

Revisiting the Debate about 'constitutionalising' the European Court of Human Rights

Steven Greer and Luzius Wildhaber*

Abstract

In spite of the implementation of Protocol No 14 to the European Convention on Human Rights on 1 June 2010, the European Court of Human Rights continues to face a case overload crisis with no definitive solution in sight. In this article we reconsider the role 'constitutionalisation' might play in providing a more secure future. Having distinguished the three dominant analytical frameworks—'individual justice', 'constitutional justice' and 'pluralism'—in the 'official' and 'academic/judicial' streams of the debate, we conclude that a fourth, 'constitutional pluralism', now offers a particularly attractive alternative.

Keywords: constitutionalisation – public international law – legal pluralism – European Convention on Human Rights – European Court of Human Rights

* Respectively Professor of Human Rights, University of Bristol Law School (Steven.Greer@bristol.ac.uk) and Emeritus Professor, Basel University and former Judge and President of the European Court of Human Rights (luzius.wildhaber@unibas.ch). The authors are grateful to Pat Capps and to Richard Young for comments on an earlier draft, and to those who participated in 'El Futuro del Tribunal Europeo de Derechos Humanos', *Tercer Seminario Internacional sobre la Jurisprudencia de la Corte Interamericana de Derechos Humanos: Impulsos de la Corte IDH y su Homólogo Europeo para México*, Konrad Adenauer Foundation, Faculty of Law, National Autonomous University of Mexico, 9–11 March 2011, and a University of Bristol Law School Primary Unit seminar on 14 November 2011, for their responses to papers presented by Steven Greer outlining some of the principal themes discussed here. The usual disclaimers apply.

1. Introduction

The European Court of Human Rights (ECtHR or ‘the Court’) is in both crisis and transition. The nature of the crisis is not in doubt. Since the late 1990s the Court has been burdened with an overloaded docket. Some recent figures, the predecessors of which have been well-rehearsed, illustrate the enduring problems. The individual application rate rose from 61,300 in 2010 to 64,500 in 2011, and by January 2012, 151,000 cases were awaiting a decision about admissibility, 61.1% of which had been lodged against five states: Russia (26.6%), Turkey (10.5%), Italy (9.1%), Romania (8.1%) and Ukraine (6.8%).¹ The ECtHR rules less than 5% of individual applications admissible² and, every month, the gap between the influx of new applications and their disposal increases by over 1,000 cases.³ Between 1959 and 1999 the Court delivered fewer than 1,000 judgments, yet by the end of December 2011 the figure had risen to over 14,000.⁴ Between 1959 and 2011 some 93% of judgments on the merits—90% of all judgments including those concerning friendly settlement, striking out, just satisfaction, revision, preliminary objections and lack of jurisdiction—resulted in a finding of at least one violation.⁵ In 2009, the Committee of Ministers reported that nearly 70% of the Court’s judgments concern clear cut Convention violations, mostly stemming from the same systemic problem in the respondent state already condemned in an earlier application.⁶ Nearly half the Court’s judgments between its establishment in 1959 and 2011 concern

- 1 ECtHR, *The European Court of Human Rights in Facts and Figures 2011*, at 5, available at: <http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS.CHIFFRES.EN.JAN2012.VERSION.WEB.pdf> [last accessed 29 October 2012]. See Wildhaber, ‘Der “Backlog” (Rückstand in der Fallbehandlung) des EGMR’, in Hestermeyer, et al. (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Leiden/Boston: Martinus Nijhoff Publishers, 2012) at 182.
- 2 For example, out of the total number of applications allocated to a judicial formation between November 1998 and December 2010, only 3.8% were declared admissible, ECtHR, *Annual Report 2010*, at 155, available at: <http://www.echr.coe.int/NR/rdonlyres/F2735259-F638-4E83-82DF-AAC7E934A1D6/0/2010.Rapport.Annuel.EN.pdf> [last accessed 29 October 2012].
- 3 ECtHR, *Analysis of Statistics 2011*, at 4, available at: <http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATSEN.2011.PDF> [last accessed 20 October 2012]. However, there is evidence that pending cases may be accumulating at a decreasing rate, Entin, Jacqué, Mahoney and Wildhaber, *Case Overload at the European Court of Human Rights* (European Law Institute, 27 March 2012) at para 15, see: <http://www.europeanlawinstitute.eu/projects/publications/> [last accessed 29 October 2012].
- 4 ECtHR, *Annual Report 2011*, at 14, available at: <http://www.echr.coe.int/NR/rdonlyres/219E9A92-716A-4337-99DE-053358F536B3/0/2011.Rapport.Annuel.EN.pdf> [last accessed 29 October 2012] 14.
- 5 ECtHR, *Violations by Article and by State 1959-2011*, available at: <http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/TABLEAU.VIOLATIONSEN.2011.pdf> [last accessed 29 October 2012]. Judgments on the merits refer to ‘Judgments finding at least one violation’ plus ‘Judgments finding no violation’.
- 6 Committee of Ministers, *Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report*, 27 May 2009, at para 16.

four states: Turkey (2,747), Italy (2,166), Russia (1,212) and Poland (945).⁷ The provisions of the Convention most frequently found to have been violated between 1959 and 2009 were the right to fair trial under Article 6 (47.5% of judgments finding at least one violation, over half of which concerned excessive length of proceedings), the right to peaceful enjoyment of possessions under Article 1 of Protocol No 1 (14.6%), and the right to liberty and security under Article 5 (10.7%).⁸ In 2008 the Court regarded only 23% of its judgments as making 'a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State', or which, although not making such a contribution, nevertheless did not 'merely apply existing case-law'.⁹ In 2011, 64% were classified as of 'little legal interest' with the remaining 36% as either making a 'significant contribution' or not merely applying existing case-law.¹⁰

Long before Protocol No 14 was ratified by all member states, the Council of Europe acknowledged that it would not provide a solution to the case overload crisis.¹¹ Nevertheless, since it came into effect on 1 June 2010, the number of cases resolved by friendly settlement and by unilateral declaration of liability has increased, and since 2011 procedures for dealing with interim measures have also improved.¹² The Court now believes that, by the end of 2015, the new single judge admissibility process is likely finally to have dealt with the backlog of manifestly ill-founded applications.¹³ These hugely welcome achievements do not, however, address the 60,000 or so admissible

7 Facts and Figures 2011, supra n 1 at 6.

8 ECtHR, *The European Court of Human Rights in Facts and Figures* (Strasbourg: Council of Europe, 2010) at 18.

9 ECtHR, Annual Report 2008 (Strasbourg: Council of Europe, 2009) at 67.

10 Annual Report 2011, supra n 4 at 87.

11 Declaration of the Heads of State and Government of the Member States of the Council of Europe gathered for their Third Summit in Warsaw on 16–17 May 2005 at para 2; and Action Plan of the Ministers' Deputies approved by the Heads of State and Government of the Member States of the Council of Europe gathered for their Third Summit in Warsaw on 16–17 May 2005, CM(2005)80 final, 17 May 2005, at para 1. Also reaffirmed at the Council of Europe, High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, at para 6, see: <http://www.coe.int/en/20120419-brighton-declaration> [last accessed 29 October 2012].

12 European Court of Human Rights, *Preliminary opinion of the Court in preparation for the Brighton Conference (Adopted by the Plenary Court on 20 February 2012)* at paras 11 and 12; ECtHR, *Annual Report 2011*, at 7–8, available at: <http://www.echr.coe.int/NR/rdonlyres/219E9A92-716A-4337-99DE-053358F536B3/0/2011.RapportAnnuelEN.pdf> [last accessed 29 October 2012]. See Caflisch, 'La nouvelle répartition des compétences au sein de la Cour: le juge unique et les comités' and Fribergh, 'First Experiences with Protocol No. 14 and Further Need for Reform', in Besson (ed.), *The European Court of Human Rights after Protocol 14: Preliminary Assessment and Perspectives* (Zurich: Schulthess, 2011). The Brighton Conference nevertheless took the view that this was a matter which required further attention from the Committee of Ministers: see Brighton Declaration, supra n 11 at para 12(e).

13 Preliminary Opinion of the Court, supra n 12 at para 8; Brighton Declaration, supra n 11 at para 20(b); Entin, supra n 3 at paras 15, 35–39, also recommends that the single judge procedure is fully exploited before the possibility of a separate filtering mechanism receives further consideration.

applications—34,000 repetitive and 26,000 non-repetitive—awaiting adjudication, nor the annual average increase of around 18,000.¹⁴ The new Article 28(1)(b) three judge committee procedure for manifestly well-founded applications has not yet delivered the enhanced productivity anticipated. This is particularly true of the backlog of repetitive applications which, on account of their very low priority, go to the back of the queue. Nor, given the existing backlog and the rate at which it continues to increase, is this situation likely to improve without further changes.¹⁵ Since, even with extra resources, the Court has the inherent capacity to dispose of on average only about 6,000 admissible applications per annum—about 1,500 of which result in judgments on the merits—it is clear that the case overload crisis is far from being conclusively resolved.¹⁶

It is difficult to maintain, therefore, that the Court has a long-term future without further substantial reform. Two kinds of transition, therefore, appear inevitable; either ‘to constitutionalisation’ which is already underway, albeit slowly and so far only partially, or ‘to stagnation or collapse’ under the weight of relentlessly accumulating petitions. As an intergovernmental organisation, the Council of Europe can change only in an incremental, consensual, ‘lowest-common-denominator’ manner.¹⁷ However, an essential prerequisite for the effective repair of any malfunctioning system or process—be it organic, mechanical, or bureaucratic—is the correct diagnosis of its fundamental problems in the context of a clear understanding of its core purpose or objectives. Yet this is something the Council of Europe has been reluctant to do with respect to the Convention system. Indeed, at the Interlaken, Izmir and Brighton summits discussed below, it formally committed itself not to consider fundamentals until near the end of this decade.¹⁸ Regrettably the lobby of those resisting change, ironically on the basis that this will best secure the Court’s future, has so far been more effective than those advocating the kind of reforms required. But the delays and tinkering this has produced have fallen far

14 Preliminary Opinion of the Court, *supra* n 12 at paras 21–24; and Entin et al., *supra* n 3 at paras 4, 12 and 47. The study by Entin et al. gives a slightly higher figure for non-repetitive cases than that provided by the less recent Preliminary Opinion of the Court.

15 Preliminary Opinion of the Court, *supra* n 12 at para 9; and Entin et al., *supra* n 3 at paras 40–46.

16 Entin et al., *supra* n 3 at paras 12, 20.

17 See, for example, Brummer, ‘Enhancing intergovernmentalism: The Council of Europe and uman rights’ (2010) 14 *International Journal of Human Rights* 280.

18 See also Entin et al., *supra* n 3 at para 26; see also Mahoney, former Registrar of the ECtHR, ‘Thinking of a Small Unthinkable: Repatriating Reparation from the ECtHR to the National Legal Order’, in Caflisch (ed.), *Human Rights: Strasbourg Views – Liber Amicorum L. Wildhaber* (Kehl: N.P. Engel Verlag, 2007) 263; and Harmsen, ‘The Reform of the Convention System: Institutional Restructuring and the (Geo-) Politics of Human Rights’, in Christoffersen and Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011) at 119.

short of a satisfactory solution. Protocol No 14 and its aftermath have done nothing to dissuade us from the commitment to constitutionalisation we have each expressed independently.¹⁹ In this article we seek to revisit this issue in the light of recent developments. We begin by observing that what was once arguably a more integrated debate about the Court and its prospects has now effectively diverged along parallel lines. We argue that while the 'academic/judicial' stream pays close attention to its 'official' counterpart, the same is not true the other way round. This has resulted in a failure by the Council of Europe to engage with potentially valuable insights. We then consider the three dominant analytical frameworks within which procedural and institutional reforms are currently conceived—'individual justice', 'constitutional justice' and 'pluralism'—and conclude that 'constitutional pluralism', a hybrid of two of the others, now offers a particularly attractive alternative.

2. Two Parallel Debates

While there are, of course, important overlaps between the 'official' and the 'academic/judicial' debates, and equally important differences of opinion in both, each now also has several distinct characteristics arguably less prominent before.

A. The Official Debate

The official debate is dominated mostly by Strasbourg officials, diplomats and NGOs. Broadly speaking it is characterised by an unwillingness to discuss thoroughly what the primary functions of the Court could and should be, by minimalism, and by a mixture of confusion about, and hostility and indifference towards, constitutionalisation. For many years it has also been dominated by an abundance of official papers churning over largely the same 'shopping lists' of possible procedural and institutional reforms. Some of these, if they succeed—for example an advisory opinion system and the otherwise welcome accession of the EU to the European Convention on Human Rights (ECHR)—are ironically more likely to *add* to the Court's case load than to reduce it.²⁰

19 For example, Greer: *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006) at 165–9; 'What's Wrong with the European Convention on Human Rights?' (2008) 30 *Human Rights Quarterly* 680; and Wildhaber, 'The Role of the European Court of Human Rights: An Evaluation' 8 (2004) *Mediterranean Journal of Human Rights* 9; 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161.

20 Entin et al., *supra* n 3 at paras 39, 54–60. The Court thinks an advisory opinion jurisdiction 'should be the subject of continued reflection', Preliminary Opinion of the Court, *supra* n 12 at paras 28, 48.

Evidence-based proposals from the academic/judicial debate have also been consistently ignored or dismissed out of hand.

There have been three High Level Conferences on the Future of the European Court of Human Rights since January 2010 when the Russian Federation finally decided to ratify Protocol No 14 permitting it to be fully implemented on 1 June 2010. A number of possible reforms, some recycled from the Protocol No 14 debate, were discussed at the first of these held in Interlaken from 18 to 19 February 2010.²¹ The Interlaken Declaration is, however, more symbolic than substantial, apart from a series of deadlines which include requiring the Committee of Ministers to assess, between 2012 and 2015, the effects on the Court's workload of Protocol No 14, to determine by the end of 2015 if further action is required, and before the end of 2019 to decide whether more profound change is needed.²² The second High Level Conference, held at Izmir on 26–27 April 2011, largely affirmed what had been agreed at Interlaken.²³

In contrast, the leaked Draft Declaration for the third summit, held in Brighton from 19 to 20 April 2012, appeared to presage significant change. Friction between the UK government and Strasbourg, particularly over prisoners' right to vote and the stalled attempt to extradite the radical Muslim preacher, Abu Qatada, to Jordan, also stimulated considerable British media interest. But, in the event, the final draft turned out to be timid and betrayed a

21 Council of Europe, High Level Conference on the Future of the European Court of Human Rights—Interlaken Declaration, 19 February 2010. Documents relating to the Interlaken conference ('Interlaken documents') can be found at: <http://www.coe.int/portal/web/coe-portal/conference-on-the-future-of-the-european-court-of-human-rights-interlaken-18-19-february-2010?dynLink=true&layoutId=622&ddlgroupId=10226&dfFromArticleId=> [last accessed 29 October 2012]. See also Mowbray, 'The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?' (2010) 10 *Human Rights Law Review* 519; and Wolfrum and Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications – International Workshop, Heidelberg, 17-18 December 2007* (Berlin/Heidelberg/New York: Springer, 2007). Preceding official Council of Europe conferences and colloquy on the future of the Court and Convention system since the finalisation of Protocol No 14 include: Applying and Supervising the ECHR: Towards Stronger Implementation of the European Convention on Human Rights at the National Level. Colloquy organised under the Swedish Chairmanship of the Committee of Ministers of the Council of Europe, Stockholm, 9–10 June 2008, Proceedings (Strasbourg: Council of Europe, 2008); Applying and Supervising the ECHR: Future Developments of the European Court of Human Rights in the Light of the Wise Persons' Report, Colloquy organised by the San Marino Chairmanship of the Committee of Ministers of the Council of Europe, San Marino, 22–23 March 2007, Proceedings (2007) 28 *Human Rights Law Journal* 1; Report of the Group of Wise Persons to the Committee of Ministers, Cm(2006)203, 15 November 2006; and Applying and Supervising the ECHR: Reform of the European human rights system, Proceedings of the high-level seminar, Oslo, 18 October 2004 (Strasbourg: Council of Europe, 2004).

22 Interlaken documents, 'Interlaken Declaration', supra n 21 at 'Implementation' para 6.

23 Council of Europe, High Level Conference on the Future of the European Court of Human Rights, organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, Izmir, Turkey, 26–27 April 2011, particularly para 4, see: www.coe.int/izmir [last accessed 29 October 2012].

lack of vision. The Brighton Declaration²⁴ invites the Committee of Ministers, by the end of 2013: to include a reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the Preamble to the Convention; to provide an optional protocol providing a 'preliminary reference procedure' (similar to that available in the EU context) which would enable national courts to seek, in on-going litigation, a non-binding advisory opinion from the ECtHR, the implications of which for a subsequent application to Strasbourg by one or more of the parties have yet to be clarified;²⁵ to reduce the time limit from six to four months between the final decision of the domestic legal system and the submission of an application to the ECtHR; to remove from Article 35(3)(b) the requirement that an application should have been 'duly considered by a domestic tribunal' before it can be rejected as inadmissible on the grounds that the applicant has suffered 'no significant disadvantage' as a result of the alleged violation; to amend Article 30 to permit Chambers to relinquish jurisdiction to the Grand Chamber whether or not one of the parties objects; and to amend Article 32(2) to ensure that judges are no older than 65 years when their term of office commences. The Brighton Declaration expresses concern about the rising backlog of admissible applications, but offers no credible solution apart from the possibility of extra judges being appointed (with potentially different terms of office and functions) which, as Entin, Jacqué, Mahoney and Wildhaber argue, is both problematic and unlikely to contribute anything of lasting value.²⁶ The Brighton Declaration also speculates that 'to secure the future effectiveness of the Convention system . . . it may be necessary to evaluate the fundamental role and nature of the Court'. With undeniable symbolism yet characteristic ambivalence, it adds that the Committee of Ministers might be required to 'carry out a comprehensive analysis of potential options' including 'how the Convention system in essentially its current form could be preserved, and consideration of more profound changes to how applications are resolved . . . with the aim of reducing the number of cases that have to be addressed by the Court'.²⁷ The objectives specified at Interlaken and Izmir to be achieved by the end of 2015 and 2019 are also reaffirmed.

B. The Academic/Judicial Debate

In contrast, what we call the 'academic/judicial debate' has the following characteristics. First, it is dominated by jurists, other scholars and, in their personal

24 Brighton Declaration, *supra* n 11.

25 Entin et al. argue that a system of advisory opinions should not be introduced until the Court gains more control of its own docket, nor, if and when it is, should it be at the expense of the right of individual application to Strasbourg, *supra* n 3 at paras 54–60.

26 Brighton Declaration, *supra* n 11 at paras 6 and 20(e); and Entin et al., *supra* n 3 at paras 42, 48.

27 Brighton Declaration, *ibid.* at paras 30, 31, 35(e).

capacities, certain former and current judges on the Court and other Council of Europe officials. However, unlike the official debate, there are also more serious and thorough attempts: to discern trends in the Court's activities and in the development of the Convention system including their interactions with national institutions, norms and processes; to identify the core contemporary functions of the Strasbourg process given the seismic changes in the wider European context since the end of the Cold War; to diagnose the central problems; and to identify coherent and integrated frameworks within which detailed reforms could be conceived and implemented.

What might be regarded as the two key questions facing the Convention system have also been framed more clearly in the academic/judicial debate than in its official counterpart. The first concerns how the Council of Europe can best encourage the institutionalisation of those national processes, which both reduce the risk of violation of Convention rights by public authorities and, where they have occurred, enable them to be effectively addressed at national level. The evidence shows that the impact of the ECHR on domestic legal systems 'varies widely across States and across time' and that the Court's impact is 'broad and pervasive' in some but 'weak in others'.²⁸ In 2011, the following states had the highest number of violations: Turkey (174), Russia (133), Ukraine (105) and Greece (73).²⁹ States with the fewest 'raw score' annual average number of violations over the past decade or so include Ireland, Norway and Sweden, while France, Turkey and Italy have had the most.³⁰ These are not, however, unproblematic indicators of compliance.³¹ But ranking states according to the official violation rate per head of population, as some have advocated,³² risks introducing other distortions because, for example, a single judgment may cover a cluster of applications and may address a violation suffered by thousands or even tens of thousands. A ranking which also sought to factor in widely divergent national application rates, has yet to be attempted and it is doubtful if this would be worthwhile either because some states are more litigious than others. Keller and Stone Sweet argue that the key to improvement in national Convention compliance lies more in the effective 'reception', or 'domestication', of the ECHR in national legal systems than in its formal incorporation.³³ This means ensuring the Convention binds all national public authorities, ranks at least above statute in national constitutional systems, takes precedence over other competing legal norms, and is capable of

28 Keller and Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford/New York: Oxford University Press, 2008) at 4.

29 Facts and Figures 2011, *supra* n 1 at 6.

30 Keller and Stone Sweet, *supra* n 28 at 693–4; and Greer (2006), *supra* n 19 at Chapter 2.

31 Greer (2006), *supra* n 19 at 69–78.

32 Keller and Stone Sweet, *supra* n 28 at 693.

33 *Ibid.* at 706–7; see also Helder, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *European Journal of International Law* 125; and Greer (2006), *supra* n 19 at 83–5.

being invoked by individuals in litigation before national courts.³⁴ While the Strasbourg institutions seek to persuade states to embed Convention rights more effectively in their national processes, ultimately this is all they can do since only states themselves can make it happen.

The second key question facing the Convention system is how the scarce judicial resource represented by the Court can be deployed with maximum effect. Rather obviously, the Court itself has claimed the lead here. However, the scope for it to improve its own contribution is inevitably limited by the Convention framework. The answer to this question critically depends on how the Court's basic functions are understood. Strange though it may seem, even after over more than half a century, there is still no firm consensus on what these are.

3. Three Conceptual Frameworks

Two conceptual frameworks—'individual' and 'constitutional justice'—dominated the academic/judicial debate, especially in the UK, prior to the finalisation of Protocol No 14 in 2004.³⁵ However, another perspective, 'pluralism'—linked to wider debates about the characteristics of international legal regimes—also now needs to be considered.

A. Individual Justice

The model of individual justice maintains that the Court exists primarily to redress Convention violations for the benefit of the particular individual making the complaint, with whatever constitutional or systemic improvements at the national level might thereby result. For anyone considering the merits of various human rights protection systems, this objective is likely to seem very attractive.³⁶ If governments did not hinder it, such a system would soon entice plenty of applicants. It would also put victims in the driving seat, allowing them to choose for themselves whether or not they wanted to complain, with no State or third party able to do so on their behalf. Cases and issues embarrassing for a government would, therefore, be much more difficult to suppress. By contrast, the reporting systems that characterise other human rights

34 Keller and Stone Sweet, *supra* n 28 at 14, 17, 682–3; and Greer (2006), *supra* n 19 at 321.

35 See Henneke-Vauchez, 'Constitutional v International: When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' and Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?', in Christoffersen and Madsen (eds), *supra* n 18 at 144–63 and 181–203, respectively; and Greer (2006), *supra* n 19 at 165–74.

36 Wildhaber, 'Rethinking the European Court of Human Rights', in Christoffersen and Madsen (eds), *supra* n 18 at 208.

treaties, including for example the Council of Europe's European Social Charter,³⁷ are state-managed and therefore entail a degree of shadow-boxing and attempts to gloss over real problems. Recourse to an international court also seems to offer redress to victims of human rights violations which states would otherwise be unwilling to grant, although admittedly the Convention itself guarantees only declaratory, pecuniary and procedural (but not substantive) remedies.

However, a narrow and a broad sense of the term 'individual justice' need to be distinguished. With the inter-state applications process all but obsolete, virtually the only viable vehicle through which any judicial objective under the Convention system can currently be achieved is by judgments delivered in response to individual applications. The Court is, therefore, inescapably committed to the delivery of 'individual justice' in this narrow sense no matter what other goals it might have. The term 'individual justice' can also mean, in a broader sense, the attempt by the Convention system to ensure that every genuine victim of a Convention violation receives a judgment in their favour, however slight the violation, whatever the bureaucratic cost, whether or not the applicant receives compensation or any other tangible remedy, and whatever the likely impact on the state conduct or practice in question (call this 'the systematic delivery of individual justice'). While the principle of individual petition is likely to remain central to the Court's future, the systematic delivery of individual justice was never a credible goal for the Convention system and is even less so now. By refusing to acknowledge the need for radical change, those who remain wedded to this echo of an imagined past jeopardise the right to individual petition, the very thing they claim to hold most dear.

The idea that the systematic delivery of individual justice could and should be the Court's core function is untenable for three principal reasons. It is perhaps not surprising, therefore, that those who support it have never sought to offer a full and coherent argument in its favour. It has, instead, merely been implicitly invoked, in both pre- and post-Protocol No 14 debates, by those opposed to any reconsideration of the admissibility criteria for individual applications.³⁸ The first reason is that this was not what the Convention system was originally set up for. At its inception the ECHR was intended to prevent a recurrence of the atrocities of the Second World War, and to contribute to the

37 See Benelhocine, *The European Social Charter* (Strasbourg: Council of Europe Publishing, 2012); and Harris and Darcy, *The European Social Charter*, 2nd edn (Ardsey NY: Transnational, 2001).

38 See, for example, Brighton Declaration, *supra* n 11 at para 35(c). Recent academic contributions include: Leach, 'Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?' (2006) 27 *Human Rights Law Journal* 11; Amnesty International, (Updated) *Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights*, signed by 114 NGOs, April 2004; Benoit-Rohmer, 'Il faut sauver le recours individuel' (2003) 38 *Recueil Dalloz* 2584-90; and Tulkens, 'Les réformes à droit constant' (2002) *Revue Universelle des Droits de l'Homme* 265.

peace of Western Europe in the context of the Cold War by providing an independent, transnational judicial forum mediating international disputes about rights violations. While the promotion of international peace in Europe is now shared at the transnational level with other institutions, particularly the European Union, the Convention's fundamental role and rationale continue to be the defence of the character and integrity of national political, constitutional and legal systems in European democracies through the language and medium of human rights, rather than benefiting individual applicants *per se*. Secondly, in view of the changes of the past half century there is simply no realistic prospect of justice being systematically delivered to every applicant with a credible complaint about a Convention violation.³⁹ And unless it is systematic, individual 'justice' risks becoming arbitrary. As already indicated the ECtHR rejects as inadmissible about 95% of the applications it receives, an admissibility rate not dissimilar to that of national constitutional courts.⁴⁰ Officially, about two thirds of these are rejected on the grounds of being 'manifestly ill-founded' (the lack of an arguable case).⁴¹ However, what counts as a manifestly ill-founded application may span a spectrum of standards ranging from 'totally unmeritorious' to 'no *prima facie* breach'.⁴² It is also naïve to regard the manifestly ill-founded criterion as an 'objective test' in either of two senses. It is, in the first place, only one of a number of possible criteria of admissibility, which could have been chosen at the inception of the ECHR for individual applications when these were not expected to be the main mechanism of enforcement. Nor is it 'objective' in the sense of being beyond the exercise of judgment and the interpretation of conduct, facts and norms. If it were otherwise the Court would not need to explain, as it sometimes does, why an application is 'manifestly' ill-founded.⁴³ Requiring reasons to be given in each of the 50,000 or so cases the Court currently rejects as inadmissible every year,⁴⁴ as some have proposed,⁴⁵ would also massively compound the case overload crisis. Indeed, some commentators maintain that many complaints are rejected on the 'manifestly ill-founded' criterion simply because the

39 As recently recognized by the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly, see Mowbray, *supra* n 21 at 523; see also Entin et al., *supra* n 3 at paras 30, 31.

40 Greer (2006), *supra* n 19 at 183–4; see also Annual Report 2010, *supra* n 2.

41 ECtHR, Preliminary Contribution by the President of the Court to the Izmir Conference, 26–27 April 2011, Appendix 2: 'The Follow-up by the Court to the Interlaken Declaration and Action Plan' at para 11 (copy on file with author).

42 Harris, O'Boyle, Bates and Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009) at 785.

43 A classic example is the controversial case of *Banković and Others v Belgium and 16 Other Contracting States* 2001-VII; 44 EHRR SE5.

44 50,677 cases were declared inadmissible or struck out of the list by a single Judge, a Committee or a Chamber in 2011; 1,518 strike out decisions followed a friendly settlement or a unilateral declaration: see Analysis of Statistics 2011, *supra* n 3 at 4.

45 Lester, 'The European Court of Human Rights after 50 Years' (2009) *European Human Rights Law Review* 461 at 470.

Court does not have the resources to consider them properly.⁴⁶ Thirdly, for many applicants a judgment that their Convention rights have been violated is a hollow victory because levels of compensation are low and other rewards few.⁴⁷ Although states only rarely refuse to pay compensation where the Court has ordered it, the ‘justice’ delivered tends to be more symbolic than instrumental. For example, applicants who manage to persuade the Court that their conviction for a criminal offence occurred in circumstances where their right to fair trial was breached, will not automatically have their convictions quashed, although nowadays criminal proceedings are more likely to be reopened in such circumstances than before.⁴⁸

B. Constitutionalisation and ‘constitutional justice’

In order to understand what ‘constitutionalisation’ and ‘constitutional justice’ might mean, we need to begin by distinguishing different senses of the term ‘constitution’.

(i) What is a ‘constitution’?

In its broadest sense a ‘constitution’ refers to how any entity, for example the human body, is constructed and how it functions. In the narrowest sense it is confined only to the fundamental laws of the modern sovereign nation state as expressed in a single formal document. Various senses lie in between, including the terms upon which any deliberately constructed human association—from a university sports club to an international organisation—is based, and how the rights and obligations of membership are defined and distributed. These may be found either in a canonical document created by the association’s founders, and/or inferred from various sources including largely settled and consistent institutional practice, such as statutes having constitutional rank, customary and judge-made law. While all human associations with constitutions in this sense are likely to have had seminal ‘constitutional moments’, ‘constitutionalisation’⁴⁹—the process by which a constitution is framed and institutionalised—may be protracted and may also vary in degree and intensity from place to place. A useful conception of a constitution in the

46 Simor and Emmerson (eds), *Human Rights Practice* (London: Sweet and Maxwell, 2000) at para 20.039.

47 Harris et al., *supra* n 42 at 856–61.

48 Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, 2nd edn (Strasbourg: Council of Europe Publishing, Human Rights Files No 19, 2008) at 18–24; and Keller and Stone Sweet, *supra* n 28 at 704.

49 Loughlin, ‘What is Constitutionalization?’, in Dobner and Loughlin (eds), *The Twilight of Constitutionalism* (Oxford: Oxford University Press, 2010) at 47; and Kumm, ‘The Best and the Worst of Times: Between Constitutional Triumphalism and Nostalgia’, in Dobner and Loughlin, *ibid.* at 201, 212–8.

political–legal sense is provided by Raz who states that it is: (i) constitutive of the legal and political structure, (ii) stable, (iii) written, (iv) superior to other laws, (v) justiciable, (vi) entrenched, and (vii) expresses a common ideology.⁵⁰

(ii) The 'constitutional' characteristics of the ECtHR and Convention system

While it would be difficult to argue that the ECHR fulfils the first of Raz's criteria, it would also be difficult to deny that it largely fulfils the remainder, albeit unevenly across member states. As Sadurski concludes, it could, therefore, be said to be '*largely* though not fully constitutional', with the ECtHR having become much more constitutional than before.⁵¹ More specifically, the Council of Europe, the ECHR and the ECtHR could be said to have the following constitutional characteristics for the following reasons.

Firstly, as the Court has stated, the Convention is 'a constitutional instrument of European public order'.⁵² Are we to conclude, as the negative attitude expressed in the official debate towards constitutionalisation (considered more fully later) suggests, that the Court has fundamentally misunderstood its own constitutive document?

Secondly, human rights litigation in national legal systems is, almost by definition, 'constitutional' because it raises fundamental questions about the distribution of benefits and burdens and about the structure of social and institutional relationships, because it tests the limits of the exercise of public power by reference to specified interests framed as rights, and because it impacts significantly only on the docket of the highest courts, particularly at the supreme or constitutional court level. Lower courts in all national legal systems are generally concerned with fact finding, the application of positive law—which although derived from human rights is rarely directly about human rights themselves—and the management of various kinds of official discretion. For example, the UK's Human Rights Act 1998, which makes Convention rights litigable in domestic courts, is virtually invisible in the routine legal process, featuring, for example, in only two per cent of reported appellate cases and considerably fewer at first instance.⁵³ It is, however, referred to in about a third of House of Lords/Supreme Court cases although it substantially affects the results in only about one-tenth.⁵⁴ It is difficult to understand, therefore, how human rights litigation with such a clear constitutional

50 Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) at 153–4.

51 Sadurski, 'Partnering with Strasbourg', *Constitutionalisation of the ECtHR, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments* (2009) 9 *Human Rights Law Review* 397 at 448–9 (italics in original).

52 *Loizidou v Turkey (preliminary objections)* A 310 (1995); 20 EHRR 99.

53 *Review of the Implementation of the Human Rights Act* (London: Department for Constitutional Affairs, Justice, Rights and Democracy, July 2006) at 10.

54 *Ibid.*

complexion at the national level could lose this characteristic when it is taken to Strasbourg.

Thirdly, the reverse is also the case. The fact, as recent research shows, that the ECHR is increasingly acquiring 'constitutional status' in member states, albeit in different ways in different places,⁵⁵ poses an intriguing question for those who reject the constitutionalisation thesis: how could it gain such status at the national level without having it at the transnational level in some sense already?⁵⁶

Fourthly, to a large extent, the ECtHR decides broadly the same kind of issues as a domestic supreme or constitutional court, and also in largely similar ways. This involves exploring whether the aims invoked to restrict a specific human right are legitimate, whether the restrictions have a sufficient legal basis, and whether they are proportionate and necessary in a democratic society.⁵⁷ Indeed the dozen or so principles of interpretation used by the Court—for example, democracy, the rule of law, effective protection of human rights, margin of appreciation, subsidiarity, proportionality and so on—are effectively constitutional principles because they raise two distinct and quintessentially constitutional questions: the 'normative question' of what a given Convention right means including its relationship with other rights and collective interests, and the 'institutional question' of which institutions—judicial/non-judicial, national/European—should be responsible for providing the answer.⁵⁸ The central constitutional issue raised by the Convention is, therefore, how its basic purpose can be realised institutionally. This is more fundamental than the distribution of competence between national institutions, on the one hand, and the ECtHR on the other since the function of national non-judicial bodies differs under the Convention from that of both national courts and the ECtHR which together share similar, though not identical, responsibilities. The central constitutional question therefore becomes—how can responsibility for rights protection and the democratic pursuit of the public interest be distributed between judicial and non-judicial institutions each acting in accordance with the rule of law?

Greer has argued that answering this question, while remaining faithful to the Convention's underlying object and purpose, requires a re-arrangement of the primordial soup of principles of interpretation, and a re-structuring, but

55 Keller and Stone Sweet, *supra* n 28 at 682–9.

56 Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749 at 752, 768.

57 Klug and Wildbore, 'Follow or Lead? The Human Rights Act and the European Court of Human Rights' [2010] *European Human Rights Law Review* 621; Besson, 'The Reception Process in Ireland and the United Kingdom', in Keller and Stone Sweet, *supra* n 28, 31–106; see also Barak, *Proportionality, Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012); and Osiatyński, *Human Rights and Their Limits* (Cambridge: Cambridge University Press, 2009).

58 Greer (2006), *supra* n 19 at Chapter 4.

not a substantive revision, of the orthodox principle of effective protection of human rights, as well as the principles of legality/rule of law, and the principle of democracy. This produces three primary constitutional principles each exercised according to the principle(s) of legality, procedural fairness and rule of law, to which the remaining principles of interpretation are subordinate.⁵⁹ The 'rights' principle holds that, in a democratic society, Convention rights should be protected by national courts and by the ECtHR through the medium of law. The 'democracy' principle maintains that, in a democratic society, collective goods/public interests should be pursued by democratically accountable national non-judicial public bodies within a framework of law. The principle of 'priority to Convention rights' mediates the relationship between the other two by insisting that Convention rights take procedural and evidential, but not conclusive substantive, priority over the democratic pursuit of the public interest, according to the terms of given Convention provisions. Providing the role of the principle of legality is recognised as integral to these three primary constitutional principles, little of consequence results from counting them as three rather than four. The function of the remaining subordinate principles of interpretation is to provide a complex web of overlapping and underpinning support for the primary ones.

A fifth constitutional characteristic of the Convention system concerns, as Gardbaum and others have pointed out, the 'ongoing process of implicit constitutionalisation in both the human rights system and international law as a whole'. Both the international human rights regime and international law itself, nevertheless, continue to be 'constrained by the still important role of state consent and the failure of human rights generally to bind international organizations'.⁶⁰ Debates about the constitutionalisation of the Court and Convention,⁶¹ and of international law and pan-national legal

59 Ibid.

60 Gardbaum, *supra* n 56 at 768.

61 See, for example, Sadurski, *supra* n 51; Helfer, *supra* n 33; Costa, 'La Cour européenne des droits de l'homme est-elle une cour constitutionnelle?', in Montchrestien (ed.), *Mélanges en l'honneur de Jean Gicquel* (Paris: Montchrestien, 2007); Wildhaber, *supra* n 19; Greer (2006), *supra* n 19; Wildhaber and Greer, 'Reflections of a Former President of the European Court of Human Rights' (2010) *European Human Rights Law Review* 165 at 166–8; Mahoney, 'New Challenges for the European Court of Human Rights Resulting from Expanding Case Load and Membership' *Conference on Human Rights – Dynamic Dimension*, London, 27 April 2002, and 'An Insider's View of the Reform Debate', paper presented at the *Symposium on the Reform of the European Court of Human Rights*, Strasbourg, 17 November 2003; Ryssdal, 'On the Road to a European Constitutional Court', Winston Churchill Lecture on the Council of Europe, Florence, 21 June 1991, quoted in Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court', in Mahoney, Matscher, Petzold and Wildhaber (eds), *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdall* (Cologne/Berlin/Bonn/Munich: Carl Heymans, 2000); Flauss, 'La Cour européenne des droits de l'homme est-elle une Cour constitutionnelle', (1998) 36 *Revue Française de Droit Constitutionnel* 711; and White and Boussiakou, 'Voices from the European Court of Human Rights' (2009) 27 *Netherlands Quarterly of Human Rights* 167.

regimes,⁶² have spawned a sophisticated literature that has grown rapidly over the past few years, the principal insights of which will be considered later.

(iii) Conceptions of ‘constitutional justice’

There are also various conceptions of ‘constitutional justice.’⁶³ At one end of the continuum, is the narrow view that ‘constitutional justice’ is limited to the decisions and judgments of national constitutional or supreme courts operating in a legal and political system with a single constitutional document empowering them to annul legislation, quash executive action, and overturn the decisions of lower courts principally when constitutional rights have been violated. At the other end, is the wider view that it includes the decisions and judgments of any court empowered to rule authoritatively and finally within a given legal system on whether fundamental rights have been breached by non-judicial authorities. In the latter sense, and according to the constitutional characteristics of the Convention system identified above, the Court is already a kind of constitutional, or quasi-constitutional court. It has itself affirmed, for example, that while ‘the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public policy grounds in the common interest’, albeit a problematic order of priorities considered further below.⁶⁴ This also appears to be what the Brighton Declaration means when it states that, while the Court’s function is to act as a ‘safeguard for individuals whose rights and freedoms are not secured at the national level’, in the longer-term and in ‘response to more effective implementation at the national level’, it should also focus more of its attention on ‘serious or widespread violations, systematic and structural problems, and important questions of interpretation and application of the Convention.’⁶⁵

As already indicated, the core challenge presented by the case overload crisis concerns how the scarce judicial resource the ECtHR represents can be most efficiently and effectively deployed. It is difficult to maintain that these requirements are currently being fulfilled not least because, also as already indicated, considerable amounts of time are consumed by admissibility decisions,

62 Recent contributions include Dobner and Loughlin (eds), *supra* n 49; Klabbers, Peters and Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Tsagourias (ed.), *Transnational Constitutionalism: International and European Models* (Cambridge: Cambridge University Press, 2007); Diggelmann and Altwicker, ‘Is there Something Like a Constitution of International Law?’ (2008) 68 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 623; and de Wet, *The International Constitutional Order* (Amsterdam: Vossiuspers UvA, 2005); see also the early seminal study of Loewenstein, *Verfassungslehre* (Tübingen: J.C.B. Mohr, 1959) at 127–66.

63 Wildhaber, “Constitutionnalisation” et “jurisdiction constitutionnelle” – Point de vue de Strasbourg’, in Hennette-Vauchez/Sorel (eds), *Les Droits de l’homme ont-ils constitutionnalisés le monde?* (Brussels: Bruyant Bruxelles, 2011) at 93.

64 *Karner v Austria* 2003-IX; 38 EHRR 528 at para 26; see also below.

65 Brighton Declaration, *supra* n 11 at paras 35(c), 33.

the Court itself considers 64% of its own judgments as of 'little legal interest', and between a half and two-thirds of its judgments concern repeat applications.⁶⁶ Inherent in the notion of 'constitutional justice' in the ECHR context is the idea that the Convention system should ensure that cases are both selected and adjudicated by the ECtHR in a manner which contributes most effectively to the identification, condemnation, and resolution of violations, particularly those which are serious for the applicant, for the respondent state (because, for example, they are built into the structure or *modus operandi* of its public institutions), or for Europe as a whole (because, for example, they may be prevalent in more than one state).

Four relatively recent developments indicate that, in this sense, constitutionalisation is already underway, albeit hesitantly and slowly. Firstly, the Court now groups similar applications for a single decision or judgment into what are effectively 'class actions', a policy encouraged by the Brighton Declaration.⁶⁷ In 2011, for example, 1,157 judgments disposed of 1,511 applications.⁶⁸ Secondly, the Court also prioritises applications in accordance with their seriousness and deals with the most serious first, a formal recognition that some meritorious cases are more worthy of examination at the international level than others.⁶⁹ Thirdly, the new admissibility criterion in Article 35(3)(b), which embodies a limited seriousness test, was intended to result in more cases being ruled inadmissible by enabling applications disclosing a *prima facie* case of Convention violation to be rejected where the applicant has not suffered a significant disadvantage, the case has been duly considered by a domestic tribunal, and there are no other human rights reasons for adjudication at Strasbourg. However, this new test has been a dismal failure so far. Between 1 June 2010 and 31 May 2011 applications ruled inadmissible by reference to it constituted only 0.34% of all applications with respect to which Chambers and the Grand Chamber made an admissibility decision in both separate and joint proceedings.⁷⁰

Fourthly, the boldest attempt to tackle the problem of defective national legislation or practice has undoubtedly been the so-called 'pilot judgment procedure', an 'emphatic expression', according to Sadurski, of the 'constitutional turn' in the Court's function.⁷¹ Developed by the Court independently of Protocol No 14, this enables a ruling to be made on a particular application

66 See sources in *supra* nn 6, 9, 10.

67 Brighton Declaration, *supra* n 11 at para 20(d).

68 Analysis of Statistics 2011, *supra* n 3 at 4–5; see also ECHR, *Preliminary Contribution by the President of the Court to the Izmir Conference, 26–27 April 2011*, Appendix 2: 'The Follow-Up by the Court to the Interlaken Declaration and Action Plan' at para 25.

69 Rule 41 of the Rules of Court; see Preliminary Opinion of the Court, *supra* n 12 at para 19; Entin et al., *supra* n 3 at para 12; Analysis of Statistics 2011, *supra* n 3 at 5; and Fribergh, *supra* n 12 at 119.

70 Greer, 'The New Admissibility Criterion', in Besson, *supra* n 12 at 40; and Preliminary Opinion of the Court, *supra* n 12 at para 10.

71 Sadurski, *supra* n 51 at 450.

allowing the many thousands, or tens of thousands, of potential complaints about the same violation to be diverted back to national authorities. However, according to a recent study, pilot judgments have only been 'relatively successful' in some contexts but less so in others.⁷² They are not, therefore, the panacea for the problem of case overload some may have hoped. Three kinds of judgment relating to systemic violations of the Convention by member states have been distinguished. First, up to January 2010, six 'full' pilot judgments had been delivered in cases against Poland, Russia, Moldova, Ukraine and Bosnia and Herzegovina in relation to a range of problems including the adequacy of compensation for the state seizure of private property, the non-enforcement of domestic court judgments and the excessive length of domestic legal proceedings. In these the ECtHR both expressly invoked the term 'pilot judgment' to describe its own approach, and identified a systemic Convention violation. The respondent state was reminded of the need to address the source, and of its obligation under Article 46 of the ECHR to abide by the final Strasbourg judgment. The Court also stipulated, in the operative part of its judgment, that general measures were required from national authorities and, typically, adjourned all other cases arising from the same problem. The adoption of this, the full pilot judgment procedure, depends on a mixture of 'practical and political considerations, as well as legal factors'.⁷³ In the second type, 'quasi-pilot' judgments, the Court identifies a systemic problem and invokes Article 46, but does not expressly describe its judgment as a 'pilot judgment', nor does it prescribe general measures in the operative part or, subject to certain exceptions, does it adjourn other similar cases. The third type are judgments, some of which predate the pilot judgment debate, which resemble 'quasi-pilot' judgments in all particulars except for the lack of an express invocation of Article 46.

The most critical issues that have arisen in the debate about pilot judgments are: what determines their effectiveness and how could this be enhanced? According to Leach et al., the key factor is the cooperation of respondent states, particularly recognition of the specific systemic problem by national constitutional or other higher courts before a pilot judgment has been delivered. The authors claim that lack of cooperation at the national level may be due to 'the extent of the political will . . . the domestic political agenda, the status of the Convention in national law, . . . technical capacity and financial burdens'.⁷⁴ 'Reputational pressures' are also listed but not explained.

72 Leach, Hardman, Stephenson and Blitz, *Responding to Systematic Human Rights Violations – An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level* (Antwerp: Intersentia, 2010) at 178; see also Entin et al., *supra* n 3 at para 11.

73 Leach et al., *ibid.* at 174.

74 *Ibid.* at 179.

(iv) Criticisms of the 'constitutionalisation thesis'

While the 'constitutionalisation thesis' has been rejected in the 'official debate' this is much less true of the academic/judicial debate. Although not universally accepted here either, Harmsen's claim that '(m)ajority academic opinion' has come down 'squarely on the side of the individual justice thesis' is difficult to reconcile with Hennesse-Vaucher's contribution to the same collection of essays considered further below.⁷⁵ Some legitimate concerns about constitutionalisation, nevertheless, need to be addressed.

The lack of a sustained defence of the case for 'individual justice' is mirrored in the official debate by the absence of a systematic critique of the arguments for 'constitutionalisation' and 'constitutional justice', or the articulation of any coherent alternative including pluralism. Instead all that has been offered so far are sweeping generalisations often rejecting the very notion that the Convention or Court have any constitutional characteristics or functions, typically confined to a few sentences, and implicitly referenced to the narrow nation-state model of constitutionalism. For example, at the Interlaken Conference in 2010 the Secretary General of the Council of Europe said:

'In recent years, there has been undefined talk of the Court becoming a "Constitutional Court". Although this has not yet led to any sort of agreement, let alone results, it has not been helpful. The Convention is not intended to be a "European constitution" and it is difficult to see how the Court could become like any existing national constitutional court. At the same time, I would like to recall that, ten years ago, the Declaration adopted by the European Ministerial Conference on Human Rights held in Rome to mark the 50th anniversary of the Convention already re-affirmed that "the Convention must continue to play a central role as a *constitutional instrument of European public order* on which the democratic stability of the Continent depends".⁷⁶

This confusing statement, which appears both to reject the constitutional character of the Court and simultaneously rejects and endorses the constitutional nature of the ECHR, embodies several misconceptions, some of which also feature in the academic/judicial debate. First, the 'constitutionalisation thesis' is by no means a recent development. As Hennesse-Vaucher points out 'multiple key Convention people have sided with a constitutional reading of the ECHR' from its very foundation.⁷⁷ According to this commentator, these

75 Harmsen, *supra* n 18 at 130; and Hennesse-Vaucher, *supra* n 35 at 145–54.

76 Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, 18 December 2009, SG/Inf(2009)20 at para 28 (emphasis in original), see: <http://www.coe.int/lportal/web/coe-portal/conference-on-the-future-of-the-european-court-of-human-rights-interlaken-18-19-february-2010?dynLink=true&layoutId=622&ddlgroupId=10226&fromArticleId=> [last accessed 29 October 2012].

77 Hennesse-Vaucher, *supra* n 35 at 151.

have included at least three Presidents of the Court (Rolf Ryssdal, Luzius Wildhaber and, less prominently, Jean Paul Costa), two Registrars (Michele de Salvia and Paul Mahoney), Jochen Frowein and Evert Alkema (respectively Vice-President and member of the European Commission of Human Rights), Pierre-Henri Imbert (head of the Human Rights Directorate), and Hans-Christian Krüger (head of the Commission's Secretariat). Others—such as Presidents of the Court Henri Rolin, Sir Humphrey Waldock and Lord McNair, and judges W. J. Ganshof van der Meersch, H. Mosler, Alfred Verdross, and Gerald Fitzmaurice—regarded the ECHR as embodying a common European ‘public order’, arguably a less formal version of constitutionalism.

Second, the case for constitutional justice does not advocate that the Court should *become* a ‘constitutional court’. It maintains, rather, that the Court is effectively one already and that this is a role that should be more formally acknowledged and more consistently performed. The case for constitutional justice is, therefore, much more about consolidation than it is about transformation.⁷⁸ The key question, therefore, considered more fully below, concerns how enhanced fidelity to its own inherent constitutional character would contribute to resolving the problems the Court faces.

Third, exponents of constitutionalisation or constitutional justice do not argue, as some critics suppose,⁷⁹ that the ECtHR should resemble national constitutional or supreme courts *in all significant particulars*, much less that it should become like the US Supreme Court with the power to annul national legislation. For at least four reasons the ECtHR does not, nor does any credible conception of constitutionalisation require it to have, this kind of authority. Firstly, its jurisdiction is limited to declaring whether or not the Convention has been breached.⁸⁰ It does not have the power to annul legislation or, including under the pilot judgment process, to prescribe to states precisely what needs to be done in order to correct a violation. Secondly, the role of the Court is subsidiary to that of national authorities that have the primary responsibility for ensuring Convention rights are not violated in the first place.⁸¹ Thirdly, the margin of appreciation doctrine legitimately leaves considerable scope for a range of equally Convention-compliant national norms, institutions and processes. Fourthly, whether or not a judgment of the Court is effectively implemented at national level will depend upon both the willingness and capacity of national institutions on the one hand, and negotiation with the Committee of Ministers in the supervision of the execution of judgments on the other. Indeed, far from regarding the principles of subsidiarity, margin of appreciation and proportionality as characterising non-constitutionalised

78 Wildhaber, Foreword to Greer (2006), *supra* n 19 at xiii; see also Keller and Stone Sweet, *supra* n 28 at 13.

79 Hennette-Vauchez, *supra* n 35 at 153.

80 See Articles 19, 32(1), 45, 47–49 ECHR.

81 See, for example, Christoffersen, *supra* n 35 at 183–5.

pluralist legal orders, Klabbers et al. rightly regard them as integral to international constitutionalism.⁸² The case against constitutional justice can, in fact, be turned on its head. Is it possible that any modern court, capable of authoritatively condemning legislative and executive action from the standpoint of an independent judicial interpretation of formally specified fundamental rights, could legitimately exist and function in the absence of any constitutional framework whatever?

A fourth misconception is that limiting the ECtHR to the adjudication of only serious alleged violations, as the constitutionalisation thesis suggests, would threaten the right of individual petition and would undermine the Court's legitimacy. Contrary to what many NGOs and others appear to think, the right of individual petition is a right to *make a complaint*, not a right to *have it judged on the merits*.⁸³ No applicant who can currently lodge an application at Strasbourg would be unable to do so if seriousness were to become the core substantive criterion of admissibility. Indeed, the vast bulk of the docket of the constitutional courts in Germany and Spain, and of most other European national constitutional courts, consist of individual applications the admissibility of which hinges upon the seriousness of the complaint.⁸⁴

Fifth, there is no substance either in the fear that acknowledging the ECtHR's constitutional character threatens the independence of national constitutional courts. Although there may be differences of opinion as to how the constitutional function of each of these types of court should be interpreted, properly understood their roles are complementary and not antagonistic. As Fassbender puts it: '[I]t is a profound misunderstanding to equate the advancement of the constitutional idea in international law with a weakening of the institution of the independent state.'⁸⁵

Sixth, it has been claimed that individual and constitutional justice are not mutually exclusive but twin goals that the Court must deliver simultaneously, albeit appropriately balanced.⁸⁶ But as Greer has argued, it is 'trite to assert that... (the Court)... ought to dispense both individual and constitutional

82 Klabbers et al., *supra* n 62 at 31–6.

83 See, for example, the following recent statement from Amnesty International in *Amnesty Magazine*, March/April 2012, available at: www.Amnesty.org.uk [last accessed 29 October 2012]: 'At present anyone living in one of the 47 member states of the Council of Europe has a remedy if the state violates their human rights. They can take their case to the European Court of Human Rights, which enforces the European Convention on Human Rights'; see also Entin et al., *supra* n 3 at para 22.

84 Bell, 'Reflections on continental European Supreme Courts' (2004) 24 *Legal Studies* 156 at 163; Blankenburg, 'Mobilization of the German Federal Constitutional Court', in Rogowski and Gawron (eds), *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court* (New York/Oxford: Berghahn Books, 2002) 157 at 158.

85 Fassbender, 'The Meaning of International Constitutional Law', in Tsagourias, *supra* n 62 at 326; see also Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317 at 334.

86 Egli, 'Protocol No. 14 to the ECHR: Towards a More Effective Control Mechanism?' (2007) 17 *Journal of Transnational Law and Policy* 1; and Steering Committee for Human Rights (CDDH),

justice since every judgment in an individual application delivers ‘individual’ justice in the narrow sense. But the consistent and systematic delivery of individual justice is simply beyond the Court’s capacity, and dispensing small amounts of compensation to a tiny percentage of individual applicants for what may or may not be substantial Convention violations inhibits the fulfilment of its constitutional mission.⁸⁷

Some may also be concerned, seventh, that ‘constitutionalisation’ is not quite the right way in which to frame the pursuit of greater efficiency and effectiveness and that a different label might avoid some of the misconceptions about what this term implies. Possible substitutes—for example ‘systemic justice’, a ‘systemic approach to alleged Convention violations’, a ‘holistic approach’—might serve equally well. But determining precisely what they mean raises at least as many questions.

Eighth, it has also been claimed that constitutionalisation would make the selection of cases for adjudication at Strasbourg, pragmatic, unprincipled and unpredictable, too heavily reliant on figures and numbers, liable to ignore the underlying issues in complaints, and vulnerable to ‘moral panics’.⁸⁸ It is said that, in its turn, this would dilute the existing level of human rights protection, introducing relativistic standards rather than tailor-made responses to each individual application, which would damage the credibility of the Court and diminish its pedagogical function in a heterogeneous international community. These concerns are, however, misconceived for the following reasons. Firstly, precisely the same criticisms could be laid at the door of every constitutional or supreme court in every member state of the Council of Europe, yet no one would seriously do so. Secondly, national public opinion tends to accord constitutional courts higher esteem and legitimacy than any other national public institution.⁸⁹ Thirdly, for the ECtHR to select cases for adjudication on the basis of a seriousness criterion is no less predictable, unprincipled or discretionary than the ‘manifestly ill founded’ test which it would replace. Fourthly, the fact that the Court spends most of its time adjudicating complaints which do not raise issues of particular significance hardly contributes to its credibility, legitimacy, and pedagogical function. Fifthly, creating more time for the ECtHR to spend on issues of the greatest significance would,

Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights—Addendum to the final report containing CDDH proposals (long version), 9 April 2003, CDDH(2003)006 Addendum final, at 4, para 11.

87 Greer (2006), supra n 19 at 190.

88 See the sources discussed in Wildhaber, supra n 63.

89 Rogowski and Gawron, ‘Constitutional Litigation as Dispute Processing: Comparing the U.S. Supreme Court and the German Federal Constitutional Court’, in Rogowski and Gawron (eds), supra n 84 at 7; see also Kleijkamp, ‘Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights’ (2002) 12 *Transnational Law and Contemporary Problems* 307.

therefore, enhance rather than diminish the prospects of these objectives being attained.

Finally, the most powerful criticism of the 'constitutionalisation thesis', considered in the following section, comes from those who argue that pluralism provides a better approach.

C. Pluralism

The pluralist model comes in two main forms. One is the claim that the Court has many functions and not the binary alternatives suggested by the models of individual and constitutional justice. The other is the view that the Convention system is part of an interlocking plurality of legal systems in both contemporary Europe and beyond.

(i) A plurality of functions

Various commentators have identified a range of functions discharged by the Court. Çali, for example, distinguishes four: '(1) to hold states parties to account; (2) to protect minority groups and views; (3) to trigger reform; and (4) to uphold a model of rights-bearing based on individuals rather than citizens.'⁹⁰ While stating that 'it would be difficult to conceive of the ECtHR as a constitutional court', she nevertheless concedes that the Court's central purpose is to establish 'the accountability of individual Member states on the specific subject-matter of human rights protection,'⁹¹ a function which, together with the others, has constitutional significance in spite of the author's denial. Çali also maintains that these four functions should 'be taken into account when admissibility criteria are established upon the coming into force of Protocol No. 14,'⁹² but declines to say what this means or how it would work in practice. Keller and Stone Sweet also maintain that the Court has several functions depending upon which Convention rights and which states are involved. They claim, for example, that the Court behaves like a 'kind of High Cassation Court' when it comes to procedure, an 'international watchdog' regarding grave human rights violations and massive breakdowns in the rule of law, and an 'oracle of constitutional rights interpretation' in relation to Articles 8–11 and 14 of the ECHR.⁹³ However, crucially, they also acknowledge that 'the Court is increasingly engaged in delivering... "constitutional justice".'⁹⁴

90 Çali, 'The Purposes of the European Human Rights System: One or Many?' [2008] *European Human Rights Law Review* 299 at 299.

91 *Ibid.* at 304.

92 *Ibid.* at 299.

93 Keller and Stone Sweet, *supra* n 28 at 695.

94 *Ibid.* at 703.

Wildhaber has distinguished six functions,⁹⁵ each only capable of being properly harmonised and prioritised by the Court's core constitutional mission. First, the ECtHR filters applications, rejecting as inadmissible the vast majority on formal grounds (for example, non-exhaustion of domestic remedies), mixed grounds (for example, incompatibility with the Convention), or substantive grounds (for example, being 'manifestly ill-founded'). Nevertheless, those applicants whose petitions are rejected will, at least, have had the opportunity to raise a complaint—the second, 'wailing wall', function. Four further functions in cases judged on the merits are: borderline fine-tuning, responding to grave breaches of human rights, addressing structural or systemic problems and preventing arbitrariness by delivering administrative justice. As far as borderline fine-tuning is concerned, the ECtHR takes pride in its evolutive interpretation of the Convention in the light of progressively developing social values and changing individual needs, with some of the key players apparently believing they have a duty to extend the reach of Convention rights as far as possible.⁹⁶ The ECtHR has also, unfortunately, had to deal with clear cases of grave and massive human rights breaches, including for example, random killings, torture, disappearances, rapes, prolonged illegal detention, thoroughly unfair or arbitrary proceedings, and systematic attempts to eliminate political opposition. There is little doubt that a human rights court should condemn such grave breaches as a matter of the utmost priority even though the governments concerned will often resent its intervention and may denounce its judgments as political rather than legal.

As already indicated, one of the biggest problems facing the Convention system is how to deal with large numbers of well-founded applications deriving from structural or systemic problems in member states which generate either repetitive or mass claims. The best-known examples are the excessive length of court proceedings and the failure to execute final court judgments, problems that continue to exist in many of Europe's states.⁹⁷ No matter how many cases concerning these difficulties arrive at the door of the Court, the fact that each applicant is equally aggrieved may suggest that each case should be examined with equal care. But it is difficult to see how this is possible given that over 150,000 applications are currently awaiting an admissibility decision.⁹⁸ A solution, which the Court and others find attractive, would be for these cases to be dealt with by respondent states and the Committee of

95 Wildhaber, *supra* n 36 at 209–12. Filtering, routine adjudication, borderline fine tuning, addressing grave breaches and confronting structural or systemic problems are distinguished by Entin et al., *supra* n 3 at paras 27, 34.

96 Voeten, 'Politics, Judicial Behaviour and Institutional Design', in Christoffersen and Madsen, *supra* n 18 at 61–76.

97 Wildhaber, *supra* n 36 at 210.

98 Facts and Figures 2011, *supra* n 1 at 5.

Ministers as an execution problem.⁹⁹ Finally, it can also be observed that, in the context of recent complaints about inadequate compensation for hidden or de facto expropriations or excessively high fines or fees, the ECtHR is becoming not only a quasi-Constitutional Court for Europe, but also effectively a sort of a 'European quasi-Supreme Administrative Court'.¹⁰⁰

While the ECtHR can be relied upon to work hard to harmonise and reconcile its various functions, this task is inevitably delicate and depends upon the standpoints and agendas of the various players, especially the judges themselves. 'Judicial activists' and 'perfectionists'¹⁰¹ are likely to consider the Court's mission to be, first, the steady expansion of human rights on a widening front, second, the abandonment of notions such as subsidiarity and margin of appreciation in favour of ambitious standard-setting, and, third, the renunciation of the distinction between those cases which, on the one hand, require 'routine adjudication' or 'fine-tuning', and, on the other, those relating to 'grave breaches'. The implication is that all these distinctions would be replaced by the simple concept of 'human rights violations writ large'. On the other hand, advocates of 'judicial self-restraint', 'realism', and 'minimalism'¹⁰² would go less far. For them the ECtHR's inescapable dependence upon, and interconnectedness with, the various national courts, parliaments and governments, necessarily involves a sense of proportion and prioritisation. From this perspective, the Court provides, above all, inspiration, guidelines, minimal standards, and a programme of 'realistic idealism'/'idealistic realism'; that is to say idealism tempered by a full appreciation of what the Convention can and cannot achieve.¹⁰³

Given the impossible workload, we believe it would be more honest and transparent, and more consistent with the Court's constitutional mission, to acknowledge the following. Firstly, many applications cannot and should not be examined whether or not they disclose a credible violation. This is effectively what, in a very limited manner, the new Article 35(3)(b) test does. Secondly, the ECtHR will, inevitably, have to continue to handle claims alleging grave breaches of the ECHR, since this is a task no human rights court

99 Preliminary Opinion of the Court, supra n 12 at para 21; and Entin et al., supra n 3 at paras 7, 43–6.

100 See Wildhaber and Wildhaber, 'Recent Case Law on the Protection of Property in the ECHR', in Binder, Kriebaum, Reinisch, and Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of C. Schreuer* (Oxford: Oxford University Press, 2009) at 674–6.

101 For discussions of 'activism' and 'restraint' as styles of adjudication in the Convention context see Delzangles, *Activisme et Autolimitation de la Court européenne des droits de l'homme* (Paris: Librairie Générale de Droit et de Jurisprudence, 2009); Voeten, supra n 96; and Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57. For a discussion of the distinction between 'scepticism', 'realism' and 'perfectionism' in relation to human rights, see Greer, 'Being 'realistic' about Human Rights?' (2009) 60 *Northern Ireland Legal Quarterly* 147.

102 Ibid.

103 Wildhaber, supra n 36 at 212.

worthy of the name can avoid. Thirdly, with respect to structural or systemic problems, the Court must decide what its guiding principles should be. While the details should be entrusted to national authorities, the ECtHR must retain ways and means of periodically controlling national execution in individual cases. But, given case overload, it is simply not feasible to rely extensively on a case-by-case control by the Court alone. It is, in any case, doubtful if a European Court could, by itself, discipline national systems which, for whatever reason, simply do not play by the rules of the pan-European game. As to routine adjudication and fine-tuning, in open societies judicial attitudes will necessarily oscillate between more activist and more self-restrained approaches. For example, a large number of Grand Chamber judgments are accompanied by dissenting and separate opinions because judicial agendas and perceptions differ, and because it is difficult to deny that there are various ways of safeguarding most human rights. Ideally the ECtHR should develop an acute sense of its own effectiveness and priorities, and a realistic sense of what should be secondary. This is, after all, merely the logic of subsidiarity, which entails that, in many respects, the primary sites for the protection of human rights are, and will continue to be, decentralised.¹⁰⁴ It is difficult, therefore, to deny that, in a fundamental sense, these are all constitutional issues because they concern deep questions about the interpretation and implementation of rights and about how relevant processes should be institutionally managed.

(ii) A plurality of systems

The second sense of the term ‘pluralism’ refers to a type of post-national legal regime.¹⁰⁵ In this sense it is essentially a macro-level descriptive-analytical framework with normative implications,¹⁰⁶ whereas the case for constitutionalisation in the Convention context is largely normative and stems directly from the debate about how the Court’s application-overload crisis might be resolved.¹⁰⁷ Krisch, perhaps the leading exponent of the pluralist conception of the European human rights legal regime, observes that the ECtHR has gained such remarkable authority over the past half-century or so, that its judgments enjoy high rates of compliance, and are regularly cited in most member states.¹⁰⁸ As many others would also acknowledge, this means that it

104 See also Christoffersen and Hennette-Vauchez, *supra* n 35.

105 Krisch, ‘The Case for Pluralism in Postnational Law’, in de Búrca and Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011); *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) at Chapter 4; and ‘The Case for Pluralism in Postnational Law’, LSE Law, Society and Economy Working Papers 12/2009.

106 See Krisch (2009), *ibid.* at 19.

107 See, for example, Greer (2006), *supra* n 19 at 165–89.

108 Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71 *Modern Law Review* 183 at 184.

is no longer useful to distinguish between domestic and European human rights law in terms of the classic domestic/international dichotomy. But, because the 'ever-closer linkage' between national and European levels of human rights protection has been accompanied by similar processes in many national legal systems, the two combined cannot be said to form an integrated whole, neatly organised according to rules of hierarchy and a clear distribution of tasks.¹⁰⁹ According to Krisch, the emerging human rights legal order in Europe, therefore, has pluralistic characteristics. Instead of there being a common set of fundamental authoritative legal norms, several compete for authority. The relationships between the constituent parts of the legal regime this produces are governed in the final analysis, not by legal rules, but by politics, including the politics of the various judiciaries involved. This results in a horizontal-heterarchical, rather than vertical-hierarchical structure, which is, nevertheless, remarkably stable, mutually-respectful, and ultimately non-conflictual. As far as the relationship between Strasbourg and member states of the Council of Europe is concerned, Krisch maintains that the principal dynamic stems mainly from the status of the ECHR in national legal systems, and the role ascribed to it and to Convention jurisprudence by national courts.

Pluralism, in this second sense, has also recently been invoked as an explanatory paradigm for the ECHR by Hennette-Vaucher and Christoffersen. Hennette-Vaucher maintains that 'constitutionalist talk' in the Convention context is based on a 'false alternative between individual and constitutional justice' since such 'transnational language' is 'hardly audible in the national settings . . . in which the Convention primarily operates'.¹¹⁰ Seeking to illustrate this by reference to legal discourses over the Convention in France and Italy, she argues that 'there is no such thing as one "ECHR law"',¹¹¹ but rather a Strasbourg and forty-seven other national versions. She concludes that 'constitutional semantics' are mostly used in a "'preservation-of-the-national-legal-order" fashion in Italy', whereas in France, in contrast, they implicitly 'support a technically much looser desire to affirm a "symbolic-axiological" primacy of human rights'.¹¹²

Christoffersen maintains that 'there are severe restrictions on the Court's role as an institution granting individual relief, just as there are serious limits on the Court's scope for developing a constitutional role'.¹¹³ In an effort to indicate what 'a constitutional role' means, he identifies characteristics of the Convention system assumed to be inconsistent with it. Some of the most important of these include: the limits on the Court's capacity to make 'sweeping

109 Ibid.

110 Hennette-Vaucher, *supra* n 35 at 145.

111 Ibid. at 145–6.

112 Ibid. at 153–4.

113 Christoffersen, *supra* n 35 at 202.

statements of principle'¹¹⁴ imposed by its responsibility to respond to the precise facts of individual applications; the lack of a power of 'abstract review' (declaring whether or not any exercise of national public power has violated the Convention in the absence of a complaint to this effect from a specific victim); the restriction of the Court's advisory jurisdiction almost to vanishing point where a risk of compromising a possible concrete complaint on the same matter may arise; and fact-and-state-specific limitations on the *erga omnes* effect of the Court's judgments.¹¹⁵ Secondly, Christoffersen regards the fact that the Court's judgments must be enforced by national authorities as inconsistent with it having a 'constitutional role'. He, therefore, concludes that the 'ECHR is *prima facie* pluralistic in the sense that the enforcement system is highly decentralised'.¹¹⁶

Christoffersen's eloquent pleas for a new approach to ECHR adjudication are based on subsidiarity, the dynamic between national and international authorities, and on the Court's workload. As he puts it:

This means first and foremost that the States must implement the ECHR in their domestic legal orders and follow the case law of the Court; but States must also do more than that. States may and must, depending on the circumstances, deviate from the case law of the Court and independently strike a fair balance between opposing forces and provide their own answers to pertinent human rights issues. States need to provide answers that have 'higher legitimacy than those given by the Court'.¹¹⁷

From the standpoint of international law, Christoffersen's argument could be understood as a plea for a modernised form of dualism with the, at least occasional, primacy of national law anchored less in general theory than in empirical reality. He asks how clear an interpretation of the Convention must 'be before domestic authorities – according to national law – are allowed and/or obligated to take the ECHR into account'.¹¹⁸ It is true that any theory of pluralism will have to answer the following primordial questions: is it up to national authorities to decide more or less freely when they want to give primacy to municipal law; is this permitted only in cases where no core contents of the Convention or no issues of European public order are at stake, and what would these core contents of the public order be; is the quality of the national democratic decision relevant and what will be left of the binding force of judgments of the ECtHR which member states have undertaken to respect according to Article 46(1) ECHR; and will it be sufficient to rely on the dialogue

114 *Ibid.* at 189.

115 See Besson, 'The *Erga Omnes* Effect of Judgments of the European Court of Human Rights – *What's in a Name?*', in Besson, *supra* n 12.

116 Christoffersen, *supra* n 35 at 195.

117 *Ibid.* at 181; see also Besson, *supra* n 115 at 149–58.

118 Christoffersen, *supra* n 35 at 192.

between national and European judges conducted in a spirit of tolerance and mutual respect.¹¹⁹

The cases presented by Hennette-Vauchez and Christoffersen are supported by empirical evidence. Recent judgments by several national supreme and constitutional courts—for example in Austria, Italy, Norway, Spain and Switzerland¹²⁰—could be characterised in terms of what might be called 'critical loyalty' to ECtHR jurisprudence. For instance, in its controversial *Görgülü* judgment, the German Federal Constitutional Court stated, in an *obiter dictum*, that the Basic Law did not renounce 'sovereignty, which is expressed in the German Constitution, which in turn constitutes the last word.'¹²¹ This means that 'exceptionally the legislature could disregard treaty law if this was the only way of avoiding disregard for core principles of the constitution.'¹²² While these passages may not sound very 'Convention-friendly', other statements invite German courts to interpret national law in conformity with the ECHR. Ultimately, after protracted court battles, the applicants' claims based on Article 8 of the ECHR were accepted. Such ambiguities are typical of the often predominantly symbolic or even emotional discussions about the conceptual frameworks in this field. No one can seriously deny, however, that, in the final analysis, effective solutions for Convention violations must be found at national level, or that, for a variety of reasons, the ECHR has an uneven impact in member states. But, having said all this, two main problems with Hennette-Vauchez's and Christoffersen's critiques of constitutionalism in the Convention context remain. Firstly, they are closely referenced to the national, rather than to the international, model of constitutionalism and, secondly, it is not clear how they might contribute to resolving the Court's case overload crisis.

119 Garlicki, 'Contrôle de constitutionnalité et contrôle de conventionalité. Sur le Dialogue des Juges', in Dalloz (ed.), *La conscience des droits, Mélanges en l'honneur de Jean-Paul Costa* (Paris: Dalloz, 2011) 271–80.

120 See the following judgments (Erkenntnisse) of the Austrian Constitutional Court (Verfassungsgerichtshof, VfGH): 2 July 2009, B 559/08, *Europäische Grundrechte-Zeitschrift* (EuGRZ) 2010 631, applying the *Zolotikhin* case of the ECtHR; 6 December 2007, B 639/07, EuGRZ 2008 309, applying the *Eskelinen* case of the ECtHR; 10 October 2005, G 87/05, V 65/05, EuGRZ 2006 432, applying the *Karner* case of the ECtHR. On Italy, see Hennette-Vauchez, *supra* n 35 at 154–7; on Spain, see Krisch, *supra* n 108 at 187–91.

121 *Görgülü* decision (Beschluss) of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307 = EuGRZ 2004, 741, at 744 (free translation by the authors). See the subsequent *Görgülü* decisions of 9 February 2007, 1 BvR 125/07, 1 BvR 217/07, EuGRZ 2007 235 and 238, and also the following decisions of the BVerfG: 19 September 2006, 2 BvR 2115/01, EuGRZ 2006 684, on taking into account decisions of international tribunals; 26 February 2008, 1 BvR 1602/07, EuGRZ 2008 202, applying the *Caroline von Hannover* case of the ECtHR; 21 July 2010, 1 BvR 420/09, EuGRZ 2010 511, applying the *Zaunegger* case of the ECtHR.

122 *Görgülü* decision of the BVerfG, EuGRZ 2004, 741 at 744.

4. Conclusion: Towards ‘constitutional pluralism’?

The Council of Europe and the Court should be congratulated for having reduced the scale of the case overload crisis with respect to inadmissible applications. However, no definitive resolution of the workload problems which derive from meritorious petitions is in sight. Whatever else may be required to address these difficulties, and to secure the Court’s future, we believe that ‘constitutionalisation’ continues to provide a useful shorthand signifying that cases should be selected and adjudicated in a much more strategically focused manner than at present. Over the past two decades the case for ‘constitutionalisation’ in the ECHR context has gathered considerable support from academics and others and stimulated discussion connected with the much wider and more sophisticated debate about the constitutionalisation of international legal regimes and international law itself. Yet, in spite of this, there has also been considerable misunderstanding and misrepresentation. Our concern here is to argue that the constitutionalist paradigm now needs to incorporate a pluralist perspective. Endorsing an approach taken by authors in other contexts, some using the same and others different labels for essentially the same thing, we, therefore, advocate ‘constitutional pluralism’ as the best analytical paradigm for the Convention system and also the best framework for the identification and pursuit of procedural and other reforms.¹²³ In our view, any attempt to provide transnational legal protection for human rights in Europe is likely to be ineffective unless grounded in a full appreciation of the fact that, although a plurality of national and transnational legal and constitutional systems clearly exists, almost without exception¹²⁴ they presuppose common constitutional fundamentals embodying democracy, the rule of law, and human rights, as exemplified by the Convention. While it is true that the Council of Europe is an association of states without, apart from its Statute, a formal constitutional document, its core membership conditions

123 Advocates and critics of constitutional and pluralist hybrids include: Avbelj and Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012); Gordillo, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law* (Oxford: Hart, 2012); Goldoni, ‘Constitutional Pluralism and the Question of the European Common Good’ (2012) 18 *European Law Journal* 385; de Búrca, ‘The ECJ and the International Legal Order: A Re-evaluation’, Halberstam, ‘Local, Global and Plural Constitutionalism: Europe Meets the World’, and Weiler, ‘Prologue: Global and Pluralist Constitutionalism – Some Doubts’, in de Búrca and Weiler (eds), *supra* n 105; Walker, ‘Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason’ (2011) 24 *Ratio Juris* 369; Klabbers et al., *supra* n 62 at 25–31; Avbelj and Komárek, ‘Four Visions of Constitutional Pluralism’ (2008) 2 *European Journal of Legal Studies* 325; Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford: Oxford University Press, 2007); Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *European Law Journal* 262; Maduro, ‘Contrapuntal Law: Europe’s Constitutional Pluralism in Action’, in Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003); and Walker, *supra* n 85.

124 Belarus remains the last bastion of Soviet style autocracy in Europe and Kosovo’s status as a state is not yet clear.

nevertheless include a commitment to democracy and the rule of law, the limitation of the exercise of public power by a set of justiciable 'constitutional' rights found in the ECHR, a Court to settle complaints about their alleged violation, and another institution (the Committee of Ministers) to supervise the execution of the Court's judgments.

However, for several reasons, the Convention's constitutional landscape is also undeniably pluralistic, polyvalent, and heterarchical, rather than unitary, monistic, and rigidly hierarchical. Firstly, a significant degree of harmony and convergence can be observed, based as much on political compromise as upon legal prescription where the question of ultimate authority is open and contested. But these are not only inevitable features of any international constitutional order; they are also common in national constitutional systems and processes as well.¹²⁵ Secondly, the Convention provides the functional equivalent of a constitution for a 'partial' rather than 'full' polity, that is to say one with executive and judicial but no legislative functions. Moreover, the ECHR is a creature of the Council of Europe and the extent to which it binds the parent body, as well as its members, is debatable. Thirdly, not all states are equally integrated into it. Several national constitutional courts have, for example, been reluctant to follow the ECtHR when they deem its interpretation of Convention rights inconsistent with their interpretation of their own national constitutional rights. But, the fact that national courts may not share Strasbourg's interpretation of what are essentially the same fundamental rights found in different documents, does not mean that each court, and each document, are not components of a common, though pluralistic, 'multi-verse' of constitutional systems. As other commentators have pointed out, the unevenness of a constitutional process does not necessarily deprive it of its constitutional character.¹²⁶ In fact, complex and contingent commitments such as those exhibited by the Convention system are the hallmarks of constitutionalised international law.¹²⁷ It may be an overstatement to claim, as Gardbaum does, that the 'ECHR has arrived at a roughly similar point of constitutionalisation as federalisation, albeit via a different route'.¹²⁸ But, in our view, the Court and Convention system can, nevertheless, be said to display a 'commonwealth model of constitutionalism'¹²⁹ or, a unique form of 'constitutional pluralism'.

This has two main implications for the future. Firstly, there are good reasons for believing that the Court should have much more control over its own docket, not least because all modern legal systems are based on an increasingly restricted selection of cases, usually on the basis of a judicial assessment

125 Klabbers et al., *supra* n 62 at 349.

126 For example, *ibid.* at 346.

127 *Ibid.* at 29.

128 Gardbaum, *supra* n 56 at 760.

129 *Ibid.* at 757.

of their seriousness or significance, as litigation moves from lower to higher levels.¹³⁰ It is difficult, therefore, to see how, and why, the ECtHR could and should be more generous. The myth of a right of unrestricted individual access, therefore, needs to be more explicitly abandoned in favour of a system with more realistic objectives. Since the Court cannot fully adjudicate more than 1,500 applications per year,¹³¹ we believe it should be able to select the 1,500 it considers the most important and reject the rest. Instead of disposing of thousands of cases administratively and declaring applications manifestly ill-founded which may not be so obviously manifestly ill-founded, such an approach would be more predictable, transparent and honest. It would also focus attention upon real priorities, and would serve the overall protection of human rights better. In our view the debate now, therefore, needs to focus on the various ways this result might be achieved. It has recently been argued, for example, that a more robust application of Article 37(1)(c)¹³² would enable low priority, though well-founded applications, to be struck off the list by unanimous decision of a panel of at least three judges according to criteria developed over time by Convention case law.¹³³ Alternatively, the Convention could be amended to replace all the current substantive admissibility tests with a single test based on seriousness which, in its turn, would have significant implications for the jurisdiction of the Grand Chamber.¹³⁴ The Court itself accepts that, in the longer term, a new admissibility criterion or other ways of excluding some well-founded cases from adjudication of the merits, might be justified.¹³⁵ The second implication is that the Court should adjudicate the tiny fraction of the total number of applications it receives in a more ‘constitutional’ or principled manner—that is to say by seeking the best, and most consistent, interpretation of the Convention as a whole and with a view to maximising the effects of each judgment both in the respondent state and in Council of Europe states generally.

130 Entin et al., supra n 3 at para 49.

131 Analysis of Statistics 2011, supra n 5 at 4–5; see also Wildhaber, supra n 36 at 224–6, and ‘Filtering Mechanisms’, in Besson (ed.), supra n 12; and Entin et al., supra n 13 at para 20.

132 Article 37(1)(c) reads: ‘The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that . . . for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.’

133 Entin et al., supra n 3 at paras 7, 50, 51.

134 The Committee of Ministers’ advisory body, the CDDH, still does not think this necessary: see Mowbray, supra n 21 at 521, but many other commentators do. These include: White and Boussiakou, supra n 9 at 186–8; Goldston, ‘Achievements and Challenges: Insights from the Strasbourg Experience for other International Courts’ (2009) *European Human Rights Law Review*, 603 at 606; Bernhardt, ‘The Admissibility Stage: The Pros and Cons of a *Certiorari* Procedure for Individual Applications’, in Wolfrum and Deutch (eds), supra n 21; Greer (2011), supra n 12 at 46; and White and Boussiakou, supra n 61.

135 Preliminary Opinion of the Court, supra n 12 at paras 31–4, 48.

Developments in recent years, including the prioritisation of applications by the ECtHR, pilot judgments, and the new, though much too limited admissibility criterion under Article 35(3)(b), indicate that the 'transition to full constitutionalisation' is already underway. But so far it has been too slow and incremental. The Convention system may well get there in the end. But, in our view, it would be much better if it arrived sooner rather than later.