January 14, 2018

NOTE TO THE READER: A MAP TO WHAT FOLLOWS

What follows is part of a much larger and ambitious essay where I present "dialogism" as the principle of adjudication of the European Court of Human Rights.
I borrow the term "dialogism" from literary theorist and philosopher Mikhail Bakhtin, whose main contributions to my topic I elaborate at length in a different section not included here. Whereas Bakhtin famously defended the dialogical against a monological style of discourse—in the arts, sciences, religion, philosophy, and the law—I adopt a narrower definition of dialogism, not as an external compositional form of the discourse, but as an inner constituting feature of an utterance; the kind of dialogism that penetrates the entire structure from within and populates it with alien intentions, which affects all its semantic and evaluative dimensions.

The essay properly deals with the famous 2005 case of *Hirst v The United Kingdom* before the European Court of Human Rights (the ECtHR or the Court), which declared that the UK blanket ban on prisoners' voting was contrary to the Convention. The decision created uproar in the UK and, to this day, has not been implemented. This has generated interesting ensuing case-law where the Court, with few gives and takes, has basically reaffirmed its position on principle. Although I do not assume everyone to be knowledgeable about the intricacies of the case, I trust these few general strokes suffice to make a more general outline unnecessary.

My aim is to show exactly how the Court constructs its authority in a dialogical fashion, which I try to demonstrate with a careful and detailed reading of the case. Being able to demonstrate this in the particular case of *Hirst* is important, because the judgement has often been read as the exact opposite of dialogical—as an exercise of judicial imperialism and overreach. The implications of my argument, however, go well beyond the case, to what I consider a distinctive "dialogical style of judging," of which the ECtHR is a leading exponent.

The essay is still being re-worked and needs much adjustment to get into proper shape. The body and general structure of the paper is still open and it would have to be reworked toward its eventual publication as a law-review article. Ideally, I would like to add a general introduction explaining the main problem I am trying to address and situating my argument in the scholarly literature on "judicial dialogues" (from where I borrow and from where I distance myself). The essay also needs a final section, so I welcome any feedback, comments, and suggestions, about these or any other extremes that could make the argument come to the surface more clearly and help with the general flow and readability.

Last but not least, for an essay so closely attuned to the importance of citation and cross-borrowing, it is ironic that my own system of citation is not yet in place, but only in a very rudimentary fashion.

Reading *Hirst* Dialogically

1. On the consequences of engaging with foreign law

In a section devoted to the relevant case-law from other states, the Court engages with, and cites profusely from, the judgement of the Canadian Supreme Court in *Sauvé v. The Attorney General of Canada* [No 2].[1] To begin, the Court reports the main arguments of the majority opinion written by Justice McLachlin, who considered:

> *that the right to vote was fundamental to their democracy and the rule of law and could not be lightly set aside. Limits on this right required not deference, but careful examination. The majority found that the Government had failed to identify the particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test, in particular as the Government had failed to establish a rational connection between the denial of the right to vote and its stated objectives.*[2]

The Court introduces the citation as reported speech, which reveals both familiarity with the case and confidence to be able to explain it to their own audience.[3] In doing so, the Grand Chamber inflects the citation with its own institutional voice, filtering it through its own categories of analysis and institutional lens. The Court does not explain what exactly finds it relevant or how this judgment affects its own, even though the fourth chamber had already said in first instance that the *Sauvé* case provided "detailed and helpful observations" and found the "substance of the reasoning apposite to the present case."[4]

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[1] *Sauvé v. The Attorney General of Canada* [2002] R.C.S. 519. The case has an interesting life: A first case had originated in 1992 … when the Supreme Court struck down too broad; In 2000 a new law: 2 years. Second appeal against the law: Canada: 2nd look case (Sauvé II).

[2] Hirst, para 36.

[3] In this The Grand Chamber differs from the fourth Chamber in first instance, which provided verbatim citation from the summary as reported in the official headnote. Given that later in the judgment the chamber alludes to arguments not included in the headnote, the reason cannot be their lack of familiarity with the case; more likely, the chamber wishes to be as accurate as possible in reporting of a foreign case.

[4] The chamber makes these assertions, despite "taking due account of the difference in text and structure of the Canadian Charter" (*Hirst*, Chamber Judgment (4th), 30 March 2004, para 43)

On its face, the Canadian majority presents a strong corrective to the government's case, as it stated unequivocally that "denying penitentiary inmates the right to vote was more likely to send messages that undermined respect for the law and democracy than messages that enhanced those values."[5] This is a powerful voice in support of the applicant'

is nonetheless important that *someone* does—that this language be heard and find its place in the opinion.

Fairness in the practice of citation obliges the Court to include also the minority opinion by Gonthier, who was not persuaded that this was a matter for the courts, but for Parliament to decide. According to him, the objectives of the measure were pressing and substantial and based upon a reasonable and rational social and political philosophy, such as enhancing civic responsibility and respect for the rule of law. It was also proportionate, as depriving prisoners temporally of the right to vote, with an additional punitive and retributive function, was rationally connected to the objectives and carefully tailored to apply to perpetrators of serious crimes.[9]

This proves that borrowing can be a double-edged sword, for in order to preserve cogency the Court may be forced to entertain (sometimes even to address) an array of arguments that it may not have otherwise need to. Citation can also be risky, as it unwittingly may turn against the one relying on it. For instance, even at this early stage, the Canadian majority serves to undermine the support that the UK's Divisional Court wanted to draw on the shoulders of the Federal Court of Appeal, upholding the legislation. Lord Kennedy "commented" that, despite the Canadian Court was applying a differently phrased provision, the judgment of Linden JA "contained helpful observations, in particular as regards the danger of the courts usurping the role of Parliament."[10] Once the Supreme Court reverses the Appellate decision on which Lord Kennedy so heavily relied in his judgment, the force of his argument must necessarily weaken.

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disenfranchisement of prisoners fulfils an important legitimate aim, as the government claimed? For the government, the disenfranchisement helps to prevent crime, punishes serious offences, enhances civic responsibility, and promotes the respect for the law. But is it enough for the government to claim that something does all of those things for them to be accepted? It would be possible to cite studies that indicate

allowing prisoners to vote would offend public opinion, or send confusing messages about the government's attitude concerning crime. Clearly, the fact that polling stations may be costly does not seem a compelling reason to deny a class of citizens their fundamental rig

"[p]erhaps the best course is … to leave it philosophers the true nature of this disenfranchisement whilst recognizing that the legislation does different things?"[21]

Thirdly, the jurisdiction of the ECtHR is only subsidiary to the national protections and, in what concerns the particular case of electoral matters, the states enjoy a wide margin of appreciation. In the present case, the added challenge is that many countries of the Council of Europe still practice some form of disenfranchisement of prisoners, and certainly the UK is not unique in its approach. In a situation of lack of consensus, should the Court refrain from judging and honor the so-called margin of appreciation?

These kind of interrelated obstacles: *epistemic* (having to do with problems of evidence and expertise), *institutional* (having to do with the proper competence or forum), and *jurisdictional* (having to do with limited role of the European court) make it hard for the Court to assess the claims of the parties. As we will see, the Court develops various strategies to deal with these various obstacles (e.g., shifting the burden of proof; making it an exercise of supervisory function; relying on the domestic organs' own arguments…), all of which exhibit some form of dialogism.

Here's how the Court navigates the thorny issue of the legitimacy of the measure of the ban, which requires identifying several embedded relations and their respective evaluative orientations:

> *Although rejecting the notion that imprisonment after conviction involves the forfeiture of rights beyond the right to liberty, and especially the assertion that voting is a privilege, not a right* (*see paragraph 59 above*), *the Court accepts that section 3 [of the UK law] may be regarded as pursuing the aims identified by the Government. It observes that, in its judgment, the Chamber expressed reservations as to the validity of the asserted aims, citing the majority opinion of the Canadian Supreme Court in Sauvé (no 2)… However, whatever doubt there may be* [as to the efficacy of achieving these aims through a bar on voting] *the Court finds no reason in the circumstances … to exclude those aims as*

[21] *Hirst*, para 16.

> *untenable or incompatible per se with the right guaranteed under Article 3 of Protocol No 1*.[22]

Colin Murray argues that "in *accepting* the UK Government's argument that laws which disenfranchised prisoners could potentially foster civic responsibility … the Grand Chamber departed from the Fourth section's judgment, which had doubted the validity of this rationale for disenfranchisement."[23] But, to what an extent can it be said that the Court "accepts" the government's argument? Or, more accurately, what does the term "acceptance" mean in this precise dialogical context?

In order to begin unpacking this passage dialogically we must note that prior to saying that it "accepts" the government claim, it first qualifies that

Yet this hypothetical scenario where the legitimacy of the aims may be accepted is immediately undercut by the mention of the fact that the chamber judgment "expressed reservations" about it. The court does not disclose the content of these reservations, but the fact that it reminds them to their audience, adds another layer of uncertainty to the hypothetical scenario.

On top of that, the reservations are augmented by reference to the Canadian majority that challenged the legitimacy of the government's measure, here reintroduced in the audience's mind without the need of restatement, by alluding to paragraphs 44-47 of the chamber's judgment. Here, the chamber expressed "doubts" as to the validity of these aims, and despite refraining from ruling so as being "unnecessary to decide,"[24] found "much force in the arguments of the majority in *Sauvé* that removal of the vote in fact runs contrary to the rehabilitation of the offender as a law-abiding member of the community and undermines the authority of the law as derived from a legislature which the community as a whole votes into power".[25]

Even at the point where the Grand Chamber shows to be ready to leave the doubts behind and accept that the ban may be regarded as pursuing the aims identified by the Government, it does so by restating the *doubts that remain* both about their validity ("whatever doubt there might be as to their validity of these aims") and their efficacy ("whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting").

In this tension-filled and densely populated dialogical context, the Court "finds no reason to exclude these aims as untenable or incompatible per se," a particularly divesting, double negative construction where the reason (not found) refers not to the strength of the government's position, but to the Court's powerlessness to exclude them.

[24] The chamber says that "it leaves the question open as it is unnecessary to decide it in the present case," [para 47] moving on immediately to find fault proportionality.
[25] *Hirst*, Chamber judgment, para 46.

the ECtHR does not appear eager to engage arguments of political philosophy, not because they are not relevant for the case (the fact that they are cited demonstrates that they are), but rather because it is perhaps for other voices to advance them. These arguments appear refracted, that is, they are heard as arguments of others. And yet, without the intermediation of these other voices that permeate it—the chamber's reservations, the doubts there may remain, the self-effacing tone of impersonal detachment—the Court's position could not be completely understood.

This is what Bakhtin refers to as the *evaluative orientation* towards one's language.[27] Doctrinal analysis is not often attentive to this dimension of language. For example, Plaxton and Hardy say that "the Court echoed Justice Gonthier in *Sauvé*, who likewise took the view that the courts should defer to the government on such philosophical issues."[28] But one cannot feel two attitudes more at odds than the Court's actual reservation and Gonthier's attitude of positive respect and deference. In the former case, the Court does not express any positive opinion about the government's aims. In the latter, the Government's views *deserve* to be heeded. Here we have a clear example of how the relations between utterances express the institutional position of speakers: The court's opinion is mediated by its understanding of its proper jurisdictional role in the Council of Europe —to what it feels entitled to say in the institutional context in which it participates. Therefore, dialogism tells us something fundamental about the structure of the adjudication of the Council of Europe. In this setting, the Court may decide to refrain from declaring the government's aim

[27] [Ref.].
[28] At 121. In fairness, Plaxton and Lardy are more aware than their statement lets on: they conclude that "One might be forgiven for supposing that, so long as the member state phrase it objective in sufficiently abstract and portentous language, the Court will refuse to challenge the state's contention that that the policy in question is rationally connected to the objective." [My contention here is that the "refusal to challenge" does not give us the measure of the Court's opinion on the matter].

illegitimate, but this is a far cry from saying that the Court should defer to Parliament on

Additionally, the Court notices “[no] direct link between the facts of any individual case and the removal of the right to vote” (77).[31] In other words, the removal of the vote follows the prisoner’s conviction without the need for specific declaration by the sentencing judge. Therefore, the restriction operates as a blanket ban: “It applies automatically on all convicted prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances”.[32]

More significantly,

Trying to unravel this question will enable us to shed light on a major difference between dialogism as it is being developed here and “dialogue theory” as it has been developed by constitutional legal scholars to think about the relationship between parliament and the court and judicial review. Here too the Canadian example proves instructive.

Since the publication of Peter Hogg and

with its own” (Sauvé no 2, para

direct and unmediated reading of the Charter, whereas the European Court does not ground its judgment on its own autonomous reading the Convention. Instead, as we will

therefore, is mediated by alien voices with which it interacts, presupposes, emulates, entices, tries to influence, or to resist.

Further, whereas "dialogue" in constitutional theory evokes the image of interlocutors who advance their own points of view in a respectful, measured, and reflective way,[47] dialogical interactions in the Bakhtinian sense presuppose frictional and conflictual communicative contexts of "alien words, value judgments and accents."[48] In such "dialogically agitated and tension-filled environment"[49] different actors struggle to appropriate language for their own uses, yet one is able to control the meanings created, nor be shielded from being encroached upon by others who may want use those meanings for their own ends.

A speaker[50] may want to use the language of others to stress, confirm, augment, or contrast his or her authority, but the borrowed language may sometimes resist those intentions, undermining he who fails to control and rein it in. As Bakhtin argues, not all words submit equally easily to appropriation: "many words stubbornly resist, others remain alien, sound foreign in the mouth of the one which appropriated them and who now speaks them … *as if the put themselves in quotations marks against the will of the speaker*."[51] Therefore, in their capacity "stubbornly to resist against the will of the

there can be no such thing as a word-for-word, literal borrowing, for “the speech of another, once enclosed in a context, is—no matter how accurately transmitted—always subject to certain semantic changes.”[53] The interactions between borrowed and borrowing language, language of origin and language of destination, host and guest language, always entail subtle and multi-directional transfers of authority that are

have the ability to modify, alter, or transform a given state of affairs, but their effects cannot be fully anticipated not controlled by the Court alone.

4. On proportionality as dialogical construction

The Government tries to defend its position by appealing to the "margin of appreciation," arguing that the UK is not alone among the contracting states to ban prisoners from voting and that the regulation of electoral matters remains within their prerogative, as part of the range of permissible approaches within the Convention. The Court accepts that the margin is indeed wide. However, "the fact remains that it is a minority of states" which impose a blanket restriction and that the lack of uniform approach "cannot in itself be determinative of the issue."[56]

More pointedly, the Court says that "there is no evidence" that Parliament ever sought to weigh the competing interests or to assess the proportionality of the blanket ban on the right to vote of convicted prisoners (79). In suggesting so, the European court turns the thorny issue of institutional competence (and the difficulty about the legitimacy of the aim) into a more amenable matter of assessing the proportionality of the measure; an issue over which courts are traditionally keen on performing by weighing and balancing of conflicting interests.[57]

And yet in a manner consistent with the dialogical principle, the Court doesn't perform such analysis of proportionality on its own. Here it is worth contrasting the approaches of the chamber and the Grand Chamber. In first instance, the chamber had suggested with reference to the Canadian courts that the effects of the UK ban were somewhat "arbitrary" (as they randomly depend on the time-period when the prisoner

[56] Hirst, para 81.
[57] [R. Alexy; M. Kumm]. My aim is not to defend proportionality as a general principle, or how it is done in practice, but simply to point out that proportionality is increasingly practiced, and almost everywhere conceived, as a *judicial* function (R. Stacey, "The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication", *The American Journal of Comparative Law*, forthcoming 2018).

serves his sentence), and that, given the government's own rationale for the ban, it lacked "logical justification" as applied to post-tariff prisoners who had completed the punishment part of their sentence.[58] Rather than engage this kind of proportionality analysis, the Grand Chamber points out the failure of Parliament to ever having weighed the relevant interests. In other words, it signals an omission in the legislative process properly to perform such an analysis of proportionality.

Next, the court moves to assess whether such was compounded judicially at the domestic level, when the Divisional Court had the opportunity to review the case. Here, the Grand Chamber points out that, resting upon principles of Parliamentary supremacy and separation of powers, the domestic courts failed to assess the proportionality of the measure, as they did not deem the analysis even necessary. As Lord Kennedy wrote, "It is easy to be critical of a law which operates against a wide spectrum … but its position in the spectrum is a plainly a matter for Parliament not for the courts. That applies even to the 'hard cases' of post-tariff discretionary life sentence prisoners…".[59]

Here again, rather than oppose Lord Kennedy directly, the court allows him to express the limitations of his position, which falls short of the proportionality analysis. Lord Kennedy admits as much, given that he thought this task was "plainly" a matter for Parliament even in hard cases. He may paint himself in the more difficult role,[60] but

grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation from the past."[67]

The Grand Chamber seizes the words of the chamber as "internally persuasive argument,"[68] yet it does not completely merge with the latter's voice. Whereas the chamber formulates the above statement as a matter of general principle, the Grand Chamber limits itself to verify the lack of a substantive debate on the continued justification in light f modern day penal policy and current human rights standards. The passive voice ("it cannot be said that there was") claims to represent not the subjective position of the Court, but of *any* impartial observer who could reach identical conclusion.

To arrive at it, the Court relies on three important considerations: First, the view of the lack of debate in the course of the proceedings we are reminded that the challenged precept was a part of a consolidation bill that "re-enacted without debate the provisions of the law of 1969, the substance of which dates back to the Forfeiture Act of 1870, which in turn reflected earlier laws related to the forfeiture of certain rights by convicted felons, the so-called 'civic death' of the times of King Edward III."[69] Secondly, during the passage of the law, the representative of the Government maintained that the loss of vote followed automatically after conviction as part of the punishment.[70] Similarly the Home Secretary defended the measure as a natural consequence of incarceration, for prisoners "have forfeited the right to have a say in the

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way the country is governed."[71] The statements show not only that the government believed the disenfranchisement could follow automatically for convicted prisoners, but that the removal of the right to vote for prisoners required no special justification.

Thirdly, in signaling the shortcomings of the parliamentary debate the court doesn't seek to fill the "substance" of the legislation, or to replace the arguments of the members of parliament with its own. Rather, it points out that the grounds for the restriction of voting rights must be compatible with modern day penal policy and human right standards. The Court does not deny that in electoral matters states continue to enjoy a wide margin of appreciation, provided there is enough justification on relevant and sufficient reasons. But in the absence of any efforts by the UK Parliament to consider the restrictions in light of the human rights at issue, the provisions of the law lay outside any potential margin of appreciation. This demonstrates that the key issue concerning the margin of appreciation is not, contrary to a popular misconception, "how much" margin the Court will afford, but "how well" it is used by the state.

A dialogical reading of the decision reveals how the European court shifts the justificatory burden to the domestic organs and finds them wanting. In doing so the court not only avoids a frontal clash of legitimacies,[72] but lets it transpire that the remedy for the perceived deficit stays with the state. It is up to the UK Parliament to justify the ban in light of modern day penal policy and human rights, for the court's decision doesn't preempt Parliamentary action to restrict the vote, and the state can decide on the choice of means to secure the rights in question (para 84).

In sum, the decision is not judicial usurpation of legislative function, but the precise exercise of its mandate to protect vulnerable populations who, like prisoners,

[71] Statement of the Home Secretary, Jack Straw, of 22 February, 2001 (cited approvingly by Lord Kennedy in the Divisional Court judgement of 4 April, 2001).
[72] Cf. Tulkens and Zagrebelsky ("this is in an area in which two sources of legitimacy meet, the court on the one hand and the national parliament on the other")

convicted of uncitizen-like conduct, provided the restrictions were not arbitrary (*X v. the Netherlands*[77]; *H. v. Netherlands*[78]). More recently, in *Patrick Holland v. Ireland*, the case "closest to the facts of the present application" (*Hirst*, para 68), the Commission

In sum, the decision in *Hirst* is hardly the application of established principles to a new situation. There are at last three fundamental changes from the older line of precedents: First: a shift in the way of framing the issue, from a matter of electoral organization over which states have more or less unquestioned discretion to a matter of prisoners' rights that must be respected. Secondly, a consideration of prisoners as a captive population who maintain all rights except those derived from the deprivation of liberty; and thirdly, an understanding of the disenfranchisement as a severe form of punishment somewhat antithetical with democratic principles, or, out of synch with the progressive history of the franchise. Given these significant changes, it is ripe to ask what exactly pushes the court to reverse course and modify its criterion to intervene.

The argument to develop here is that the profound shift in the framing of the case is

After a long engagement with the *Sauvé* case, the Grand Chamber of the ECtHR cites the following words from the Constitutional Court of South Africa in *August v. Electoral Commission*. Writing for the Court, Albie Sachs writes:

> *The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts*.[84]

Judging from the way they have circulated across jurisdictional boundaries, Sachs' words can be considered tremendously influential. [85] Not only have they become standard in South African subsequent jurisprudence,[86] but repeated more than once by the European Court,[87] and in interesting loop back also in Canada.[88] That these words are picked up and repeated should tell us something about their influence, but we need to proceed to a dialogical reading to assess how they are brought to bear on the particular opinion. Writers who focus on the phenomenon of judicial communications and cross-referencing[89]

emphasized that the judgment was not to be read as preventing Parliament from disenfranchising certain categories of prisoners, provided the limitations were reasonable and justifiable.[91] So what exactly do they consider relevant in this case?

To appreciate their full force it is necessary to see how these words are lifted from their South African context and put to work in their new context, which requires a bit of background. The 1996 South African Constitution enshrined adult universal suffrage (Section 19) and made no especial provision for disqualifications, which could only be done bc

personhood." He explains that "in a country of great disparities of wealth and power [the vote] declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same South African nation; that our destinies are intertwined in a single interactive polity." Therefore, he concludes, "[r]ights may not be limited without justification and legislation dealing with the franchise must be interpreted in favor of enfranchisement rather than disenfranchisement."[93]

At this point in the decision, Sachs adds a footnote to the Canadian case of *Haig v. Canada*, where Cory J argued that "All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom."[94]

There is no doubt that the passage of the South African Constitutional Court quoted in *Hirst* closely mirrors the words uttered by the Canadian Justice Cory in *Haig*, but note how in the travelling process, a slight variation in the terms of value operates a fundamental transformation in the way the right to vote is conceptualized: from the vote as foundational of democratic government to its importance beyond nationhood and democracy; from an indeterminate number of citizens to each and every citizen; from the marking of the ballot as a mark of distinction to the vote as a mark of equality; from the consideration of the vote as a badge of freedom to it being a badge of human dignity and personhood; and, finally, from counting as simple arithmetic exercise of registering ballots to really *counting* as an active member of an interactive polity.

Sachs is certainly aware of this double-meaning of "counting" and challenges the assimilation of voting with a simple arithmetic exercise, when later in the judgment

[93] August, para 17.
[94] *Haig v. Canada* [1993] 2 S.C.R. at 1048 (Cory J, dissenting). Sachs also cites the opinion of Arbour JA by the Ontario Court of Appeals in *Sauvé* I (1992) 7 O. R. (3rd

he associates it with the reality of incarceration and the deprivation of liberty, where prisoners are "literally a captive population, living in a disciplined and closely monitored environment, regularly *counted* and *recounted*."[95] He counters the abstractness of the electoral process with the tangible reality (the "literalness") of belongingness to a polity where everybody *counts*, which leads to a more inclusive notion of democracy.[96] The worry in the latter is not so much with the electoral process as a mechanism for guaranteeing "the free opinion of the people," but with taking account of all citizens.

Note also the very different connotations of the term "badge" in both passages, for a "mark of distinction" can also be a mark of inequality (e.g., the infamous "badge of inferiority" legally maintained until *Brown v. Board of Education*), and sustained in historical situations where voting was restricted to having certain qualifications or attributes of race, gender, wealth, or status. In our context, too, to posit the ballot as a "badge of freedom" excludes precisely those who are deprived of liberty by reason of incarceration; by contrast, a "badge of dignity" is not necessarily affected by incarceration, for it remains untroubled "whoever we are, whether rich or poor, exalted or disgraced."

From this Sachs derives a strong presumption in favor of enfranchisement, which is not easily rebutted. While the exclusion of prisoners from the ballot box serves allegedly to guarantee the "purity of the electoral process,"[97] once the issue is perceived as a matter of dignity and personhood, it is harder to justify the limitation, for prisoners

[95] August, [para 28]
[96] For a view of democracy where those "outside the count" make themselves "of some account," see J. Rancière, *Disagreement* (1999).
[97] This view has been criticized. According to

don't lose dignity due to incarceration and continue to be citizens while in prison. Accordingly, the shift in the protected good, from the abstract general will to the actual dignity of every individual citizen, has the important effect of raising the bar of justification.

Sachs's words have the ability to crystalize what was but as an inchoate thought: the intimate connection between the capacity to express oneself through the vote and one's sense of self and standing in the polity. This is precisely how the ECtHR will conceptualize the issue: even though the Convention speaks about guaranteeing the electoral process (to "ensure the free expression of the opinion of the people,") the Court is able to reframe it as a matter of prisoner's *status*.[98] We can see therefore that the framing of the case is being altered, in ways that a dialogical reading of the decision permits us unequivocally to perceive.

This subtle yet profound transformation occurs in the process of travelling, first, from the Canadian context to the South African one, where Justice Sachs anchors it in the historical indignities of the Apartheid regime and where the franchise and the acquisition of "full and effective citizenship" were achieved not without years of struggle and hard-won battles. And then from the South African context to the different one of the Council of Europe, where human dignity is at the core of the entire regime of the Convention created in the aftermath of World War II and remains central to this day—and the same can be said about Canada.[99]

It is important to realize that the adequacy of the borrowing process is not to be measured by the correspondence between the contexts of origin and of destination—an

[98] The Court implicitly conceptualizes it thus, when assuring: "there is no question … that a person forfeits his Convention rights merely because of his *status* as a person detained following conviction" (*Hirst*, para 70, emphasis added). Playing a similar chord, it argues that "[t]he present case highlights the *status* of the right to vote of convicted prisoners" (para 63).

[99] Interestingly, McLachlin references *August* precisely when arguing that the ban is inconsistent with the respect for the .

impossible identity between post-Apartheid South Africa and contemporary Europe, Canada, or the United Kingdom for that matter—but by the work the borrowed language is doing in the context of its current use, which is the case before the ECtHR. Contrary to what it is sometimes assumed when discussing the phenomenon of judicial borrowing and the use of comparative sources, the very different circumstances and intricacies of the South African context are of little consequence: the Court is knowledgeable enough about the circumstances it now faces to distinguish the very different contexts of application.

Yet the borrowed language helps the European Court to convey a more profound understanding of what it is really at stake in *Hirst* in a way that had not come to the fore before.[100] Sachs articulates in memorable fashion not only that voting matters, but *why* it matters: from now on, the Court no longer assesses whether limitations of voting rights respect the "free opinion of the people" (as the old case-law of the Commission invariably did), but whether they can be justified in an inclusive—and not merely formal or procedural—democracy, "where tolerance and broadmindedness are [its] acknowledged hallmarks."[101]

In an assertive voice, the Court agrees with the applicant: "the right to vote is not a privilege. In the twenty-

Conversely, Section 3 of the Representation of the People Act 1983 (as amended in 2000) may be considered a "relic," the origins of which are rooted in the notion of civic death where imprisonment entailed withdrawal from citizenship.[102]

In the historical arch that the Court traces, prisoners are analogized to other categories of citizens excluded from the franchise on account of class, race, gender, sexual orientation, and so forth. Indeed, some scholars contend that the situation of "felons is similar [to] those 'discrete and insular' minorities whose concerns have not registered with officials because of the combination of hostility and indifference that the larger majority of the citizenry has towards them."[103] It is therefore incumbent upon the court to revisit the ban from the perspective of those affected by it.

In a move that cannot go unremarked, the Grand Chamber devotes an entire new section to prisoners (para 63-71).[104] Opening one of the most compelling passages of the opinion, "[t]he Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right of liberty."[105] For example: prisoners may not be ill-treated, or subjected to inhuman or degrading punishment; they continue to enjoy the right to respect for family life; the right to freedom of expression; the right to practice their religion; the right to effective access to a lawyer and to a court; the right to respect for correspondence; the right to marry… All in all, "[t]here is no question, therefore, that a prisoner forfeits his

[102] This view finds support in the brief submitted by the *Prison Reform Trust* (a London based non-governmental organization that intervened as amicus curiae). For a comprehensive study of the role of amici in the ECtHR, see L. Van den Eynde, "Encouraging Judicial Dialogue: The Contribution of Human Rights NGOs' Briefs to the European Court of Human Rights" in A. Müller ed. (2017), 339-397.
[103] A. Altman, "Democratic Self Determination and the Disenfranchisement of Felons" 22 Journal of Applied Philosophy (2005) 263 …, at 271 (focusing on the United states); also Antony Duff ("Introduction: Crime and Citizenship," 22 *Journal of Applied Philosophy* 2005, 211…) and Susan Easton, "Constructing Citizenship: Making Room for Prisoner's Rights" *Journal of Social Welfare and Family Law* 30:2 (2008), 127-146.
[104] Some passages are lifted directly from the chamber decision, but not without significant variation and new additions (e.g., para 70 GC).
[105] *Hirst*, para 69.

Convention rights merely because of his status as a person detained following conviction”(70).

The Court acknowledges that certain limitations may flow from the circumstances surrounding imprisonment (e.g. limits on the ability to send or receive certain letters, para 69). Moreover, the disenfranchisement can be imposed on someone who has seriously abused a public position or whose conduct threatens to undermine the rule of law of democratic foundations (para 71). But the fact remains that disenfranchisement is an exceptional measure not to be resorted lightly (id.). Moreover, the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned (para 71). Above all, there is “[no] place under the Convention, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based merely on what might offend public opinion” (para 70).

This means not only that the measure of disenfranchisement needs to be justified, but that not every conceivable justification suffices, calling upon the UK Parliament to revise its commitment to the disenfranchisement in light of modern-day

Albeit in a manner consistent with the dialogical principle, however, the court *does* change the parameters of the conversation: moving forward, the conversation cannot continue in the same language that the UK organs wanted to have it, as a mere matter of penal policy over which states would have unlimited discretion and no real supervision. This gives us perhaps the exact measure of "unfinalizability" of the decision, which does not close off alternative possibilities for implementation, including a reinstatement of the ban, but redefines the conversation: Voting can no longer be considered a privilege—as implicitly argued by several organs in the UK—and limitations must take into consideration those whom it affects. A dialogical judgment is not be confused with a never-ending chatter incapable of decisi