

Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism

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Introduction

To state that the European Court of Human Rights (“ECtHR” or “the Court”) has become a victim of its own success is an oft-repeated mantra. Yet to ring the death knell for what is undoubtedly the most successful international human rights project is premature. While the Court is facing an unsustainable caseload under its current formation, the solution is not to abandon the Court altogether, but to find a structure that facilitates the accommodation of this burdensome caseload. While Protocol 14 - permitting a single judge to rule on admissibility - has eased the Court backlog somewhat,² this impact has only been on cases which are ‘clearly inadmissible’. Reform of the Court is still needed if it is to adequately deal with the huge numbers of cases that meet the requirement of admissibility, and the backlog of such cases that have yet to be adjudicated upon.³

In this article, we argue that although the large backlog of cases currently stifling the ECtHR is a direct result of the individual complaints procedure, nevertheless, the importance of this procedure as the “crown jewel”⁴ in the ECHR system cannot be foregone. Our proposed model for restructuring the ECtHR preserves such right of individual petition while facilitating the expedition of constitutionalist complaints. We argue that Chambers of the ECtHR should focus on adjudicatory cases and their procedure should be simplified, whereas the Grand Chamber should be reserved for pronouncing upon constitutionalist issues only. While Draft Protocols 15 and 16 contain provisions that can emphasise the separation between the adjudicatory function of the Chambers and constitutionalist function of the Grand Chamber, we argue that further reforms may be needed and these reforms should be

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² A reduction of 16% in 2012. See, European Court of Human Rights Statistics 2012. http://www.echr.coe.int/NR/rdonlyres/ED509815-5E4E-4EC5-8224-A92775B7FB72/0/CMS2012_ENG.pdf (Accessed 25 March 2013)

³ While in 2012 the ECtHR managed to reduce the backlog of inadmissible complaints by 35%, the backlog of committee cases (repetitive meritorious cases) increased by 85%. There was slight decrease in the Chamber backlog but there are still 43,050 pending. At the end of 2012 there were slightly less than 70,000 meritorious cases awaiting adjudication. See *ibid*.

⁴ Laurence R. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19 EJIL 125, 159.

based on the idea of functional separation between the Grand Chamber and other Court's formations.

1. The Dual Functionality of the European Court of Human Rights

It has been argued that the *raison d'être* of the ECtHR is that "it will hear any case, from anyone who claims to be a victim of the Convention".⁵ It has also been suggested, however, that the Court is incapable of providing individual justice to all applicants and consequently a mechanism for the selection of cases based on their importance should be introduced. These suggestions were not, however, endorsed by some stakeholders⁶ who argue that the legitimacy and authoritativeness of the ECtHR is dependent on the availability of individual justice and therefore the right to individual petition ought to be considered sacrosanct.⁷ Consequently, Paul Mahoney points out that the Convention's mission is "indissoluble from the right of individual petition."⁸ Relatedly, the Court should not avoid adjudication of repetitive cases as it can influence State parties through the reiteration of a particular rule in repetitive meritorious cases.⁹ The role of the ECtHR in providing just satisfaction for aggrieved petitioners is incredibly important for the legitimacy of the Court in the eyes of those that petition it. Similarly, from a rule of law perspective, the admissibility or grounds for each petitioner should remain the same, with such grounds articulated clearly beforehand in order to maximise clarity and certainty of the legal norms involved.

Despite this apparent importance of the adjudicatory function of the ECtHR, in late 2012 and early 2013 two articles were published in leading human rights journals in which the adjudicatory function of the ECtHR was challenged. Fiona de Londras argues that the

⁵ Marie-Benedicte Dembour, "Finishing off" cases: the radical solution to the problem of the expanding ECtHR caseload' [2002] European Human Rights Law Review 604, 621.

⁶ In their contribution to the Interlaken Conference 2010, the NGOs stated that '[w]e oppose proposals: that would undermine the accessibility of the Court such as charging applicants fees, or adding new, more restrictive admissibility criteria. Lack of funds should never be an obstacle for bringing an application before the Court; that would give the Court discretion to decide on which admissible cases it renders judgment...' (emphasis added). Preparatory contributions. Interlaken Conference. P. 35. http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0108.File.tmp/Brochure_contributions_preparatoires_en.pdf

⁷ House of Lords & House of Commons Joint Committee on Human Rights, 'Protocol No. 14 to the European Convention on Human Rights' First Report of Session 2004–05, 9. Available at <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/8/8.pdf>; see also

⁸ Paul Mahoney, 'Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order' in L. Caflisch and others (eds), *Liber amicorum Luzius Wildhaber: Human Rights - Strasbourg Views* (2007), 267.

⁹ Alec Stone Sweet argues that '[t]hrough precedent, the Court seeks to legitimize its law-making, to structure the argumentation of applicants and defendant States, and to persuade States to comply with findings of violation'. Sweet, Alec Stone, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court" (2009). Faculty Scholarship Series. Paper 71, 3.

adjudicatory function of the Court creates a “logistical nightmare” for the Court and allows the Council of Europe and the Contracting Parties to rely too heavily on the Court instead of “developing an autonomous jurisprudence on the Convention at the domestic level.”¹⁰ Relatedly, Steven Greer and Luzius Wildhaber offer a powerful critique of the adjudicatory function of the Court, arguing that the Court is simply incapable of consistent adjudication of individual complaints which in turn prevents the Court from fulfilling “its constitutional mission”.¹¹ Greer and Wildhaber therefore propose to select and adjudicate cases ‘in a much more strategically focused manner than at present’.¹² de Londras also concludes that the adjudicatory function of the Court should be curtailed and instead it should concentrate on more significant cases, i.e. constitutionalist issues.

Notwithstanding these persuasive critiques, we argue that the adjudicatory function of the Court is crucial for maintenance of the Court’s influence and that the arguments eloquently presented by de Londras, and Greer and Wildhaber do not offer widely acceptable or politically practical solutions for resolving the current crisis. We therefore offer a model which would keep adjudicatory functions and at the same time promote the constitutionalist hypostasis of the ECtHR.

Before turning to our argument, some terminological clarifications are necessary. An ‘individual application’ (or ‘individual petition’) is an application lodged before the Court according to Article 34 of the Convention. Due to the importance of the individual application procedure outlined above, it is rare that commentators suggest that this right to individual petition as such should be abandoned altogether.¹³ However, the right to bring a petition and the right for this petition to be dealt with by the Court are two different issues. Greer and Wildhaber argue that under the individual justice model, the Court exists ‘for the benefit of the particular individual... with whatever constitutional or systemic improvements at the national level might thereby result.’¹⁴ Therefore, under this system all meritorious cases should be adjudicated. The consequence of individual justice is that the Court has to deal with adjudicatory cases which are repetitive and in which the Court ‘is asked to play a de facto

¹⁰ Fiona de Londras, ‘Dual Functionality and the Persistent Frailty of the European Court of Human Rights’ [2013] EHRLR 38, 39-40.

¹¹ Steven Greer and Luzius Wildhaber, ‘Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights’ (2012) 12 HRLR 655, 676.

¹² *Ibid*, 684.

¹³ See e.g. Aidan O’Neill Reform of Strasbourg Court: a modest proposal <http://ukhumanrightsblog.com/2011/03/28/reform-of-strasbourg-court-a-modest-proposal-aidan-oneill-qc/>

¹⁴ Greer and Wildhaber, (n ~~111112~~) 663.

appellate function'.¹⁵ de Londras, and Greer and Wildhaber in their respective articles suggest that the model of individual justice is unsustainable and the Court should turn towards a constitutional model of justice.¹⁶

The concept of a 'constitutionalist model' is not a straightforward term. For de Londras, constitutionalist cases are those in which the ECtHR is 'clarifying standards, holding states to account for them, and sometimes developing those standards beyond their literal conceptions.'¹⁷ Wildhaber argues that there are at least three possible understandings of constitutionalisation. First, the fact that the ECtHR, despite being designed as a bulwark against totalitarianism turned into a court more akin to a normal national constitutional court enforcing a Bill of Rights.¹⁸ Second, democracy and human rights are constitutionalist principles, therefore securing these principles makes the ECtHR constitutionalist or at least quasi-constitutionalist.¹⁹ Finally, constitutionalisation is seen as an analytical tool that can distinguish between trivial adjudicatory decisions and more serious constitutionalist judgments.²⁰ This latter definition is more helpful in the context of this paper. Greer and Wildhaber convincingly state that the ECtHR possesses constitutional characteristics²¹ but we argue that this status of the ECtHR is not incompatible with it being an adjudicatory court bringing justice to individual applicants. We argue therefore that the Court should remain with both adjudicatory and constitutionalist functions in its jurisprudence but these two functions should be clearly distinguished and different reforms should be developed to optimise the Court's performance in relation to these two functions.

2. Distinguishing constitutionalist complaints from adjudicatory decisions

An alternative approach to curtailing the system of individual justice would, we suggest, be to separate the adjudicatory and constitutionalist functions of the ECtHR; placing an emphasis of resources through structural reform on the latter function and thus enabling the Court to

¹⁵ De Londras, (n [104014](#)) 42.

¹⁶ Greer and Wildhaber, (n [114442](#)), 684; de Londras, (n [104014](#)) 39.

¹⁷ *Ibid.* at 40

¹⁸ Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011), 226-227. See also, Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press 2010).

¹⁹ *Ibid.*, at 227.

²⁰ Wildhaber argues that this understanding of constitutionalist nature of the Court is the reaction to the overwhelming backlog of mostly inadmissible and repetitive applications. *Ibid.*

²¹ See, Greer and Wildhaber, (n 12), 667-670; de Londras, (n [104014](#)), 41.

strengthen its constitutionalist hypostasis. However, despite this suggestion being more modest than abandonment or significant curtailment of the adjudicatory function, the idea of separating these functions has not yet been universally accepted. One of the fundamental reasons why proposals to separate the Court's functions are not always welcomed is the inability to establish a clear typology of constitutionalist issues.

On the basis of various definitions of constitutionalism,²² constitutionalist cases are firstly those that deal with novel issues, never before presented to the ECtHR. These 'novel' cases provide a lens through which the scope of the treaty can be delineated. The second type of constitutionalist cases are those which are of particular significance for the State concerned. This includes endemic violations which are repetitive and embedded in a particular legal system. In such instances the ECtHR has to emphasise the importance of the problem and urge the Contracting Party to solve the issue. Such judgments can summarise and codify the approach which was elaborated through the adjudicatory function.²³ The third definition of a 'constitutionalist issue' are allegations of serious human rights violations. These are cases where the nature of the human rights breach is of such severity as to undermine a Contracting Party's commitment to the Convention and consequently the legitimacy of the Convention itself.²⁴ Therefore, a once off breach of the Convention may be of such severity that it may on its own be of sufficient importance to constitute a constitutionalist issue.²⁵

These three categories are, however, not wholly satisfactory because they do not set clear criteria for distinguishing constitutionalist from adjudicatory cases. If the constitutionalist nature of a complaint becomes an admissibility criterion then the divide between adjudicatory and constitutionalist cases must be very clear.

²² E.g. in 2001, the ECHR Evaluation Group, for example defined constitutionalist judgments as "[F]ully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law, are of particular significance for the State concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication." See 'Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights', 27 September 2001, Para. 98 available at <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>. ~~De Londras, identifies constitutionalist decision making as 'clarifying standards, holding states to account for them, and indeed sometimes developing those standards beyond their literal (or, indeed, 'original') conceptions in order to reflect more contemporary standards or what they consider to be a more appropriate level of limitation of state action. De Londras, (n 11), 40.~~

²³ The ECtHR normally uses the pilot judgment procedure for these issues. See, for example, *Broniowski v. Poland (GC)*, (2005) 40 E.H.R.R. 21; *Burdov (no 2) v. Rissia*, (2009) 49 E.H.R.R. 2.

²⁴ E.g., the cruelty and severity of many of the Article 3 (freedom from torture) complaints do not raise constitutionalist issues as understood by first and second definition outlined above, can justify attaching special (constitutionalist) attention to these cases. See e.g. *Davydov and others v. Ukraine*, 17674/02 and 39081/02.

As mentioned above, constitutionalist issues are often a result of judgments in numerous repetitive cases which reveal endemic violations of human rights in a particular country or region.²⁶ Therefore, in some instances, a significant number of similar applications may turn adjudicatory cases into a constitutionalist issue. If a Contracting Party continues to flout the Convention and explicit decisions of the Court, this seriously undermines the efficacy of the Court in securing the Conventions goals, as well as bringing into question a Contracting Party's commitment to the European human right project. If the Court does not react to this situation this may foster apathy both among the applicants due to a lack of just satisfaction and perceived emasculation of the Court, and also amongst other Contracting Parties, given their commitment to the perceived norms that are being habitually violated.

The importance of identifying constitutionalist issues relatedly facilitates the recognition of a case that is only adjudicatory in nature: cases that do not clarify further the previously established limits of state power; that do not involve serious breaches of human rights; that do not clarify dichotomous jurisprudence, that may be decided according to current existent jurisprudence and that are of primary importance only to the parties involved. However, while one can broadly identify two distinct categories of cases when looking at the jurisprudence of the Court as a whole, labelling individual cases as constitutionalist or adjudicatory is a much more nuanced pursuit.

Greer and Wildhaber also discuss the challenge of separating constitutionalist and adjudicatory cases. They, however, argue that the difficulties in selecting constitutionalist cases do not undermine the value of the constitutionalist model.²⁷ They offer five reasons why selection of cases is not a problem. First, they argue that national constitutional courts often have broad discretion in the selection of cases they are willing to adjudicate.²⁸ However, some national constitutional courts become overly politicised in a large part precisely because they select cases on the basis of importance.²⁹ Second, domestic constitutional courts despite selecting cases on the basis of discretion are nevertheless seen as

²⁶ See for example set of Chechen cases (such as *Isayeva, Yusupova and Bazayeva v. Russia* ([57947/00, 57948/00 and 57949/00](#)) (2005) 41 E.H.R.R. 39, *Khashiyev and Akayeva v. Russia* ([57945/00](#)) (2006) 42 E.H.R.R. 20) or Kurd cases (such as *Elei and Others v. Turkey*, *Avşar v. Turkey* ([25657/94](#)) (2003) 37 E.H.R.R. 53).

²⁷ Greer and Wildhaber, (n [11442](#)), 676.

²⁸ *Ibid.*

²⁹ E.g., the writ of *Certiorari* which accords the US Supreme Court vast discretion to select which cases it hears allows the court the power to effectively set its own agenda, setting 'the direction for Constitutional Law, just as the opinions themselves account for its substance'. See, Barry Friedman, 'The Politics of Judicial Review' (2005) 84 (2) Texas Law Review 257, 294.

more legitimate than other public institutions.³⁰ A much more detailed analysis of this argument is needed but even if this assertion is correct the ECtHR cannot be directly compared to national constitutional courts in terms of political legitimacy. Judges of the ECtHR come from different states with different agendas in mind and unlimited discretion in selection of the cases can seriously undermine standard setting capacity of the Court. Third, the criterion of significance will not be more unpredictable than the currently applied rejection of cases on the grounds that they are ‘manifestly ill-founded’. This is a strong argument; indeed, sometimes it is not entirely clear why the Court declares certain applications manifestly ill-founded.³¹ However, if the constitutional model is accepted, rejection of justice will be conducted on a much bigger scale. Currently only some applications are declared inadmissible based on the manifestly ill-founded criterion. If the constitutional model is accepted, only a fraction of applications will be dealt with because they pose a question of constitutional significance. Fourth, the individual justice model neither increases the Court’s legitimacy nor has any ‘pedagogical function’.³² One can argue that the rejection of thousands of applications without even minimal explanation would not enhance legitimacy of the ECtHR either. At least under the status quo, when rejecting a complaint the Court states that it did not fulfil admissibility criteria which are known and accessible. If the Court only adjudicates vaguely defined important cases this might put the trust of stakeholders in the ECtHR at risk. Fifth, the Court will be able to spend more time on issues of high importance.³³ The model we suggest would allow the Court to deal with very serious issues but at the same time would not undermine legitimacy of the Court by introducing constitutionality as an admissibility criterion.

We submit therefore that amending admissibility criteria to exclude adjudicatory complaints is too drastic an approach to undertake when codifying what constitutes a ‘constitutional issue’ is such a difficult task. Notwithstanding this difficulty, however, the identification of constitutionalist and adjudicatory complaints can be a useful tool for the more modest function of distributing the Court’s resources between these two functions.

³⁰ *Ibid.*

³¹ Tickell points out that conceptualising decisions on admissibility as a simple bureaucratic exercise is incorrect and that discretion and judgment is in fact exercised. See Andrew Tickell, ‘Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a “Bureaucratic Rational” Construction of the Admissibility Decision-Making of the European Court of Human Rights’ (2011) 12 GLJ 1786, 1793.

³² Greer and Wildhaber, (n ~~11442~~) 676.

³³ *Ibid.*, 676-677.

3. Facilitating Dual Functionality: Separating Adjudicatory and Constitutionalist Justice

While we argue that the Court should maintain its adjudicatory function, this does not mean that this function should prevent the Court from allocating more resources into the more important function of constitutionalist justice. Therefore, we suggest that the dual functions of the Court should be clearly separated, with different formations of the Court hearing adjudicatory and constitutionalist cases respectively and the resources of the Court distributed accordingly. The adjudicatory function of the Court should become less burdensome through simplification of the admissibility procedure, developing formal, consistent and clear rules of application, or even through referral the repetitious application to the competence of the Committee of Ministers of the Council of Europe. The processing of the adjudicatory function needs to be clearly located within the Chambers of the Court and consequently the Chambers should not be concerned with the constitutionalist aspects of the Court's case law. The Chambers should mostly deal with cases that cannot be called constitutionalist or "hard cases".³⁴ In cases when such aspects do arise, Chambers should relinquish such cases to the Grand Chamber.

The predominant focus of the Grand Chamber on constitutionalist issues is arguably the *de facto* situation in the Court at present. However, we submit that the dual functionality of the court is, nevertheless still dispersed between the Chambers and the Grand Chamber. On the one hand the Chambers can deliver constitutionalist judgments including pilot judgments.³⁵ Engagement of the Chambers in constitutionalist matters creates a few substantial disadvantages: firstly, it takes the resources allocated to the Chambers from simple adjudicatory cases into more complex constitutionalist cases which, among other issues, require more substantive and consistent reasoning and more profound background research. Secondly, judgments delivered at Chamber level might create certain fragmentation in the case law of the ECtHR as diverging opinions on factually similar cases may be issued by the various Chambers (different Sections of the Court).³⁶ These conflicting precedents would be

³⁴ Tamanaha argues that '[w]hat jurists refer to as 'hard cases' usually fall into one of the two... categories: cases involving gaps, conflicts, or ambiguities in the law, and cases involving bad rules or bad results.' Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide* (2010), 192.

³⁵ E.g. in *Ananyev and Others v. Russia* ([42525/07 and 60800/08](#)) (2012) 55 E.H.R.R. 18 the first Chamber of the Court delivered a pilot judgment.

³⁶ The authors of the paper are aware that the judgments of the Court are checked by the *jurisconsult* of the Court for consistency. However, certain disparities are nevertheless possible especially in application of general principles.

detrimental for the authority of ECtHR judgments. Thirdly, consideration of a hard case by the Chamber which can be followed by the consideration of the Grand Chamber duplicates the work of the Court.

Under the current system there are two ways for a case to appear before the Grand Chamber. First the case can be relinquished by the Chamber according to Article 30 of the Convention which provides that where a case pending before a Chamber raises a serious question, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects. While this test covers some constitutionalist issues it does not cover all of them. As stated previously, constitutionalist issues also arise from novel situations and endemic violations that require a structural reform in the Contracting Party. Therefore, the reasons for relinquishment should be formulated in more precise terms.

The on-going reform of the Court is inclined towards strengthening the constitutionalist role of the Grand Chamber. The Brighton declaration acknowledges the central role of the Grand Chamber in achieving consistency in the Court's jurisprudence.³⁷ Under the current system, parties can object to the decision of the Chamber to relinquish its jurisdiction to the Grand Chamber. This provision is in line with the Court's role as a provider of individual justice where it is up to the parties to choose the appropriate forum for adjudication of their dispute. However, the will of the parties is irrelevant in consideration of whether the issue is constitutionalist or not. The draft Protocol 15 enshrines provisions designed to strengthen the constitutionalist role of the Grand Chamber through removing the objection clause from the Convention.³⁸ This would intensify the constitutionalist role of the Grand Chamber and therefore we endorse this proposition.

Secondly, [pursuant to Article 43 of the Convention](#) a case can be heard by the Grand Chamber if a committee of five judges decides so following a request from one of the parties to the case after the Chamber has delivered its initial judgment. We submit that under the

³⁷ Brighton declaration. Para 25-d.

³⁸ Article 3 of the Draft Protocol 15. Available here: <http://www.unhcr.org/refworld/docid/513849f02.html>. The Court has also expressed positive opinion regarding this amendment: 'This change, which was proposed by the Court as a means of enhancing case-law consistency, is also welcomed.' Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights. Available here: http://www.echr.coe.int/NR/rdonlyres/58BF65B4-3124-4E7D-A09A-BCDC97CD8036/0/Court_Opinion_P15_EN.pdf.

suggested system the parties should not have a procedural right of referral. Rather, such an argument would have to be framed in terms of whether the case raises a constitutionalist issue or not. It would therefore be for the individual Chamber to decide, rather than a panel of five judges of the Grand Chamber. While this issue may be rather cumbersome at first, it is submitted that the gradual build-up of precedent would eventually assist judges in making swift, clear decisions grounded in the rule of law. This would in turn save a certain amount of resources. Under this system the Chambers would be able to determine if a case raises novel legal issues and endemic violations and request the Grand Chamber to adopt an authoritative ruling in a particular case.

In assessing whether a constitutionalist issue arises, we submit that the Chamber should take an in depth look at facts and legal issues raised by the case. The test should be whether the Chamber considers that a constitutionalist issue has been raised and that accordingly, jurisdiction is relieved for the Grand Chamber to hear the case. This should be contrasted to a less strict approach whereby a petitioner would only raise an *arguable* question as to whether or not a constitutionalist issue is raised in the case, and the Court on foot of a preliminary hearing of arguments, refers this arguable question to the Grand Chamber.

When the functions of the Chambers and the Grand Chamber are clearly separated, the procedure in the Chambers could be intensified, the judgments should not require profound reasoning, and some judgments could be delivered summarily when the Committees or Chambers would simply implement the case law rules adopted by the Grand Chamber. While this system would sufficiently intensify the procedure on the level of admissibility and adjudicatory justice, it would not leave any complaints unanswered, which makes such a system more appropriate than changing the Strasbourg system to a system of purely constitutional justice as suggested by Greer and Wildhaber.³⁹

The constitutionalist nature of Grand Chamber rulings will be enhanced by the proposed advisory opinion mechanism contained in the draft Protocol 16. Pursuant to this Protocol the ‘highest courts and tribunals of a High Contracting Party’ will be able to petition the ECtHR for an advisory opinion on the implementation of the Convention at a domestic level.⁴⁰ This proposed change would not affect our suggested reconfiguration of the Court as such

³⁹ Greer and Wildhaber, (n [111112](#)).

⁴⁰ Art.1.1 Protocol 16.

questions, if accepted by a Chamber of five judges, would be heard by the Grand Chamber.⁴¹ As such questions would deal with ‘questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto’,⁴² these questions would fall within the constitutionalist nature of the ECtHR.

4. Conclusion

The European Court of Human Rights is facing a crisis which the preservation of the status quo will only exacerbate. New ideas must be put forward in a bid to solve the problems the current system faces. However, these solutions must operate mostly within the rigid barriers that currently exist in the system, most notably its budgetary limits. In the near future, it is highly unlikely that there will be any substantial increases in the resources available to the Court. Bearing this in mind, we have endeavoured to shape a model for the Court’s future that would enhance the Court’s constitutionalist jurisdiction, without sacrificing the ‘sacrosanct’ right of individual petition. Our approach of separating adjudicatory complaints from constitutionalist issues, with constitutionalist issues referred to the Grand Chamber and adjudicatory complaints heard by Chambers strives to satisfy the above conditions laid out.

⁴¹ Ibid, Art.2.1, Art.2.2.

⁴² Ibid, Art.1.1