Murphy, M. (2020) Taking education to account? The limits of law in institutional and professional practice. *Journal of Education Policy*. (Early Online Publication)

(doi: 10.1080/02680939.2020.1770337)

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Taking education to account? The limits of law in institutional and professional practice

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Word count: 7943

Abstract

Recent years have seen the spread of a litigation culture in the UK education sector, with members of the public increasingly seeking recourse to the law to appeal, complain, or achieve compensation. The increasing tendency of people to resort to litigation suggests that recourse to the law is seen as a more immediate form of taking education services to account. While in theory an effective accountability tool, this development has unfortunately produced some less than desirable consequences in educational institutions, most notably the avoidance of risk. This paper argues that such consequences need to be understood as a reflection of the limits placed on legal regulation, once it encounters the already highly-regulated world of educational institutions. To flesh out this argument, this paper examines these limits as a set of consequences relating to the following: increasing juridification; the intersection of law and mechanisms of accountability, judgement and professional discretion; and the relation between risk and trust. The argument draws on the 'law in context' literature, as well as recent debates over the pathologies of legal freedom.

Taking education to account? The limits of law in institutional and professional practice

Introduction

Recent years have seen the spread of a litigation culture in the education sector in the UK and elsewhere, with individuals increasingly seeking recourse to the law to appeal, complain, or achieve compensation (Allsop and Jones 2008, Novak, 2019, Author 2018a). This important development suggests that recourse to the law is seen as a more immediate form of taking education services to account Numerous aspects of work in the education sector (in schools and higher education) have been affected by the spread of a litigation culture (Furedi and Bristow, 2012), with the sector experiencing rises in the number of lawsuits.

The detail of these lawsuits is revealing, as they illustrate the highly individualised approach to legal accountability in education services. Furedi and Bristow in their report *The social costs of litigation* (2012) provide some examples of successful claims against schools in the UK based on injuries sustained during designated curricular time for sport. These include amounts up to £13,000 each for cases where: a teacher injured a pupil when demonstrating how to perform a rugby tackle; a student was injured when a set of goalposts fell; where a netball ring fell on a pupil; where a student was hurt when struck in the face by a hockey stick; and another who broke their arm in gym class (Furedi and Bristow 2012: 56). But alongside this set of physical injury awards is a range of other legal actions and compensatory payouts in areas to do with student satisfaction, bullying between school pupils and school

admissions policies. There are also cases of teachers suing schools for injuries sustained at work, such as being assaulted by a pupil (Furedi and Bristow 2012: 51).

Given this recent development, then, it is something of an oversight in the broader literature that law and its implications for education have not been dissected more thoroughly. Literature on forms of accountability such as inspections and audit, for example, avoid the subject (See Wilkins and Olmedo 2018; Strathern 2000). Studies of new managerialism and new public management, for all the benefits they bring to critical understandings of policy, tend to be more focused on the effects of marketisation on forms of institutional and professional life (Pashiardis and Brauckmann 2019; Tolofari 2005). In critical studies of education, the legal system has remained an outlier.

Its increased prominence in the education sector suggests that it is time that the legal field is taken more seriously in studies of educational governance. The expanding role of law across numerous sectors, what the literature refers to as *juridification*, can be witnessed across numerous other sectors (Magnussen and Nilssen 2013: 233). Although it has received a great deal of interest in the 21st century[i], an interest in juridification and the social impact of law has been present for some time, its limitations the main focus of concern. Teubner referred to juridification as an 'ugly word - as ugly as the reality which it describes' (Teubner, 1987: 3). For authors such as Teubner, it was ugly because it represented the 'bureaucratization of the world'. Since this was written, much of the commentary on juridification has followed a similar path, bemoaning its tendency to add further regulatory measures onto already existing layers of control in public and other services (Davis, 2010; Salter, 2005). Juridification is widely cast as a trend with significant limitations when it comes to effective and prudent governance.

The purpose of this paper is to explore these limitations in the field of education, and in order to assess these limits, the paper situates this educational trend as a reflection of a much broader and deeper social development, one in which the language of law 'increasingly pervades the public sphere' (Honneth 2014: 92). This trend is altering the relations between the public and their institutions, as well as conceptions of justice and rights that govern the social order. One of these institutions is schools, in which 'the needs of children are increasingly presented in the form of legal claims' (Honneth 2014: 92). This recourse to forms of legal freedom is also evident in other policy domains such as health and social care and has significant implications for education as a public service as well as a mechanism of social justice.

To flesh out this argument, this paper examines the limits of law as a set of consequences relating to the following: increasing juridification; the intersection of law and mechanisms of accountability; the impact on professional discretion; and the consequences of juridification for relations between education and the public, with a specific focus on risk and trust. The argument draws on the 'law in context' literature (Selsnick 2003), as well as debates over the pathologies of legal freedom (Honneth 2014). This paper adapts and extends Axel Honneth's argument about the limitations of legal freedom, putting it to work in the field of education studies while also engaging the work of Niklas Luhmann on risk and trust (Luhmann 2000).

The social pathologies of juridification

There is a number of definitions of juridification, a concept with a rich but relatively unknown history. For the purpose of this paper, juridification is defined as the tendency of both formal law and sets of legal expectations to expand their domain of influence, a definition that encompasses the working conceptualisations put forward by Habermas (1987), Teubner (1998), and Paterson (2000), as well as the more general theory of extrapolation developed by Arturs and Kreklewich (1996). This signifies that in public matters, the 'weight of the judiciary' (MacNair 2011: 78) is never far from the action, hovering over institutional practices and professional relations[ii].

Juridification, importantly, does not just signify an increase in law, but also a qualitative change in the intentions behind it. It represents a process in which 'the interventionist social state provides a new type of law, regulatory law' (Teubner 1998: 420). This is quite distinct from classical formal law, which delivers a formalised basis for the development of social autonomy, and has no jurisdiction over subsequent developments. With regulatory law, control becomes significant, as it is geared towards specifying social processes needed to develop desired outcomes (Laughlin and Broadbent 1994: 339). As well as expanding the content of law, juridification also manifests itself in the 'spread of legal discourse, jargon, rules, and procedures' into the political sphere (Hirschl 2008: 121).

The expansion of juridification is increasingly evident in sectors such as health and social care (Walsh 1999; Davies 2013; Veitch 2012), a symptom of the public reform agenda that has opened the door for such forms of legalisation. But it is also prevalent in numerous other fields of activity, such as sport (Carlsson 2009), the armed forces (Foster 2012) and the leisure industry (Talbot 2011). This suggest that Schuck is correct when he compares law to the metaphorical fog in Dicken's *Bleak House* (Schuck 2000: 419), as law 'seeps silently into

each nook and cranny of our lives, gradually regulating all social behaviour and relationships'.[iii]

Its extension into education policies and practices can be evidenced in a number of ways, such as 'contractualism' in the case of home-school agreements in the UK (Gibson 2013), the spread of regulatory oversight of school exam systems in Sweden (Novak and Carlbaum 2017), the rise of legal rights rhetoric regarding consumerism in higher education (Kaye et al, 2006), and forms of litigation avoidance in the revision of HE assessment practices (Ecclestone and Swann 1999).

This extension of law has not gone unnoticed, and there has been something of a more general backlash against the growing presence of juridification, particularly in the United States, which has famously fed a powerful litigation culture and a sense that law is sometimes the first rather than the last resort when it comes to atoning for the sins of professional malpractice, consumer dissatisfaction and personal grievance. Numerous authors have criticised the growing presence of legal forms of accountability in the USA, what Hirshl calls the 'Juristocracy' (2004), viewing the power of lawyers and lawsuit culture as the nemesis of freedom (Howard 2002; 2009). These more recent concerns follow on from warnings in the 1970s about a 'legal flood' (Barton 1975)' and 'legal pollution' (Ehrlich 1976) seeping into the public arena.

Alongside this considerable backlash, there are also those who believe the increasing role of law in social life has its benefits. Parker for example argues that law has the unique capacity to encourage social institutions to 'engage in processes of networking with each other', processes that can help to build greater social cohesion and stronger social networks (Parker

2008: 358). Gunningham (1999: 195) makes a similar argument in relation to health and safety regulation, via which the law can 'stimulate modes of reflection'. For Gunningham, law can help guide the internal self-regulation of institutions so that they adopt a more positive and pro-active approach to occupational health and safety issues (Gunningham 1999: 195). Juridification in this case helps to improve regulatory compliance by 'coercing' education and other organisations to improve their internal monitoring systems.

Law can also be used as a check on unfettered professional power, including those working in the education sector. Juridification, especially in relation to the protection of individual legal rights, can act as a bulwark against institutional and professional insularity and self-serving actions on the part of public servants. This is important, given that the design of social law in the shape of social policy, much of which is geared towards tackling social problems, has 'largely been left to 'professionals' or 'experts'' (Magnussen and Nilssen 2013: 237). This can then be viewed as an upside of juridification in that it strengthens forms of publicness: juridification of social policy thus provides individuals with the necessary tools to act on matters of social justice (Magnussen and Nilssen 2013: 239).

Law has a legitimate regulatory function when it comes to institutions and professions. For example, all the cases of compensation mentioned in the introduction were the result of institutional and/or professional negligence, and hence the individuals have every right to undertake legal action. The actions by pupils and parents in these cases cannot be considered unreasonable or indeed necessarily counter to social justice. This caveat also applies to the introduction of regulation to prevent negligence in the first place.

More generally, law has been the midwife of numerous victories for social justice. Social movements and pressure groups have viewed legal regulation as a core tool in the struggle for social transformation on various fronts, viewing law as a guarantee of civil liberties such as freedom of religious expression and sexual identity, and protection from gender and race-based violence. Arguably juridification from an historical perspective was at its most ambitious when it came to protection of workers' rights and consumer protections in the economic sphere. This scenario is on display at the supranational level of the EU, in which courts often deliver a more effective form of democratic governance for the public 'than do traditional representative organisations' (Cichowski 2007: 6). Cichowski sees civil society as an active broker and shaper of juridification, using litigation processes to further agendas around gender equality rights and environmental protection.

Law, accountability and overregulation

Good intentions sometimes underlie the development of juridification in the public sphere, intentions that themselves are couched in the language of democracy (Zacher 1987: 408). It is also the case that, taken individually, the cases of litigation and compensation mentioned previously do not by themselves constitute pathologies in the education system. Nevertheless, there is a substantial difference between the kinds of grassroots collective forms of mobilisation mentioned above, with a common pursuit of social justice, and the increasing highly-individualised and in some cases consumerist form of juridification at work in education. Caveats aside, it is wise to be concerned about the presence of juridification and the increasingly role of law more generally. This is because there are limits to what law can achieve in a regulatory and a judicial sense. These limits are partly determined by the crowded field of regulatory oversight as well as other sources of legitimation, such as culture,

which often have consequences for the efficacy of law in the public sector. The context of law matters (Selsnick 2003: 186; Parker 2008: 350), as the creeping nature of juridification finds itself confronting other forms of existing public sector regulation. The desire to call these services to account and make their governance systems as transparent as possible has resulted in an accountability agenda taking centre stage in discussions around the legitimacy of these services, including education. Education provision is now increasingly governed by the demands of accountability mechanisms such as performance indicators and audits; these are joined by a set of other sector-specific mechanisms such as school inspections, league tables, research and teaching excellence frameworks, all of which provide formalised systems for monitoring and surveillance on the part of states (Author 2010, 2013).

These political requirements of nation states signify the key context for the rise of accountability, a context that has witnessed a dramatic transformation in the way in which public services are managed and delivered. The rise in accountability mechanisms reflects a shift from the positive state to the regulatory state (Stirton and Lodge 2001: 480). This regulatory state is itself part of a shift towards 'governing without government' in more decentralised regimes (Rhodes, 1996), employing techniques of 'steering at a distance' (Kickert 1995; Marginson 1997) to manage public services and achieve public sector reforms (Author 2018b). The state's arsenal of accountability mechanisms constitute an exemplary form of this arms'-length governance, providing a less traditionally top-down form of state management as well as a platform for public sector reform that can measure quality and outcomes.

In 'the age of neoliberalism' (Ranson, 2003: 463), accountability regimes have mushroomed and intensified, marking a dramatic shift away from the traditional focus on professional

accountability to a much more diffuse yet interdependent set of surveillance technologies. These include forms of consumer, contract, corporate and performative accountability, all of which come with their own set of unique structures, practices and cultural codes (Ranson, 2003: 463). The spread of legal regulation in the context of this ever greater scrutiny of public services is bound to have further ramifications. There is a number of key ways in which law and accountability intersect in ways that curtail the effectiveness of both. Key points of intersection include duplication of function and liability exposure.

Duplication of function – Both laws and accountability tools seek to promote and encourage rule-governed behaviour, and constitute sets of standards about what is acceptable and legitimate in professional life. While outcomes might differ, their impact on education services suggests that the lines between them are often muddied, to the extent that it can be difficult to gauge when educational accountability ends and the law begins. This is a problematic issue in the field of education as so many aspects of professional life are bound by legal rights and obligations - safeguarding, inclusion, health and safety, various forms of equity law (Riddell and Weedon 2006). In principle these issues stay in the background and do not tend to directly impact matters of professional competence. Yet in practice they can easily surface in the context of a school inspection for example (Lindgren et al, 2012). These blurred boundaries are arguably unavoidable given that law is a legitimate way to holds educators to account. But it can lead to a form of role confusion that does little for the capacity of institutions to deliver professional services.

This mesh of regulatory protocols and procedures has produced a number of unwanted and unintended outcomes, one being what Haines and Sutton (2003: 2) term ‘overregulation’. Another potential consequence is the cumulative effect of this overregulation on the

education sector, in particular its cultural makeup and modus operandi. In this normative space, juridification 'emerges as a process of interaction between internal regulation and external law' (Carlsson 2009: 481), which in turn can alter or even transform the internal statutes of educational institutions. While Carlsson was referring to juridification in the football sector, his analysis that the field is both juridified from outside and 'juridifies itself' (2009: 481) should cause concern for a field such as education, one that relies heavily on sets of professional and institutional norms to regulate itself[iv].

Liability exposure: Accountability regimes require substantial systems of bureaucracy in order for them to operate. This is evident in the paper trails that accumulate around inspections, audits and evaluations. These paper trails comprise data threads generated from various forms of accountability and compliance mechanism. The demands of these mechanisms result in much greater effort directed towards the production of measured outcomes, these outcomes in turn laying the foundations for a culture of evidential exposure (Author, 2018a). The paper trail is an (unwitting) focal point for law and accountability to reinforce one another, precisely because the transparency demands of accountability require the gathering of a substantial evidence base. This evidence base can simultaneously satisfy accountability protocols while also, in an increasingly juridified work culture, act as a prized source of legal evidence.

The evidential requirements of accountability constitute a double-edged sword: evidence providing a platform for calling individuals and institutions to account, while also opening up professionals to liability exposure (Power 1997: 139). The evidential nature of accountability mechanisms is fertile ground for exposure to legal risk. This dual purpose to some extent reflects the historical lineage of accountability, a history in which the perceived threat of

unchecked professional ineptitude and consequent litigation in public services contributed significantly to the growth of quality assurance mechanisms, a form of governance in which the concept of accountability as risk management took centre stage (Brown and Calnan 2009). The accountability agenda has not managed to overcome this juridical past, and as a result, accountability and its mechanisms, due to the emphasis on evidential exposure, is more and more occupying the ground between liability and litigation.

Judgement and professional discretion

Overregulation and liability exposure are unwanted outcomes of juridification in the context of a heightened accountability culture. But the limits of law are also to be found in the work of education professionals, in forms of everyday professional practice. The work done at the front line of public services is an important dimension to consider, given their input into the production of public policy (Lipsky 2010). Street-level bureaucrats such as teachers occupy this privileged position as their core task is to deal and engage with other people – this role ensures that they represent the public face of the state while also offering a level of discretion when dealing with members of the public, such as students. This dual responsibility positions teachers at the forefront of legal forms of justice, offering a justification for public policy as well as bearing the brunt of demands for legitimacy.

Professional discretion is a vital part of the work of street-level bureaucrats such as teachers, because the work of education demands human judgement that ‘cannot be programmed and for which machines cannot substitute’ (Lipsky 2010: 161). Dealing with other people necessitates the execution of discretionary action on the part of teachers, an aspect of professional practice that is often forgotten in the rush to deliver accountability of public

services. The tendency to equate high discretion with low accountability overlooks the fact that the operation of discretion is *itself a* key form of accountability to the public. Professionals such as teachers are 'accountable to the client and to an appropriate response to the client's situation and circumstances', considerations that 'cannot sensibly be translated into authoritative agency guidelines' (Lipsky 2010: 161). Discretion is a vital tool of accountability as it offers recourse to professional judgement 'when organisational rules are vague, contradicting or even bad for clients' (Ponnert & Svensson 2016: 591).

This discretionary power of teachers provides an epistemic expertise that helps institutions function effectively, aided by the reasonable assumption that teachers 'are capable of making rigorous judgments' (Karseth & Møller 2018: 13). But this balance between discretionary accountability and state-level bureaucracy is sorely tested when law enters the equation. Accountability to sets of legal regulations, in particular the safeguarding of pupils' rights, tend to take priority in institutions, thus having an overbearing effect on other forms of accountability. Compliance with the law in this regard, according to Lipsky, 'may undermine rather than enhance service quality and may systematically decrease service quality when certain conditions of public bureaucracy prevail' (Lipsky 2010: 161). While Lipsky does not refer specifically to the education system, the undermining of service quality in this context can refer to aspects of curriculum design and delivery, classroom pedagogy and assessment regimes, all of which are heavily dependent on the discretionary power of the teacher.

Discretionary distortion resulting from safeguarding pupil rights has been evidenced in the case of examination systems. Novak and Carlbaum's study of regulatory oversight of exam systems in Sweden (2017) indicates that the legal creep of juridification may 'penetrate deep into the teaching process' (2017: 686). The imperative of student rights protection and the

avoidance of litigation has produced a scenario in which the scrutiny of grades for the protection of rights has been gained at the cost of teacher discretion, as well as other consequences such as curriculum narrowing, loss of pedagogical innovation and deprofessionalisation. The juridifying of the curriculum has worked hand-in-hand with a prominent discourse that frames teachers' assessments as 'incorrect, unfair and as jeopardizing the credibility of the grading system' (Novak and Carlbaum 2017: 673). While the discourse of student rights is an important one to consider in the context of fairness and equity, such undesirable consequences should give pause for serious reflection at a governance level.

The onset of juridification impacts the fragile balance between discretionary power and state-level oversight at the frontline of public service. This positioning is fertile ground via which juridification can seep into the daily practices of professionals. The evidence indicates that juridication has extended itself into the classroom and its influence is apparent on professional judgement and the capacity of education professionals to exercise discretion in the execution of their tasks (Author 2018b). The creeping danger of exposure and the levels of confusion generated by overregulation provide an unhelpful context within which to make decisions and weight up the consequences of actions. Inevitably, the threat of legal action and the potential for accusations of malpractice see educators sometimes take the line of least resistance and exercise undue caution when dealing with students (Reed et al, 2008).

This caution was evident in previous work by the author, specifically in relation to the dangers of school trips. One of the teachers in the study indicates why some teachers prove reluctant to go on school trips. The teacher involved took the school pupils to an indoor football tournament. However,

> On my way back upstairs, I heard a scream and found a child who had cut her head on the railings. This worried me all night because if that parent took the risk assessment word for word I would be picking up my p45 in the morning. I didn't take the kids to any sports things after that. I stayed at school and did my marking instead (in Author 2018a)

This fear on the part of the teacher of liability exposure cannot be dismissed as irrational given the findings of Furedi and Bristow as detailed earlier in this paper (Furedi and Bristow 2012).

Some caution in relation to litigation and the law is logical and justified. It could even be argued that a certain level of risk avoidance comes under the remit of a duty of care. But present in the author's research was a heightened level of professional anxiety. The same teacher reiterates this point when stating that, regarding the use of equipment, 'I don't think the risk assessments would be water tight with a lawyer who is trained in a specific field … they would tear it apart.' Although the teacher in question could never be sure what a lawyer would or could do in this circumstance, the fact that the threat was there contributed to the professional's sense of uncertainty in dealing with pupils and their physical environments (Author 2018a).

What this example illustrates is that risk assessment as an aspect of discretionary power becomes increasingly important in the context of juridification. The evidence suggests that the capacity to assess risk is under real pressure in this context, as opposed to a scenario that facilitates the 'death of discretion' (Evans and Harris 2004). This is supported by Ottesen and Møller (2016)'s study on legal regulation and discretion. Using the enactment of the

Norwegian Education Act as its focus, their study details a high level of discretion by teachers when it comes to the interpretation of law: what comes more to the fore is more the ways in which they *use* their discretion. This discretionary power can be a risky endeavour when it comes to the pupils themselves, which leads to real uncertainty about how to exercise professional judgement. And for good reason, as the discretionary power of teachers, for example in relation to special needs education, can provide 'too many opportunities for action and hence weakens pupils' legal rights' (Karseth & Møller 2018: 13).

Juridification and trust avoidance

The impact of juridification on professional discretion highlights another significant limitation to its reach. As illustrated above, a key component of judgement is the capacity to assess the level of risk attached to certain actions (Tummers and Beckers 2014). This risk assessment is influenced by professional expertise, knowledge, experience and other external factors such as time and resources. But importantly for this discussion it is also affected by the level of *trust* professionals have in their students and their families not to sue them (and also in their institution to support them). A low level of trust in this regard inevitably results in a professional assessment of risk as high.

What juridification does in this context is to *magnify* the bond between trust and risk. Trust itself becomes increasingly risky in the face of criminal, financial and reputational damage. This is what Luhmann meant by the phrase 'the vicious circle of not risking trust', with the fog of law resulting in professional educators 'losing possibilities of rational action, losing confidence in the system, and so on being that much less prepared to risk trust at all' (Luhmann 2000: 106). Luhmann suggests that this form of risk avoidance is a 'new type of

anxiety' about the future. To risk trust is to open oneself up to unnecessary danger, for example in the shape of accusations of professional incompetence or even malpractice.

This is significant: while researchers have highlighted risk avoidance as a consequence of regulation and accountability (e.g. Papadopoulos 2010), *trust avoidance* should also be considered, thanks to juridification, as an equally troublesome offshoot of overregulation and liability exposure. The avoidance of trust is especially troublesome for teachers and academics as trust is central to the workings of education (Haynes 2018). Trust is important as a foundation for risk work in professional lives, and central to an educator's capacity to make judgements and exercise their discretion, all central to forms of effective institutional governance. Trust is a prerequisite for risk taking, and hence provides the foundation for discretionary power.

Trust avoidance is a reflection of the damage done to the 'readiness to trust' in professional life (Luhmann 2000: 92). Juridification has enabled this scenario with the development of a 'hermeneutic of suspicion' (Kennedy, (2014) that has seeped into professional matters. It contributes in this way because it impacts the context within which such hermeneutics play themselves out. The readiness to trust at the street level 'rests on the structures which confer trust' (Luhmann 2000: 92). When these structures start to become insecure, the 'burden of action' (Luhmann 2000: 92) at the street-level increases as teachers find themselves isolated and without the safety net of a secure system.

A worrying danger of trust avoidance is the further damage it can cause to professional practice, as juridification weaves its way into procedures, regulations, protocols and also forms of tacit knowledge and professional practice, along the way altering the DNA of front-

line services. More disturbingly it can force educators into 'impossible situations' (Zacka 2017: 200), such as dealing with unattainable, incompatible or irreconcilable objectives, situations that can help corrode the moral integrity of public services. Teachers can become indifferent or hostile to their students in the face of competing demands and what appear as attacks on their professional integrity.

Zacka talks of impossible situations as a kind of 'performative self-contradiction' (2017: 227), one that teachers find themselves in when attempting to reconcile their own sense of professional identity and worth in the face of contradictory demands. The impossibility arises when teachers struggle to retain their moral identity and integrity 'while continuing to systematically and consciously perform actions that are contrary to it' (Zacka 2017: 227-228). The following quote from a teacher summarises such an impossible situation:

You cannot expect me, as a teacher, to keep doing what I need to do to meet the accountability requirements. As a teacher, (according to how I understand this term and myself), it is impossible for me to do so. Of course, I, as an individual, could still perform the actions that you require of me. But I would effectively no longer be a teacher in my own eyes. What I cannot do is hold on to the identity and to the actions at the same time (quoted in Zacka 2017: 228).

What Zacka sees as pathological effects of impossible situations can also be seen, in the context of juridification, as social pathologies of legal freedom. What Honneth refers to as a 'juridicial model of society' (Honneth 2014), brings with it dysfunctional forms of interaction and communication, a corrosion of the intersubjective nature of life. People's easy access to legal solutions, a 'retreat into legal freedom' (2014: 87) results in individuals rejecting

obligations to others and 'stubbornly insisting on their legal claims'. This can then compel people to 'increasingly adjust the way we act in the case of social disputes and conflicts so as to improve our prospects in court' (Honneth 2014: 89). For Honneth, the 'juridification of communicative areas of life' (2014: 90) subtly compels people to view interactions through the prism of legality.

There are two sides to this symbiotic relationship between risk and trust: while professional discretionary power relies on the capacity to, as Power put it, 'trust trust' (1997: 137), it only forms one part of the equation. The level of trust *in* professionals and the assessment of the risks they pose, by the public as well as policy makers, is just as important in a discussion of juridification and its discontents. Faith in the capacity of public service professions to regulate themselves has dropped, a development long since evident in the UK education sector (Baxter 2016), with increasing levels of suspicion attached to teachers, academics and educational institutions. This declining trust is identified in the rise of home school agreements in the UK, a form of legal-contractual relationship that symbolises 'a decline in levels of trust within school communities' (Gibson 2013: 795). It is also evident in the level of regulatory scrutiny that now takes place of schools and professional practice (Novak and Carlbaum 2017).

Placing trust in education and public services more generally has become, in the eyes of the public, a high risk behaviour, one that is 'inevitably accompanied by a sense that professional life may exhibit features of dishonesty, corruption and professional arrogance' (Brown 2014: 20). The avoidance of trust by these two sides – the public and the education profession - can reinforce each other, leading to what Brown and Calnan call 'chains of distrust' (Brown and Calnan 2016). This chain of distrust means that the benefits of trust, in particular the

‘bracketing off of doubts’ (Brown and Calnan 2016: 288), which facilitates a positive collaborative ethos, become increasingly unavailable to either party in the relationship.

Conclusion

This article set out to examine the limits of law in education, in particular as manifested in rising juridification and its impact on institutional and professional practice. These limits were explored in the context of its relation to existing regulatory systems, especially accountability; its impact on the capacity of educators to exercise professional discretion; and its consequences for risk management and trust relations in everyday practice. The first conclusion to be drawn from this paper is that there are significant dangers attached to using law in education settings as an arbiter of first resort. These dangers come primarily in two forms: as pathological offshoots of juridification and extended forms of accountability; and as threats to effective institutional governance. Juridification, while to some extent a product of growing concern with the rights of children and young adults, compounds the existing erosion of professional judgement and its contribution to educational institutions.

Education is now more open to the legal system for members of the public who wish to use this system to correct what they consider an injustice. Recourse to the law as a mechanism of accountability has become a popular and effective way of taking education to account. Reflecting on the issues outlined in this paper, however, it is evident that there is much more at stake here than purely technical questions reading legal competence, role duplication and regulatory confusion. The delivery of education services is a matter of *social justice*. The capacity to deliver a just order lies at the heart of public sector reform agendas and the education system occupies a specific position in this respect. Education has not lost its

position as the instrument of social mobility across social class divides and hence acts as a lightning rod for concerns over social justice.

Whether legal accountability, in the shape of an increasingly juridified education sector, can deliver this social justice is the key bone of contention. Zacher, writing in 1987, to some extent pre-empted the current condition. when he stated that there is a 'pent-up demand' for what he refers to as 'correct' juridification – i.e., a 'correct ordering of the conditions of care' (1987: 409). This pent-up demand has made its presence felt today, most strongly in the case of legal accountability as a path to individual justice. But a question mark hangs over this form of calling education to account, the question being: does juridification help build 'publicness into public services', a value orientation which Stirton and Lodge (2001) consider something of a litmus test for forms of accountability? Does it help build legitimacy, transparency and responsiveness? The evidence provided in this paper indicates otherwise and instead suggests that the relational bonds that make teaching effective, as well as the discretionary power of teachers that underpin these bonds, are in danger of being damaged. This is a scenario more in line with Zacka's (2017) conclusion that school reform has produced a corrosion of moral integrity in the teaching profession, than it is to any sense that juridification strengthens the democratic fabric of education services.

A second important conclusion relates to the study of educational governance (Wilkins and Olmedo 2018). This field, while delivering a much needed engagement with changing forms of educational administration, would be wise to think more carefully about the relationship between law and education, and to avoid treating law as a separate field of activity. Instead, governance studies should seek to understand how law weaves its way into systems of governance as well as aspects of professional and institutional practice. Governance,

especially in the shape of accountability, finds itself increasingly entangled in legal forms of regulation. These points of intersection illustrate how closely aligned law and accountability are in practice, representing 'alternative, potentially complementary even synergistic forms of social control' (Schuck 2000: 423). This knowledge itself provides a welcome alternative to studies of power which isolate one form of social control to the exclusion of others – a form of what Komesar terms 'single institutionalism' (Komesar 1994: 50) that produces a serious distortion of policy analysis (Schuck 2000: 423). Ignoring the presence of law and its effects on education policies is an unwanted exemplar of this kind of single institutionalism approach.

It is important to widen out the field of education governance studies because a multiple institutionalism approach offers a richer frame of analysis for viewing contemporary aspects of power and policy in educational practice. In this regard, one potentially rich vein of research would be to explore the manner in which shifting forms of education governance impacted the current trend of juridification. When reading education policy texts, what strikes is the way in which the rise of forms of new public management in the 1990s and 2000s cast light on the conditions that paved the way for a juridified world. The literature on the transformation of education provides a compelling evidence base for, in different ways and to varying degrees depending on context, a repositioning of educational authority, a transformation of institutional culture and a destabilising of the teaching and academic professions. This overhaul of educational governance and practices has opened the door for a process of de-legitimation of the education profession, while other forces demand education to justify itself in the face of heightened concerns over justice, employability, equity and social mobility.

Into this uniquely charged environment steps law as a powerful and fearsome arbiter, one that takes advantage of a professional context which confers ever greater responsibility while simultaneously weakening professional power. Based on the argument made in this paper, the juridification of education is deserving of much greater scrutiny, of a form of critical accountability that sheds much needed light on a significant impact factor in modern education governance.

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Notes

[i] Juridification has been a focus of study in sectors as diverse as business ethics (Buhmann 2016), technical standards (Colombo and Eliantonio 2017) and occupational safety (Estrada et al, 2014).

[ii] For a fuller account of definitions, see Blichner and Molander 2008).

[iii] This is not to say that this is a wholly recent phenomenon, as evidence exists of its presence as far back as the 19th century (Debaenst 2013).

[iv] This role confusion can be witnessed in other juridified sectors such as the UK National Health Service, particularly after the introduction of the 2012 Health and Social Care Act. This Act brought in competition laws into the sector, effectively replacing already existing mechanisms for managerial accountability with legal accountability and market orientation within a public service organisation. According to Davies, this produced a set of enforcement issues and regulatory uncertainty which made it difficult to ascertain how much of these marketised laws pertain to issues of care, issues that are central to the remit of the NHS (Davies 2013: 584).