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# Juridification of Educational Spheres

*The Case of Swedish School Inspection*

JUDIT NOVAK



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### **Abstract**

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This dissertation argues that the great transformation of education policy and governance that we have witnessed in the last few decades can only be properly understood by taking into account a process of *juridification*. In and of itself, this is not a novel assertion; what is argued here is that what *this entails concretely* has been only partially understood. The mounting importance of positive rights in the welfare state as a means of preserving and legitimating the State's role is underlined, and particular focus is directed to the Swedish Schools Inspectorate (SSI) as an intermediary body between the State and educational institutions. The main argument that this dissertation advances is that the Swedish 2010 Education Act, along with the changes that its enforcement brought to state school inspection, is an instructive expression of the institutionalization of a juridified school system. Central to this argument is the idea that the legitimacy of the postmodern State in the eyes of its citizens can no longer be taken for granted. Juridification can be seen as a strategy of compensatory legitimation. Drawing on earlier research on governance and juridification, respectively, the dissertation sketches out the general thrust for the examination of the relation between the two and, in particular, just what the theoretical perspective of juridification adds to our understanding of the transformation of education policy and practice. We still know rather little about the latter, i.e., about what the functions and implications of a "juridified" mode of education governance may be more precisely. Against the backdrop of three empirical studies, it advances the argument that a good part of the evolutionary process that is here called "the juridification of educational spheres" comprises operations, institutions and actors deeply involved in locally or regionally situated issues and struggles. It further argues that state school inspection processes as such provide some means of intermediation – the means of making ideologies become real and policies come true. The final discussion is conducted in light of the specific case of the SSI, particularly how the actions and decisions involved in the Inspectorate's enactment of policy actually constitute policy by giving it certain forms and specific content. These considerations take us beyond the sphere of governance and to the heart of what we may think schooling is or ought to be about.

*Keywords:* Education policy, educational spheres, evaluative state, governance, institutionalization, judicialization, juridification, law as institution, legalization, new managerialism, positive rights, re-regulation, rule of law, school inspection, schools inspectorate

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# List of Papers

This thesis is based on the following papers, which are referred to in the text by their Roman numerals.

- I Novak, J. (2016). Skolan och rättssäkerheten: Vad har en elev rätt att kunna? [Schooling and the rule of law: What does a student have the right to know?]. In M. Gustavsson, E. Hållén and T. Österman (Eds.). *Vad ska en svensk kunna? Utbildningens dilemma – intressenas spel* (pp. 105–131). Daidalos Förlag.
- II Novak, J., and Carlbaum, S. (2017). Juridification of examination systems: Extending state level authority over teacher assessments through regrading of national tests. *Journal of Education Policy*, 32(5), 673–693.
- III Novak, J. (2014). Anpassningarnas för(e)ställning: Om Skolinpektionens tillsyn som en scen för förändring. [Performing the “right” impression: toward a dramaturgy of school inspection]. *Utbildning & Demokrati*, 23(1), 127–144.

In addition to the three papers, above, two other published works have been adapted to form the basis of dissertation chapters. Sections of Chapter 3 are adapted from Novak, J. (2017a). Juridification and Education. In M. A. Peters (Ed.). *Encyclopedia of Educational Philosophy and Theory* (pp. 1200-1205). Singapore: Springer. DOI 10.1007/978-981-287-532-7\_480-1. Sections of Chapter 4 and Concluding Discussion have been borrowed, in modified form, from Novak, J. (2017b). Juridification of Educational Spheres: The Case of Sweden. *Educational Philosophy and Theory* (Epub Ahead of Print). DOI 10.1080/00131857.2017.1401464. A few source references have been added, and certain passages have been abbreviated, while others have been elaborated. Stylistic considerations have led to further editorial adjustments. Such revisions notwithstanding, the arguments remain unaltered. Cross-references between chapters correspond mainly to references in the original publications.

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# Contents

<i>Acknowledgments</i> .....	vii
<b>Introduction</b> .....	11
Case and Context .....	12
Outline of the Dissertation .....	14
<b>PART I PERSPECTIVES</b>	
<b>1 Notes on Methods and Data</b> .....	19
The Remit of the Dissertation Topic .....	20
Policy Analysis .....	22
Empirical Material.....	25
Governmental Commissions in Sweden: An Arena for Policy-Making.....	27
<b>2 Situating the Case</b> .....	31
Research and Policy – Problems of the 1980s, Solutions of the 1990s, Issues of the 2010s .....	31
The New Public Management Explanation .....	33
General Critiques and Specific Challenges .....	34
<b>3 Theoretical Directions for Further Inquiries</b> .....	35
Juridification.....	37
<b>PART II EMPIRICAL INVESTIGATIONS</b>	
<b>4 A Process of Juridification</b> .....	45
From Obligations to Rights .....	48
The Gradual Extension of the Scope of Protections Accorded by Rights.....	49
The Institutionalization of Rights in the Legal System.....	50
<b>5 Implications</b> .....	52
Paper I.....	52
Paper II .....	56
Paper III.....	59
<b>Concluding Discussion</b> .....	61

The Transformation of Governance and the Nature of Juridification.....	62
A Foundational Transformation in and of a Complex System ..	64
A Troubled Beginning .....	66
In the Aftermath of the 2010 Education Act .....	67
Legality and Legitimacy.....	68
Final Remarks .....	70
<i>Swedish Summary</i> .....	71
<i>References</i> .....	74

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## JURIDIFICATION OF EDUCATIONAL SPHERES

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*Judit Novak*

Hamilton, New Zealand, December 2017



# Introduction

This dissertation argues that the great transformation of education policy and governance that we have witnessed in the last few decades can only be properly understood by taking into account, among other things, what I here term a process of juridification. By the term *juridification*, I mean the reliance on law and judicial means for addressing core moral predicaments and political controversies, as well as issues concerning education policy. In and of itself, this is not a novel assertion. In what follows, however, I will argue that what *this entails concretely* has been only partially understood. In particular, I underline the mounting importance of positive rights in the welfare state as a means of preserving and legitimating the State's role. For the sake of clarity and focus, I have chosen to limit my object of study to the Swedish Schools Inspectorate (SSI) as an intermediary body between the State and educational institutions.

The main argument that I advance in this dissertation is that the Swedish 2010 Education Act, along with the changes that its enforcement brought to state school inspection, is an instructive expression of the institutionalization of a "juridified" school system. Central to this argument is the idea that the legitimacy of the post-modern State, for a variety of reasons, in the eyes of its citizens can no longer be taken for granted. In the face of this new political precarity, the re-establishment of credibility becomes a matter of central concern for State authority. Juridification can be seen, or so I will argue, as a strategy of compensatory legitimation.

This argument raises several questions. What is juridification? Is it a scholarly construction or a political and educational reality? Is it a product of the neo-liberal project of a global free market? (Scott, 1998) Most important, *what are the implications of juridification for education policies and practices?*

I will argue, following a substantial scholarly consensus, that juridification is not simply a by-product of neo-liberalism. Drawing on earlier research on governance and juridification respectively, I sketch out the general thrust for the examination of the relation between the two and, in particular, just what the theoretical perspective of juridification adds to our understanding of the transformation of education policy and practice. For we still know rather little about the latter, i.e., about what more precisely the functions and implications of a "juridified" mode of education governance may be, which is largely an empirical question. This dissertation is intended in part to fill that lacuna by addressing this specific mode of welfare regulation. Against the backdrop of three empirical studies, I advance the argument that a good part of the evolutionary

process that I call “the juridification of educational spheres” comprises operations, institutions and actors deeply involved in locally or regionally situated issues and struggles. I argue further that state school inspection processes as such provide some means of intermediation – the means of making ideologies real, and make policies come true (Clarke, 2015). After all, as we shall see, policies do not just come true by virtue of being announced. The final discussion is conducted in light of the specific case of the SSI and, in particular, how the actions and decisions involved in the inspectorate’s enactment of policy actually constitute policy by giving it certain forms and specific content. These considerations will take us beyond the sphere of governance and to the heart of what we may think schooling is or ought to be about.

My choice to study a particular national setting (in this case, Sweden) is based mainly on three considerations: First, many of the most heated and sustained disputes regarding education policy are generated when dealing with rights policies, or the impact of the first on the second. The articulation and administration of rights is a continuous struggle over the boundary between what the State does and what people think it ought to do (Stone, 2012). Second, while global conditions are indeed important, “global regimes often only become operative, or performative, when they enter the national domain” (Sassen, 2006, p. 2). Hence “there is much more going on than meets the global eye – or than highly recognizable global scalings allow us to understand” (ibid.). My third and final consideration is in many ways derived from the first two: many important distinctions between types of social situations and relationships that are not immediately obvious come to light in an examination of the standard uses of certain concepts and the way in which these depend on a particular policy context, a point made by Hart already in 1961 (Hart, 1961). Hence, I sometimes raise questions that may seem at first merely semantic. I consider, for instance, the difference between *rights* and *obligations* (Paper I), how reference to a valid *rule of law* differs from a prediction of the behavior of professionals in schools (Paper II), and the difference in meaning between saying that school principals observe a rule and saying that their schools habitually do certain things (Paper III). These seemingly trivial observations, taken together, indicate a substantial transformation of education policy.

### Case and Context

More needs to be said, by way of introduction, about the reasons why the SSI offers a particularly interesting research site for the study of transformative changes in education policy and governance from the perspective of juridification. The most important one is that the SSI, like many other inspectorates within the European education systems, holds a powerful position in the national arrangement of education governance. The proliferation of regulatory

agencies is often considered one of the most striking features of what is commonly described as the shift from “government” (the practice of politics, policy and administration under the auspices of the State) to “governance” (involving co-production by many agents and agencies) (Majone 1994; Loughlin and Scott, 1997; Stoker, 1998; Moran 2002; Clarke 2015;). A regulatory agency can be characterized as:

...a non-departmental public organization mainly involved with rule making, which may also be responsible for fact-finding, monitoring, adjudication, and enforcement. It is autonomous in the sense that it can shape its own preferences; of course, the extent of the autonomy varies with its administrative capacities, its ability to shape preferences independently, and its ability to enforce its rules. The autonomy of the agency is also constituted by the act of its establishment as a separate organization and the institutionalization of a policy space where the agency’s role becomes “taken for granted.” (Levi-Faur, 2011a, p. 11-12)

Most apparent are the rather limited provisions of the various statutes governing the powers and obligations of regulatory agencies (Scott, 1998). The basic responsibilities of the SSI, for instance, are detailed in the *Ordinance for Instruction of The Swedish Schools Inspectorate* [*Förordning med instruktion för Statens skolinspektion*] (SFS 2011:556). The ordinance states broadly that the SSI is to ensure that all students – whether in pre-, compulsory, upper secondary or adult education – have access to equivalent education of high quality in a safe environment. It further states that the SSI “shall contribute to good conditions for children’s development and learning as well as improved knowledge outcomes for students and adult students” (ibid., § 1). In carrying out these duties, the agency shares a responsibility with the National Agency for Education, the National Agency for Special Needs Education and the Swedish Institute for Educational Research “to ensure the fulfillment of the political and educational goals in the area of education” (ibid., § 8). Supplementary to this ordinance is the Education Act, which specifies, among other things, that the SSI is to conduct regular supervision, quality auditing, handle complaints from students and parents, and issue permits for independent schools.

In order to understand the purpose of this research project, it should be noted that when the 2010 Education Act came into effect on July 1, 2011, the SSI acquired a legal mandate to “control whether the educational institution under scrutiny complies with the requirements of laws and regulations” (SFS, 2010:800 Education Act, Chapter 26, § 2). It also acquired broad powers to impose sanctions against the principal organizer for non-compliance. These sanctions include, but are not limited to, injunction with a penalty, temporary operating ban, and revocation of the permit to operate in the case of charter schools (ibid., §§ 10-18, § 27). Further, the Teachers’ Disciplinary Board [*Lärarnas ansvarsnämnd*] was established, to which the SSI may report teachers and call for a review of their suitability to teach (ibid., Chapter 27, § 4). The

regulations regarding degrading treatment were also incorporated into the Act, as was the mandate of the Child and School Student Representative [*Barn- och elevombudet*, which has been a part of the SSI since 2008] to represent students in court (*ibid.*, Chapter 6, § 15).

Against the backdrop of these recent changes, it can be argued on empirical grounds that the SSI's regulatory toolbox has been expanded and, importantly, entails new techniques of governance. Previous research suggests that these techniques refine the work of the inspectors and represent a professional advance in regulatory techniques (Lindgren, 2014a; Baxter, Grek and Segerholm, 2015; Hult and Segerholm, 2016). I argue that, on a different level, these techniques allow the inspectors to align themselves with the State's agenda of re-establishing legitimacy in the aftermath of the decentralization and far-reaching marketization of the education sector.

### Outline of the Dissertation

The remainder of the dissertation is divided into two main parts. A third part consists of a summary of the first two, together with conclusions to be drawn therefrom, as well as suggestions for future research agendas and policy issues concerning the education sector in Sweden and other countries.

The organizational structure of the dissertation is guided by the principle that the current mode of education governance cannot be properly understood if the study is confined to the question of how governance plays out through global processes and institutions. Such a narrow focus would lead us into the "endogeneity trap" that, as Sassen (2006) points out, so profoundly affects the literature on globalization. Avoiding this trap requires that some attention also be paid to the work that produced the new condition.

In Part I, I go into events that have brought forth the current situation. I distinguish between a *negative right* – the right to do something free of restraint – and a *positive right* – an entitlement to have or receive something, such as health care or, importantly for this dissertation, education. While both types of rights define relationships, positive rights inevitably require the State to ensure the realization of certain rights claims. Accordingly, different policy-making frameworks reflect different perspectives on the protection of rights in the democratic policy process. I stress the importance of the distinction between negative rights and positive rights, not only because positive rights already exert considerable power within the State, but also because the current emphasis on rigorous forms of accountability in schooling at all levels, tighter control, and the stress on freedom of choice and greater efficiency is not reducible to neoliberal economic policy. Rather, I suggest, these phenomena need to be situated in the processes that legal theorists have recognized as "juridification."

For the purposes of this introduction, it suffices to note Habermas' (1987) suggestion that law in the modern era has responded to global social developments with four different "thrusts" of juridification, each of which, in turn, have influenced the developments to which they were responses. Such an historical perspective, argues Teubner (1987), avoids the fallacy of dealing with juridification processes in general as the extension and densification of law. Elsewhere (Novak, 2017a), I have added the point that this perspective also offers a theoretical background against which we can understand juridification as an important aspect of the processes of socialization and inculturation through formal schooling, which can be effected by policy challenges posed by educational research.

I develop this point further in Part II, where I follow the shift from government to governance and the (re)emergence of the regulatory State in Sweden during a period of intensive development and exchange in national education policy and politics in European countries. A significant theme throughout Part II is that rights are best considered *claims* – particularly claims on government for policy recognition – and that constitutional arrangements shape the political process of making and determining competing claims. I advance the argument that rights are complex institutionalizations constituted through specific processes and arising out of struggles and competing interests, and, further, that the specificity of rights is partly conditioned by their level of formalization. I demonstrate empirically that a good part of juridification materializes in a variety of microprocesses of policy – processes that have the power to reorient particular aims of educational institutions and specific practices away from historically shaped national logics and towards global logics. Another theme of Part II concerns the practical work of the SSI. The inspectorate is framed as a certain type of policy instrument that governments can use in their attempts to realize rights policies, that is, make them real. I take from Clarke (2015) the idea that *embodied regulation* provides a way of thinking about this particularly distinctive form of authority action. Hence, I examine processes and practices that were previously identified simply as "the State." One of the significant features of school inspection in Sweden, like school inspection elsewhere, is indeed its embodied character. While inspectors often work on-site, i.e., they are a physical and social presence in the schools being inspected, they can also exercise direction, authority, and control from a distance (Clarke, 2015). In this way, the SSI serves as an intermediary in the move from one means of governing to another.

The final part summarizes the dissertation chapters, considers the conclusions that can be drawn from them and the implications of juridification for education policies and practices, and raises questions for future research.



**PART I**  
**Perspectives**



# Chapter 1

## Notes on Methods and Data

### Background

The idea of bringing school inspection and juridification into a unified framework grew out of my participation a collaborative project in which the term juridification was applied to the events and conditions of governing through school inspection.<sup>1</sup> The project analyzed, among other things, how the aims, directions and procedures of Swedish school inspections had been portrayed in a sample of texts produced by the responsible national authorities during 2003-2007 and 2008-2010, respectively. A focal finding was “a growing tendency to approach issues of quality in schooling as a formal legal issue” (Lindgren, Hult, Segerholm and Rönnberg, 2012, p. 584). This growing tendency was understood as “an example of juridification,” that is, “a general increase in legal and regulative processes in society” (ibid.).

The legal and regulative processes in the work of the SSI became a salient feature of the policy study, particularly after the Swedish 2010 Education Act came into effect on July 1, 2011. In 2012, I conducted a study of the inspection procedures and found that the enforcement of the Education Act had brought about a remarkable change in the operating frame of the SSI. My interviewees – principals of 20 compulsory schools which had all been subjected to inspection after the Education Act had given the inspectorate new legal powers – described the SSI’s impact on them as school leaders as well as on their schools’ everyday practices. Drawing on a theoretical framework for evaluation influence, I analyzed especially the emotional, cognitive and behavioral change mechanisms that occurred during the course of the inspections. The final research report (Novak, 2013) demonstrated the influence of inspection processes and exposed certain systematic defects of a phenomenon that I then considered describing as a “juridified model” of evaluation.

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<sup>1</sup> The project was entitled *Governing by Inspection: School Inspection and Education Governance in Sweden, England and Scotland* (no 2009-5770, Segerholm, Forsberg, Lindgren, Nilsson and Rönnberg) and was financed by The Swedish Research Council (VR). This project was connected to two other research projects: *Swedish National School Inspections: Introducing Centralized Instruments for Governing in a Decentralized Context* (no 2007-3579, Rönnberg) financed by The Swedish Research Council (VR) and *Inspecting the “Market”: Education at the Intersection of Marketization and Central State Control* (no. 223-514-09, Rönnberg and Lindgren), financed by Umeå University.

Although I did not utilize the term juridification in the research report, I found a number of the findings of the study puzzling. Since the fall of 2013, I have alternated between collecting and analyzing additional data on school inspection and education governance, on the one hand, and studying relevant scholarship, on the other. The empirical studies and analyses of school inspection from the perspective of juridification offered here suggest important explanations for a wide range of patterned behaviors that have been seen in Swedish schools. This dissertation should be understood as an attempt to bring educational research in rapprochement with some of the insights garnered in legal studies.

### The Remit of the Dissertation Topic

This dissertation neither attempts to reconcile the disputed connections between juridification and education governance nor intends to develop a comprehensive cosmology of school inspection. Moreover, the theoretical approaches utilized herein have been drawn from scholarship in a number of areas, some of which are only remotely connected with education. To the extent that there are intradisciplinary debates regarding the works to which I refer, these are not germane to this thesis, and are left without commentary. Finally, this dissertation does not belong to the growing literature concerning the problem of how the terms “regulation,” “juridification,” and “rule of law” are to be defined – although these terms all constitute key concepts in this present work.

The relationship between what the case examined in this dissertation *is*, and what this case is *a case of*, is complicated. It is widely agreed by scholars in the field of case study research that in order for a “case” to exist, it must have a characteristic unit, the unity of which is given (at least initially) in concrete historical experiences (e.g., Ragin, 1992). The specific case under examination in this dissertation – the Swedish Schools Inspectorate (SSI) – constitutes a unified phenomenon insofar as it can be construed as a social and historical artifact, comprising a variety of elements into a combined set of social roles, an institution, a social movement, as well as a framework of community action. The case under examination is not, however, *in itself*, these roles, this institution, or this social movement. What is this case *a case of*, then? In one sense, it is a theoretical construction, that is, through the demonstrating of its connections to a hypothesized general process (see Walton, 1992). Therefore, it is entirely possible to find in the present study a case of something other than the juridification of education, and to disagree with the interpretation offered here. The aim of the dissertation is not to claim that the SSI should be seen exclusively in terms of the juridification or even primarily so; rather the study demonstrates that, on the one hand, such a reading helps us better understand

both the processes involved in its evolution and, on the other, provides an instructive illustration of how juridification works concretely in the context of education.

The reflections above notwithstanding, there are questions that can be asked as to the nature of case studies in general, and this one in particular, since any number of research methodologies and even epistemological starting points can be used under the label (Stake, 1995; Kushner 2015; Yazan, 2015).

The major source of ambiguity in this project concerns the blurry line between the unit that is studied – the SSI – and other adjacent units that may be brought into the analysis. In short, there is a certain degree of ambiguity regarding the question of where to draw the relevant boundaries and, how much of context should be taken into account to examine and understand the case satisfactorily. For instance, one might argue that the inspectorate cannot be treated accurately without taking into account other means of state regulation. Or that it cannot be understood as a means of regulation without taking into account various forms of school inspection and regulatory mechanisms in other countries. Following Kushner (2015), the approach chosen can be described in terms of “contingency,” i.e., national-level policy and local-level policy are treated here not as contextual variables, but as integral parts of the case being studied.

The dissertation approaches the SSI as a *regulatory agency* and its inspection activities as *practices of embodied regulation* (Clarke, 2015), the study of which involves in-depth examination of a number of sites, data sources, contexts, and events, all of which are intended to contribute to a “thick description” (Geertz, 1983) of policy changes. Attention has been paid, for instance, to how certain inspection practices of the legally strengthened SSI were experienced by compulsory school principals, to the principals’ involvement in the construction of the inspection and to how these processes shaped their work (Paper III). Attention has also been paid to how educational “problems” and “solutions” were discursively framed from the points of view of the Government, the SSI and the media, respectively: the “truth” about teachers’ “erroneous” assessments was the justification for the SSI’s monitoring and assessments of the accuracy with which teachers grade students’ answers on national tests (Paper II).

Naturally, the approaches employed and the methods used vary among the sub-studies. Forcing a messy reality into a one-dimensional view would have run the risk of losing sight of what Ozga (1990) calls the “bigger picture.” Details about the methodology and methods in the different studies making up this dissertation project are provided in each paper. While the topics of the three papers are diverse, they all serve to provide arguments and work out in detail the complex of values and implications of the case under study.

This is an exploratory study, not a normative project. The aim is not to try to state what should be regulated and how, but to offer insights with thick descriptions into the settings in which policy is negotiated, formulated, mediated

and, ultimately, realized. By drawing on legal theory, this dissertation raises critical questions about how we are to understand the role of law and the applicability of a concept such as “juridification” to instances not originally construed in such terms (Papers I, II and III).

One of the thorny problems for this dissertation is the balance between generality and specificity. The need for systematic understanding inevitably pushes toward generalization and the broadening of perspectives, that is, toward illustrating how the theoretical and empirical issues at stake are exemplified in the case. At the same time, as noted by Cotterrell in *Law, Legal Culture and Society*, “the empirical basis of understanding exert pressure to reject broad speculation that ignores or generalizes beyond what the detail of particular observation experience can support as plausible” (Cotterrell, 2006, p. 57).

The synthesis offered here is an attempt to consider and integrate different interweaving contexts at different levels into a balanced composite. The events and ideas highlighted are selected “not as elements of a true chain of events, but as prompts to thinking in a coherent fashion about matters that otherwise might seem chaotic and incoherent” (Adelman, 2015, p. 2).

### Policy Analysis

In 1987, Ozga famously coined the term “policy sociology” to cover education policy analysis. She described the field of inquiry as “rooted in the social science tradition, historically informed and drawing on qualitative and illuminative techniques” (ibid., p. 144). Juxtaposing conceptual considerations and patterns, Goodwin makes the observation that:

[I]n essence, policy is concerned with the principles and practices of pursuit by government of social, political and economic outcomes (Fawcett, Goodwin, Meagher, & Phillips, 2010). For this reason, policy analysis conventionally focusses on government action. The types of government action regarded as ‘policy’ are various. Policy consists of a range of actions – and inactions – including, but not limited to, laws, policy statements, programs, statements of principle, processes and performances. As such, the objects of policy research and policy analysis are also various. Policy researchers analyze texts, institutions and institutional processes, as well as interactions between policy players. They also interrogate values and principles and evaluate outcomes. (Goodwin, 2011, p. 168)

Educational policy analyses range from macro analyses of national and/or international policy on education to analyses of policy-making and policy implementation confined to an individual institution or program. Although educational policy analyses take into account the role of states and governments

(whether at the global, national, regional or local level) in the formulation, realization and monitoring of education policies, states or governments will not always lie at the very center of concern (Deem and Brehony, 2000).

Many attempts have been made to clarify the meaning of *policy* and elucidate the distinction between this concept and related terms such as *policy-making* and *policy implementation*. Central to many studies of educational policy is the endeavor to understand the complex relationships that exist between the latter two. While it is common practice to distinguish between policy-making and policy implementation in theory, the distinction is difficult to maintain in practice. It is well known, for instance, that those expected to put policies into practice – the so called street-level bureaucrats (Lipsky, 1980) – play a key role in how a policy actually takes form and “comes alive.”

Lundgren’s (1990) distinction between the policy formulation arena and the policy realization arena is helpful for understanding the complexity of the policy process. As Lundgren points out, the conditions rules for policy formulation are different from those that apply in the realization of those policies – that is, on the level of the “street bureaucrats.” In the formulation arena, the goals of particular policy issues as well as solutions to particular policy problems are often products of negotiations and appear as solid concrete products, even when they are abstractly formulated. By contrast, in the realization arena, where the new policy is expected to “come alive,” there already exist concrete policy goals (and problems). Upon entering the realization arena, the centrally formulated goals and/or solutions to problems will immediately need to be subjected to local negotiations. Moreover, they will have to be transformed into concrete techniques and methods. Intermediary bodies established “from above,” such as a state schools inspectorate, will have an impact on the direction and structure of this process (Lundgren, 1990).

At this juncture, one might be tempted to think that this model of policy advocates the view that Stone (2012) calls “the rationality project,” that is, the establishment and implementation of a hierarchical sequence of stages, “almost as if on an assembly line” (*ibid.*, p. 23). On this account, an issue is put on the agenda, and a problem gets defined. The problem then becomes subject to deliberation and negotiation by the legislative and executive branches of government, where a variety of solutions are proposed, analyzed, refined, legitimized, and, ultimately, and selected. The chosen solution (or solutions) move from the formulation arena to the realization arena’s street-level bureaucrats, who, possibly under the guidance of an intermediary body, implement the new policy (or not).

I argue that this line of thinking misses the point of Lundgren’s approach, which while acknowledging the role of the state in the policy process, removes it from center-stage in the examination of education policy. Importantly for my research project, it also allows for considerable emphasis to be placed on policies as *texts* to be read and interpreted – not only by those directly involved

in the different arenas, but also by those who act in the capacity of intermediaries, such as school inspectors.

In the introduction, it was noted that the SSI is accounted for in the statutes, and considered central for the realization of the substantive educational goals emanating from these statutes. The SSI, like the British Office for Standards in Education, Children's Services and Skills (OFSTED), acts with substantial discretionary powers when putting the legal framework into practice, i.e., during the act of intermediation between centrally formulated visions and local practices. Specifically, it i) specifies the targets and processes to which the statutes can be applied; ii) establishes guidelines against which educational practices can be modeled, scrutinized and judged; and iii) sanctions non-compliance without external interference. As such, it codifies the often open-ended norms contained in the legal frameworks. Hence, the SSI is not only concerned with intermediation but is to a significant degree involved in policy-making. Lundgren's model is helpful in that it facilitates an understanding of how those who have the capacity to interpret and recontextualize policies, an activity over which policy formulators have little control, are engaged in making sense of the policies of others, while simultaneously forming policies of their own. As Bell and Stevenson (2006) have emphasized, developing a conceptual understanding of these processes is a prerequisite for a more informed theoretical and empirical understanding of what is happening in our schools. The next section will consider this point in depth.

### ***Policy as Text and Discourse***

Like Lundgren, Ball (1994) draws attention to the importance of policies as texts, which, as was just argued, are subject to a range of interpretations. To see policy as text is to see it as representations encoded by the authors "via struggles, compromises, authoritative public interpretations and reinterpretations," and decoded by the readers "via [their] interpretations and meanings in relation to their history, experiences, skills, resources and context" (Ball, 1994, p. 16). In other words, policies are not "things;" they are processes and outcomes. This conceptualization holds that a policy "is both contested and changing, always in a state of 'becoming', of 'was' and 'never was' and 'not quite'" (ibid., p. 16). To see policy as discourse is to recognize that policy responses are also shaped by wider structural factors, and these factors powerfully circumscribe the capacity of individual actors to shape policy. "From a discourse perspective, policies become 'regimes of truth' which set limits to their interpretation and enactment" (Deem and Brehony, 2000, p. 1999). Ball argues that it is important to recognize that the factors that shape discourses are not value-neutral, but rather reflect the structural balance of power in society. This point is made clear in his frequently quoted remark: "Discourses

are about what can be said, and thought, but also about who can speak, when, where and with what authority” (Ball, 1994, p. 21).

This dual approach to policy (i.e., as text and as discourse) reinforces the need to see policy as both *product* of various actions and *process* of those actions (Taylor, Rizvi, Lingard and Henry, 1997), i.e., as both a statement of strategic, organizational and operational values *and* the operationalization of these (and other) values. Moreover, it reinforces the need to acknowledge that conflicts over values play out as much in the processes of policy development as in the policy text itself, and perhaps more (Bowe, Ball and Gold, 1992).

My research project is to a great extent informed by Ball’s conceptualization of policy. Thus I see policy not as a matter of “implementation,” but as a continuous and a contested process in which those with competing values and access to power seek to form and shape education policy in harmony with those values as well as other interests. This view does much more than simply announce the underwhelming news that policy analysis is an interpretive enterprise. To understand the policy process in this way, I argue, calls for a shelving of the association of policy-making with such familiar institutions as candidates running for office in parliamentary elections, in favor of associating policy-making with more abstract values of community life, such as equity, efficiency, welfare, liberty, security and the rule of law. These values are not only commonly invoked in policy debates, they are also what Stone (2012, p. 14) calls “motherhood issues.” In other words, they are values that everyone is for, at least “when they are stated abstractly.” But as soon as we ask what people mean by them, conflicts arise. Moreover, “[t]hese values not only express goals but also serve as the standards we use to evaluate existing situations and policy proposals” (ibid., p. 14).

## Empirical Material

The main argument that I advance in this dissertation is that the Swedish 2010 Education Act, along with the changes that its enforcement brought to state school inspection, is an instructive expression of the institutionalization of a juridified school system. In order to fully grasp the legislation in questions, and, more importantly, the goals, motivations and consideration that became formalized in it, I have analyzed the legislative history [*förarbeten*] of the 2010 Education Act. Legislative history refers to materials such as government bills, committee hearings, committee reports, parliamentary debates, governmental commissions of inquiry reports, and other documents generated during the passage of a statute.

The work of governmental commissions of inquiry has been of particular importance to the analyses presented here. In the following section, I will argue that, on theoretical grounds, the utilization of governmental commissions

of inquiry in the process of making policy provides a plausible strategy for enhancing the legitimacy of that process. Here it shall suffice to say that one characteristic of commissions of inquiry that is relevant to the issue of legitimation has less to do with its underlying methodological construction, and more with its inherent utility as a vehicle of conflict management. The consideration of alternative policies is rarely free from conflict, but rather tends to be marked by controversies over the premises and presumed effects of a proposed policy. Another characteristic of commissions of inquiry of importance to the analyses offered herein is what Ashforth (1990, p. 8) refers to as “the archival phase” of a commission of inquiry. This phase enters at the end of a commission’s political career as an active instrument of policy-making; its report becomes then “a source of historical ‘facts’” (ibid., p. 8). Further, and importantly for this research project, the commissions can be used as “a means for interpreting events from perspectives other than that of an immediate reference for action” (ibid., p. 8).

I have collected the digitalized versions of all governmental commission of inquiry white papers published in the SOU series<sup>2</sup> from 1922 through May, 2015, comprising a total of over 6000 documents. In addition to these white papers and other documents contained in the legislative history of the 2010 Education Act (government bills, committee reports etc.), I have analysed i) published as well as unpublished organizational corporate plans and inspection reports retrieved from the SSI; ii) media articles and press releases; and iii) interviews with principals of 20 compulsory schools that underwent the inspection type called regular supervision in the latter half of 2011, i.e., after the operating frame of the SSI had changed with the enforcement of the new Education Act. The interviews were intended to penetrate the principals’ expectations of the inspection, their perceptions of it, their assessment of strategic opportunities and their view of policy alternatives, their reasons for taking certain paths and rejecting others, and the way in which all these choices were shaped and constrained by the structural environment in which they acted. Against this background, we can better understand what happens on “the shop room floor,” for instance, the SSI’s regradings of student achievements on national tests (Paper II), and the meeting between school principals and inspectors during the course of regular supervision (Paper III).

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<sup>2</sup> SOU is the abbreviation for *Statens offentliga utredningar*. These government white papers are published annually and are sequentially numbered. I cite these sources in the format used in Sweden (year:number).

## Governmental Commissions in Sweden: An Arena for Policy-Making

In his frequently cited article, Anton (1969) argued that Swedish policy-making through government-appointed commissions of inquiry is extraordinarily deliberative, rationalistic, open, and consensual. While Anton's claim has been called into question (e.g., Claesson, 1972) it is generally agreed that the extensive use of government-appointed ad hoc commissions of inquiry and the referral system that accompanies it are indeed two central features of the policy formulation processes in Sweden. The former is an institutionalized tradition which can be traced back at least as far as the constitution of 1809, which charged the government with acquiring knowledge about society and consulting experts in all matters of importance (Hesslén, 1927; Wisselgren, 2008). The latter is a procedure whereby the reports emanating from governmental commissions are submitted to the relevant national ministry, which then circulates copies for consideration and comment by relevant authorities, advocacy groups and the public.

Before explaining the Swedish system in greater detail, it should be emphasized that the government commissions of inquiry are central to the policy-making process in many countries (Ashforth, 1990; Ginsberg and Plank, 1995). Drawing on literature from Australia, Canada, England, India, South Africa, Sweden, and the United States, Ashforth (1990) contends that the commission of inquiry can be said to be a particularly authoritative institution for three reasons in particular:

Firstly, Commissions are authorized (commissioned) by high-level political authorities within a State to conduct investigations on behalf of the State. Secondly, they are empowered to speak authoritatively on particular subjects by virtue of the status and expertise of their members (deriving from sources formally external to the political institutions of the State, such as universities and the legal profession). Thirdly, the rational, impartial, objective and independent procedures of truth seeking Commissions follow impart an authority to their "findings." (Ashforth, 1990, p. 16)

Commission reports are thus intended to be seen as representing a State speaking the "truth" about itself (Ashforth, 1990). This epistemological sense of representation is as fundamental to the legitimacy of the modern State as is the political sense of representation as an embodiment of the popular will (Sheriff, 1983). Seen from such a perspective, commissions produce a rational and scientific administrative discourse out of the raw materials of political struggle and debate. The representations of "truth" produced by commissions of inquiry are an important institutional form in modern states through which the

parameters of responsible political action and debate are constructed (Ashfort, 1990).

In the article cited above, Ashforth (1990) maintains that conventional understandings of such inquiries as policy-making instruments of government fail to grasp the significance of their political form. By stressing the symbolic and ritual aspects of commissions' work, Ashforth argues that this work may best be characterized as "reckoning schemes of legitimation" (ibid., p. 1). Such schemes of legitimation "serve in constituting a realm of discourse through which collective action vis-à-vis Society by those who act in the name of the State becomes thinkable, and thereby organizable" (ibid, p. 1).

In Sweden, as in many other countries, the system for commissions of inquiry is an important arena for political negotiations, and is often seen as offering a flexible solution to a wide variety of pressing policy problems (Meijer, 1956; Zetterberg; 1990; Trägårdh, 2007). From the 1950s onwards, the system of governmental commissions developed into an effective instrument of majority parliamentarism and welfare state expansion, as well as the successively developing bureaucracy attending the latter. Yet the development of the commission system also reflects the limited flexibility of the bureaucratic apparatus, in which the commission often functioned as a complementary and more flexible arena for governmental action outside the ministerial organization (Premfors, 1983).

Earlier research on the history of the Swedish commission system offers a rich source of empirical studies (e.g., Hesselén 1927; Meijer 1956; Claesson, 1972; Johansson 1992; Granström, 2009). In a study of the role of commissions from 1955–1989, Johansson (2012) identified three key aspects or functions of the system of commissions of inquiry. First, they are used as a knowledge-producing institution. Second, they are used as an instrument for policy planning controlled by the government. Lastly, they may be seen as an arena for consensus building in Swedish politics.

The crucial role that the governmental commissions play in political culture and policy-making in many countries calls for a more detailed presentation of the function and use of such commissions in Sweden.

The appointment of a commission of inquiry in Sweden usually happens at an early stage in the formulation of government legislative proposals or proposals for other important measures. Initiatives to appoint a commission may come from Parliament, the Government, individual members of Parliament, or joint statements from political parties. The task of such a commission is to examine and report on matters in accordance with a set of directives, formally known as terms of reference [*direktiv*], laid down by the Government. These

directives identify the area or issue to be investigated, define the problems to be addressed and set a closing date for the inquiry.<sup>3</sup>

A commission of inquiry in Sweden can take the form of a parliamentary commission, which may include or co-opt experts, public officials and politicians, or of a single-investigator commission (one-man committee). The distinction is not clear-cut, as parliamentary commissions do not necessarily include representatives from all parties, and single investigator commissions may well collaborate with experts and other actors during the course of investigation. There are also multiple terms for referring to such commissions, including “committee,” “investigation” and “delegation.” I will use the term “commissions” to avoid confusion with the parliamentary committees [*riksdagsutskotten*] of the Swedish Parliament.

Commissions operate independently of the government.<sup>4</sup> Upon completion of their work, the commissions publish their findings in a final report, sometimes preceded by an interim report. These reports are published in the Swedish Government Official Report Series (SOU). When the report is published, the commission disbands. The principle of public access to official records in Swedish public administration ensures that the reports are fully available to the public as long as no special grounds for secrecy can be invoked, such as reasons of national security.

The referral process [*remissbehandling*] functions as a quality control as well as a way of checking whether the proposals are likely to gain general support. Responses from interested parties are considered by the minister responsible, who then takes a position. If legislation is required, a bill is drafted for consideration by the Parliament. Before a government bill is drafted, the legislative proposal is submitted to a Parliamentary Committee. If the proposed law has important implications for private citizens or the welfare of the public, the Government should first refer the proposal to the Council on Legislation to ensure that it does not conflict with existing legislation. When the Parliamentary Committee has completed its deliberations, it submits a report, and the bill is put to the Parliament for approval. If adopted, the bill becomes law. After its successful passage through the Parliament, the government formally announces new law. All new or amended laws are published in the Swedish Code of Statutes (abbreviated in Swedish as SFS).

Historically, commissions of inquiry have most often taken the form of a parliamentary commission, thus comprising representatives from the political parties, interest groups, government agencies, and academic expertise (Meijer,

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<sup>3</sup> It is possible, however, for the Government to issue complementary guidelines during the course of the commission’s work. This is usually the case if there is an unforeseen occurrence that the commission needs to address in order to carry out its mission.

<sup>4</sup> Claesson (1972) has noted, however, that governmental commissions in Sweden do not fit well into the ideal of *independent* commissions of inquiry, the primary task of which is to “find out the truth” in a disinterested manner (more of which later).

1956). This form has been described as the political majority's method of outreach to the minority, a way to manifest the ideal of openness in the political system (Helander and Johansson, 1998). The form of a commission has also been seen as a way of consolidating the notion of compromise, not only by inviting the political opposition into the deliberations, but also in, working toward an agreement on the design of a proposed reform (*ibid.*).

Since the 1950s, the number of single-investigator commissions has increased at the expense of parliamentary commissions (Johansson, 1992; RIR 2004:2). One consequence of this shift – that is, from commissions composed of parliamentarians and public officials to smaller commissions composed either of a single investigator or of members with particular areas of specialist expertise – is that the government can exercise stronger control over the outcome of a commission's work (Riksdagens revisorer, 1997). After all, while the work of the commission may well be steered through the very formulation of the terms of reference, the selection of commission members is also critical. In deciding to appoint commissions of inquiry, determining who is going to take part in them, framing their scope of inquiry, and having power to dissolve or merge commissions, the Government can exercise influence on the resources at their disposal, as well as on how they carry out their work. With this in mind, the notion that Swedish ad hoc commissions are primarily instruments of objective inquiry has been rejected as a myth; thus it has been argued that commissions are best described as an integral part of an often highly politicized process of policy making (Claesson, 1972; Premfors, 1983; Gunnarsson and Lemne, 1998).

Premfors (1983) concluded in the early 1980s that the main reason why ad hoc commissions in Sweden cannot easily be replaced by alternative means of inquiry has to do with their political functions. These functions are, as has been discussed, both manifest and latent. Furthermore, while the work of commissions is largely directed by the Minister and his or her staff (since the Minister both formulates the directive and appoints the members of the Commission), there is also considerable leeway for interest organizations and the political opposition to affect the outcome.

Matters investigated by government commissions are seldom purely of a technical kind. For the most part, they address matters of contention between different “experts” and “interests” regarding perceived social and political implications (Ashforth, 1990). Through the referral system, the government then allows free expression of contrary views to the commission report in a public forum. Ideally, in this way, the commissions serve in the transformation of matters of contentious political struggle into discourses of reasoned argument.

## Chapter 2

# Situating the Case

Before turning to the specific linkages between the Swedish governance structure and the legislative choice to use state school inspections for enforcement of the law, it will be helpful to situate the SSI in the context of research on state regulation with respect to the shift from government to governance and non-judicial actors' pursuit of their policy agendas. This will lay the groundwork for outlining a broader set of arguments in the next chapter, which will then be elaborated theoretically and investigated empirically within the national context of the study.

### Research and Policy – Problems of the 1980s, Solutions of the 1990s, Issues of the 2010s

There has been a great deal of attention paid in the last couple of decades to the re-regulation of education systems – as though some ugly ghost of the past, thought to be long laid to rest, had emerged from its grave. The events that have prompted this change of scholarly focus are obvious, namely, the interest reflects profound changes that have taken place in policy objectives and instruments. As Peters and Pierre (1997) have pointed out, liberal democratic welfare states in the 1960s and 1970s were more state-centric in comparison with those of the 1980s and 1990s. Goodwin and Grix (2011) suggest that these changes were in part a response to the obsolescence of a hierarchical model in which Western politics has traditionally been organized, according to institutionalized bureaucratic rules and active interventions by the central executive, with a high degree of central control over policy design and outcomes. The 1980s were marked by the gradual substitution of “traditional” government styles with the decentralization of management control from the center (government departments and ministries) to individual institutions (Arthurs and Kreklewich, 1996). The new doctrine of “self-management” entailed a new kind of accountability and new funding structures (Whitty, 1997; Lundahl, 2002). As part of these forms of accountability and funding, outcome measuring and performance indicators were brought forward as part of more inten-

sive policies for evaluating and controlling the provision and quality of education (Loughlin and Peters, 1997; Helgøy, Homme and Gewirtz, 2007; Neave 2012). These ideas were promulgated under headings such as equity (Francia, 2011), enlargement of professional autonomy (Helgøy and Homme, 2007; Wermke and Forsberg, 2017) and deregulation (Segerholm, 2007).

The deregulatory aspect was at the forefront at the central level, but this deregulation was in many instances soon compensated for by more regulation at a decentralized level. There is a broad consensus in the research literature that as education moved well into the twenty-first century, the rhetoric of rolling back the frontiers of the State has resulted in the opposite; the frontiers have rolled forward in the shape of a multiplication of regulations and a high degree of intervention through intermediary bodies situated between governments and educational institutions, serving as direct agents of evaluation and audit (Amaral and Magalhães, 2007; Hudson, 2007; Maroy, 2008; Neave, 2012; Hall and Sivesind, 2015; Clarke, 2017).

For the sake of clarity, some care should be taken regarding the use of the terms *deregulation* and *re-regulation*, which are often used in the literature to convey different and sometimes conflicting dimensions of the much wider phenomenon of governance. In the context of education, deregulation refers to the reduction of economic, political and educational restrictions on the behavior of education providers and professionals working in schools. The notion of re-regulation is often used to suggest that regulatory reforms in particular and liberalization in general have resulted in new settings of regulation rather than in deregulation (Jordana and Levi-Faur, 2004, p. 5; Helgøy, Homme and Gewirtz, 2007, p. 198; Hasselberg, Rider and Waluszewski, 2013, p. 6-7). For instance, as was mentioned in the introduction, the increase in regulation and the number of regulatory agencies has been one of the most striking features of what is conventionally described as the shift from “government” to “governance.” “Governance” is often used as a shorthand for politics “in a world where interdependencies between political actors, policy outcomes and policy process are increasingly common, across countries, regions, sectors and issues” (Jordana and Levi-Faur, 2004, p. 23). The “politics of regulation,” as Fitzpatrick’s (2016) book title puts it, today often occurs in complex multi-level arenas, where some actors can perform simultaneously at several levels.

Like “governance,” the term *regulation* can be and has been used in different ways. While some conceive of regulation strictly in terms of rule-making by judicial and administrative bodies, others extend it to include rule monitoring and rule enforcement (Baldwin, Scott and Hood, 1998; Hood, Rothstein and Baldwin, 2001; Trubeck and Trubeck, 2005). By contrast, there are also those who conceptualize regulation as “the *ex-ante* bureaucratic legalization of prescriptive rules and the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors” (Levi-Faur, 2011a, p. 6) and thus emphasize the variety of forms of steering

and regulation in the effort to capture the plurality of sources of control involved in different issues, problems, and institutions.

Beyond the sheer multiplicity of definitions, the term is also employed for a myriad of discursive, theoretical, and analytical purposes (Baldwin et al. 1998; Black 2001, 2002; Levi-Faur, 2011a; Parker and Braithwaite 2003). While some begin with ideas about the “regulatory state” (Majone, 1994; Braithwaite, 2000), “high modernism” (Moran, 2003) and “regulatory capitalism” (Gilardi, 2005; Braithwaite 2008), others are concerned with the broader definition, which encompasses “any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within the acceptable limits of the regime” (Scott, 2001, p. 283). With this definition, Clarke (2015) notes, Scott positions regulation within a wider sense of governance, and underlines the diversity of actors, agencies and practices through which regulation is performed.

Yet while much is known about various forms and implications of re-regulation, I argue that our understanding of what *drives* it is still rather constricted.

## The New Public Management Explanation

A common denominator of the explanations provided for the current state of affairs is often reference to various versions of the new managerialism, in particular New Public Management (NPM). The central feature of NPM of interest here is the stress on the importance of public accountability influenced, on the one hand, by the model of corporate managerialism and private sector management styles (Clarke, Gewirtz and McLaughlin, 2000), and, on the other, by new institutional economics, agency theory and transaction cost analysis (Peters, 2013). These models and theories, note Peters and Marshall (1999, p. xxv), “have been used both as the legitimating basis and instrumental means for redesigning state educational bureaucracies, educational institutions and also, albeit surreptitiously, the public policy process itself.”

Generally, two elements of NPM are especially salient in the present context. First, the bureaucratic functions of regulation are separated from service delivery. Second, as a result of the withdrawal of the State from direct provision of services (for instance, via the devolution of responsibility and the privatization of existing services), evaluative and controlling functions are increasingly prominent and constitute the new frontiers where the State restructures itself (Levi-Faur, 2011b). For the education sector in Sweden, the transfer of responsibility for schooling to the municipalities and the proliferation of charter schools would be a case in point. One of the most striking effects of the division of labor is the rise of what has been called “the education market.” Another one is, again, the rise of intermediary bodies, regulatory agencies.

## General Critiques and Specific Challenges

While a detailed account of the critique of how states distribute and regulate their resources is beyond the scope of the present study, there is broad agreement in the literature that the ascendancy of neoliberalism and the attendant discourses of NPM during the 1980s and 1990s have had profound implications for educational institutions (as well as other institutions), particularly with respect to how they define and justify their existence. The more education is commodified, the more educational institutions are reconstituted as businesses selling a commodity to consumers in a competitive market (Fielding and Moss, 2011; Rönnerberg, 2015). Marketization has become a recurrent theme in work concerned with recent trends toward the commodification of education and the various ways in which educational institutions meet the new performance criteria (Olssen and Peters, 2005). In particular, Lyotard's concept of *performativity* and the economic notion of efficiency have proven to be useful for understanding how educational principles come to be subsumed under or replaced by the model of minimum input and maximum output for the socio-economic system (Peters, 1995; Barnett, 2000; Ball, 2003; Perryman, 2006, 2009; Rider and Waluszewski, 2015). In this post-modern condition, economic rationality is the hegemonic cornerstone of educational changes (Rider and Waluszewski, 2015), and the relationship between the State and its citizens is a relationship between the State as provider and the taxpayer as consumer of public services (Biesta, 2004, 2006). One of many striking results of this change is that parents and students have been maneuvered into an economic relationship in which they are the consumers of the provision called education (Englund, 1994). As a result of pressures created by the market, Gewirtz (2002, p. 49) contends, "headteachers and teachers find themselves enmeshed in value conflicts and ethical dilemmas, as they are forced to rethink long held commitments." This has been proven to be the case also in Sweden (Holm and Lundström, 2011; Solbrekke and Englund, 2011; Jarl, Fredriksson and Persson., 2012). Biesta (2004) uses the term *middle-class anxiety* to sum up the outcome of interactions between professionals in schools and parents as they become focused primarily on questions about the "quality" of the provision and getting value for money, rather than on questions about the education as a common good. The seemingly inevitable conclusion often reached in the literature is that neo-liberal regimes coerce educational institutions into engaging in perpetual production of evidence that they are doing things "efficiently" and in the "correct" way (Olssen, 1996; Apple, 2005; Green, 2011), dramatically changing existent educational relationships and the self-understanding of the parties involved (Trowler, 1998; Thrupp and Willmott, 2003; Biesta, 2004; Holmgren, Johansson, Nihlfors and Skott, 2012; Lundahl, Erixson Arremén, Holm and Lundström, 2013).

## Chapter 3

# Theoretical Directions for Further Inquiries

In the previous chapter, I argued that the intense preoccupation with what is called the re-regulation of education as a policy problem is a rather recent phenomenon. Re-regulation is not an exact term, nor are its boundaries strictly limited to the sphere of law. Its significance largely resides in the fact that certain simultaneous, and arguably interrelated, developments are occurring both on a national and on a global level. Extensive research on these developments has been conducted from a variety of perspectives and disciplines. In the context of education, it has been suggested that the alleged decline in public trust in educational institutions is linked to the decline of legitimacy of state authority, both of which might be connected to the rise of the “audit society” (Power, 1997, pp. 145-147) and the “evaluative state” (Neave, 1988, 1998).

The historical conjuncture that brought together the rise of the evaluative state at the same time as the stagnation or even retreat of the welfare state has led some to suggest that the evaluative state is essentially neoliberal. According to Neave, such an interpretation leads to the mistaken impression that the Evaluative State, as applied to the sphere of education policy, designates a crisis situation. Rather, the term is intended to identify the historical factors that brought the crisis about. Neave’s criticism suggests that inquiry must go beyond what he calls the “technical interpretation” of the origins of the Evaluative State, that is, as a response to government demands for more institutional efficiency and better enterprise, as well as to the introduction of the market as the prevailing regulating principle of education. The inquiry must involve an examination of the change which the State brought in the domain of evaluation itself, and which, “conversely, the ‘new evaluation’ appears to have brought upon the role of the State” (Neave, 1988, p. 268).

Following Neave, but going a step further, I suggest two ways for understanding the change. The first is to view law *as institution*, that is, “as a complex of normatively regulated action” (Habermas, 1996, pp. 79-80). To understand law as institution is to direct particular attention to the institutionalization of law, that is, to how law is created, interpreted or enforced through the use of recognized procedures and agencies. We are to think of law, “not just as the unified, systematized law of the nation state, but as produced and interpreted

in many competing sites and processes in and beyond the state and often relying on conflicting, unclear or controversial authority claims” (Cotterrell, 2006, p. 29). Questions about the nature of rights and duties are closely associated with these matters (Gustafsson, 2002; Vinthagen and Gustafsson, 2013).

The concept of rights is closely connected to positive law (Wilkins, 2005; Sinding Aasen, Gloppen, Magnussen and Nilssen, 2014). This brings us to the second way to understand the aforementioned change: through what legal theorists refer to as “juridification.” In the next section, I will argue that juridification includes, but also goes beyond, what is commonly referred to as judicialization – the increasing social and political role of courts – calling attention to the changing role and power of elected politicians, bureaucrats and professionals (Sinding Aasen, et al., 2014). This conceptualization of juridification highlights the close relationship between law and politics (Novak, 2017b).

Hence, I will pursue a somewhat different trajectory, although one not in disharmony with previous studies. I will investigate a number of particular rationales and principles behind the changes often associated with re-regulation and managerial modes of governing education. The principles and motivations behind such phenomena as the minimizing of ministerial discretion in the detailed operation of government agencies, or the institutional separation of the funding agency from the provider, or the separation of advisory, delivery and regulatory functions, or the emphasis on markets as the most efficient (and neutral) social institution for distributing scarce resources, or conceptions of liberty understood in terms of freedom of choice, are often explained as predictable effects of competitive globalization, of capital in crisis and its accompanying fiscal crisis of the state (e.g., Clarke, Gewirtz, Hughes and Humphrey, 2000). I will argue that the arrangements designed to give optimize economic growth, people’s choice, efficiency, and education improvement should also be seen as stemming from the amplification of positive rights.

Unlike a *negative right*, the right to do something free of restraint, a *positive right* refers to an entitlement to have or receive something, such as health care or education (Wilkins, 2005). While negative rights are single-party rights, meaning that no second party is necessary for an individual to assert them (second parties can only prevent the exercise of negative rights), positive rights imply the necessity of a second party to provide the right-holder with the entitlement. Asserting that there is a right to education is pointless unless someone has a duty to provide it (Stone, 2012).

Clearly, both types of rights define relationships. The crucial point, however, is that positive rights inevitably require the State to ensure the fulfillment of certain claims. Accordingly, different types of rights require different perspectives on the protection of rights in the policy process.

I stress the importance of the distinction between negative rights and positive rights because it is central to my thesis, which is, among other things, that the current emphasis on rigorous forms of accountability in schooling at all

levels and on tighter control is not reducible to the effects of neo-liberalism. Rather, these developments should be situated in a context in which the traditional “formal” attributes of modern law come to be replaced by “material” attributes in the interventionist state and the work of legitimation in the welfare state (Weber, 1978; Habermas, 1987; Teubner, 1987). Legal theorists have recognized this phenomenon as “juridification.” The dissertation does not claim to provide an exhaustive intellectual or political history of this process; rather the project is a more modest one of highlighting assumptions and relationships that often go unnoticed, and indicating the circumstances in which specific analyses of this kind may be applicable.

## Juridification

*Juridification* is an ambiguous concept that has engendered a fair degree of terminological diversity: juridification refers, for instance, broadly to the proliferation of law (Habermas, 1987), or more specifically to the “proliferation of legislation as a tool of governance” (Masterman, 2009, p. 477). Niezen (2010) suggests that one form of such juridification involves legalistic intensification, i.e., “a widened jurisdiction of legal institutions and increased recourse to formal processes within societies in which law already preponderates in bureaucratic procedure, dispute resolution and governance” (ibid., p. 218). This legalizing aura can be distinguished from what Niezen calls legal substitution, i.e., “the processes by which formal law is introduced to or becomes dominant in societies or communities that have previously relied more exclusively on informal customary institutions and procedures” (ibid., p. 218). The latter may be discernible through “the penetration of law and legalism into domains previously governed by other forms of social ordering” (Arthurs and Kreklewich 1996, p. 18), for example, by a growth of litigation in an area where previously there was little (Brännström, 2009). Juridification may also refer to “construction of judicial power” (Stone Sweet, 1999, p. 164), for instance, through a proliferation of international judicial bodies (Romano, 1999).

The aforementioned examples all point to an understanding of juridification as a growth phenomenon. Blichner and Molander (2008), for example, juxtapose conceptual considerations and patterns, and distinguish between descriptive and normative content. In descriptive terms, juridification can be seen as indicating and/or conveying growth in a particular area. In normative terms, juridification can be seen as “the hallmark of constitutional democracy, the triumph of the rule of law over despotism” or, alternatively, “as undermining not only efficiency, but also undermining democracy and civil society, for example, in the form of ‘legal domination’, and eventually the rule of law itself” (ibid., p. 36-37).

Masterman (2009) conveys additional nuances of juridification by distinguishing between its tangible and intangible developments. An example of the former is when an entity or activity becomes subjected to legal or law-like regulation or accommodation. Examples of the latter are the individual's awareness of his status or potential as a legal actor, or the less distinct process in which members of institutions increasingly come to define themselves and others in legal terms (*ibid.*, 2009, p. 477; see also Loughlin 1996, p. 369; Blichner and Molander 2008, p. 47). As noted by Hirschl (2008), there is an ever greater popularization of legal jargon and an ascendancy of legal discourse in a wide range of areas of modern life. Issues that have previously been negotiated in an informal or non-judicial fashion have come to be dominated by legal rules and procedures, or even quasi-legal ones, as reference to a law that does not actually exist or pertain may be seen as a form of juridification (see more of the latter argument in Blichner and Molander 2008).

The relationship between rule of law and juridification is complex. There is some disagreement in the literature about whether the two should be harmonized or kept distinct. In advocating for the latter, Blichner and Molander (2008) argue that, in descriptive terms, the rule of law represents one type of juridification, whereas, in normative terms, it constitutes a standard that may be used to evaluate tendencies of juridification or dejuridification. I consider the rule of law and the relationship between this concept and juridification in the Swedish context in Paper I (see Chapter 5 for a summary).

The multiple, complex, and variegated denotations and connotations of juridification, of which some of the more frequently cited were just mentioned, have given rise to partly overlapping strands of scholarly discussion. Various schools of thought are often merged, interrelated or cross-referenced. Given the multifarious meaning of the term “juridification” in the current debate, it is not surprising that it is possible to find a variety of definitions, or sometimes even the opposite – no definition of what juridification actually means. As a “catch-all” phrase for anything concerned with an increase in formal regulations or with “a process in the sense that something increases over time” (Blichner and Molander, 2008, p. 38), the term has been diluted to such an extent that it may pose problems for research into social relations. As many critics have pointed out, “juridification” suffers from an almost impenetrable abstraction.

Elsewhere, I have worked to make the term juridification less polymorphous by synthesizing its essential features (Novak, 2017a). This synthesis is used in the present study to lay a certain groundwork for inquiry into the multiple procedures of negotiation that take place between educational institutions and the SSI on the one hand, and between SSI and government on the other. The next section will explore this point further.

### ***Historical Roots and Contemporary Branches***

Among the most influential analyses of the roots of juridification in modern times are the works of Max Weber (1864–1920) and Jürgen Habermas (b. 1929). The overarching objective in Weber’s sociology was to comprehend the processes of modernity. The notion of rationalization is generally considered one of his most significant contributions. Weber analyzed the implications of the general processes of secularization and rationalization on the character of modern life in terms of a distinction between “formal rationality,” the strategy of adapting one’s own conduct to the predetermined purposes built into the capitalist system, and “material rationality,” the rationalization of the conduct of the life of the individual with respect to ultimate value positions (Lash and Whimster 1987). Continuing some of the discussions that were sparked by Weber, Habermas made major contributions to social theory in general and critical theory in particular. Among Habermas’s enduring interests are societal evolution and modernization, especially issues related to the Weberian conception of rationality, communication and knowledge.

Despite important differences, Weber and Habermas share an understanding of juridification (“*Verrechtlichung*” in German) as essential to the foundations of political sovereignty and political legitimacy. For Weber, the legitimacy of political systems of modern Western societies depends on the legality of their use of political power. The legitimacy of this power in legal forms is essentially granted by the rationality that the law *itself* possesses (regardless of morality). Put differently, the rationality of law is grounded in its formal properties. Weber (1978) argued that the legal order tended to develop the characteristics of a formal rationality to serve as a normative foundation for society. What he meant by the “materialization of law,” then, was its moralization; the penetration of substantive justice into positive law.

For Habermas, juridification in the modern welfare state (which expresses itself in the materialization of formal law) entails, among other things, an increased recourse to the medium of law, connected to the continuous growth in positive law. This course of juridification is characterized by new legal institutions, together with corresponding changes that penetrate deeply into what he calls the life-world. The materialization of a formal law that certain historical conditions have brought about happens as law and, through a particular political configuration, is then transformed from being an “enabler” to being the “medium” of other forms of steering media (i.e., money and power). This materialized law, driven by political processes, attempts to move societal systems into new levels of activity and concern, and can eventually lead to a “colonization of the lifeworld” (Habermas, 1987, p. 196). Moreover, it is constitutive, in that it constitutes new forms of behavior and can be “legitimized only through procedure” (ibid., p. 365). Habermas considers this form of juridification a pathological and counterproductive kind of legal intervention.

## JURIDIFICATION OF EDUCATIONAL SPHERES

Habermas (1986) distinguishes between four “thrusts” of juridification in Western industrial nations. Each one of these thrusts is connected to the emergence of various forms of the State and involves specific features of legal functions and normative structures. With reference to the bourgeois state, the bourgeois constitutional state (*Rechtsstaat*), the democratic state, and the welfare state, it can be argued that, historically, law has played an emancipatory role of the highest order, partly because all four forms have guaranteed freedoms, even if the freedoms safeguarded have varied. For the bourgeois citizen, it was important to prevent the State from attacking or even intervening in the rights of private ownership. It was necessary to guarantee by law bourgeois civil rights pertaining to private property, the freedoms of speech, assembly, the press, economic activity, etc. Further characteristics were rules having to do with how to pass and effectuate political acts, limit political power, and protect individual rights, as well as to assign exclusive competencies within the political system. The concept of the rule of law in the bourgeois constitutional state grew obsolete with the emergence of the democratic state and the welfare state. Guaranteeing every person within the jurisdiction of the national state a protection of a private autonomous sphere against arbitrary government action was no longer an issue. Instead, the State was now also to manage the task of allocating prosperity and social welfare, which meant the managing of new distributive functions and responsibilities (Gustafsson 2002).

According to Habermas, the thrusts of juridification that followed are to be understood as the gradual constitutionalization of the economic and political systems. These frameworks place the “life world” at the disposal of the market. Universal and equal franchise, freedom of organization for political associations and parties, norms of employee protection, complex networks of social security, the intensification of company constitutions, and antitrust law interventions on the market can all be seen as part of the latest epoch-making thrust of juridification. In this thrust, the intervening social state uses law as a means of control. Governance through the new juridification is dependent for its legitimation on forms of rationality, which, in turn, depend upon the efficiency of the market, but also of market actors.

Drawing heavily on Habermas, Teubner (1987) argues that the phenomenon of juridification becomes analyzable, interpretable, and strategically appropriate only when it is identified as this type of modern regulatory law, in which law becomes both politicized and socialized. Pursuing the ideas of Habermas in a differentiated manner on more local and specific levels of society, Teubner focuses in particular on the collisions between the different social and legal discourses within specific social spheres (Sand, 2008).

In light of Habermas and Weber, the impulse toward juridification should be seen as an inherent potentiality in liberal democracy, not something arising as a consequence of marketization or regimes of New Public Management. This intrinsic relationship between a certain form of rationality in the behavior of institutions and individuals, and the need for recognized and legitimate forms of

## THEORETICAL DIRECTIONS FOR FURTHER INQUIRIES

control on the equitable distribution of positive rights, is the juncture at which law meets policy, the juncture at which the 2010 Education Act, the SSI and the current wider education context in Sweden meet.



**PART II**  
**Empirical Investigations**



## Chapter 4

# A Process of Juridification

Part I situated the SSI in the research context of state regulation, particularly with respect to the shift from government to governance and non-judicial actors' pursuit of their policy agendas, and outlined theoretical directions for this project's inquiry. Part II is concentrated on the case of the SSI against the backdrop of the insights into juridification developed in the first part. The purpose of this shift – that is, from the general to the particular and from the macro to the micro – is to shed light on the how the process of juridification comes to be institutionalized. In this part, I examine particular policy episodes and contexts, sifting through the qualitative historical record to find the rationales behind the Government's decision to rely on school inspection for realizing important rights legislation, starting with the 2010 Education Act. I sketch the development of this approach to law enforcement and its reliance on school inspection from the late 1980s through the early 2010s. This outline provides the conceptual and historical scaffolding for the empirical papers in the following chapter.

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Up until the 1990s, Sweden was known to have one of the most centralized educational systems in Europe (OECD 2010, p. 14). The 1990s were marked by what series of reforms that brought about radical changes in the system, how it was steered and the manner in which organizers of education were held accountable.

One of the major adjustments was in school funding, from centrally allocated resources to each school to earmarked lump-sum grants to municipalities for education. The earmarked central transfers were, however, soon abandoned, and all central transfers became part of the general grant to municipalities (Lundahl, 2002; Ozga, Simola, Varjo, Segerholm and Pitkänen, 2011). This placed greater financial responsibility for municipalities. A central notion behind these reforms was that resource allocation would become more effective, since resources could be directed to where they were most needed (Blanchenay, Burns and Köster, 2014).

Another major change concerned the division of responsibilities between the central government and the municipalities. In addition to the financial responsibilities for public schools being essentially decentralized to the municipalities, the reforms also created a system in which national goals were set by the central administration, while decisions and responsibilities regarding how to reach those goals were left with the municipalities and their schools. In line with the devolution of responsibilities, governance was reformed from a centrally run educational system that directly managed inputs to a decentralized education system managed by outcomes and objectives. Schools were granted extensive autonomy in determining teaching content, methods and materials for the achievement of the centrally set objectives (Wahlström, 2002; Francia, 2011).

The reforms of decentralization and the transition from an input-regulated school system and curricula to an output, goal- and results-based system with fewer regulations were accompanied by free-market reforms. The latter entailed liberalization of rules for establishing and running charter schools and the introduction of school choice for students and parents.<sup>5</sup> Parents were no longer required to enroll their children in the local school, but could choose any school, public or independent, that met with their preferences (Daun, 2004). The governance system's opening up for new school trustees aimed at encouraging schools to compete for students by creating individual emphases in their curricula, as well as promoting diversity among schools. With the distribution of funds based on the number of students a school could attract, a quasi-market for education was established (Lundahl 2002; Wikström and Wikström, 2005; Forsberg, 2015). The government also imposed some new forms of control – for instance, through national tests and a new national grading system, as well as via the audit and approval powers given to the National Agency for Education to check the fairness and propriety of local authority actions.

Although 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 (and many of these supervisory powers were, indeed, highly interventionist in form), the supervisory powers were intended to be used neither regularly nor in a regulatory way. Rather, the supervisory powers accorded to the National Agency for Education were aimed at providing a final check on local action. By conferring broad discretionary powers on local

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<sup>5</sup> Independent or charter schools are an instance of public asset privatization, i.e., they are publicly funded but privately owned and managed. The schools have extensive autonomy to allocate resources as long as they conform to government regulations. Ownership arrangements vary: for instance, they can be owned by groups of parents or private companies (including national and international chains and franchises). Funding from the municipalities is provided on a per capita basis through vouchers attached to each student, on the same basis as public schools. At present, approximately 15 % of the students in primary and lower secondary education, and 25% of the students in upper secondary education, attend charter schools in Sweden (National Agency for Education, 2016).

authorities and extensive supervisory powers on the central authorities, the aim in Sweden was similar to that observed by Loughlin (1996, p. 365) in England: “to formalize an administrative relationship between the centre and the localities and to marginalize the role of the judiciary.” Rather than adopting a rationalist approach of seeking to define and formulate the precise powers, duties and procedures of public authorities in law, flexible frameworks were established through which the relationships of public bodies and professions would emerge in the course of practice.

The basic facets of the central–local relationship in the late twentieth century significantly influenced the role of law in government. In general, greater fragmentation of responsibility between the State, local government, schools and individuals within institutions (e.g., school principals, teachers, students and/or their parents) is accompanied by a move from detailed regulation to framework legislation. Here, the role of law is transformed from one of direct regulation of behavior to a more indirect, but no less constraining, regulation of procedures (Novak, 2016a). As the example of Sweden brings home, the transition from detailed legislation to a legislative framework often entails an increased need for systematic monitoring and follow-up.

Though the basic facets of the central–local relationship in Sweden in the last decades of the twentieth century may rightly be understood as processes of decentralization (e.g., Ozga, Simola, Varjo, Segerholm, and Pitkänen, 2011), I argue that this decentralization was *not* accompanied by a sweeping juridification of the educational system. This is not to say that the education system did not rest on a legal foundation. Nor does it mean that questions of responsibility, accountability, and the means by which schools ought to be governed – with prominence given to the control of the output side of education by, for example, quality controls, standardized testing, evaluations, as well as the introduction of national bodies responsible for carrying out these controls – did not become a central political issue. What it means is that, in Habermas’s (1987) terms, law was not used as an active medium for regulating the system.

The absence of this particular role of law in the case of Sweden is notable in that, despite major changes in Sweden’s education policy toward the end of the previous century, the Education Act of 1985 continued to provide the basic statutory foundation for the Swedish system well into the 2000s. For a long time, instead of reorganizing the Education Act along orderly juridical lines, the governing of education entailed bringing extensive individual rights within the fold of existing arrangements. Given that the existent legal framework had not been designed with such a purpose in mind, however, this proved to be a rather difficult exercise. Not surprisingly, the legal framework soon suffered from an increasing number of gaps and ambiguities.

The scale of these gaps and ambiguities was highlighted in 1999, when a governmental commission of inquiry was appointed to investigate how the Education Act could be “modernized” – by which the Government meant better

fitted for a system in which many of the State's responsibilities for education were delegated to the municipalities (Ministry of Education 1999:15). At that point, the 1985 Education Act had been amended some 50 times since the decentralization reforms had taken place nearly a decade earlier. Another of the commission's objectives was to investigate how the rule of law could be strengthened.

The Education Act Commission raised a number of complex political questions during the three years of its investigation. Many of them revolved around concerns regarding autonomy, individualism, and instrumentalism. While all of this is of great interest in and of itself, here I am primarily concerned with the role assumed by law in the commission's proposal for the new Education Act.

### From Obligations to Rights

The Commission's final report *An Education Act for Quality and Equity* [*Skollag för kvalitet och likvärdighet*] (SOU 2002:121) was presented to the Government in December 2002. This is a 773 page policy document divided into 16 chapters and several appendices. Overall, the report indicated that the Commission was unhappy with the emphasis on local governments' obligations in the existent Education Act. To meet national objectives as well as to comply with international legal responsibilities according to international laws and conventions,<sup>6</sup> the commission called for the introduction of new legal standards. The fulfillment of these objectives and responsibilities, the Commission argued, "requires that the Education Act indicate not only what the school authorities are obliged to provide, but also – to a greater extent than is the case today – grant students certain rights" (SOU 2002:121, p. 149). The Commission stressed that a shift from obligations to rights requires that the content of the rights be specified in legal text. Furthermore, that "the terms student's *rights, entitlements, or the equivalent, be used only when there is the possibility of an administrative appeal*" (SOU 2002:121, p. 144, emphasis added). Specifying the rights was considered crucial in order to avoid a situation where an individual cannot demand from a municipality something that he or she, according to the legislation, is entitled to have. Knowing that it would be politically controversial, the Commission proposed that a transition be made from what it referred to

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<sup>6</sup> Among the international responsibilities discussed were the *Universal Declaration of Human Rights*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention against Discrimination in Education*, the *1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, but also the European Union Law and some particular agreements between the Nordic countries. For a detailed account, see chapter 6 in the Commission's report (SOU 2002:121, pp. 165–196).

as an “obligations-based” Education Act to one based on rights (SOU 2002:121, p. 150).

At this juncture, two observations are in order. To begin with, it is generally recognized that a right-based approach to social development has gathered momentum since the twentieth century, and promises to extend well into the current century. It has been claimed that while the earlier needs-based approaches to education “have failed to achieve the Education for All goals” (UNESCO/UNICEF 2007, p. 11), a rights-based approach especially incorporates striving for the attainment of the goals of governments, parents, and children, “because it is inclusive and provides a common language for partnership” (*ibid.*, p. 11). In other words, talk of rights is thought to provide a framework within which to signal an intentional move toward more genuinely inclusive democratic processes in various areas (Cornwall and Nyamu-Musembi, 2004). Secondly, as Loughlin (2000) notes, within rights discourse, “liberties are converted into rights, concessions into entitlements, and governmental powers into duties” (*ibid.*, p. 204). But the implications of this change in language is not self-evident until attention is directed toward the gradual extension of the scope of protections accorded by rights. After all, each of these discourse conversions contributes to the need for the State to ensure the realization of certain rights claims. Uvin (2004, p. 131) emphasizes this point in his analysis of the implications of conferring a more central role to human rights: “If claims exist, methods for holding those who violate claims accountable must exist as well. If not, the claims lose meaning.”

### The Gradual Extension of the Scope of Protections Accorded by Rights

Although the Education Act Commission’s work did not immediately result in legal reform, one of its effects was to bring school inspections to the forefront of the governing process. The year after the Commission presented its final report to the Government, state school inspections were reinstated under the auspices of the National Agency for Education. Five years later, in 2008, the SSI was established as a new governmental agency and took over the inspection tasks that had been carried out by the National Agency for Education since 2003.<sup>7</sup>

Though funded by the central government, the SSI has been independent in its methodology, actions, and reporting ever since it was established. Its main authority is the General Director, who is appointed by the Government.

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<sup>7</sup> For a comprehensive analysis of the political motives for reinstating school inspections under the auspices of the National Agency for Education in 2003 and for later establishing the SSI as an independent agency of the government in 2008, see Rönnberg (2012, 2014a).

As was mentioned in the introductory chapter, school inspectors scrutinize and monitor all schools from pre-school to adult education.<sup>8</sup> The inspectors assess the conditions under which the school authority provides education (the quality of management, the level of competence of principals and teachers, the use of funding, and schools' compliance with binding regulations), monitor student results, assess the extent to which educational goals are met, and handle complaints from students and parents. They also assess applications to run charter schools, and follow up on approved applications to ensure that schools operate in accordance with licensing conditions. As noted earlier, with the adoption of the 2010 Education Act, the SSI acquired new powers.

### The Institutionalization of Rights in the Legal System

When the new Education Act (SFS, 2010:800) came into effect on July 1, 2011, law moved from the background to the foreground of the SSI's practices. The SSI received a legal mandate to "control whether the educational institution under scrutiny complies with the requirements of laws and regulations" (*ibid.*, Chapter 26, § 2). It was also authorized to impose sanctions on the principal organizer if the latter fails to rectify shortcomings found by the SSI (*ibid.*, Chapter 26, §§ 10–18, § 27). The Teachers' Disciplinary Board was also established, to which the SSI may report teachers and enquire into their suitability to teach (*ibid.*, Chapter 27, § 4). Moreover, the regulations regarding degrading treatment were incorporated into the Act, as was the mandate of the Child and School Student Representative (which has been a part of the SSI since 2008) to represent students in court (*ibid.*, Chapter 6, § 15).<sup>9</sup>

The new legal framework approved in 2010 and the institutional adaptation that took place in 2011 resulted in a series of changes that have radically altered the relationship between the SSI and educational institutions. Principal organizers and school staff can be brought before the SSI, the Child and School Student Representative, and/or the Teachers' Disciplinary Board and held accountable if they fail to comply with legal requirements in a way the SSI finds appropriate. Hence, the institutionalization of rights transforms political claims into legal entitlements, a process that – as Papers I, II and III show – has been accompanied by application of specialized and standardized forms of judicial reasoning. As with developments in other public sectors, such as health care services (Brännström, 2009; Bærøe and Bringedal, 2014), the position of judicial bodies has also been strengthened with regard to education. Yet, although extensive powers to hold local authorities and their educational

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<sup>8</sup> There are approximately 450 employees working at the SSI's executive branches, located in five regional centers.

<sup>9</sup> See Carlbaum (2016a) for an analysis of the introduction of the Child and School Student Representative and students' right to damage compensation.

institutions accountable for their activities have been conferred upon the SSI, this does not imply the abandonment of framework legislation. Rather, the most significant change was not so much the legal mandate of new central powers as it was the fact that these newly delegated powers *are intended to be used actively and to establish a precise regulative framework*. Following Loughlin (1996), the critical point here is that the conceptualization of framework legislation as providing a skeletal structure while leaving the details to be provided by secondary legislation or guidelines does not capture the basic change in legislative style that has been effected since the decentralization reforms of the last decades. Although we have continued to see the enactment of framework legislation,

...the style of this framework legislation has changed from facilitative legislation to that of *instrumental* legislation; that is, from legislation which provides a flexible structure enabling norms to emerge through working practices to that of legislation which is designed to establish the norms and regulate the relationship. (Loughlin, 1996, p. 381)

The juridification of central–local government relations consists in the transformation of law from a facilitative framework to a regulatory regimes. This process is a product of the restructuring of the political-administrative system that began with the reforms of the 1990s. We have seen that, in the framework of central-local government relations, local authorities were vested with very broad enabling powers that maximized their discretionary powers of action. This feature of the framework has been significantly modified by the Government. The SSI can be seen as illustrating how the juridification of Swedish schooling comes to be institutionalized in this sense.

In the next chapter, I will summarize the individual papers, which show some of the concrete social, political, educational and cognitive implications of “juridified” forms of school inspection and control. This investigation is highly relevant, not only for the relationship between state demands for educational accountability and certain governing activities, but also for the overarching issue of the tension between governance through litanies of audits and indicators, on the one hand, and the exercise of professional judgment and expertise, on the other.

## Chapter 5

# Implications

### Paper I: Skolan och rättssäkerheten: vad har en elev rätt att kunna? [Schooling and the Rule of Law: What does a Student have the Right to Know?]

Paper I takes the first three decades of the twentieth century as its starting point, and revisits the ideological and economic perspectives that have been wrought from and contributed to the dismantling of the welfare state in conjunction with the emergence of a global market logic. Analyzing the legislative history of the 2010 Education Act and governmental white papers published by the Ministry of Education from 1922 to 2014, it uncovers shifts in the political debate regarding the rule of law [*rättssäkerhet*],<sup>10</sup> and examines the impact of these shifts on education policy priorities. Particular attention is paid to the transformation of institutional relationships and changes in the organization of interests.

Apart from its significance as it pertains to juridification (see Chapter 3), what makes the rule of law an interesting object of study is, as noted in Chapter 2, that it is value-laden. However it is understood, “the rule of law” is usually considered good, and its absence a problem (Cotterrell, 2006). The concept of the rule of law, thus, has a strong normative aspect: to say that a school, a schools inspectorate or a national education system operates in accordance with the rule of law is not merely to describe it; it is to commend it. Consequently, there is something of value to be had in being considered an instantiation of the rule of law. For these reasons, we need some empirical reference for the concept. Since the term has been interpreted in a variety of ways in the literature (for an overview, see Møller and Skaaning, 2014), an operational definition is required for a study of particular cases to be clear and self-consistent.

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<sup>10</sup> Some brief remarks on the translation of “*rättssäkerhet*” itself are in order. Aside from the usual difficulties of translation, there are challenges stemming from the fact that the Swedish word “*rättssäkerhet*” does not have *one* equivalent in English, but several. Depending on the context, *rättssäkerhet* could mean, for instance, the rule of law, legal certainty, legal soundness or due process. Most of the differences lie at the level of specialized terms and technicalities. I use the term “rule of law” in this paper summary, bracketing the Swedish term.

At the most general level, the rule of law means that in its exercise of power, the State should be bound by its laws (Raz, 1979; Gustafsson, 1988; Jareborg, 1992). Furthermore, because judicial measures must be predictable, law must be fixed and stated in advance. To cite Raz (as quoted in Maravall and Przeworski, 2003, p. 2), “In curtailing arbitrary power, and in securing a well-ordered society, subject to accountable, principled government lies the value of the rule of law.” The rule of law is generally considered necessary for the proper working of the market and for the existence of liberty precisely because it allows individuals to plan their affairs, secure in the knowledge that government powers will not be used deliberately to frustrate their efforts (Hindess, 2003).

Against the backdrop of historical examples, however, some legal theorists have expressed the need to add *ethical acceptability* as a requirement for the rule of law. Peczenik (1986) argues that “German Jews during in the midst of Hitler’s reign could easily have foreseen that they would be persecuted, but it would be absurd to call such predictability the rule of law” (ibid., pp. 31-32). Hence, the concept necessarily must include ethical considerations; it cannot be explained solely with reference to foreseeability.

In addition to predictability and ethical acceptability, Gustafsson (2002) has added the requirement for *social acceptability* to the concept of the rule of law. In other words, a judicial decision can neither be anchored nor fully legitimated unless it is also socially acceptable. Viewed in this light, the rule of law is an ideal state in which legality implies legitimacy. Gustafsson’s conceptualization of the rule of law understands the law’s core values as multifaceted: the law is a normative system that fulfills social functions and interacts with different societal structures. It can be seen as something relational and mutable, serving a particular historical social situation determined by ideological, political, and economic factors. Changes in the rule of law come about because of changes in society at large, and they have a political significance insofar as they involve the powers and limits of government. By calling attention to the social, political, and cultural context within which legal rules are made and applied, this perspective emphasizes contingency and variability of the law. On this view, any examination of the role and function of changes in the concept of the rule of law in Swedish education policy requires that we survey these historical developments.

Paper I demonstrates that, in Sweden, the very meaning of the rule of law has been altered from an emancipatory concept to a primarily economic one. The present use treats the student as a consumer – someone guided by rational economic choices in the education market. The notion of “freedom of choice” is a cornerstone of contemporary education policy, referring in its current incarnation to the rights of individuals to pursue narrow self-interests in a competitive marketplace. In the rule of law as understood here, rule of law secures freedom of choice in this sense. A few examples from the paper can illuminate what this means.

## IMPLICATIONS

The rule of law was introduced in the Swedish education policy debate as a term referring to a broad and widely shared consensus about education in accordance with basic democratic principles; above all, the aim was to establish processes to protect the student from the discretionary exercise of power in connection with official decisions concerning grading and admission to higher education. Drawing on white papers and previous research, I demonstrate that, up until the 1970s, discussions with respect to the rule of law were anchored in an explicit ambition to establish a normative base that was consistent with the basis upon which the society rested. The school was seen as having a profound importance for the formation of shared frames of reference, and was explicitly given the task of helping develop student's civic skills, their sense of solidarity, and their social conscience – components that were considered essential to the proper functioning of society.

In the extensive restructuring of the school system that began in the 1970s, which resulted in the decentralization, deregulation, and marketization of the school system in subsequent decades, societal demands for more civic influence and greater variety of options in the public sector were a matter of prime concern for policy makers. The terms of the debate were what should be subject to central decision-making, and what should be left to the individual citizens and educational institutions to decide. The governmental commission of inquiry report *Democracy and power in Sweden* [*Demokrati och makt i Sverige*] described the fundamental challenge of democracy as being ultimately a matter of “how to combine the freedom of personal choice with a community based on solidarity” (SOU 1990:44, as quoted in Paper I, p. 116).

Within the new framework of freedom of choice as the prioritized value, calls for greater differentiation and alternative profiles for schools, the right to choose between a variety of options, etc. came to prominence, while the earlier values of non-segregation and social equalization receded into the background. The Government assumed that schools that are responsive to the preferences of parents and students would be more likely than ones administered by state bureaucrats to produce high levels of scholastic achievement, which would benefit both individuals and the nation. These changes were also consistent with the general movement toward less reliance on government and greater reliance on markets and other forms of decentralization.

While legal authority over education resided with the State, the operational responsibilities came to rest with municipalities. As described in the previous chapter, the system was decentralized in the 1990s, and the government exercised little control over many decisions at the local level. But the goal of replacing education bureaucracies with market mechanisms did not necessarily liberate education from a centrally controlled bureaucracy. Rather, another type of regulatory system arose. It was in the context of these ideological, economic, and political changes that the rule of law came to be used as it is today.

In the last two decades, the legal provisions and the discourse on the rule of law associated with them have increasingly come to stress that the State must,

in various ways, provide students with a solid basis for making well-informed choices between the available educational options. Examples of how the school system should be organized in this spirit were presented in the governmental commission report *Path to the future – a reformed upper secondary school* [*Framtidsvägen – en reformerad gymnasieskola*]. In this white paper, the investigator argues that each upper secondary education program must communicate clearly to the public “what it promises” and “where it leads” so as to provide individuals with a basis for decisions regarding their choice of program (SOU 2008:27, as quoted in Paper I, p. 126). By making it easier for students to make an informed choice about, the investigator deemed that the rule of law be strengthened.

These arguments are obviously directly traceable to the market ideal. In a well-functioning market economy, consumers are able to make intelligent and appropriate choices. In order to make such choices, consumers need to have good information. Here, the rule of law is to secure the individuals’ rights to access reliable information so that they will be able to make their choices on solid grounds. This is in part the motivation for state school inspections – to enable families to make informed decisions through evaluation and comparison of school quality and to hold schools accountable if they fail to deliver what they promise (see also Rönnberg, 2012, 2014a).

In the 2010 Education Act, more statutory provisions were introduced to strengthen the student’s legal position and the rule of law. The crucial role of *monitoring, evaluation, inspection and supervision* in the service of *equity, quality and the rule of law* was manifest in the Education Act Government Bill, which states that “an equitable school (system) requires that the rule of law and the quality of the schools’ operations can be ensured” (Government Bill 2009/10:165, as quoted in Paper I, p. 122). For this reason, “clear and effective monitoring, evaluation, inspection and supervision are required” (*ibid.*). The decisive consideration concerned the practical possibility of judicial review of educational institutions and, therefore, the existence of a framework of laws and institutional conditions in which such reviews can take place.

The importance of judicial review by the SSI in this account is that *it grounds the rule of law in social practices and institutional conditions* rather than in a wholly abstract relation between government action and certain principles. Accordingly, when the Education Act came into force, pedagogical and curricular supervision through state school inspection was turned into a primarily judicial review of schools. State school inspectors are “to secure” [*säkerställa*] educational institutions’ compliance with the law through strong enforcement actions (e.g., sanctions and penalties). In the paper, I argue that though the practical and technical aspects of managing education are important, there is a danger that we fail to notice that there may be unforeseen consequences to the change in the conception from the guarantee of a citizen’s fundamental right to an education that prepares her for civic as well as economic life to a consumer right buttressed with the possibility of legal sanctions. The rule of law

## IMPLICATIONS

has shifted from guaranteeing citizen's rights against abuse by the State itself, that is, as a guarantor of individual rights and freedoms, to instead be associated with the overseer of the marketplace, who must "ensure" that the market is working correctly. A broad and widely shared consensus, in accordance with basic democratic principles, that students should be protected from a discretionary exercise of power in connection with official decisions concerning grading and admission to higher education, is reduced to limited, specific political and economic interests. The liberties and rights thus protected are ultimately those accorded to the actor in the marketplace, rather than the citizen in a democracy.

### Paper II: Juridification of Examination Systems: Extending State Level Authority over Teacher Assessments through Regrading of National Tests

Paper II concerns the practical work of the Swedish Schools Inspectorate (SSI). Specifically, this paper revolves around the SSI's monitoring and assessments of the accuracy with which teachers grade students' answers on national tests. This supervisory program was introduced by the Swedish Government in 2009 and subsequently assigned to the SSI on a permanent basis.

During the period studied, the SSI was to carry the program out in three rounds over three successive years (i.e., one round per year). In each round, the SSI collected a sample of copies of completed tests. The sample served as a representative at the national level for each subject and grade, as well as at the school level. The tests were anonymized and then graded again by teachers recruited by the SSI. The results were presented in terms of discrepancies between the test grades assigned by the school teachers and those given by the teachers hired by the SSI. For each school, the number of negative grades (when a teacher hired by the SSI gave a lower grade than a student's teacher), positive grades (when a teacher hired by the SSI gave a higher grade than a student's teacher), and matching grades were tabulated. The reported differences were both positive and negative, although negative differences dominated all three years. During the three rounds under study in the paper, approximately 94,000 tests from 1,800 schools were regraded.

The paper postulates that the SSI's regrading program is an example of the political management of the tensions between competition and equity inherent in neo-liberal education regulatory regimes, and examines contemporary control policies and government actions undertaken to resolve issues of unfair assessment and safeguard students' rights. Starting from Bacchi's (2009) idea that policy problems are *represented* rather than *discovered*, the paper focuses on

the role problem representation plays in policy proposals and policy enactments. Analyzing a textual corpus consisting of government policy documents, organizational corporate plans and inspection reports, and media articles and press releases, the paper elucidates how a control policy is shaped through framings of educational “problems,” government “solutions,” and constructions of concepts, subject positions, and “truth” in the discursive practices of government, auditing, and media, respectively. In particular, the significant role of the media in the socio-political construction of issue and problems is highlighted.

One of the most striking features of the SSI’s regrading program as it pertains to juridification is the recourse to legislative enactments that it takes when the 2010 Education Act comes into force. A forthright action in this direction is the introduction of supplementary inspections, so called *targeted inspections*, which aim to control whether the teachers and the principal comply with the laws and other formal regulations for assessment and grading. The targeted inspections were assigned to the SSI by the Government after the results from the second round of regradings were presented. The SSI was to conduct targeted inspections of schools where the test grades awarded by the students’ teachers has deviated significantly from the test grades awarded by the SSI-hired teachers, and/or when a substantial difference has been found between the test grades awarded by the students’ teachers and the final course grades awarded by those same teachers in the corresponding subjects. The SSI was furthermore commissioned to issue penalties against schools that do not provide the SSI with a “sound basis” (in terms of documentary material) for the SSI’s regradings and targeted inspections (Ministry of Education, 2011, as quoted in Paper II, p. 682).

The first targeted inspection comprised 20 schools. In addition to a separate audit report for each school, the SSI published a joint audit report in which the results from the 20 inspections were summarized into three main findings regarding teachers’ assessments and gradings in the inspected schools. First, teachers’ methods of assessing student achievement and awarding grades do not comply with the Education Act and other legal regulations. Second, the national tests are not utilized to support final course grades. Third, the principals do not ensure that grades are awarded in accordance with the Education Act and other regulations. The SSI decided on an injunction<sup>11</sup> in 19 cases out of 20.

While previous reports from SSI mainly blamed the teachers for their “erroneous” assessments, with claims that teachers enjoy too much discretion and are too subjective, the principals are now brought into the spotlight. Now it is

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<sup>11</sup> An “injunction” specifies what the school has to rectify, along with the related requirements that the SSI sets for the responsible education provider (i.e., the actor running the school). An injunction can form the basis of other coercive measures, such as a penalty, a temporary operating ban, or, in case of a charter school – revocation of operating license.

## IMPLICATIONS

principals who are blamed and changes in their behavior is what is required. The authority of claims by the SSI is framed as unassailable. This positioning of principals as the source of the “problem” was picked up by the media, and the newspapers covering the SSI’s targeted inspections reported that the SSI had “failed” 19 out of 20 schools (DN 2012-03-31, as quoted in Paper II, p. 683). Not only did readers learn that these 19 schools had failed the inspection, but also, that all “school assessments of national tests are incorrect”, as one headline put it (SVD 2012-03-31, as quoted in Paper II, p. 683). The names of the inspected schools were listed, and it was reported that the national tests in these schools “are not used to support teachers’ grading in any of the schools, except in one” (DN 2012-03-31, as quoted in Paper II, p. 683); furthermore, the media announced, the support teachers receive from the principals is insufficient for fair and impartial assessment and grading. According to the media, one main source of the problem was that in each of those schools, the principal “has not made sure that the teachers are aware of which rules apply for assessment and grading” (ibid.).

By demonstrating how discursive practices worked to frame teachers’ assessments as incorrect, unfair, and as jeopardizing the credibility of the grading system, thus justifying increased central control and authority over teacher assessments and grading, the paper highlights the processes by which those who have the institutional authority to make truth claims constitute the subjects of education policy. But it also shows the ways in which discourse delineates the possibilities of policy action and constitutes some institutional practices as legitimate while rendering others less legitimate. It highlights, in particular, how a legalistic discourse on safe-guarding students’ rights to just and fair assessments comes to penetrate the problem representations of teachers’ assessments in government, auditing, and media. This legalistic discourse is concerned with ensuring public accountability, both through the language that is used but also by engendering a sense of “trust” insofar as compliance with laws and other formal regulations is thought to improve the quality and provision of education. The paper concludes with a discussion of how the protection of students’ rights with respect to educational measures such as examinations and tests is achieved at the cost of a juridification that may penetrate deep into the teaching process. The compulsion toward litigation-proof certainty of grades and the over-regulation of the curriculum may lead to deprofessionalization and the inhibition of pedagogical innovation. The aforementioned paradox is displayed in the increased control of discrepancies between students’ final course grades and their grades on the national tests. The inspection regime and the market regime together amplify the national tests’ embodied potential for narrowing the curriculum and the discretion of teachers, not only by the scope of the tested curriculum constructs, but also by the processes that undergo juridification in resolving issues of “unfair assessments” and safeguarding students’ rights.

Paper III: Anpassningarnas för(e)ställning:  
 Om Skolinspektionens tillsyn som en scen för  
 förändring [Performing the “Right” Impression:  
 Toward a Dramaturgy of School Inspection]

The practical work of the SSI is also the theme of Paper III, which focuses on the inspection type called *regular supervision*. The paper’s empirical basis consists of interviews with principals of 20 compulsory schools that underwent regular supervision in the latter half of 2011, i.e., after the operating frame of the SSI had changed with adoption of the new Education Act. Drawing on social interaction theory, I analyze the principals’ “stories” (Abbott, 1992; Turner, 1980) about encounters between their schools and the SSI, particularly the adjustments in rules and practices undertaken to meet the SSI’s demands. The article advances the argument that everyday acts of compliance with legal authority, referred to as primary and secondary adjustments (Goffman, 1961) and tactics (de Certeau, 1984/2002), display ways in which members of educational institutions accommodate to power while protecting their interests and identities. By revealing how adjustments require a consciousness of opportunity, i.e., an opening in the situation through which one might intervene and turn matters to one’s advantage, the articles illustrate how tactical compliance often involves “making do” (de Certeau, 1984/2002) with what a situation offers. The paper shows that, in response to pressure from the SSI working to see rights policies made “real” in practice, local schools adopted written rules, formal training programs, and internal oversight procedures to ensure compliance and to bring those practices closer in line with written policy commitments and legal norms. Notably, these changes were not required by law, nor were they necessarily sold as efforts to better comply with the law; rather, they were driven by efforts to comply with the criteria set by the SSI seeking to solve the problem of inconsistently or incompletely applied policies. As the SSI put pressure on schools, which in turn feared that failure to comply with laws would threaten their professional legitimacy, school actors came to believe that adopting and applying legal norms through managerial mechanisms were valuable contributions to the profession itself. The article discusses how school inspection aimed at enforcing legal compliance constitutes a reality that is staged so that it can be acted upon, and thus how it defines a strategic landscape in which educational practitioners must navigate. This landscape is political, consisting of policy-related domains within which society manages itself and represents its values. Yet it is also socially and educationally constitutive, as the paper shows.



## Concluding Discussion

In this dissertation, I have argued that the great transformation of education policy and governance within the last few decades cannot be adequately grasped without taking processes of juridification into account. In particular, I have underlined the mounting importance of positive rights in the welfare state as a means of preserving and legitimating the State's role. For the sake of clarity and focus, I limited my object of study to the SSI as an intermediary body between the state and educational institutions. One of the issues at the heart of this thesis is precisely the intermediary function of the SSI. Located between the state and educational institutions, it mediates between the old and new orders and policies.

The main argument this dissertation advances is that the 2010 Education Act, along with the changes that its enforcement brought to state school inspection, is an instructive expression of the institutionalization of a juridified school system. Central to this institutionalization process – which I claim expresses a transformation of governance – is the challenge of diminished credibility in the eyes of its citizens. Faced with this situation, the re-establishment of legitimacy becomes a matter of central concern for state authority. Juridification can be seen, or so I have argued, as a strategy of compensatory legitimation.

This argument has raised several questions. What is juridification? Is it a scholarly construction or a political reality? Is it a product of the neo-liberal project of a global free market? (cf. Scott, 1998) Most importantly, *what are the implications of juridification for education policies and practices?* In support of my claim that juridification is more than a byproduct of neoliberalism, I outlined, in Part I, the thrust of previous research and theorizing on governance and juridification, respectively (Chapters 2 and 3). These outlines provide a basis for considering how governance is understood and what the theoretical perspective of juridification adds to our understanding of the transformation of education policy and practices. The question of *what* the functions and implications of a “juridified” mode of education governance might be, however, is largely an empirical question. More empirical examination of this specific mode of welfare regulation is needed, and three such empirical studies have been provided here.

Focusing closely on the Swedish national setting, in Part II, I examined certain features of governance and some particular processes and institutions by which regulation is enforced through school inspection, while being attentive

to the idea that each institution of formal schooling may have its own distinctive regulatory aspects (Chapters 4 and 5). To study how the SSI as an intermediary body can regulate processes and social relations inside institutions of formal schooling suggests a very ambitious agenda. The studies that provide the basis for Part II are merely exploratory studies in this field of inquiry. What most directly links them regarding their subject matter is a focus on school inspection, policy analysis, and scholarship on law and juridification. By use of such an approach, I have sought to advance an understanding of both the current governance of Swedish education sector in general and the type of juridification that is institutionalized through school inspection in particular.

This final part summarizes the contents, considers the conclusions that can be drawn from the dissertation chapters and studies, and raises questions for future research.

### The Transformation of Governance and the Nature of Juridification

Prominent among the themes discussed in the dissertation are institutions – laws, norms, policy-making procedures, and enforcement. When viewed from this perspective, the entire machinery of governance is a vast collection of constraints that define the roles of different policy actors and limit the range of strategies open to them (Majone, 1989).

While the Swedish nation-state is the major locus for this present work, the state apparatus itself is undergoing a foundational change in one or several of its critical components. In a sense, this dissertation, while not an historical study, is suffused with history. I focus on a certain period when existing configurations became unsettled. This period was marked by the new Education Act approved in 2010 and the institutional adaptation that took place in 2011.

The precise form that law takes changes over time, and the effected shifts provide a key to understanding the current state of affairs. At its beginning in the late 1980s, the period examined here was marked by the coexistence of multiple dynamics, notably deregulation and decentralization, which charged local governments with a growing number of regulatory and executive responsibilities. Subsequent reforms in the early 1990s were also aimed at reforming control over both the supply and demand sides of education. The supply side was altered by facilitating privatization and the creation of new independent providers of education (i.e., charter schools). The demand side was changed by providing an ever greater diversity of options to parents seeking education for their children. New financing policies compelled institutions to enter a wider market to compete for students and financial resources. One outcome of the new policies was an increase in the number of charter schools across the country.

It is generally agreed that the decentralization, deregulation, and marketization reforms brought together a new coalition of forces in support of the “evaluative state.” The evaluative state “is perceived as an alternative to regulation by bureaucratic fiat” (Neave, 1988, p. 11); at the same time, it has been seen as a reaction to deregulation promoted solely on the basis of an anti-state ideology (ibid.). There is also general agreement that the role of law in the post-war system of central–local government relations in Sweden, as in many other countries, has been to establish a structure that would maximize local school authorities’ power to act, as well as central evaluative and auditing authorities’ power to regulate (first the National Agency for Education, and subsequently, the SSI).

More recently, however, the legal and bureaucratic regulatory structures of government have been gradually (re)employed as normative frameworks. This has become particularly evident in the enforcement of the 2010 Education Act, which motivated the inquiry resulting in this dissertation. Extensive powers to hold local authorities and their educational institutions accountable for their activities have been conferred upon the SSI. Yet, as I argue in Chapter 4, the most significant change in legislative style that occurred with the enforcement of the 2010 Education Act was not so much the legal mandate of the new central powers as it was the fact that these newly delegated powers were intended to be used actively and to establish a precise regulative framework.

The juridification of central–local government relations consists in the reconception of law from providing a facilitative framework to establishing a regulatory regime (Loughlin, 1996). In Sweden, this juridification has developed over time and was buttressed by the devolution of responsibility, the reorganization of the approach to financing education, the accreditation of new institutions, the establishment of a more “effective” and “efficient” monitoring and quality-assuring system, and the enforcement of a new legal framework for combining market and policy coordination mechanisms.

What is gained by understanding the transformation of governance as juridification in this way? For one, it enables us to better understand the possibilities for constructing new forms of state authority under current conditions (cf. Sassen, 2006), including forms of state authority not aimed primarily at furthering economic globalization. As the chapters of Part II demonstrate, the protection and enhancement of positive rights, achieving greater equity in education and assuring accountability of education organizers constituted such new forms of state authority, ones that are best understood as *intermediary bodies* characterized by their potential to change current alignments.

One of the issues at the heart of this thesis is precisely the intermediary function of the SSI. Inspectors are being called upon to mediate between private interests and public legislators, regulators and regulatees, and various and divergent domestic and international treaties of the state (cf. Arthurs and Krekewich, 1996). As of July 1, 2011, this mediation between state and private

interests has to be framed in legal terms. Throughout the dissertation, I seek to decipher particular historical configurations to understand the processes of intermediation and change. Naturally, a full account of these configurations is more than I can accomplish here. But I do propose to identify, in a summary way, important implications and complexities of the phenomenon I call the juridification of educational spheres.

### A Foundational Transformation in and of a Complex System

A key influence on the change in the inspection framework that occurred with the enforcement of the Education Act on July 1, 2011, was found in the history, not simply of past economic and administrative boundaries, but of the relational history embodied in highly complex issues concerning rights and duties. The issue of rights and duties in education has a long history but a crucial watershed was the Education Act Commission's final report in 2002 (SOU 2002:121) and the government bill in 2009 (Government Bill 2009/10:165). In Chapter 5, we saw that the Education Act Commission's answer to many of the problems in the 1985 Education Act was quite straightforward: a transition should be made from an "obligations-based" Education Act to one based on rights. With reference to international laws and treaties, the commission argued the necessity of providing a stronger basis for students and parents to make claims on the state as well as for holding local authorities accountable for their duties to enhance the access of their students and students' parents to the realization of their rights. This was emphasized as important for rule of law, which requires compliance by the state with its obligations in both international and national law (e.g., Møller and Skaaning, 2014, p. 23).

What is today promulgated as a rights-based approach to education has a relatively recent history in the discourse of international development agencies (Cornwall and Nyamu-Musembi, 2004). The point to be emphasized, however, is that many of the principles articulated as part of this approach are not new (see Chapter 3). What rights talk provides, Cornwall and Nyamu-Musembi argue, "is not just a set of conventions or legal instruments with which to back claims and press for duties to be upheld. Rights talk is above all talk of politics, of power and of social justice. It is talk that inspires and impassions, talk that animates and mobilises, talk that restores to people a sense of their agency and their rightful claim to dignity and voice" (*ibid.*, p. 1433).

Yet, to recall an argument from Chapter 4, the implications of this change in discourse are usually not self-evident until attention is directed toward the gradual extension of the scope of protections accorded by rights. Again, this

discursive reorientation contributes to the need for the state to ensure the realization of certain rights claims. The Swedish Government stressed, accordingly, that the strategy for the 2010 Education Act was to establish guidance, control, and review mechanisms (Paper I). The administrative review procedures for inspection were set up in a market framework in which inspections were seen as assuring quality, equity, and the rule of law, (see also Papers II and III).

The above conception of the link between the inspection of educational institutions, on the one hand, and equality, quality, and the rule of law, on the other, can be understood in either a descriptive or a normative sense – that is, as a description of the (ideal) state of affairs in twenty-first-century Sweden or as indicating how to achieve a higher degree of the three aforementioned societal values. With regard to the latter, I argue that the promotion of each of these through judicial review by SSI is an important feature of what Englund (1996) has called “the small democracy” [*“Den lilla demokratin”*] (see also SOU 1990:44). This policy model is tailored toward enhancing the autonomy of legal subjects who are to seek and find their happiness, primarily as market actors, by pursuing their own personal interests as rationally as possible. Englund’s point is significant in several respects. Most relevant in the context of this dissertation, it suggests that the interpenetration of the principle of legal freedom with the universal right to equity and quality created the normative expectation that social justice could be attained through legislation and legal reform (cf. Habermas, 1996, p. 191).

In the first chapter of *The Constitution of Liberty*, Hayek (1960) distinguishes “freedom” from “liberty,” and defines the first as the “state in which a man is not subject to coercion by the arbitrary will of another or others” (ibid., p. 11). A discussion of alternative conceptions of liberty is beyond the scope of this dissertation, but it is worth noting that Hayek discusses liberty and coercion largely in the context of relations between the State and its citizens. In other words, in Hayek’s definition, a reduction in coercion by the State is equivalent to a reduction in coercion per se. According to Weber (1978), however, this would be misleading, since, as he points out in his discussion of law in *Economy and Society*, the reduction of legal constraints on economic activity operates primarily for the advantage of the economically powerful. Nevertheless, one of the most salient assumptions about the rule of law is that it enables individual autonomy; the rule of law makes it possible for people to predict the consequences of their actions and, hence, to plan their lives.

We saw in Paper I that the Government’s decisive consideration in the 2009 Bill concerned the practical possibility of judicial review of educational institutions and therefore the existence of a framework of laws and institutional conditions in which such reviews can take place. In this account, the importance of judicial review by the SSI is that *it grounds the rule of law in social practices and institutional conditions*, rather than in a wholly abstract relation be-

tween government action and certain principles. The current model of governance means that the State's task is to guarantee individuals the right *to be able to make* informed choices, and to regulate and control the quality of what is offered on the market. Thus, access to information is central. The State allows the market to operate freely, but it ensures that education providers behave in a "legally sound" [*rättssäker*] manner by conducting output control through inspections, evaluations, and the like, such as by requiring content declarations for educational programs. In the execution of inspections – whether targeted inspections as in Paper II or regular supervision as in Paper III – effectiveness and efficiency standards that govern the deployment of administrative power take the place of standards for the legitimacy of legal regulation. Then, the law – having been instrumentalized for political goals – degenerates into one more means of solving a specific and foremost technical kind of problems (cf. Habermas, 1996). Because inequalities in education outcomes are partly attributed to deficiencies in educational institutions' compliance with the law, the problem of structural coupling may be reduced to a problem of technical effectiveness.

Reasonably, the point is not to distinguish between particular kinds of procedures and arrangements simply because we approve or disapprove of them but rather to do so on the grounds that the procedures and arrangements are thought to conform to or even to further specific ideals and principles to which we adhere. In the next sections, I identify a number of these ideals and principles and simultaneously discuss the question posed in the introductory chapter: *What are the implications of juridification for education policies and practices?* The complexity and contradictions in inspection processes observed in the research on school inspection in Sweden and other countries will provide a useful point of reference for this discussion. Scholars have drawn attention to school inspection as a practice involving the agency of both school inspectors and inspectees. While it is important to hold on to wider economic, political, and cultural determinants, the role of agency and the possibilities it opens up are equally important.

## A Troubled Beginning

When the 2010 Education Act came into force, pedagogical and curricular supervision through state school inspection was turned into a primarily judicial review of schools. State school inspectors are to "ensure" educational institutions' compliance with the law through strong enforcement actions (e.g., sanctions and penalties).

The empirical studies provided here suggest that this experience has been rather troublesome for many of the educational institutions involved. The SSI's regular supervisions have often strained educational procedures, and the

speed with which the educational institutions have been required to act has often resulted in different forms of tactical compliance (Paper III). The SSI's regradings of already graded national tests, along with the publicizing of those results and the problems represented by the discrepancies in gradings between the SSI-hired teachers and the teachers in schools have facilitated a game of naming and shaming (Paper II). Discursive practices in government, auditing, and media have framed teachers' assessments as incorrect, unfair, and jeopardizing the credibility of the grading system – a problem that has been represented as stemming partly from school principals' and teachers' professional irresponsibility (cf. Thrupp's [1998] analysis of “the politics of blame” in the context of school inspection in New Zealand and England; see also Carlbaum [2016b]). Increased state-level control and the widespread media narrative of schools “failing inspection” fueled mistrust in teachers' and principals' professionalism and the spread of legalized accountability as a shared policy model (Paper III).

It should be noted, however, that the studies have not only brought to the fore the “victimology” of legal colonization. Like Cooper's (1995) analysis of the character of legal consciousness within local government in the 1980s and early 1990s, Paper III illustrates that school inspections under juridification have also generated effects at the level of resources, by which it has pointed to the capacity of school inspections and law to act as a resource for others (similar findings have been presented by Ek, 2012; Novak, 2013; Rönnberg, 2014b; and Ivarsson Westerberg, 2016). Moreover, the principals interviewed for this study often found that inspection made them more aware of students' rights, legally binding regulations, and the administrative responsibilities of professionals in these regards (cf. Hult and Segerholm, 2017).

## In the Aftermath of the 2010 Education Act

Carlbaum (2016a) shows that, concurrently with the developments examined in this project, the number of complaints from students and parents to the state's auditing agencies (first the National Agency for Education and subsequently the SSI) has increased each year. While an increase in the number of complaints might suggest increased societal faith in, and reliance on, resolution of conflicts by reference to the law, it can also be seen as an indication that students and parents increasingly pursue individual problem-solving strategies rather than collective ones (see Paper I for a comprehensive discussion).

The developments described with respect to schools, as those involving health care services (Brännström, 2009; Bærøe and Bringedal, 2014), have a number of implications. First, the processes of institutionalizing moral argumentation by means of legal procedures may encourage individuals and insti-

tutions to turn to judicial bodies to achieve educational goals or initiate discussions concerning political and moral issues. Second, professional standards and norms may be subordinated to, and codified by, legal provisions; this applies both to school inspectors and school professionals.

Studies on school inspectors' work in Sweden indicate that the nature of the inspectors' judgement-making sometimes give rise to complicated professional dilemmas; inspectors may experience a tension between juridical and standardized directives and their own tacit and embodied professional knowledge (Lindgren and Rönnerberg, 2017; Lindgren, 2014a, 2014b, 2014c), as well as between procedural and substantial values (Segerholm, 2014).

As for the professionals in schools, we saw in Paper II that school leaders and teachers in Sweden, to varying degrees, have adapted their practices to the legal provisions that provide the criteria for the inspection authority's measurements. Similar findings have been presented by Colnerud (2014), Lindgren (2015), Ivarsson Westerberg (2016), Runesdotter (2016), and Segerholm and Hult (2016) in Sweden, by Cooper (1995) and Courtney (2013) in England, and by Hall (2016) and Ottesen and Møller (2016) in Norway. Further, as Hult and Lindgren (2016) argue, because teachers must increasingly adhere to formal plans and submit written student incident reports to the principal, traditional embodied knowledge of conflict management has come to be replaced by new competencies related to formal definitions and strategic language use.

Consistent with Cooper's observation in her investigation of local government actors' understandings and experiences of law, Papers II and III, together with previous research, also demonstrate that in Sweden, "professional practice required repeated 'grazing' of legal norms and technicalities" (Cooper, 1995, p. 517). As such, I argue that "the law" became institutionalized; it was absorbed into the mission, function, and self-definition of those agencies, their employees, and their goals.

## Legality and Legitimacy

There is one more issue to deal with before concluding this part of the discussion. I initially argued that juridification is a strategy to regain lost legitimacy. How can this system be legitimated if it does not operate in accordance with our "traditional" language of legitimation – that is, through detailed regulation and a high degree of central planning? The answer, Loughlin (1988) suggests, is that its legitimacy is *a function of success*. That is, "the political-administrative system is legitimated by its achievement in bringing about substantial improvements in material conditions. It delivered the goods" (ibid., p. 22).

The question of whether Sweden's juridification of educational spheres (Novak, 2017b) has ultimately improved the material conditions – that is, if it

has brought a more legally sound [*rättssäker*] education system with a higher degree of equity, quality, effectiveness and efficiency in education – is obviously an issue of contention. What would appear to be less controversial, however, is that the guidance, control, and judicial review mechanisms established by the government have considerably formalized not only the sphere of the political-administrative system but the educational sphere as well. My critical point here is that *the constraints imposed on educational institutions by juridification are structural* and not, as has at times been suggested, quantitative. They are structural in the sense that the enforcement of rights and the expansion of legal protection require methods for holding those who violate claims accountable. Accountability in this sense, however, is not secured by control; it requires a high degree of differentiation among specific conditions, exceptions, and legal measures. In the area of schooling, this means that the pedagogical domains of action are opened up to bureaucratic intervention and judicial control. By implication, instructional procedures and school measures must be given in forms that are accessible to judicial review. Hence, what I call the juridification of educational spheres does not refer to increasing density in an already existing network of formal regulations, but rather to legally supplementing a communicative context of action through the superimposition of legal norms. This superimposition is accomplished “not through legal institutions but through law as a medium” (Habermas, 1987, p. 369). Because this function of law as a medium facilitates a conceptualization of education as a set of legally contestable administrative acts, pedagogical contexts are stimulated to be juridically structured – that is, “formally reorganized in such a way that the participants can refer to legal claims in the case of conflict, where previously the conflicts arising in them had been managed on the basis of habit, loyalty, or trust” (Habermas, 1996, p. 75). All this makes for an extremely complex configuration of interests that impinge on how rights policies come to inform what is actually done.

It is not my aim here to settle the great and enduring controversy with respect to what the scope and practices of education should be. My point is that predominant instrumentalist values entail that institutional success is judged in terms of the degree of compliance with formally correct procedures, that is, according to the criteria for the measurements dictated by the inspection authority. The notion of professional responsibility thus “collapses into the ability to do things” (Cribb, as quoted in Green, 2011, p. 12). Yet this is not the ability to do just *any* thing, but things ultimately decided by legal rationality and its dynamics. Thus, in agreement with Green’s eloquent analysis of new managerialist policies and their impact upon practitioners in educational and other public institutions, I would suggest that, although juridification may be expected to enhance accountability, it might, paradoxically, make school leaders less responsible and teachers less educative.

## Final Remarks

The question of success discussed above, along with the issues raised by the dilemmas, intricacies, and opportunities arising through the juridification of educational spheres, obviously calls for a more extensive investigation. The findings generated in this project certainly bolster the argument that juridification can be seen as a different form of state building, in which school inspections play a crucial role in policy development. Although the choice to rely on state school inspection as a means of enforcing or even establishing government policy may have resulted from the relative weakness of traditional bureaucratic alternatives for pursuing policy goals, the outcome points to an “evaluative state” characterized by legalized accountability as a shared policy framework for realizing the promises of the welfare state.

The purpose of this project was not to try to dictate what should be regulated or how, but to offer insights with thick descriptions into settings in which policy is negotiated, formulated, and, ideally, realized. By drawing on the work of scholars within areas both directly adjacent to and considerably distant from education, I have aimed at contributing to a more nuanced understanding of education policy changes than would have been possible from a single perspective. What we lack, I argue, is not so much “better” explanations of the regulation of education under the current model of governance, of education policy-development and of the role of intermediaries herein, as a broader and more inclusive dialogue among advocates of different perspectives.

This project has aimed at *exploring* and *illustrating* rather than issuing edicts. What I have done should thus be seen as a prolegomenon – an invitation to further develop conceptual links between juridification and education through the intermediary bodies situated between the state and educational institutions that affect both ministerial responsibility and institutional autonomy and thus change the lines of accountability. Last, but no less important, I have characterized a complex web of considerations, values, and principles, perhaps “as a prelude to more specific inquiries about the ideological significance of legal doctrine” (Cotterrell, 2006, p. 96) and the various educational practices in which it is institutionalized.

## Swedish Summary

Inom offentlig sektor har individuella rättigheter över tid kommit att spela en mer framträdande roll i den offentligt sanktionerade styrningen. Skolområdet är inget undantag. I 2010 års skollag (SFS 2010:800) har fler lagbestämmelser införts i syfte att stärka elevens ställning och rättssäkerhet. Som ett led i dessa strävanden har bland annat Statens skolinspektion (Skolinspektionen) skrivits in i skollagen. Med skollagens ikraftträdande fick Skolinspektionen utökade sanktionsmöjligheter mot både enskilda och offentliga huvudmän som Skolinspektion bedömer missköter sina skolor. Vid Skolverket har också Lärarnas ansvarsnämnd inrättats, till vilken Skolinspektionen kan anmäla lärare för till exempel oskicklighet.

Med utgångspunkt i ovan nämnda förändringar studeras i den här avhandlingen styrningen av skolan med fokus på statligt ansvarsutkrävande från lärar- och skolledarprofessionerna för förverkligandet av elevers rättigheter. Specifikt utvecklas kunskap om juridifieringen av skolan. *Juridifiering* studeras här som en process – en särskild *styrningsrationalitet* – och de förändringar som Skolinspektionen genomgick med skollagens ikraftträdande förstås som ett institutionellt uttryck för denna styrningsrationalitet. Med en sådan inramning utvecklar avhandlingen kunskap om juridifiering både som ett teoretiskt begrepp och ett empiriskt fenomen. Särskilt undersöks epistemologiska, sociala, politiska och pedagogiska implikationer av den förändrade rättsliga regleringen och tilltagande kontrollen av skolväsendet.

Avhandlingen bygger på fem publicerade arbeten. Två av dessa utgör underlag för vissa av kappans olika kapitel, medan de övriga tre ingår i avhandlingen som fristående publikationer i sina fulla versioner. De fristående publikationerna understödjer avhandlingens övergripande syfte genom att, från olika analytiska perspektiv och genom analyser av olika empiriska underlag, utveckla kunskap om såväl skolinspektion som en förkroppsligad styrning (Clarke, 2015) som ett antal specifika processer i vilka aktörer tillsammans formar och omformar såväl utbildningspolicy som utbildningspraktik.

*I den första artikeln* analyseras förändringar i begreppet *rättssäkerhet* som uttryck för förändringar i relationen mellan staten och individen, särskilt den mellan skolan och eleven. Artikeln tar som sin utgångspunkt att innebörden av ”rättssäkerhet” inte är en gång för alla given utan i högsta grad avhängig de ideologiska, politiska och ekonomiska faktorer som råder vid en given tidpunkt i ett givet sammanhang (Gustafsson, 2002). Överfört till utbildningssam-

manhang är rättssäkerhetsbegreppet immanent förbundet med politiskt formulerade idéer om utbildningens syfte och mål, och vilka processer som på ett effektivt sätt förväntas leda till målet. Utbildningsprocessens effektivitet och vart utbildning förväntas leda bygger, i sin tur, på *principer om rättigheter och skyldigheter*. Som visas empiriskt i artikeln ger förändringar i rättigheter och skyldigheter inte bara implikationer för relationen mellan elev och lärare, elev och skolpersonal; de sätter också upp ramarna för de föreställningar som skapas om utbildning och vad den ska syfta till. Genom att empiriskt uppmärksamma rättssäkerhetsbegreppets vidgade innebörd, det vill säga att den samtidigt har en juridisk och värderande (etisk, normativ och politisk) innebörd, bidrar artikeln till förståelsen av juridifiering som styrningsrationalitet genom perspektiv på, samt en empiriskt grundad diskussion om, vad svenska elever förväntas kunna utöver de kunskaper som stipuleras i läroplanen.

*I den andra artikeln* studeras Skolinspektionens årliga omrättningar av nationella prov. Skolinspektionsmyndigheten har sedan 2009 haft i uppdrag av regeringen att årligen genomföra viss central rättning av proven. Syftet med omrättningarna har beskrivits av regeringen och inspektionsmyndigheten i termer av att stödja en likvärdig bedömning och betygssättning av proven över landet. I artikeln analyseras textmaterial från tre ”sociala fält” (Lingard and Rawolle, 2004; Rawolle, 2010): regeringsfältet, inspektionsfältet och mediafältet. Artikeln utvecklar kunskap om hur en kontrollpolicy ”blir till” (Ball, 1994), det vill säga hur specifika processer av diskursiva praktiker i respektive fält medverkat i skapandet av diskursiva ”sanningar” om skolans problem, vilket i sin tur legitimerat inrättandet av specifika ”lösningar”. I artikeln studeras särskilt de problemrepresentationer (Bacchi, 2009) som är kopplade till rättvisa och rättssäkerhet i bedömning och betygssättning, samt hur Skolinspektionens aktiviteter antas bidra till att lösa problemen. Skolinspektionens omrättningar av nationella prov diskuteras i artikeln som ett exempel på en mer utbredd styrningstendens, i vilken den ideologiskt laddade frågan om att elever ska ges rättvisa betyg genom olika processer förskjuts till ledningstekniska utbildningsfrågor med juridisk sanktion.

*I den tredje artikeln* analyseras intervjuer som genomförts med ett antal rektorer för grundskolor som varit föremål för skolinspektionens regelbundna tillsyn efter att bestämmelserna i 2010 års skollag rustat Skolinspektionen med utvidgade befogenheter att använda sanktioner mot de skolhuvudmän som myndigheten bedömer missköter sina skolor. Från ett dramaturgiskt perspektiv analyseras hur rektorer, bland annat genom sina ”framträdanden” (Goffman, 1961), iscensatt anpassningar av sina skolverksamheter och därigenom manövrerat mellan verkligheter som de upplever vara svåra att förena inom ramen för tillsynsprocessen. Med framträdande avses rektorernas utsagor om deras interaktioner med inspektörer under Skolinspektionens regelbundna tillsyner, det vill säga de intryck som rektorerna överförde till inspektörerna inom ramen för tillsynsprocessens ”dramaturgi”. Mot bakgrund av den empiriska belysningen diskuteras manövrarna som ett sätt att ”make do” (de Certeau

1984/2002) med de möjligheter som de upplever finns för att tillmötesgå krav från inspektionsmyndigheten. Rektorerens berättelser om deras framträdanden inför Skolinspektionen inom ramen för den regelbundna tillsynen förstås i artikeln som något *mer* än återberättade händelser; de ses också som en möjlig källa till kunskap om relationerna mellan mål, värderingar och de meningsskapande handlingar som finns inbäddade i de ordningar som Skolinspektionens juridiskt förstärkta regelbundna tillsyn institutionaliserar.

Avhandlingens samlade kunskapsbidrag är fyrfaldigt: i) övergången från ”government” till ”governance”<sup>12</sup> utmanar legitimiteten i styrsystemet; ii) en särskild aspekt av ”governance” kommer att bli juridifiering av bland annat legitimitetsskäl; iii) den juridiskt förstärkta skolinspektionens kommer att utgöra en särskild institutionell manifestering av juridifiering; iv) implikationerna av juridifiering för utbildningspolicy och praktik är primärt strukturella och är direkt relaterade till spänningen mellan statlig styrning genom skolinspektion och professionell bedömning.

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<sup>12</sup> I brist på adekvata motsvarigheter i svenska terminologi används de engelska termerna även i denna svenskspråkiga sammanfattning.

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