Why Incorporate the ECHR? The Domestic Incentives of Human Rights Commitment

Johan Karlsson Schaffer
University of Gothenburg, Sweden

Why do consolidated democracies incorporate international human rights law (IHRL) treaties into national law? Existing research suggests contrastive accounts of the participation of democracies in IHRL regimes. While overall more likely to ratify, consolidated democracies are sometimes reluctant to accept demanding human rights commitments and less likely than both newly democratic and authoritarian regimes to incorporate international law in their constitutions. To theorize why established democracies commit to IHRL, this paper provides a comparative process tracing of the decisions to incorporate the European Convention on Human Rights (ECHR) into national law in Denmark and Sweden in the early 1990s. Why did these solid democracies with an exceptional commitment to human rights wait over 40 years to give domestic effect to a treaty they had helped create? Assessing rival theories of state commitment to human rights norms, the findings suggest that contextual developments in European law provided an opportunity for domestic political elites to seek insurance by incorporating the ECHR to place constraints on executive power. The argument qualifies claims about material strategizing or socialization to European norms as the primary drivers of incorporation.

¿Por qué las democracias consolidadas incorporan los tratados internacionales en materia de derechos humanos dentro de la legislación nacional? Las investigaciones existentes sugieren explicaciones contrapuestas de la participación de las democracias en los regímenes internacionales de los derechos humanos. Si bien, en general, es más probable que las democracias consolidadas los ratifiquen, existen ocasiones en las que son más reacias a aceptar compromisos exigentes en materia de derechos humanos y, en consecuencia, tienen menos probabilidades de incorporar el derecho internacional en sus constituciones que los regímenes autoritarios y de nueva democracia. Con el fin de teorizar por qué las democracias establecidas se comprometen con los tratados internacionales de derechos humanos, este artículo ofrece un proceso comparativo de seguimiento de las decisiones de incorporar el Convenio Europeo de Derechos Humanos (CEDH) a la legislación nacional en Dinamarca y Suecia a principios de la década de 1990. ¿Por qué estas democracias sólidas, las cuales tienen un compromiso excepcional con los derechos humanos, esperaron más de 40 años para dar efecto interno a un tratado que habían ayudado a crear?Al analizar las teorías rivales sobre el compromiso del Estado con las normas de derechos humanos, concluimos que los desarrollos contextuales en la legislación europea brindaron una oportunidad para que las élites políticas nacionales buscaran un seguro mediante la incorporación del CEDH para poder imponer restricciones al poder ejecutivo. Este razonamiento nos sirve para calificar las afirmaciones sobre la estrategia material o sobre la socialización hacia las normas europeas como los principales impulsores de esta incorporación.

Pourquoi les démocraties consolidées incorporent-elles des traités de droit international relatif aux droits humains (DIDH) dans leur droit national? D'après les travaux de recherche existants, la participation des démocraties aux régimes de DIDH serait contrastée. Bien que leur probabilité de ratification soit généralement supérieure, les démocraties consolidées sont parfois peu enclines à accepter des engagements exigeants en matière de droits humains. Par ailleurs, elles incorporeront moins souvent le droit international dans leur constitution que les nouveaux régimes démocratiques ou les régimes autoritaires. Pour théoriser les raisons qui poussent les démocraties établies à s'engager à respecter le DIDH, cet article propose un suivi comparatif des processus des décisions d'incorporation de la Convention européenne des droits de l'homme (CEDH) dans le droit national au Danemark et en Suède au début des années 1990. Pourquoi ces solides démocraties, à l'engagement exceptionnel en faveur des droits humains, ont-elles attendu plus de 40 ans avant de faire entrer en vigueur au niveau domestique un traité qu'elles ont pourtant aidé à rédiger? Basées sur l'évaluation de théories rivales sur l'engagement étatique en faveur des normes de droits humains, les conclusions suggèrent que l'évolution du contexte législatif européen a fourni une occasion aux élites politiques nationales de chercher assurance en incorporant la CEDH pour appliquer des contraintes sur le pouvoir exécutif. Cet argument nuance les affirmations selon lesquelles la stratégie matérielle et la socialisation aux normes européennes seraient les principaux facteurs d'incorporation.

Introduction

Why do consolidated rule-of-law democracies incorporate international human rights law (IHRL) instruments into national law? Existing research shows long-term democratic states are more likely to ratify core human rights treaties and to comply with the judgments of international human rights tribunals (Hafner-Burton 2012; Milewicz, Bächtiger, and Nothdurft 2010; Simmons 2009; Goodman and Jinks 2013). Such patterns seem to match theoretical expectations that democracies commit to IHRL treaties because they reflect the same principles of equality and rule of law in

Johan Karlsson Schaffer is professor of International Relations at the School of Global Studies, University of Gothenburg, Sweden. His research focuses on the politics and philosophy of international human rights.

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terms of which they legitimate the authority of their regime (Hathaway 2003). Additionally, commitment comes at a low cost because democracies already abide by human rights norms.

On the other hand, while transitional democracies are eager to ratify, consolidated democracies are sometimes as reluctant to accept demanding human rights commitments as are authoritarian states (Hafner-Burton 2012). Stable democracies are also less likely than both newly democratic and authoritarian regimes to incorporate international law in their constitutions (Ginsburg, Chernykh, and Elkins 2008). This may reflect theoretical arguments that whereas democratizing regimes can use the costs they incur from participating in IHRL institutions to entrench liberal policies and signal their reformist resolve to international and domestic audiences, mature democracies can reap fewer benefits from their participation (Moravcsik 2000; Hafner-Burton, Mansfield, and Pevehouse 2015). Thus, existing literature gives inconclusive accounts of why democratic, rule-of-law states accept the authority of international human rights law (cf. Šipulová, Janovský, and Smekal 2018).

To help theorize why established democracies commit to IHRL, this paper seeks to explain the decisions to incorporate the European Convention on Human Rights (ECHR) into national law in Denmark and Sweden in the early 1990s. Adopted by the Council of Europe (COE) in 1950, the ECHR is the world's most effective international human rights treaty. The Scandinavian states participated in establishing the ECHR, yet—along with Ireland and the UK—waited longer to incorporate it—i.e., to give the treaty domestic effect in the national legal system—than any other member of the COE. Why did these consolidated democracies, often described as exceptionally committed to human rights, wait more than 40 years to incorporate a human rights treaty they had helped create? Their decisions to do so seem even more puzzling given that the European Court of Human Rights (ECtHR), empowered by its doctrine of dynamic interpretation, had just raised the stakes by increasingly ruling against these supposedly exemplary state parties. The article finds that these developments in European supranational law, attended by Scandinavian legal interpretive communities, provided an opportunity for key political parties, uncertain about their future likelihood to govern, to place constraints on the executive by incorporating the ECHR.

The article makes three contributions. First, through a comparative process tracing, the article helps to develop an explanation of state incorporation of IHRL treaties, theorizing treaty commitment beyond ratification. Second, the article pinpoints previously undertheorized factors influencing the participation of consolidated democracies in IHRL institutions, suggesting that international relations (IR) scholarship should pay more attention to how domestic power dynamics shape state commitment to IHRL treaties. Third, providing a novel account of a milestone in the politics of human rights in Scandinavia (cf. e.g., Wiklund 2008; Christoffersen and Madsen 2011; Schaffer 2020),[1] the article also contributes new knowledge about the transformation of European legal orders in recent decades.

The article proceeds in six steps: First, I present the puzzle of Scandinavian ECHR incorporation. Second, I introduce a set of theoretical expectations derived from established accounts of state commitment to IHRL. Third, I present the explanatory approach to process tracing and delineate shifts in contextual layers of European law, before turning to analyzing the incorporation policy processes in Denmark and Sweden, respectively. Fourth, I compare the two cases to rival theoretical accounts and discuss how the argument generalizes, before I conclude.

[1]Expanding on my own previous work on Sweden's participation in the IHRL regime (Schaffer 2020), this article deepens the empirical analysis and develops novel explanations of incorporation.

Pioneers and Laggards: Scandinavian Commitment to the ECHR

More than 40 years after Denmark and Sweden ratified the ECHR, they incorporated it into national law in the 1990s. These decisions to give an international human rights treaty domestic effect—i.e., granting citizens the right to invoke it as a source of fundamental rights law before national courts and authorities—are, arguably, unparalleled: "No other region in the world … has undergone such a transformative constitutional change in such a short period," a change all the more astonishing given that it "was not accompanied by any change of regime type or major economic transformation" (Hirschl 2011). Moreover, only Ireland and the United Kingdom would outlast the Scandinavian states in resisting incorporation of the ECHR (Figure 1).

The Scandinavian states' decisions to incorporate the ECHR are puzzling. On the one hand, the Scandinavian states are often claimed to be exceptionally committed to international human rights norms (e.g., Brysk 2009). Sweden and Denmark were both founding members of the CoE in 1949, participated in the drafting of the ECHR in 1950, and ratified the Convention in 1952 and 1953, respectively (Malmborg 1994; Brathagen 2014; Schaffer 2020). From the 1960s, Scandinavian states promoted human rights in their foreign policies, for instance in a ground-breaking ECHR interstate complaint against Greece on allegations of torture in 1967; they also helped draft several new IHRL instruments and were often among the first to ratify (Schaffer 2020; Vik and Østberg 2021). In the 1980s, they began appointing ambassadors for human rights, sponsoring UN conferences on human rights, lifting human rights issues in multilateral forums, and emphasizing human rights in their development aid policies (Christoffersen and Madsen 2011). In short, their policies suggest a deep commitment to human rights norms. Yet why did they then wait so long to give the ECHR domestic effect?

On the other hand, the Scandinavian states have also been circumspect about allowing international human rights institutions to restrict their sovereignty. For instance, in the 1950 negotiations drafting the ECHR, the Scandinavian states sought to minimize the Convention's constraints on sovereign discretion by insisting on detailed rights (rather than a vaguer list to be defined through the jurisprudence of national courts and an international tribunal) and ensuring states controlled the implementation machinery (Sundberg 1986; Bates 2010; Brathagen 2014; Schaffer 2020). Furthermore, Sweden (like Norway, unlike Denmark) dragged its feet about accepting the jurisdiction of the ECtHR until 1966. Such reluctance about supranational judicial review may have reflected values and beliefs ingrained in Nordic legal-political culture, such as constitutional traditions of parliamentary supremacy and judicial deference, as well as the predominance of Scandinavian Legal Realism, a pragmatic jurisprudential philosophy dismissing natural rights as nonsense (Føllesdal and Wind 2009; Wind 2010; Husa 2011). From this perspective, it seems equally curious that Scandinavian governments would grant the world's most powerful IHRL treaty domestic effect.

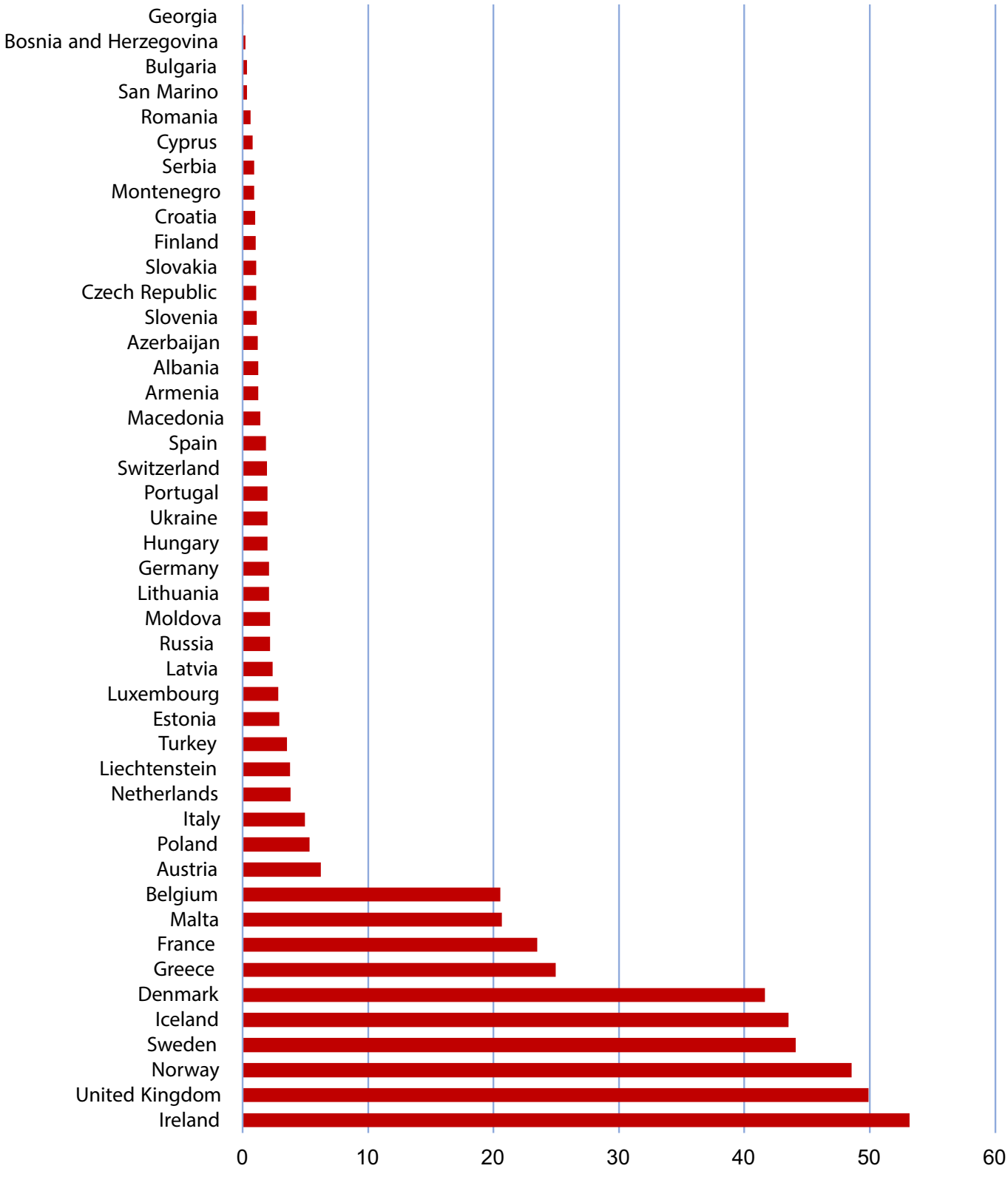

Figure 1. ECHR signature–incorporation lag (years). The chart includes state parties to the European Convention on Human Rights (except Andorra and Monaco). (Data on incorporation primarily sourced from Blackburn and Polakiewicz 2001; Danilenko 1999; Keller and Sweet 2008; Rodin and Perišin 2015).

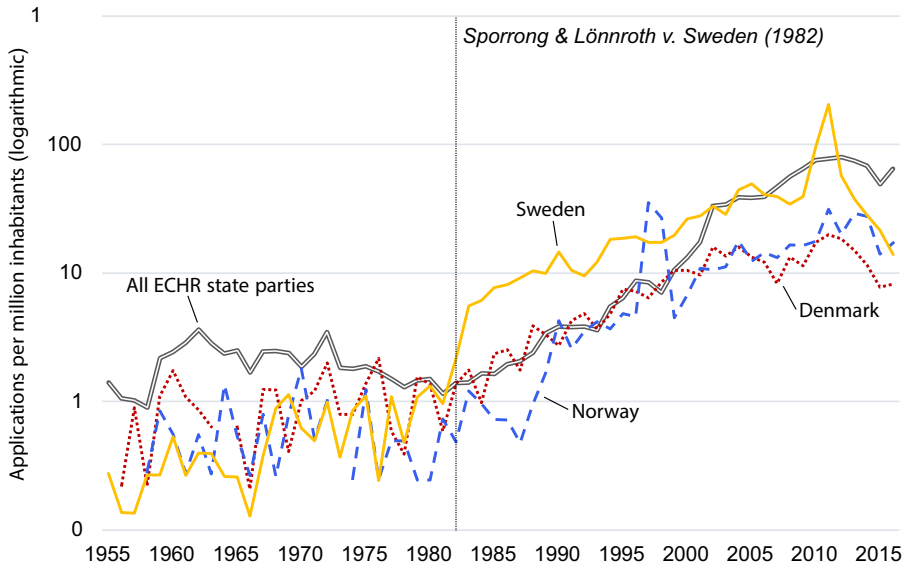

Figure 2. Individual applications under the ECHR from the Scandinavian states, 1955–2016. Data sources: ECHR Yearbooks, ECtHR Annual Reports. Population data: World Bank, OECD.

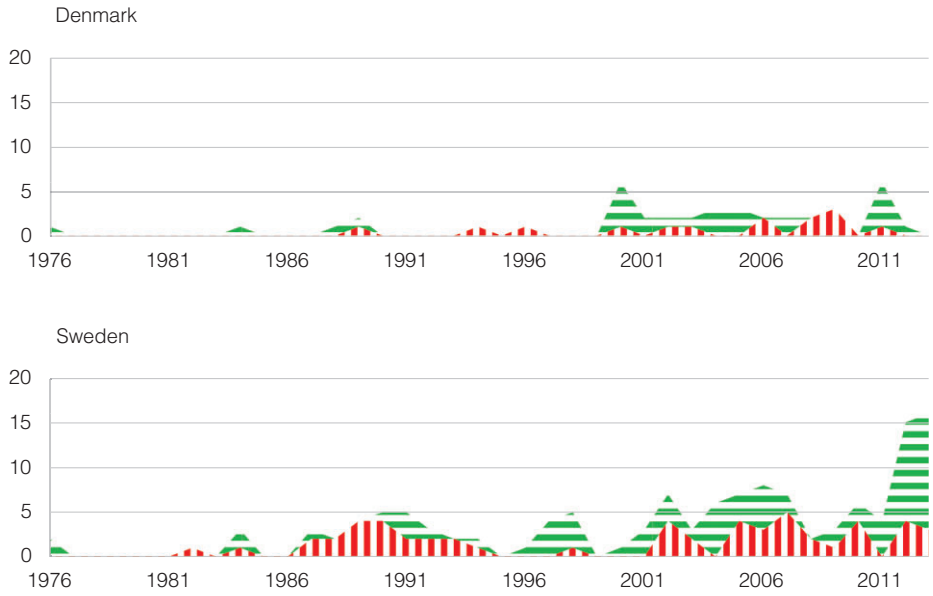

Figure 3. Judgments by the European Court of Human Rights on Denmark and Sweden and judgments finding at least one violation, 1976–2013. Data source: HUDOC.

Moreover, because of their established skepticism, the timing of the Scandinavian states' decisions to incorporate the ECHR seems odd given the expanding authority of the Convention in the 1980s. By the mid-1970s, most state parties had accepted the jurisdiction of the ECtHR, which, revitalized by a more progressive bench, developed its doctrine of dynamic interpretation, i.e., regarding the Convention as a living instrument to be interpreted in light of present-day conditions (Madsen 2007; Bates 2010). With *Sporrong & Lönnroth v. Sweden* (European Court of Human Rights 1982), the ECtHR delivered its first-ever judgment finding against a Scandinavian state. Individual applications increased rapidly (Figure 2) and soon judgments followed finding against Denmark too (Figure 3).

Furthermore, beginning in the 1980s, reforms expanded the ECHR system's authority. Institutional alterations to reduce the Strasbourg organs' workload allowed individuals to petition the Court directly and abolished the Commission and the judicial function of the Committee of Ministers (Bates 2010, chaps. 10–11)—i.e., removing the political control of the implementation machinery upon which Scandinavian states had originally insisted. Thus, Strasbourg raised the costs of participating in the ECHR system and indicated it would continue to develop its authority in the future—and yet the Scandinavian states responded by increasing their commitment.

Hence, given what we know about the politics of human rights in Scandinavia, the decisions to incorporate

the ECHR in the 1990s seem peculiar, for multiple reasons. Given the Scandinavian states' track record of international human rights commitment, the question is why they took longer to incorporate than most founding members of the ECHR. Alternatively, considering their longstanding reluctance to accept constraints on sovereign jurisdiction, the puzzle is rather why they incorporated at all, and especially at a time when the ECHR system was upping the ante of commitment. Presumably, this seeming ambivalence of Scandinavian governments towards human rights norms had some role to play in shaping their decisions to incorporate the Convention but is an insufficient explanation. Thus, we must consult theory.

Theory: Sovereignty Costs, Socialization, and Power Preservation

Why would sovereign governments choose to incorporate international human rights law instruments into national legislation? IR scholarship on state participation in international human rights institutions suggests three key theoretical arguments—sovereignty costs, socialization, and domestic political incentives—that I shall draw on to specify empirical expectations about what led Denmark and Sweden to incorporate the ECHR.

States regulate the relationship between international and national law in different ways: On the monist approach, public international law and municipal law constitute a single legal system, so that a ratified international law treaty is directly enforceable before domestic courts; on the dualist approach, by contrast, the treaty must be formally translated into municipal law by a legislative act (incorporation or transformation). Legal scholarship tends to dismiss these categories as failing to capture how international and national law interact: there are multiple forms of both monism and dualism, and no state is strictly monist or dualist (Chiam 2021). However, when legislators and courts regulate and interpret the domestic applicability of international law regulations, monism and dualism still often hold sway as doctrines.

Whether a state mainly adheres to monism or dualism, granting an IHRL treaty domestic effect has consequences. Certainly, formal incorporation does not exhaustively determine a treaty's impact—for instance, because prevailing jurisprudential doctrines may hold that a treaty is applicable without incorporation or vice versa (Keller and Sweet 2008, 683). Yet, by deciding to incorporate a treaty, the legislator expressly sanctions invoking its provisions in the domestic legal system. *Ex ante,* the legislative process forces the legislator to determine principled and practical questions about how courts and authorities are to interpret and apply international norms in relation to other laws (cf. Simmons 2009, 125–29, 14). *Ex post*, granting an IHRL treaty domestic effect also mandates national courts and authorities to apply it and invites citizens to claim it, in ways that may be hard for a government to predict, let alone control—especially when the case law of an international court, like the ECtHR, interprets the treaty's provisions dynamically. Therefore, the decision to incorporate an IHRL treaty may reveal whether and how a government is prepared to bind the state to the norms the treaty defines and to accept the anticipated consequences.

First, rationalist approaches expect states to strategically calculate the advantages and disadvantages of adopting international norms. By participating in IHRL instruments, states incur *sovereignty costs*, i.e., costly constraints on their sovereign discretion, that governments weigh against any benefits they can extract from their participation (Moravcsik 2000; Hafner-Burton, Mansfield, and Pevehouse 2015). The costs depend on both the design of the treaty (treaties with "hard law" features and stronger enforcement and monitoring are more costly than "soft law" treaties) and how much the state's preferences or practices deviate from the treaty's provisions (Hathaway 2003). The benefits of participating in IHRL treaties are rather indirect: Unlike treaties on e.g., trade or environmental protection, states cannot obtain joint benefits from contracting with others on human rights (Moravcsik 2000; Simmons 2009). However, a government in a weakly democratic system may bind itself to IHRL to "lock in" liberal policies against future backsliding, to signal its reformist resolution, or to obtain material benefits from leading liberal states (Moravcsik 2000; Pevehouse 2002).

Stable democracies, by contrast, stand little to gain, according to this view: "As sovereignty costs increase, consolidated democracies are even more unlikely to join these institutions" (Hafner-Burton, Mansfield, and Pevehouse 2015), but they may nonetheless do so if pressured by domestic groups or because it serves their long-term foreign policy goals of promoting democratization abroad. Moreover, governments may be deterred if they expect post-commitment compliance costs—for instance, that the treaty would empower the judiciary to exercise undesirable discretion, which governments in parliamentary systems likely seek to avoid (Hathaway 2007; Simmons 2009).[2]

By this logic, we would expect policymakers to decide to incorporate because the sovereignty costs—i.e., giving domestic effect to an extensive rights catalog with dynamic supranational judicial review—were being outweighed by even greater potential foreign policy benefits. Consequently, we may expect key policy actors to frame incorporation as a constraint on sovereignty mainly acceptable because it advances foreign policy goals, such as binding democratizing states to liberal norms. Additionally, we may expect cost-sensitive policymakers to take precautions to control post-incorporation disadvantages, for instance by limiting judicial application of the ECHR. Alternatively, the rationalist approach may expect the Scandinavian states to have incorporated, despite rising net sovereignty costs, because domestic groups with a stake in ECHR compliance pressured the government (Hathaway 2007, 596). Accordingly, we should look for evidence that the government incorporated against its own preferences, bowing to pressure from interest groups.

Second, constructivist accounts focus on how international pressures socialize states to conform to international human rights norms (Risse, Ropp, and Sikkink 2013). *Persuasion* entails that a state comes to internalize an international norm through a process that may involve exhortation by leading liberal states, naming and shaming by transnational advocacy groups, and mobilization by domestic civil society actors, often in combination. By contrast, *acculturation* entails that a target state adopts an international

[2]Some scholars emphasize how domestic ratification hurdles, e.g., legislative veto players or independent law-making courts, may prevent a state from committing to a treaty whose objectives it shares (Raustiala 1997; Moravcsik 2005; Simmons 2009; Kelley and Pevehouse 2015). As unitary states with deferential judiciaries and parliamentary systems, where the legislature can approve incorporation of international law treaty by majority vote, the Scandinavian states lack any apparent institutional hurdles that could explain the delayed incorporation of the ECHR. However, prevalent norms of seeking consensus on important international and constitutional commitments may allow major parties to block such reforms. To explain how such potential institutional hurdles were overcome, we need to look at the strategic incentives facing political parties.

norm because it identifies with a reference group of states and cares about its status in the international community (Goodman and Jinks 2013). Unlike persuasion, acculturation does not presuppose that the target state completely internalizes the norm; it only adopts the norm to avoid the discomforts of nonconformity with group norms, often regardless of functional needs within the state (so-called decoupling).

Both persuasion and acculturation suggest that incorporation is a response to external normative pressures. Persuasion draws our expectations toward external actors—leading liberal states, international institutions, transnational advocacy groups, possibly allied with partners in domestic civil society—inducing, through critique, Scandinavian states to eventually change their minds about giving the ECHR domestic effect. Following such internalization, we would expect policymakers eventually to implement the norm willingly. Acculturation rather directs our attention to Denmark and Sweden taking cues from regional peers, recognizing that to maintain their status as "good citizens" of Europe and globally leading promoters of human rights, they needed to conform to an emerging regional norm of granting the ECHR domestic effect—even against the preferences and needs of national legal elites or without providing adequate enforcement mechanisms (Goodman and Jinks 2013).

Third, while strategic calculation, persuasion, and acculturation accounts focus on how external material, normative or social pressures influence a state to adopt an IHRL norm, domestic politics models instead focus on how interactions among policy actors within the state shape a government's preferences on human rights policy. Since a state's implementation of IHRL may both constrain and enable political elites in their pursuit of ideological and strategic objectives, we can expect incorporation decisions to reflect strategic interactions among the major competitors in the domestic political party constellation (cf. Schimmelfennig 2005). Thus, political competition suggests distinct and partly competing explanations of IHRL incorporation.

Focusing on ideological rivalry, a prominent argument holds that government policies on IHRL implementation reflect a left–right or liberal–authoritarian cleavage, with progressive, liberal, or pro-Western political elites supporting human rights and conservative, authoritarian, or nationalist elites resisting (Moravcsik 2005, 157; Schimmelfennig 2005; Simmons 2009, 81). Thus, we may expect that decisions to incorporate the ECHR would be made by left-wing, progressive, pro-European parties in power. Alternatively, we may expect the opposite if parties form their positions on a specific IHRL treaty based on its substantive provisions (cf. Šipulová, Janovský, and Smekal 2018): The conservative and Christian Democrat founders of the ECHR envisioned it as a supranational safeguard for property rights and judicial independence against social democratic parliamentary majorities after World War II (Duranti 2017). Accordingly, incorporation of the ECHR would rather appeal to the center-right. In either case, incorporation would map onto ideological cleavages.

Ideology aside, political elites are also strategically interested in gaining and retaining power. In comparative research on why polities adopt constitutional review by independent courts, a family of theories suggests that self-interested political elites can opt to defer to an empowered judiciary because they are uncertain about their ability to hold on to power in the future (Volcansek 2010). Focusing on electoral competition, the insurance hypothesis assumes that political parties expecting to lose elections repeatedly might prefer constitutional review as a constraint on the executive, unlike parties anticipating to prevail in the electoral market (Ginsburg 2003; Ginsburg and Versteeg 2014). Similarly, the hegemonic preservation hypothesis assumes that if hegemonic political, economic, and legal elites anticipate losing power, they might seek such constraints to enshrine their dominance beyond the reach of majoritarian lawmaking (Hirschl 2004).

Since granting an IHRL treaty direct effect can similarly empower the judiciary to play an independent, countermajoritarian role, the power preservation model expects the incorporation of the ECHR to result from strategic struggles among competing elites in the domestic political arena. Specifically, we would expect parties to pursue or resist incorporation based on how they assess their chances of holding on to power, given historical experiences, electoral conjunctures, and party constellations: An incumbent foreseeing losing power would be more inclined to seek insurance through incorporation than one anticipating staying in power. Moreover, a dominant party in decline, which cannot count on future electoral success, might prefer incorporation as protection against future policy reversals (cf. Volcansek 2010, 283), whereas a party confident about its future parliamentary dominance would oppose such constraints on executive discretion. Thus, the desire of political elites to use IHRL treaties with supranational judicial review to "lock in" their preferred policies, "insulating them from the actions of future governments" (Moravcsik 2000, 228) is not confined to reformist governments in transitional democracies seeking protection against authoritarian backsliding; rather, in any polity, elites are likely to seek such assurance if they fear losing long-term influence.

Incorporating the ECHR in Scandinavia

In this section, I will analyze the policy processes that led to the incorporation of the ECHR in Denmark and Sweden. My approach to process tracing is explanatory (Hedström and Ylikoski 2010; Saylor 2020) and distinct from inferential approaches to process tracing elaborated in recent political science comparative and case study methodologies. The inferential approach regards process tracing as a tool to deduce knowledge about causal effects by examining empirical regularities and conceptualizes causal mechanisms as intervening variables or causal pathways (e.g., George and Bennett 2005; Gerring 2007). By contrast, explanatory process tracing serves to formulate an explanation of particular outcomes—to demonstrate how a purported cause changed something and produced its alleged effect (Saylor 2020, 15). Ontologically distinct from variables, causal mechanisms are entities with a durable causal structure that are portable and may operate in different contexts (Falleti and Lynch 2009; Bengtsson and Hertting 2014; Saylor 2020). What causes an outcome to occur is not the mechanism alone, but its interaction with a specific constellation of alterable, multi-layered contextual social conditions (Falleti and Lynch 2009; Saylor 2020). Hence, my analysis seeks to identify how contextual factors at the European level as well as in domestic politics allowed a power preservation mechanism to cause incorporation.

An explanatory approach to process tracing also informs my research design and case selection. Whereas inferential approaches advise researchers to approximate a quasi-experimental design by selecting cases from a population to control for confounding variables, the explanatory approach instead suggests to select cases for study if they seem

relatable to an ideal type (Saylor 2020). Reconstructing a case in terms of the ideal-typical causal mechanisms and the contextual layers in which it operates can help identifying the causes that are present and jointly responsible for an outcome (Saylor 2020), and it also provides an analytical bridge by which to generalize through between-case comparison (Bengtsson and Hertting 2014; Bengtsson and Ruonavaara 2017). Thus, I justify selecting the Scandinavian cases based on their contextual features that make them relevant to an ideal type of robust rule-of-law democracies. Temporally, my analysis focuses on critical junctures, i.e., transitional periods in which policy actors were struggling over different alternatives (Bengtsson and Ruonavaara 2017), which arose through differently paced changes in several contextual layers (Falleti and Lynch 2009)—chiefly, the expanding authority of the ECtHR, geopolitical shifts in Europe, and conjunctural shifts in domestic government–opposition dynamics.

Finally, the explanatory approach informs my evidentiary strategy. Rather than treating process tracing as a search for diagnostic pieces of evidence with which to test empirical regularities through inferences, my analysis aims to formulate an explanation of the decisions to incorporate the ECHR. A good explanation should accurately describe the factors that were present and jointly responsible for causally generating the outcome, and consider rival explanations—i.e., explain why one thing happened rather than another (Crasnow 2017; Saylor 2020). Considering alternative accounts, I seek an explanation that is *coherent* in the sense of being both *complete*, i.e., showing how a purported mechanism and the context combined to produce the outcome, and *consistent*, i.e., its expectations should not contradict the events as they happened (Crasnow 2017). Since mutual exclusivity is rarely the case (Zaks 2017), I treat the theory-derived expectations about incorporation as rivals, but forming a coherent explanation may require combining rather than eliminating some of them. The empirical material consists of public policy documents, press coverage, contemporaneous debates among legal professionals, and secondary sources. I use this material to document how key policy actors—the incumbent, its main challenger, and legal elites—acted at key events constituting the process resulting in incorporation. I have assembled my sources in a transparency appendix (TRAX).

This section continues by analyzing the changing context in the mid-1980s and early 1990s within which the incorporation decisions took place, before analyzing the processes in each case. The next section will employ the rival theoretical hypotheses to explain the cases.

The Growing Authority of the ECtHR and Scandinavian Rapprochement With the European Community

To trace the process of incorporating the ECHR into Danish and Swedish law, let us begin by analyzing how developments at the European level by the mid-1980s increasingly abraded against prevailing legal doctrines in Scandinavia. The evolving dynamic jurisprudence of the ECtHR and efforts to step up EC integration form an essential yet incomplete part of the causal explanation: They altered the context in which Scandinavian legal interpretive communities and policymakers had to regulate the domestic status of the ECHR. On their own, however, these contextual factors do not explain how, why, or when incorporation happened.

In the 1950s, Denmark and Sweden had ratified the ECHR using a method of passive transformation to implement the Convention. On the dominant view, the ECHR detailed rights already protected by state parties, and consequently, its drafters never considered its domestic application (Bates 2010, 114). Thus, by declaring normative harmony between the Convention and domestic law, governments could implement the Convention at minimal effort, though some critics questioned whether e.g., administrative detention practices met Convention demands (TRAX:1). In the early 1970s, both states reinforced the doctrine of dualism (TRAX:2;15;16), which allowed the governments to ratify new IHRL treaties while declaring normative harmony between national law and international treaty obligations. Thus, dualism kept questions of compliance off the agenda.

Yet the ECtHR's dynamic jurisprudence increasingly interpreted the Convention in ways Scandinavian governments had not anticipated in the 1950s. For instance, by developing a doctrine of *Drittwirkung*, i.e., that the Convention could have horizontal effect among private parties, the ECtHR placed obligations not only on states but also on individual citizens—an idea alien to many participants in the Nordic legal interpretive community (Nørregaard 2004). Similarly, in *Sporrong & Lönnroth v. Sweden* (1982) and other judgments, the Court had established a broad interpretation of the "civil rights" mentioned in Article 6 (the right to a fair trial), covering not only private litigation between individuals—as most states had presumed when ratifying—but also disputes between individuals and the state (Ehrenkrona 1995). Such doctrinal developments undermined confidence in the presumption of normative harmony.

Moreover, domestic courts and authorities increasingly had to make sense of what the presumption of harmony entailed in practice. General jurisprudential principles obliged courts to interpret legal rules, as far as possible, in accordance with international law and to presume the legislator as having no intention to contravene the state's international obligations. ECtHR judgments finding against Sweden and Denmark indicated that the harmony between national law and the ECHR could no longer be taken for granted.

For legal elites in Scandinavia, these developments at the European level increasingly highlighted the need to clarify the status of the ECHR in domestic law. Throughout the 1980s, national and pan-Nordic associations of legal professionals arranged numerous conferences and meetings where judges, lawyers, law professors, and government officials debated the evolving Strasbourg jurisprudence and the domestic status of the ECHR. Moderating their strict dualism, the Supreme Courts in Denmark and Sweden delivered a series of judgments in, respectively, 1989 and 1988–1991 establishing that the courts and authorities should base their interpretation of national law on the ECHR and its case law (TRAX:9;23). Thus, concerted action by legal professionals linked with transnational epistemic communities contributed to placing ECHR implementation on the policymaking agenda.

Furthermore, the status of the ECHR in domestic law was complicated by the revitalized integration within the European Community (EC) (see Schaffer 2020). Through the 1986 Single European Act (SEA), EC member states had agreed to deepen their political cooperation and establish the single market by 1992. In Denmark—an EC member since 1973—a makeshift parliamentary majority (including the Social Democrats) opposed the SEA, but an advisory referendum approved it with a clear majority. For EC outsider Sweden, the SEA entailed the risk of new trade barriers in its most important export market, so Sweden moved to bring the European Free Trade Area into closer collaboration with

the EC by establishing the European Economic Area (EEA) (Gstöhl 1996; Ingebritsen 1998). In 1991, Sweden also applied for accession to the EC, yet already accepted to adopt the EC *acquis* under the EEA Agreement.

EC integration had tremendous political, economic, and legal consequences for both Denmark and Sweden, but EC law also opened a backdoor for the ECHR. By the mid-1970s, the European Court of Justice had established that EC law was based on general principles of law, including respect for fundamental rights enshrined in member state constitutions and the ECHR (De Búrca 2021). The SEA preamble declared state parties were "determined to work together to promote democracy" on that fundamental rights basis, and the 1992 Maastricht Treaty codified the practice as a treaty obligation. Thus, Scandinavian EC integration entailed the ECHR might become applicable in areas of national law regulated by EC law.

To sum up, developments in several interconnected contextual layers—the dynamic jurisprudence of the ECtHR, picked up by Scandinavian legal interpretive communities, and the renewal of EC integration—combined to create a critical juncture for Scandinavian policymakers by the late 1980s, rendering the dualist presumption of harmony between national law and the ECHR increasingly untenable. These contextual shifts provide an important part of the causal explanation, since without them policymakers would have had little reason to alter policies on the domestic status of the ECHR.

However, on their own, the contextual shifts render the explanation incomplete. For one thing, the ECHR left it to state parties to decide how to best implement the Convention—it did not mandate incorporation, as the Commission and Court made clear in several judgments in the 1970s and '80s (Bates 2010, 159 n257). Likewise, the Supreme Courts' doctrinal shifts did not make the Convention directly applicable, but only required that the national law be interpreted in line with ECHR case law. Moreover, the contextual factors do not explain how, why, or when incorporation happened. Specifically, they could have triggered any of the causal mechanisms hypothesized by the theoretical models, altering the material cost-benefit calculus of governments; persuading governments about the normative validity of an emerging norm of making the ECHR applicable in national law; intensifying pressures on governments to conform to European group standards; or creating a political opportunity for domestic elites to pursue their aims. To construct a complete causal explanation, we need to investigate the policy processes in the two cases and see how they fit these theoretical expectations.

Denmark: A Social Democratic Opposition Initiative

Denmark ratified the ECHR in 1953. Amending certain provisions on administrative detention in the Social Services Act, government declared Danish legislation to be in harmony with the Convention, and parliamentary debate paid little attention to domestic implementation, save for a lone Communist critic (TRAX:1.2).

Since the Convention did not have the status of domestic law, it made no direct imprint on Danish legislation (Espersen 1970). A 1973 public inquiry commission recommended continuing the dualist practice, especially for non-self-executing treaties such as the ECHR that defined rights without specifying clear corresponding duties (TRAX:2). Keeping an eye on Strasbourg jurisprudence, the legislator continually adapted domestic legislation to comply with the convention and its case law (Justitsministeriet 1991). Thus, doctrine paid little interest to the status of international law in the domestic order (Gulmann 1983), and until the mid-1980s, courts hardly ever used the ECHR (Justitsministeriet 1991, 66–79; Nørregaard 2004, 21). While the plaintiffs lost the first Danish case before the ECtHR—concerning parents' right to exempt their children from sex education in public schools (Kjeldsen, Busk Madsen, and Pedersen V. Denmark 1976)—the case illustrated that Denmark's dualist method of abstract implementation through passive transformation risked dissociating the national legal order from the Convention's requirements. Incorporation, some argued, could compel lawmakers and lawyers to take the ECtHR seriously, thus reducing the risk Denmark would inadvertently violate the Convention (Holm 1980).

By the mid-1980s, legal elites began debating whether the convention could be used as a source of law, despite its non-incorporated status. Courts increasingly had to decide cases where litigants cited the ECHR, though the Supreme Court in 1986 maintained that the Convention was not directly applicable (TRAX:3). The Danish Centre for Human Rights (DCHR), founded by parliament in 1987, established itself as a key forum, arranging multiple conferences on the domestic status of the ECHR, and advocated incorporation in public debate (TRAX:4). Participating in these debates were legal heavyweights like Carl-Aage Nørgaard, President of the ECmHR, who advocated incorporation as the best way to ensure courts and authorities would consider the Convention (TRAX:5.1), and Asbjørn Jensen, then Director of the Legal Division of the Ministry of Justice, who argued that directly incorporating the Convention's vague, broad provisions would rather create legal uncertainty undermining the rule of law (TRAX:5.2).

In early 1989, these debates reached the policy agenda, as Social Democratic opposition MPs gathered parliamentary support for appointing a commission on incorporation. Among the initiators were Ole Espersen—a law professor and former minister of justice (1981–'82)—who had also co-inaugurated the DCHR. As an academic, Espersen had published on the domestic implementation of international law treaties and served as secretary in the 1970s inquiry commission on the topic; as a parliamentarian, he had been a key entrepreneur of the so-called footnote politics of the 1980s, whereby an "alternative majority" enforced foreign policy concessions from the Conservative-led coalition governments.

The motion argued that Denmark's preferred passive method of implementation discouraged lawyers from invoking the ECHR before Danish courts, which caused two problems (TRAX:6): It prevented Danish courts from authoritatively settling whether the Convention's demands had been met, forcing individuals to rely on the slow Strasbourg process; and it failed to keep up with the dynamic development of the Convention since its inception. Therefore, the group motioned, parliament should instruct government to appoint an expeditious commission, involving the DCHR, to prepare a bill on incorporation.

Responding to the motion, Minister of Justice H. P. Clausen (Conservative) questioned the need for incorporating a Convention Denmark had loyally implemented for 36 years and argued that it could sow doubt about the method of implementation of IHRL treaties used hitherto (TRAX:7.1). In public debate, Clausen cited Espersen's doctoral dissertation to disprove the claim that the ECHR could not be used as a source of law in Danish courts (TRAX:7;34), but he agreed to setting up an unprejudiced inquiry commission. Mandated to investigate the advantages and disadvantages of incorporating the ECHR and to propose tech-

nically appropriate solutions, the commission comprised government officials and legal professionals, including Carl Aage Nørgaard representing the DCHR (Justitsministeriet 1991, 9f).

However, the commission had hardly begun its work before the legal situation changed. In May 1989, the ECtHR delivered its first judgment finding Denmark in violation of the ECHR. *Hauschildt v. Denmark* (1989) concerned a bullion dealer investigated for tax fraud, who had been detained on remand for more than four years, where the judge deciding on his detention had also led the fraud trial—a breach of Article 6 (the right to a fair trial). Parliamentary horse-trading had then already changed Danish law: In 1987, Social Democrats dropped their resistance to a long-standing Conservative demand for expanding pre-trial detention, in exchange of a criminal procedure reform to ensure compliance with the ECmHR's decision in *Hauschildt* (TRAX:8). Moreover, in the autumn of 1989, the Supreme Court followed up the *Hauschildt* judgment by establishing that national courts and authorities were obliged, as far as possible, to base their interpretation of Danish law on the ECHR and its case law (TRAX:9).

Taking note of these developments, the inquiry commission in its final report concluded that incorporation would clarify the legal situation and provide an explicit basis for applying the Convention (TRAX:10). It also emphasized that incorporation should not disturb the balance between the legislator and the courts, which were to continue to practice self-restraint in interpreting the Convention.

In the consultation round, most consultative bodies were either neutral or supported the proposal (TRAX:11). The DCHR praised the proposal, arguing incorporation would "entail a clearer legal situation for the individual citizen" and "strengthen Denmark's reputation abroad." However, Asbjørn Jensen—now in his role of Attorney General—continued to argue that incorporation would undermine the rule of law in Denmark: Transformation would better serve to create an unambiguous state of law for Danish citizens, he claimed, while incorporation would entail that part of the law-giving competence would be transferred to the courts. Citizens would also be put in a weaker legal position, as ECHR litigation in Danish courts would delay their access to the Strasbourg organs (TRAX:11.1). The social partner organizations regretted that the commission had failed to clarify the consequences for the labor market system (TRAX:11.2), while the Ministry of Labor cautioned that incorporation could cause problems, as Scandinavian labor arrangements relied on private collective agreements between strong social partner organizations rather than legal regulation—a system frequently misunderstood by international treaty bodies (TRAX 11.3).

In parliament, the bill was supported by all political parties except the populist Progress Party, which echoed the Attorney General's skepticism (TRAX:12;14). The Conservative chair of the Law Committee voiced similar concerns about legal uncertainty in a question to the minister of justice (TRAX:13). Presenting the bill, newly appointed Minister of Justice Hans Engell stated that "although we agree with many of the Attorney General's views," the reasons were insufficient to abstain from incorporation, which was just a codification of current practice that would not entail any changes. Engell also warned that government and parliament must carefully watch the judiciary, to ensure "that any changes that may prove necessary are undertaken by Parliament and not entrusted to the courts." And while the bill would not change much for Danish citizens, it would have "significance for our international relations, not least in relation to the new democracies in Central and Eastern Europe" (TRAX:12).

In sum, acting on legal elites' growing concerns with an ECHR compliance gap, as indicated by Strasbourg finding against Denmark, the center-left opposition swayed government to incorporate the ECHR. This rudimentary account of the process does not yet provide a complete explanation, so let us compare with the case of Sweden before we revisit the hypothesized mechanisms.

Sweden: A Conservative Challenge to Social Democratic Hegemony

Sweden ratified the ECHR in 1952, declaring Swedish legislation fully compliant with the Convention. However, Conservative and Liberal MPs and prominent lawyers disputed the veracity of this declaration of harmony (TRAX:1.1). Later, their motions in parliament to accept the jurisdiction of the ECtHR (Article 46) further prompted discussions about the domestic status of the Convention and its caselaw. In 1966, when government proposed to accept Article 46, the minister of justice expressed misgivings about the risk of having to change domestic legislation to comply with ECtHR judgments (Schaffer 2020).

Indirectly, ECHR implementation was also on the agenda in the protracted constitutional reform process in the 1970s, when Conservatives and Liberals sought stronger protection of fundamental rights and judicial review, which Social Democrats opposed (Algotsson 1987). In protests and press debates, liberals, conservatives, and groups on the radical left had criticized the weak protection of civil rights and liberties in the draft constitution. While the conflict mainly focused on domestic safeguards, judicial elites and industry organizations also argued that the new constitution should reflect Sweden's commitments to the ECHR and other IHRL instruments by granting them domestic effect. The justice minister, however, argued that since the treaties diverged formally and substantively from Swedish legislative technique, they were unsuitable to be applied by courts and authorities, and that incorporation would generate legal uncertainty in multiple areas (TRAX:17). Eventually, the major parties reached a compromise on constitutional rights guarantees (Algotsson 1987), and while some conservatives advocated a constitutional clause on the ECHR to strengthen property rights (TRAX:18), no political parties pursued incorporation by the late 1970s (TRAX:19).

Although the new constitution did not regulate the domestic status of international law, authorities reinforced the doctrine of dualism in the early 1970s. A public inquiry commission advocated maintaining dualism (TRAX:15), while the Supreme Courts established that Sweden adhered to dualism and declared international law a source of law virtually irrelevant (TRAX:16). Hence, courts considered themselves not formally bound by the ECHR, nor by the case law of the ECtHR (Wiklund 2008, 207).

However, the sensational judgment in *Sporrong & Lönnroth v. Sweden* (1982)—concerning two property owners on whose properties Stockholm municipality had issued extended, non-appealable expropriation permits—revealed that Sweden failed to meet the standards of the ECHR (Schaffer 2020). The government, however, defied the judgment. At a press conference in Strasbourg in September 1983, Prime Minister Olof Palme (Social Democrat) called the ECtHR "a playhouse for Justice Gustaf Petrén" (TRAX:20.1), referring to a prominent judge who was a key advocate of strengthening constitutional rights protection. In the ensuing public debate, Palme both denied and defended this remark, faulting Conservatives for politicizing

the Court (TRAX:20.2). Asked what the government had concluded from the *Sporrong & Lönnroth* case, Minister of Justice Sten Wickbom said he saw no reason to believe similar violations could arise again or to change Swedish legislation (TRAX:21.1).

When Sweden failed to implement the judgment, the Commission soon admitted further cases against Sweden, in which the Court again found violations (Schaffer 2020). Helped by the media reporting, the number of ECHR complaints against Sweden doubled annually (Figure 2). Government minister Lennart Bodström explained that the many complaints were due not to any legal flaws, but to citizens having better access to information and opportunities to challenge authorities in Sweden than in other countries (TRAX:21.2).

Yet the numerous complaints and the ECtHR judgments on access to justice rights demonstrated that the *Sporrong & Lönnroth* case was not unique. In 1987, the government reluctantly introduced *Lex Pudas* (named after another much-publicized Strasbourg case), a temporary law extending the right to judicial review of administrative decisions. "It is an order that runs counter to traditional Swedish legal principles and entails a major change in principle," lamented Johan Munck, head of the Law Division of the Ministry of Justice, when presenting the new law (TRAX:21.3). Ambassador Carl Lidbom (former Social Democratic minister without portfolio in the Ministry of Justice) claimed that Sweden must denounce the ECHR if the Court continued to deliver judgments contradicting the Swedish "common sense of justice" (TRAX21.4). Commenting on the status of the ECHR in Sweden, ambassador Hans Corell, who had represented Sweden in several Strasbourg cases, stated that "there is no real general debate" on the issue and that the legislator would "not be so much in favour of incorporation" (TRAX:21.5). Thus, among government and its legal elites, there was no support for incorporation by the late 1980s.

Conservatives and the broader center-right, however, increasingly exploited the ECHR in challenging Social Democratic hegemony. The complaints against Sweden concerned, variously, the rights of the little man against state bureaucracy; the opposition could thus weave them into a narrative of abuse of power by a social democratic elite (seemingly evidenced by a series of scandals involving government ministers). In 1983, government launched the so-called Wage Earner Funds, a scheme to gradually transfer ownership of private enterprises to trade unions. Opposing the scheme, business and employer groups organised mass demonstrations and utilised ECHR and constitutional litigation tactics inspired by the *Sporrong & Lönnroth* case (Svenska Managementgruppen AB v. Sweden 1985; Löntagarfonderna 1987). The leading conservative daily *Svenska Dagbladet* exposed rule of law lapses and promoted the ECHR as a key solution in its editorials, while top Conservative politicians advocated incorporation in its op-ed section (TRAX:22.1). In public debate, the ECtHR gained almost mythical status as a cure-all to real or imaginary abuses of power and miscarriages of justice.

Increasingly, the center-right bundled incorporation with other demands for constitutional reform, such as strengthening judicial review and property rights, and creating a constitutional court. In May 1988, the Bar Association presented a policy paper on the rule of law (TRAX:22.2), while Timbro, an industry-sponsored market-liberal think tank, published a proposal for constitutional reform (TRAX:22.3), both of which advocated incorporation of the ECHR. Later that summer, the Conservative election manifesto pledged to incorporate the ECHR (TRAX:22.4). Yet the government dismissed repeated Conservative motions on incorporation of the ECHR (TRAX:24). Citing the dualist doctrine of the 1970s, the parliamentary majority argued incorporation was not necessarily the best way to incorporate international law treaties; the method of implementation must be decided on a case-by-case basis under the oversight of the government offices (TRAX:25).

After the 1991 election, a Conservative-led minority coalition came to power. It soon appointed a parliamentary inquiry commission mandated to investigate how to expand constitutional protection of civil liberties and judicial review, including whether to incorporate the ECHR. In the commission, the Social Democrats and the government parties were in a standoff chiefly on the issue of judicial review, but reached a compromise in April 1993, in which the government parties dropped their demand for enhanced judicial review, while the Social Democrats agreed to incorporate the ECHR. The commission found incorporation appropriate to underscore the importance of the ECHR, to avoid lengthy complaints procedures in Strasbourg, and to clarify the Convention's domestic status, not least considering it was already applicable in the areas regulated by EC law (TRAX:27). The only representative to file several reservations was Ulf Brunfelter—the very lawyer who had initiated the *Sporrong & Lönnroth* case, now representing the right-wing populist New Democracy—who advocated strengthening property rights, creating a constitutional court, and making the ECHR an explicit ground for judicial review (TRAX:27.1). Conservative critics lamented that the non-socialist negotiators had "lost their shirt" in the deal by agreeing to limit judicial review and the constitutional rank of the ECHR (TRAX:28).

Before it could be enacted, however, the compromise nearly fell through twice. Most consultative bodies, including key legal institutions, had supported the proposal on incorporation, and business and employer interest organizations greeted it with triumphant satisfaction (TRAX:29). Emboldened by the consultation responses, the non-socialist parties again made a push for enhanced judicial review and for giving the ECHR constitutional priority. When party leaders met to negotiate a package of constitutional reforms in November 1993, these demands met protracted opposition from Social Democrats. In a new agreement, the five parties agreed on numerous reforms, including the incorporation of the ECHR as an ordinary statute but with special constitutional protection. Yet when the government presented the bill on incorporation, Social Democrats threatened to abandon the agreement, accusing Prime Minister Carl Bildt of having snuck a formulation in that could empower courts by granting the ECHR priority over statutory law. In parliament, the Constitutional Affairs Committee removed the controversial formulation (TRAX:30), and parliament unanimously adopted the revised bill, which entered into force on January 1, 1995—at which point the Social Democrats were back in government.

Discussion: ECHR Commitment and Domestic Political Competition

Let us revisit the theoretical models on state commitment to IHRL—sovereignty costs, socialization, and power preservation—to assess how well they explain the decisions to incorporate the ECHR in Denmark and Sweden. In assessing their relative merit, we seek an explanation that is both *complete* in demonstrating how a mechanism interact-

ing with context produced the outcome, and *consistent* with the actual events (Crasnow 2017).

First, the sovereignty-costs model expects a shift in the governments' cost/benefit calculi. Demonstrably, the sovereignty costs of ECHR participation were rising, with dynamic ECtHR jurisprudence exposing Scandinavian violations. Potentially balancing those increasing costs, the successive downfall of authoritarian regimes in Europe created an opportunity to bind transitioning states to liberal-democratic norms, while the economic rewards of European integration may have made the nuisance of incorporating the ECHR acceptable to policymakers.

However, demands for incorporation rose on the agenda in the mid-1980s, years before the fall of Communism. Although Scandinavian states had filed ECHR inter-state complaints against Greece in 1967 and Turkey in 1982, support for democratic consolidation in Europe is an argument conspicuously absent from incorporation debates. When incorporation proponents eventually referred to democratization in Europe, it was to demonstrate the need for rule of law reform at home (TRAX:24.3;35). Only once they had agreed to incorporate did policymakers justify the decision in terms of supporting democratization, almost as an afterthought. And while policymakers explicitly weighed the sovereignty costs of EC integration—which dwarfed the constraints imposed by the ECHR—against the benefits of access to markets and political influence (Gustavsson 1998; Pedersen 2009), they did not justify incorporation in terms of such material rewards (TRAX:6;10;26;27). Additionally, key policy actors did not link ECHR incorporation to EC integration. For instance, in the Danish and Swedish referenda on the EC (in 1992 and 1994, respectively), conservative and social democratic parties in both countries belonged on the pro-integration side, yet their positions on the EC did not correlate with their positions on ECHR incorporation. In Sweden, when elites advocating for incorporation did connect the issue to Sweden's rapprochement to the EC, they framed it not as a tolerable nuisance, but as a desirable constitutionalization of Swedish political-legal culture (TRAX:31).

Second, the persuasion and acculturation models expect incorporation to result because governments change behavior in response to external normative pressures. Consistent with *persuasion*, ECtHR judgments demonstrated a compliance gap, prompting domestic civil society and legal professionals to debate how to resolve the legal inconsistencies. Eventually, the Supreme Courts revised the prevailing legal doctrine on the ECHR, establishing that courts and authorities should interpret domestic law, as far as possible, in line with the Convention and its case law. Yet this account is partly incomplete and partly inconsistent: These judicial initiatives did not give the Convention direct domestic effect, and legal and policy elites could credibly maintain that transformation provided a viable and preferable alternative to incorporation (TRAX:11;29.2–3). Moreover, the persuasion mechanism presumes these external normative pressures rationally convinced government to alter its beliefs about the validity of the norm, whereas the actual policy process rather suggests that resistant actors were won over through domestic compromise bargaining.

Acculturation does not presuppose actors to change their beliefs—rather, a state adopts a norm mainly to conform with social-cognitive pressures from international society, even against national functional needs and the preferences of domestic elites. Obviously, Nordic governments became aware that their countries stood out in an increasingly important West-European reference group by not granting the ECHR domestic effect, and taking cues from one another, they sought to coordinate a Nordic approach to incorporation. However, if acculturation expects the government, concerned with its state's international status, to override the preferences of domestic legal elites, the proposed mechanism seems inconsistent with both cases: Some legal and policy elites claimed that incorporation failed to address any real needs in the domestic legal system, while other elites were actively mobilizing for incorporation, identifying internal needs to bridge the compliance gap—i.e., to *overcome* the decoupling increasingly caused by the transformation doctrine. Certainly, the normative groundwork by legal elites was essential in exploring the compliance gap and its potential solutions, shaping the alternatives available to policymakers. Yet the legal elite reorientation was less driven by principled conversion or disingenuous concession than pragmatic adaptation—a collective (but not unanimous) effort to resolve a practical legal problem.

Moreover, the sovereignty-costs, persuasion, and acculturation models all suggest a causal dynamic by which a target government alters its cost/benefit calculus, principled beliefs, or group orientation in response to external material, normative, or socio-cognitive pressures. Yet both cases demonstrate that changes in the state's position on ECHR incorporation resulted when domestic parties with a pro-incorporation agenda gained influence over policy. To build a complete explanation, we must therefore also account for how key policy actors—the major political parties—reacted to the growing sense of a compliance gap, bringing the issue of incorporation into their pursuit of power. First, we can conclude that ideological orientations seem conspicuously unrelated to major parties' positioning on this vital constitutional issue: The primary policy entrepreneurs were Social Democrats in Denmark and Conservatives in Sweden. While incorporation in both cases was enacted under Conservative-led governments, only in Sweden did Conservatives welcome incorporation as a way of constitutionalizing liberal-conservative values. Danish and Swedish Social Democrats took starkly contrastive positions.

Instead, as expected by the power preservation model, what led ideologically cognate parties to take such diverging stances on incorporation seems to be their different prospects for gaining and retaining power. By 1990, Swedish Social Democrats had been in government 52 of the preceding 58 years, and in the 1980s on average still commanded 45 percent of the vote and held 23 percent more seats in parliament than their main rival (Figure 4). Through a protracted constitutional reform process in the 1970s, Conservatives had sought to strengthen property rights and judicial review, against Social Democratic resistance (Algotsson 1987). After *Sporrong & Lönnroth v. Sweden* (1982), they began advocating incorporation of the ECHR to impose such constitutional constraints on government as an insurance against future Social Democratic dominance (TRAX:22;24;28;31). Unlike the 1976–1982 center-right governments, which ended the Social Democrats 40-year period in power but then mostly administered pre-existing policies, the 1991–1994 Conservative-led government coalition pursued long-term institutional change outlasting its term of office (TRAX:36;37).

In Denmark, the Social Democrats were unable in the 1980s to transform their plurality in parliament to government power. Since 1924 the Social Democrats had been able to govern most of the time, but from 1973 unclear parliamentary majorities generated weak governments. In 1982, the center-left Radical Liberals shifted allegiance, helping Conservative Poul Schlüter to form government.

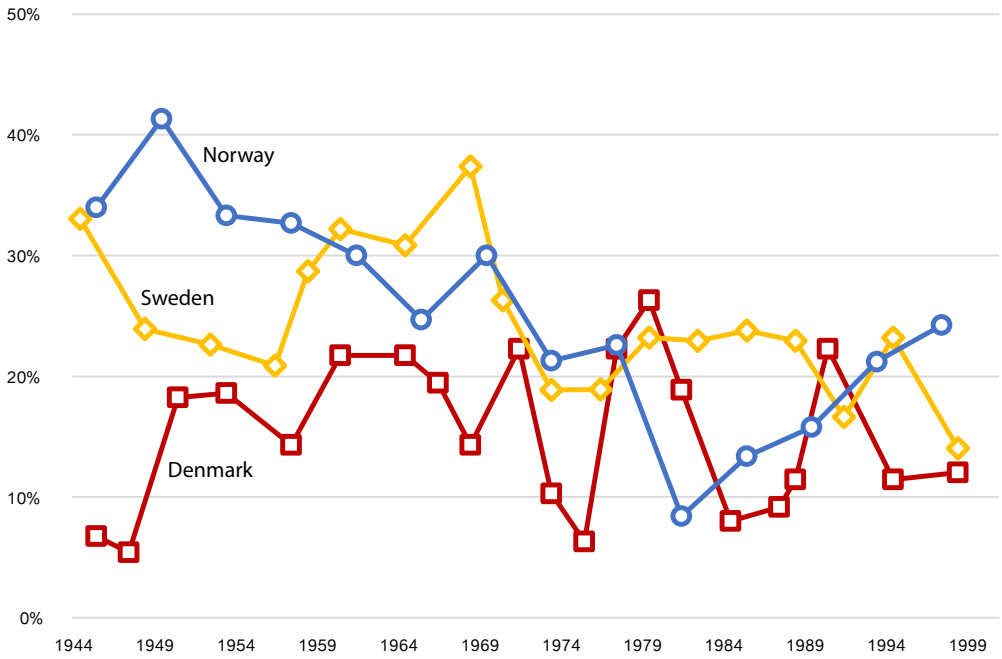

Figure 4. Social Democratic parliamentary dominance in Denmark, Norway and Sweden, 1944–1998 (seats advantage over second biggest party).

(TRAX:32). Schlüter's center-right coalitions survived despite facing "alternative majorities" in parliament: The supporting parties sometimes sided with the opposition, forcing government to exempt Denmark from controversial NATO decisions and oppose EC reforms—the so-called footnote policy era (Damgaard and Svensson 1989; Pedersen 2013). Although the footnote era ended in 1988, the opposition continued to exploit disunity in government to enforce its policies, for instance the pathbreaking legalization of same-sex unions in 1989. Occasionally, the government made deals with the Social Democrats to secure a broad majority on e.g., tax or law enforcement reform (such as the 1987 bargain on remand regulations [TRAX:8]). Yet while Social Democrats could exploit parliamentarism to enforce policies and gain influence (Pedersen 2013), they were unable to use their electoral advantage to win government (TRAX:32). Denmark's longest-serving PM since 1945, Schlüter took pride in having ended the Social Democrats' "virtual monopoly" on forming government (TRAX:33). Thus, as expected by the power preservation model, the incorporation policy entrepreneurs had reason to doubt their future ability to maintain power.

The power preservation thesis is further supported by the fact that in both Sweden and Denmark, the actors pursuing incorporation framed it as part of a broader attempt to place constitutional constraints on government. In Sweden, the center-right combined demands for ECHR implementation with other property rights, rule of law and constitutional reforms (TRAX:24). The Conservative-led government mandated the public inquiry commission investigating incorporation to consider strengthening fundamental rights and liberties, and judicial review (TRAX:27). Conservatives and Social Democrats alike understood incorporation could expand judicial power in the long term (TRAX:28;30;37).

Likewise, in Denmark, incorporation featured among opposition calls for reforms to constrain the powerful Ministry of Justice (TRAX:34;35). Seen to represent the highest legal competence of the land, the Ministry of Justice had a dominant role in the Danish legal-political system, including the authority to appoint judges, to grant leave to appeal to the Supreme Court, and to govern the judiciary, the prosecution service, and the police (Wind 2010; 2022). Serial political scandals indicated the Ministry was abusing its vast powers. Key among these was the so-called Tamils Affair, breaking in early 1989, which eventually led to the impeachment of a Conservative justice minister and Schlüter's resignation in 1993 (TRAX:32). The center-left opposition parties proposed, e.g., creating a constitutional council to preview legislation; equipping Parliament with its own legal department to lessen its dependency on the Ministry's legal expertise; divesting the Ministry of the competence to grant leave to appeal to the Supreme Court; and an overhaul of the constitution (TRAX:35). The 1987 establishment of the DCHR, which could advise parliament directly, challenged the Ministry's authority to interpret international law in Denmark (TRAX:34). Thus, the opposition grafted incorporation into a broader constitutionalist charge against a Ministry of Justice increasingly seen as acting above the law.

The power preservation model also straightforwardly explains the key puzzle why Sweden and Denmark responded to the ECtHR finding against them by incorporating the Convention: For the incorporation policy entrepreneurs, the Strasbourg system's growing authority was not a threat but an opportunity. With uncertain prospects to govern, Conservatives in Sweden and Social Democrats in Denmark endorsed incorporation as an institutional constraint on government. By contrast, incorporation was not produced by a coalition of hegemonic elites (Hirschl 2004): While business, industry, and employer interests supported incorporation in Sweden, they sided with trade unions cautioning against incorporation in Denmark, and legal elites in both cases were fairly divided.

How does this argument generalize beyond the two cases? Let us examine another Scandinavian ECHR incorporation

laggard: In Norway, implementing IHRL treaties by constitutional incorporation was proposed by social democrat Helen Bøsterud in 1984, then chair of Parliament's Standing Committee on Justice (TRAX:38.1). Historically, the Social Democrats had been as dominant as in Sweden, but by 1981, Conservatives, having nearly closed the electoral gap, formed government. In opposition until 1986, Social Democrats grafted human rights into their liberal renewal, turning away from state socialism and towards empowering citizens in the welfare state (Sejersted 2009). Moreover, unlike their Swedish cousins, Norway's Conservatives had achieved judicial review and strengthened property rights at home: With its ground-breaking 1976 *Kløfta* decision, the Supreme Court of Norway had not only overturned a permissive expropriation act the Conservatives had opposed in parliament, but also reasserted its constitutional review powers (Kierulf 2018, chap. 5). In line with the insurance model, a Social Democratic party in decline may have seen incorporation of IHRL treaties as a safeguard for the future.

The need for insurance in changing electoral markets might also explain the timing of Norway's delayed incorporation: In 1988, the Bar Association petitioned Bøsterud, then minister of justice, to deliver on her earlier proposal, prompting government to declare its intent to incorporate select IHRL treaties and appoint an inquiry commission in January 1989 (TRAX:38.2). Yet by the 1990s, the center-right was fragmented, and the Social Democrats secured a parliamentary seat advantage of more than 20 percent (Figure 4). After the commission delivered its report in 1993, the Social Democratic government shelved the proposal (TRAX:38.3). It would take six more years before parliament adopted a bill on incorporation, proposed by the Christian Democrat-led minority coalition that formed government after the 1997 election (TRAX:38.4).

Conclusion

This paper has analyzed the processes of ECHR incorporation in Denmark and Sweden in the 1990s. Both states were among the last of the founders to give the Convention domestic effect and they did so when the dynamic jurisprudence of the ECtHR had begun to challenge their presumption of norm harmony and Scandinavian states were increasing their integration with the EC. Yet, as I have argued here, the decisions to incorporate cannot fully be explained as resulting from elites seeking the material benefits of European integration, persuasion through the jurisprudence of the ECtHR, or the acculturation of Nordic policymakers towards a European community.

Instead, when these contextual shifts in European legal integration interfaced with domestic political conjunctures, political parties concerned with their future access to government pursued incorporation of the ECHR to constrain executive discretion. Just as political parties may prefer constitutional review by national courts to seek insurance for the future (Ginsburg and Versteeg 2014), key political parties, uncertain about their ability to prevail in parliamentary competition, exploited the expanding authority of the ECHR to preserve their preferences against future reversals by their rivals. In Denmark, a declining Social Democratic party that could mobilize an "alternative majority" for key policies but not for its pretensions to govern launched incorporation as part of a broader effort to constrain the executive and especially the all-powerful Ministry of Justice. In Sweden, by contrast, the Conservative Party and its allies integrated the incorporation of the ECHR into their broader constitutionalist challenge to Social Democratic hegemony.

What are the theoretical takeaways of this analysis? First, elaborating a previously underappreciated causal dynamic, the findings improve our understanding of why consolidated democracies commit to international human rights law instruments. Somewhat paradoxically, stable democracies seem both strongly committed and skeptical to international human rights institutions. Previous literature suggests several factors to explain this seeming ambivalence, such as prevalent domestic legal and political institutions or ideological cleavages (Moravcsik 2005; Schimmelfennig 2005; Hathaway 2007; Simmons 2009; Kelley and Pevehouse 2015; Šipulová, Janovský, and Smekal 2018). Instead, my analysis suggests that strategic incentives among key policy actors were essential in bringing about a shift in the domestic status of the ECHR in Scandinavia. While the Scandinavian cases are, arguably, outliers in terms of their contextual features, identifying these causal dynamics allows us to better appreciate how policy agents perceive the strategic opportunities of IHRL commitments—a domestic political game similar to the adoption of constitutional review (Ginsburg 2003; Hirschl 2004).

Second, the essential role of the power preservation mechanism invites us to reconsider whether transitional and consolidated democracies operate by different logics when committing to human rights. Previous IR literature has theorized lock-in in the context of new democracies that use ratification and incorporation of IHRL treaties to signal to domestic and international audiences their commitment to democratization and to obtain material advantages from leading liberal states (Moravcsik 2000; Pevehouse 2002; Hafner-Burton, Mansfield, and Pevehouse 2015). Consolidated democracies, by contrast, supposedly have no need for IHRL as a reputation-building commitment device (Moravcsik 2000; Ginsburg, Chernykh, and Elkins 2008) nor as a concession to secure advantages; consequently, IHRL treaties serve "different, sometimes incompatible functions for members" (Hafner-Burton 2012). However, my analysis suggests that a lock-in or insurance mechanism—i.e., challenger parties seeking to constrain government discretion—was crucial in explaining how the increasing costs of complying with the ECHR led Scandinavian states to increase their level of commitment by giving the Convention domestic effect. The theoretical upshot is that a government's preferences on IHRL commitment are not simply a function of regime type/age or institutional features of the state, but of the strategic competition for power in domestic politics.

Third, seeing how political actors use IHRL incorporation as insurance for the future may nuance our understanding of how policymakers assess the costs and benefits of commitment (cf. Kelley and Pevehouse 2015). The magnitude of the sovereignty costs and compliance costs depends on policy preferences; differently situated actors value such costs differently. For the agents advocating ECHR incorporation, the cost was not just a short-term expense of sovereignty to be traded against direct material rewards, but rather an investment that could generate power over the future.

Supplementary Data

Supplementary information is available at the *International Studies Quarterly* data archive.

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