, and naturally, political actors behind detailed legislation tend to mold the laws around the idea of political opportunity,

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*förbudet mot ministerstyre: en analys av konstitutionsutskottets betänkanden från 2000 till 2005*, 174-177 (2006). The political influence over the public administration in general is rather limited in Sweden, making it (in practice) a two-power system, where administrative practices tend to have a strong quasi-legislative status in many areas of both private and public law, from the control of the financial market to welfare law issues. See Fredrik Sterzel, *Författning i utveckling -konstitutionella studier*, 133-137 (1998).

73 See The Instrument of Government, Ch. 7, Art. 2 (“In preparing Government business the necessary information and opinions shall be obtained from the public authorities concerned. Information and opinions shall be obtained from local authorities as necessary. Organizations and individuals shall also be given an opportunity to express an opinion as necessary”); and Olof Petersson, *Rational Politics: Commissions of Inquiry and the Referral System in Sweden*, 651-652 (2015). See also Wiweka Warnling-Nerep, Annika Lagerqvist Veloz Roca, Hedvig Bernitz & Lena Sandström, *Statsrättens grunder*, 105-106 (5th ed. 2015). See also OECD, *APEC-OECD Integrated Checklist on Regulatory Reform*, 7 (2008), available at <https://www.oecd.org/regreform/34989455.pdf>.

74 See, *e.g.*, Erik Lundberg, *Does the Government Selection Process Promote or Hinder Pluralism? Exploring the Characteristics of Voluntary Organizations Invited to Public Consultations*, 1 J. Civ. Soc’y 72 (2013) (where, based on the empirical data of his study, the author poses the question on whether in Sweden “public consultations [are] an effective way for voluntary organizations to influence policy-making, or...merely symbolic and a way for the government and the voluntary sector to gain legitimacy in the policy process”). See also Lavin Rune, *Lagrådets ställning och betydelse*, 1 FÖRVALTNINGSRÄTTSLIG TIDSKRIFT 64 (2003); and Anne Ramberg, *Advokatsamfundets remissarbete*, Svensk Juristidning 803-804 (2011).

75 See Björklund, Clark, Edin, Fredricksson, and Krueger, *supra* note 40, at 2-3. See, *e.g.*, Anne West, *Private Schools in Sweden: Policy Development, Inequalities and Emerging Issues*, 72-76 (2017); or Anders Böhlmark & Mikael Lindahl, *The Impact of School Choice on Pupil Achievement, Segregation and Costs: Swedish Evidence*, 42 (2007), available at <http://ftp.iza.org/dp2786.pdf> (where the authors “find evidence that the competitive forces unleashed by the 1992 school reform in Sweden induced higher pupil achievement, but also higher costs and greater segregation”). Compare Anders Bergh, *Explaining the Survival of the Swedish Welfare State: Maintaining Political Support Through Incremental Change*, 32 Fin. Theory & Prac. 245-246 (2008).

and the insertion of law-making into a broader context of political considerations targeting not only students and teachers, but all potential voters.<sup>76</sup> For example, to strengthen electoral ties in rural areas, since the late 1990ies the Swedish center-left governments used their law-making competence to aggressively promote and bring about transformation of colleges into fully accredited universities, despite strong (and *ex post* well-founded) opposition by professionals working within public agencies specialized in education.<sup>77</sup>

From this short work, the reasons appear quite clear for why Sweden should move towards an administrative model when legislating education, i.e., a model where the prominent law-making role is played by public agencies (and lower-level agencies in particular) while leaving Swedish assemblies the fundamental duty of setting strategies and frameworks in statutory form (within which the agencies should operationalize according to the contexts in which they operate). On the other hand, it is quite clear that such a model can entail inherent risk: namely of encouraging scattered and excessively diversified regulatory regimes, each established in the attempt to “operationalize” the framework for a specific context.<sup>78</sup>

Bringing attention to the potential dangers of the administrative model is more than legitimate. However, one should consider that at least when consider-

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76 See Ingrid Carlgren, *The Swedish comprehensive school -lost in transition?*, 12 *Zeitschrift für Erziehungswissenschaft* 644-645 (2009). See, e.g., Gary Miron, *School Choice and the Quasi-market in Swedish Education*, 41 (1996); and Luis A. Benveniste, *The Political Structuration of Assessment: Negotiating State Power and Legitimacy*, 46 *Compar. Educ. Rev.* 89 (2002) (where scholastic assessments should be mainly considered as “a political phenomenon that reflects the agendas, tensions, and nature of power relations between political actors”). See also Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 76-77 (2nd ed. 1998) (as to the idea of “political opportunities” as “consistent - but not necessarily formal or permanent - dimensions of the political environment that provide incentives for collective action by affecting people’s expectations for success or failure... [in particular by] emphasiz[ing] the mobilization of resources external to the group” [italics in the original]).

77 See Lars Engwall & Thorsten Nybom, *The Visible Hand Versus The Invisible Hand. The Allocation of Research Resources in Swedish Universities*, 32-34 (2007); Högskoleverket (National Agency for Higher Education), *Högskola i dynamisk Utveckling -fyra högskolors förutsättningar att bli universitet*, 74-75 (1998), available at <https://www.uka.se/download/18.12f25798156a345894e2ab2/1487841915053/9811R.pdf> (where only one of the 4 colleges which applied was deemed suitable to become a university by the national agency in charge of the process. The Government decided instead to give the university status to all applicants); and Riksdagen, *Riksdagens snabbprotokoll 1998/99:36 Tisdagen den 15 december, 1998, 9*, available at <https://data.riksdagen.se/fil/C9195609-2F22-4556-B000-F305A63B5E91>. See, e.g., Mats Alvesson, *Slappare utbildningar slår mot offentlig sektor*, 9 november 2017, DAGENS SAMHÄLLE, available at <https://www.dagensamhalle.se/nyhet/slappare-utbildningar-slar-mot-offentlig-sektor-19410>.

78 See Geert Bouckaert, B. Guy Peters & Koen Verhoest, *The Main Argument -Specialization without Coordination is Centrifugal*, 7-12 (2010); and Sandra Van Thiel, Koen Verhoest, Geert Bouckaert & Per Lægred, *Lessons and Recommendations for the Practice of Agencification*, 423-424 (2012).

ing education in Sweden, the statutory approach – despite its original intentions – has not prevented the scattering of regulations. In many cases, to adapt very detailed statutory provisions to a diversified reality (e.g., for people with special needs or for immigrants with a different background knowledge), the very legislative statutory provisions concerning education often appear to be diffuse and in conflict with each other. For instance, inconsistencies and fragmentations seem to be the trademark of detailed legislation dealing with the role of parents within the primary school system, or the legal position of the universities within the public administration.<sup>79</sup>

Moreover, even if it is impossible to prevent completely, at least it is possible to minimize the risk of scattered regulation that is inherent in the adoption of the administrative model as the legislative policy for education. In particular, the danger can be reduced by setting two levels of control for how local public agencies produce regulatory regimes of education. First of all, an internal system of control can be established by assigning to the central agencies of education (e.g., the Swedish Higher Education Authority, *Universitetskanslersämbetet*, and the Swedish National Agency for Education, *Skolverket*) the specific task of authoritatively coordinating the differentiated regulatory regimes so that inconsistencies and contradictions among the various local agencies' law-making can be avoided. This co-ordination can be done, for instance, by enacting authoritative policy documents explaining how the general principles provided in the statutes should be interpreted.

As to the second level of control, this device can be set external to public agencies and will require a more active role by the Swedish judicial branch – an actor that has traditionally tended to be quite passive when it comes to education.<sup>80</sup> In particular, the primary task of ordinary and administrative judges will

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79 See, e.g., Utbildningsdepartementet, *Var-dags-inflytande i förskola, skola och vuxenutbildning-Ds 2003:46*, 17-28 (2003), available at <https://www.regeringen.se/49b71a/contentassets/c567794ac109401c9b2949bcd-c3bf9f8/var--dags---inflytande-i-forskola-skola-och-vuxenutbildning>; or S.O.U., *Självständiga lärosäten -Betänkande av Autonomiutredningen 2008:104*, 110-121 (2008), available at <https://www.regeringen.se/contentassets/e23c5b1112974ed3b52d1eb439ee3152/sjalvstandiga-larosaten-sou-2008104>.

80 See Judit Novak, *Juridification of Educational Spheres. The Case of Swedish School Inspection*, 46-47 (2018), available at <https://uu.diva-portal.org/smash/get/diva2:1163431/FULLTEXT01.pdf> (“the judiciary in Sweden, as in many other countries, in effect recognized that the National Agency for Education was better suited to supervising the manner in which the discretionary powers vested in local authorities were being exercised,” 46). See, e.g., Katja Gillander Gådin & Nan Stein, *Do schools normalise sexual harassment? An analysis of a legal case regarding sexual harassment in a Swedish high school*, 31 *Gender & Educ.* 920 (2019) (where it is pointed out how it was not until 2012 when the first sexual harassment case against a school was brought to a Swedish court). Compare, e.g., *Franklin v. Gwinnett County Public Schools*, 503

be to keep the various regulations produced by local public agencies within the frameworks set by statutory provisions.<sup>81</sup> For example, in an area with a high level of a certain religious denomination, local agencies can be more sensitive in their regulation by allowing specific religious holidays. However, judges can intervene if local regulations aimed at respecting religion interfere with (or even endanger) fundamental rights such as gender equality, i.e., rights which are guaranteed in the Swedish legal system to each individual, regardless of the context in which he or she operates.

## V. CONCLUSION

As this brief article has shown, legislating education is not an easy task, and the Swedish situation is no exception. The task of choosing the appropriate legislative policy is continually confronted with the endless dilemma of whether the goal of education is to build a better society or better individuals. In this respect, Swedish legislators have a continuous struggle: should they build a system that encourages bringing out the best in every student, but which runs the risk of creating many future citizens who have fulfilled their own potential but who are non-functional to society; or should legislators promote education that produces good and functional citizens but, in doing so, sacrifice the diversity of individuals and their potential, when this diversity is one of the core features required for the progress of society?

However, Sweden has also shown that although it is always difficult to find the right content for legislation on education, certain attention must be paid to the modalities of regulation as well, i.e., to the various models of legislative policy. In particular, the Swedish case has put this factor under the spotlight: when choosing a certain legislative policy, less attention (and power) should be given to the political environment, i.e., where the legislation comes from; instead, the choice should be focused on the target of the legislation, i.e., the addressees'

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U.S. 60 (1992) (where the United States Supreme Court decided a monetary compensation by the school in a case of sexual harassment).

81 As to the central role the judicial should play in the administrative legislative policy when the latter is deployed in a Swedish context, see Robert A. Kagan, *Fragmented Political Structures and Fragmented Law*, 4 *Jus Politicum* 16 (2010), available at <http://juspoliticum.com/uploads/pdf/Kagan-3.pdf> ("In cohesive Sweden, which invests in extensive professional education for caseworkers, very *general* legislative standards may yield legal decisions in welfare cases that are both consistent and responsive" [italics in the original]).

context. The failure of Swedish legislation in the field of education demonstrates once again the tricky aspect of legislation in general: even if legislation is created to solve a citizens' problem, this problem is seldom the primary criterion used to select the best way to legislate.

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