Four Scenarios and a Proposal for the Future of the ECHR's Dynamic Case Law on Asylum

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07.12.2025 doi: 10.59704/1ec2dc462dcbe835

75 years after its creation, the European Convention on Human Rights stands at a crossroads. A quarter century of dynamic judgments has profoundly expanded individual rights in matters of asylum and migration: detention in the context of entry controls, Dublin transfers, socio-economic non-refoulement, and the prohibition of collective expulsions have been subject to structural shifts. At this moment in time, our trajectory of interpretative dynamism may come full circle: calls for "flexibility" on the part of governments epitomise an attempt at regaining room for political decisions by means of overcoming an entrenched "lock-in" effect which occurs when human rights judgments effectively petrify today's legislation.

A quarter of a century of profound dynamism

Human rights are two things at the same time: normative values and legal constructs resulting in highly complex judgments. It can be difficult to distinguish both dimensions. Nobody wants to legalise torture or inhuman treatment, but there may be different views about how to interpret a decidedly short and abstract guarantee such as Article 3 ECHR. More than one-hundred judgments of the European Court of Human Rights (ECtHR) have gradually expanded the reach of human rights in the field of asylum far beyond the guarantees enshrined in the Refugee Convention.

When I started dealing with asylum in the early 2000s, Strasbourg gave states quite some flexibility – as a short reminder of four examples about the state of the case law after the millennium change illustrates: At the time, Strasbourg tended to accept detention for purposes of entry control at the external borders for several months, subject to an arbitrariness test the Grand Chamber distinguished from proportionality. Second, two decisions recognised that transfers of asylum seekers under the Dublin system were not subject to legal remedies with suspensive effect.

Third, there was strong resistance, also by the German Federal Administrative Court, to a first judgment from the Strasbourg Court which had stipulated that severe health problems can bring about a prohibition of refoulement. Fourth, hardly anyone talked about the prohibition of collective expulsions twenty years ago, although this guarantee has been transformed into a de facto right to asylum in the meantime.

Over the past 20 years, I have attended numerous conferences where critical academics called for dynamism – often with success, as the four examples show. More recently, governments are calling upon Strasbourg to continue the dynamism, this time to increase *their* room for manoeuvre. Many present such pleas for flexibility as a distasteful assault on fundamental values. I disagree. The form of an open letter may be inappropriate, but the human rights community would make a grave mistake if it restricted the legitimate discourse to a one-way street advancing individual interests. In the field of asylum, the dynamism has been so profound that it risks undermining the whole system if different viewpoints are brushed aside.

Transformation instead of standstill vs. destruction

At an intermediate level, we may distinguish four scenarios of how the case law on asylum and the position of the Strasbourg Court will evolve in the years to come. The first scenario is about "continued dynamism" advancing individual interests in accordance with the previous trajectory. It seems to the author that the Court of Justice of the European Union (CJEU) in Luxembourg follows this script to a certain

extent, whereas the ECtHR has trodden carefully for some time. It decided against further dynamism with regard to humanitarian visas and, most recently, search and rescue.

Scenario two is about standstill with judges refraining from innovations, while insisting on the strict observance of the dynamic judgments delivered over the past quarter of a century. It seems to me that Strasbourg is defined by "standstill" at the moment: not much change in either direction. However, such standstill does not undo the practical effects of older judgments decided 14 or 20 years ago. They remain in place and are applied diligently in numerous cases by national authorities and courts on a daily basis (at least in countries such as Germany, Austria, Italy or the Netherlands where national courts are loyal to EU law and the ECHR). It seems to me that governments' frustration is fed by such domestic everyday experiences more than by recent decisions of the Strasbourg Court.

The third scenario concerns the outright "destruction" of domestic and international human rights systems. The danger of destruction is real: think of Donald Trump and Nigel Farage. Destructionists often employ asylum as a catalyst to advance an ethno-nationalistic agenda which threatens social cohesion of diverse societies and may ultimately seek to abolish the ECHR and undercut supranational cooperation within the EU. It would be a grave strategic mistake – and an intellectual misjudgment – if we equated criticism of the status quo with nationalism and authoritarianism. The very term "backlash" implies a binary juxtaposition of either support or rejection of the Strasbourg case law.

There must be room for a fourth scenario which is about "transformation" in response to changes in the factual, geopolitical, and political context. Such transformation builds upon the "living instrument" concept by reversing the dynamism of some previous rulings or, better, by searching for new solutions, such as the innovative idea in the *N.D. & N.T.* judgment on legal pathways as a precondition for non-admission without access to an asylum procedure as a matter of human rights law.

The "lock-in" effect of the human rights case law

Many instances of dynamic interpretation were not "politically activist" in the sense of judges introducing new standards out of the blue. Judgments on asylum, in particular, often built upon a prevalent consensus about how to deal with asylum seekers as laid down in, amongst others, EU legislation. In 2005, Member States unanimously introduced "subsidiary protection" for persons fleeing indiscriminate violence during civil wars, before the ECtHR brought situations of general violence firmly within the reach of its case law on the prohibition of torture.

On other occasions, the Strasbourg Court has pushed governments. The celebrated *M.S.S.* judgment extended the principle of non-refoulement to relations between State Parties and interpreted it, moreover, to cover basic needs so as to protect against extreme material poverty. The EU legislature followed suit and introduced legal remedies against transfer decisions two years later. What was done without court involvement up until 15 years ago, is subject to literally tens of thousands of judgments each year within Germany alone. The pattern was oftentimes similar: innovative human rights judgments and legislation reinforced each other.

This trajectory resulted in a "lock-in" effect which occurs when judgments that had not been very controversial originally, as they reflected a basic political consensus, effectively petrify political preferences of a specific moment in time. Elevating legislative choices to the level of human rights can prevent policy reform in the future. Such limitations enshrined in older judgments remain intact even if the Strasbourg Court acts cautiously nowadays. States have lost room for manoeuvre they had as little as 20 years ago. This degree of constitutionalisation within Europe differs markedly from the flexibility Canada and Australia enjoy under the Refugee Convention, as well as did the US under Barack Obama and Joe Biden.

ECtHR and CJEU judgments are oftentimes employed as an argument in legislative debates in Brussels and national capitals as to why certain measures cannot be adopted. By way of example, judg-

ments prevent politicians from reversing the legislation with regard to the four examples mentioned at the outset. The doctrinal original sin behind the consensus argument in the field of asylum may be precisely this "lock-in" effect when policy decisions made 20 years ago in a different context are effectively set in stone.

To put it bluntly, Europe would not plunge into a dark age of injustice if the interpretation of Article 3 ECHR with regard to Dublin transfers were reversed or if the prohibition of collective expulsions stopped applying to non-admission at the border, as the term "expulsion" suggests anyhow. It would not even be the end of human rights protection if Strasbourg interpreted Article 3 ECHR in light of the explicit security exception enshrined in Article 33(2) of the Refugee Convention. Note that my comments do not present an argument that the interpretation should be reversed. They are, rather, about the abstract recognition that there was – and is – nothing quasi-automatic about many instances of interpretative dynamism.

Protecting the Court's authority by means of an additional protocol

The background paper to the conference jointly organised by the German Ministry of Justice and Consumer Protection and the Max Planck Institute for Comparative Public Law and International Law to mark the ECHR's 75th anniversary (from which this symposium emerged) invited the speakers, inter alia, to reflect on whether the Strasbourg Court communicates its judgments appropriately. I am not a communication expert, and it is certainly correct that there is fake news and that public debates often misapprehend the small print, so better communication may be warranted.

However, the gut feeling of the author is that the general public and governments would not be perfectly happy if only they understood the judgments better. The opposite might even be true: citizens and politicians might be stunned if they realised how dynamic judgments on the double prohibition of torture and collective expulsions have been in the quarter of a century between the end of the Cold War and the asylum policy crisis of 2015. They might be surprised to hear, for instance, that judges extended the prohibition of refoulement to socio-economic living conditions and humanitarian concerns beyond the reach of the Refugee Convention.

A structural reason for what is often called "backlash" may be the absence of a genuinely democratic environment. The ECtHR's discursive community is essentially limited to the closed epistemic world of English- and, possibly, French-, Spanish-, and German-speaking human rights experts in governments, courts, international treaty bodies, academia, and NGOs. Many regular readers of the Verfassungsblog belong to this community, as does the author. This epistemic community is a small and self-selected subset of the European society Armin von Bogdandy wants to establish.

I do not see how the Court itself – or the epistemic community supporting it – will be able to perform transformation and re-balancing in accordance with the fourth scenario presented previously. Recent years demonstrate that the Brighton and Copenhagen Declarations have had a certain impact. Thus, a remake of these endeavours which the Secretary General of the Council of Europe appears to have recently initiated might give States some symbolic "victories", but it would hardly reverse basic tenets of judgments which the Court had reaffirmed repeatedly.

What is more, transformation from within would be accompanied by a public discourse which is no longer confined to the epistemic community of human rights experts. Truly public debates about the role of human rights judgments would almost inevitably turn nasty, thus damaging the authority of the Court and undermining the rule of law generally. In retrospect, the open letter of the nine governments might possibly appear as the timid start for much more pronounced statements and accusations.

That is why governments should opt for the ECHR equivalent of a constitutional amendment, not a political declaration, if they are determined to reverse selected instances of interpretative dynamism in order to restore some degree of political autonomy: They should focus their energy on negotiating Additional Protocol No. 17 on the Interpretation of Certain Provi-

sions in the Field of Migration and Asylum. To do so is the legally sound way forward from the perspective of international law. Its contents could probably be projected upon the EU's Charter of Fundamental Rights under the condition that an outright majority of EU Member States participates.

For many human rights experts such continued dynamism to the benefit of States would be painful, and they might accept it as a strategic manoeuvre at best to prevent the destruction scenario from turning into reality. At the same time, our comments in this symposium demonstrate that one can equally make a normative argument that some judgments during the quarter of a century from the end of the Cold War up until the mid-2010s have arguably gone too far in limiting the "right [of each State] to control the entry of non-nationals into its territory" – a right numerous judgments recognise "as a matter of well-established international law" up until this day.

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SUGGESTED CITATION

Thym, Daniel: Four Scenarios and a Proposal for the Future of the ECHR's Dynamic Case Law on Asylum, Verfassungsblog, 07.12.2025, doi: 10.59704/1ec2dc462dcbe835.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20251208-172221-0.