

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. Please disregard the clumsiness.

Looking forward to your comments,

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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

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's view who similarly disputed that punishment could legitimately remove fundamental rights other than the right to liberty, and defended that the removal of the vote was inconsistent with the rehabilitative aim of prison, as it took away civic responsibility and served to alienate prisoners further from society.⁶

Further, McLachlin suggested that the ban as an additional form of punishment was arbitrary, as it was not tailored to the acts and circumstances of the individual offender and bore little relation to the offender's particular crime [...]."⁷ Lastly, she confronted the broader challenge to the jurisdictional role of Court vis-à-vis Parliament. In her view, legislative action that affected a right so fundamental to their democracy and the rule of law required "not deference, but careful examination."⁸

Judging from the holding in *Hirst* (declaring the UK legal provision in breach of the Convention) the two decisions may be quite similar. However, as we will see, the European Court does not follow McLachlin's position all the way, revealing the very different mandate and institutional position of both Courts. As an international Court overseeing a vast continent with diverse social mores and legal traditions, and where states are often granted a margin of appreciation on account of their close contact with the "living forces" of their respective societies, the Court may not be willing to adopt the confident language of McLachlin. But even if it does not speak it in its own voice, it

⁵ *Hirst*, para 36.

⁶ *Hirst*, para 44.

⁷ *Hirst*, para 36.

⁸ *Hirst*, para 36.

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.

⁹ Hirst, para 37. Gonthier suggested that the ban reflected a moral line which safeguarded the social contract and the nexus between individuals and their communities.

¹⁰ Hirst, para 16. The Court makes a point of noting Kennedy’s attempt at “borrowing” Linden’s authority, in a way that the chamber did not mention (compare paragraphs 16 of the Grand Chamber’s judgment with paragraph 13 of the Chamber).

Furthermore, the fact that the Canadian case was discussed in the Divisional Court dispenses with the legitimacy issue, for it cannot be argued that the foreign decision is irrelevant now that the Supreme Court contradicts him. In addition, both parties have opportunity to reflect on what to extract from the case, subjecting it to adversarial control.¹¹ Interestingly, both parties before the European Court try to mobilize the case in their favor, the applicant emphasizing the Canadian majority, the government the minority, but *none* argues that the case is irrelevant.

Even though the reasoning of the Canadian court pervades the entire judgment, this is filtered through its own doctrines and case-law. The Court must satisfy itself that the measures do not curtail the rights to such an extent as to impair their very essence and deprive them of their effectiveness; that the limitation must be justified in pursuit of a legitimate aim and the means employed are not disproportionate (para 62).¹² Thus, the process of borrowing is not a word for word transposition, for those meanings undergo a process of translation and are heard in a *refracted* way. To determine the bearing of a borrowed argument and show how it figures in the judgment requires a fine-grained assessment of how exactly the borrowed utterances interact with, and orient themselves towards, each other—their responses, dispositions, valuations, and meaningful silences. This is the type of analysis afforded by what I am calling *dialogism*.

Ultimately what the ECtHR borrows from the Canadian example is neither a doctrine, nor a standard argument, but rather an attitude of scrutiny, which the Court will perform from within its own jurisdictional position within the Council of Europe.

2. “Legitimate aim”: On the doctrinal deafness to dialogical relations

Whenever there is an interference in a Convention right, the first thing is to determine whether the restriction pursues a legitimate aim. Can it be said that the

¹¹ [response to Glendon].

¹² See, e.g., *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, para 52.

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 the opposite,¹³ but how is the Court assess this? Should we hear what social scientists, sociologists, criminologists and other “experts” say about it?¹⁴

While the issue is not one of substituting one philosophy for another,¹⁵ there are those who would argue that the government’s arguments lacked plausibility.¹⁶ In McLachlin’s view, 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. [...] To deny prisoners the right to vote was to lose an important means of teaching them democratic values and social responsibility¹⁷ While it is not always easy to agree on what constitutes a good argument, it may be easier to agree on a “bad” one, namely, on the kind of argument that would not likely pass human rights muster. Suppose the government were to argue that it would be too costly to devote resources to criminals which could be better used for more deserving citizens.¹⁸ Or that

¹³ There are studies showing some correlation between voting and reduced recidivism (C. Uggen and J. Manza, “Voting and Subsequent Crime and Arrest: Evidence from a Community Sample”. *Columbia Human Rights Law Review* 36:1 (2004), 193-216.

¹⁴ Article by G. Grant Amyot: expert witness in political theory and philosophy for Richard Sauvé. (in Sauvé the government position was supported by legal theorists as experts: see para 53.

¹⁵ Sauvé (no 2), para 9 (McLachlin J).

¹⁶ See also Susan Easton (p. 445 *Electing the Electorate*).

¹⁷ Inevitably, her argument discloses underlying premises about democracy and the social contract (Plaxton and Lardy) (p. 111 and 113: most importantly that prisoners do not, just by virtue of their criminal offense, lack the moral worth possessed by the citizens to be part of the political community)

¹⁸ This was one of the main arguments of the South African government in *Minister for Home Affairs v. Nicro* [Minister for Home Affairs v. National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) 2004 (5) BCLR 445 (CC). As Michale Plaxton and Heather Lardy argue, “[i]t is difficult to understand why the government thought this argument would succeed”. [Prisoner Disenfranchisement: Four Judicial Approaches, 28 *Berkeley Journal of International Law* 101 (2010), at 116]. The other two arguments were that providing rights to prisoners vitiated the integrity of the voting process and that disenfranchising them enabled the government to send an aggressive message against crime to the population.

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 rights.¹⁹ Similarly, the disenfranchisement may send a message of being tough on crime, but message is not sent precisely at the expense of a particularly hateful class of citizens. Likewise the fact that rescinding the disqualification might offend public opinion cannot be considered sufficient ground to limit the right; nor can fear that the public may misunderstand the government's true attitude to crime provide a proper basis.²⁰ The kind of argument that is acceptable in a particular legal culture is heavily dependent on the expectations of a legal tradition—and these constantly change.

But suppose the argument is not flawed in the former sense. Thus, Gonthier argued that ... temporary exclusion of the political community by being deprived of the right to vote for the duration was consistent with the basic tenets of social contract and the rule of law and could additionally serve to promote civic virtue. Should the Court accept this argument or probe its underlying assumptions? In other words how skeptical /more probing should the Court be with the arguments adduced in support of the legislation? What level of scrutiny should they have?

Secondly, ought courts even be making that kind of assessment, or should they rather leave such matters of that sort to Parliament or to other institutions better placed to make difficult policy assessments on matters of public policy? For example, how is a Court to (dis)prove the claim that disenfranchisement deters crime or rehabilitated criminals? Faced with challenges of this nature, the Divisional Court suggests that

¹⁹ NICRO, para 53: "The mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners." [Check]

²⁰ NICRO, para 56. "A fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights they retain despite their incarceration." "It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its own image" (id.) [Check] (para 70: similar in *Tyrer* about physical punishment as deterrent)

“[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 assertion by “rejecting” two other notions defended explicitly or implicitly by the government: that prisoners forfeit the right to vote due to incarceration and that voting is a privilege. It does so moreover through cross-reference of another passage of the judgment (paragraph 59), where the Court sides with the applicant against the Government (“as pointed out by the applicant, the right to vote is not a privilege”) and asserts that “in the twenty-first century, the presumption in a democratic state must be in favour of inclusion.”

Secondly, the Court does not say that it accepts the aims of the government as legitimate, but that aims “may be regarded” as such. The conditional language opens up a hypothetical, best case scenario where the aims of the government could be considered legitimate, in a charitable reading that the court is willing to entertain (at least provisionally, or *conditionally*).

²² *Hirst*, para 75, internal citations omitted and emphasis added.

²³ Murray, “Playing for Time,” 312. Murray rightly contends that the *Hirst* judgment “although frequently cast as usurping the role of ‘democratically-elected lawmakers,’ instead constitutes one of Strasbourg’s increasingly frequent attempts to ‘navigate thorny issues’ in a manner which reflects its position as an international court” (310).

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.

That is to say, the Court intimates not that the government's reasons are compelling or persuasive, but that they are not "untenable or incompatible *per se*." The later expression alludes to an ever more abstract world of things-in-themselves, where "aims" are imagined to exist in their pure noumenal (non-phenomenal) existence, divested from the circumstances the Court belies the court's claim to examine the present circumstances. A more removed and impersonal language is hardly conceivable.

In sum, the Court hides its intentions behind provisos, hypothetical constructions, double negations, cross-references, and self-effacing language, as if wanting to erect a wall of separation between the inner life and motivation of their speech, and the external manifestation in words. The discourse displays the characteristics of typical Bakhtinian double-voiced discourse. If we ask "who is speaking here, and whose voice is it?", it is not hard to see the speaker behind the mask. By referring impersonally to the "doubts there may be," the court's own doubts are barely hidden behind someone else's, and recast in the conditional language of "acceptance," as if wanting to quarantine these doubts and cordon these doubts off—and withhold judgment for the time being.

These doubts are not fully repressed and come through.²⁶ It cannot escape detection that the Court is at pains to avoid any strong criticism, perhaps because it would require judgments of value that the court is not prepared to make at this point; or perhaps, because it does not wish to clash head on with the state. The fact is that the Court does not raise the kind of bold criticism expressed by Justice McLachlin. The Court seems aware that to confront those statements on a substantive level puts them in a delicate terrain of argument and counter-argument on contested philosophical, empirical, and normative issues. Unlike the majority of the Canadian Supreme Court,

²⁶ [Bakhtin: Dostoevsky, at 185]

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 its 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 philosophical issues.²⁹

Determining the evaluative attitudes of the speaker in regards their statements cannot be decided simply by taking the words of the court at face value, for there might be a discrepancy between what the court *says* and what the court *enacts in its saying*. This is the task of a dialogical reading that pays attention to dynamic interactions between utterances in real contexts of communication, beyond the conventional view of legal doctrines as “abstract pieces of language,” wholly disconnected from the concrete lived context where they are employed.

3. Interlude: On the distinction between dialogism and “dialogue theory”

Having found no reason to exclude the aims adduced by the state, the next step is to assess whether the law as currently applied in the UK is proportional, that is, a measure sufficiently respects the essential contours of the right and strikes an appropriate balance.³⁰

The Court notes that the bar on voting applies to all persons sentenced to imprisonment, regardless of length and the nature of the crime. The measure concerns a significant number and range of offenses, from relatively minor to those of the utmost gravity, targeting equally individuals sentenced to one day in prison and those sentenced to life. The measure also extends to post-tariff prisoners as Mr. Hirst, who have completed the punitive part of their sentence (related to retribution and deterrence) but are detained on grounds of public safety and dangerousness (para 77).

²⁹ Cf. Plaxton and Hardy, arguing that the court “display[s] a staunch deference to the state’s own appreciation of the limits on the right, sketching a margin without drawing any detectable doctrinal analysis” (p. 119).

³⁰ [Ref. Nothing so strict as the Oakes test]

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, “there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote” [79].³³ In fact, “it cannot be said that there was any substantive debate among the members of the legislature on the continued justification [of the measure]” (id) and adds also that: “It is also evident from the judgement of the divisional court that, believing it to be a matter for Parliament and not national courts, it did not undertake any assessment of proportionality of the measure itself” (80). The Court concludes therefore that “such general, automatic, and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation” (82).

Clearly, the tone of these statements contrasts sharply with the earlier where the Court “did not dare express” its reservations aloud: can it be said that the court is forgetting its subsidiary role and encroaching upon Parliament? If so, to what an extent can the judgment be still considered an example of dialogism rather than of judicial overreach and supremacy?³⁴

³¹ The Court says that deprivation of the right to vote doesn’t play any role in the sentencing process in criminal cases in the UK.

³² [82]

³³ The Court recognizes that the question was considered by the multi-party Speaker’s conference on Electoral Law in 1968 [para 79].

³⁴ [Ref]

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 Alison Bushell’s seminal article on constitutional adjudication under the Canadian Charter, dialogue theory has been propounded as an alternative to the US style of judicial review.³⁵ In fact, “dialogue” has become a favorite metaphor in constitutional discourse, and espoused as a template for conceptualizing the relationship between courts and parliament and various degrees of cooperation between them.³⁶ The main idea is that both branches co-share the responsibility for governing and neither branch has the last word, for even a negative judgment by the Court leaves open Parliament’s ability to respond with ensuing legislation and, vice versa, the court tends to be responsive to Parliamentary action.³⁷

In *Sauvé II*, a case that looms large in the judgments of the EctHR, there are two opposing views of what such “dialogue” entails: The first view is the view of dialogue as deference, where each side is protective of its proper role. For Gonthier, the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values, for “[w]hen, after a full and rigorous ... analysis Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament’s reasonable choices

³⁵ Hogg and Bushell.; See also Roach. Also Symposium ... and articles by ... In the US context, Barry Friedman, Michelman; see C. Bateup.

³⁶ Ref.

³⁷ In Canada this even has a specific constitutional provision [“Notwithstanding clause”, Section 33]

with its own” (Sauvé no 2, para 104)”.³⁸ The problem with this view is that only after ensuring that the law conforms to the constitution can deference be considered proper.³⁹ In other words, the “proper amount” of deference can only be decided once the contentious issue of whether courts ought to review action of Parliament has already been done.⁴⁰

The second view is exemplified by Chief Justice McLachlin for whom Parliament must ensure that whatever law it passes (i.e., also in “second look” cases) it conforms to the constitution, which does not mean that the court should defer to Parliament as a result of a “dialogue.” As McLachlin writes, “[t]he healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of ‘if at first you don’t succeed, try, try again’”.⁴¹ This understanding of dialogue as compatible with rigorous scrutiny aims to ensure that Parliament conforms with the constitution.⁴² The danger here is that the court may end up replacing Parliament’s view with their own.⁴³

Judging from the outcome in *Hirst*, the European Court appears to adopt the latter “robust dialogue” and to reject Gonthier’s principle of deference.⁴⁴ This more stringent attitude of scrutiny notwithstanding, the attributes of the judgment associated in his article with dialogism do not permit equating the court’s position with McLachlin’s either: For one, the Canadian judge assesses the legislation against her

³⁸ This view has been criticized: Haigh and Sobkin argue that it is wrong for the courts themselves to use dialogue theory as a prescription or guideline suggesting that they ought to give particular deference to legislative responses to their decisions R. Haigh and M. Sobkin “Does the Observer Have an Effect? An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts” (2007) 45 *Osgoode Hall L.J.* 67, at 80-81.

³⁹ [Trevor Allan].

⁴⁰ See also Kent Roach “Dialogic Review and Its Critics” (2004) 23 *Supreme Court Law Review* (2d) 49, at 70-71.

⁴¹ Ibid. Sauvé 2, para 17. “Second look” cases are those where Parliament presents a new law to replace a former law struck down by the Court (i.e., in *Sauvé* No1).

⁴² Jackson; Choudry.

⁴³ See Manfredi (“The Day Dialogue Died”)

⁴⁴ Proponents of deference defend it as more respectful. This is debatable: reading Gonthier’s lengthy dissent gives the impression that he is not simply “deferring” to the arguments of Parliament, but actually making up for their absence.

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 see, the judgment rests primarily on the strengths and failings of the domestic organs whose actions it reviews, as well as on other relevant voices it uses as springboard (e.g. comparative and foreign sources). This is why the decision can be considered dialogical rather than monological, for the weight of the argumentative burden is carried with “borrowed authority.”

This observation permits us to make a fundamental distinction between “dialogue theory” as popularized in the Anglo-American constitutional literature and dialogism as it is being developed here. As distinguished from dialogue theory—which has been proposed, and criticized, as a normative model for guiding the relationship between courts and parliament⁴⁵—the point of dialogism is not to prescribe any concrete course of action. Nor is to decide in the abstract “who has the last word.” Dialogue theory invites us to conceive of separate spheres of action for the respective behavior of courts and parliament; by contrast, dialogism penetrates each position from within as their *internally constitutive principle*. In other words, it understands “dialogue” not as a mere external conversational form between established partners, but as penetrating the “entire structure” of the communicative context, and affecting “all its semantic and expressive layers.”⁴⁶ As different from dialogue, dialogism thus refers to the piecemeal and fragmentary construction of each and every speaking position, where the self speaks others, and others speak the self. An internally dialogized opinion,

⁴⁵ Scholars are beginning to deduce details normative prescriptions for institutional behavior from the metaphor, but as Aileen Kavanagh perceptibly argues, “[o]nce we [move] beyond truisms that both courts and legislatures should ‘have a say’ about rights and that each branch should listen to one another and learn from one another in an open and respectful way, the uncomfortable truth remain[s] that the metaphor of dialogue [is] indeterminate on the crux constitutional questions about the respective roles and responsibilities of each branch of government when protecting rights.” That is, “the metaphor of dialogue [is] compatible with all possible answers, as well as their opposites” (Kavanagh, “The Lure and the Limits of Dialogue,” *The University of Toronto Law Journal* (Winter 2016) 83-120, at 84-5).

⁴⁶ Bakhtin, “Discourse in the Novel,” 279.

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 speaker⁵⁰ 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 speaker,” a given dialogical utterance “weaves in and out of complex interrelationships, merges with some, recoils from others, intersects yet with a third group.”⁵² Therefore,

⁴⁷ Kavanagh, “The Lure and Limits” (86-87; describing how the metaphor is employed in the literature.)

⁴⁸ Bakhtin, “Discourse in the Novel,” at 279.

⁴⁹ Id.

⁵⁰ A speaker does not need “speak” verbally. As an author of the Bakhtinian circle writes: “Dialogue, in the narrow sense of the word, is, of course, only one of the forms—a very important form, to be sure—of verbal interaction. But dialogue can also be understood in a broader sense, meaning not only direct, face-to-face, vocalized verbal communication between persons, but also verbal communication of any type whatsoever. A book, i.e., a *verbal performance in print*, is also an element of verbal communication. [...] it responds to something, objects to something affirms something, anticipates possible responses and objections, seeks support, and so on” V. N. Voloshinov- *Marxism and the Philosophy of Language* Translated by L. Matejka and I. R. Titunik, Harvard Univ. Press, Cambridge 1986, at 95, emphases in the original.

⁵¹ Discourse in the Novel, 293-4 [check exact], emphasis added.

⁵² Bakhtin, Discourse in the Novel, 279

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 evaluatively loaded and can be assessed.

In what follows, I will try to show that dialogism as understood here offers a better way to analyze both the decision—its continuous shifts and transfers of authority as internally dialogized discourse—and, most importantly, also the Court’s *relational*, not autonomous, conception of its own authority, subsidiary to the domestic organs and exercising a supervisory function within the Council of Europe.

This requires dispelling a final misperception: it is often suggested that “dialogue” is in some aspects “an implausible way to describe the authoritative act of judging. [...] Institutionally, [judges] expect their decisions will settle disputes and be obeyed, not start conversations”.⁵⁴ It is true that dialogism opposes the closed and univocal authority of the monological (i.e. the *authoritarian*), but this does not entail an inability of judging making *authoritative* judgments (i.e., judgments which are to be respected).⁵⁵ In the context of judicial decision-making, accordingly, the Bakhtinian notion of *unfinalizability* does not mean the impossibility of making binding decisions, but their inevitable reliance on subsequent performances, in contexts neither fully known nor knowable in advance. In the sense here elaborated, dialogical judgments

⁵³ Bakhtin, *Discourse in the Novel*, 340

⁵⁴ One final criticism of the dialogue metaphor has to do with the institutional meaning of judgments: Kent Roach: “the idea of dialogue is in some respects an implausible way to describe the authoritative act of judging. [...] Institutionally, they expect their decisions will settle disputes and be obeyed, not start conversations” [see K. Roach. “Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience (2005) 40 *Texas Int’l LJ* 537, at 537].

⁵⁵ The distinction is owed to Joseph Vining, “the Authoritative and the Authoritarian,” *The University of Chicago Press*, Chicago and London (1986).

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 then it may be wondered what exactly the role he sets for himself is—is there actually any role left for him?—if "even hard cases" are outside his purview? It is not just that he fails to intervene, but that he offers no guidance as to where it might be appropriate for him to do so. Stripped of its rhetoric, his enactment amounts to the principle

⁵⁸ *Hirst* [Chamber], para 49.

⁵⁹ *Hirst*, para 16.

⁶⁰ As Kennedy admonishes "it is easy to be critical of a law which operates against a wide spectrum ..." (ibid.). The implicit commendation of deference as "the hardest path" is often shared by doctrine. For example, Aileen Kavanagh writes that [o]ne of the biggest challenges facing the courts in public law adjudication is to determine the appropriate limits of their constitutional role," Kavanagh, "Judicial Restraint in the Pursuit of Justice," 60 *University of Toronto Law Journal* (2010), 23-40, at 23.

“Parliament knows best, even in error.” This is not an avenue open to the ECtHR: a court of human rights cannot be expected to fail to do such scrutiny, where it is a long-running principle that domestic laws and practices are subject to rigorous European control.

An analysis in terms of dialogism permits contrasting the positionality of the two courts vis-à-vis each other as well as Parliament. In this regard, Danny Nicol argues that “the Divisional Court considered that restrictions on prisoner voting were generally seen as a matter for parliament, not courts, and that the ECtHR *did not criticize* the Divisional Court in this regard.”⁶¹ This assessment misreads the utterances in their dialogical context. Nicol implies a relationship of agreement between the utterances of both courts, whereas a Bakhtinian analysis demonstrates a clear disagreement: the European Court is actually criticizing the Divisional Court for failing to scrutinize Parliament. To put it plainly, the statement that the way Parliament draws the line is outside the purview of courts is *not* an acceptable position for the Court.⁶² We might therefore conclude that the ECtHR rejects an *ex ante* deferential attitude exemplified by the Divisional Court.

A similar consideration permits us to revisit, and retroactively to fill out, their earlier attitude of mental reservation, which they can no longer keep under the lid. For, arguably, when the Court affirms that there is no evidence that the UK Parliament “ever sought to assess the competing interests,” it is retroactively putting into question whether the legislation can *actually* serve the aim intended, when Parliament has not even taken into account how it would affect those whom it concerns. The dialogical build-up of the opinion has, therefore, an additional curious effect: given that Lord Kennedy submits the responsibility of drawing the line back to Parliament, we might

⁶¹ Public Law, Legitimacy of the Commons Debate on Prisoner Voting, See at p. 683 (emphasis added).

⁶² Cf. (Plaxton and Hardy; Nicol

say that he is implicitly inviting judicial scrutiny of how the line has been drawn, that is, we may say that he is implicitly *authorizing* it. The court picks up the gauntlet and, in one of the most controversial statements of the opinion, confirms that “it cannot be said that there was any substantive debate among members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards.”

According to the dissent by judges Tulkens and Zegrebelsky, the court here is dangerously stepping into the “difficult and slippery terrain” of assessing the competence with which Parliament had carried out its legislative function.⁶³ In doing so, it has been argued that the court is nullifying the margin of appreciation. As judge Costa wonders in his separate dissent, is it not inconsistent to acknowledge that there is a wide margin and then proceed to restrict it on the basis of proportionality?⁶⁴

Once again, a dialogical reading may help us to put things in perspective: Consistent with a long-standing practice of interpreting the Convention as a “living instrument”⁶⁵ consistently with present-day conditions and human rights standards, the fourth chamber stated: “a Contracting State may [not] rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition.”⁶⁶ In saying so, the chamber echoed well-known criticisms to the common law made by jurists like Jeremy Bentham and Oliver Wendell Holmes Jr. who famously wrote: “it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the

⁶³ Joint concurrent opinion of Judges Tulkens and Zagrebelsky. See also the joint dissent of judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens

⁶⁴ Separate dissent of Judge Costa.

⁶⁵ Repeated since the landmark case of *Tyrer v. United Kingdom* (Judgment of 25 April 1978).

⁶⁶ *Hirst v. United Kingdom (No2)*, [Chamber], para 41. Murray likens this judgment to cases such as *Dudgeon*, where 19th century parliamentary debates criminalizing homosexuality could not suffice to insulate such measures from human-rights challenges (“A Perfect Storm,” at 524).

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 of 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

⁶⁷ O. W. Holmes Jr., “The Path of the Law,” in Holmes, *Collected Legal Papers*, New York: Harcourt, Brace and Howe, 1920, at 187.

⁶⁸ Bakhtin.

⁶⁹ *Ibid.*, para 22 (citing para 17 of the chamber judgment). The dissent considers the maintenance of the bar in successive legislative amendments sufficient, “as it can be assumed that the legislation it reflects political, cultural values in the UK.” [para 7 of the dissent of Wildhaber, Costa, Lorenzen, Kovler, and Jebens].

⁷⁰ During the passage through Parliament of the Representation of the People Act 2000, the representative of the Government Mr. Howarth maintained the view that “it should be part of a convicted prisoner’s punishment that he loses rights and one of them is the right to vote” (*Hirst*, para 24).

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”)

have been absent in both the legislative and judicial processes. The reasoning of the court shows a *relational understanding of its authority and role* as a Court of Human Rights, tasked with ensuring that restrictions on Convention rights be justified in a manner compatible with it.

5. On the unexpected gestalt of the badge of dignity

Notwithstanding the Court's relational authority and role, it can still be wondered why it decides to interfere in an area of great political sensitivity where states have traditionally enjoyed ample discretion. As the Court says it best, “[t]here are numerous ways or organising [sic] and running electoral systems and a wealth of differences ... in historical development, cultural diversity and political thought within Europe which it is for each Contracting state to mould [sic] into their own democratic vision”.⁷³

In addition, the text of the Convention is not as explicit as the Canadian Charter in the recognition of the right to vote of every citizen, and Article 3 of Protocol No 1 only mentions the obligation of member states “to hold free elections” to ensure “the free expression of the opinion of the public.”⁷⁴ It is true that the said article has been interpreted jurisprudentially to include the individual right vote and to stand for elections⁷⁵; regardless, the Court has an uphill battle against its own precedent on prisoners voting.

Thus in some early cases, the older European Commission of Human Rights⁷⁶ considered that it was open to the legislatures to remove political rights from persons

⁷³ Hirst, para 61.

⁷⁴ Art 3 of Protocol 1 states: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure that the free expression of the opinion of the public in the choice of the legislature.” Protocol 1 was not part of the original Convention signed in 1950, but was added soon after in 1952.

⁷⁵ In *Mathieu-Mohin and Clerfayt v. Belgium* (Appl. 9267/81, Judgment 2 March 1987), the Court explained how the position of the Commission gradually evolved from the idea of an “institution” right to the holding of free elections to the concept of universal suffrage and then, as a consequence, to the subjective rights of participation, both in their active and passive components (para 51).

⁷⁶ Until the entry into force of Protocol no 11 in 1998, cases were brought first to the European Commission for Human Right, which could decide on admissibility as well as on the merits. The system

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 decided that the suspension of the right to vote for prisoners could not be considered arbitrary. In that case, there was no legal provision permitting prisoners to vote in prison, but a convicted prisoner was *de facto* deprived of it.

The Court tries to distance itself from that line of precedents arguing that this the first time that the Court has had the occasion to consider a general and automatic disenfranchisement (68). However, the Commission had expressed as late as 1998 that “the fact that all of the convicted prisoner population cannot vote does not affect the free expression of the opinion of the people in the choice of legislature.”⁷⁹ The Court claims that it cannot attach decisive weight to that decision, because the Commission confined itself to analyzing whether the bar was arbitrary and did not extend to the other elements established in *Mathieu-Mohin and Clerfayt* (i.e., legitimate aim and proportionality). However, this seems like a doctrinal rationalization⁸⁰ that does not in itself explain the shift of criterion. Moreover, *Patrick Holland* validated a *de facto* deprivation of the vote in the absence of legislation. In the case at hand, there is domestic legislation that explicitly bars all prisoners from voting, which would presumably strengthen the legal position of the state.

was revamped after Protocol No 11, abolishing the two-tier system and establishing the right of individual petition before the Court and the mandatory jurisdiction of the Court.

⁷⁷ *X. v the Netherlands*, application no 6573/74, Decision of 19 December 1974 (concerning deprivation of vote for life due to gross abuse of power during Second World War. Inadmissible).

⁷⁸ *H. v the Netherlands*, Application 9914/82, Decision of 4 July 1983 (concerning deprivation of the vote following 18 months imprisonment for refusing to attend military service. Inadmissible.)

⁷⁹ *Patrick Holland v UK* (Application No 24827/94, Decision of the Commission of 14 April 1998) (no paragraphs provided; citations omitted).

⁸⁰ The dissenters do not seem to perceive a difference. As Judge Costa puts it in his separate dissent: “I see no convincing arguments in the majority’s reasoning that could persuade me that the measure to which the applicant was subject was *arbitrary*, or even that it affected the free expression of the opinion of the opinion” (para 9, emphasis added). Interestingly, Judge Costa “confesses” to “having doubts” as to the legitimacy (or “rationality”) of the aim and actually to have been “tempted” to vote for the concurrent judgment in violation (para 5).

In sum, the decision in *Hirst* is hardly the application of established principles to a new situation. There are at least 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 brought about in large part by a case barely mentioned by the chamber,⁸¹ and dismissed by the Divisional Court as unhelpful,⁸² but explicitly engaged in the section of the judgment devoted to relevant case-law from other States (the only other case being *Sauvé v. Canada* already mentioned). The point is not to demonstrate a causal relation between the two cases, something that it is hardly ever possible to do—who after all can tell with confidence what exactly influences judicial decisions?⁸³ Fortunately, this is unnecessary for our purpose, which is to show how the said case brings something crucial to the attention of the European Court that was not apparent before.

⁸¹ The chamber merely mentions “trends in Canada, South Africa, and other European countries ... to enfranchise prisoners” (Chamber, para 31).

⁸² Lord Kennedy devotes just one sentence to it. Because there is no law of Parliament limiting the right of prisoners in August, “I am unable to derive any assistance from that case” (*Pearson and Martinez v. Home Department and Hirst v. Attorney General*, Case No: CO/31/01 and CO/448/01, [2001] EWHC Admin 239, para 39).

⁸³ One need not be much of a legal realist to agree that judicial decisions are, despite the best acumen of psychologists and other empirical legal scholars, as much of a mystery today as in the old days.

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-referencing⁸⁹ speak about their having “persuasive authority,” in contrast to the “binding authority” of domestic precedents and other sources.⁹⁰ But what exactly is the Court being persuaded about—and how it can be shown to operate in the decision?

To be sure, it cannot be that the court is looking for analogous solutions or legal doctrines, for the question whether legislation barring prisoners would be justified under the Constitution was not raised in *August* and the South African Constitutional Court

⁸⁴ *August and Another v. Electoral Commission and Others*, 1 April 1999, Constitutional Court of South Africa, Case CCT 8/99 (cited in para 38)

⁸⁵ Neil Duxbury explains that influence “occurs where a person’s outlook alters as a result of his or her conscious or subconscious noticing of some external stimulus,” which “may be hard or even impossible to ascertain” (Duxbury, *Jurists and Judges: An Essay on Influence*, Hart Publishing: Oxford and Portland, OR, 2001, at 6). He says that citation analyses may be a good indication of influence, but these may lead to distortions. In fact, “the identification and the assessment of influence are two very different exercises, ... and the limitations of citation analysis usually become most evident not when we are trying to locate influence but when we are trying to assess it” (ibid., at 8).

⁸⁶ NICRO.

⁸⁷ *Scoppola v. Italy* (No 3), Appl. 126/05, Judgment 22 May 2012, para 52.

⁸⁸ As cited by McLachlin in *Sauvé* N° 2.

⁸⁹ The literature on judicial dialogues and cross-references is vast and growing (A.M. Slaughter; V. Jackson, S. Choudhry; M. Bobek...). For a recent volume, see *Judicial Dialogue and Human Rights*, edited by Amrei Müller in collaboration with Hege Elisabeth Kjos (Cambridge University Press, 2017).

⁹⁰ On persuasive authority, the classic reference is Patrick Glenn (“Persuasive Authority”).

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 by a law of Parliament that met the general requirements of reasonableness and justifiability (Section 36). Since the electoral law of 1998 made no special disqualification for prisoners, the applicant prisoners approached the Electoral Commission to ensure they would be able to register to vote, but the Commission failed to make the necessary arrangements. The case went to the Transvaal High Court, which decided that the prisoners were in a “predicament ... of their own making,” having “deprived themselves of the opportunity to register and or to vote”. In the judge’s view, there were “insurmountable logistical, financial and administrative difficulties,” and concluded that the Electoral Commission had no obligation to ensure their registration and vote.⁹²

On appeal, the Constitutional Court set aside the High Court judgment and ordered to make the necessary arrangements to ensure the prisoners’ vote. In explaining the Constitutional Court’s unanimous decision, Sachs J argues that “[t]he achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship in South Africa regardless of race, and for the accomplishment of all-encompassing nationhood.” Sachs he then writes the passage quoted by the ECtHR where he considers the ballot to be “a badge of dignity and

⁹¹ *Hirst*, para 39.

⁹² Cited in *August*, para 8.

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) 481 where she argued that “incarceration conditions should be made, as far as possible, compatible with the fullest possible exercise of the right to vote rather than advanced as a reason to deny that right altogether.”

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 Von Hirsch and Wasik “it is not apparent how or why permitting prisoners to vote would undermine the democratic process. The franchise is a fundamental right of citizenship, and its removal denies convicted persons the opportunity to promote their own legitimate interests through the political process” (A. von Hirsch & M. Wasik, “Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework” 56:3 *Cambridge Law Journal* (1997), 599-626, at 606, fn. omitted).

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 dignity of every person that lies at the heart of the Canadian democracy and the Charter (*Sauvé* para 44; and para 35).

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-first century, the presumption in a democratic state must be in favor of inclusion” (para 59). Not only has “[u]niversal suffrage ... become the basic principle” (id.), but “[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature” (para 62). The Court illustrates this by appealing to the Parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power.

¹⁰⁰ Choudhry: “dialogical justification”.

¹⁰¹ *Hirst*, para 70.

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 to 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 criminal law and human rights principles.¹⁰⁶ As if anticipating their rejoinder, the Court tries to assuage them it is imposing no uniform solution, for several possible avenues are still open, including a reinstatement of the ban. As a commentator concludes, “*Hirst* must therefore be regarded, in spite of the hyperbole of ‘judicial imperialism’ that swirls around it, as a restrained decision which eschewed the possibility of specifying remedial obligations.”¹⁰⁷

¹⁰⁶ As we have seen, the view that Parliament had passed the legislation with virtually no substantive debate is essentially correct (Murray, at 520).

¹⁰⁷ Murray, “Playing for Time,” at 314-315, internal citations omitted). According to Murray, “The Grand Chamber seems to have taken great pains to triangulate between the activism of the Canadian Courts in *Sauvé* and the inadequacy of the ‘hands-off’ approach adopted by the United States (US) Supreme Court in its refusal to mandate the enfranchisement of felons in *Richardson v. Ramirez*” (*ibid.*, at 315).

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 decision.¹⁰⁸

The opinion is double-voiced in the most profound sense: not only does the court speak with the borrowed authority of others, but its own voice is internally divided, ranging from the gentle assessment of the aim as “not untenable per se” to a more robust articulation of the right to vote as deeply intertwined with human dignity and personhood. At the heart of the decision there is a constitutive tension between its timid assessment of doctrine and a substantially more confrontational stance on questions of principle. As I have tried to argue accordingly, dialogism is both the Court’s most important accomplishment *and* its most defining trait, helping us to flesh out specific legal doctrines, to situate its institutional position, and to guide its practice of human rights adjudication in an increasingly entangled normative world.

¹⁰⁸ Carl Schmitt (“clase discutidora”).