Introduction

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The contributors to this volume have rewritten a judgment or decision of the European Court of Human Rights, with a view to improving the way the Court addresses the specific concerns of members of non-dominant groups. Contributors were selected on the basis of their academic expertise on the rights of the particular group concerned, in addition to relevant diversity factors, including gender, academic seniority and the geographic location of their institution. They were invited to select a case and put themselves in the Court's shoes. In the accompanying papers, authors have outlined the theoretical concepts and frameworks that guided their approaches and have explained the amendments they made to the original text and how, in their opinion, each of these improves the reasoning.

While the initiators of this project worked on the assumption that there is room for improvement in the Court's approach to diversities, we have refrained from offering substantive guidelines to the contributors. Rather than promoting one way of doing justice for non-dominant groups, we want to explore how different approaches can be translated into judicial practice. The focus of the book is therefore on the translation of – sometimes diverging – academic views into judicial language.

First drafts of the papers were presented at the conference, 'Mainstreaming Diversity: Rewriting Judgments of the European Court of Human Rights', held at the European Court of Human Rights in Strasbourg on 3–4 February 2011. The event brought together academics from around the world, judges of the European Court of Human Rights, and practitioners from across Europe. Presentations were organised in six panels covering gender, disability, religion, culture, sexual orientation and children. In each panel, three legal scholars presented the rewritten passages of the selected judgments and decisions and two discussants – generally a practitioner and a judge of the European Court of Human Rights – reacted to the proposals giving crucial insights into their practical feasibility.

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The rewriting concept has been practised by top scholars in other jurisdictions such as Canada,[1] the United States[2] and the United Kingdom.[3] Compared to these other projects, the current book is wider in scope, covering six types of diversity. Moreover, while some judgments were selected because of their 'landmark' status, other judgments and decisions have been redrafted for different reasons, as set out by the authors of the redrafts.

With this rewriting concept, the book seeks to bridge the gap between academic analysis and judicial practice. This is not about academics telling judges that they can or must do better. It is not even certain whether this exercise can be labelled 'academic activism'.[4] If anything, it has been a humbling experience for the scholars involved. They were forced out of their comfort zones, and had to make the jump from theoretical analysis to technical solutions. Reading this book may provide an *Aha-Erlebnis* for both academics and judges. To academics, the book shows that the translation of ideas into judgments is fraught with complications, and that it may be worth spending some time on this issue, especially for those who wish their work to impact on judicial practice. At the same time, judges will find in this book numerous examples of what endorsing a theoretical analysis may look like in the text of a judgment.

Redrafting eighteen judgments/decisions

This volume presents eighteen redrafted judgments/decisions. Among them are ten Chamber judgments, four Grand Chamber judgments and four decisions in which the Court finds the applicant's complaint inadmissible. The eighteen judgments/decisions are listed and categorised in Table 1.

With respect to two of the four inadmissibility decisions (*Phull* and *De La Cierva Osorio*), the redraft finds a violation of the Convention, resulting in the conversion of the decision into a judgment on the merits.

The large majority of the redrafts concern judgments/decisions that are less than a decade old. None is older than two decades. Some authors have deliberately selected a somewhat older landmark judgment, with a view to updating it in light of developments that have occurred in the Court's case law, and/or in the broader legal environment, in society or science. While a historical approach, working with the sources available at the time of the original

[1] The Women's Court of Canada, 'Rewriting Equality', available at www.womenscourt.ca.
[2] Jack Balkin (ed.), *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York University Press, 2002); Jack Balkin (ed.), *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (New York University Press, 2005).
[3] Rosemary Hunter, Clare McGlynn and Erika Rackley (eds.), *Feminist Judgments, From Theory to Practice* (Oxford and Portland, OR: Hart Publishing, 2010).
[4] *Ibid.*, p. 8.

Table 1 *Typology of redrafted judgments/decisions*

Case name	Chapter
Chamber judgment	
A, B and C v. Ireland	4
Herczegfalvy v. Austria	14
Kemal Taşkın and others v. Turkey	18
Kolanis v. United Kingdom	15
Konstantin Markin v. Russia	6
Lustig-Prean and Beckett v. United Kingdom	12
Muñoz Díaz v. Spain	16
Muskhadzhiyeva and others v. Belgium	3
Schalk and Kopf v. Austria	10
V v. United Kingdom	1
Grand Chamber judgment	
Burden v. United Kingdom	11
Chapman v. United Kingdom	17
DH and others v. Czech Republic	2
Leyla Şahin v. Turkey	8
Inadmissibility decision	
De La Cierva Osorio De Moscoso v. Spain	5
Deschomets v. France	7
Sentges v. Netherlands	13
Suku Phull v. France	9

judgment,[5] has its own value, several authors have preferred a redraft from today's perspective.[6] Table 2 sets out the chronology of the eighteen judgments/decisions.

Doing justice for non-dominant groups is not only a matter of outcomes, it concerns first and foremost ways of reasoning that take into account minority experiences and worldviews. About half of the redrafts in this volume change the outcome of the case – invariably in the sense of finding a violation where the

[5] See Michael Kavey, in Chapter 12, p. 317, below.
[6] See Pierre Bosset, in Chapter 8, p. 196, below; Ursula Kilkelly, in Chapter 1, p. 95, below; and Julie Ringelheim, in Chapter 17, below.

Table 2 *Chronology of redrafted judgments/decisions*

	2010	2009	2008	2007	2006	2005	2003	2001	1999	1992
A, B and C	X									
Burden			X							
Chapman								X		
De La Cierva Osorio De Moscoso									X	
Deschomets					X					
DH				X						
Herczegfalvy										X
Kemal Taşkın	X									
Kolanis						X				
Konstantin Markin	X									
Leyla Şahin						X				
Lustig-Prean and Beckett									X	
Muñoz Díaz		X								
Muskhadzhiyeva	X									
Schalk and Kopf							X			
Sentges	X									
Suku Phull						X				
V									X	

Court found none. Six authors selected a judgment in which the Court had found in favour of the applicant. Keeping this outcome unaltered, the redrafts improve the Court's reasoning, and in several cases find additional violations on top of those found by the Court. In three cases, the redrafters agree with the finding that there is no violation – two of those even agree with the finding of inadmissibility – yet they change the reasoning in a way that, to their mind, reflects a better integration of diversity concerns. Table 3 sets out the results of the redrafted judgments/decisions.

There is an interesting range of diversity among the redrafts in this volume. Interventions vary from the changing of a single word[7] to the near-total replacement of the Court's reasoning on the merits.[8]

Some authors have explicitly attempted to keep the redraft as realistic as possible, so that it 'appears like it could have been written by the European

[7] See Lisa Waddington, in Chapter 13, below. [8] See Holning Lau, in Chapter 10, below.

Table 3 *Outcome of original judgments/decisions and redrafts*

	Non-violation becomes violation	Violation stays violation	Non-violation stays non-violation
A, B and C	X		
Burden	X		
Chapman	X		
De La Cierva Osorio De Moscoso	X		
Deschomets			X
DH		X	
Herczegfalvy	X		
Kemal Taşkın	X		
Konstantin Markin		X	
Leyla Şahin	X		
Lustig-Prean and Beckett		X	
Muñoz Díaz		X	
Muskhadzhiyeva		X	
Schalk and Kopf	X		
Sentges			X
Suku Phull			X
V		X	

Court of Human Rights',[9] and/or that the changes do not go further than the author anticipates the Court might be willing to go along with.[10] In that sense, several authors have strategically built their proposals for change on existing lines of reasoning in the Court's case law.[11] Authors generally have provided 'appropriate grounding in (and citations to) Convention jurisprudence',[12] selecting references that support their argument, or distinguishing cases whenever appropriate. The separate (concurring or dissenting) opinions attached to

[9] Alexandra Timmer, in Chapter 6, p. 166, below.
[10] Holning Lau, in Chapter 10, pp. 257–8, below; and Eduardo J. Ruiz Vieytez, in Chapter 16, p. 408, below.
[11] E.g. Lourdes Peroni, in Chapter 18, pp. 458–9, below (dimensions of a substantive notion of equality); Patricia Londono, in Chapter 4, p. 96, below (developing positive obligations); Renata Uitz, in Chapter 7, p. 180, below (general intention); Holning Lau, in Chapter 10, p. 247, below (general intention); Pierre Bosset, in Chapter 8, p. 199, below ('practical and effective') and p. 206, below (self-determination); and Michael Kavey, in Chapter 12, p. 311, below (multi-faceted character of private law).
[12] Michael Kavey, in Chapter 12, p. 314, below.

some of the original judgments have proven to be a source of inspiration for several redrafts.[13] Yet some authors have not hesitated to propose drastic changes based on innovative reasoning, such as the creation of a new (sub-) right[14] or the adoption of a new approach to relations and family life.[15]

Some authors have made up additional factual information, when that was not available, yet felt to be needed for the new line of argument.[16] Others have refrained from doing so, preferring to work within the limits of the available information.[17] Similarly, some authors have chosen to raise issues and bring up arguments that were not brought forward by the applicants in the case.[18] This reveals that, to the extent that a redraft can be seen as a criticism of the original judgment, such criticism is not *per se* addressed to the Court alone. A judgment is the result of an interplay between the judges, the applicant, the defendant, their representatives, and all other intervening parties – such as other States and NGOs intervening as third parties. If an issue that is crucial to the case was not raised during the proceedings, this is in the first place the responsibility of the applicants and their representatives.[19] Conversely, some objectionable aspects of the Court's reasoning may be traced to the applicants themselves.[20]

In the course of redrafting judgments and decisions, the contributors to this volume have made numerous improvements that are specifically tailored to diversity and minority issues, as well as others that are more generally aimed at improving the Court's reasoning. In what follows, the two types of interventions will be presented separately.

Improving judicial reasoning

In most cases, the redrafts are animated not only by a desire to do (better) justice for minorities, but also by broader ambitions, for example for judgments that are 'intellectually satisfying',[21] or for the development by the Court of human rights norms that provide guidance to the Contracting States and beyond.

[13] Patricia Londono, in Chapter 4, below; Sia Spiliopoulou Åkermark, in Chapter 2, pp. 53–4, below; Julie Ringelheim, in Chapter 17, p. 434, below; and Pierre Bosset, in Chapter 8, p. 200, below. In one case, a parallel case had been brought before the Human Rights Committee of the United Nations, and the redraft was inspired by the dissenting opinion attached to the views of the Committee: Yofi Tirosh, in Chapter 5, below.
[14] Maris Burbergs, in Chapter 15, below.
[15] Aeyal Gross, in Chapter 11, pp. 288–9, below.
[16] Sia Spiliopoulou Åkermark, in Chapter 2, p. 51, below (information on views and experience of each individual applicant).
[17] Peter Bartlett, in Chapter 14, p. 353, below.
[18] E.g. Lourdes Peroni, in Chapter 18, pp. 459–60, below; Maris Burbergs, in Chapter 15, pp. 382–3, below; Eduardo J. Ruiz Vieytez, in Chapter 16, p. 408, below.
[19] See Sia Spiliopoulou Åkermark, in Chapter 2, p. 55, below.
[20] Michael Kavey, in Chapter 12, p. 294, below.
[21] Pierre Bosset, in Chapter 8, p. 200, below.

Several authors have shifted emphases in their redrafts compared to the original texts, so as to *better reflect the applicant's perspective*. They express the wish to focus on the real, fundamental issues, pertaining to the harm as it is experienced by the individuals concerned. They claim that the Court either failed to identify some core human rights issues or identified them inadequately.[22] This may be blamed on a reliance on analytical schemes that do not grasp what parties are trying to convey,[23] and in that case may be remedied through the improvement of such schemes. A variant of this is the opinion that the Court's labelling of the harm as pertaining to a particular Convention provision does not send the right message – the answer to this is requalification of the issue under a different provision.[24] A related claim wants the Court to take certain types of harm more seriously, by bringing something within the scope of a Convention right that in the eyes of the Court was too light or not sufficiently linked to that right.[25] A lighter intervention in cases where an interference is found is one that dwells in more detail on that interference, painting a richer picture of the harm in all its aspects.[26] Under Article 3, specifying whether the treatment is 'inhuman', 'degrading' or 'torture', rather than leaving this open, may do more justice to the applicant's suffering and add moral force to the judgment.[27]

From a different – yet complementary – angle, several authors propose that the Court broaden its perspective *beyond the applicants' case*. They may wish the Court to acknowledge a systemic problem underlying the violation in the individual case and to suggest general measures that would bring legislation and administrative practice into conformity with the Convention.[28] Or they may want the Court to choose wording that broadens the impact of the judgment, addressing other scenarios than the one before the Court or issuing clear general statements that allow for a better assessment of the relevance of the judgment for similar yet not identical cases.[29]

In most cases, the core of the Court's reasoning consists of a *proportionality analysis*. Most contributors make suggestions that apply to this part of the judicial analysis. In particular, some authors take issue with the use of the margin of appreciation. When the Court leaves a wide margin of appreciation to the

[22] Lourdes Peroni, in Chapter 18, pp. 451–3, below; Peter Bartlett, in Chapter 14, p. 364, below; Ursula Kilkelly, in Chapter 1, p. 24, below.
[23] Lourdes Peroni, in Chapter 18, pp. 451–2, below.
[24] Michael Kavey, in Chapter 12, p. 310, below. [25] Yofi Tirosh, in Chapter 5, below.
[26] Michael Kavey, in Chapter 12, pp. 315–16, below.
[27] Wouter Vandenhole and Julie Ryngaert, in Chapter 3, p. 79, below.
[28] Julie Ringelheim, in Chapter 17, p. 438, below; Alexandra Timmer, in Chapter 6, p. 158, below.
[29] Wouter Vandenhole and Julie Ryngaert, in Chapter 3, p. 77, below; Patricia Londono, in Chapter 4, p. 108, below; and Eduardo J. Ruiz Vieytez, in Chapter 16, pp. 416–17, below.

Member States, it exercises only light scrutiny. Authors may disagree with this, claiming that the Court should play a more active role in norm-setting, exercising more leadership.[30] Several authors have more specific criticisms with respect to margin-of-appreciation analysis. For example, Bosset emphasises correct interpretation of the consensus among the Member States[31] – which is an important line in the Court's reasoning: if an infringement is widely practised throughout Europe, the Court is less likely to find it violates human rights, and *vice versa*. Londono argues against conflating the margin of appreciation with respect to the beginning of life, with the margin of appreciation in balancing conflicting rights.[32] And Lau develops a different approach to the margin of appreciation, where the room for flexibility shifts from whether, to how and when.[33]

Nearly the opposite of a wide margin of appreciation, is a 'less restrictive alternative' test, obliging States to choose among several options the one that least restricts Convention rights. Several authors promote a version of this test. Ouald Chaib[34] uses a procedural interpretation – the obligation to examine whether less restrictive alternatives are available – coupled with a shift of the burden of proof. Bosset promotes 'a general obligation to design public policy so as to mitigate its impact on fundamental rights'.[35] And Vandenhole and Ryngaert include the less restrictive alternative test in their redraft in a context of positive obligations.[36] Other proposals aimed at correct proportionality reasoning concern 'asking the right necessity question':[37] the question is not whether the legitimate aim of the interference is necessary, but whether the interference is necessary for the aim – and avoiding analysis at an overly abstract level.[38]

A majority of contributors include in their redraft *references to other international human rights standards*, beyond the Convention, and/or to the output of other international human rights bodies. This is a technique that is particularly suited for the integration of minority concerns, in those cases where specific texts exist that target this particular group, 'for the latter can be assumed to accommodate more and better the specificities of that particular group'.[39] Yet the integration of the Convention within the broader world of human rights law is an issue that goes beyond diversity concerns. This is about ensuring harmony within international human rights law[40] – indeed, it should be avoided that the

[30] Holning Lau, in Chapter 10, pp. 244–5, below.
[31] Pierre Bosset, in Chapter 8, pp. 109–200, below.
[32] Patricia Londono, in Chapter 4, p. 112, below.
[33] Holning Lau, in Chapter 10, pp. 255–6, below.
[34] Saïla Ouald Chaib, in Chapter 9, pp. 234–5, below.
[35] Pierre Bosset, in Chapter 8, p. 202, below.
[36] Wouter Vandenhole and Julie Ryngaert, in Chapter 3, p. 82, below.
[37] Saïla Ouald Chaib, in Chapter 9, p. 231, below.
[38] Pierre Bosset, in Chapter 8, pp. 198–9, below.
[39] Wouter Vandenhole and Julie Ryngaert, in Chapter 3, p. 83, below.
[40] Pierre Bosset, in Chapter 8, p. 197, below.

proliferation of norms and supervising bodies leads to conflicting guidelines for States and individuals.[41] Moreover, cross-referencing may serve to emphasise the indivisibility of human rights.[42] References in the redrafts include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and related general recommendations,[43] the United Nations Convention on the Rights of Persons with Disabilities,[44] the Convention on the Rights of the Child (CRC) and related general recommendations,[45] general comments of the Committee on Economic, Social and Cultural Rights,[46] general comments and case law of the Human Rights Committee,[47] concluding observations of the CRC Committee[48] and the CEDAW Committee,[49] case law of the Inter-American Court of Human Rights,[50] the Charter of Fundamental Rights of the European Union,[51] the work of the Advisory Committee on the Framework Convention for the Protection of National Minorities,[52] the work of the European Committee of Social Rights,[53] the Standards of the Committee for the Prevention of Torture,[54] and soft law standards of the United Nations[55] and the Council of Europe.[56]

In some cases, these references constitute supportive arguments that strengthen a line of reasoning, yet, in others, they have implications for the outcome of the case.[57] One way in which the outcome may be affected, is through the 'consensus argument': the fact that the large majority of States Parties ratified a specific treaty can be seen as evidence of a consensus with respect to that treaty's approach, and hence should restrict the States' margin of appreciation.[58]

[41] Peter Bartlett, in Chapter 14, pp. 358–9, below.
[42] Pierre Bosset, in Chapter 8, p. 215, below.
[43] Alexandra Timmer, in Chapter 6, pp. 166 and 168, below.
[44] Maris Burbergs, in Chapter 15, below; and Peter Bartlett, in Chapter 14, below.
[45] Wouter Vandenhole and Julie Ryngaert, in Chapter 3, below.
[46] Pierre Bosset, in Chapter 8, p. 196, below.
[47] Pierre Bosset, in Chapter 8, pp. 192 and 208, below.
[48] Ursula Kilkelly, in Chapter 1, p. 39, below.
[49] Pierre Bosset, in Chapter 8, p. 203, below.
[50] Alexandra Timmer, in Chapter 6, pp. 167 and 168, below.
[51] Maris Burbergs, in Chapter 15, p. 391, below.
[52] Julie Ringelheim, in Chapter 17, p. 427, below.
[53] Julie Ringelheim, in Chapter 17, p. 435, below.
[54] Peter Bartlett, in Chapter 14, below; and Wouter Vandenhole and Julie Ryngaert, in Chapter 3, below.
[55] Maris Burbergs, in Chapter 15, p. 382, below; and Pierre Bosset, in Chapter 8, p. 208, below.
[56] Maris Burbergs, in Chapter 15, p. 391, below; Julie Ringelheim, in Chapter 17, p. 436, below; Peter Bartlett, in Chapter 14, p. 365, below; and Ursula Kilkelly, in Chapter 1, p. 39, below.
[57] This is the case in Julie Ringelheim, in Chapter 17, below; Peter Bartlett, in Chapter 14, below; and Pierre Bosset, in Chapter 8, p. 196, below.
[58] Julie Ringelheim, in Chapter 17, pp. 434–5, below.

Against this tendency, however, Spiliopoulou Åkermark points out that broad references to international standards risk depersonalising a case – whereas, in her approach, personalising the case is crucial.[59]

A number of concerns addressed in the redrafts concern *procedural justice*. Ouald Chaib places procedural justice at the centre of her paper. Based on social psychology research, she checks the original decision against four procedural justice criteria: representation, neutrality, respect and trustworthiness.[60] Several other authors discuss related issues. Bosset takes a critical look at the process of 'dialogue' that had preceded the measure allegedly violating Convention rights.[61] Kilkelly wants to promote the clarity and coherence of the judgment.[62] And Uitz argues that detailed guidance from the Court is needed to improve the perception of impartiality and neutrality in domestic court decisions.[63] In fact, several authors expect more detailed guidance from the Court on specific issues, such as clarifying the threshold for establishing an interference in a particular field[64] or creating substantive criteria for interpreting a concept (*in casu* 'therapeutic necessity').[65]

Additionally, some amendments simply want to strengthen the Court's reasoning, by adding more and better arguments,[66] adding references to recent research,[67] and avoiding circular argumentation.[68]

Dealing with diversity

The focus of this volume is on approaches to diversity in human rights cases. Hence, most of the interventions in the redrafts aim at improving justice for non-dominant groups: women, children, ethnic or religious minority members, persons with disabilities, and lesbian, gay and bisexual (LGB) individuals. These groups were chosen by the initiators of the project, yet, in many cases, judicial tools that are suited for one type of diversity may be applied equally to other types. The conference preceding this volume had 'mainstreaming diversity' in its title. The term 'mainstreaming' refers to the integration of specific attention for the concerns of minority or non-dominant groups in a general human-rights-protection mechanism – as opposed to a mechanism that is specifically tailored to that group. However, within the 'general' European Convention on Human Rights, some provisions target specific groups. Article 9, on religious freedom, is the obvious

[59] Sia Spiliopoulou Åkermark, in Chapter 2, pp. 42 and 58, below.
[60] Saïla Ouald Chaib, in Chapter 9, below. [61] Pierre Bosset, in Chapter 8, p. 203, below.
[62] Ursula Kilkelly, in Chapter 1, p. 24, below.
[63] Renata Uitz, in Chapter 7, pp. 178 and 188, below.
[64] Lisa Waddington, in Chapter 13, pp. 330–1, below.
[65] Peter Bartlett, in Chapter 14, p. 365, below.
[66] Wouter Vandenhole and Julie Ryngaert, in Chapter 3, pp. 69 and 73, below.
[67] Ursula Kilkelly, in Chapter 1, p. 37, below. [68] Aeyal Gross, in Chapter 11, p. 278, below.