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The Self-Exempting Activist: Sweden and the International Human Rights Regime

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ABSTRACT

This article seeks to account for Sweden's evolving commitment to the international human rights (HR) regime since its inception in the late 1940s. Where previous research has explained Nordic HR exceptionalism in terms of values of solidarity and democracy in domestic society, this article instead develops a rationalist framework focusing on how governments assess the sovereignty costs states incur through their international HR commitments – costs which may increase as the international regime accretes authority and domestic groups gain opportunities for mobilising for compliance. Empirically, the article adopts a longitudinal approach to determine how Swedish governments have committed to international human rights norms in three historical episodes: the emergence of the European Convention on Human Rights; the era of international activism from the 1960s, and the domestication of international human rights law since the 1980s.

KEYWORDS

Sweden; commitment; human rights treaties; culturalism; European Convention on Human Rights; ratification; dualism

1. Introduction

Why is Sweden seemingly both exceptionally committed to human rights in foreign policy and reluctant to allow international human rights treaties to influence domestic politics? Existing research has grappled with Swedish exceptionalism in the human rights area. International Relations (IR) scholars have portrayed Sweden as a 'global good Samaritan',[1] committed to a cosmopolitan foreign policy originating in values of solidarity and equality supposedly predominant in domestic society. Comparativists in law and political science similarly point to deep-seated cultural values to explain the Nordic states' scepticism toward constitutionalism, judicial review and justiciable rights.[2]

While these existing accounts highlight Sweden's (and the other Nordic states') complicated relationships to human rights, they seem insufficient to account for how these relationships have changed over time. An emerging literature indeed rather suggests that Nordic governments' attitudes toward international human rights norms have

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[1] A Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (Oxford University Press 2009).

[2] J Husa, 'Nordic Constitutionalism and European Human Rights: Mixing Oil and Water?' (2011) 55 Scandinavian Studies in Law 101; JE Rytter, and M Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) ICON 9(2) 470.

varied in terms of commitment to and compliance with international human rights law (IHRL) treaties.[3] Such variance is difficult to explain in terms of predominant culture or values, since culture changes only over the long haul and values affect outcomes only as people act on them.

Taking on the challenge of explaining why Sweden's commitment to human rights has changed over time, this article instead develops a rationalist framework suggesting that states' participation in international human rights regimes is shaped by how governments assess the domestic consequences of their international commitments. Their calculations have changed because the international human rights regime has expanded its authority, but also because government preferences are shaped by political processes at the domestic level. Substantiating this framework, the article provides a case study of how governments of Sweden – allegedly the 'gold standard' of cosmopolitan commitment[4] – have assessed the costs and benefits of its IHRL engagements since the 1940s to the present day.

The article makes three chief contributions to existing literature: first, it advances rationalist theory on why states commit to IHRL by theorising how government preferences are shaped by domestic contestation and how governments may seek to protect themselves against the evolving sovereignty costs they incur as human rights institutions accrete authority. Second, the article's longitudinal study of Sweden's evolving commitment to IHRL offers a novel empirical account of Nordic exceptionalism. Previous scholarship has described Sweden as exceptionally committed to the IHR regime[5] or the Nordics as having experienced a boomerang effect, as the regime their virtuous internationalism helped create eventually had unexpected domestic repercussions.[6] By contrast, this article suggests that Sweden was reserved about committing to IHRL long before the boomerang returned in the 1980s. Third, while a growing literature has provided rich, contextualised histories of some key episodes of Nordic human rights engagements, this article rather offers a general, theory-informed argument on the political dynamics involved in the Swedish case.[7]

The article is structured in five parts. Section 2 demonstrates the limitations of culturalist accounts of Nordic exceptionalism and presents an alternative theoretical framework focused on how governments assess the evolving sovereignty costs of IHRL commitments. Three empirical sections then apply this framework to episodes in Sweden's evolving relationship with IHRL: section 3 analyses how the government of Sweden acted during the drafting and subsequent ratification of the European Convention on Human Rights

[3]e.g. J Christoffersen and MR Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights' (2011) 80 (3) Nord J Intl L 257; M Langford, AD Fisher, JK Schaffer and F Pareus, 'The View from Elsewhere: Scandinavian Penal Practices and International Critique' in Peter Scharff Smith and Thomas Ugelvik (eds), *Scandinavian Penal History, Culture and Prison Practice* (Palgrave Macmillan 2017) 451–79; JK Schaffer, 'Mellan aktivism och ambivalens: Norden och de mänskliga rättigheterna' (2017) 40(1) Retfærd: Nordic Journal of Law and Justice; AJ Semb, 'Why (Not) Commit? Norway, Sweden and Finland and the ILO Convention 169' (2012) 30(2) Nordic Journal of Human Rights 122; HH Vikand SA Østberg, 'Deploying the Engagement Policy: The Significance of Legal Dualism in Norway's Support for Human Rights Treaties from the Late 1970s' (2018) 36(3) Nordic Journal of Human Rights 304.

[4]Brysk (n 1).

[5]Brysk (n 1); K Sikkink, 'The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe' in J Goldstein and RO Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press 1993).

[6]Christoffersen and Madsen (n 3).

[7]This paper also develops my own previous research on Nordic human rights policies by advancing theoretical explanations and providing novel qualitative and quantitative data on the Swedish case. Parts of the empirical argument draw on and expand on Schaffer, 'Mellan aktivism och ambivalens' (n 3).

(ECHR). Section 4 analyses how Sweden contributed to expanding the international human rights regime from the 1960s while concurrently entrenching the doctrine of dualism to keep international and national law separated. Section 5 turns to explaining why Sweden – despite the European Court of Human Rights (ECtHR) finding against the state in the 1980s – incorporated the ECHR into domestic law, and how the domestication of IHRL has made Sweden more reluctant to commit to new treaties. The article concludes by discussing the relative merits and broader implications of my account of Sweden's human rights policies.

2. Explaining Nordic Human Rights Exceptionalism

Existing research has sought to explain why Sweden and the other Nordic states have, allegedly, assumed a position of unparalleled support for international human rights norms, and more broadly for humanitarianism and international law. This seemingly altruistic foreign policy orientation has led scholars to describe Sweden as a 'moral superpower',[8] a 'global good Samaritan',[9] an 'agent of the world common good'[10] or simply a 'good state'.[11]

To account for the seeming exceptionality of Swedish foreign policy, scholars have mostly assumed the state's international role to be rooted in dominant values and beliefs in domestic society. For instance, Bergman argues that Sweden's foreign policy is based on '… a thin conception of cosmopolitan duty that does not exclusively privilege the rights of … nationals', which is anchored in a welfare state based on solidarity, inclusiveness and universality.[12] Similarly, Lawler suggests Scandinavian exceptionalism is partly '… driven by … distinctive values, including that of solidarity'.[13] Others claim that this internationalist orientation rests on a normative legacy that predates the modern nation-state.[14] Scholars seeking to explain the equally conspicuous Nordic reluctance towards individual rights, judicial review or international law in domestic politics[15] similarly point to legal culture, mentality or tradition prevalent in Nordic society.[16] Thus, whether construing Nordic exceptionalism as external commitment or domestic reluctance to human rights norms, an established view holds that its key determinant is cultural values prevalent in society.

While these literatures identify a research puzzle in the human rights commitments of Sweden and the other Nordics, the culturalist approach seems insufficient to resolve it. First, claims about national mentality or primordial cultures are difficult to verify and

[8]A-S Dahl, 'Sweden: Once A Moral Superpower, Always A Moral Superpower?' (2005) 61(4) International Journal 895.
[9]Brysk (n 1).
[10]A Bergman, 'Co-Constitution of Domestic and International Welfare Obligations: The Case of Sweden's Social Democratically Inspired Internationalism' (2007) 42(1) Cooperation & Conflict 73.
[11]P Lawler, 'The Good State: In Praise of Internationalism' (2005) 31(3) Review of International Studies 427.
[12]Bergman (n 10).
[13]P Lawler, 'Scandinavian Exceptionalism and European Union' (1997) 35(4) J Com Mar St 565, 568.
[14]M Kuisma, 'Social Democratic Internationalism and the Welfare State After the "Golden Age"' (2007) 42(1) Cooperation & Conflict 9.
[15]A Føllesdal and M Wind, 'Nordic Reluctance towards Judicial Review Under Siege' (2009) 27(2) Nordic Journal of Human Rights 131; R Hirschl, 'The Nordic Counternarrative: Democracy, Human Development, and Judicial Review' (2011) 9(2) ICON 449; M Wind, 'The Nordics, the EU and the Reluctance Towards Supranational Judicial Review' (2010) 48(4) J Com Mar St1039, M Wind, 'Do Scandinavians Care about International Law? A Study of Scandinavian Judges' Citation Practice to International Law and Courts' (2016) 84(4) Nord J Intl L 281.
[16]Husa (n 2); Rytter and Wind (n 2).

may obscure more than they explain. Why do egalitarian values promote commitment to human rights externally, but resistance internally? And why do political actors act out values only sometimes? Moreover, since cultures and deep-seated values change only slowly, culturalist accounts have difficulties explaining variation over time or across cases. Second, some culturalist accounts arguably misinterpret the content and origin of supposedly Nordic values. For instance, beyond rhetoric the Nordic welfare state model is less based on citizens' altruistic solidarity than on conditional reciprocity[17] and its governing ideas were partly imported rather than inherently Nordic.[18] Additionally, Nordic foreign policymakers have always, even in the heyday of internationalist activism, balanced ideals and interests.[19]

2.1. A rationalist approach to IHRL commitment

To explain how Sweden has altered its engagement on human rights over time, I suggest to theorise IHRL commitment as a dynamic process: as both the international human rights regime and domestic politics evolve, governments continually need to weigh the 'sovereignty costs' – i.e. constraints on their sovereign discretion – they incur against the benefits they can extract from their participation. The costs depend on both the design of the treaty and the internal politics of the state. Features of a treaty such as whether it includes binding obligations or delegation to enforcement bodies may entail considerable constraints on state sovereignty.[20] Yet since even the strongest IHRL treaties have only weak external enforcement mechanisms, the cost of participation also depends on both how much a state's existing HR practices diverge from the treaty's provisions and whether independent domestic agents are likely to press government to implement its international obligations.[21]

Rationalist accounts of why states participate in IHRL treaties start from the puzzle that while IHRL treaties entail apparent sovereignty costs, they typically provide no joint benefits, since each state can achieve the level of rights protection it desires without contracting with others.[22] However, democratising states may find it useful to join IHRL treaties with strong enforcement mechanisms because it allows them to signal their reformist determination, to lock in liberal policies or to obtain benefits from leading liberal powers; consolidated democracies, by contrast, may accept the costs of joining an IHRL treaty if they are pressured by domestic groups or if it supports their broader foreign policy goals of promoting liberal values abroad.[23] Thus, this rationalist framework counterintuitively expects consolidated democracies to be more reluctant than transitional states to participate in IHRL treaties, especially if they entail hard law provisions, since the external

[17]B Rothstein, *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State* (Cambridge University Press 1998).
[18]M Koivisto, *Normative State Power in International Relations* (Oxford University Press 2012).
[19]cf PV Jakobsen, 'The United Nations and the Nordic Four: Cautious Sceptics, Committed Believers, Cost–Benefit Calculators' in P Nedergaard and A Wivel (eds), *The Routledge Handbook of Scandinavian Politics* (Routledge 2018) 281–94.
[20]EM Hafner-Burton, ED Mansfield and JCW Pevehouse, 'Human Rights Institutions, Sovereignty Costs and Democratization' (2015) 45(1) Brit J Po Sci 1.
[21]OA Hathaway, 'The Cost of Commitment' (2003) 55 Stan L Rev 1821.
[22]A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54(2) International Organization 217, 217; B Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 123.
[23]Hafner-Burton and others (n 20).

benefits of binding other states to liberal norms rarely outweigh the internal sovereignty costs – a pattern confirmed in several empirical studies.[24]

However, in order to theorise IHRL commitment as a dynamic process, rather than as an isolated, discrete decision,[25] I argue we need to conceptualise how sovereignty costs evolve, how governments form their preferences and how democracies may seek more diverse benefits from participation. First, the costs a government incurs by participating in an international HR institution may increase if the institution expands its authority and the scope of parties' obligations or if new member states with more activist preferences accede. While such alterations are hard to predict, risk-averse governments are likely to factor in that uncertainty in their continual decisions to participate:[26] when negotiating a new institution, governments may seek to shape substantive or procedural provisions in order to reduce future compliance costs, for instance by granting state-controlled committees ultimate authority. When ratifying and implementing, governments may take measures to control the domestic impact of their treaty obligations. Treaty commitment may also have collateral consequences, when actors at the domestic level change their behaviour as a result of treaty commitment,[27] which may increase if groups in domestic society with an interest in treaty compliance gain capabilities or opportunities for holding government to account. Moreover, IHRL treaty commitment may shift power from the elected branches of government to the judiciary,[28] a disruption to domestic political order governments in parliamentary systems are likely to seek to avoid.

Second, how a specific government appreciates commitments depends on its preferences on human rights related policies and on the benefits it can extract by participating. Large-N studies of IHRL commitment often derive expectations about state preferences on IHRL treaties from regime type, categorising states as democratic, transitional or authoritarian. While this categorisation makes sense as democracies tend to derive their legitimacy from the same egalitarian rule of law values that inform HR treaties, government preferences in a democracy are also shaped by political parties, with diverging preferences on human rights-related policies, competing for power in the domestic party constellation.[29] IR literature on the politics of human rights often assumes splits over international HR enforcement reflect partisan cleavages, with the political left being in favour and the right sceptical.[30] However, how political parties evaluate IHRL treaties depends both on the content of the treaty and on party constellations in the specific national political context. For instance, the ECHR was originally framed by European conservatives as a supranational palladium of property rights and judicial independence against post-war left-wing parliamentary majorities;[31] expectedly, its substantive and procedural provisions would appeal more to the centre-right. Moreover, in a dominant-party system such as

[24]EM Hafner-Burton, 'International Regimes for Human Rights' (2012) 15 Annual Review of Political Science 265.
[25]H Dijkstra, 'Efficiency versus Sovereignty: Delegation to the UN Secretariat in Peacekeeping' (2012) 19(5) Intl Peacekeeping 581.
[26]Ibid.
[27]OA Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51(4) J Conflict Resol 588.
[28]Hathaway, 'The Cost of Commitment' (n 21).
[29]cf F Schimmelfennig, 'European Regional Organizations, Political Conditionality, and Democratic Transformation in Eastern Europe' (2007) 21(1) East European Politics and Societies 126, 132.
[30]A Moravcsik, 'The Paradox of US Human Rights Policy' in M Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 198–222; Simmons (n 22) 81.
[31]M Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017).

Sweden (where the Social Democrats ruled uninterrupted from 1936 to 1976), the opposition may value external commitments as a form of insurance, and the more so the more hegemonic the dominant party.[32]

Third, I suggest to consider other benefits stable democracies may reap from their IHRL commitments. Existing literature suggests that consolidated democracies participate in IHRL treaties as it helps them pursue their foreign policy goals of promoting peace by preventing authoritarian backsliding in newly democratic states[33] or liberalisation and democratisation abroad more generally.[34] Yet consolidated democracies can also factor in more directly self-centred benefits into their commitment decisions: first, since international collaboration in other issue-areas is often linked to IHRL, states may sometimes gain benefits by reinforcing their IHRL commitments. For instance, as the law of the European Community (EC) became increasingly enmeshed with the human rights norms of the ECHR, governments weighed the benefits of the former against the costs of the latter. Second, while IHRL treaties are primarily 'self-binding', a government can also use them as 'other-binding' devices, i.e. to control other states or other domestic actors[35] (beyond preventing authoritarian backsliding abroad). For instance, a state that already complies with specific HR norms may use international regulations to impose costly obligations on others.[36] If governments think they can control their own treaty compliance costs, other-binding strategies may be attractive, but may backfire if the treaty's authority evolves.

Having established this rationalist framework, I shall now use it to analyse how the government of Sweden has assessed the costs and benefits of its participation in the international human rights regime in three episodes since the 1940s.

3. Reticence and Ratification

In the late 1940s, Sweden participated in founding the Council of Europe (COE) as it began drafting a human rights convention for Europe. How did government position itself in the negotiations on this ground-breaking treaty and assess the domestic consequences of ratifying it? A culturalist account would assume Sweden to be passionate about the project of creating a regional international law instrument to protect human rights, but, as this section will show, its government was rather preoccupied with preserving sovereign discretion.

3.1. Scandinavian scepticism and the European rights regime

In the founding of the COE, Sweden was a key player, yet anything but enthusiastic about the project. Already when Winston Churchill gathered the Congress of Europe in The Hague in 1948, Swedish Social Democrats had followed British Labour in rejecting

[32]cf T Ginsburg,*Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 24ff.
[33]Moravcsik, 'The Origins' (n 22).
[34]Hafner-Burton and others (n 20).
[35]KJ Alter, 'Delegating to International Courts: Self-Binding vs Other-Binding Delegation' (2008) 71(1) Law and Contemporary Problems 37; cf Hathaway, 'Why Do Countries Commit' (n 27).
[36]LR Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 Colum L Rev 1832, 1853.

Churchill's initiative and instead sought closer Nordic cooperation.[37] When France and Belgium picked up the Congress' demand for a European parliamentary assembly as a first step toward European federation, the United Kingdom (UK) responded by suggesting instead an intergovernmental council. The resulting compromise – the new organisation would have a Committee of Ministers, making decisions unanimously, and a Consultative Assembly, elected by national parliaments – reflected the split between federalists and sovereigntists that would dominate European collaboration in the coming years. Reluctantly accepting the invitation to participate in the founding of the COE in 1949,[38] Sweden, together with the UK, Denmark and Norway, eventually came to block any federalist ambitions.

In the founding years, a key issue was what the COE would actually do: military and security cooperation in Western Europe developed separate structures, the OEEC organised economic coordination, and the UN offered forums for cultural affairs and human rights.[39] However, the federalist European Movement had proposed a human rights convention and a court to uphold it as a foundational notion for the COE – eventually, it would become its key purpose. The process by which human rights ended up a central task of the COE allows us to get a glimpse into Swedish priorities in the late 1940s.

To begin with, Sweden was among the states that sought to prevent human rights from even being on the agenda of the COE. In August 1949, the Consultative Assembly held its inaugural session, where the enthusiasts of the European Movement sought to expand the limited scope of action allowed by the Statute. The governing Committee of Ministers first excluded human rights from the Assembly's agenda.[40] Sweden, represented by foreign minister Östen Undén, questioned the added value of a European rights convention, fearing it might duplicate the work concurrently undertaken at UN.[41] Only after Churchill instigated a veritable revolt did the Committee allow the Assembly to discuss human rights.[42] After animated debate, the Assembly adopted a convention drafted by the European Movement as a recommendation to the Committee of Ministers, along with another 38 recommendations. In the Committee, however, the British and Scandinavian representatives voted against all these recommendations, save for the one proposing a human rights convention.[43] While sceptical of an international treaty authorising interference in domestic affairs, they could not totally oppose it, as it 'would have been a major embarrassment if the Council of Europe could not even conclude a treaty on human rights protection'.[44]

The next issue was how to turn the draft into a workable international law treaty that the states would actually accept. Finding the Consultative Assembly's draft convention too vague, the Committee of Ministers appointed a Committee of Legal Experts, which suggested two ways of writing the convention: Either simply enumerating rights, expecting

[37] M af Malmborg, *Den ståndaktiga nationalstaten: Sverige och den västeuropeiska integrationen 1945–1959* (Lund University Press 1994) 131ff.
[38] Ibid. 157.
[39] Ibid. 199ff.
[40] E Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 59; Duranti (n 31) 181ff.
[41] K Brathagen, 'Competition or Complement to Universal Human Rights? The Norwegian Position on a European Convention for Human Rights 1949–1951' in R Mariager, K Molin and K Brathagen (eds), *Human Rights in Europe during the Cold War* (Routledge 2014); L Kellberg, 'Den svenska inställningen till Europarådsdomstolen' in LAE Hjerner, J Ramberg, O Bring and S Mahmoudi (eds), *Festskrift till Lars Hjerner: Studies in International Law* (Norstedts 1990) 299–311, 300.
[42] Duranti (n 31) 184.
[43] Malmborg (n 37) 177.
[44] Bates (n 40) 78.

member states to specify them, supported by the jurisprudence of an international court, or defining them in detail.[45] When the Conference of Senior Officials negotiated the legal experts' proposals in June 1950, the conference chair – Sture Petrén, head of the Legal Division of the Swedish Foreign Ministry – helped forge a text that corresponded to the majority view.[46] While some states still wished to enumerate rights, Sweden was among the states insisting that the convention be formulated as precisely as possible, in order to clearly define states' obligations. States preferred precision not to protect individual interests against the state, but to protect states' interests against one another, since, on the dominant view, the convention was an international agreement with inter-state complaints as its primary mechanism.[47]

Equally contentious was the issue of implementation, especially the Court and its jurisdiction, and the right of individual petition. A minority of states proposed an impartial tribunal as indispensable for protecting human rights.[48] However, the majority, including Sweden, opposed the proposal, seeing no real need for an enforcement institution or fearing it might provide an arena for subversive forces, such as communist agitators.[49] Petrén, however, came up with the solution that would find majority support: To make the Court's jurisdiction optional.[50] compromise proposal that the Committee of Ministers would have final say over the Commission.[51] This compromise was necessary to make decisions binding and enforced, since the Court was made optional,[52] but 'the downside, of course, was that final decision would be left to a political body'.[53] When the draft convention was passed back to the Committee of Ministers, Undén insisted the Committee should be authorised only to decide on whether a state had violated the convention, not to dictate to a defaulting state to take measures or pay damages to the injured party.[54] The right of individual petition proved to be a final disputatious subject:[55] voicing fears that it might be abused by subversive forces, some delegates opposed including an automatic petition right; eventually, the Committee agreed to make individual petition optional, too. Finally approved by the Committee of Ministers, states signed the Convention in Rome on 4 November 1950.

To sum up: reticent about the whole project of European integration, Sweden – along with the other Scandinavians and the UK – effectively put a brake on post-war federalist enthusiasm and sought to limit the ECHR's constraints on sovereign discretion, e.g. by specifying rights in detail, vesting ultimate authority in the Committee of Ministers, limiting the Committee's powers, and making the enforcement mechanisms optional. Overall, Sweden's role in the founding phase is hardly that of a virtuous internationalist. On the other hand, it might have been precisely the sovereigntist bloc's cautious realism that made the ECHR – an unprecedented international law experiment – viable.

[45]AWB Simpson, *Human Rights and the End of Empire* (Oxford University Press 2004) 713.
[46]T Salén, 'Europarådets konvention om mänskliga rättigheter och friheter' (1951) 14(1) Förvaltningsrättslig Tidskrift 1; JWF Sundberg, 'Human Rights in Sweden: The Breakthrough of an Idea' (1986) 47 Ohio State Law J 951.
[47]Bates (n 40) 8, 90; Sundberg (n 46) 957.
[48]Bates (n 40) 90ff.
[49]Ibid. 91; Brathagen (n 41); Kellberg, 'Den svenska' (n 41) 301.
[50]Bates (n 40) 90ff; Simpson (n 45) 719.
[51]Sundberg, 'Human Rights in Sweden' (n 46) 962.
[52]Simpson (n 45) 719.
[53]Bates (n 40) 92.
[54]Kellberg, 'Den svenska' (n 41) 303.
[55]Bates (n 40) 95.

3.2. Ratifying and implementing the ECHR

After the adoption of the ECHR, the manner in which Sweden ratified and implemented the Convention and its optional clauses suggests that the government sought to avoid costly compliance or constraints on its sovereignty. Following the UK and Norway, Sweden became the third state to ratify the ECHR in early 1952. The government treated ratification as a foreign policy matter and omitted a thorough review to determine potential compliance issues.[56] In the bill, foreign minister Undén outlined the Convention and found no conflict with current legislation, except for restrictions on religious freedom which were to be reformed anyway.[57]

For a government concerned with preserving its sovereign discretion, it may seem surprising that Sweden upon ratification as the first state ever accepted the right of individual petition – and, unlike the states that would follow, without time limit at that. Foreign minister Undén noted the risk that individual petition could be abused for propaganda purposes, yet argued that granting individuals standing was essential to guarantee that states would observe the Convention, rather than relying on other states to file complaints against a government flouting its obligations. Moreover, given that Sweden had successfully helped ensure the Committee of Ministers would have ultimate control over the Commission and limited power to dictate remedies, accepting individual petition seemed risk-free,[58] since Undén expected the Committee would hardly be so 'ridiculously scrupulous' as not to accept Swedish administrative practices.[59]

During and after ratification, however, Conservative and Liberal parliamentarians pointed out that Swedish laws seemed to diverge from the rule of law principles of the Convention.[60] For instance, certain curtailments of civil liberties, including some forms of administrative detention, could only be appealed to the government, not in a court. The opposition continually demanded *ex post* review of Sweden's compliance with the Convention[61] and the issue prompted debate among law professors and government officials.[62] Partly concerned that Sweden's compliance might be tried by the European Commission, parliament tasked an expert commission with investigating legal security in administrative detention, yet took several decades to legislate on involving courts in deciding or reviewing most forms of administrative detention.[63] The lack of rights to

[56]H Eek, 'Makten över utrikes ärendena' (1957) 57(4) Statsvetenskaplig Tidskrift 375.

[57]In the preceding half-century, lawmakers had debated laws banning Catholic monasteries and prohibiting citizens from leaving the state church without entering another community of faith; compliance with the ECHR was not decisive but provided an additional reason to relax the bans: YM Werner, 'Katolicism och religionsfrihet: Den svenska religionsfrihetslagen 50 år' (2002) Signum (9); Utrikesdepartementet, *Godkännande av Sveriges anslutning till Europarådets konvention angående skydd för de mänskliga rättigheterna och de grundläggande friheterna* Prop 1951:165, Sveriges riksdag.

[58]Sundberg, 'Human Rights in Sweden' (n 46) 962.

[59]Kellberg, 'Den svenska' (n 41) 307.

[60]e.g. E Håstad, *Om utredning för fastställande i vad mån svensk rätt strider mot de förpliktelser, som Sverige åtagit sig enligt Europarådets konvention angående skydd för de mänskliga rättigheterna och grundläggande friheterna, m m* Mot 1956: AK590, Sveriges riksdag; Herlitz N, *Angående godkännande av Sveriges anslutning till Europarådets konvention angående skydd för de mänskliga rättigheterna och de grundläggande friheterna* Mot 1951:FK459, Sveriges riksdag; R Swedberg, B Elmén, M Ståhl and J Braconier, *Om en allmän översyn av gällande regler om frihetsberövande* Mot 1952:AK410, Sveriges riksdag.

[61]L Kellberg, 'Sverige och Europarådets konvention om de mänskliga rättigheterna' (1961) Svensk Juristtidning 503.

[62]Already in 1949, a public inquiry commission had been tasked with reviewing administrative appeals with a view to enhance legal security: S Hurwitz, B Honkasalo, Þ Eyólfsson, Johs Andenæs and H Göransson (eds), *Nordisk kriminalistisk årsbok 1954* (Ivar Hæggströms boktryckeri 1955) 61ff.

[63]Första lagutskottet, *Utlåtande i anledning av väckt motion om utredning för fastställande i vad mån svensk rätt strider mot de förpliktelser, som Sverige åtagit sig enligt Europarådets konvention angående skydd för de mänskliga rättigheterna och*

appeal administrative decisions in other areas would later render Sweden its first negative judgment by the ECtHR.

Government further sought to minimise the risk of being embarrassed by complaints in Strasbourg by deferring to accept the jurisdiction of the Court. Prime Minister Tage Erlander declared that authorising an international court to adjudge whether Swedish authorities respected the human rights of Swedish citizens seemed 'extremely dubious' and 'alien to our opinion'.[64] During Undén's tenure as Foreign Minister, the Swedish government held that the ECHR was a unique international law experiment, and only time would tell if there was any practical need for the Court within it.[65] As the Court became operational in 1959, Conservatives and Liberals began motioning repeatedly in parliament that Sweden should accept its jurisdiction.[66] The COE's Consultative Assembly repeatedly urged Sweden to accept the Court, as did the Nordic Council, once the Court had been accepted by Denmark (1953), Iceland (1958) and Norway (1964).

The foreign minister, however, oppugned the proposal in public debate,[67] arguing that international courts should interpret treaties and adjudicate international disputes, but that the ECHR stretched the concept of international issues to domestic affairs. In a 1959 memo, Undén noted that in multiple politically contentious issues – such as religious instruction in schools or administrative detention – it would hardly be '… attractive if a Swedish citizen could have the case referred via the Commission to the Court'; granting the Committee of Ministers final say was 'a more pliable way', since '… the ministers can be assumed to have a sense for the view that a convention of this kind should not be too rigorously interpreted'.[68] Only once Undén – a towering authority, senior statesman and international law professor – had retired did Sweden accept the jurisdiction of the Court in 1966; as a token of respect, perhaps, the justice ministry prepared the bill, not the ministry of foreign affairs.[69] Yet the justice ministry, too, had sincere doubts about allowing judicial review by an international court, whose future jurisprudence was impossible to predict.[70]

In sum, the Swedish government took precautions in ratifying the Convention, avoiding direct compliance costs through Undén's magisterial presumption that domestic legislation fully met the Convention's demands – but also, seemingly negating that presumption, postponed accepting the jurisdiction of the ECtHR to avoid having domestic practices reviewed in Strasbourg. Realising the Convention could restrain government, at a time when the social democratic reform project was accelerating, the centre-right opposition persistently questioned Sweden's compliance and, eventually, demanded that Sweden accept the Court's jurisdiction – a pattern that would repeat in the 1980s on the issue of incorporation.

grundläggande friheterna m m Utl 1956:1LU19, Sveriges riksdag; Justitiedepartementet, *Förslag till lagändringar för att möjliggöra domstolsprövning av vissa frihetsberövanden*. Prop 1974:155.

[64]Sveriges riksdag, *Protokoll 1950:FK11*, p 18.

[65]Kellberg, 'Den svenska' (n 41) 304.

[66]Justitiedepartementet, *Om förklaring enligt artikel 46 i Europarådets konvention angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*. Prop 1966:33, p 3f.

[67]Ö Undén, 'Om FN:s och Europarådets domstolar' (1963) Svensk Juristtidning 657.

[68]Kellberg, 'Den svenska' (n 41) 306.

[69]Justitiedepartementet, *Om förklaring enligt artikel 46* (n 66) 3f.

[70]C Lidbom, 'Lagstiftningsmaktens gränser' (1993) 93/94(2) Juridisk Tidskrift 283.

4. Activism and Dualism

In the 1960s, Sweden began substituting a more activist foreign policy for its traditional interpretation of the policy of neutrality as standing aloof from great power politics. Sweden supported the expansion of the international human rights regime and used the ECHR to lodge inter-state complaints against military rule in Greece and Turkey. Domestically, however, the doctrine of dualism allowed government to assume IHRL commitments had no domestic effect. In this section, I shall analyse how government expanded its international commitments while taking measures to retain sovereign discretion at home.

4.1. Human rights and foreign policy activism

Sweden's changing international role in the 1960s resulted from structural shifts: If foreign policy had previously been formulated in elite consensus with an aim of keeping Sweden out of trouble, societal radicalisation politicised foreign policy and government began reframing the doctrine of neutrality as granting Sweden an obligingly independent voice to speak out on global issues. Sweden started expanding development assistance to levels few other states would rival, supporting liberation movements in the third world and the struggle against apartheid, and engaging in mediation and peacekeeping in international conflicts. A growing number of third world countries began using the United Nations (UN) as an arena for contestation, and Sweden increasingly sided with the non-aligned movement rather than its traditional Western partners.

While Sweden's third-world support was chiefly framed in terms of promoting national self-determination,[71] activism also extended into the human rights area. In 1967, Sweden – together with Denmark, Norway and the Netherlands – filed an inter-state complaint against the military junta that had seized power in Greece in 1967. While the governments initially sought to maintain diplomatic dialogue with Greece,[72] the public outrage at the coup pressured them to confront the junta. A confrontation risked damaging bilateral trade relations, but it also offered governments an opportunity to appease domestic audiences. While Sweden was only unofficially affiliated with the Western alliance, taking action in the COE helped the governments of Denmark and Norway to deflect attention from the contentious issue of Greece's NATO membership, at a time when domestic opposition to the alliance was growing.[73] Eventually, the complaint resulted in a comprehensive report in 1970 that found Greece to have violated its ECHR obligations[74] – yet Greece, anticipating the suspension of its membership, had withdrawn from the COE already in late 1969. In 1982, Sweden again joined forces with Denmark, Norway, the Netherlands and France to lodge a similar inter-state complaint against Turkey after the military coup in 1980.

[71] JK Schaffer, 'How Democracy Promotion became a Key Aim of Sweden's Development Aid Policy' in K Bjørkdahl and A de Bengy Puyvallée (eds), *Do-Gooders at the End of Aid* (Cambridge University Press forthcoming 2021).
[72] M Demker, 'Dans på slak lina: Sverige och den grekiska diktaturen 1967–1974' (Statsvetenskapliga institutionen, Göteborgs universitet 2005)
[73] EGH Pedaliu, '"A Discordant Note": NATO and the Greek Junta, 1967–1974' (2011) 22(1) Diplomacy & Statecraft 101.
[74] Council of Europe, *Yearbook of the European Convention on Human Rights: The Greek Case* (Martinus Nijhoff 1972).

This time, however, the applicant states sought to uphold relations with Turkey and eventually accepted a lenient friendly settlement.[75]

The inter-state cases had mixed consequences: On the one hand, the Greek Case was the first time ever that an international human rights body established that a state had practised torture and the case helped to place torture on the international agenda in the 1970s. On the other hand, the cases contributed to sealing the fate of the ECHR as an inter-state pact against totalitarianism – as the founders had mainly envisioned it – because an inter-state complaint in the COE could do little to prevent massive human rights abuses. However, by its high-minded defence of human rights abroad, the Swedish government accorded the Strasbourg system an authority its own citizens would eventually turn against itself.[76]

Moreover, while commenters have suggested that the Greek Case resulted from the applicant states' moral conviction to protect human rights anywhere in Europe,[77] the Swedish government was selective in its criticism of human rights lapses abroad. For instance, in the 1968 election campaign – concomitant with the Greek Case – Prime Minister Erlander castigated the opposition leader for suggesting that Sweden should support the right to self-determination of the people of Czechoslovakia. Likewise, during the Helsinki Conference on Security and Cooperation in Europe in 1975, whose Final Act would provide essential support for dissident movements in Eastern Europe, Sweden rejected the criticism of the Soviet bloc as unbalanced, and sought chiefly to preserve stability in the Baltic region.[78]

By the mid-1970s, the idea of human rights had its real breakthrough in international politics and Sweden actively took part in expanding the regime with new treaties. Much like in the inter-state complaints, Sweden came to occupy its vanguard position because government was pressured by domestic civil society groups. For instance, following public outrage at the coup in Chile in 1973, Sweden initiated the UN Declaration against Torture in 1975 and eventually drafted, in collaboration with non-governmental organisations (NGOs) such as Amnesty International, the UN Convention against Torture adopted in 1984.[79] Likewise, Sweden's standard-raising agenda in the Convention on the Rights of the Child (CRC) resulted because Save the Children and other NGOs put public pressure on the government.[80] Such initiatives rested on the presumption that the conventions targeted severe problems abroad, such as disappearances in dictatorships or the use of child soldiers, rather than any practices in Sweden.

Sweden also continued its external efforts to prohibit the death penalty in international law. For instance, Swedish parliamentary delegates at COE played a leading role in initiating the Sixth Protocol to the ECHR, obliging states to abolish the peacetime death penalty, which entered into force in 1985.[81] Yet since Sweden had already abolished the

[75] S Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10(2) Hum Rts Q 249, 293.
[76] JWF Sundberg, 'Volte face: Om Europakonventionens historia i Sverige' (2001) (5) Tidskrift utgiven av Juridiska Föreningen i Finland 377.
[77] J Becket, 'The Greek Case before the European Human Rights Commission' (1970) 1(1) Human Rights 91
[78] A Makko, 'Advocates of Realpolitik: Sweden, Europe and the Helsinki Final Act' (PhD diss, Stockholm University 2012).
[79] AM Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton University Press 2001) 136; K Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Responsibility' in F Lessa and LA Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012) 19–41, 25ff.
[80] L Lindkvist, 'Rights for the World's Children: Rädda Barnen and the Making of the UN Convention on the Rights of the Child' (2018) 36(3) Nordic Journal of Human Rights 287; Vik and Østberg (n 3).
[81] J Fitzpatrick and A Miller, 'International Standards on the Death Penalty: Shifting Discourse' (1993) 19(2) Brooklyn J IntL Law 273.

death penalty (in peacetime 1921; in wartime in 1973), its abolitionist activism entailed no domestic compliance costs.

Furthermore, in negotiations on new IHRL instruments, Sweden sought to shape them after its national preferences. For instance, in negotiations on the Convention on the Elimination of All Forms of Discrimination Against Women, Sweden insisted that real equality between men and women could not be achieved by measures aimed only at women – men's traditional roles had to change too, and Sweden and the other Nordics emphasised gender equality in the family and in child rearing.[82] Similarly, in the drafting of the CRC, Nordic governments promoted the notion of children as autonomous persons, opposing the view that parents should define the best interest of the child.[83] Such interventions reflected national elites' beliefs, but also helped minimise the state's future compliance costs by codifying existing domestic practices as international norms.

To conclude, while Sweden became more outspoken in its foreign policy from the 1960s onwards, it was not simply the result of extrapolating domestic values in an altruistic fashion. Rather, government sought to handle the radicalisation of public opinion and specific pressure group mobilisation. Moreover, norm export could also serve strategic purposes, as modelling new IHRL treaties after domestic practice could help reduce compliance costs down the road. Finally, even in its prime, Swedish foreign policy activism was always selective and biased, because it was conditioned on more fundamental security interests.

4.2. Rights at home and the doctrine of dualism

While Sweden expanded its external activism in the area of IHRL in the 1960s–1970s, the government's policy at home rather served to limit the constitutional protection of rights and the domestic impact of international law commitments.

In the post-war decades, government and the legal profession became permeated with the philosophy of Scandinavian legal realism – a pragmatic, utilitarian legal philosophy regarding jurists as engineers tasked with executing the sovereign legislator's intentions and rejecting natural rights as metaphysical nonsense.[84] Turning law into an instrument of social reform, legal realism served the Social Democratic project well, and some of its key advocates in the law professoriate were also leading Social Democratic politicians. Since the 1930s, law students had been schooled in legal realism and by the 1960s they reached senior positions in the ministry of justice, which expanded with the mushrooming legislative activity of the welfare state.[85]

This spirit of pragmatic legal reformism also reached the constitution. A protracted, contentious process of constitutional reform culminated when parliament adopted a new Instrument of Government in 1973.[86] Based on the principle of parliamentary sovereignty, the new constitution upended a practice of judicial review that had

[82]CM Bailliet, 'A Nordic Approach to Promoting Women's Rights Within International Law: Internal v External Perspectives' (2016) 85(4) Nord J Intl L 368, 372.
[83]Vik and Østberg (n 3) 313.
[84]J Strang, 'Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law' (2018) 36(3) Nordic Journal of Human Rights 202.
[85]KÅ Modéer, 'From "Rechtsstaat" to "welfare-state": Swedish Judicial Culture in Transition 1870–1970' in WW Pue and D Sugarman (eds), *Lawyers and Vampires: Cultural Histories of Legal Professions* (Hart 2003) 151–67, 165.
[86]K-G Algotsson, *Medborgarrätten och regeringsformen: Debatten om grundläggande fri- och rättigheter i regeringsformen under 1970-talet* (Norstedt 1987).

developed since the 1920s and included only a provisional rights catalogue, as government and opposition had failed to agree on how to protect civil rights and liberties. A series of public inquiry commissions were appointed to resolve the disagreement on constitutional rights protections; not until five years later, under a non-socialist government, did Parliament reach a compromise which included a provision on limited judicial review.

While legal realism provided a general inoculation against rights claims and judicial activism, government also entrenched the doctrine of dualism – according to which international law regulations require a national measure (incorporation or transformation) to apply in the state – to control the domestic effects of international law obligations. In the early 1960s, parliament had noted that the domestic effect of international law was unregulated, yet assumed that courts could resolve conflicts should they arise.[87] From the mid-1960s, however, government became increasingly concerned about the issue because of the rapidly increasing number of international organisations and treaties, and the prospect of joining the European Economic Community (EEC). EEC law created particular problems: not only was it very extensive; in 1963–1964, the European Court of Justice had declared that it was directly binding and supreme over national law. The government appointed an expert commission, which – after consulting with similarly tasked commissions in the other Nordic countries – eventually concluded in favour of continuing the dualist approach that had long been established in legislative practice.[88] In 1971, though, government dropped Sweden's 'open application' to accede the EEC.

For government and the deferential judiciary, dualism offered a convenient solution to the problem of international law obligations. Government could propose ratifying new IHRL treaties on the presumption that ratification entailed neither legislative nor budgetary consequences.[89] While the new constitution did not codify dualism, a series of highest-court rulings in the early 1970s corroborated the dualist practice and declared courts not formally bound by the ECHR or the judgments of its Court: incorporated or transformed international law would always be published in the Swedish code of statutes, and beyond that, Swedish law should be presumed to accord with international law.[90] Yet since government upon ratification standardly asserted that IHRL treaties were in harmony with national law, courts and authorities increasingly had to grapple with whether to treat the ECHR and other IHRL treaties as sources of law. In the long run, neither legal realism nor dualism would shield Swedish governments from the coming onslaught of IHRL in the 1980s.

5. Impact and Resistance

By the 1980s, government began realising that Sweden's IHRL commitments had more far-reaching domestic implications than it had assumed, as an increasingly proactive ECtHR delivered its first judgments finding against the state. Initially defiant against

[87] Första lagutskottet, *Utlåtande i anledning av väckt motion angående rätt till resning vid konflikt mellan svensk och internationell domstols avgöranden* Utl 1961:1LU38, Sveriges riksdag.

[88] Justitiedepartementet, *Internationella överenskommelser och svensk rätt* SOU 1974:100.

[89] Accession to the Convention on the Elimination of All Forms of Racial Discrimination, though, prompted stricter laws on hate speech: Justitiedepartementet, *Godkännande av konvention om avskaffande av rasdiskriminering, m m* Prop 1970:87; cf Vik and Østberg (n 3).

[90] O Bring, 'Monism och dualism i går och i dag' in R Stern and I Österdahl (eds), *Folkrätten i svensk rätt* (Liber 2012) 16–36

the Strasbourg court, Sweden eventually incorporated the ECHR into national law. The increasing domestic impact of IHRL limited the government's enthusiasm for ratifying new IHLR treaties. This section analyses the process of domestication of IHRL from the 1980s until the 2000s.

5.1. Sweden on trial in Strasbourg

In 1982, the ECtHR for the first time found Sweden to have violated its obligations under the Convention, in the case of *Sporrong and Lönnroth v Sweden*.[91] Initiated and sponsored by a construction industry interest organisation, which had sought out suitable litigants to challenge increasingly discretionary expropriation and zoning laws, the case concerned two property owners whose buildings in central Stockholm the city had put under an extended expropriation permit. The Court found that since the claimants could not have the permits time-limited, claim compensation for the economic damage they suffered, or appeal the city's decision, the state had violated their rights to peacefully enjoy their property and to a fair trial. Covering the case, mass media helped spread knowledge about the ECHR both among lawyers and the population at large,[92] and individual applications against Sweden increased rapidly (Figure 1).

The government, however, refused to comply with the judgment. At a press conference in Strasbourg in 1983, Prime Minister Olof Palme called the Court 'a playhouse', an expression the opposition exploited in public debate, and which thereby only helped raising public awareness of Sweden's failure to meet its ECHR obligations. The Minister of Justice declared that there was no reason to believe similar violations could occur again and that the judgment had '… no immediate consequences for our legislation'.[93] Spurred on by the government's defiance, the Commission admitted several other applications against Sweden, in which the Court again found violations (Figure 2). With mounting evidence that the Swedish legal system fell short of European standards, the government grudgingly introduced a temporary law minimally extending the right to administrative appeals.[94]

However, applications and judgments against Sweden also increased because the ECHR system had evolved. By the mid-1970s, most states in Western Europe had ratified the Convention, individual petition and the jurisdiction of the Court, and the original bench at Strasbourg gave way to a new generation of judges, including e.g. Pierre-Henri Teitgen, one of the Convention's founding fathers and a devout Euro-federalist.[95] Relaunching itself as a progressive force for human rights in Europe, the Court also developed its doctrine of dynamic interpretation: the Convention should be interpreted as a living instrument, in step with societal developments.[96] Particularly consequential for Sweden, a series of judgments had clarified that the 'civil rights and obligations' referred

[91] *Sporrong and Lönnroth v Sweden* App no 7151/75, 7152/75 (ECtHR, 23 September 1986).
[92] Sundberg, 'Volte face' (n 76) 394; O Wiklund, 'The Reception Process in Sweden and Norway' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 188.
[93] Sveriges riksdag, *Protokoll 1983/84:58*.
[94] Justitiedepartementet, *Om Europakonventionen och rätten till domstolsprövning i Sverige*. Prop 1987/88:69.
[95] Bates (n 40) 320, 377ff.
[96] Christoffersen and Madsen (n 3) 263.

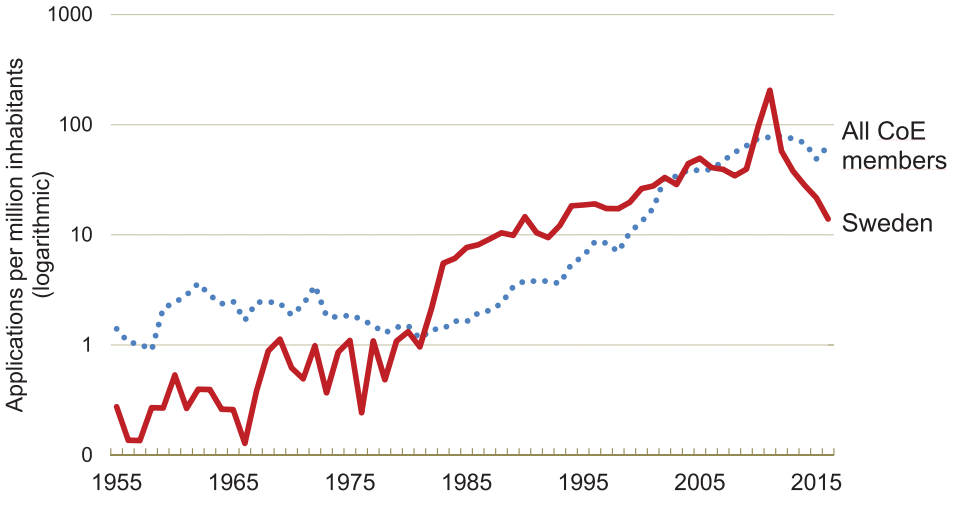

Figure 1. Individual applications under the ECHR against Sweden, 1955–2017. Data sources: ECHR Yearbooks, ECtHR Annual Reports. Population data: World Bank, OECD.

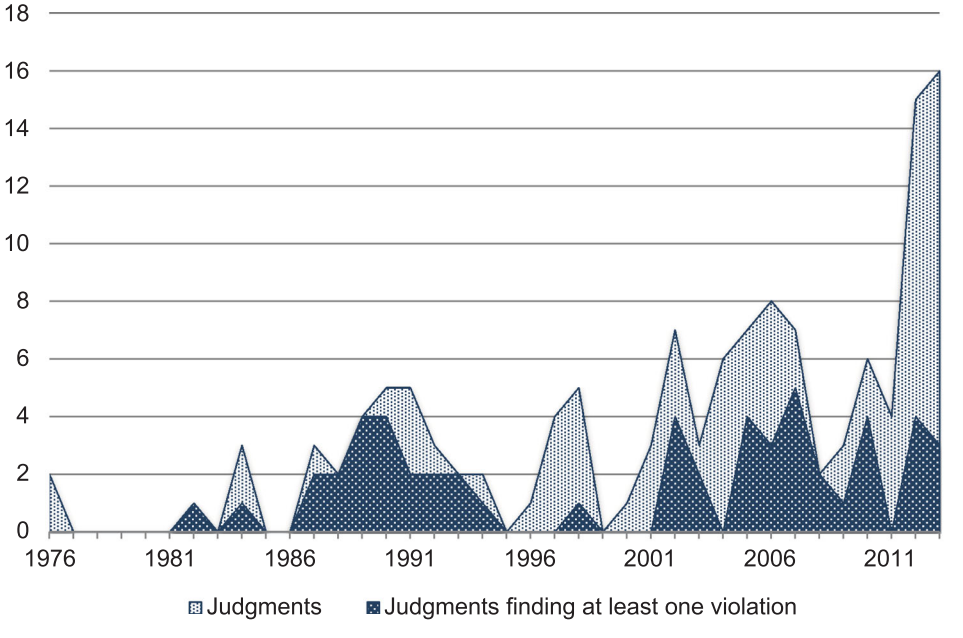

Figure 2. ECtHR judgments on Sweden, 1976–2013. Data source: HUDOC.

to in Article 6 concerned disputes not only between individuals, as Sweden and other states had assumed on ratification, but also between individuals and the state.[97]

[97]CH Ehrenkrona, 'Sverige och Europakonventionen – erfarenheter av mötet med en ny rättsordning' (1995) (22) EU-ret & Menneskeret 57.

Moreover, as southern and eastern Europe democratised, the Council of Europe evolved from a small club of like-minded states, with the Scandinavian states as a leading bloc, into an international regime promoting democracy and the rule of law.[98] The new members, having recently experienced authoritarian rule, saw international human rights regimes as an external guarantor of democracy and a door to EU accession. Globally, democratisation in the 1980s to 1990s similarly transformed the international human rights regime. Following the Vienna World Conference on Human Rights in 1993, the international human rights regime increasingly emphasised domestic implementation of human rights norms. For instance, the UN Office of the High Commissioner on Human Rights (OHCHR) began opening field offices around the world, sending Special Rapporteurs on country visits, and accrediting national human rights institutions.[99] Hence, the expanding authority of the regime also changed the stakes of participation.

5.2. Incorporating the ECHR

The 1990s saw a sea-change, as IHRL began to alter domestic legal and political systems in the Nordic region.[100] In the early 1990s, Sweden began a process of incorporating the ECHR into national law. Given that the Convention had just proven to be consequential, and not just a symbolic, external pledge, why did government respond by committing Sweden even more tightly to it?

Sweden decided to incorporate against a backdrop of legal inconsistencies, major geopolitical upheaval, economic recession and a shift in government. Dualism had allowed Sweden to implement HR treaties passively, by presuming harmony between international law obligations and national law. By the 1980s, however, courts and other authorities increasingly found themselves having to consider the ECHR a source of law. As litigants cited the ECHR, courts had to figure out what the harmony presumption meant in practice, and with the ECtHR increasingly finding against Sweden, the domestic status of the Convention needed clarification.

Furthermore, rapprochement with the European Community (EC) made the status of ECHR in domestic law even more inconsistent. When the EC formed the Single European Act in 1987, members of the European Free Trade Association (EFTA) risked facing new trade barriers, while the thawing Cold War conflict allowed them to reorient their security policies toward Europe.[101] Led by Sweden, EFTA states therefore sought to collaborate with the EC by establishing the European Economic Area (EEA). Eventually preparing also to join the EC, Sweden would be obliged already by the EEA Agreement to adopt the EC *acquis*. In a series of judgments, the European Court of Justice had ruled that the general principles of EC law included fundamental rights as recognised in the member states' constitutions and the treaties they had ratified, especially the ECHR,

[98] JWF Sundberg, 'Om Europakonventionen och språnget österut: Slutet på en epok?' (2003) 4/5 Tldskrift utgiven av Juridiska Föreningen i Finland 532.

[99] B Oomen, *Rights for Others: The Slow Home-Coming of Human Rights in the Netherlands* (Cambridge University Press 2013) 4.

[100] Christoffersen and Madsen (n 3).

[101] S Gstöhl, 'The Nordic Countries and the European Economic Area (EEA)' in L Miles (ed), *The European Union and the Nordic Countries* (Routledge 1996) 47–62; C Ingebritsen, *The Nordic States and European Unity* (Cornell University Press 1998).

and the 1992 Maastricht Treaty codified this practice as a treaty obligation. Thus, the question was not really whether or not to incorporate the ECHR, but whether incorporation should also extend to areas unregulated by EC law.

Yet the Social Democratic government held fast to the dualist policy of the 1970s and repeatedly dismissed Conservative motions on incorporation in the late 1980s. After the 1991 election, the new centre-right coalition appointed a parliamentary commission to consider incorporation within a broader reform of constitutional rights protection. Social Democrats strongly opposed the government's attempt to strengthen rights to property, negative freedom of association (specifically, the right not to be a member of a trade union) and judicial and administrative review, and even threatened to leave the commission late in the process.

Ultimately, though, the advantages of access to the Single Market, political influence in Brussels and legal coherence prevailed in a cross-partisan agreement on incorporation. Cautious to preserve parliamentary sovereignty, however, the commission emphasised that incorporation should not disrupt the balance between the legislator and the judiciary[102]: it would still be the legislator's responsibility to ensure, through continual adaptation, that national law met the requirements of the Convention. Moreover, the commission argued, incorporation might grant more rights cases their final treatment at national courts and authorities by enabling them to directly apply the Convention, reducing the risk of costly processes in Strasbourg.[103]

However, incorporation did not decisively settle the issue, since the ECHR was given a semi-constitutional status – superior to statutory law, but subordinate to constitutional law. Moreover, Sweden joined the EU in 1995, at a time when the EU began expanding its authority over human rights. Adding a layer of supreme European law to the Swedish legal order undermined both dualism and legal realism, as courts no longer could rely exclusively on extensive *travaux préparatoires* to interpret the will of the sovereign legislator, but increasingly needed to take into account international treaties and the case law of European courts, and engage in principled reasoning on the hierarchy of norms.[104]

In sum, incorporation was shaped by both domestic political contestation and external geopolitical events. For Conservatives, binding Sweden to the ECHR was part of broader constitutional efforts to constrain an expansionist state, whereas for Social Democrats, it represented the price to be paid for reorienting Sweden towards the European Community, which became both possible and necessary due to the geopolitical shift and economic downturn in the late 1980s.

5.3. Domesticating IHRL norms

For Swedish governments, the costs of complying with IHR commitments have continued to grow. The half-hearted incorporation delayed the ECHR's impact, but afterwards courts and the legislator successively developed legal remedies.[105] Importantly, through a series

[102]Justitiedepartementet, *Fri- och rättighetsfrågor. Del B. Inkorporering av Europakonventionen*. SOU 1993:40B, p 126.
[103]Ibid. 124.
[104]Wiklund (n 92) 180f.
[105]U Bernitz, 'Rättighetsskyddets genomslag i svensk rätt – konventionsrättsligt och unionsrättsligt' (2010) (4) Juridisk Tidskrift 821.

of judgments since 2003, the Supreme Court expanded public authorities' tort law liabilities for ECHR violations.[106] With expanding opportunities to mobilise rights claims in courts, an increasing range of civil society groups, representing diverse social causes, have adopted litigation strategies, including e.g. Sami groups claiming land rights, disabilities rights activists challenging differential treatment, pro-life groups mobilising for conscientious exemption for healthcare professionals, and groups litigating LGBT rights – with varying legal success, but often with considerable media coverage.

Government has also incurred rising compliance costs as the IHR regime has raised the bar for domestic implementation. Unwilling to admit any domestic flaws, the government presented Sweden's first National Human Rights Action Plan in 2002 mostly to signal its commitment as an international role model.[107] Increasingly, however, the responsibility for implementing human rights has diffused from ministries and parliament to involve numerous public authorities and regional and local municipalities. Furthermore, while international treaty bodies in their periodic reviews initially praised Sweden as a model for others to emulate, their Concluding Observations have become increasingly critical of Sweden's persistent failure to comply with important recommendations.[108]

Growing awareness that IHR treaties can entail substantial compliance costs has made government more cautious about expanding Sweden's IHRL commitments. While still priding itself on being a human rights pioneer, the government often assumes a reserved attitude to new IHR treaties. For instance, in the negotiations on optional protocols establishing complaints procedures to the CRC and International Covenant on Economic, Social and Cultural Rights, Sweden disputed the need for complaints mechanisms, given the conventions' vagueness and the risk of overlap with other mechanisms, and proposed qualifications limiting the procedures' remit.[109] The government has deferred ratifying these protocols, citing a 'wait and see' policy in order for the consequences of the mechanisms to clarify.[110] Furthermore, Sweden participated in drafting the International Labour Organization Convention 169 on Indigenous and Tribal Peoples (C169) and has promoted the rights of indigenous peoples elsewhere through foreign policy. Yet successive governments have chosen not to ratify C169.[111] On the view reigning in government and Parliament, strengthening Sami land rights risks disrupting forestry, mining and other vital industry interests,[112] as well as established hunting and fishing rights in northern Sweden.

The 2018 decision to incorporate the CRC may be the exception that confirms the rule: like the Conservatives, Social Democrats long resisted incorporation, arguing that the CRC's vague provisions would shift authority from elected branches to courts, as

[106]M Schultz, 'Skadeståndsrättens framtid' [2016] Svensk Juristtidning 111.
[107]E Abiri and P Johansson, 'Vem äger mänskliga rättigheter? Människorättsbaserad politik – för vem?' in G Gunner and A Mellbourn (eds), *Mänskliga rättigheter och samhällets skyldigheter* (Ordfront 2005) 113–30.
[108]Langford and others (n 3).
[109]C de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights' (2010) 32 (1) Hum Rts Q 144, 152 n 37; C de Albuquerque and M Langford, 'The Origins of the Optional Protocol' in *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 17–36, 30; M Langford and S Clark, 'A Complaints Procedure for the Convention on the Rights of the Child: Commentary on the Second Draft' (Norwegian Centre for Human Rights, Oslo 2011) p 8.
[110]e.g. Sveriges riksdag, *Interpellationsdebatt 2013/14:84*.
[111]e.g. Jordbruksdepartementet, *Samerna – ett ursprungsfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169*. SOU 1999:25
[112]cf Semb (n 3).

concluded by a parliamentary inquiry commission.[113] However, children's rights groups continued to lobby for incorporation and in 2011 the Social Democrats suddenly changed their stance. After the 2014 election, the Social Democrat–Green coalition pushed through incorporation, without resolving the complex conflicts with Swedish law the legal establishment warned about.[114]

6. Conclusion

This article has sought to explain how and why Sweden has participated in the international human rights regime since its founding in the late 1940s. Finding culturalist accounts of Swedish exceptionalism in previous literature insufficient to explain variance in state commitment to IHRL, I instead developed a rationalist approach focusing on how governments assess the sovereignty costs states incur by participating in evolving IHRL treaties, an assessment partly shaped by domestic political considerations.

Empirically, the article's longitudinal study of Sweden's commitments to the international human rights regime has suggested that Swedish governments have been reluctant to accept the sovereignty costs it entails, in contrast to what culturalist accounts of exceptionalism would expect. In the drafting of the ECHR, government sought to vest authority in the Committee of Ministers, ratified the Convention on the presumption it necessitated no revision of domestic laws and practices, and long deferred accepting the Court's jurisdiction. While Sweden geared up its (selective) international activism for human rights in the late 1960s and contributed to expanding the regime with new treaties, government and courts concurrently entrenched the doctrine of dualism to control the domestic effect of international law. By the 1980s, the government reacted with disdain at the first ECtHR judgments finding violations; however, following rapprochement with the European Community, a new centre-right government incorporated the ECHR in the mid-1990s. Since then, realising that IHRL commitments can entail significant compliance costs, not least by sparking mobilisation in civil society, governments have become more reluctant to ratify new treaties. In short, Sweden has often conditioned its activism for human rights on exempting itself from costly compliance.

The article has also raised issues for further research. Previous literature portrays Sweden as an outlier even among the allegedly exceptionalist Nordic states and one could corroborate this article's findings by comparing them to the Nordic neighbours. For instance, while social democracy has been influential in all Nordic states, the unparalleled dominance of the Swedish Social Democratic Party has structured the domestic politics of IHRL differently than in for example Denmark, where human rights has rather been politicised as a left-wing cause. Future research should seek to define the relevance of such differences in greater detail.

In conclusion, a rationalist approach seems better to account for Sweden's peculiar combination of activism and reluctance in the human rights area and it also reveals aspects of its exceptionalism that culturalist approaches fail to register. More generally, the article also demonstrates the value of assessing claims about value-determined

[113]Socialdepartementet, Barnets bästa i främsta rummet: FN:s konvention om barnets rättigheter förverkligas i Sverige. *SOU 1997:116*.
[114]RT Stern, 'Much Ado about Nothing? The Road to the Incorporation of the UN Convention on the Rights of the Child in Sweden' (2019) 27(2) Intl J Child Rts 266.

foreign policy exceptionality in a policy area where international commitments may have tangible domestic costs, rather than just expressive benefits. It should lead us to dispute the veracity of such claims, since Sweden seems to commit to IHR norms in anything but an exceptional way, but rather carefully evaluates the potential consequences down the road, uncertain and hard to predict as they are in an ever-changing international landscape.

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