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An Unlikely Rights Revolution: Legal Mobilization in Scandinavia Since the 1970s

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ABSTRACT

Why have civil society groups in Scandinavia increasingly turned to legal mobilization in recent decades? In Denmark, Norway, and Sweden, a legal-political culture based on parliamentary supremacy, deferential judiciaries, strong-state corporatism, and jurisprudential scepticism towards rights talk supposedly discourages groups in civil society from seeking societal change through litigation. Yet, in all three countries, diverse groups and organizations in civil society have increasingly adopted litigation strategies for a broad range of causes. In this paper, we seek to account for how and why this shift has occurred. Drawing on socio-legal mobilization theory, we compare Denmark, Norway, and Sweden across three episodes from the 1970s to today. Litigation has gradually moved from the political margins to the mainstream. Our findings suggest that while European law, domestic institutional reforms, and a proliferating human rights discourse have opened new ways for resourceful groups and entrepreneurial individuals to challenge the status quo, parliamentary and corporatist channels remain often viable and preferred alternatives for mainstream organizations. The paper thus contributes to the emerging literature on how civil society groups in Scandinavia employ litigation strategies by offering a comparative and historical assessment and contributes to knowledge about the factors that shape legal mobilization by civil society groups.

KEYWORDS

Civil society; corporatism; legal mobilization; strategic litigation; Scandinavia

1. Introduction

Why have civil society groups in Scandinavia increasingly turned to legal mobilization? Previous research suggests that Denmark, Norway, and Sweden provide an uncongenial environment for such organizations to pursue redress and social change through litigation. Among the factors that supposedly militate against a turn to courts are a political culture based on strong-state corporatism, a political-legal system premised on parliamentary sovereignty and judicial deference, and the predominance of jurisprudential philosophies dismissive of abstract rights talk.

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However, in recent decades, diverse groups in Scandinavian civil society have mobilized law for an array of causes. Notable cases include lawsuits on climate change; Sami struggles for Indigenous rights; legal action against discrimination of disabled persons, religious minorities, and LGBT persons; and challenges to the constitutionality of European Union (EU) treaty law. Thus, despite allegedly being at odds with Scandinavian politico-legal culture, legal strategies have moved from the margins to the mainstream, seemingly forming a key repertoire of contention for many groups in civil society. The region thus offers interesting possibilities for examining prevailing arguments on legal mobilization.

In this article, we seek to account for this shift. Comparing Denmark, Norway, and Sweden, we analyse how legal mobilization evolved from a marginal strategy in the 1970s to a more mainstream repertoire of contention today. We draw on socio-legal mobilization theory to assess how shifting legal and political opportunities, access to legal mobilization resources, and a changing rights consciousness contribute to this shift. Our findings suggest that while European law, domestic institutional reforms, and a proliferating human rights discourse have opened new modes for resourceful groups and entrepreneurial individuals to challenge the status quo, parliamentary and corporatist channels often remain viable alternatives for mainstream organisations.

The paper thus makes two key contributions. First, contributing to the emerging literature on how discrete Scandinavian civil society groups use legal strategies, we offer a novel comparative account of the evolution of legal mobilization across Scandinavia, allowing for the identification of broader patterns. Second, given that Scandinavian states may seem unlikely cases for such a development to occur, they enable us to advance theoretical knowledge about the factors that shape legal mobilization by civil society groups. Specifically, we argue that despite the systemic similarities of the Scandinavian states, the structural conditions that set different incentives for civil society legal mobilization across the three contexts suggest that legal mobilization may emerge differently and for different reasons among these small but strong states.

The paper is structured as follows. Section 2 reviews existing literature on Scandinavian politico-legal culture, while section 3 provides an analytical framework for examining legal mobilization. Next, we compare how legal mobilization evolved in three periods across the region. Section 4 analyses the emergent period in the 1970s and 1980s, when legal entrepreneurs on the political fringes adopted litigation tactics as part of their critique of the corporatist strong state. Section 5 explores its gradual expansion in the 1990s as well as the rising influence of European law. Section 6 analyses the increasing and diversifying use of litigation strategies by civil society groups in the new millennium. Section 7 employs our analytical framework to reflect on the overall patterns that emerge from our analysis.

2. An unlikely environment for legal mobilization?

Across the world, legal mobilization has become an important repertoire of contention for civil society groups. However, prevailing views in social science and legal scholarship suggest that multiple factors make Scandinavian legal-political culture infertile ground for legal mobilization.[1] First, the political constitutions of Scandinavian states are

[1]Malcolm Langford and Johan Karlsson Schaffer, 'The Nordic Human Rights Paradox: Moving Beyond Exceptionalism' (2015) University of Oslo Faculty of Law research paper no. 2013-25. For in-depth historical analyses, see Malcolm M

based on parliamentary supremacy and majority rule, and their judiciaries were historically reluctant to exercise or recognize their implicit judicial review powers across public law.[2] Furthermore, Nordic welfare states have provided citizens with broad entitlements to services and benefits, yet few justiciable rights.[3]

Second, the political cultures of Denmark, Norway, and Sweden are strongly corporatist, even if corporatism may have declined in recent decades.[4] Corporatism entails that select peak interest organizations participate in making and implementing public policy in processes based on compromise and consensus. This suggests that the interest groups included in corporatist arrangements would cultivate a 'culture of advocacy' that is disinclined to antagonize their government or other partners by filing lawsuits.[5]

Third, Scandinavian legal culture has been profoundly shaped by so-called Scandinavian legal realism—a pragmatic positivist legal philosophy which viewed talk of natural rights as metaphysical nonsense and jurists as engineers dispassionately operating the black letter of the law.[6] With generations of jurists trained in versions of that pragmatist doctrine, it seems that litigants' appeals to fundamental rights in court are unlikely to be taken seriously.[7]

In sum, institutions predominant in Scandinavian politico-legal culture would appear to discourage groups in civil society from employing legal mobilization strategies. Groups seeking to influence public policy may regard courts as less effective (or appropriate) arenas for pursuing their demands than political spaces.[8] In a comparative context, this politico-legal culture may seem to over-determine Scandinavian states as unlikely cases for a broader turn to legal mobilization—and yet, as we will show, groups in Scandinavian civil society have increasingly adopted litigation strategies. So what has changed in these societies to incentivize civil society groups to seek redress, policy reform, and social change through legal mobilization?

3. Legal opportunities, resources, and framing

Existing literature largely suggests that the increasing role of courts as political arenas is a result of the growing impact of European law on domestic legal-political systems driving the judicialization of politics in Scandinavia.[9] By incorporating the European Convention on Human Rights (ECHR) and other human rights treaties and deepening to varying

Feeley and Malcolm Langford (eds), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021).

[2]Anine Kierulf, *Judicial Review in Norway* (Cambridge University Press 2018); Ran Hirschl, 'The Nordic Counternarrative: Democracy, Human Development, and Judicial Review' (2011) 9 International Journal of Constitutional Law 449.

[3]Toomas Kotkas, 'The Short and Insignificant History of Social Rights Discourse in the Nordic Welfare States', *Social Rights in the Welfare State* (Routledge 2016).

[4]Peter Munk Christiansen, 'Still the Corporatist Darlings?' in Peter Nedergaard and Anders Wivel (eds), *The Routledge Handbook of Scandinavian Politics* (Routledge 2018).

[5]Lisa Vanhala, 'Legal Mobilization under Neo-Corporatist Governance: Environmental NGOs before the Conseil d'Etat in France, 1975–2010' (2016) 4 Journal of Law and Courts 103; Malin Arvidson and others, 'A Swedish Culture of Advocacy? Civil Society Organisations' Strategies for Political Influence' (2018) 55 Sociologisk Forskning.

[6]Johan Strang, 'Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law' (2018) 36 Nordic Journal of Human Rights 202. The influential doctrine of 'Scandinavian legal realism' was distinct from the homonymous academic legal research programme.

[7]Ola 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).

[8]Feeley and Langford (n 1).

[9]Hirschl (n 2).

degrees their integration in the European Union (EU) in the 1990s, the Scandinavian states profoundly transformed their legal-political systems and—as a not necessarily intended side-effect—opened up for legal mobilization.

Yet, while the impact of Europeanization can hardly be exaggerated, it's another matter to determine how this shift has changed things on the ground. For instance, the Europeanization of law has affected different groups in different ways. The same transformation might entail opportunities for some groups and threats for others, for example in relation to labour rights. Further, since entering national political cultures in the 1980s, international human rights norms have taken on different political meanings across the three states and over time. Modelling Europeanization as an exogenous process or judicialization as a redistribution of power from elected branches of government to the judiciary risks obscuring how the increasing use of courts and other legal channels for political purposes is driven by agents who have an interest in societal change and exploit the institutional and discursive openings available to them.

Thus, to account for the broader litigious turn across Scandinavia, we seek to shift attention from exogenous systemic shifts to the agents engaging in legal mobilization and their variegated contexts.[10] Legal mobilization entails that an agent purposively invokes a formal, institutional legal mechanism.[11] Groups often combine legal mobilization strategies with other action repertoires, such as protest, lobbying, advocacy, citizen initiatives, or civil disobedience; and successful litigation often depends on coordinating it with broader movement strategies.[12] Drawing on socio-legal mobilization theory, we expect that legal mobilization is shaped by the politico-legal opportunities facing civil society groups and organizations, the mobilization resources they can muster, and how they frame their grievances.

First, in terms of *opportunities*, groups mobilize law in a political and legal environment that sets constraints and openings for their action.[13] A group's decision to pursue legal mobilization is likely to be informed by institutional regimes governing access to legal and political arenas and by the contingent receptivity of the respective elites to its demands. Politico-legal opportunity is thus shaped by procedural and substantive legal rules which determine access to courts and what complaints groups can file, by judicial elites' willingness to hear groups' causes, and by groups' access to alternative modes of influencing policy-making, such as through corporatist or electoral channels.

Second, to exploit legal or political opportunities, groups must also have access to *mobilization resources*, such as finances, organizational networks, and legal

[10]Cf. Langford & Schaffer (n 1).

[11]Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 Law & Social Inquiry 166. We thus define legal mobilisation narrowly, excluding e.g., legal reform advocacy and discourse – cf. e.g., Malcolm Langford, 'Privatisation and the right to water' in Malcolm Langford and Anna Russell, *The human right to water: Theory, practice and prospects* (Cambridge University Press 2017).

[12]Sandra Botero and Daniel M Brinks, 'A Matter of Politics: The Impact of Courts in Social and Economic Rights Cases' in Malcolm Langford and Katherine Young (eds), *Oxford Handbook on Economic and Social Rights* (Oxford University Press 2023); Yoav Dotan, 'The Boundaries of Social Transformation through Litigation: Women's and LGBT Rights in Israel, 1970 – 2010' (2015) 48 Israel Law Review 3.

[13]Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 Journal of European Public Policy 238; Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 Law & Society Review 523; Gianluca De Fazio, 'Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States' (2012) 53 International Journal of Comparative Sociology 3.

expertise.[14] Litigation entails considerable costs and risks, so the propensity of a civil society group to pursue legal mobilization will likely depend on the resources it can employ for its cause. Actors must also be willing to sustain any direct and opportunity costs of legal mobilization, which may be material, reputational, or affective, such as public humiliation.[15] However, transformational litigation can occur in the absence of strong support structures if open and flexible rules of standing in courts have the same effect.[16]

Finally, turning to *motives*: to engage in legal mobilization, groups need to express their grievances in terms of violations of law that can be remedied through legal action.[17] Thus we can expect legal mobilization to reflect an evolving rights consciousness and framing of group demands in terms of legally protected fundamental rights. The Nordics are not immune to the broader global turn to the rights paradigm across the political spectrum that occurred from the 1970s, yet whether grievances attract both human rights and legal framings often depends on the relevant constellation of civil society actors and social discourse. Paradoxically, lawyer-dominated movements may either encourage greater rights consciousness or, if they are clearer about the concrete limitations of the approach, less.[18]

In this paper, we shift attention accordingly from mere top-down, systemic shifts to analyse how actors in the Scandinavian context have appropriated legal mobilization as a repertoire of contention. By comparing the three Scandinavian states through three episodes from the 1970s through the 2010s, with a focus on illustrative events and processes, we can identify patterns in the evolution of legal mobilization. We shall employ motives, means, and opportunity as an analytical framework for identifying factors that may have led more actors to legal mobilization in Scandinavia. Given the historical and comparative scope of our analysis, our empirical account mainly builds on secondary sources, including our own previous works.

4. 1970s–1980s: legal entrepreneurs on the fringes

The 1970s saw both the pinnacle of the social democratic welfare state project, so emblematic for Scandinavia, and its emerging crisis. The so-called Nordic model had come to include strong-state corporatism,[19] with tripartist collaboration among unions, employers and the government and umbrella interest organizations being involved in the making and implementation of public policy, and a welfare state based on the universalist provision of welfare services. Yet this was also a period of crises, recession, radicalization,

[14]Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Univ of Chicago Press 1998).

[15]Malcolm Langford, 'Revisiting the Theory of the Legal Complex' in Malcolm M Feeley and Malcolm Langford (eds), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021).

[16]Bruce M Wilson and Juan Carlos Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39 Comparative Political Studies 325.

[17]Holly J McCammon and Allison R McGrath, 'Litigating Change? Social Movements and the Court System' (2015) 9 Sociology Compass 128.

[18]Sandra R Levitsky, 'To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements' in Austin Sarat and Stuart A Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006); Thomas M Keck, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights' (2009) 43 Law & Society Review 151.

[19]Johannes Lindvall and Bo Rothstein, 'Sweden: The Fall of the Strong State' (2006) 29 Scandinavian Political Studies 47.

and polarization; the breakup of the social democratic quasi-hegemony paved the way for liberalization across many sectors in the 1980s. This was the context in which groups on the political fringes began mobilizing law as part of their challenge to a 'strong state' seen as increasingly stagnant.

This fringe was partly based on the critical law movement, which initiated several university-based legal aid and outreach activities and new pan-Scandinavian critical law journals.[20] These networks mainly involved legal academics but also some radical practitioners. While they debated whether using the bourgeois state's law and courts for progressive purposes was compatible with Marxist politics, they occasionally engaged in litigation—either to obtain a concrete outcome or to expose the system politically through a loss. For instance, in 1976, law professor Ole Krarup and radical communist lawyer Carl Madsen represented the self-proclaimed Free Community of Christiania in Copenhagen in a lawsuit against the state, aware that a loss in court was inevitable; media attention around the case helped the community create public sympathy for Christiania's existence.[21] While such groups were small and radical, in the 1980s, they would contribute to turning a critical human rights gaze toward the shortcomings of Scandinavian states.

Litigation strategies also featured early in emerging Sami ethnopolitical mobilization.[22] In Norway, a government plan to construct a hydropower dam on the Alta-Kautokeino waterway that would deluge the Sami village of Máze catalysed a broad resistance movement of Sami Indigenous people and environmentalists in the late 1970s. Engaging in hunger strikes outside parliament in Oslo and civil disobedience at the construction site, hundreds of activists were arrested and charged with rioting. Lawyers mobilized to represent protestors and challenge the dam's approval as inconsistent with international human rights law, but also mediated between the groups and parliament/police. The dam was eventually constructed, and while the Supreme Court rejected the affected Sami villages' appeal,[A] it acknowledged that international law was applicable and the case also prompted a comprehensive review of state policies toward the Sami, culminating in the Sami Act 1987 and Sami Parliament in 1989,[23] and helped establish networks between activists, lawyers, and legal academics.[24] Simultaneously, in the Taxed Mountains Case (*Skattefjällsmålet*)—the most extensive case ever brought before the Supreme Court of Sweden—several Sami villages filed a lawsuit in 1966 to claim ownership of lands the state had confiscated in the nineteenth century. The Supreme Court found that the disputed areas belonged to the state, yet the case set important precedents on Sami Indigenous rights that would be revisited in several later lawsuits.[B]

[20]Mikael Rask Madsen, 'Denmark: Between the Law-State and Welfare State' in Malcolm M Feeley and Malcolm Langford (eds), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021).

[21]Mikael Rask Madsen, *L'Emergence d'un champ des droits de l'homme dans les pays européens: enjeux professionnels et stratégies d'Etat au carrefour du droit et de la politique (France, Grande-Bretagne et pays scandinaves, 1945–2000)*, PhD dissertation (Paris: l'École des hautes études en sciences sociales, 2005).

[22]Semb, 'How Norms Affect Policy — The Case of Sami Policy in Norway' (2001) 8 International Journal on Minority and Group Rights 177; Henry Minde, 'Assimilation of the Sami – Implementation and Consequences' (2003) 20 Acta Borealia 121.

[23]Sunniva Olaussen, 'Rettssikkerhet for den samiske befolkningen' (UiT The Arctic University of Norway 2022) <https://munin.uit.no/handle/10037/27148> accessed 25 January 2023.

[24]Malcolm Langford, 'Norwegian Lawyers and Political Mobilization: 1623-2015' in Malcolm M Feeley and Malcolm Langford (eds), *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021).

In Sweden, the fringe also featured actors who challenged the expansionist social democratic state from a liberal-conservative standpoint. In the early 1970s, the weak protection of civil rights and liberties in the new constitution prompted resistance by a makeshift coalition of the liberal press, conservative legal elites, and radical jurists and intellectuals.[25] Advocacy petered out once a parliamentary compromise delegated the Bill of Rights controversy to a series of public inquiry commissions. In early attempts to challenge labour market corporatism, the European Court of Human Rights (ECtHR) tried two cases against Sweden concerning freedom of association for trade unions and their members, finding no violations.[C]

A breakthrough for litigation strategies came in 1982 when the ECtHR ruled in *Sporrong & Lönnroth v. Sweden* that the state had violated rights to peaceful enjoyment of property and a fair trial.[D] A construction industry interest organization initiated the case to challenge discretionary expropriation laws. Finding domestic legal opportunities for asserting individual property rights to be limited, the legal team opted for an ECHR complaint and recruited suitable litigants – two property owners in Stockholm whose buildings the government had subjected to long-term expropriation permits and construction prohibitions.[26] While the government refused to comply with the judgment, the number of ECHR applications against Sweden doubled every year, which led the Strasbourg organs to try other similar complaints against Sweden, again finding violations. To avoid further embarrassing defeats, the government passed a temporary law extending the right to judicial review of administrative decisions in 1987.[27]

The *Sporrong & Lönnroth* case came as centre-right political elites and business interest organizations in Sweden increasingly opted out of corporatist arrangements to pursue fundamental systemic change. Tens of thousands demonstrated against the so-called Wage Earners' Funds (*Löntagarfonderna*), a scheme for gradually socializing private enterprise. In 1984, the Confederation of Small Businesses initiated a lawsuit on the constitutionality of the scheme while the Employer's Confederation filed an ECHR complaint; the litigation failed but garnered much publicity.[E] The enterprise-friendly centre-right parties could also graft lawsuits over apparent rights violations into their narrative of opposing the high-handedness of the social democratic government; in public discourse, the ECtHR was seen as a panacea to any and all perceived or real abuses of power.[28] By the late 1980s, the two Swedish supreme courts also 'gradually came to consider the ECHR as an important source of interpretation and inspiration'.[29] By going to Strasbourg, litigants had forced legal, judicial, and political elites to reconsider the ECHR's status in domestic law.

In Norway, the *Sporrong & Lönnroth* case had a domestic parallel in the *Kløfta* case, where landowners sued to challenge a controversial 1973 law on expropriation compensation.[F] In its 1976 landmark judgment, the Supreme Court asserted not only constitutional

[25]Karl-Göran Algotsson, *Medborgarrätten och regeringsformen: Debatten om grundläggande fri- och rättigheter i regeringsformen under 1970-talet* (Norstedt 1987).
[26]Ulf Brunfelter, 'Historien kring processen' in Jacob WF Sundberg (ed), *Sporrong-Lönnroth: En handbok* (Institutet för offentlig och internationell rätt 1985).
[27]Johan Karlsson Schaffer, 'The Self-Exempting Activist: Sweden and the International Human Rights Regime' (2020) 38 Nordic Journal of Human Rights 40.
[28]Johan Karlsson Schaffer, 'Why Incorporate? The Domestic Politics of Human Rights Commitment in Scandinavia' (26 May 2022) <https://papers.ssrn.com/abstract=4120430> accessed 11 January 2023.
[29]Joakim Nergelius, 'The Nordic States and the European Convention on Human Rights' in Rainer Arnold (ed), *The Convergence of the Fundamental Rights Protection in Europe* (Springer Netherlands 2016).

civil rights for ordinary citizens, but also its own judicial review powers, overturning a half-century-old practice of judicial deference to parliament.[30] Moreover, EHCR litigation began making a mark as lawyers in Norway started experimenting with references to the ECHR: between 1980 and 1992, they cited Strasbourg jurisprudence in 47 cases before the Supreme Court of Norway and sent approximately 100 cases to the European Commission on Human Rights (ECmHR),[31] although both strategies initially had meagre success. Few of these cases would qualify as strategic litigation, but they familiarized the legal community with the ECHR and cemented the ECHR in domestic legal opportunity structures. A series of cases in the Supreme Court successively clarified that domestic law must be interpreted in compliance with Norway's international law obligations, especially the ECHR.[32G]

The most spectacular use of legal mobilization in Norway in this period was by conscientious objectors to military and civilian service.[33] Refusal to serve entailed 16-month imprisonment without parole. In 1981, pacifists in Norway and Sweden founded the Campaign Against Military Service, exploiting almost every possible repertoire of contention and creating 'dilemma actions' for the authorities.[34] The campaign included public advocacy, hunger strikes in prison, breaking *into* prison to sit in solidarity with imprisoned colleagues, and legal action. While the ECmHR declared the movement's complaint inadmissible,[H] the holding of a full oral hearing demanded extensive engagement by the Justice Ministry and attracted much media attention.[35] Moreover, activists creatively exploited judicial spaces, including burning the conscription book in court and, in one case, successfully impersonating the prosecutor (absent due to the routine nature of the cases). These acts were much publicized, and a re-trial was required in the latter case. While all legal actions were ultimately unsuccessful, they generated media attention and prompted legal change.[36]

In Denmark in the mid-1980s, legal activists and some politicians with an interest in human rights successfully lobbied for and eventually helped establish a national human rights centre: the Danish Centre of Human Rights. Initiated through a conference involving law professors, government officials, legal professionals, and civil society organizations,[37] the creation of the Centre came out of a convergence of several interests. The foreign ministry was interested in developing human rights expertise for Danish foreign policy, but the Centre was also mandated to oversee human rights *in* Denmark (unlike the similar but smaller centres established in Norway and Sweden at the time). A state-funded monitoring body thereby became the primary producer of human rights activism in the country, pre-empting the kinds of civil society legal mobilization

[30]Anine Kierulf, *Judicial Review in Norway* (Cambridge University Press 2018) ch 5.
[31]Harald Espeli, Hans E Næss and Harald Rinde, *Våpendrager og veiviser: Advokatenes historie i Norge* (Universitetsforlaget 2008) 349.
[32]Erik Møse, 'Den internasjonale rettens innflytelse i Norge: EMK og andre menneskerettskonvensjoner' in Tore Schei, Jens Edvin A Skoghøy and Toril M Øie (eds), *Lov Sannhet Rett. Norges Høyesterett 200 år* (Universitetsforlaget 2015).
[33]Majken Jul Sørensen, 'Kreative aktører i det rettslige spill – et rettssosiologisk perspektiv på Kampanjen Mot Verneplikt' (2016) 24 Sosiologisk tidsskrift 225.
[34]Majken Jul Sørensen and Brian Martin, 'The Dilemma Action: Analysis of an Activist Technique' (2014) 39 Peace & Change 73, 83–87.
[35]Sørensen (n 33).
[36]ibid.
[37]Preben Søegaard Hansen and Lars Adam Rehof (eds), *Det danske menneskerettigheds-projekt* (Dansk Røde Kors 1986). See also Madsen (n 21)

observed in the other countries. The Centre also advocated for incorporating the ECHR into domestic law. Some of the Centre's early figures came from critical law environments, but its state-sponsored human rights activism, even when critical of the Danish state, was different from the radicalism of the 1970s.

In 1989 the ECtHR found Denmark in violation of the Convention for the first time: in *Hauschildt v. Denmark*, a bullion dealer investigated for tax fraud had been detained on remand for more than four years during the trial processes, and the judge who had decided on his detention also presided over the trial.[I] Concurrently, the Supreme Court ruled that national courts and authorities were obliged to base their interpretation of Danish law on the ECHR and the case law of the ECtHR—pre-empting a public inquiry commission and the government's bill on incorporation.[38]

Moreover, the critique of the law of the 1970s had evolved to include a critique of the European Communities (EC) as a capitalist undertaking undermining social justice and welfare. A major social movement of the time, the campaign against the EC employed legal strategies on several occasions. Before Denmark's accession in 1973, EC sceptics had tried to get the Supreme Court to rule that Denmark could only accede through a constitutional amendment; the Court dismissed the case on the grounds that there is no access to ex-ante review in Denmark.[J] Immediately after accession, they tried again, but the SC refused the case, finding that the claimants lacked locus standi as they did not have a sufficiently concrete and immediate interest in a ruling.[K] (The question of standing had also been a key issue in the Christiania case.) Two decades would pass before the Supreme Court, in a landmark ruling, allowed 'the Europe question' to go to court.

To sum up, legal mobilization strategies were often introduced in Scandinavia by groups on the political fringes, including radical academic lawyers in Denmark and Norway and conservative elites in Sweden. In both instances legal strategies were part of an attempt to challenge and critique the 'strong state' project. Groups and organizations well-integrated in and content with corporatist arrangements often remained sceptical about enhancing opportunities for legal mobilization.[39]

5. 1990s: legal mobilization through European law

In the 1990s, Denmark, Sweden, and Norway incorporated the ECHR into domestic law.[40] This did not expand opportunities for legal rights mobilization in the national legal system immediately or irrevocably, however, for the incorporation acts gave the ECHR an unclear semi-constitutional status, cautioned courts to practice self-restraint in applying the ECHR, and neglected to create any domestic legal remedies to give the new rights effect.[41] Scandinavia simultaneously became more integrated in the European

[38] Justitsministeriet, 'Den Europæiske menneskerettighedskonvention og dansk ret' (Statens informationstjeneste 1991) Betænkning 1220/1991.

[39] For instance, Swedish trade unions and employers' organizations alike opposed legislating against discrimination in the 1970s and 1980s. Laura Carlson, 'Access to Justice in Sweden from a Comparative Perspective' in Barbara Havelková and Mathias Möschel (eds), *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press 2019); Reza Banakar, 'When Do Rights Matter? A Case Study of the Right to Equal Treatment in Sweden' in Simon Halliday and Patrick Schmitt (eds), *Human rights brought home* (Social Science Research Network 2004).

[40] Schaffer (n 28).

[41] Jonas Christoffersen and Mikael Rask Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights' (2011) 80 Nordic Journal of International Law 257; Schaffer (n 27).

Community: Denmark had been a member since 1973, while the 1992 Agreement on the European Economic Area (EEA) brought Sweden and Norway under the umbrella of EC law, and Sweden (but not Norway) joined the EU in 1995. Integration into the EU legal order meant both new opportunities for legal mobilization through the European Court of Justice and EFTA Court, respectively, and an evolving additional source of legal rights, especially in the area of anti-discrimination.

Across the Scandinavian states, the numbers of individual complaints under the ECHR continued to grow, and the ECtHR gradually delivered more judgments finding violations. In 1990, the Court ruled against Norway for the first time, finding the state had violated the right to a fair trial when it delayed holding review proceedings for the applicant's unlawful detention claim.[L] Three more judgments then found convention violations, the most important of which, confirming that Norwegian press freedom legislation failed to conform to the right to free expression in the ECHR, contributed to constitutional reform.[M] While the Norwegian government dragged its feet about incorporating the ECHR throughout the 1990s, litigants cited the ECHR before courts, and the Supreme Court was especially active in applying it to criminal procedure.[42]

In Denmark, following the first surprise of the *Hauschildt* judgment, the gates seemed to open, and the media reported several losses in Strasbourg. During that period, however, the cases going to Strasbourg were not marked by strategic litigation but rather by individuals seeking to rectify flaws in the justice system or address specific issues, for example, freedom of expression. Famously, journalist Jens Olaf Jersild won a 1994 case that established that freedom of expression was effectively governed by the ECHR rather than the Danish constitution.[N] Other cases concerned lengthy proceedings,[O] but they never suggested that Denmark was especially challenged by Strasbourg. Since only a few people were involved, ECtHR litigation remained somewhat exotic. National courts welcomed incorporation, however, and so ECHR arguments became increasingly common within them.

In the 1990s, Danish Eurosceptics took the government to court again. In a 1992 referendum, a slim majority rejected the Maastricht Treaty, prompting political elites to negotiate the Edinburgh Agreement, a watered-down version of the treaty that was subsequently approved in a new referendum. In 1993, some of the same jurists who had been involved in the 1970s EC lawsuits helped twelve citizens in a lawsuit on the transfer of sovereignty under the Maastricht Treaty. Now, the Supreme Court found that EU law so profoundly affected the lives of ordinary citizens that the conditions for locus standi were met.[P] The litigants thus gained the capacity to challenge the constitutional relationship between the Danish Accession Act and EU law. As in the Christiania case 25 years prior, they ultimately lost but created publicity and access for future public interest litigation.[Q]

The European Court of Justice also offered new options for Danish litigants through the preliminary reference procedure. Just as profiled ECtHR cases of the period involved resourceful litigants like the media, it was a trade union (Handels- og Kontorfunktionærernes Forbund, or HK) that started using EU law for their political ends. In two key cases from the period, HK (assisted by other organizations in the latter case) sought to achieve equal pay for men and women using EU anti-discrimination law.[R] While HK had

[42]Wiklund (n 7) 199.

significant wins using this avenue, they were met with 'muted enthusiasm' from the corporatist establishment.[43] This suggests that strategic litigation using EU law clashed with traditional negotiated solutions in the labour market.

In Sweden, litigants continued using the ECHR to challenge corporatist arrangements. One case concerned whether special courts with judicial panels composed of interest-organization representatives could be considered impartial, independent tribunals in the sense of Article 6.[S] With the *Gustafsson* case—concerning a restaurateur refusing to sign a collective agreement for his employees—questions about the Swedish labour market model were brought to a head.[T] Concerned by how the case might disrupt the Swedish collective bargaining system, the National Confederation of Trade Unions (*Landsorganisationen*, LO) demanded that Sweden denounce the ECHR and re-ratify with reservations on Article 11. While the ECtHR's final judgment in the case affirmed the trade union's position, firms would later use European law again to challenge Swedish rules on collective bargaining and industrial action.[U]

Besides European law, some groups exploited legal opportunities of a purely domestic origin.[44] In Sweden, for instance, individuals and groups in civil society filed numerous administrative appeals on social rights from the late 1980s to the mid-1990s. Between 1986 and 1990, administrative courts decided on around 900 appeals on special services for persons with intellectual disabilities, overturning municipalities' decisions in two-thirds of the cases[45]—a legal action campaign orchestrated by the National Association for People with Intellectual Disability. Moreover, in the early 1990s, the annual number of appeals under the Social Services Act quintupled, partly because the economic recession made more people dependent on social services. Administrative courts often overruled decisions by municipal authorities. As municipal bodies sometimes refused to comply with court judgments, local politicians were fined for misconduct and contempt of court. Finally, various pensioners' organizations filed a series of strategic lawsuits to challenge pension cuts agreed by trade unions and employers as part of a 1992 deal to tackle the economic crisis. Winning most of these parallel lawsuits, pensioners' organizations could extract retroactive pension raises for their members costing employers billions of Swedish kronor.[46]

In Norway, too, a disability rights organization helped secure a landmark ruling on social rights in administrative law. In *Fusa*, the Supreme Court decided that a municipality's discretion to provide health and social services—in this case, to a woman with a disability—was limited by an implied requirement to provide a certain or acceptable minimum.[V] Failure to do so would be manifestly unreasonable, essentially being discriminatory or arbitrary.[47] The judgment altered social welfare law[48] and partly resulted from legal mobilization: the Norwegian Association of the Disabled had supported the

[43]Jeffrey Miller, 'Explaining Paradigm Shifts in Danish Anti-Discrimination Law' (2019) 26 Maastricht Journal of European and Comparative Law 540.
[44]Based on Johan Karlsson Schaffer, 'Rättvisans entreprenörer: Mobilisering för tillgång till rättvisa i civilsamhället' in Anna Wallerman Ghavanini and Sebastian Wejedal (eds), *Access to justice i Skandinavien* (Santérus Academic Press 2022) 370-371.
[45]A Hollander, 'Rights to Special Services for People with Developmental Disabilities in Sweden: The Risks and Benefits of a Legislative Approach' (1993) 2 Scandinavian Journal of Social Welfare 63.
[46]Schaffer (n 44).
[47]Tor-Inge Harbo, 'Social Rights in Norway and Scandinavia', *Diversity of social rights in Europe(s): Rights of the poor, poor rights* (European University Institute 2010).
[48]Asbjørn Kjønstad, 'Rettsskapende virksomhet, Velferdstjenester og pasientrettigheter' (2004) 43 Lov og Rett 385.

case from its instigation and was granted leave to litigate the appeal after the applicant passed away.[49]

Throughout the 1990s, legal mobilization remained a marginal repertoire of contention, however. European rights law continued to alter opportunities for litigation, and courts signalled increasing attention to principled issues, yet the half-hearted incorporation of the ECHR limited its effectiveness as a political strategy. Select civil society groups and interest organizations employed or supported litigation strategies, but the corporatist establishment and broad segments of civil society remained sceptical to adversarial legalism—a pattern that would partly change in the subsequent phase.

6. 2000s–2010s: the mainstreaming of legal mobilization

After the turn of the millennium, legal mobilization by civil society groups increased, diversified, and evolved in different directions in Scandinavia. In Sweden and Norway, heterogeneous civil society groups engaged in strategic litigation on a variety of causes. Disparate special interest groups—such as corporations, disability activists, religious minorities, and environmentalists—launched high-profile lawsuits, while a set of organizations developed public interest litigation as part of their mission to protect the rule of law, legal aid, and human rights. In Denmark, continuity combined with innovation; well-oiled organizations like trade unions kept pushing their agendas on equality via EU law, while newly founded think tanks, notably Justitia, also brought a renewed focus on the rule of law issues which fed into a growing concern with the performance of the legal system. In all three countries, increasingly outspoken associations of legal professionals sought to attract attention to basic rule of law issues.

In Norway, the Bar Association became increasingly activist. While it had sought to avoid politicization in the 1970s, its petitioning of the government to incorporate the ECHR in 1989 signalled a first step towards a more political role; it began establishing itself as a public service expert organ on the rule of law issues, for instance through numerous legislative hearing responses and press releases.[50] In the 2010s, the Bar Association also engaged in coordinated strategic litigation. Between 2007 and 2014, its migration law committee analysed 1,755 rejections of asylum applications and selected 74 cases for judicial review under administrative law. Handled by the Association's members, 70 per cent of these appeals were successful.

Following the asylum campaign, the Bar Association led litigation against solitary confinement.[51] The criminal defence group at the Bar Association, collaborating with academics and lawyers in individual cases, successfully challenged expansive solitary confinement practices in police detention on the basis of the right to privacy in the ECHR,[W] obtained a Supreme Court ruling that solitary confinement on remand should entail a reduced term of imprisonment,[X] and negotiated a settlement of a case with the prison authorities, in which they acknowledged that its comprehensive use against a female prisoner amounted to torture and agreed to let her speak at the subsequent annual prisons conference.[52]

[49]See also discussion in Thomas Mathiesen, *Retten i samfunnet: En innføring i rettssosiologi* (Pax 2001), 165.
[50]Langford (n 24).
[51]Kjersti Lohne and Marte Rua, 'Rettspolitisk mobilisering og strategisk sakførsel mot isolasjon i norske fengsler' (2021) 108 Nordisk Tidsskrift for Kriminalvidenskab 118.
[52]ibid 128.

Beyond the Bar Association, other groups have pursued strategic litigation on key issues. This has included, for instance, a test case seeking compensation for transgender people who were required to undergo sterilization before changing gender until 2016,[Y] given that Norway (unlike Sweden) had not established a legislative mechanism.[53] The Church City Mission, coordinating with a network of organizations and academics, strategically litigated select cases for Eastern European Roma arrested for begging-related and other offences—winning a notable case in which the Supreme Court found that deportation for two minor offences was inconsistent with the Migration Act.[Z] Christian groups also supported the litigation of a Catholic doctor fired for refusing to implant contraceptive intrauterine devices, where the Supreme Court eventually invalidated the dismissal.[AA] In a notable case of legal action through civil disobedience, activist Arne Viste employed rejected asylum seekers and encouraged the state to prosecute him, claiming that they had the constitutional right to work.[54] Viste lost, but the case generated significant attention for the plight of rejected asylum seekers who could not return to their home states.[BB]

The corporate sector and trade unions have also litigated to challenge public policies. Shipowners challenged the imposition of additional taxes in their industry of NOK 21 billion—with a 6–5 majority deciding that societal interests were not sufficiently compelling to justify the retroactive measure.[55] A Norwegian seamen's union challenged an age limit of 62 years in the maritime industry (which also adversely affected pension rights) in a 2011 complaint to the European Committee on Social Rights,[CC] after the Supreme Court had affirmed the limit was in line with the ECHR, which does not include a right to work.[DD] However, the committee found no grounds for the differential treatment and the Norwegian government soon complied by amending legislation.

In Sweden, a heterogeneous civil society support structure for legal mobilization emerged in the 2000s.[56] It included a network of local anti-discrimination bureaux, the public interest law firm Centrum för rättvisa (CFR, Centre for Justice) and the Swedish Helsinki Committee/Civil Rights Defenders (CRD), but also legal aid initiatives and interest organizations pursuing strategic litigation. Firstly, CFR was founded in 2002 by Gunnar Strömmer, a lawyer and former leader of the Conservative Youth, who had been inspired by his internship at a US libertarian public interest law firm to exploit the expanded opportunities for litigation opened when Sweden joined the EU and incorporated the ECHR. Organized as a fundraising foundation, CFR would cover the legal costs of its clients. It also engaged in public debate and organized training programmes for law students. In its first two decades, CFR pursued more than 250 cases against public authorities, winning 20 in the highest instances. Among these lawsuits, a prominent example is the case of Blake Petterson, who had been deprived of his citizenship—in violation of an absolute constitutional right. Represented by CFR, Petterson won the case in

[53]Daniela Alaattinoğlu and Ruth Rubio-Marín, 'Redress for Involuntarily Sterilised Trans People in Sweden against Evolving Human Rights Standards: A Critical Appraisal' (2019) 19 Human Rights Law Review 705.

[54]Hanna Buer Haddeland, '"Victims Not Wrongdoers": The Legal Consciousness of Rejected Asylum Seekers in Norway' (2021) 48 Journal of Law and Society 645.

[55]Gunnar Grendstad, William R Shaffer and Eric N Waltenburg, 'When Justices Disagree. The Influence of Ideology and Geography on Economic Voting on the Norwegian Supreme Court' (2011) 34 Retfærd: Nordic Journal of Law and Justice; Benedikte Moltumyr Høgberg, 'Grunnloven § 97 etter plenumsdommen i Rt. 2010 s. 143 (rederiskattesaken)' (2011) 123 Tidsskrift for Rettsvitenskap 694.

[56]This paragraph and the next three draw on Schaffer (n 44) 371–380.

the Supreme Court, in a landmark judgment awarding an individual compensation for violation of a constitutional right for the first time.[EE]

Secondly, in 2009, the Swedish Helsinki Committee, which had supported rights activism in Eastern Europe and monitored the rule of law in Sweden since 1982, changed its name to Civil Rights Defenders, adopted a global focus, and expanded its capacity for legal action in Sweden. A much-publicized case concerned the Skåne Police Authority's illegal register of 4700 persons of Roma ethnicity. CRD represented eleven selected persons in the register in suing the state for ethnic profiling, seeking redress and putting the issue of ethnic discrimination on the agenda. In 2017, finding the register to violate the Policing Data Act and the ECHR,[FF] an appellate court awarded each registered person SEK 30,000, totalling the largest reparation ever paid by the state. CRD's legal mobilization has also included causes such as rendition flights, police brutality, conditions in detention, and hate speech, often using low-cost appeals to supervisory authorities rather than court litigation.

Thirdly, several local anti-discrimination bureaus (ADBs) emerged as grassroots cooperatives among organizations with stakes in discrimination. Increasingly, policymakers saw the ADBs as essential to implementing EU anti-discrimination directives, complementing centralized ombudsman institutions. Government funding and regulation transformed the ADBs into legal aid organizations, and the new comprehensive Antidiscrimination Act (2009) gave NGOs standing to represent individuals. The ADBs engaged in several lawsuits in the 2010s. For instance, a lawyer at the ADB in Uppsala successfully litigated in an administrative court to repeal the regulation requiring the sterilization of persons seeking gender reassignment.[GG] Yet despite increasing public funding, the ADBs—in 2019, there were 18, serving about 80 percent of Swedish municipalities—had a difficult mandate, not least since the limited remedies available in the Anti-Discrimination Act restricted opportunities for seeking redress and policy change through litigation.

Diverse groups and organizations adopted legal mobilization strategies concurrently. For instance, in 2015, the Independent Living Institute initiated a project to enhance the movement's legal capabilities to assist its members against discrimination. Collaborating with disability organizations and ADBs, the project litigated to, inter alia, ensure access to public transport and spaces, secure rights for pupils with dyslexia to use aid tools when taking school tests, and challenge discrimination in employment. Likewise, LGBT groups supported a series of legal actions on transgender rights and discrimination against same-sex couples. Other new actors included, for instance, Scandinavian Human Rights Lawyers, a Christian law firm whose most profiled case concerned two midwives denied employment for refusing to participate in abortion procedures, a hotly debated case that ended with a loss in the Labour Court (the ECtHR later dismissed their complaint as manifestly ill-founded[HH]). Progressive or left-leaning groups also began employing and advocating legal mobilization strategies, such as Centre for Social Rights (Centrum för sociala rättigheter), which sought to halt the eviction of a Roma migrant camp in Malmö through several administrative appeals.

In both Norway and Sweden, environmentalist groups turned to legal mobilization. In Norway's much publicized 'Climate Lawsuit,' Greenpeace and the environmental organization Nature & Youth sued the state, claiming that oil exploration plans in the Barents Sea violate constitutional rights to a healthy environment and Norway's international

treaty obligations. While the claimants lost the case in the Supreme Court in 2021,[II] the lawsuit brought, at least, massive media attention to the moral tension between Norway's ambitious climate policies and its reliance on petrol extraction. In Sweden, environmentalist organizations have exploited legal strategies against extractive industries.[57] In the recent so-called *Aurora* case, over 600 young people filed a crowdfunded class action against the Swedish state, claiming its climate change mitigation policies violate their ECHR rights.[JJ]

Furthermore, Sami groups continued their legal struggles for Indigenous rights and recognition. Sami legal mobilization has resulted in some landmark judgments expanding Indigenous rights to land and culture, yet these also reflected deep conflicts within Sami communities and between Sami groups and the broader society. For instance, after the Swedish Supreme Court's 2020 ruling that transferred rights to administer hunting and fishing rights from the state to Girjas Sami reindeer-herding community,[KK] some non-reindeer-owning Sami opposed the outcome, and Sami people experienced an outburst of hate speech and harassment.

In Denmark, the Danish Centre for Human Rights, by this time the centre of gravity for Danish human rights activism, began engaging in litigation in the 2000s. With increasing contestation over migration, it found itself in the middle of a political storm due to its outspoken way of monitoring practices in Denmark, a legacy of its first two directors' background in critical law and refugee law. In 2001, when a liberal-conservative minority formed a government, the coalition secured the support of the far right by offering to downsize the Centre, prompting critique from the UN High Commissioner for Human Rights. Restructured as the Danish Institute for Human Rights, operations continued as did its director, but the clash marked the beginning of a politicization of human rights, as a growing far-right minority pushed for challenging international human rights conventions.[58] When a new director took office in 2008, the Institute started investing seriously in litigation. One key case in which the Institute involved itself concerned voting rights for persons deprived of their legal capacity, which the claimants lost at the Supreme Court and later at the ECtHR.[LL] Nevertheless, having possibly been inspired by the logic of the critical law movement, the case created attention that helped in the push for legal reform.

Groups also expanded mobilization against and with EU law. Eurosceptics brought Denmark's membership of the EU to court again to challenge the ratification of the Lisbon Treaty. Launched by a mixed group of citizens, entertainers, and politicians critical of the EU, the complaint argued that the Danish government had ratified the treaty without using the proper constitutional procedure for delegating sovereignty. Following its 1996 ruling on locus standi, the Supreme Court granted the citizens access to hear the case in Court.[MM] In its ruling on the merits of the case, it hardened its stance on EU law, clarifying that the Court is ready ultra vires to review decisions made by the EU, if any such decision 'raises doubts'.[NN]

[57]Daniel Fjellborg, Karin Beland Lindahl and Anna Zachrisson, 'What to Do When the Mining Company Comes to Town? Mapping Actions of Anti-Extraction Movements in Sweden, 2009–2019' (2022) 75 Resources Policy 102514; Anshelm J, Haikola S and Wallsten B, 'Politicizing Environmental Governance – A Case Study of Heterogeneous Alliances and Juridical Struggles around the Ojnare Forest, Sweden' (2018) 91 Geoforum 206

[58]Madsen (n 21). This stance was to continuously influence Danish politics. See Mikael Rask Madsen, 'Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights' (2020) 22 The British Journal of Politics and International Relations 728.

In several cases, litigants fought over the applicability of EU anti-discrimination law in Denmark. The trade union HK, which had sued to secure gender-equal pay, now filed a stream of complaints to the Danish Board of Equal Treatment concerning discrimination against disabled workers. Eventually, HK again successfully used the preliminary reference procedure to compel Danish courts to address flaws in disability rights jurisprudence.[59] Later, when the Confederation of Danish Industry brought the *Ajos* case, the Supreme Court took the European legal community by surprise by both disregarding the guidelines of the CJEU set out in a recent preliminary ruling and establishing new boundaries to the applicability of the CJEU's rulings in Denmark.[OO] Concluding that the judge-made principles of EU law developed after the latest amendments of the Danish Accession Act—such as the general principle of non-discrimination on the ground of age—were not binding, the Supreme Court further cemented a hardening stance towards EU law.[60]

Overall, as in Norway and Sweden, the 2000s also entailed heightened interest in the rule of law and legal certainty in Denmark. Emblematically, the think tank Justitia was founded in 2014 by a jurist who had gained public attention when heading the legal policy department of the free-market liberal think tank CEPOS. Breaking with this political affiliation, Justitia was created to inform and educate about civil liberties and the rule of law and to be involved in pro bono strategic litigation. Its educational programme sought to educate legal debaters and human rights activists, but rather than relying on the older critical law segment of the profession, it invited academics, politicians, high-level civil servants, and judicial officers. This general mobilization of the mainstream of the broader legal profession is also reflected by the Danish Bar Association increasingly becoming a voice in rule-of-law debates and even involving itself in principled litigation, including in collaboration with Justitia on disabled persons' rights. In recent years, the traditionally discreet Association of Danish Judges has also participated in debates on the rule of law and judicial independence, seeking to carve out a more independent position for the judiciary; this signals a change in perceptions of state and justice.

To sum up, legal mobilization strategies have grown across the three states both quantitively (number of organizations and cases) and qualitatively (nature of issues and obligations). However, development across the region is uneven: Sweden and, to a certain extent, Norway now seem to have quite vibrant and heterogeneous ecosystems of civil society groups that provide legal aid and engage in public interest litigation, but legal strategies remain a more marginal civil society strategy in Denmark. Moreover, as we shall discuss below, some groups choose different strategies even when the conditions appear conducive to legal mobilization.

7. Concluding discussion: emerging patterns and explanations

Why have civil society groups in Scandinavia increasingly turned to legal mobilization? Our comparative analysis of the three cases through three episodes reveals some

[59] Jeffrey Miller, 'Explaining Paradigm Shifts in Danish Anti-Discrimination Law' (2019) 26 Maastricht Journal of European and Comparative Law 540.

[60] Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) 23 European Law Journal 140.

interesting patterns and trends. Over time, legal mobilization strategies have shifted from the political fringes to a more secure and sustained place in politico-legal culture. To account for the advent of legal strategies in the unlikely institutional setting of Scandinavia, we proposed an analytical framework drawing on the concepts of opportunity, means, and motives.

Firstly, the *politico-legal opportunity structure* has changed in ways that might incentivize legal mobilization. Systemic institutional developments have expanded the substantive and procedural law available to civil society groups, as well as the principled authority of courts as policy-making actors. First, EU law, the ECHR, and other international human rights treaties have increasingly provided an external source of fundamental rights law, progressively recognized as justiciable since the 1990s, which CSOs have occasionally used strategically to alter domestic practices. Second, in Norway and Sweden, constitutional reforms have successively updated the domestic protection of fundamental rights. In Sweden, the Supreme Court has expanded public authorities' tort law liabilities for violations of fundamental rights,[61] thus creating the legal remedies the legislator neglected when incorporating the ECHR. Third, judicial reforms, such as expanding judicial review powers and docket reforms, have transformed the judiciaries from reactive courts of appeal, at times, to proactive courts of precedent[62]—enabling courts to act as agents of policy change. Denmark may be the odd one out: the constitutional bill of rights has hardly been updated since 1849, the ECHR remains the only incorporated IHRL treaty,[63] and the Supreme Court, imbued with a doctrine of judicial self-restraint and lacking docket control, has only once exercised its review powers, in the 1999 *Tvind* case.[PP] From a systemic point of view, civil society actors seeking policy change through courts seem to face a more open legal opportunity structure in Sweden and Norway than in Denmark.

Paralleling the expansion of legal opportunities, the political environment in which civil society groups and interest organizations are embedded has also changed over the period in ways that would incentivize them to turn to courts. Overall, the impact of European law has been described as supplanting domestic corporatist interest mediation systems with adversarial legalism by empowering firms, citizens, and groups to claim supranational rights against national governments.[64] Yet the decline of corporatism also has roots in domestic political constellations—specifically social democratic hegemony declining decades earlier in Denmark than in Sweden (with Norway in the middle), which partly explains why the ECHR was politicized by the centre-right in Sweden but by the centre-left in Denmark. Generally, the push by employer and business organizations to break with corporatism was stronger in Sweden than in Denmark and

[61] Mårten Schultz, 'Rights Through Torts: The Rise of a Rights Discourse in Swedish Tort Law' (2009) 17 European Review of Private Law 305.

[62] Jørn Øyrehagen Sunde, 'From Courts of Appeal to Courts of Precedent: Access to the Highest Courts in the Nordic Countries' in Cornelis Hendrik (Remco) van Rhee and Yulin Fu (eds), *Supreme Courts in Transition in China and the West: Adjudication at the Service of Public Goals* (Springer 2017); Anna Wallerman Ghavanini, Gunnar Grendstad and Johan Karlsson Schaffer, 'Institutions That Define the Policymaking Role of Courts: A Comparative Analysis of the Supreme Courts of Scandinavia' (2023) 21 International Journal of Constitutional Law 3.

[63] Silvia Adamo, 'Protecting International Civil Rights in a National Context: Danish Law and Its Discontents' (2016) 85 Nordic Journal of International Law 119.

[64] R Daniel Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance' (2006) 39 Comparative Political Studies 101.

Norway,[65] and in discrete sectors, groups exempted from or challenging corporatist arrangements have been more prone to legal mobilization—such as radical Swedish disability rights activists or the Danish HK trade union which stood partly outside of the collective bargain system—than groups favouring the status quo.[66]

However, the adversarial legalist challenge to corporatism shouldn't be exaggerated. With the mainstreaming of legal mobilization in the 2000s, many groups employing litigation strategies did not seek to disrupt corporatism, and some arguably institutionalised corporatism in the rights sector, such as the Danish Centre/Institute for Human Rights or the Swedish network of anti-discrimination bureaus. Expressing the widespread resistance towards adversarial legalism among social partner organizations, a representative of a Danish industrial association stated that winning rights through court litigation is not just 'against the whole idea of democracy' but also 'absolutely against our interests'.[67] Thus, while courts and rights have offered new opportunities for activists on the margins, for mainstream actors, the broader political opportunities of parliamentary politics and corporatist interest intermediation offer viable, broader, and often preferable alternatives.

Secondly, resources available to groups have also developed in ways that may facilitate legal mobilization and may account for some of the variations we register. As is well-established in socio-legal mobilization theory, sustained, successful legal mobilization requires finances, expertise, and organization.[68] Since the Scandinavian civil law procedure abides by the 'English rule' (i.e., the losing party must pay both their own and the winning party's legal costs) and since public legal aid is limited, litigation is a costly, risky strategy. Groups that have built more sustained litigation strategies have managed to overcome such resource hurdles. For example, the Norwegian Bar Association could rely in its litigation campaigns on the pro bono work and natural legal expertise of its members. Likewise, reliable backing from well-resourced donors allowed Centre for Justice in Sweden to guarantee its clients full coverage of the legal costs, while pro bono consultation by leading law firms has strengthened its legal capacities. Danish HK's creative anti-discrimination litigation was enabled by its robust legal department.[69] On the flip side, lack of resources can offset organizational strength, as evidenced by the Swedish network of local anti-discrimination bureaus: lacking long-term funding and the finances to cover the legal costs of their clients, ADBs mostly resorted to small-claims litigation, which lessens both the redress value for clients and the preventative effect of litigation; they have cited financial risk as a key obstacle to access to justice.[70] Whether public or private, deep-pocketed funders of civil society are often sceptical of supporting litigious activities.

Thirdly, increasing legal mobilization may also reflect the fact that organizations increasingly frame their goals in rights-based language, adjusting to evolving legal consciousness in Scandinavian societies. For example, when Scandinavian LGBT groups began mobilizing

[65]But cf. Peter Munk Christiansen and others, 'Varieties of Democracy: Interest Groups and Corporatist Committees in Scandinavian Policy Making' (2010) 21 Voluntas: International Journal of Voluntary and Nonprofit Organizations 22.
[66]Aude Lejeune, 'Legal Mobilization within the Bureaucracy: Disability Rights and the Implementation of Antidiscrimination Law in Sweden' (2017) 39 Law & Policy 237; Jeffrey Miller, 'Explaining Paradigm Shifts in Danish Anti-Discrimination Law' (2019) 26 Maastricht Journal of European and Comparative Law 540.
[67]R Daniel Kelemen, 'The EU Rights Revolution: Adversarial Legalism and European Integration' in Tanja A Börzel (ed), *The State of the European Union, 6: Law, Politics, and Society* (OUP Oxford 2003).
[68]Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Univ of Chicago Press 1998).
[69]Miller (n 66).
[70]Schaffer (n 44) 381-384.

more openly in the 1970s, they chiefly framed their cause as sexual emancipation or equality, while in recent decades, they have increasingly adopted a human rights frame. Similarly, disability policy was traditionally based on a social welfare model, providing differential treatment for persons with disabilities, but in the 1990s, policy shifted towards guaranteeing anti-discrimination rights, and eventually, disability rights activists challenged what they saw as the co-opted complacency of corporatist disability organizations.[71] Likewise, pro-life groups that used to frame their cause as protecting the unborn child increasingly employ human rights discourse, e.g., to assert the rights of healthcare professionals to conscientious exemption. Thus, many groups have reframed their causes as demands for rights, which may account for their increased propensity for legal action.

However, the increasing rights framing may represent ad hoc tactical adjustments or more sustained socialization. When groups frame their claims for tactical reasons, legal opportunity structures and available resources may be important reasons for legal mobilization. Thus, for instance, the Campaign Against Military Service seemed to adopt rights language to advance court claims for purely material reasons (to potentially strike down the law) and for political reasons (to use the courts as political theatre and generate attention). Yet, other forms of legal mobilization have the promotion of fundamental rights and the rule of law as their raison d'être and business model, such as the public interest law groups in Sweden, Denmark's Justitia, or the increasingly activist Norwegian Bar Association. They evince a more conscious and strategic long-term shift towards a rights framing.

These empirically distinct forms of Scandinavian legal mobilization suggest new tasks for theoretical explanation and empirical investigation. One such question is how effective legal mobilization is compared to alternative movement strategies across different issues. Various interest groups have been able to secure strong legal rights protection without litigation. For instance, through protest, advocacy, and lobbying from the 1970s to the 2000s, Scandinavian LGBT movements secured a broad range of rights, from decriminalization and depathologization to same-sex unions and adoption. Not until the 2010s did the LGBT movement employ litigation strategies, with some notable landmark judgments securing additional rights in Sweden and eventually Norway,[72] while Danish LGBT groups eschewed litigation. Likewise, the comparatively well-organized women's movements have refrained from legal action.

What strategic opportunities do these patterns reflect? One may speculate that the women's movements, supported by cross-partisan majorities on advancing gender equality, have achieved their aims through lobbying and political parties. Yet the resulting gender-equality legislation has often lacked justiciable rights, providing instead other mechanisms such as auditing and alternative dispute resolution.[73] Moreover, building on the long-standing Scandinavian ombudsman model, anti-discrimination bodies (as well as newer national human rights institutions) provide different modes of implementing human rights, possibly reducing the need or opportunity for litigation. Analysing how particular groups strategize to exploit the politico-legal opportunities they face would enhance our understanding of the structural conditions for contentious politics in Scandinavia.

[71] Lejeune (n 66).
[72] Alaattinoğlu and Rubio-Marín (n 51).
[73] Banakar (n 39).

Turning to framing, one question that emerges is why similarly situated groups choose different repertoires of action even if they all frame their objectives in terms of fundamental civil rights and the rule of law. For instance, while the Swedish Helsinki Committee, rebranded as Civil Rights Defenders, expanded its capacities for legal strategies, the Norwegian and Danish Helsinki Committees have kept to monitoring and advocacy. Similarly, the litigation campaigns by the Norwegian Bar Association seem unparalleled in Denmark and Sweden. Another question is why some groups avoid legal or rights-based frames. The secretary general of the Danish Bar Association suggests it is a tactical choice: 'people are looking for results and they use the terminology that will make the greatest impact in Denmark, and that is not human rights terminology'.[74] In a political culture which privileges consensus-seeking and politicizes rights discourse, groups may be incentivized to frame their causes in less confrontational terms.

Finally, a notable feature that cuts across the three cases is the role of individual actors in collective mobilization. Historically, this was a strong feature of public mobilization by Nordic lawyers, and it seems that the phenomenon partly persists.[75] In all three countries, individual mavericks, non-conformists, and legal entrepreneurs have often played a pivotal role. Whether inspired by legal Marxism or US-style cause lawyering, innovators operating from the fringes of the legal establishment, but also within and across key institutions such as academia, national human rights institutions, and NGO boards, have been able to achieve some remarkable results by exploiting legal opportunities and instigating strategic litigation. In small countries, elite actors can sometimes seamlessly 'double hat' in different roles, move in 'revolving doors' between different institutions, or interact in weak but tight social networks, which can kickstart legal mobilization and enhance its effectiveness. However, the centrality of individual agency may also constrain or indicate the lack of long-term institutionalization of strategic litigation. Future research should theorize the role of individual avant-garde actors in collective legal mobilization and their relationship with civil society support structures.

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Appendix: Cited court cases and judgments

A. Rt. 1982 s. 241 (*Alta-saken*) Supreme Court of Norway 1982.
B. NJA 1981 s. 1 (*Skattefjällsmålet*) Supreme Court of Sweden 1981.
C. *Swedish Engine Drivers' Union v Sweden* [1976] European Court of Human Rights (ECtHR) 5614/72; *Schmidt and Dahlström v Sweden* [1976] ECtHR 5589/72.
D. *Sporrong and Lönnroth v Sweden* [1982] ECtHR 7151/75, 7152/75.
E. *Svenska Managementgruppen AB v Sweden* [1985] European Commission on Human Rights 11036/84; NJA 1987 s. 198 (*Löntagarfonderna*) Supreme Court of Sweden 1987.
F. Rt. 1976 s. 1 (*Kløfta-saken*) Supreme Court of Norway.

[74] Julie Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions* (Stanford University Press 2009) 22.
[75] See case studies in Feeley and Langford (n 1).

G. Rt. 1974 s. 935; Rt. 1982 s. 241 (*Alta-saken*); Rt. 1984 s. 1175; Rt. 1990 s. 312; Rt. 1990 s. 319; Rt. 1991 s. 177; Rt. 1993 s. 112 Supreme Court of Norway.
H. *Johansen v Norway* [1996] ECtHR 17383/90.
I. *Hauschildt v Denmark* [1989] ECtHR 10486/83.
J. UfR 1972.903H Supreme Court of Denmark 1972.
K. UfR 1973.694H Supreme Court of Denmark 1973.
L. *E v Norway* [1990] ECtHR 11701/85.
M. *Bladet Tromsø and Stensaas v Norway* [1999] ECtHR 21980/93; Justis- og politidepartementet, *'Ytringsfrihed bør finde Sted': Forslag til ny Grunnlov § 100* 1999 [NOU 1999:27].
N. *Jersild v Denmark* [1994] ECtHR 15890/89.
O. E.g. *A and Others v Denmark* [1996] ECtHR 20826/92.
P. UfR 1996.1300 Supreme Court of Denmark 1996.
Q. UfR 1998.800H Supreme Court of Denmark 1998; for a commentary, see Sten Harck and Henrik Palmer Olsen, 'Decision Concerning the Maastricht Treaty' (1999) 93 American Journal of International Law 209.
R. *Danfoss* [1989] European Court of Justice (ECJ) C-109/88; *Høj Pedersen* [1998] ECJ C-66/96.
S. *Langborger v Sweden* [1989] ECtHR 11179/84.
T. *Gustafsson v Sweden* [1996] ECtHR [GC] 15573/89.
U. *AB Kurt Kellermann v Sweden* [2004] ECtHR 41579/98; *Laval* [2007] ECJ C-341/05.
V. Rt. 1990 s. 874 (*Fusa-dommen*) Supreme Court of Norway.
W. TOSLO-2013-103468 District Court of Oslo 2013.
X. HR-2019-2048-A Supreme Court of Norway 2019.
Y. The case lost at first instance (TOSLO-2017-132417 District Court of Oslo 2013) and on appeal (LB-2018-190131 Borgarting Court of Appeal 2018); and the Supreme Court dismissed it on appeal (HR-2021-1392-U Supreme Court of Norway 2021). The case may be taken to the ECtHR given its judgment in *A.p, Garçon and Nicot v France* [2017] ECtHR 79885/12, 52471/13, 52596/13.
Z. HR-2022-533-A Supreme Court of Norway 2022. See coverage in Kjetil Kolsrud, 'Høyesterett opphever utvisning av rumener dømt for tyveri' *Rett24* (8 March 2022) <https://rett24.no/articles/hoyesterett-opphever-utvisning-av-rumener-domt-for-tyveri> accessed 10 February 2023.
AA. HR-2018-1958-A Supreme Court of Norway 2018.
BB. TOSLO-2019-59563 (*Viste-saken*) City Court of Oslo 2019.
CC. *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, European Committee of Social Rights, Collective Complaint No. 74/2011, Decision on the merits, 2 July 2013.
DD. HR-2019-2048-A Supreme Court of Norway 2019.
EE. Through creative jurisprudence, the Supreme Court of Sweden expanded the tort law liabilities of the state and municipalities for violations of the ECHR – see NJA 2005 s. 462 (*Finanschefen på ICS*) and NJA 2009 s. 463 (*Kommunens olaga frihetsberövande*). The Blake Petterson case established that in certain situations the constitutional bill of rights entailed similar liabilities. NJA 2014 s. 323 (*Medborgarskapet I*).
FF. T 6161-16 Svea Court of Appeal 2017.
GG. Case No. 1968-12 Stockholm Administrative Court of Appeal 2012.
HH. *Grimmark v Sweden* [2020] ECtHR 43726/17.
II. HR-2020-2472-P (*Klima-saken*) Supreme Court of Norway 2020.
JJ. At the time of writing, the suit filed on November 25, 2022, is still pending in Nacka District Court.
KK. NJA 2020 s. 3 (*Girjasdomen*) Supreme Court of Sweden 2020.
LL. *Strøbye and Rosenlind v Denmark* [2021] ECtHR 25802/18, 27338/18.
MM. UfR 2011.984H Supreme Court of Denmark 2011.
NN. UfR 2013.1451H Supreme Court of Denmark 2013.
OO. UfR 2014.824H Supreme Court of Denmark 2014.
PP. UfR 1999.841H Supreme Court of Denmark 1999.