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Walking Back Dissents on the European Court of Human Rights: A Rejoinder to Alec Stone Sweet, Wayne Sandholtz and Mads Andenas

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Abstract

Over the last decade, scholars have debated whether the shifting landscape of individual rights protection in Europe has influenced the decisions of the European Court of Human Rights (ECtHR). In our article, 'Walking Back Human Rights in Europe?', we analysed every minority opinion of the ECtHR Grand Chamber between 1998 and 2018. We found a substantial increase in what we labelled as 'walking back dissents' – minority opinions asserting that the Grand Chamber has overturned prior case law or settled doctrine in a way that favours the government. In their Reply, Stone Sweet, Sandholtz and Andenas (SSA) offer two principal critiques. First, they assert that they could not 'replicate' our coding. Second, SSA challenge our claim that legal and political developments in Europe have incentivized the ECtHR to move in a rights-restrictive direction. These claims are inaccurate and mischaracterize our article. First, SSA do not 'replicate' our study. Instead, they code a very small subset of judgments using more restrictive, subjective and vague criteria – which, unsurprisingly, yield fewer walking back dissents. Second, SSA narrowly focus on the Brighton and Copenhagen conferences, ignoring numerous other changes at the national and regional level that have created a more constrained environment for the ECtHR.

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1 Introduction

Over the last decade, scholars have debated whether the shifting landscape of individual rights protection in Europe has influenced the decisions of the European Court of Human Rights (ECtHR). In our article, 'Walking Back Human Rights in Europe?', we contribute to this debate by analysing every minority opinion of the ECtHR Grand Chamber between 1998 and 2018.[1] Although the Court has never expressly overruled a prior judgment in a rights-restrictive direction, we find a substantial increase in minority opinions asserting that the Grand Chamber has overturned prior case law or settled doctrine in a way that favours the government. We label such opinions as 'walking back dissents' (WB dissents).

In their Reply, Stone Sweet, Sandholtz and Andenas (SSA) offer two principal critiques: first, they assert that they could not 'replicate' our coding; second, SSA criticize our claim that legal and political developments in Europe have incentivized the ECtHR to move in a rights-restrictive direction.[2]

These claims are inaccurate and mischaracterize our article. First, SSA do not 'replicate' our study. Instead, they code a very small subset of judgments, using more restrictive, subjective and vague criteria – which, unsurprisingly, yield fewer WB dissents. Second, SSA narrowly focus on the Brighton and Copenhagen conferences, ignoring numerous other changes at the national and regional level that have created a more constrained environment for the ECtHR.

2 Replication?

SSA repeatedly assert that they could not 'replicate' or 'reproduce' our findings. 'Replication' has a specific meaning in academic research. A 'direct replication' verifies research findings using the original study's methodology and protocols, whereas a 'conceptual replication' seeks to measure a concept or relationship from the original study using a different methodology or operationalization.[3] A conceptual replication must explain how it differs from the original study for readers to understand whether discrepancies in the findings are due to errors by the original researchers or to different coding procedures or other methodological differences.

Consistent with the 'replication standard' for social science research,[4] we provided to SSA (and published online for other scholars) a replication archive consisting of our codebook, two datasets, and the code to reproduce the graphs and tables in our article.[5] SSA's purported replication ignores most of these materials, including the

1 Helfer and Voeten, 'Walking Back Human Rights', 31 *European Journal of International Law* (*Eur. J. Int'l L.*) (2020) 797.

2 Stone Sweet, Sandholtz and Andenas (SSA), 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten', 32 *European Journal of International Law* (2021) 897.

3 E.g. Simons. 'The Value of Direct Replication', 9 *Perspectives on Psychological Science* (2014) 76.

4 King, 'Replication, Replication', 28 *Political Science and Politics* (1995) 444.

5 Voeten, Replication Data for: Walking Back Human Rights, available at https://doi.org/10.7910/DVN/U4ZQE6, Harvard Dataverse, V1 (posted 11 March 2021).

detailed operational definition of WB dissents that our article discusses. Instead, SSA apply a narrower, subjective and vague standard to identify such dissents.

However, the Reply is not transparent about these methodological differences, leaving the erroneous impression that SSA could not replicate our findings and that we coded the cases incorrectly. SSA even express 'confiden[ce] that [our] results are inaccurate and cannot be reproduced by external analysts'.[6] Neither claim has merit.

SSA use our first dataset to extract 23 Grand Chamber judgments (out of almost 400 we coded). Yet they ignore the second dataset containing detailed codings of nearly 800 separate opinions. Moreover, SSA do not apply our codebook, which includes detailed instructions for coders, explanations of different categories of WB dissents, and sample codings.

Most notably, SSA disregard our article's operational definition of a WB dissent: a minority opinion is coded as a WB dissent if it asserts that the majority overturned prior case law in a direction that favours the government in one of three ways: '(i) by *explicitly overturning* prior judgments [..]; (ii) by *implicitly or tacitly overturning* prior case law; or (iii) by *construing* prior case law too narrowly or too broadly, *ignoring* prior case law or *failing to apply* it.'[7] We also asked coders 'whether a separate opinion (i) disagrees with the majority over the application of one or more key legal doctrines *and, in addition*, (ii) asserts that the doctrine had been applied more broadly in prior case law'.[8]

The Reply quotes an abridged version of this definition. Yet when SSA discuss why their codings differ from ours (in online appendices), it becomes apparent that they applied very different standards. For example, their justifications for rejecting a WB dissent include that a minority opinion was insufficiently precise, 'failed to indicate how the ruling would reduce standards of rights protection' or 'did not show that the judgment would expand the regulatory autonomy of states'.[9] These are not our criteria.

We examined the judgments they recoded in their online appendix and found two reasons why our results diverged.[10] First, SSA categorically exclude WB dissents concerning doctrine and remedies. For example, the minority in *A B and C v. Ireland* called the majority's application of the European consensus doctrine a 'real and dangerous new departure in the Court's case-law'.[11] This unambiguously fits our definition, but SSA reject all WB dissents about retrogression of settled doctrine. SSA also dismiss a dissent about just satisfaction as 'not relevant to present concerns',[12] presumably

6 SSA, *supra* note 2, at 898.

7 Helfer and Voeten, *supra* note 1, at 811.

8 *Ibid.*, at 811–812 (emphasis in original). We report in Table 1 (at 813) how many separate opinions fit each of these categories. We also discuss inter-coder reliability and explain how we resolved disagreements between coders (at 811–812, fn. 80).

9 SSA, *supra* note 2, at 903. The online appendices are available at 898.

10 We reviewed only 22 judgments because we did not code *Markin v. Russia* as having a WB dissent.

11 ECtHR, *A, B and C v. Ireland*, Appl. No. 25579/05, Grand Chamber Judgment of 16 December 2010, at para. 9 (Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, JJ., dissenting).

12 SSA, *supra* note 2, Appendix B (characterizing Judge Karakas' dissent in *Bărbulescu v. Romania*).

because the opinion did not explain how the Court expanded state regulatory autonomy. This too is not part of our definition.

SSA might have argued that allegations of walking back doctrine or damages should not qualify as WB dissents. We disagree. The consensus and margin of appreciation doctrines are key targets of the ECtHR's critics. And limiting remedies for victims surely qualifies as evidence of the Court's regressive turn. Regardless, SSA do not advance this or any other conceptual replication critique in their Reply. Nor do they justify their significantly different coding scheme.

Second, SSA do not code what the minority opinions actually say. Instead, they substitute their own view of whether a dissent makes a true WB allegation. This contrasts fundamentally with our approach. Rather than offering yet another subjective assessment of Strasbourg jurisprudence, we investigate whether the *judges themselves* increasingly claim that the Grand Chamber is retreating from past case law or settled doctrine.

In contrast, SSA conducted their own 'doctrinal analysis' that subjectively evaluates the quality and merit of the minority's allegations in 23 judgments.[13] This approach leads them to disqualify blatant assertions of backtracking. For example, in *S.H. v Austria*, six judges label the judgment as a 'dangerous departure from the Court's case-law'.[14] SSA reject this as a WB dissent because the judges 'do not explain how this general statement is supported'.[15] The Reply dismisses the minority's claim in *Bédat v. Switzerland* – that 'the present judgment constitutes a regrettable departure from [the Court's] long-established position' – because the judge also cites non-ECtHR precedents.[16] They similarly reject the minority opinion in *Dubská v. Czech Republic* – which accuses the majority of 'watering down the principles developed in *Ternovszky*' – because it 'does not amount to a claim that the majority is walking back from any specific precedent'.[17]

Andenas' re-codings of the minority opinions quoted in our article are similarly subjective.[18] We selected these quotes to illustrate different types of WB dissents. Andenas dismisses most of them because he is unpersuaded by the judges' reasoning. For example, a dissent in *Regner v. Czech Republic* criticized upholding an absolute restriction on the right to a fair hearing, lamenting that 'the case-law should not have changed direction in the present case'. Andenas, in contrast, concludes that this is not a WB dissent because none of the judgments the opinion cited '*were shown* to have been downgraded or overruled'.[19] He also dismisses a four-judge opinion in *Beuze v. Belgium* that criticizes a judgment as 'a regrettable counter-revolution' because 'there is no

[13] *Ibid*, at 902.

[14] ECtHR, *S.H. and Others v. Austria*, Appl. no. 57813/00, Grand Chamber Judgment of 3 November 2011, at para. 10 (Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, JJ., dissenting).

[15] SSA, *supra* note 2, Appendix B.

[16] *Ibid*.

[17] *Ibid*.

[18] SSA, *supra* note 2, Appendix D.

[19] *Ibid*. (emphasis added).

breach of precedent that would support the view that the ruling comprises a WBJ [Walking Back Judgment]'.[20] These statements suggest that even if a minority opinion explicitly alleges retrenchment by the ECtHR, SSA do not accept the opinion as a WB dissent unless SSA *themselves* believe that the judgment walks back rights.[21]

These examples make plain that SSA do not take what Strasbourg judges say at face value. This violates a core premise of our study – to document the shifting views of the judges themselves. When we applied our coding scheme to the WB dissents accompanying SSA's self-selected sample of 23 judgments, we did not find a single error.

3 The Changing Legal and Political Landscape for Human Rights in Europe

The ECtHR famously interprets the European Convention as a living instrument that incorporates progressive changes in human rights. Yet judges and scholars have long debated how the Court should respond if trends move in a regressive direction. Our article cites four types of evidence of such a retrogression: (1) the 2012 Brighton Declaration, in which member states agreed to add references to subsidiarity and the margin of appreciation to the Convention's preamble; (2) rollbacks of domestic rights protections for politically unpopular groups, such as criminal defendants, suspected terrorists, asylum seekers and non-traditional families; (3) challenges to and non-compliance with ECtHR judgments, including by established democracies long seen as the Court's staunchest allies; and (4) public critiques of the ECtHR by government officials, including threats to leave the ECtHR's jurisdiction.[22] Taken together, this evidence reveals myriad ways that 'member states, both individually and collectively, have responded to controversial judgments and to the broader trajectory of ECtHR case law'.[23]

The Reply fails to discuss nearly all of this evidence. Instead, SSA consider only the formal statements of diplomatic conferences from Brighton to Copenhagen, seeking to prove that the member states sought to alleviate the ECtHR's docket crisis, not to critique the Court.

SSA's selective reading of the conference declarations ignores the reality that governments were interested *both* in sending political signals about greater restraint *and* in reducing the backlog of applications. Indeed, deference to national decision-makers, subsidiarity and access restrictions can achieve both goals simultaneously.[24] The declarations, adopted by consensus, also obscure the fact that several governments were openly critical of the ECtHR before and during the conferences, continued to publicly

[20] *Ibid.*

[21] For this same reason, SSA's coding of which of the 23 cases they believe are 'Walking Back Judgments' (SSA, *supra* note 2, Appendix C) is irrelevant to our study.

[22] Helfer and Voeten, *supra* note 1, at 798.

[23] *Ibid.*, at 808.

[24] E.g. Shelton, 'Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights', 16 *Human Rights Law Review* (2016) 303.

criticize the Court thereafter and have appointed judges with greater inclinations towards interpretive restraint.[25] For example, the UK Parliament voted overwhelmingly in 2011 to defy the Strasbourg Court and keep a ban on prisoner voting,[26] in 2015 Russia authorized the Constitutional Court to declare ECtHR rulings unenforceable[27] and the UK Conservative Party's 2015 manifesto promised to 'curtail the role of the [ECtHR], so that foreign criminals can be more easily deported from Britain'.[28]

We are hardly alone in arguing that a changing legal and political environment is influencing Strasbourg jurisprudence. Our article cites studies by Çali, Madsen and Arnardóttir,[29] but there are many others. Rui explains that the diplomatic conferences triggered a 'paradigm shift' in ECtHR case law, including a wider margin of appreciation, a 'relativisation and narrowing down [of] Convention rights' and an overturning of pro-applicant precedents.[30] Bates describes the reaction to the prisoner voting cases as a 'warning to Strasbourg—a call for more self-restraint', to which the Court responded with jurisprudence that 'answers much of the UK critique about judicial activism, national sovereignty and democratic legitimacy'.[31] Even Glas – who SSA quote to illustrate the allegedly symbolic importance of Protocol 15 adding subsidiarity to the Convention's preamble – recognizes that the greater emphasis on subsidiarity in recent ECtHR decisions 'has taken place at least in part as a reaction to the concerns uttered by the States in the declarations'.[32]

4 Conclusion

SSA's Reply fails as a critique of our article. SSA did not replicate our empirical findings – although they erroneously suggest otherwise. They instead applied a narrower, subjective and vague standard that disregards a core premise of our study – to let Strasbourg judges speak for themselves. Had they followed our coding protocol, they would have reproduced our findings.

[25] E.g. Stiansen and Voeten. 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', 64 *International Studies Quarterly* (2020) 770; Petrov, 'The Populist Challenge to the European Court of Human Rights', 18 *International Journal of Constitutional Law* (*I•CON)* (2020) 476.

[26] Murray. 'A Perfect Storm: Parliament and Prisoner Disenfranchisement', 66 *Parliamentary Affairs* (2013) 511, at 539.

[27] Leach and Donald, 'Russia Defies Strasbourg: Is Contagion Spreading?', EJIL: Talk!, 19 December 2015, available at https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/.

[28] The Conservative Party Manifesto (2015), 58, available at https://www.theresavilliers.co.uk/sites/www.theresavilliers.co.uk/files/conservativemanifesto2015.pdf.

[29] Helfer and Voeten, *supra* note 2, at 805–806.

[30] Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights', 31 *Nordic Journal of Human Rights* (2013) 28, at 49.

[31] Bates, 'Principled Criticism and a Warning from the "UK" to the ECtHR?', in M. Breuer, *Principled Resistance to ECtHR Judgments – A New Paradigm?* (2019) 193, at 202, 217.

[32] Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?', 20 *Human Rights Law Review* (2020) 121, at 149.

SSA also turned a blind eye to abundant legal, political and social changes that have altered the environment in which the ECtHR operates. SSA acknowledge in their Reply that the ECtHR is a strategic actor that is responsive to its social, political and policy environment.[33] Yet, they seem to assume that this responsiveness can only operate in a progressive direction.

Finally, SSA strip our article of all context and nuance. We recognize that judges write minority opinions for a variety of reasons. We discuss examples of 'walking forward' dissents, which allege that the majority has overturned prior judgments or misconstrued doctrine in favour of applicants. And we do not claim that minority opinions are definitive interpretations of Grand Chamber judgments.

Yet even with these caveats, our article finds that, over the last two decades, an increasing number of Strasbourg judges have lamented that the ECtHR is moving in a rights-restrictive direction regarding specific judgments, case law and doctrine. Nothing in the Reply casts doubt on these findings as 'suggestive evidence from an especially well-informed group of actors that the ECtHR is, in fact, walking back human rights in Europe, even if the Court is not doing so overtly'.[34]

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Alec Stone Sweet, Wayne Sandholtz and Mads Andenas continue the debate on EJIL: Talk!

[33] SSA, *supra* note 2, at 904.

[34] Helfer and Voeten, *supra* note 1, at 800.