DIVERSITY AND EUROPEAN HUMAN RIGHTS

Through redrafting the judgments of the ECHR, Diversity and European Human Rights demonstrates how the Court could improve the mainstreaming of diversity in its judgments. Eighteen judgments are considered and rewritten to reflect the concerns of women, children, LGB persons, ethnic and religious minorities and persons with disabilities, in turn. Each redrafted judgment is accompanied by a paper outlining the theoretical concepts and frameworks that guided the approaches of the authors and explaining how each amendment to the original text is an improvement. Simultaneously, the authors demonstrate how difficult it can be to translate ideas into judgments, whilst also providing examples of what those ideas would look like in judicial language. By rewriting actual judicial decisions in a wide range of topics, this book offers a broad overview of diversity issues in the jurisprudence of the ECHR and aims to bridge the gap between academic analysis and judicial practice.

EVA BREMS is a professor of human rights law at Ghent University, where she co-founded the Human Rights Centre. Her research interests include most areas of human rights law (Belgian law, European law, international law, comparative law), with special emphases on women’s rights, children’s rights and cultural diversity.
DIVERSITY AND EUROPEAN HUMAN RIGHTS

Rewriting Judgments of the ECHR

Edited by

EVA BREMS
CONTENTS

List of tables page viii
Notes on the contributors ix
Foreword xiii
Acknowledgments xv
Guide to understanding the rewritten judgments xvi
List of abbreviations xvii

Introduction 1
EVA BREMS

PART I Children 17

1 Rewriting V v. United Kingdom: building on a ground-breaking standard 19
URSULA KILKELLY

2 Images of children in education: a critical reading of DH and others v. Czech Republic 40
SIA SPILOPOULOU ÅKERMARK

3 Mainstreaming children’s rights in migration litigation: Muskhadzhiev and others v. Belgium 68
WOUTER VANDENHOLE AND JULIE RYNGAERT

PART II Gender 93

4 Redrafting abortion rights under the Convention: A, B and C v. Ireland 95
PATRICIA LONDONO

5 A noble cause: a case study of discrimination, symbols and reciprocity 121
YOFI TIROSH
vi CONTENTS

6 From inclusion to transformation: rewriting Konstantin Markin v. Russia 148
ALEXANDRA TIMMER

PART III Religious minorities 171

7 Rethinking Deschomets v. France: reinforcing the protection of religious liberty through personal autonomy in custody disputes 173
RENATA UITZ

8 Mainstreaming religious diversity in a secular and egalitarian State: the road(s) not taken in Leyla Şahin v. Turkey 192
PIERRE BOSSET

9 Suku Phull v. France rewritten from a procedural justice perspective: taking religious minorities seriously 218
SÄILA OUALD CHAIB

PART IV Sexual minorities 241

10 Rewriting Schalk and Kopf: shifting the locus of deference 243
HOLNING LAU

11 The Burden of conjugality 265
AEYAL GROSS

12 The public faces of privacy: rewriting Lustig-Prean and Beckett v. United Kingdom 293
MICHAEL KAVEY

PART V Disability 327

13 Unravelling the knot: Article 8, private life, positive duties and disability: rewriting Sentges v. Netherlands 329
LISA WADDINGTON

14 Rethinking Herczegfalvy: the Convention and the control of psychiatric treatment 352
PETER BARTLETT

15 Rewriting Kolanis v. United Kingdom: the right to community living 382
MARIS BURBERGS
PART VI CULTURAL MINORITIES 399

16 Minority marriage and discrimination: redrafting Muñoz Díaz v. Spain 401
EDUARDO J. RUÍZ VIEYTEZ

17 Chapman redux: the European Court of Human Rights and Roma traditional lifestyle 426
JULIE RINGELHEIM

18 Erasing Q, W and X, erasing cultural differences 445
LOURDES PERONI

Index 470
### TABLES

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Typology of redrafted judgments/decisions</td>
</tr>
<tr>
<td>2</td>
<td>Chronology of redrafted judgments/decisions</td>
</tr>
<tr>
<td>3</td>
<td>Outcome of original judgments/decisions and redrafts</td>
</tr>
</tbody>
</table>
NOTES ON THE CONTRIBUTORS

PETER BARTLETT is Nottinghamshire Healthcare NHS Trust Professor of Mental Health Law in the School of Law and Institute of Mental Health at the University of Nottingham. With Oliver Lewis and Oliver Thorold, he is author of *Mental Disability and the European Convention on Human Rights* (2006).

PIERRE BOSSET is Professor of Human Rights and Public Law at the Université du Québec à Montréal (UQAM). The relationship between law and religion is one of his major research interests. For the Québec Human Rights Commission, he has authored influential policy papers on religion in the public sphere, secularism, reasonable accommodation, and the right to wear head-scarves in schools.

EVA BREMS is a professor of human rights law at Ghent University (Belgium). Her research interests include most areas of human rights law, in European and international law as well as in Belgian and comparative law.

MARIS BURBERGS is a PhD candidate at the Human Rights Centre of Ghent University. He holds a BA from the University of Latvia and a European Master’s Degree in Human Rights and Democratisation from EIUC (Italy). Prior to his PhD studies, he was a lecturer on human rights at the University of Latvia and a legal adviser to the Ombudsman of Latvia.

AEYAL GROSS is Associate Professor of Law at Tel Aviv University. He is also a visiting reader at the School of Oriental and African Studies (SOAS) at the University of London. He holds an LLB from Tel Aviv University and an SJD from Harvard Law School. He is a board member of the Association for Civil Rights in Israel (ACRI).

MICHAEL KAVEY, a writer and attorney in New York, recently served as an Associate-in-Law at Columbia Law School, where he taught legal practice workshop and assisted in teaching legal methods and employment discrimination law; he also worked with Columbia’s Sexuality and Gender Law Clinic. He previously practised law with Lambda Legal, and served as a law clerk to the Honorable Sonia Sotomayor (US Court of Appeals, Second Circuit) and the Honorable Gerard E. Lynch (US District Court, Southern District of New York).

URSULA KILKELLY is a professor of law at University College Cork where she directs the Child Law Clinic and the LLM in Child and Family Law. She has

Holning Lau is an associate professor of law at the University of North Carolina, where he teaches family law and law and sexuality. He has held fellowships at UCLA’s Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy, and at the University of Hong Kong’s Centre for Comparative and Public Law.

Patricia Londono is a barrister (Lincoln’s Inn) and a lecturer in law at Brunel Law School (2011 to present). Before that, she was a John Collier Fellow in Law at Trinity Hall, Cambridge (2007–10), a lecturer in law (non-stipendiary) at Jesus College, Oxford (2006–7), a graduate teaching assistant at the Faculty of Law, Oxford University (2006) and a lecturer in law (non-stipendiary) at Lincoln College, Oxford (2004–5 and 2005–6).

Saïla Ouald Chaib is a PhD researcher at the Human Rights Centre of Ghent University. In her research she aims at integrating a minority perspective in the case law of the European Court of Human Rights, with a main focus on religious minorities. She obtained her LLB (Kandidaat in de Rechten) from KU Leuven Kulak and her LLM from Ghent University.

Lourdes Peroni is a PhD candidate at the Human Rights Centre of Ghent University. Her research focuses on issues of recognition and equality in ECHR case law concerning religious and ethnic minorities. She received her LLB from the National University of Asunción and her LLM from Harvard Law School. She was a fellow at the Inter-American Commission on Human Rights and at Yale Law School.

Julie Ringelheim is a researcher with the Belgian National Fund for Scientific Research (FRS-FNRS) and Lecturer in Human Rights Law at Louvain University. Her publications include *Ethnic Monitoring. The Processing of Racial and Ethnic Data in Anti-Discrimination Policies* (with O. De Schutter, 2010) and *La protection des minorités par la Convention européenne des droits de l’homme* (2006).

Eduardo J. Ruiz Viytez is Director of the Human Rights Institute of the University of Deusto (Bilbao, Basque Country, Spain) and associate professor of constitutional law at the same university. He has been a legal adviser to the Basque Ombudsman and member of the Spanish Official Council for Integration of Immigrants. His activities and publications are related to immigration policies and the rights of national, religious or linguistic minorities.

Julie Ryngaert is a PhD researcher at the Law and Development Research Group, University of Antwerp Law Research School. She studies the interaction...
between children’s rights and human rights, with a particular emphasis on migration.

SIA SPILOPOULOU ÅKERMARK, JUR. DR., is an associate professor in international law (Uppsala, Sweden) and Director of the Åland Islands Peace Institute (Finland). Her research focuses on minorities, autonomies, treaty law, use of force, and development issues. Among her latest major works are the edited volumes, *International Obligations and National Debates: Minorities around the Baltic Sea* (2006) and *The Åland Example and Its Components – Relevance for International Conflict Resolution* (2011).

ALEXANDRA TIMMER is a PhD candidate at the Human Rights Centre of Ghent University. Her research explores issues of equality and discrimination in the case law of the ECHR, with a specific focus on the concepts of stereotyping and vulnerability. She studied both history and law at Leiden University, and obtained an LLM from Columbia Law School.

YOFI TIROSH is a member of the Tel Aviv University Faculty of Law. Her research focuses on anti-discrimination law and on cultural legal analysis, with a particular emphasis on body, gender, language and identity. She teaches labour and employment law, jurisprudence, anti-discrimination law and food law.

RENTA UITZ is professor and chair of the comparative constitutional law program at the Legal Studies Department of Central European University, Budapest. She works on the protection of individual autonomy as a human right, in contexts ranging from religious liberty to sexual autonomy.

WOUTER VANDENHOLE teaches human rights and holds the UNICEF Chair in Children’s Rights at the Faculty of Law of the University of Antwerp, where he co-directs the Law and Development research group. He is the chair of the Research Networking Programme GLOTHRO: Beyond Territoriality: Globalisation and Transnational Human Rights Obligations.

LISA WADDINGTON holds the European Disability Forum Chair in European Disability Law at Maastricht University, the Netherlands. She is the joint editor of the *European Yearbook of Disability Law*. Professor Waddington is a co-ordinator of the European Network of Legal Experts in the Non-Discrimination Field and a member of the Core Research Team of the Academic Network of European Disability experts (ANED).
I am pleased to welcome an original, audacious and courageous initiative. Under the capable and dynamic leadership of Professor Eva Brems – undoubtedly one of the most brilliant academics of her generation in the human rights field – a group of international researchers have tackled the ‘magic mountain’ of the case law of the European Court of Human Rights. But they have not just done so any old how, and that is precisely why this publication is of such interest.

First of all, they have chosen an angle which is especially important and sensitive but which, it has to be acknowledged, is very often – indeed all too often – neglected, namely, the particular situation of non-dominant groups: children, gender, religious, sexual and cultural minorities, and disability. While we all recognise that the question of minorities is at the heart of a democratic society, are the experience and perspectives of these groups clearly visible in the case law of the European Court of Human Rights? How, in the judgments selected, have their specific concerns been taken into account in our reasoning, if at all? The vigilance and sensitivity of the various contributors are particularly acute since they are all experts, in their respective fields, on the matter under discussion, both nationally and at a European and international level. They also have a shared concern: the emancipation of non-dominant groups through a change in culture.

Next, the researchers have invented a new method. Rather than sticking to the traditional method of external scientific analysis, they have chosen ‘to put themselves in the Court’s shoes’. Taking the no doubt legitimate view that the Court’s case law could still be improved in its approach to different forms of diversity, the authors have had no hesitation in revisiting and rewriting the judgments subjected to their critical analysis. They have done so intelligently and humanely. Some might find the whole exercise ambitious, if not somewhat impertinent; I disagree entirely. The fundamental idea is the translation of academic, scholarly views into judicial language, an approach which is rarely encountered. Personally, I find it a helpful and necessary means of bridging the gap between theory and practice, between what we know and what we do. How can we clarify theory through practice and practice through theory? I am
convinced that steps need to be taken on both sides to work progressively towards this goal.

As far as the judicial decision-makers are concerned, I think that they should be reminded of the famous quip that 'there is nothing more practical than a good theory'. Analyses and interpretations of the Court’s judgments by academics, with the special tools and critical distance that are characteristic of their work, are of vital importance for judges. Because of the responsibility they assume, an attitude of openness on the judges’ part is, in my view, essential and, moreover, they have everything to gain from it. As far as the researchers are concerned, it is a pity that, very often, they pay little attention to the practical use of their research. They have a tendency to look at matters out of context and only rarely offer alternative solutions to the situations they criticise.

These are precisely the traditional obstacles which the initiators of the project behind this publication boldly set out to address and overcome. In a further effort to break down the barriers between these two worlds, they also submitted their reflections and analyses to the scrutiny of the judges themselves at a seminar in Strasbourg in February 2011. Of course, certain 'rewritings' of judgments of the European Court of Human Rights may in turn attract criticism, not least from the judges. But that is not what matters here. The background to this publication, and the contributions it contains, pave the way for enhanced mutual understanding between judges and academics, for the greater benefit of human rights, our common heritage.

Françoise Tulkens
Vice-President of the European Court of Human Rights
The trajectory from a ‘wild idea’ over an amazing conference to the present volume was made possible thanks to a number of people and institutions, who deserve a heartfelt thanks.

Thanks to the European Research Council, the Research Fund of Ghent University and the Flemish Fund for Scientific Research, we have a great team at the Human Rights Centre of Ghent University working on the legal reasoning of the European Court of Human Rights. It is a privilege to work with such capable and dynamic young people. Together, we planned and realised the conference as well as the book. Alexandra, Laurens, Lourdes, Maris, Saïla and Stijn, thank you very much!

We are obliged also to the European Court of Human Rights, which hosted our conference. Special thanks are due to judge Françoise Tulkens, to her assistant Sylvie Ruffenach, and to Deputy Registrar Michael O’Boyle.

We thank all contributors to this volume for taking up the challenge, and for bearing with the constraints of the format. And we thank the respondents at the conference, who, through their comments on first drafts, enriched the rewritten judgments and accompanying papers: Judges Egbert Myjer, Ann Power, Christos Rozakis and András Sajó, Aida Grgic, Professor Marie-Bénédicte Dembour, and NGO representatives Nuala Mole (AIRE Centre), Gauri Van Gulik (Human Rights Watch), Lucy Claridge (Minority Rights Group International), Helmut Graupner, and Constantin Cojocariu (Interights).

Academic work is not possible without excellent supporting staff. For this and other projects, I am much indebted to Anne Van Beversluys and in particular Martine Dewulf, who accompanied us to Strasbourg and finalised the manuscript.

Finally, we thank Nienke van Schaeverbeke at Cambridge University Press for her friendly, flexible and efficient professionalism.
GUIDE TO UNDERSTANDING THE REWRITTEN JUDGMENTS

Each chapter of this volume consists of commentaries on a specific judgment of the European Court of Human Rights, followed by a rewritten version of that judgment. This deliberate choice of format comes with unique challenges at the level of presentation. To assist the reader in understanding the rewritten judgments, an explanation is given below of all style elements that have been used in the presentation of the rewritten judgments. To further improve the reading experience, we advise the reader to keep the original judgment close by when reading the rewritten judgments.

Plain text Indicates passages of the original judgment that have been kept intact by the author.

Bold text Indicates new passages, written by the author as part of the rewriting exercise.

[Paragraph deleted] Indicates that a paragraph from the original judgment has been deleted, because the author disagrees with its content.

[Original paragraph deleted] Indicates that a paragraph from the original judgment has been deleted, because the author disagrees with its content, and a new paragraph with the same numbering has been inserted in place of the original paragraph.

[Fragment deleted] Indicates that a passage from the original judgment has been deleted, either because the author disagrees with its content or for purposes of coherence of the rewritten judgment (e.g. for grammatical reasons).

[References deleted] Indicates that references to other cases as represented in the original judgment have been deleted by the author to ease the reading of the rewritten judgment.

... Indicates that passages or paragraphs from the original judgment have not been reproduced in the rewritten judgment. The author agrees with these passages or paragraphs, but their reproduction is not necessary to understand the rewritten judgment.
ABBREVIATIONS

CEDAW  Convention on the Elimination of All Forms of Discrimination Against Women
CPA 2004  Civil Partnership Act 2004 (UK)
CPT  Committee for the Prevention of Torture (Council of Europe)
CRC  Convention on the Rights of the Child
CRPD  Convention on the Rights of Persons with Disabilities (UN)
DR  Decisions and Reports of the European Commission of Human Rights
ECHR  European Court of Human Rights
ECJ  European Court of Justice
ECommHR  European Commission of Human Rights
EHRR  European Human Rights Reports
ETS  European Treaty Series
FCNM  Framework Convention for the Protection of National Minorities
GC  Grand Chamber
HPAT  Homosexual Policy Assessment Team (UK)
HRC  Human Rights Committee (UN)
ICCPR  International Covenant on Civil and Political Rights
ICD  International Classification of Diseases (UN)
LGB  lesbian, gay and bisexual
MHRT  Mental Health Review Tribunal (UK)
MoD  Ministry of Defence (UK)
RADAR  reciprocal anti-discrimination argument
UNHRC  Human Rights Committee (UN)
UNTS  United Nations Treaty Series