**Hard Cases, Bad Law: How Philosophising Could Help the ECtHR to Achieve Completeness and Coherence**

There are many ECtHR judgments which display varying degrees of incompleteness and which have attracted significant criticism on these grounds.[[1]](#footnote-1) There are also many ECtHR judgments which have been criticised for displaying various kinds of incoherence with one another.[[2]](#footnote-2) One part of the solution to these problems is for ECtHR judges to take a range of pragmatic steps to improve the quality of their legal reasoning. However, in some cases, a pragmatic approach of this sort is not by itself capable of producing complete and coherent judgments, and can only be part of the solution.

In the first section, I examine two instances in which ECtHR judgments have been insufficiently complete and coherent, and explain why the Court would not have been able to achieve sufficient degrees of completeness and coherence by adopting a ‘purely pragmatic’ solution that sidesteps philosophical reasoning.[[3]](#footnote-3) In the second section, I show that by engaging with philosophical thinking about the Convention the Court could have achieved sufficient completeness and coherence in these instances.[[4]](#footnote-4) In the third and fourth sections, I look at objections to the ECtHR engaging in philosophical reasoning, and argue that the adoption of a ‘pluralistic approach’ to philosophical reasoning would weaken the force of many of these objections. I conclude that there are, at least on certain occasions, sound reasons for the ECtHR to engage in philosophical reasoning.

1. **The Problems of a Purely Pragmatic Solution to Incompleteness and Incoherence in the ECtHR**
2. ***Incompleteness***

To see clearly the problems caused by incompleteness and the nature of the solution required, it will help to examine a single case in detail ­– the case of *Dickson*.[[5]](#footnote-5)Although many different kinds of incompleteness exist, *Dickson* is typical of the way the Court sometimes deals with difficult proportionality assessments in an incomplete manner by taking a broad brush approach to balancing a range of factors against one another, jumping from some set of premises to conclusions which do not follow deductively from those premises.[[6]](#footnote-6)

Mr Dickson was a convicted murderer, serving a life sentence. He and his wife applied for the use of artificial insemination facilities. Their application was denied by the Home Office on the grounds that there was a policy of allowing the use of such facilities by prisoners only in ‘exceptional circumstances’ – a threshold which the Home Secretary concluded was not met in Mr Dickson’s case. The ECtHR held by twelve votes to five that there had been a violation of Article 8, on the grounds that the threshold of ‘exceptional circumstances’ was set so high that the policy did not strike a fair balance between the competing public and private interests.

The problem in *Dickson* is that the Court failed to provide a sufficiently complete justification for its assertion that the Home Secretary’s policy of preventing prisoners from accessing artificial insemination facilities unless they were in ‘exceptional circumstances’ set the threshold too high. In order to try to justify that assertion, the Court set out four considerations it thought relevant: (1) the applicants’ interests in having a child; (2) the effect it would have on the public confidence in the penal system if the applicants were allowed use of the artificial insemination facilities; (3) the punitive function which would be served by withholding use of the facilities; and (4) the interests of the potential child itself. However, the Court’s statement of the relevant considerations does not do enough to justify its conclusion. The Court does not explain its assessment of the weight of each of these four factors, or how its assessment led to the conclusion that the threshold was set too high.[[7]](#footnote-7)

Could an unphilosophical, purely pragmatic judge have been able to make a sufficiently complete judgment in *Dickson*?

In relation to the first consideration – the applicants’ interests in having a child – the Court mentioned case law in which the right to be a genetic parent was regarded as an ‘important facet of an individual’s existence or identity’ giving rise to a restricted margin of appreciation.[[8]](#footnote-8) This points towards giving the applicants’ interests a high weighting. However, another relevant doctrine which the Court failed to mention pulls in the opposite direction: Article 8 does not give an unrestricted guarantee of the right to a child, and its core is concerned with protecting existing family relations, rather than with safeguarding ‘the mere desire to found a family’.[[9]](#footnote-9) There is no pragmatic legal reason for preferring either of these conflicting doctrines ­– no higher order legal principle exists which tells us how to resolve the conflict.

In relation to the second consideration advanced by the Court in the *Dickson* case – the effect that allowing the procedure would have on public confidence in the penal system – the Court merely mentioned that this factor ‘has a role to play’.[[10]](#footnote-10) Here a pragmatic judge trying to fill the gaps in the Court’s reasoning could have mentioned the Court’s own jurisprudence concerning the weight that ought to be accorded to the ‘public interest’. However, that case law is highly inconclusive, with different elements of it being congruent with different weights being accorded to this factor, and disclosing no higher order principles for determining which of these is superior.[[11]](#footnote-11)

In relation to the third consideration advanced by the Court – the punitive function of preventing the procedure – the judges could (in contrast to the previous two factors) have decided what weight to accord purely by engaging in pragmatic reasoning, and did indeed do so. The result was that the Court accorded this factor very little weight. It justified doing this by reference to number of legal instruments adopted by the Council of Europe which indicated a shift away from the punitive aim of incarceration.[[12]](#footnote-12) This was sufficient justification. This is one factor with respect to which the pragmatist solution sufficed.

In relation to the fourth consideration advanced by the Court – the interests of the potential child – it is difficult to see how a pragmatist judge could go about deciding how much weight to accord these interests. Though the Court mentioned its jurisprudence relating to states’ positive obligations to ensure child welfare,[[13]](#footnote-13) this does not indicate how much weight this consideration ought to carry here. Though there is much existing law indicating the importance of a living child’s welfare, there is little concerning the extent to which the likely welfare of a potential child affects the rights of potential parents to have a child. Though ruling out extreme views – such as the view that having a child is a right which exists *irrespective* of the likely welfare of the child – the existing legal framework does not point to the correctness of any particular more moderate view; it is congruent with, for example, both the view that the likely welfare of the child is of only slight importance, and the view that the likely welfare of the child is of paramount importance.

1. ***Incoherence***

The cases of *VgT v Switzerland*[[14]](#footnote-14) and *Animal Defenders International v UK*[[15]](#footnote-15) provide a good example of the depth and nature of the separate problem of incoherence between different cases.[[16]](#footnote-16)

Both cases concerned prohibitions on political advertising, and both concerned animal rights groups which had been prevented from airing television and radio adverts promoting the animal welfare movement. In the *VgT* case, the Court’s Second Section concluded that the prohibition on advertising had breached the Article 10 rights of the applicants, whereas, in *Animal Defenders*, the Grand Chamber held that although there was an interference with the Article 10 rights of the applicants, there was no violation.

The results in these two cases are at least prima facie inconsistent because, as Yowell notes, ‘there was no material difference between the laws of the two states’.[[17]](#footnote-17) Despite the judgment of the majority in *Animal Defenders* making many references to the judgment of the Second Section in the *VgT* case, the Court never explicitly distinguished the two cases; nor did it make clear to what extent *VgT* is still to be regarded as valid law.

It might be argued that the outcomes of the two cases are not flatly inconsistent because distinguishing features can be found between them. One fact which might be said to account for the distinction between the two cases is that (in relation to *Animal Defenders*) the British Parliament and the courts had given extensive scrutiny to the questions of whether the legislative prohibition was compatible with Article 10, whether the prohibition could be made less restrictive in some way, and whether *VgT* was applicable. Indeed, the Court attached ‘considerable weight to these exacting and pertinent reviews’.[[18]](#footnote-18)

However, the Court failed to articulate clearly the normative basis for this distinction. Although procedural review in general is now well-established, the normative basis for procedural distinctions between different pieces of primary legislation which have been enacted through a proper democratic legislative process remains controversial.[[19]](#footnote-19) Moreover, even if there were a sound justification for distinguishing between legislative regimes by reference purely to the process by which they were enacted,[[20]](#footnote-20) the Court did not make clear how and why such a distinction should apply between these two specific cases, where the only substantive difference between the relevant pieces of legislation was that the British legislative process was able to include a consideration of the *VgT* judgment because it occurred after that judgment had been handed down.[[21]](#footnote-21)

To a great extent a thoroughly practical solution can work here. The Court would have been able to decrease the degree of legal uncertainty significantly simply by clarifying whether it was distinguishing or overruling *VgT*. Even with very little explanation of why it was making such a choice, much would have been gained in terms of certainty. However, very much more would have been gained if the Court had made such a choice *and* had provided a justification for it. We would then not only have been able to know the state of the current law, but might *also* have been able to predict future decisions in this area. It is this extra step of providing a justification for either distinguishing or overruling *VgT* which poses a problem for a purely pragmatic solution.

Imagine that the Court in *Animal Defenders* had wanted to overrule *VgT.* There is a range of pragmatic reasons to which the Court could have turned in order to justify such a ruling. A number of the considerations which the Court had already taken into account could have served this purpose had they been re-labelled as reasons to overrule *VgT.* The Court observed, for example, that broadcast media of the sort to which the political advertising ban applied was likely to have a particularly powerful impact on society compared to other forms of media, like the internet, to which the ban did not apply;[[22]](#footnote-22) that because the prohibition was narrowly tailored to apply only to certain types of media, the applicants might be able to achieve their ends through other means;[[23]](#footnote-23) and that there was a lack of European consensus in this area.[[24]](#footnote-24) The Court also focused on the fact that less restrictive means of achieving the same aims were not feasible, both in terms of administrative burdens and in terms of legal certainty.[[25]](#footnote-25) However, had the Court relied on these reasons alone to overrule *VgT*, one would have been left feeling that the Court was avoiding the core of the issue. These kinds of pragmatic reasons are not alone capable of justifying a view about the legitimacy of campaign finance restrictions. In neither of *Animal Defenders* nor *VgT* does the Court really engage with substance of the debate about campaign finance and political advertising. It is this kind of engagement which is needed if the Court is to develop a clear jurisprudence on this immensely important issue in the future.

Imagine now that the Court in *Animal Defenders* wanted not to overrule *VgT,* but instead to distinguish it. Though the Court did not articulate it, the grounds for such a distinction might be that the legislative process in *Animal Defenders* involved higher standards of scrutiny than the equivalent process in *VgT.* There is now an established body of legal sources, including a number of rulings of the ECtHR, which could be cited in support of making ‘procedural’ distinctions in general.[[26]](#footnote-26) So this might be thought to provide a route by which the Court could have made a principled distinction between the two cases using pragmatic reasoning alone.

However, even if distinctions based on procedural grounds in general have a sound legal basis, we might be suspicious of making a procedural distinction in this particular case. To see whether these suspicions are well-founded we need to look at the justifications for ‘procedural review’, and ask to what extent they apply to this case. Brems sets out four possible justifications for procedural review: (1) ‘the process efficacy rationale’, according to which procedure is valuable insofar as it leads to good legislative or executive decisions, (2) ‘procedural fairness’, which refers to the positive effects on social welfare that are created by good process, (3) ‘autonomous process value’, which refers to the importance of good process to the proper functioning of a democracy, and (4) ‘the subsidiarity rationale’, according to which procedural review is a way of ensuring that courts respect their proper institutional role and avoid excessive intrusion on legislative and executive power.[[27]](#footnote-27) The first three of these are incapable of justifying a distinction between the two cases. The first fails to do so because the legislative regimes relating to political advertising in the two cases were, for all intents and purposes, the same, so it cannot be argued that focusing on process might lead to better substantive results. The second fails as a justification for the distinction because, as Brems argues, ‘while a ﬁnding of a lack of procedural fairness can support the ﬁnding of a violation, a positive record of procedural fairness cannot be decisive for ﬁnding that a rights infringement does not constitute a violation’.[[28]](#footnote-28) The third fails to justify the decision because, as Brems argues, ‘promoting a well-functioning democracy’ – in the sense of promoting higher standards of legislative scrutiny – is not part of the explicit mandate of the Court’. And so, ‘this motive alone cannot justify strong inferences from good or bad parliamentary process in the Court’s case law.’[[29]](#footnote-29)

The story with respect to the fourth of Brems’ justifications – the subsidiarity rationale – is a little more complicated. The subsidiarity rationale provides a sound basis for the Court to allow facts about procedure to be decisive in finding no violation of the Convention. It is, for example, clearly normatively significant that a legislature has given serious and careful consideration to the compatibility of some piece of legislation with human rights principles, and this kind of fact might be decisive in a finding of no violation. However, it is still not obvious that this rationale can justify a distinction between *Animal Defeneders* and *VgT*. The only difference between the two cases was that Parliament had carefully considered the *VgT* judgment, not that Parliament had independently engaged in a thorough deliberative process aimed at discussing the compatibility of the legislation with the moral reality of human rights. In order to justify a view about the normative significance of the fact that Parliament had carefully considered the *VgT* judgment, the Court would need to move beyond purely pragmatic reasoning.

1. **A Philosophical Solution to Incompleteness and Incoherence in the ECtHR?**

The difficulties encountered in trying to find a purely pragmatic means of providing completeness and coherence in cases such as *Dickson,* and *VgT* and *Animal Defenders,* raise the question whether the ECtHR can achieve these ends by engaging in philosophical reasoning.There is of course a wide range of philosophical perspectives which might fit with elements of the Court’s jurisprudence: the virtue ethicist, the deontologist, the consequentialist, the pluralist, the particularist, or the Thomist might each plausibly claim that their theory can provide the completeness and coherence which a purely pragmatic solution is unable to provide. Nor are there just different *philosophies.* There are also different *kinds* of philosophical reasoning which may be needed to achieve completeness and coherence in different cases: some may call for normative ethical thought, whereas others may call for conceptual analysis, meta-ethics, or legal philosophy. And it may also be necessary to deploy philosophical thinking at different *levels* to achieve sufficient completeness or coherence in different kinds of cases: in some cases, the desired completeness or coherence may be achievable only through complex reasoning about first principles and deciding between abstract foundational values, whereas in others completeness or coherence may be achieved simply by the deployment of lower order intuitive principles without any resort to broader more general theories of value. To show that philosophical reasoning could help the Court to achieve completeness and coherence in *Dickson* and *VgT* and *Animal Defenders*, I take only a small sample of philosophical approaches and apply them to the two cases. For *Dickson,* I discuss how applying Kantianism and informed preference-satisfaction utilitarianism – two fundamental normative ethical theories which are amongst the most plausible candidates for providing philosophical foundations for the Court’s jurisprudence as a whole – might have enabled the Court to achieve greater completeness when dealing with the difficult balancing required.[[30]](#footnote-30)For *VgT* and *Animal Defenders,* by contrast, I discuss how articulating lower order justifications for limiting the right to freedom of expression in the case of political advertising, and articulating a lower order justification for procedural review, might have led to greater coherence.

1. ***Incompleteness***

First, to determine the weight that ought to be accorded to the applicants’ interests in having a child in *Dickson*, a judge would have to look at the set of higher order considerations which both justify the right to procreate and also fit with the existing legal sources. This investigation of higher order considerations would inevitably take the judge away from pragmatic legal reasoning into the realm of legal or moral philosophy.

As a preliminary matter, a large body of the Court’s existing jurisprudence already indicates that the prisoner’s negative right to control over his own body is not in fact violated by him being prevented from having conjugal visits and procreating in the ordinary manner.[[31]](#footnote-31) The question facing the Court, therefore, cannot be construed as one about how much weight to give to the prisoner’s negative rights to control over his own body, but instead has to be construed as a question about how much weight to accord to the two applicants’ claims to the positive right to use artificial insemination facilities.

From a Kantian perspective, it would be difficult to justify according very much weight to such a putative positive right, because Kantians are reluctant to accept the existence of any positive rights except where correlative duties can be relatively precisely specified,[[32]](#footnote-32) and in this case it is difficult to specify the content of the duty owed. If the duty is to provide free unlimited use of assisted reproductive facilities, then this might place a significant burden on states. If, however, the duty is limited, then it is hard to know how it ought to be limited. Moreover, it is difficult to know who is meant to be the duty bearer. ‘The state’ is of course involved; but, in contrast to a negative right where duties are owed on the part of every single agent of the state, it is more difficult to see who exactly is in violation of their duties if prisoners and their partners are not given access to assisted reproductive facilities.

By contrast, from the utilitarian perspective, the applicants’ putative positive right might receive a significantly higher weighting. Advocates of this philosophical view might argue that procreation is a very widespread, stable, and permanent interest of many people, who regard the ability to procreate as central to the meaning of their lives, who see having children as a crucial ‘vehicle for their self-expression’, and who regard it as being important to pass on their name, property, genes, or values.[[33]](#footnote-33) Advocates of this utilitarian view would also regard the collective interests at stake as important – without a sufficient number of births in a society there will not be enough people to care for the elderly, to sustain the economy, and to sustain the liberal institutions necessary for other rights to be upheld. The addition of these collective interests to the individual interests of the right-holders implies that the interest in procreation might be given an abstract weight at the top of the ‘moderate’ range or even at the bottom of the ‘serious’ range.[[34]](#footnote-34)

When one considers these two different sets of conclusions that arise, respectively, from applying a Kantian theory and from applying a utilitarian theory to the same case, one is driven to the conclusion that philosophy could have helped here. By choosing between philosophical perspectives about the best justification for the right to family life, the ECtHR could have justified taking a view about the weight that ought to be accorded to the applicants’ interests in having a child.

Second, the only way for the Court to have justified taking a view about how much weight ought to be given to public confidence in the penal system would have been by reference to a particular philosophical view of the importance of this factor. From a Kantian retributivist perspective, one of the key functions of punishment is to express public moral disapproval.[[35]](#footnote-35) So from this perspective it might make sense to accord this factor significant weight, given that not allowing certain prisoners access to artificial insemination facilities expresses a strong form of public moral disapproval for the serious crime committed by Mr Dickson.

By contrast, an informed-preference utilitarian who holds that only rational interests are of value, and who denies any retributive value in punishment, might argue that there are no rational interests at stake in having Mr Dickson not be allowed the procedure, and would give this factor little to no weight. Deciding how much weight to accord to this factor will involve deciding between different ways of thinking about the nature of the public interest and will therefore necessarily involve philosophical reasoning.

Third, it would again have been useful for the Court to examine philosophical perspectives to determine how much weight to accord to the interests of the potential child. From the Kantian perspective the right to procreate is seen as inherently ‘contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others. Persons who beget or bear without making any such plans cannot claim to be exercising such a right’.[[36]](#footnote-36) On this view, the decision to procreate necessarily comes with a set of obligations. If someone is incapable of discharging those obligations, then they ‘have no right to procreate at that time’.[[37]](#footnote-37) While those who hold this view admit the difficulty of finding reliable tests for good parenting, they also argue that ‘it is not difficult to identify some situations…which…would make a decision to procreate unreasonable’.[[38]](#footnote-38) From this kind of philosophical perspective it makes sense to accord significant weight to the fact that the applicants in *Dickson* might be unable properly to carry out their parental obligations.

By contrast, although the utilitarian will recognise that the interests of the potential child may sometimes justify limiting the right to procreate, or at least justify limiting access to publicly funded artificial insemination facilities, unlike the Kantian, the utilitarian will base the right to procreate on the balance of interests, including the interests of the parents, and will thus recognise that it is only where there is reliable evidence that a potential child is unlikely to have a life worth living that the parents’ right to procreate should be limited. In this context, it is unlikely that the utilitarian would see the negative impact that Mr Dickson’s incarceration would have on the potential child’s welfare as being, in itself, enough to justify limiting the right to procreation. Once again, it is only by engaging with philosophical perspectives like these that the Court in *Dickson* could begin to give a proper justification for according the child’s interests a particular weight.[[39]](#footnote-39)

When we compare these two philosophical perspectives we can see how reasoning philosophically would have helped the Court to make its judgment more complete. Had the Court adopted the utilitarian perspective it would have been clear what weight each factor had been attributed, and why it had been attributed that weight – the applicants’ interests in having a child would have received a high weight, the public interest in maintaining confidence in the penal system a low weight, and the interests of the potential child a low to moderate weight. Comparatively, the Kantian justification would attribute a low weight to the applicants’ interests in having a child, a moderate weight to maintaining public confidence in the penal system, and a high weight to the interests of the child.

Had the Court adopted either of these perspectives, this would also have given states a much clearer idea of the kinds of alternatives to the impugned policy which would be likely to be compliant with the Convention. According to the utilitarian view, it is clear that the impugned policy was manifestly non-optimific – and it is therefore clear that a significantly lower threshold than ‘exceptional circumstances’ would have been required in order to strike a fair balance between the competing interests at stake. By contrast, from the Kantian perspective it is clear that though the ‘exceptional circumstances’ threshold constitutes a breach of the Convention, only a slight reduction in the threshold would have been required for compliance with Article 8.

1. ***Incoherence***

The solution to the problem of incoherence between *Animal Defenders* and *VgT* would not, unlike for *Dickson*, have required the Court to consider foundational values or normative ethical theories. Rather, a less abstract form of philosophising would have been required. The Court would need only to have considered lower order principles compatible with a range of different ethical theories.

Had the Court wanted to overrule *VgT* and provide a sufficiently complete justification for doing so, then it would have had to engage with the abstract justifications for limiting the right to freedom of expression in the case of political advertising, and to decide which of those justifications it considered legitimate. An extremely helpful analysis of this sort is provided by Pevnick, who identifies three distinct such lower order goals by reference to which limits on political advertising might be justified – ‘the elimination of corruption, the attempt to ensure that citizens have equal chances for political influence, and the importance of levelling the playing field between competing candidates’ – and identifies the different ‘policy programmes’ which are entailed by the acceptance of each.[[40]](#footnote-40) The view that political advertising can be restricted only in order to eliminate corruption represents a libertarian perspective favouring a near-absolutist conception of the right to free expression. Whereas, the view that political advertising can be restricted for a wider set of goals represents a more egalitarian perspective favouring a more qualified conception of the right to free expression. Pevnick notes that the US Supreme Court, in the notorious *Buckley v Valeo* case,[[41]](#footnote-41) adopted the more libertarian perspective favouring a near-absolutist view of the right to free speech. The Court took the view that ‘elections can be trusted to reﬂect the informed judgments of voters only after unrestricted debate’. The Court thus concluded that the ‘only justiﬁable rationale for limiting electoral speech involves curbing corruption’. And the Court has since held that only restrictions which prevent ‘quid pro quo corruption or the appearance of the same’ are compatible with the First Amendment.[[42]](#footnote-42) This has led to the US Court *predictably* upholding legislation aimed at limiting individual donation to specific candidates while striking down aggregate limits on campaign contributions.[[43]](#footnote-43) Whether one agrees with the substance of the US Court’s decision or not, it is this kind of predictability which is woefully unavailable from the ECtHR’s approach in *Animal Defenders*. In order to create the same kind of predictability offered by the US Court, the ECtHR would need to take a view about the extent to which these different possible theoretical rationales are compatible with the right to freedom of expression, and in order to justify such a view some kind of *philosophical* story (albeit one about lower order values) will need to be told about the justifications for that right and its limitations, and about how that right fits into democratic theory more generally. The Court will have to decide whether (like the US Court) it thinks the right to free expression demands that states adopt only libertarian campaign finance regimes, or whether it is within their margin of appreciation to adopt more egalitarian ones.[[44]](#footnote-44)

If, on the other hand, the Court had wanted to distinguish *VgT,* then it would have had to engage in philosophical reasoning about the normative significance of the fact that Parliament had carefully considered the *VgT* judgment. From one perspective, which represents a broadly outcome-based consequentialist moral outlook, the series of events is highly normatively significant. Having considered the ECtHR’s judgment, the elected legislature nonetheless felt so strongly about a matter that they decided to reject the judgment. From this point of view, the events constitute an important form of ‘sensible dialogue’ between domestic authorities and the Court;[[45]](#footnote-45) the Court has reason to suspect that the UK legislature might not comply with a judgment made against it, and so has good ‘prudential reasons for deference’.[[46]](#footnote-46) From another perspective, which represents a more principled, duty-based moral outlook, this can be seen simply as a case of ‘Strasbourg losing its nerve’;[[47]](#footnote-47) the Court ought not to kowtow to the legislature in this way, and prudential reasons of this sort are exactly the kind of unprincipled considerations which ought not to be taken into account by the Court. In order to settle the dispute between these two perspectives, the Court would have to reason philosophically about what we might call matters of constitutional theory; and, in order to justify a view about whether or not it is acceptable to rely on constitutional-theoretical reasons of this sort, one has to rely on premises which are distinctly philosophical.[[48]](#footnote-48)

1. **Objections to Philosophical Reasoning in the ECtHR**

It is not, however, possible to leap directly from proposition that completeness and coherence would in these cases have required philosophising to the conclusion that the Court should necessarily, in all of these cases, have engaged in such philosophising. Some philosophers have objected to the notion of judges engaging in theorising of this sort. Pre-eminent among them is Cass Sunstein. As Sunstein’s important work has highlighted, there are at least five sets of reasons that might count against judicial theorising. And many of the points Sunstein makes against judicial theorising in general, count as reasons against ECtHR engaging in philosophical reasoning.[[49]](#footnote-49) I argue, however, that none of these objections is conclusive.

### Damaging the Chances of Judicial Consensus

The first objection is that judicial philosophising could be a barrier to building judicial consensus on multi-member courts like the ECtHR.

In certain circumstances, this will be a serious problem. Where explaining the philosophical basis for a decision would make that decision deeper and wider than it would otherwise have been, making its direct legal effects broader, then it is likely to be a serious impediment to judicial consensus. For example, had the ECtHR tried to explain the philosophical basis for its decision in the *Animal Defenders* case, this would have made the direct legal effects of that decision broader, and could have been an impediment to consensus amongst judges who might otherwise have agreed about the outcome of the case itself but have disagreed about the merits of the broader effects. As it was, the Court in *Animal Defenders* refused to explain whether its decision involved either distinguishing or overruling the *VgT* decision. Though the nine judges in the majority all agreed, for one reason or another, that the UK should not be found to have violated the Convention, it seems very possible that they might not have been united on the question of whether to distinguish or overrule *VgT*, and that no consensus would have been possible.

However, in many circumstances philosophising will not damage the chances of consensus. A philosophical explanation for a decision which merely supplements and justifies a given outcome, rather than changing the strict legal effect of a judgment, will not run the risk of creating disagreement between judges about the wider effects of the case. In the *Dickson* case, for example, a philosophical explanation would have involved the Court justifying its assertion that a policy – which prevented prisoners from accessing artificial insemination facilities unless they were in ‘exceptional circumstances’ – set the threshold too high. Here too, there might be consensus on the outcome but dissensus about right kind of philosophical justification for it. However, a series of different justifications could be offered up by the Court without any single one of them being uniquely privileged. In *Dickson*, the reason we wanted a philosophical explanation in the first place was in order to fill the gaps in reasoning. There is therefore no reason why different judges cannot each give their own philosophical explanations for their own decisions, or for the Court to give multiple justifications for the same decision, whilst preserving the consensus about the outcome.

The point is that it cannot be shown in advance that all judicial philosophising necessarily damages the chances of judicial consensus. It may be true in some cases and not in others. And in some cases providing a convincing explanation for an outcome may even persuade more judges to agree with that outcome, and so produce greater consensus.

### Challenging Deeply Held Moral Beliefs of Citizens

Providing a philosophical solution in cases where no pragmatic solution is available might also be regarded as objectionable for a different reason: namely, that judicial philosophising risks unnecessarily challenging people’s deeply held moral beliefs.[[50]](#footnote-50)

We can better see the force of this worry through an example from the ECtHR jurisprudence. Although the *Hirst* case (about the voting rights of prisoners) was, in fact, decided on a narrow procedural basis, the ECtHR could have been clearer about which kinds of prisoner disenfranchisement it held to be unacceptable. The Court could have provided a philosophical justification for its view, and could have engaged with the different schools of thought on what justifies prisoner disenfranchisement.[[51]](#footnote-51) One way for the Court to justify its position might have been to disavow completely one or another of these schools of thought, declaring them wholly illegitimate and inadmissible reasons for prisoner disenfranchisement. So, the Court might, for example, have declared that the conception of virtue which entails that all prisoners are not virtuous enough to vote is wholly mistaken. This would have gone some of the way to justifying the Court’s conclusion that some prisoners ought to be enfranchised. However, it would be an objectionable means of justifying that conclusion because it would involve the Court unnecessarily challenging people’s deeply held moral beliefs about the nature of virtue.

Though there may be reasons to worry about whether encouraging ECtHR judges to philosophise will lead them to commit to controversial philosophical justifications for their holdings, the former clearly does not necessarily entail the latter. It is possible to provide a philosophical justification for a decision without unnecessarily challenging deeply held moral beliefs. Returning to *Hirst*, it is not only by completely disavowing one or another of the possible justifications for prisoner disenfranchisement that the rights of prisoners to be enfranchised can be justified. There are ways of justifying the same conclusion without necessarily challenging deeply held beliefs. So, instead of grandiosely declaring the conception of virtue which supposes all prisoners to be lacking in virtue to be inherently flawed, the Court might instead have argued that level of virtue ought not to be a determinant of ability to vote, or that not all crimes justifying imprisonment are necessarily indicative of a lack of civic virtue. In this way, the Court would have been able to provide philosophical justification for its judgment without challenging any deeply held moral beliefs. This shows that, in some cases, it may be possible for the outcome to be justified by philosophical reasoning no more contentious than the outcome itself.

### Increasing the Cost of Losses and Preventing Moral Evolution

The third objection posed by opponents of judicial philosophising is that, if the ECtHR were to use philosophical reasoning more often, this might increase the ‘political and social costs of legal losses’. If judges abstain from giving philosophical justifications for their judgments, and stick to incompletely theorised outcomes, then the loser of a decision seems to lose less. As Sunstein puts it, ‘they lose a decision, but not the world. They may win on another occasion. Their own theory has not been rejected’. Similarly, more philosophical judgments might hinder the possibility of ‘moral evolution over time’.[[52]](#footnote-52)

Part of the idea, here, might be that in a legal system comprised wholly of incompletely theorised agreements, losers of doctrinal battles have never really ultimately lost, and moral evolution is always possible. This infinite flexibility is seen, by some, as a virtue, because it allows courts to change with the times, and allows citizens always to believe that ‘their times’ might be just around the corner.

The first response to this ground for objecting to judicial philosophising is that, unless long-term uncertainty and inconsistency is to prevail, the doctrine of a court must become more fixed over time. Even a court which relies solely on incompletely theorised agreements will nonetheless stitch a string of those agreements together to form doctrines. In every legal system, the losers of doctrinal legal battles are always going to lose to some degree at some point, and legal systems will always become somewhat calcified over time. Newer legal systems involve more uncertainty, and more is up for grabs in each case. In older legal systems many things which were once uncertain are now settled beyond question. This process is to some degree inevitable in any jurisprudence that develops over time. When a court is confronted with a fundamental question, it may have a duty to settle that question one way or the other, and this decision will sometimes prove decisive, whether or not the court engages in any philosophical reasoning. When *Marbury v Madison* came to be decided, it is not as if the US Supreme Court could have avoided settling the question of whether the Supreme Court had the power to enforce the Constitution by striking down legislation.[[53]](#footnote-53) Sometimes fundamental matters such as this need to be decided; they cannot be perpetually re-opened in every case.

The judicial minimalist might counter that, though there may always be legal losers, and though a legal system must always become somewhat rigid and ‘calcified’, if the courts articulate the philosophical bases for their decisions this might make more turn on each individual decision, increase the cost of each individual legal losses, and speed up the process of calcification.

However, it is not clear why it should be problematic for the cost of each individual legal loss to be raised, or why it is problematic for the process of calcification to be speeded up. Perhaps we do not want too much of significance to be decided on a single occasion because a single judgment ought not to become too long and complex; but this implies only an upper limit to the amount that can sensibly be decided on one occasion, and provides no grounds for objecting to speeding up calcification in general. If anything, we might think that increasing the efficiency, transparency, and self-consciousness of the process through which doctrinal losses and necessary legal calcifications occur, is a virtue, not a vice.

Alternatively, the judicial minimalist might counter that if the courts articulate the philosophical bases for their decisions, this will not only speed up the process of calcification, but will lead the legal system ultimately to achieve a much higher level of total calcification than it would otherwise have done. So, they will argue, though some must win and lose over time, and though some degree of calcification must ultimately occur, the theoretical end-state of a legal system in which incompletely theorised agreements prevail will be less systematic, calcified, consistent and coherent than one in which theorising prevails.

However, though it might indeed be problematic for a legal system to achieve too high a degree of total calcification, and though it might indeed be good for those who lose legal cases to feel that their cause might always have a chance of winning on some other occasion, there is no good reason to think that judicial philosophising will necessarily increase the total amount (or overall scope) of calcification in the jurisprudence of the Court. ECtHR judges could adopt the approach of justifying their judgments by reference to a number of different philosophical positions simultaneously. Though the Court might of course privilege some sets of philosophical positions, and disavow others which are incompatible with the logic of the Convention, it could avoid committing to a single philosophical position. In this way, the Court could explain the philosophical bases for its decision, while avoiding any danger of excessive calcification.

### Limited Judicial Time and Capacities

Another reason against judges providing philosophical explanations for their judgments is alleged to be that judicial philosophising would take up a huge amount of judicial time, and would stretch the limits of judicial capacities. This is indeed a powerful point. Judgments which are justified by philosophical reasoning *will* tend to be considerably longer and more complex than the same judgments without such justifications provided. Judges are normally under pressure to deal with cases in a limited time. Nor are judges necessarily adept at the sort of philosophical reasoning which is required. This gives us strong reasons not to recommend that judges engage in particularly time consuming and particularly complex forms of philosophising.

These reasons can be particularly strong for the ECtHR because of the nature of some of the cases it deals with, because of the particular pressures the Court faces, and because of the selection process of ECtHR judges. In a case like *Dickson,* a proper justification for the Court’s conclusion would require the Court to explain its assessment of the weight of four different factors. This is, in itself, bound to be a fairly time consuming and complex philosophical exercise. The problem becomes even more pronounced if, as was proposed earlier, ECtHR judges adopt a pluralistic approach to reason-giving, writing separate concurring opinions, or the majority writing a single opinion including different explanations for the same result. When we take into account the fact that there were 56,350 cases pending at the ECtHR at the end of 2018,[[54]](#footnote-54) it begins to seem even less attractive to burden the Court with having to provide complex philosophical explanations for its decisions. Also relevant, is the fact that judges are not philosophers and so are prone to make philosophical mistakes. This problem might also be particularly severe in the ECtHR because of the varying national judicial selection procedures, and the fact that philosophical ability is not a prerequisite of becoming a Strasbourg judge.[[55]](#footnote-55) So ECtHR judges might be even more limited in time than most other judges, and might also be more limited in philosophical capacity.

Though these practical issues apply in all cases in which a philosophical solution is required, there are clearly some cases where the kind of philosophical reasoning required is much less time consuming and complex. So, for example, it is widely thought that *Hatton v UK* was wrongly decided on the grounds that it presupposes, in essence, a right to ‘a good night’s sleep’.[[56]](#footnote-56) It does not take any particularly deep, complex, or time-consuming philosophical reasoning to address the philosophical implications of recognising a right to a good night’s sleep. The kind of moral reasoning required here is no more complex than the kind of very complex legal reasoning in which the Court regularly engages. The consideration of these matters would not have increased the length of the *Hatton* judgment very much, and the judgment as a whole would certainty have remained shorter and less complex than other of the Court’s most complex landmark judgments. Although for many cases concerns about judicial time and capacities provide a fairly weighty *pro tanto* reason against a philosophical solution, in some cases, like *Hatton*, these are not real concerns.

### Judges Are Poorly Positioned and Poorly Trained

The last of Sunstein’s five criticisms of judicial theorising is that judges are poorly positioned and poorly trained to engage in philosophical reasoning. They are poorly positioned because they have no choice over the cases which come before them, the way those cases are presented, and the arguments that they hear, and these will all have an effect on the kind of philosophical approach which they adopt. They are also poorly positioned because the articulation of philosophical theories in the courtroom may have broad systemic effects which judges are not well suited to predict or correct. And they are poorly trained because they may not have been taught how to adjudicate between competing philosophical theories, and so may be prone to make mistakes in the way they apply those theories to facts.[[57]](#footnote-57)

These reasons against philosophising at the ECtHR are not, however, particularly strong; and they do not all apply equally in every circumstance. First, though it is true that judges are not trained as philosophers, we might question whether formal training would make judges better at the kind of moral philosophical reasoning needed at the ECtHR. Ethical expertise does not need to involve the possession of some distinctive theoretical knowledge; rather, it is a matter of practical wisdom and judgement.[[58]](#footnote-58)

Second, there will be some cases in which the philosophical reasoning required of judges is not of a particularly complex kind. In such cases the limited philosophical training of many judges is not an issue of any great significance. Furthermore, it might be possible for judges to become more experienced in handling philosophical considerations in more complex cases if judicial philosophising became a more frequent feature of the reasoning of the Court. One way this might happen is through an ongoing dialogue between academic lawyers, legal philosophers, and ECtHR judges. There are already many legal philosophers who have written about ECtHR jurisprudence.[[59]](#footnote-59) ECtHR judges could effectively receive much of the philosophical training necessary through engaging with this kind of work.

Third, though it is true that ECtHR judges are subject to the contingencies of litigation and to the effects that these contingencies can have on framing the judgments they make, this should not affect their ability to reason philosophically much more than it should affect their ability to reason in any other way. Philosophical reasoning is merely a rather systematic form of practical reasoning, which is no more likely to be corrupted or biased by the framing of the question than other kinds of practical reasoning. Indeed, consciously philosophical (i.e. systematic and rigorous) reasoning is the best possible antidote to the poison of such framing effects. Rather than judges responding to possible adverse framing effects by avoiding philosophical reasoning, they could adopt a more systematic approach – in part by introducing philosophical reasoning in place of intuitive reasoning – in order to combat these framing effects.

1. **A Pluralist Approach to Philosophical Reason Giving in the ECtHR**

Given that Sunstein’s objections to philosophical reasoning by judges – though certainly serious – do not constitute overwhelming obstacles to the application of philosophical reasoning in a range of cases, one might be tempted to inquire whether there is some underlying intuition that currently inhibits ECtHR judges from engaging in such reasoning. In my view, there is indeed such an intuition at play: namely, an intuitive fear on the part of jurists that a requirement to engage in philosophising might imply a commitment to a particular philosophical theory – something that, for some of the reasons advanced by Sunstein, judges are reluctant to countenance. This very fear of over-commitment to a particular philosophy has, moreover, been encouraged in part by those legal philosophers who are most anxious to promote the application of philosophical reasoning in courts.In the past, when legal philosophers have recommended that courts make their reasoning more philosophically coherent, they have tended to recommend the adoption, by the court, of a ‘single official philosophy’.[[60]](#footnote-60) This might have created the impression that if the Court wants to justify its judgments by reference to philosophical considerations then it will have to adopt a ‘monistic’ approach to philosophical reason giving, choosing one ethical position on which to base its judgments, to the exclusion of all others.

However, the Court need not adopt such a monistic approach. It could instead adopt an ecumenical or pluralist approach, giving a range of different philosophical explanations for its judgments, without uniquely privileging a single philosophical justification. Instead of emphasising a particular value, such as dignity, over all others, the Court could explain how its conclusions might also be compatible with, for example, maximising well-being, and emphasise the overlapping consensus among the range of different theories.[[61]](#footnote-61) Of course, certain theories will be excluded by their lack of ‘fit’ with the Court’s jurisprudence, but there will often be a range of plausible theories which fit sufficiently with the jurisprudence to provide reasonable justification. Amongst the family of reasonable theories which do fit with the jurisprudence, the Court should aim to give no special priority to any one theory. Although ECtHR judges will naturally reach to the particular justifications which accord with their own views, and the views with which they are most familiar, the Court could nonetheless make clear that there are multiple sound pathways to the same conclusion.[[62]](#footnote-62)

As well as minimising judicial angst about becoming committed to a particular philosophical theory, one of the chief merits of this proposal is that it would also significantly diminish the force of Sunstein’s objections to judges engaging in philosophical reasoning. We are now in a position to see more clearly how the pluralistic approach does that.

First, the pluralist approach makes it possible to provide a philosophical justification for a decision without unnecessarily challenging deeply held moral beliefs. That should not be surprising to us, because (if no mistake has been made) outcomes will often be capable of being justified by reference to premises which are collectively no more controversial than those outcomes themselves. Suppose for a given outcome, O, there is a set of different plausible ways of justifying that outcome X, Y, and Z. Outcome O may be acceptable to persons A, B, and C. But justification X may be acceptable only to A, and challenge the deeply held moral beliefs of B and C. Justification Y may be acceptable only to B, and challenge the deeply held moral beliefs of A and C. And so on. Were the Court to adopt only one of justifications X, Y, or Z, and to disavow the other justifications, then some individuals’ deeply held moral beliefs would be unnecessarily challenged. However, it will often be possible for a Court, in trying to justify O, to mention all of X, Y, and Z, and not to pick out any single one of them as having justificatory priority over the others. In this way none of the deeply held beliefs of A, B, and C will be challenged, and O will be much better justified than had justifications X, Y, and Z been omitted from the judgment for fear of challenging people’s beliefs.[[63]](#footnote-63) If, instead of adopting a single monistic approach to justifying its judgments, the Court sometimes takes this pluralist approach, and offers multiple philosophical explanations for its judgments, it may be able to escape the offence to deeply held beliefs that will often be associated with monistic approaches to justification. True, even with the deployment of this pluralistic justificatory strategy, Strasbourg judgments and their justifications may still sometimes challenge people’s deeply held moral beliefs. But if a pluralistic strategy is deployed, people will find their beliefs challenged *only* *insofar as is necessary* because of the nature of the decision being made by the Court.

Second, adopting a pluralist approach means that judicial philosophising will be much less of an impediment to judicial consensus. The Court need not agree on, or privilege, a specific philosophical justification for its judgment, and this would make building consensus around a single judgment easier.

Third, adopting a pluralist approach would decrease the cost of losses and increase the scope for moral evolution over time. If the Court adopted a monistic approach to philosophical reasoning, adopting a single ‘official philosophy’, then this might create excessive systematisation and calcification in the Court’s jurisprudence. However, if the Court adopted a pluralistic approach, this would leave open a range of different directions in which the Court’s jurisprudence could develop, and would prevent excessive systematisation and calcification. What determines the degree of systematisation and calcification of a legal system is the extent to which judges are seeking perfect consistency and coherence, not the extent to which judges offer up philosophical explanations for their judgments. If the Court adopts a pluralistic approach, then it can engage in philosophical reasoning without also trying to achieve perfect consistency and coherence, and can avoid increasing the cost of losses and preventing moral evolution.

Of course, with the adoption of a pluralistic approach, although some of the objections to judicial philosophising melt away, others might still hold significant weight. But the extent to which they do so is heavily dependent on the nature of case at hand: whether or not judicial philosophising will damage the chances of judicial consensus depends on whether explaining the philosophical basis for a decision changes the direct legal impact of that decision, and on the reason for which a philosophical explanation was desirable in that case in the first place; whether or not the limited time and capacities of judges provides a good reason for them not to philosophise depends on the complexity of the philosophical reasoning which would be required in a particular case; and whether or not judges’ poor training and poor institutional positioning provides a good reason for them not to philosophise depends also on the complexity of the philosophical reasoning required.

It seems likely that in some cases there will still be good reasons for the ECtHR to avoid engaging in philosophical reasoning entirely. However, in other cases, once the pluralistic approach is adopted, many of the alleged reasons for avoiding judicial philosophising seem to melt away, and the remaining objections are outweighed by the benefits of philosophising.

1. **Conclusion**

My conclusion, putting it at the lowest, is that ECtHR judges ought sometimes, perhaps relatively often, to reason philosophically. This is all that needs to be shown to justify the view that there is some jurisprudential value in philosophical thinking about the Convention – since, if the ECtHR should sometimes, all things considered, engage in philosophical reasoning, then there is clear practical value, rather than purely academic or epistemological value, in thinking about the philosophical foundations of the Convention.

What is needed, is for the Court and the academic community, working in appropriate harmony, to examine a wide range of potential philosophical underpinnings for the Convention and for the Court’s jurisprudence, in order to discern clearly the relative strengths and weaknesses of the many competing philosophical accounts of Convention rights.

As the project develops and the literature grows,[[64]](#footnote-64) those engaged in the practice of human rights law will be able to look to that literature for guidance, and will be able to find philosophical perspectives on the Convention which develop, in a sophisticated way, views which accord with their own intuitions.[[65]](#footnote-65)There can be no suggestion that those engaged in this practice ought prematurely to pick one of these views as if it embodied the whole truth about the Convention; nor indeed, ought thinkers to write as if their own view embodies the whole truth. Instead, thinkers coming from different normative ethical traditions will need to develop differing, internally coherent perspectives on the Convention – to inquire, for example, into what the virtue ethicist, the deontologist, the consequentialist, or indeed the pluralist, the particularist, or the Thomist, might say both about the Convention itself and about the Court’s jurisprudence.As each of these enquiries becomes more sophisticated and better articulated within the literature, so the philosophical reasoning of the Court and of those who appear before it in the hardest cases may become more sophisticated and better articulated, and the Court’s reasoning may become more complete and more coherent.

1. In *Palomo Sánchez*, the Court left certain factors out of the balancing exercise, and failed to explain why other factors were given the weight they were (*Palomo Sánchez & Ors v Spain* [GC] 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 Sep 2011) for criticism see Stijn Smet*, Resolving Conflicts Between Human Rights: The Judge's Dilemma* (Routledge 2017) 109). In *Hirst*, the Court largely bypassed questions of principle about when it is unjustifiable to restrict the right of prisoners to vote (*Hirst v United Kingdom* (No. 2) [GC] 74025/01 (ECtHR, 6 October 2005); for criticism see Stavros Tsakyrakis, ‘Proportionality: an Assault on Human Rights?’, (2009) 7 *International Journal of Constitutional Law* 468, 486). In *Hatton*, the Court accepted that the applicants’ interests in a good night of sleep engaged Article 8 without any real justification (*Hatton v United Kingdom* [GC] 36022/97 (ECtHR 8 July 2003); for criticism see George Letsas, *A Theory of Interpretation of the ECHR* (OUP 2007)). For an account of why completeness and coherence matter especially in relation to the ECtHR, see Jeremy Letwin, ‘Why Completeness and Coherence Matter for the European Court of Human Rights’, (2021) 2(1) *ECHR Law Review* 119-154. [↑](#footnote-ref-1)
2. In the cases of *Obst* and *Schüth,* the Court treated the same material criteria differently in each case, and gave weight to certain facts in one case but less or no weight to very similar facts in the other (*Obst v Germany* 425/03 (ECtHR, 23 September 2010); *Schüth v Germany* 1620/03 (ECtHR, 23 September 2010); for criticism Stijn Smet, ‘Conflicts between Human Rights and the ECtHR: Towards a Structured Balancing Test’, inEva Brems & Stijn Smet (eds), *When Human Rights Clash at the ECtHR* (OUP 2017) 42). In *Otto-Preminger-Institut*,the Court treated the preferences of the majority as a decisive factor in finding no violation of the Convention whereas in *Dudgeon, Hirst,* and *Dickson*, the Court seemed to treat the views of the majority of the populace as holding significantly less weight (*Otto-Preminger-Institut v Austria* 13470/87 (ECtHR, 20 September 1994); *Dudgeon v United Kingdom* 7525/76 (ECtHR, 22 October 1981); *Hirst v United Kingdom (No. 2)* [GC] 74025/01 (ECtHR, 6 October 2005); *Dickson v United Kingdom* [GC] 44362/04 (ECtHR, 4 December 2007)*;* for criticism see Letsas, *A Theory of Interpretation of the ECHR* (n 1) 120-122; Guglielmo Verdirame, ‘Rescuing Human Rights from Proportionality’, in Rown Cruft, Mathew Liao, & Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015)). In *Leander*,the Court’s judgment fits with the idea that Convention rights are ‘protected interests’ which must be balanced against the public interest conceived of as ‘common interests’, whereas in *Autronic* the Court’s judgment fits much better with the idea that Convention rights are ‘trumps’ which must be balanced against the public interest conceived of as ‘unitary interest’ (*Autronic AG v Switzerland* 12726/87 (ECtHR, 22 May 1990); *Leander v Sweden* 9248/81 (ECtHR 26 March 1987); for criticism, see Aileen McHarg, ‘Reconciling Human Rights and the Public Interest’ (1999) 62(5) *Modern Law Review* 671). [↑](#footnote-ref-2)
3. By a ‘pragmatic’ solution, I mean one which does not involve engaging in philosophical reasoning, and which involves identifying legal sources rather than asking what justifies their existence. In that sense, I use the phrase ‘a purely pragmatic solution’ as a term of art, not to be conflated with philosophical pragmatism, which could itself be part of a philosophical solution. See, Richard Posner, *The Problematics of Moral and Legal Theory* (HUP 1999) 227 [↑](#footnote-ref-3)
4. On the nature of ‘philosophical’ reasoning, see: Richard Rorty, ‘Philosophy as a Kind of Writing: An Essay on Derrida’, (1978) 10(1) *Literary Hermeneutics* 141-160, 143; Bertrand Russell, *A History of Western Philosophy* (George Allen & Unwin Ltd 1961); Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell 1968); Graham Priest, ‘What Is Philosophy?’, (2006) 81(316) *Philosophy* 189, 202; Tim Scanlon, ‘Freedom of Expression and Categories of Expression’, Ch.5 in *The Difficulty of Tolerance* (CUP 2009) 99-100; and Ronald Dworkin, ‘In Praise of Theory’, (1997) 29 *Ariz. St. L.J.* 353 [↑](#footnote-ref-4)
5. *Dickson* (n 2) [↑](#footnote-ref-5)
6. Indeed, many of the cases mentions in footnotes (n 1 & 2) conform to this pattern. [↑](#footnote-ref-6)
7. ibid paras 77-85 [↑](#footnote-ref-7)
8. *Dickson* (n 2) para 78; the Court mentioned *Evans v United Kingdom* [GC] 6339/05 (ECtHR, 10 April 2007) [↑](#footnote-ref-8)
9. See, *Fretté v France* 36515/97 (ECtHR, 26 February 2002) para 32 [↑](#footnote-ref-9)
10. *Dickson* (n 2) para 75 [↑](#footnote-ref-10)
11. See McHarg, ‘Reconciling Human Rights and the Public Interest’ (n 2) [↑](#footnote-ref-11)
12. *Dickson* (n 2) paras 75 and 28-36 [↑](#footnote-ref-12)
13. ibid para 76 [↑](#footnote-ref-13)
14. *VgT Verein gegen Tierfabriken v Switzerland* 24699/94 (ECtHR, 28 June 2001) [↑](#footnote-ref-14)
15. *Animal Defenders International v UK* [GC] 48876/08 (ECtHR, 22 April 2013) [↑](#footnote-ref-15)
16. As do the cases mentioned in footnote (n 2). *Animal Defenders* and *VgT* provide a particularly stark illustration of the problem. In some of the other case mentioned, the inconsistency is more subtle. [↑](#footnote-ref-16)
17. Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Hart 2018) 20 [↑](#footnote-ref-17)
18. *Animal Defenders*,(n 15) para 116 [↑](#footnote-ref-18)
19. See Janneke Gerards & Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017) [↑](#footnote-ref-19)
20. Ibid, see Ch.2 in particular. [↑](#footnote-ref-20)
21. Tom Lewis, ‘*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?’ (2014) 77(3) *Modern Law Review* 460, 468-469 [↑](#footnote-ref-21)
22. *Animal Defenders,* (n 15)para 101; see also concurring opinion of Judge Bratza, para 6. This is an empirical assumption which is highly doubtful given the effect social media is now having on democracy, see, e.g., Brian Loader & Dan Mercea, *Social Media and Democracy: Innovations in Participatory Politics* (Routledge 2012) [↑](#footnote-ref-22)
23. ibid para 124 [↑](#footnote-ref-23)
24. ibid para 123 [↑](#footnote-ref-24)
25. ibid para 122 [↑](#footnote-ref-25)
26. See Gerards & Brems (n 19) Chs.6 & 7 [↑](#footnote-ref-26)
27. Eva Brems, ‘The ‘Logics’ of Procedural-Type Review by the European Court of Human Rights’, in Janneke Gerards & Eva Brems (eds) *Procedural Review in European Fundamental Rights Cases* (CUP 2017) [↑](#footnote-ref-27)
28. ibid 32 [↑](#footnote-ref-28)
29. ibid 26 [↑](#footnote-ref-29)
30. For broadly Kantian approaches, see Matthias Kumm & Alec Walen, ‘Human Dignity and Proportionality: Deontic Pluralism in Balancing’ in Grant Huscroft, Bradley Miller, & Gregoire Webber (eds) *Proportionality and The Rule Of Law* (CUP 2014); and Letsas, *A Theory of Interpretation of the ECHR* (n 1); for a broadly utilitarian approach, see James Griffin, *Well-being: Its Meaning, Measurement and Moral Importance* (1986 OUP); and Jeremy Letwin, ‘A Utilitarian Account of Article 3 ECHR’, (2022) 3(3) *ECHR Law Review* 350-391 [↑](#footnote-ref-30)
31. See *Dickson* (n 2) para 81; citing *Aliev v Ukraine* 41220/983 (ECtHR, 29 April 2003) [↑](#footnote-ref-31)
32. See e.g. Onora O’Neill, ‘The Dark Side of Human Rights’, (2005) 81(2) *International Affairs* 427 [↑](#footnote-ref-32)
33. Tina Rulli, ‘The Ethics of Procreation and Adoption’, (2016) 11(6) Philosophy Compass 305, 310 (2016) [↑](#footnote-ref-33)
34. See Matthias Klatt & Moritz Meister, *The Constitutional Structure Of Proportionality* (OUP 2012) 12 [↑](#footnote-ref-34)
35. Thomas Hill, *Respect, Pluralism, and Justice: Kantian Perspectives* (OUP 2000) Ch.7 [↑](#footnote-ref-35)
36. Onora O’Neill, ‘Begetting, Bearing, and Rearing’, in Onora O’Neill & William Ruddick (eds), *Having Children: Philosophical and Legal Reflections on Parenthood* (OUP 1979) 25 [↑](#footnote-ref-36)
37. ibid 29 [↑](#footnote-ref-37)
38. ibid [↑](#footnote-ref-38)
39. As Luteran rightly notes, there is ‘no avoiding of substantive moral argument’ if one wants to justify a particular view about the right result in *Dickson*. Martin Luteran, ‘Towards Proportionality as a Proportion Between Means and Ends’, in Cian Murphy & Penny Green (eds), *Law and Outsiders: Norms, Processes and ‘Othering’ in the Twenty-first Century* (Hart 2011) 21 [↑](#footnote-ref-39)
40. Ryan Pevnick, ‘The Anatomy of Debate about Campaign Finance’, (2016) 78(4) *The Journal of Politics* 1184, 1185 [↑](#footnote-ref-40)
41. *Buckley v Valeo* [1976] 424 U.S. 1, at 26–27 [↑](#footnote-ref-41)
42. Pevnick, ‘The Anatomy of Debate about Campaign Finance’, (n 40) 1185; see *Citizens United v Federal Election Commission* [2010] 568 U.S. 310, at 359 [↑](#footnote-ref-42)
43. Ibid 1191; see *McCutcheon et al. v Federal Election Commission* [2014] 572 U.S., slip opinion, U.S. Supreme Courtslip, at 2–3 [↑](#footnote-ref-43)
44. Like that held by John Rawls, *Political Liberalism* (Columbia University Press 2005) or Ronald Dworkin, ‘The Curse of American politics’, (1996) 43(16) *New York Review of Books* 19 [↑](#footnote-ref-44)
45. Lewis, ‘*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?’ (n 21) [↑](#footnote-ref-45)
46. Aruna Sathanapally, ‘The Modest Promise of ‘Procedural Review’ in Fundamental Rights Cases’, in Janneke Gerards & Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017) 51; citing Aileen Kavanagh, ‘Deference or Deﬁance? The Limits of the Judicial Role in Constitutional Adjudication’ in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) [↑](#footnote-ref-46)
47. Lewis, ‘*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?’ (n 21) 474 [↑](#footnote-ref-47)
48. See Ronald Dworkin, *A Matter of Principle* (HUP 1985) Ch.2 [↑](#footnote-ref-48)
49. The sets of reasons against judicial philosophising which I examine are all drawn from Sunstein’s work on incompletely theorized agreements. Sunstein’s attack is not explicitly aimed at judicial philosophical reasoning, but at judicial ‘theorising’. Sunstein’s scorn is reserved specifically for ‘abstraction’ and ‘high-level theory’. He argues that judges ought generally to prefer ‘incompletely theorized agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them’. Not all abstraction and theorizing is necessarily philosophical, and so Sunstein objects to a wider class of reasoning than we are discussing here. Similarly, not all philosophical reasoning is necessarily abstract, nor does it necessarily involve systematic theorising, and so Sunstein’s critique does not translate perfectly into a critique of judicial philosophising. Nonetheless, many of the points Sunstein makes against judicial theorising apply also against judicial philosophising, which makes him the most appropriate interlocutor. See Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP 2018) 37 [↑](#footnote-ref-49)
50. For example, as Sunstein argues, it is possible to decide a case like *Roe v Wade* without ‘challenging the judgment, held by millions of people with strong moral convictions, that a fetus is a human being’. Sunstein, *Legal Reasoning and Political Conflict* (n 49) 40 [↑](#footnote-ref-50)
51. For example, some view it as a form of punishment, others as an expression of a prisoner’s lack of virtue, and others as a democracy-protecting measure. See, Jean Hampton, ‘Punishment, Feminism, and Political Identity: A Case Study in the Expressive Nature of Law’, (1998) 11 *Canadian Journal of Law and Jurisprudence* 23; Christopher Manfredi, ‘In Defence of Prisoner Disenfranchisement’, in Alec Ewald & Brandon Rottinghaus (eds), *Criminal Disenfranchisement in an International Perspective* (CUP 2009); and Roger Clegg & Marc Mauer, ‘Should Ex-Felons Be Allowed to Vote?’, (2004) *Legal Affairs*, <<https://www.legalaffairs.org/webexclusive/debateclub_disenfranchisement1104.html>>; Peter Ramsay, ‘Voters Should Not Be In Prison! The Rights of Prisoners in a Democracy’, (2013) 16(3) *Critical Review of International Social and Political Philosophy* 42 [↑](#footnote-ref-51)
52. Sunstein, *Legal Reasoning and Political Conflict* (n 49) 41 [↑](#footnote-ref-52)
53. *Marbury v Madison* (1803) 5 U.S. 137 [↑](#footnote-ref-53)
54. See<<https://www.coe.int/en/web/tbilisi/council-of-europe-news/-/asset_publisher/zsGQOJsjjHjv/content/european-court-of-human-rights-ended-2018-with-a-stable-caseload-level?inheritRedirect=false>> [↑](#footnote-ref-54)
55. See Report on Selection and election of judges of the European Court of Human Rights <<https://rm.coe.int/selection-and-election-of-judges-of-the-european-court-of-human-rights/16807b915e>> [↑](#footnote-ref-55)
56. See, for example, Letsas, *A Theory of Interpretation of the ECHR* (n 1) Ch.6 [↑](#footnote-ref-56)
57. Sunstein, *Legal Reasoning and Political Conflict* (n 49) 45-46 [↑](#footnote-ref-57)
58. Aristotle, *Nichomachean Ethics* (first published circa 340 BCE, 1955 Penguin) [↑](#footnote-ref-58)
59. Indeed, the literature has been growing over the last decade, and there can be no doubt that the Court has benefited from engagement with it. The following works have dealt most directly with the philosophical foundations of the Convention: Letsas, *A Theory of Interpretation of the ECHR* (n 1); Natasa Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Bloomsbury 2021); Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (CUP 2018); McHarg, ‘Reconciling Human Rights and the Public Interest’ (n 2); Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012); and Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP 2007) [↑](#footnote-ref-59)
60. McHarg, for example, argues that ‘the explicit and consistent adoption’, by the ECtHR, of a single philosophical perspective on balancing human rights and the public interest, would ‘be preferable to the current confusion and disarray in the Strasbourg jurisprudence’. Similarly, Luteran argues that the ECtHR Court ought to adopt a deontological approach (based on the doctrine of double effect) to balancing rights and the public interest. See, McHarg, ‘Reconciling Human Rights and the Public Interest’ (n 2) 695, and Luteran, ‘Towards Proportionality as a Proportion Between Means and Ends’ (n 39) [↑](#footnote-ref-60)
61. By using John Rawls’ terminology here, I do not mean to adopt his view that judges should eschew deep moral justifications for their judgments, or that they should abide by the constraints of ‘public reason’. My own view is quite different from that of Rawls. See Rawls, *Political Liberalism* (n 44) [↑](#footnote-ref-61)
62. Indeed, concurring judgments already often serve this purpose. [↑](#footnote-ref-62)
63. It may be possible that an outcome is easier to accept than any possible justification for it. A may find O acceptable, but, for some reason, find all of X, Y, and Z challenging to his deeply held moral beliefs. If this is possible, then we might again worry that providing philosophical justifications for outcomes is problematic. However, for the envisaged situation to occur, a mistake must have been made somewhere. It must either be, on the one hand, that X, Y, and Z do not in fact exhaust the possible justifications for O, and that were A presented with, say, justification V or W, he would not feel aggrieved in the same way, or on the other hand, that A has made a mistake in accepting O but not accepting either X, Y, or Z. [↑](#footnote-ref-63)
64. See footnote (n 59) [↑](#footnote-ref-64)
65. The fact that the choice may involve intuition does not imply that it must be arbitrary. It may be based on well-accepted metaethical approaches such as a Rawlsian reflective equilibrium. [↑](#footnote-ref-65)