



Why Do Associations Run Independent Schools in Sweden, and Why Does It Matter?

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Abstract

The Swedish school system was radically reformed in the 1990s, and went from one of the world's most uniform and egalitarian, to one of the world's most deregulated and marketized. In recent years, the political controversy has heated over the for-profit corporations that operate independent schools and allegedly make major profits off the public purse. A majority of independent schools in Sweden are operated by limited liability companies, but hundreds of schools are also operated by non-profit foundations and associations. The latter category is of interest in this article. With the help of a thorough legal historical analysis of the corporate law on associations in Sweden, and how the two forms of associations – economic associations and non-profit associations – are defined in the law, we discuss how well the law matches the purposes and needs of elementary schools in Sweden. The article concludes that the ambiguities and confusion around the law on economic associations in this specific case, and the essential lack of legislation for nonprofit associations, warrants a fundamental questioning of whether it is at all appropriate for independent schools in Sweden to be operated by economic and nonprofit associations.

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Introduction

In Sweden, the so-called school “market” is a major bone of contention. Especially the presence of for-profit companies, that allegedly make billions in profits off the public purse, is the subject of intense and polarized debate among politicians, lobbyists, teacher union representatives, public intellectuals, and other pundits. The roots of these controversies are in the structure of the Swedish school system, which since the 1990s combines far-reaching individual freedom of school choice with a single payer system, a ban on fees from parents, and a near-full right for anyone to set up an independent school. This system is very unusual in international comparison (Böhlmark and Lindahl 2015: 513; Blix and Jordahl 2021; Henrekson and Wennström 2022) and was established through a series of legislative acts starting with law (1992:710) and being fully implemented by law (1996:1044). Out of Sweden's 1,106,258 pupils in the ten-year mandatory elementary school (ages six to fifteen) 178,207 (or 16.1%) were enrolled in the 828 independent schools (*friskolor*) academic year 2021/22 (National Agency for Education 2022). The remaining are organized and run by the local authorities in Sweden's 290 municipalities, which are required by law to provide education for all their children.

Of the 828 independent schools, 515 are operated by for-profit companies (*aktiebolag* and *handelsbolag*), 86 by nonprofit foundations (*stiftelser*), 4 by religious organizations (whose legal designation is ‘registered denomination’, *registrerade trossamfund*), and 223 by associations (*föreningar*) (National Agency of Education 2022). This latter category – the independent schools operated by associations – is our concern in this article. Associations are

membership-based voluntary groups that are formed to accomplish a specific purpose. They reflect the constitutional freedom of association in Sweden, and have legal status as juridical persons. There are two types: economic associations (*ekonomiska föreningar*), defined primarily by their purpose to advance the economic interests of their members, (lag (2018:673) om ekonomiska föreningar 1 kap 4 §; for full definition, see the section on economic associations below) and nonprofit associations (*ideella föreningar*), defined by their nonprofit purpose but also characterized by a lack of a legal framework. The latter means that in lieu of designated legislation, nonprofit associations are legally defined and treated by *argumentum e contrario*, i.e. that they are associations that do not fulfill the legal provisions of economic associations (NJA 2000 s 365). 121 independent schools in Sweden are operated by economic associations, and 102 by nonprofit associations.

The results of the Swedish “experiment” of deregulating the elementary school system (Blix and Jordahl 2021; Grundberg Wolodarski 2022) have been the subject of major debate in the past decade, given allegations of segregation, mismanagement, and severe underperformance, not least reflected in the continuously declining Swedish results in the Programme for International Student Assessment (PISA) appraisals (Lundahl 2002; Fredriksson 2009; Carlgren 2009; West 2014; Sebhatu and Wennberg 2017; Wennström 2019; Grundberg Wolodarski 2022; Henrekson and Wennström 2022). At the center of the debate are the 515 independent schools in Sweden that are operated by for-profit companies. This is no surprise, given the political controversy around them: Resentment against the habit of these companies to make profits on public service and from the public purse, possibly at the expense of teaching quality and overall educational performance, has caused heated debate in national politics and mass media. But from a legal-theoretical perspective, however, for-profit companies that operate schools cannot be said to be more interesting or more controversial. Moreover, the focus on limited liability companies and the controversy around them has led to a relative lack of attention to associations, which this article makes an attempt to rectify by pointing out that the associations that operate schools in Sweden are problematic both from a legal-theoretical and practical point of view, and by demonstrating and problematizing this. Reflecting its title, the purpose of the article is thus both to draw attention to this relatively neglected topic and, more fundamentally, to explain why it is that schools in Sweden are operated by organizations with legal forms of association seemingly established for totally different purposes.

The article therefore shifts the spotlight slightly, away from Swedish independent schools operated by for-profit companies, and on to those operated by associations – economic and nonprofit – in an effort to problematize their general legal status, their regulatory frameworks, how these have evolved over time (since the first law on associations in Sweden in 1895), and the extent to which these match the purposes of elementary schools, generally and with specific attention to Swedish conditions. These purposes are far from straightforwardly and uniformly understood today, but contested political issues whose definitions and meanings may vary over time. It is not our ambition here to exhaustively discuss this matter, and neither is this article the appropriate place for such a thorough analysis. Instead, it suffices to establish that the primary purpose of elementary schools is to provide education for minors, with a reasonable degree of uniformity and equality, as reflected in the portal sections of the Swedish Education Act (Lag (2010:800), 1 kap 4-5§).

With respect to method, our legal-historical analysis rests on a teleological interpretation of the law (MacCormick 1993), which means that legislation and preparatorial works are prioritized over case law. The legal-historical analysis that forms the empirical backbone of this article has included a study of all legal definitions of purposes of economic associations, and corresponding preparatory works in Sweden, from the first regulation in the late 1800s until the current legislation. Different definitions of economic associations have been compared, and the historical changes analyzed, in light of discussions in the preparatory works, to establish the purposes of the legislation for economic associations in terms of the activities they have been intended for, and the forms of organization and control they sustain.

The legislative history is complemented by a historical framing of the phenomenon of independent schools in Sweden.

The article thereby makes a novel contribution to a very important field of scholarly investigation with obvious relevance also outside of Sweden, namely the preconditions and prerequisites for independent schools. Elementary school systems are, arguably, a cornerstone of liberal democratic welfare states. It can therefore be considered one of the central duties of the state to ensure proper education for minors. Meanwhile, many countries retain a constitutional right to “freedom of education”, meaning that parents have the right to choose education for their children in accordance with their religious, ideological, or other beliefs, a right that is also part of the European Convention on Human Rights (European Court of Human Rights 2022: 34). The legal, political, financial, and organizational arrangements for the operation of independent schools in various countries is therefore of general interest in studies of public administration. Given the specificities of the Swedish case – freedom of school choice, single payer system, ban on fees, and extensive rights for anyone to set up an independent school – and the hitherto relative lack of attention to the legal status and legislative frameworks of associations that operate independent schools in Sweden, this article makes a useful and timely contribution.

The article is structured as follows: In the next section, we outline the history of the Swedish school system, based on secondary sources and with specific attention to the deregulating reforms of the 1990s, their aftermath, and the resulting current Swedish school system. We also discuss some theoretical and practical aspects of deregulation of welfare services in general, and the school in particular. Thereafter, we present the results of the legal-theoretical and legal-historical investigation, and discuss the specific characteristics of associations in Swedish law, and how these match or mismatch schools, with specific attention to the governmental investigation that preceded the current legislation for economic associations, and how it handled the apparent inconsistencies in how the law is applied in relation to independent schools. The final section contains a concluding discussion and suggestions for future research.

Background: The Swedish School “Experiment” and School Quasi-Market

Before 1842, the elementary school in Sweden was largely unregulated, and availability was very uneven across the country. By the 1842 legislation, all parishes were obliged to establish at least one school, and in 1880, schooling became compulsory for all children between the ages of 7 and 13 (Fägerlind and Saha 1989). This system largely remained in place until the 1950s, and was complemented by an expansion of secondary and tertiary education in the early 20th century.

In the thirty years between 1950 and 1980 came a series of reforms of the Swedish elementary school system, in tandem with the expansion of the welfare state and the continued development of Swedish society into one of the world’s richest and most equal. Most of these reforms were decided in broad consensus across the political spectrum (Lundahl 2005; Carlgren 2009: 637). The largest single reform was the implementation of the nine-year primary school (*grundskolan*) which was decided by parliament in 1962 and fully built-out ten years later (Fägerlind and Saha 1989; Husén 1986). It was the key piece in the transformation of the Swedish school into a uniform, equal, and equivalent system (Carlgren 2009: 638).

This gradual and consensus-oriented thirty-year reform process came to an abrupt halt in the 1980s, when Swedish politics tilted heavily from the previous seemingly unlimited expansion of the welfare state and public authority, to a widened conception of democratic participation that included freedom of choice, pluralism of welfare services, a more efficient and downscaled public sector, and eventually the implementation of several reforms that have later come to be called New Public Management (NPM) (Blix and Jordahl 2021; Barzelay 2001: 40ff; Pollitt and Bouckaert 2011: 305-310). As part of this change, which in no small part was driven from within the social democratic party, the discourse over the nature and

function of the school system in Sweden also shifted from the previously dominant egalitarian ideals to increasing calls for pluralism and freedom of choice (West 2014: 333; Grundberg Wolodarski 2022: 72). The first major reform was enacted in 1989, when the Swedish parliament decided to transfer the responsibility for teachers' and principals' wages and working conditions to the municipalities. The school had previously been under the control of the national government through its National Board of Education (*Skolöverstyrelsen, SÖ*), which was abolished and replaced by a new government agency, the National Agency of Education (*Skolverket*). By this reform, the funding system changed from direct allocation to a block grant to the municipalities, within which they could make their own priorities (Prop 1990/91:18 p. 52 ff). Only a year later, a shift in government brought an intensification of reform ambitions. The new center-right government put strong emphasis on renewal of the Swedish public welfare system and especially freedom of choice and pluralism, and in 1992, the so called "independent school reform" ("*friskolereformen*") was enacted. The reform strengthened the freedom for parents to choose school for their children, that had been introduced in a bill in 1991 (Prop 1990/91:115 p.23f), and vastly expanded opportunities for setting up and operating independent schools. A voucher system, where 85% of the average cost of each pupil in a municipality would transfer with school choice, was introduced (Lag (1992:710) 9 kap 4a§; Prop 1991/92:95 p. 13 f). To cover for the remaining costs, independent schools were allowed to charge fees from parents, but this changed after the social democrats returned to power in 1994. A complementary reform in 1996 banned fees and expanded the voucher system to 100% of the municipal cost for each pupil, all in the name of equality – "the principle that independent schools should be open for everyone" was implemented by a change to the Education Act (Lag (1996:1044) 9 kap 6-7 §§; Prop 1995/96:200 p. 52 ff). The system has largely been unchanged since then, in spite of a changing discourse and intensification of critique towards profits and the so-called school "market" in Sweden (Lundahl 2002; Fredriksson 2009; Carlgren 2009; Wennström 2019; Blix and Jordahl 2021). The organizational field of independent schools has expanded gradually and steadily in the thirty years that have passed, with the number of independent schools increased from 217 in 1994 to 828 in 2021, and the share of pupils in independent schools increased from 1.52% (13,556 pupils) in 1993 to 16.11% (178,207 pupils) in 2021 (National Agency of Education 2022).

The reforms of 1990-1996 were enacted by successive governments of both left and right and had the support of a broad consensual majority in the Swedish parliament (Blix and Jordahl 2021; Bergh and Erlingsson 2009). By a series of reforms enacted by both social democratic and center-right governments, a school voucher system was implemented that was more or less identical to that proposed by libertarian and neoclassical economist Milton Friedman in 1955, which remains controversial in most countries including the United States (Baggesen Klitgaard 2008; Epple et al 2017). Thereby, the school itself also changed remarkably, from an almost complete focus on "equality of opportunity", "equivalent standards", and "a school for all children", to key watchwords of "excellence", "competition", and "free choice" (Carlgren 2009: 641). The effects of the changes are still under evaluation, but it is clear that the voucher system and the almost absolute freedom for independent actors to set up and operate schools has created what scholars call a 'quasi-market', where for-profit companies can make major revenues off the public purse. A 'quasi-market' is characterized by competition between public and private providers, but with a single-payer voucher system financed by taxes (Le Grand 1991). The key difference from a real market is that customers do not pay for goods/services themselves, which creates grave challenges for any attempts to evaluate quality (Blix and Jordahl 2021: 28; Böhlmark and Lindahl 2015). In theory, market-like competition should spur competition and thus produce higher quality, but in practice this logic is less apparent, because pupils and parents typically don't have access to adequate information, and because of additional incentives to compete with other means than quality.

There is therefore much to suggest that the current debate in Sweden, that pictures for-profit companies that operate independent schools as a problem and potential threat to quality

of education and overall goal fulfillment in the school system, is generally accurate. Allegations of shirking, i.e. a deliberate and conscious lowering of quality to cut costs, cream skimming, which means that independent schools lower their costs by attracting less resource-intensive pupils, and grade inflation caused by independent schools that attract pupils with implicit promises of higher grades, have been proven in large parts accurate (Blix and Jordahl 2021: 27).

But for independent actors who want to contribute to the pluralism and freedom of choice by launching and operating a school, it seems there are few alternatives to the for-profit company. Independent schools in Sweden can be operated by any organization recognized by Swedish corporate law, and by individuals. In reality, as noted above, four organizational forms dominate: Of Sweden's 828 independent schools (academic year 2021/22), 511 are run by limited liability companies (*aktiebolag*), 86 as nonprofit foundations (*stiftelser*), 102 by nonprofit associations (*ideella föreningar*), and 121 by economic associations (*ekonomiska föreningar*) (National Agency of Education 2022). The latter two are our concern in this study. Because although limited liability companies are politically problematic, they are legally rather unproblematic from the point of view of corporate law on associations (there are however a number of issues regarding administrative law which are not discussed in this article), as they are by far the most discussed in legal doctrine and have a clear and very well-established purpose of making a profit for their owners (Ohlsson 2012). At least from the point of view of association law, there are no legal issues of limited liability companies operating schools. Foundations, in comparison, are a viable alternative not least due to their nonprofit purpose and rather obvious suitability for putting a fortune to work for a specific aim, but this is also its obvious drawback: A large capital is necessary in order to create a foundation, which limits the opportunity especially for small-scale or grassroots endeavors (e.g. parent or teacher initiatives). Moreover, foundations are stable but rigid and inflexible, since the will of the founder guides the management. It is expressed upon the creation of the foundation, and can typically not be changed (Olsson 1996: 303). What remains are associations. At face value, they should be an obvious go-to alternative for any independent initiative to start and operate a school. As it turns out, however, the reality is different.

Analysis

The two types of associations recognized in Swedish corporate law have very different legal statuses. Economic associations (*ekonomiska föreningar*) have been regulated by law since 1895, and the legislation has been revised several times and thus – as is customary in Sweden – been the subject of extensive governmental investigation. Nonprofit associations (*ideella föreningar*), on the other hand, are unregulated and are legally recognized by custom. In practice, nonprofit associations are legally defined by *argumentum e contrario*, in other words, nonprofit associations are associations that do not fulfill the legal provisions of economic associations.

Economic and nonprofit associations in Sweden

As noted, the first Swedish law on economic associations dates back to 1895 (Lag (1895:66)). It was written as part of a legislative process that concerned non-trading partnerships, trading partnerships, limited liability companies, and economic associations (Prop 1895:6). In the preparatory works, economic associations were defined as societies that conduct economic activities for a joint gain, to support the housekeeping (*hushållning*) of the members. The types of support mentioned in the preparatory works were facilitating members' sources of income, reducing members' costs of living, and providing insurance (Förslag 1890 p. 96 f). The legislation contained the following prerequisites: economic associations must conduct economic activity (1) to procure food or other necessities for the members, (2) to distribute products from the members activities, (3) to provide the members with housing, or (4) in another comparable way support the economic interests of the members (Lag (1895, §1)). The law emphasized the cooperative element strongly, by a constant mentioning of the members in

the enumeration of activities that associations can undertake to fulfill their purpose. Specifically, consumer associations that traded with both members and non-members could not be economic associations under the 1895 law, which was clarified through the 1910 legislation (Prop 1910:83, p. 70).

In 1910, the Swedish parliament passed new legislation for limited liability companies (Prop 1910:54). In the preparatory works, it was also suggested that new legislation for associations should be crafted, in order to regulate governing of both economic associations and non-profit organizations. In a comment on the proposed legislation for non-profit organizations, five supreme court judges criticized the gap they saw opening between the two bodies of legislation. In their opinion, the new legislation would mean that non-profit organizations, which were at the time recognized as legal subjects, would lose this status (Prop 1910:83 p. 74 f). The proposed new legislation of non-profit organizations was never accepted, and in 1911, a new law solely on economic associations was passed instead (Lag (1911:55)). The 1911 law reused the 1895 definition of economic associations, based on examples of activities (above), with the additional recognition of the purpose to obtain loans for the members (Lag (1911:55)). In spite of the strong emphasis on economic activity, also associations with other purposes could be recognized and registered as economic associations.

In 1944, the Swedish parliament passed new legislation on limited liability companies (Lag (1944:705)). A governmental investigation was appointed in 1945 to draft a new law on economic associations, and four years later, the report of the investigation was presented (SOU 1949:17). The law it proposed was passed by the Swedish parliament, with minor modifications, in 1951. Its definition of economic associations centered on the members and their economic interests, which it defined as members either being customers, suppliers, or partaking in the association by their own labor, or any other similar engagement. The previous definition that used examples (above) was replaced by a definition that instead listed three general but necessary conditions: The *function* of an economic association should be to undertake economic activity; the *purpose* should be to promote the economic interests of the members; and economic associations should have *cooperative form*, i.e. members should participate in the activities of the association, in some way (Prop 1951:34 p. 79). The cooperative prerequisite was hereby reinstated after having been omitted in the 1911 law, with the aim, as advocated by the preceding investigation, to use this prerequisite as a way to clearly differentiate economic associations from limited liability companies (SOU 1949:17, pp. 64, 72).

The investigation also suggested that nonprofit associations (*ideella föreningar*) should be eligible for registration in accordance with the new law, and that therefore “basically the same requirements” should be made regarding these associations with respect to their “structure” and “the system according to which they operate” (SOU 1949:17, p. 72). The investigation thus proposed, by extension, that also nonprofit associations be legally defined in a direct meaning, and be given their own legislation accordingly. This was not included in the eventual 1951 law, and no separate legislation for nonprofit associations was ever introduced. Therefore, to this day, nonprofit associations are unregulated in Sweden, only defined by their nonprofit purpose and characterized by a lack of a legal framework. In a general and practical meaning, this makes nonprofit associations volatile and a form of organization that is significantly less clear from a legal standpoint. In 1979 the Swedish Council on Legislation (*Lagrådet*, a governmental agency with the mission and purpose to review legislation before it is presented to parliament) stated that “many non-profit organizations have, through legislation, gained an important influence over the development of society. Considering the role of these non-profit organizations in our country, the lack of legislation for non-profit organizations might appear as less convenient. Furthermore, the law is not clear on all related issues and there is reason to assume that more problems will appear in the coming legal praxis” (FU 1979/80:1, p. 11).

In 1977, the government created a committee to investigate “the role of the cooperative association in society”,¹ and upon the delivery of its main report (SOU 1981:60), an additional

task was given to the committee, to “make a general review of the legislation for economic associations, with the purpose of accomplishing legislation that is up-to-date” (SOU 1984:9, p 3). The report of this investigation proposed a “modernized and simplified” law that also specifically takes note of the general “societal interest in, and need for, a developed and effective cooperative movement” (SOU 1984:9, p 9). The resulting bill (Prop 1986/87:7) introduced new legislation for economic associations (Lag (1987:667)) that essentially repeated the definition in previous legislation, introducing the phrase that remains the portal section to this day: Economic associations “have the purpose of promoting the economic interests of its members through economic activity in which the members participate” (Lag (1987:667) 1 kap 1§; Lag (2018:672) 1 kap 4 §). The law also provided examples of how members can participate in the association’s activities: as consumers, suppliers, through their own labor, by “using the services of the association”, or “in other similar ways”. Economic associations were also legally distinguished by specific rules regarding membership, voting, and dividends (Lag (2018:672) 1 kap 4§, 6 kap 2-4§, 13 kap 1-3§).

In 2008, the government appointed a special investigator to review the law, and the resulting report was presented two years later (SOU 2010:90). It was thereafter processed internally at the ministry of justice (Prop 2017/18:185), and a bill was presented to parliament in March of 2018. The new law on economic associations was passed two months later and went into force in the summer of 2018 (Lag (2018:672)). With respect to definitions and basic provisions, the legislation was not changed, but echoed the 1987 law: Economic associations are defined by three criteria: Economic activity, economic interest, and member participation (1 kap 4 §). These three criteria will be the focus of the discussion in the next section. Noteworthy, as a starting point for the following, is also that nonprofit associations remain unregulated and are, in case law (For example NJA 2000 s 365), still legally defined by not fulfilling the criteria for economic associations.

Schools and the legal criteria for economic associations

The final point in the previous section calls for some specific attention, since the basic definitions of economic and nonprofit associations in Swedish law calls into question the fact that both forms of association are represented – to a significant and comparable degree – among the organizations that operate independent schools in Sweden. Specifically, 102 nonprofit associations and 121 economic associations operate independent schools in Sweden, and this is indeed peculiar. The difference between the two forms, from a legal point of view, is that nonprofit associations do not undertake economic activity, or undertake economic activity that does not have the purpose of economic benefit for the members, whereas economic associations do. Independent schools in Sweden may differ in many respects, but they do not differ in their funding, as they all receive public funding through the school voucher system and cannot accept other income, and not in the general provision of service, namely education for children between the ages of six and sixteen. Therefore, it can be called into question whether it is reasonable that 121 of the independent schools are characterized as undertaking economic activity, and 102 as not undertaking economic activity. But nonetheless, the Swedish Schools Inspectorate (*Skolinspektionen*) have evidently granted hundreds of permissions to operate schools to both types of associations, and the Swedish Companies Registration Office (*Bolagsverket*) apparently also routinely register both and thus validate their use for organizations that operate independent schools.

But the incongruities do not end here. The investigation that preceded current legislation on economic associations discussed the fact that in previous times, economic associations were mainly active in agriculture, food industry, and housing, but since the prior law was enacted in 1987, several new types of economic associations have been founded, among them schools. This prompts a brief discussion of whether these new associations really fulfill any of the criteria of the legal definition: economic activity, economic interest, and member participation. While the investigation concludes that there are inconsistencies in this regard, it nonetheless makes no suggestions of changes or clarifications of the legislation in this area.

Concerning, first, the criterion of economic activity, this has been defined in previous legislation as activities that are “commercial, industrial, financial, or in other ways organized in a businesslike way” (SOU 1949:17, p. 73). The investigation that preceded the most recent law on economic associations discussed the distinction between economic activity and business activity (*näringsverksamhet*), and noted that business activity exists as a provision in several legislations including older accounting law, the Swedish consumer sales act, and tax law. Especially the latter is narrower in its definition of business activity – in the income tax law, business activity is defined as being independent and professional, and the latter includes that the activity is lasting and with a profit motive (Lag (1999:1229), 13:1, §1). The lack of a unitary definition of business activity, and the fact that it is somewhat more narrowly defined than economic activity, leads the 2008-2010 investigation to propose that the criterion of economic activity in the law on economic associations is kept intact (SOU 2010:90, p. 367), which the law also reflects (Prop 2017/18:185, p. 10). It thus follows both from the law and from the preparatory works that economic activity has a broader meaning than business activity, and the investigation points out that the main difference is that the criterion of professionalism is not included in economic activity (SOU 2010:90, p. 368). But since schools are professional organizations, and education a professional activity, this would make schools either both business activities and economic activities, or neither. But the investigation also discusses criteria for a wider understanding of economic activity: In order to be defined as such, the activity must be “of economic nature”, that it is “businesslike or otherwise planned and organized”, that it “has or is intended to have durability”, and that it is “not intended to mainly serve a nonprofit purpose” (SOU 2010:90, p. 368). School activities ought to be of economic nature, and are doubtlessly planned and organized. The key question is whether they in fact mainly serve a nonprofit purpose. There is much to suggest that they do, or at least perhaps should.

Second, the criterion of member participation can be called into question in the context of independent schools. This criterion has historically been fulfilled by members’ participation in an association’s activities as producer (supplier), consumer, or with work efforts. Independent schools run by associations typically have parents of the school’s pupils as members, which means that some of the parents/members will have to serve as members of the board and thus participate in the activities of the association by the work they thereby put in. However, it cannot be expected than more that a handful members do this type of work, and therefore not nearly all members will, at a given time, be participating in the activities by their own work efforts – to say nothing of the fact that not all parents always are members of the association that runs a school. It is doubtful, from the perspective of freedom of association (which is a constitutional freedom in Sweden, Regeringsform (1974:152) 2 kap 1 § 5 p and 2 §) whether a school can mandate parents who choose the school for their children, either to be members of the association or participate with their own work efforts. This might mean that economic associations that operate schools by law cannot fulfill the criterion of member participation, unless parents can be viewed as having a consumer relationship to the school. This is itself doubtful, given that elementary school is mandatory in Sweden.

The third criterion is that of economic interest. The 2008-2010 investigation that preceded the current law on economic associations states that the economic interest of the members of an association “is primarily their right to use the services of the association, in wide meaning” (SOU 2010:90, p. 368f). Such a wide interpretation might give way for the conclusion that parents with children in a specific school are using this school’s services. However, one shall here be reminded of the fact that schools are not financed by the parents but by the voucher system, and that fees and any additional financing above and beyond the vouchers is illegal. The funding of the voucher system is uniform for all pupils (within a given Swedish municipality). Therefore, it is doubtful whether pupils’ participation in the education at a specific school can mean promotion of their parents’ economic interests. Add to this the fact that economic associations very well may have members that are not parents to pupils at the school (this right also follows from the freedom of association), in which case the link is even

thinner. Moreover, as already noted, the law on compulsory schooling and the law of freedom of choice of school, in combination, may make it a legal right and obligation to have one's child attend an independent school, rather than anything like the promotion of one's economic interest. There is one possible exception, namely if an economic association enables a school to operate in a place that would otherwise have no school, which certainly is very uncommon in Sweden, but might happen.

Can economic associations have non-economic purposes?

The 2008-2010 investigation also discussed whether economic associations should be allowed to operate with the main purpose of serving a public good. This was explicitly outlawed in the 1987 legislation, but the 2008-2010 investigation argues that there is a need for "social associations" that "run business-like activities with social goals and in cooperative form", and identify schools as an example of this (SOU 2010:90, p. 381). It furthermore notes that a characteristic of "social enterprises" and "civil society enterprises" is that any surplus is re-invested rather than paid to members or owners in dividends.

On one specific and for this article very relevant point, the discussion in the 2008-2010 investigation report is contradictory: It notes that economic associations that do not fully comply with the law are already in place, but does not seem to view this as problematic. Later, the investigation notes that this rarely should be a problem, given that other purposes besides economic interests are allowed as long as they are not the main purpose, and that several such auxiliary interests also can be seen as economic upon closer inspection (SOU 2010:90, p. 385f). It is, first of all, unclear why inconsistent application of a piece of legislation would not be a reason to change this legislation to better reflect its use. The main changes in this particular context – the appearance of several new independent schools in need of legal frameworks that reflect their purposes and nature – happened after the 1987 law was enacted and before the 2008-2010 governmental investigation. This change, which in effect meant that authorities began to grant legal status as economic associations to several organizations that perhaps do not fulfill the criteria of the law, amounts to a significant *de facto* break in the 100-year tradition of application of the law on economic associations.

Concerning the second point on this matter made in the 2008-2010 investigation, that other purposes are allowed as long as promotion of the economic interests of the members remains the primary purpose, it is still unclear whether schools operated by economic associations can be said to fulfill this. As noted in the introduction, it is in most cases doubtful whether any other purpose could be the primary purpose of a school than education, which means that it must be viewed as an economic interest for the criterion of economic interest to be fulfilled (see further below). In historical perspective, although the legal texts of the reforms of the early 1990s say nothing explicitly about strengthening civil society and stimulating the participation of nonprofit interests in the school system, this aspect has later been highlighted as a *de facto* motive for deregulation and the promotion of a pluralism of independent schools (e.g. SOU 2016:13; SOU 2019:56). Retaining a legal prerequisite that the economic interest is the primary purpose means that these other important values are downplayed and given a subordinate role in those schools operated as economic associations. Not least in light of the current debate over profit-making enterprises in Swedish public welfare services, including the school system, this appears problematic.

Most interesting is, however, the assertion that several interests that are auxiliary to the economic interest, also can be seen as economic upon closer inspection. The investigation makes no further effort to motivate how and why this pertains to the main activity of schools, i.e. education. Instead, it is simply noted that economic associations that operate schools are routinely registered as such by the Swedish Company Registration Office (SOU 2010:90, p. 321). While this is of course accurate, the argument is still doubtful: The legislative differentiation between economic and nonprofit associations is not supposed to provide complete freedom of choice between the two – quite the opposite: It is clearly stated in legislative history that they should be mutually exclusive.

The 2008-2010 investigation considers the risk of confusion concerning the differentiation between economic and nonprofit associations as an important reason not to allow economic associations that have as sole or main nonprofit or social purpose (SOU 2010:90, p. 387f), which stands in direct conflict with its previous argument that the *de facto* nonprofit and social purpose of schools is unproblematic, given that economic associations that operate schools are routinely registered. There is reason to believe that the committee is aware of the problem, since they write that both economic associations and limited liability companies may appear as distant choices for organizations “in the social economy”, and that nonprofit associations, due to their lack of legislative framework, may appear as unreliable. The investigation therefore acknowledges the need for “some regulation in corporate law, specifically intended for social enterprises with distinctively nonprofit purposes”. Meanwhile, it also states that “it is not our intention to take a stand regarding the need for specific legislation for enterprises within the social economy” (SOU 2010:90, p 387f). As already noted in a previous section, the 2008-2010 committee hence recommends no changes to the three-part definition of economic associations, and the new law reflects this standpoint and consequently contains no such change.

To conclude, it is quite clear from the investigation that preceded the 2018 law on economic associations that there has been a clear break with the practical interpretation of the three criteria that defines economic associations, since the previous (1987) legislation. It also appears very unlikely that any of the investigations that preceded prior legislation (1911, 1951, 1987) would have considered schools to fulfil the criterion of economic interest or the criterion of economic activity. Therefore, the changes in interpretation in the 2008-2010 investigation breaks quite clearly with a hundred years of legislative tradition and practice. The *de facto* reason for this is of course that the organizational field of schools in Sweden has changed in this time, and that hundreds of independent schools have been founded as economic associations. However, these clearly go beyond the original scope of the law. Put differently, with the school reforms of the 1990s, economic associations found a new purpose, which is a significant change neither driven by, nor reflected in, legislation. While it is somewhat acknowledged in the 2008-2010 investigation (SOU 2010:90), the change caused no changes in the definition of purposes of economic associations – the 2018 law uses the same definition as the 1987 law.

Finally, another word on nonprofit associations. As already repeatedly noted, the two forms are mutually exclusive in Swedish legislation, but the differentiation is obviously complicated by the provision that economic activity to promote members’ economic interests through member participation should be the *main* purpose of an economic association, but need not be the exclusive purpose. In other words, economic associations may in part have the same purpose as a non-profit association. In addition to this, the Supreme Court of Sweden argues that the boundaries between economic and nonprofit associations are “difficult to establish” (NJA 2000, p. 365). Given the interpretation that schools do not amount to economic activity, do not promote the economic interests of the members, and do not include member participation, there is in principle no obstacle to nonprofit associations operating schools. However, as already noted, the fact that the Swedish Company Registration Office routinely registers economic associations that operate schools, this should mean that these associations fulfill the criteria. By extension, this could mean that nonprofit associations that operate schools are not legal entities or should not be recognized as legal entities.

The lack of a legal framework for nonprofit associations in Sweden likely has historical reasons: Nonprofit associations have traditionally not been undertaking professional activities to an extent that warrants regulative frameworks. But with the reforms to the school system in the 1990s, whereby independent actors were invited to participate in the organizing of primary education in Sweden, a need perhaps arose for such frameworks, given that the nonprofit association is one likely alternative for such schools. Such a new need should, however, not be catered to by the application of the law on economic associations in conflict with its wording. Confusion abounds.

Concluding Discussion

In spite of the broad and strong consensus that seems to have characterized the reforms of the Swedish welfare system in the 1990s, including not least the school (Bergh and Erlingsson 2009: 86-87), the reforms as such seem to have been rather hastily and thoughtlessly accomplished, especially in comparison with the long Swedish tradition of investigatory work by committees ahead of governmental policy bills and legislation. This has been indicated in several later investigations, where the abrupt and insufficient character of the reform work is highlighted, and the lack of adequate prior investigation and subsequent implementation is noted (SOU 2014:5, p. 343; SOU 2016:38, pp. 58-62; SOU 2020:28, p. 97). Never mentioned in any of these investigations, or in any other study in this area that we are aware of, are the preconditions for launching and operating independent schools from the perspective of corporate law. And as this article has shown, there has been little or no such deliberations either in connection with the reforms or afterwards. It is, we argue, even possible to speak of a rather blatant lack of attention to the issue of availability of adequate forms of associations for independent schools in Sweden, or at least a lack of political and bureaucratic awareness of the importance of this matter.

The domination of for-profit companies among independent schools in Sweden – 511 out of 828, or 61.7% – has many reasons. The limited liability company is a stable and convenient legal form, with strong precedent and transparent regulatory frameworks in everything from taxation and book-keeping to employer relationships and union representation. It also has growth and expansion built-in, which means that once limited liability companies start operating independent schools, they are likely to grow and establish additional school units, and use revenue to acquire other schools. Foundations and associations, in comparison, probably operate with a non-business logic of preserving and maintaining existing operations rather than expanding with new units, which means that they are less prone to multiply. In addition, independent schools in Sweden seem, by all accounts, to be a lucrative business opportunity: Since the 1996 reform of the voucher system, which barred fees and gave independent schools access to 100% of the funding for each pupil, the voucher system has been a formidable basis for a predictable and continuous cash flow for independent schools, which in turn creates very favorable conditions for the operation of these schools as profitable businesses. This is shown in the revenues of the largest school corporations, several of which continue to make hundreds of millions of SEK in annual revenues (SOU 2016:78, pp. 198-207).

Comparably neglected is, however, the absence of appropriate alternatives. Those who want to set up and operate a school – be they parents or teachers or any philanthropist, disappointed with existing alternatives or with an idea for an alternative pedagogy or profile, or anything similar – and who do not want to run a for-profit operation, are left with few options. A foundation requires a substantial endowment. And as we have seen, associations – both economic and nonprofit associations – come with their own challenges and obstacles. In the case of economic associations, it can even be questioned whether they at all fit together with the purposes of the school, in general and as codified in Swedish legislation, namely to provide education for minors, with a reasonable degree of uniformity and equality. The lack of legal frameworks for nonprofit associations may make this form unattractive also for nonprofit activities. And the co-existence of cooperative and nonprofit associations in the organizational field of independent schools in Sweden, in spite of their mutually exclusive legal statuses – is in itself puzzling. This situation is therefore, from a purely legal perspective, very complicated. There is, however, so far little to suggest that the practical consequences for independent schools have been nearly as problematic as the legal-theoretical analysis in the previous section suggests, and this is therefore quite clearly a formidable subject of future research.

The title of this article contains two questions. The second – why does it matter that associations run independent schools in Sweden? – has been answered by the analysis in the previous sections and in this concluding section: Briefly summarized, there are enough

ambiguities and confusion around the law on economic associations, the lack of similar legislation for nonprofit associations, and the application of the law, to warrant a reconsideration of whether it is at all appropriate for independent schools to be operated by economic and nonprofit associations. The first question – why do associations run independent schools in Sweden? – can be answered in two different (yet related) ways, in light of what the analysis in this article has conveyed. First, a historical explanation would yield that given the political reforms of the Swedish public welfare system in the 1990s, and especially the school system, prompted the forming of new organizations with independent legal status to operate schools. Some of them chose to become economic associations, which is a form that had previously been used only by grocery stores, wholesalers, dairies, housing cooperatives, and the like. The prerequisites in the law on economic associations were a poor match for the new entrants on the school quasi-market, which the 2008-2010 investigation (preceding the most recent law on economic associations) surely comments on, but does nothing about. This is peculiar. It is not a stretch to suggest that the school reforms of the 1990s in fact created a new realm for private associations to act in, but no new corporate law was introduced – or even discussed – for this realm.

The second answer, which is more general and somewhat speculative, is therefore that associations run independent schools in Sweden because there are few alternatives for nonprofit efforts. The consequences thereof – should this answer reflect reality – should be investigated in future studies.

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- FU 1979/80:1 Betänkande av lagrådet. (*1979 judicial preview by the Swedish Council on Legislation*)
- Regeringsform (1974:152) (*The Swedish constitution*)
- Lag 1999:1229 Inkomstskattelagen (*Income tax act of 1999*)
- Lag 1895:66 om registrerade föreningar för ekonomisk verksamhet (*1895 law on registered associations for economic activities*)
- Lag 1911:55 om ekonomiska föreningar (*1911 law on economic associations*)
- Lag 1944:705 om aktiebolag (*1944 law on limited liability companies*)
- Lag 1975:1385 om aktiebolag (*1975 law on limited liability companies*)
- Lag 1987:667 om ekonomiska föreningar (*1987 law on economic associations*)
- Lag 2010:800 Skollag (*Swedish Education Act*)
- Lag 2018:672 om ekonomiska föreningar (*2018 law on economic associations*)
- NJA 2000 s 365, Avgörande i Högsta Domstolen (*2000 decision by the Swedish Supreme Court*)
- Prop 1895:6 med förslag till lag om handelsbolag och enkla bolag, lag om aktiebolag, lag om vissa föreningar för ekonomisk verksamhet, mm. (*1895 governmental bill with proposed legislation on partnerships and unincorporated partnerships, legislation on limited liability companies, legislation on some associations for economic activity, etc.*)
- Prop 1910:54 med förslag till lag om aktiebolag och till lag om 82isa ändringar I lagen om handelsbolag och enkla bolag (*1910 governmental bill with proposed legislation on limited liability companies, and proposed changes to the legislation on partnerships and unincorporated partnerships*)
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Notes

¹ In this specific instance, the instruction to the committee specifically used “cooperation” which is a sign of the times, but which also differs from regular terminology. In this translation, we therefore used “cooperative association” rather than “economic association” as in the rest of this article (see note 1).