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978-1-107-02660-5 - Diversity and European Human Rights: Rewriting Judgments of the ECHR

Edited by Eva Brems

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## 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.

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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

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published widely on children's rights and youth justice, and on the European Convention on Human Rights. The second edition of her book, *The Child and the ECHR*, will be published in 2012.

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between children's rights and human rights, with a particular emphasis on migration.

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## FOREWORD

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

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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*

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## ACKNOWLEDGMENTS

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, Saira 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 Schaevebeke at Cambridge University Press for her friendly, flexible and efficient professionalism.

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## 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.
<b>Bold text</b>	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.

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## 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

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