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Global constitutionalism and constitutional imagination

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Abstract: There is a difference between the normative reasons for endorsing global constitutionalism and the conditions determining its emergence. This article addresses the latter issue. Specifically, the article claims that global constitutionalism rests on an underexplored *shift in constitutional imagination*. To account for this claim, the article is structured in several parts. It begins by clarifying the meaning of 'constitutional imagination'. In so doing it builds on Kant's concept of imagination ('Einbildungskraft') and in its reception by Hannah Arendt. The article then illustrates the significance of constitutional imagination by focusing on two major developments in constitutional thinking. The first development involves the shift away from a narrative reconstruction of constitutional authority; the second points to a *cosmopolitanisation* of constitutional imagination.

Keywords: Arendt; cosmopolitanism; global constitutionalism; imagination; Kant

I. Introduction

Theories can act as self-fulfilling prophecies: they help to create the phenomenon that they are supposed to describe. Global constitutionalism is no exception in this respect. Its advocates (and critics) often point to the emergence of a new understanding of constitutionalism[1] and by doing so contribute to validating their own claim. Yet, despite all the talk about global constitutionalism, enduring theoretical change rarely comes about through mere advocacy. There are various conditions upon which a gradual theoretical shift towards global constitutionalism is premised;

[1] Cf. M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009).

some of which are empirical, others cognitive or epistemic. While the former have been subjected to substantial scrutiny in recent years,[2] the latter remain largely unstudied. The purpose of this article is to fill this gap by drawing attention to an underexplored dimension of global constitutionalism, namely the role of imagination. Specifically, this article will argue that the emergence of global constitutionalism is premised on a shift in imagination, more precisely: a shift in *constitutional* imagination. Whether this shift has taken place or is about to take place is an issue that lies beyond the scope of this article. What the article tries to show instead is that: *if* global constitutionalism is the result of a profound change in constitutional theory, *then* it must be supported by a shift in constitutional imagination.[3]

To be sure, the article does not undertake the endeavour of providing an all-encompassing definition of global constitutionalism. Instead, for the sake of simplicity, it will point to what it is not. More specifically, my assumption is that global constitutionalism has done away with the idea of a (constitution-legitimising) constituent power. In this sense, global constitutionalism is 'post-constituent constitutionalism'.[4] For most advocates of global constitutionalism, the legitimacy of constitutional norms does not depend on their being constituted by 'We the People' or any other entity acting outside the law.[5] Instead their legitimacy rests on

[2] There is already a considerable amount of literature on the causal connections between active dialogue among constitutional courts and the generation of global language of constitutionalism. See, for example, Mark Tushnet, who notes that constitutional judges increasingly meet 'in academic and other conferences, and some serve with others on various transnational bodies' (M Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Virginia Journal of International Law* 998). See also V Perju, 'Constitutional Transplants, Borrowing and Migrations' (2012) *Oxford Handbook of Comparative Constitutional Law* 1304.

[3] I am grateful to the anonymous reviewer who urged me to make clear that this is not equivalent to arguing that *because* we are observing a gradual shift in imagination in constitutional practice, *then* global constitutionalist theory is on the rise. As mentioned above, it is quite possible that theories help to create the phenomenon that they are supposed to describe for example by nudging legal experts and judges to approach their cases from a different perspective.

[4] N Walker, 'Post-Constituent Constitutionalism? The Case of the European Union' in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2007) 247.

[5] M Kumm, 'Constitutionalism and the Cosmopolitan State' (2013) *NYU School of Law, Public Law Research Paper No. 13-68* 7 (Working paper available at: <http://www.law.nyu.edu/sites/default/files/upload_documents/2014KummCosmopolitanState.pdf>); E Fox-Decent, 'Constitutional Legitimacy Unbound' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, Oxford, 2015) 119; see critically also MS Kuo, 'The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering' (2010) 1(3) *Transnational Legal Theory* 329.

their superior justificatory status by means of public reason.[6] Further below, I dwell a little more on what is meant by a superior justificatory status. For now, it is sufficient to note that global constitutionalism attempts to cut the Gordian knot that has traditionally tied the constituent power and the constitution together. The attempt of cutting the Gordian knot between the constituent power and the constitution is certainly not all that global constitutionalism is about, but it is a decisive feature when it comes to evaluating the role of imagination.

Before I address the shift of constitutional imagination, it is important to clarify the meaning of the concept 'imagination' and 'constitutional imagination'. Subsequently, I will illustrate the importance of constitutional imagination by means of two classical figures of constitutional thinking: analogies and precedents on the one hand and constitutional grounding on the other hand. These two figures are crucial when it comes to identifying a shift in constitutional imagination. As I will show, a shift in constitutional imagination can be determined on two grounds: first, by the abandonment of constitutional narratives and, secondly, by the reliance on foreign examples and precedents in constitutional cases. The first development testifies a reorientation of constitutional thinking toward a more *presentist* (i.e. less past-oriented) perspective, the second points to a cosmopolitanisation of constitutional imagination. These two developments make up what I refer to as 'shift of constitutional imagination'.

II. Constitutional imagination

Since the term 'constitutional imagination' – with a few exceptions[7] – never rose to prominence in legal and constitutional debates, it is, perhaps, appropriate to start by defining what is meant by 'imagination'. The *locus classicus* is Immanuel Kant's *Critique of Pure Reason*. There, Kant writes that imagination ('Einbildungskraft') 'is the faculty for representing an object even without its presence in intuition'[8]. This may sound abstract,

[6] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law & Ethics of Human Rights* 141; W Sadurski, 'Supranational Public Reason: Part One – A Theory' (2015) *Sydney Law School Research Paper No. 15/02* (Working paper available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553611>).

[7] Exceptions are JB White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Little, Brown & Co, Boston, MA, 1973); M Antaki, 'The Turn to Imagination in Legal Theory: The Re-Enchantment of the World?' (2012) 23(1) *Law and Critique* 1; and recently M Loughlin, 'The Constitutional Imagination' (2015) 78(1) *The Modern Law Review* 1.

[8] I Kant, *Critique of Pure Reason* (trans P Guyer and A Wood, Cambridge University Press, Cambridge, 1998) 256.

but largely corresponds to the less theoretical use of the term 'imagination' in social sciences. Benedict Anderson argued, for example, that a nation is imagined 'because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion'.[9] According to Anderson, modern nations are characterised by the fact that their members never *materialise* as a tangible group at a particular place and point of time. Through newspapers and novels, people 'imagine' themselves as similar to thousands of other people they have never seen (and will never meet). In this sense, imagination extends the scope of knowledge beyond perception. Through imagination we imagine things that we have not seen or experienced. The mind-broadening benefits of imagination are of central importance to Arendt's (*unorthodox*) Kantian account of imagination, which is developed in her *Lectures on Kant's Political Philosophy*. In her view, imagination is an essential component of judgment and a safeguard against moral blindness. One only needs to think of Adolf Eichmann, whom Arendt blames in *Eichmann in Jerusalem* for his complete lack of imagination, i.e. for his 'inability to think, namely to think from the standpoint of somebody else'.[10]

How does imagination guard us from conformism and 'thoughtlessness'? In order to understand this, we need first to understand what imagination does when it represents things that are not present (including other people's standpoints). Arendt's focus is on a specific function of imagination, namely the capacity, as Kant writes, 'to bring the manifold of intuition into the form of an image'.[11] The functioning of images can be synthesised as follows: 'If I represent what is absent, I have an image in my mind – an image of something I have seen and now somehow reproduce.'[12] It is only through images that imagination can mediate between perception and knowledge. For images provide a tangible instantiation of an abstract idea. Kant's own example is perhaps helpful for clarifying this idea. Kant writes that if 'if I place five points in a row (…) this is an image of the number five'.[13] In other words, the five points are not the number five, but an image of it.

[9] B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, London, 1991) 6.

[10] H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harcourt Brace, New York, NY, 1963) 49.

[11] See (n 8) 239.

[12] H Arendt, *Lectures on Kant's Political Philosophy* (The University of Chicago Press, Chicago, IL, 1982) 79.

[13] See (n 8) 273.

Modes of perception and cognition are important to understand why (and how) imagination is central to the act of thinking. However, what matters to Arendt (and for the purpose of the present article) is that images generated by imagination are crucial for the purpose of communicating and expanding knowledge. According to Arendt, in his *Critique of Judgment* Kant accords to examples essentially the same role in judgments that images have for experience and cognition.[14] Like images examples contain in themselves, or are 'supposed to contain, a concept or a general rule'.[15] The difference is that images need not be communicable to achieve a certain degree of generality. Examples, by contrast, must appeal and relate to the viewpoints of others to be regarded as images of a general idea. Let me explain.

Unlike images, examples do not only provide a way to move from the particular to the universal. They simultaneously involve the possibility to move from mere subjective perceptions to intersubjectively valid claims. How is this so? Arendt argues that when we give an example to sustain our point – for instance that Achilles is an example of courage – what we ultimately do is to provide a particular instance of a more general concept, whose meaning is, quintessentially, communal rather than private. In this sense, the choice of suitable examples, while essentially subjective, involves the capacity to take into account other people's views. This imaginative faculty to place ourselves in the place of others, which Kant famously called *sensus communis*,[16] brings us back to Arendt's argument about Eichmann's lack of imagination. According to Arendt 'Eichmann seemed unable to recognize a connection between himself and other human beings; he could not put himself in the place of others, that act of moral imagination, which is a condition for moral judgment of any kind.'[17]

I shall return to this issue shortly, but before doing so let me point out how constitutional thinking comes close to Arendt's Kantian conception of imagination. To do so, two analogies can be offered. The first one relates to the use of examples. Like judgments, the practice of constitutional review would be 'blind' (to use Kant's phrase), if it could not rely on examples that are imagined to the extent that they are not present. For the

[14] It should be noted, however, that Arendt compares 'examples' with Kant's 'schemata' (not with 'images'), a comparison, which is not altogether correct in my view (for reasons I will not go into here). See (n 12) 84.

[15] See (n 12) 84.

[16] I Kant, *Critique of the Power of Judgment* (ed P Guyer and trans P Guyer and E Matthews, Cambridge University Press, Cambridge, 2000) 173.

[17] B Lang, 'Hannah Arendt and the Politics of Evil' in LP Hinchman and SK Hinchman (eds), *Hannah Arendt: Critical Essays* (State University of New York Press, New York, NY, 1994) 47.

US legal scholar Edward H Levi the 'basic pattern of legal reasoning is reasoning by example'.[18] What he means by example are essentially precedents, which are called into memory by judges in order to use them as an authoritative or legitimatory basis for current or future decisions.[19]

The second analogy builds and expands on the first. Recall what was said above about examples, namely that an example 'is the particular that contains in itself, or is supposed to contain a concept or a general rule'.[20] Essentially, the same holds true for the use of precedents in legal and constitutional discourse. Previous decisions can be regarded as precedents only on condition that their underlying *ratio decidendi* (i.e. the key reason behind a court's decision) is capable of generalisation.[21] In this sense, precedents too are particular instances of general (legal) rules.

With this in mind, it is tempting to assume that what constitutional imagination does is, in effect, subsuming precedents to general rules. This, however, would be misleading. Imagination is only the first stage in constitutional thinking,[22] it is an instrument of discovery rather than a way of justifying or ordering claims.[23] 'Imagination prepares the object so that I can reflect upon it, which is to say, judge it'.[24] This means that, upon reflection, poor examples will be rejected; good examples will become to be regarded as suitable precedents.

Of course, this immediately raises the question of what distinguishes poor from bad examples. A formal criterion has already been mentioned: generalisability. As mentioned, a good example is a particular instance of a general rule (or 'schema' as Kant calls it). But, again, reflecting upon the exemplarity of a particular instance does not amount to merely subsuming

[18] EH Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, Chicago, IL, 1962) 1.

[19] Whether precedents count as sources of law is contested. Especially in a non-common-law legal context the assumption is that legal decisions are based on laws and not on (other court's) precedents. Precedents are seen as interpretive canons rather than sources (cf. R Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press, Oxford, 1989) 274–9).

[20] See (n 12) 84.

[21] It cannot be concluded from a precedent directly on the decision to be adopted. Rather, one has to make a detour: From precedent 'one extrapolates its underlying norm, the ratio decidendi; then one subsumes [the decision to be adopted] under the norm' (M Kriele, *Theorie der Rechtsgewinnung* (Duncker & Humblot, Berlin, 1967) 270; my translation).

[22] Prior to the act of subsuming, precedents must be found, and this necessarily involves a degree of imaginative freedom (what Scott Brewer calls the 'uncodifiable imaginative moment in exemplary, analogical reasoning'; see S Brewer 'Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy' (1996) 109 *Harvard Law Review* 954).

[23] R Posner, *How Judges Think* (Harvard University Press, Cambridge, MA, 2008) 183.

[24] L Zerilli, 'The Practice of Judgment: Hannah Arendt's Copernican Revolution' in J Elliot and D Attridge (eds), *Theory after Theory* (Routledge, London, 2011) 126; see (n 12) 68.

a particular fact under pre-existing legal categories. For Arendt what is distinctive about imagined examples is that they keep their particularity while striving towards universal meaning. Consider the frequently mentioned examples of the American and French revolutions.[25] Clearly, these two revolutions are events of universal significance in the sense that they reveal patterns and motives that can be read into other revolutions. But at the same time it would be reductive to think of these revolutions as mere expressions of a general rule. By doing so, their particular nature would go unnoticed and less could be learned about them.

A comment to anticipate a possible objection is in order at this point, before going on considering the different ways in which imagination operates in constitutional thinking. It may be argued that my use of the term 'constitutional imagination' is both too broad and too narrow. It is too broad because it does not take account of the nature of constitutional reasoning as a particular case of legal reasoning in general. On the other hand, it is too narrow because it rests on a defining feature of common law, namely the tendency to proceed from concrete examples and precedents to abstract rules (or *ratio decidendi*) by means of analogical reasoning.

To the charge of narrowness my reply is, that civil law thinking is not immune to the influence of imagination. It is just that imagination tends to support a more top-down approach, whereby abstract general principles are deduced first and subsequently applied to concrete cases, such that general principles trigger the example-searching activity of imagination, rather than the reverse. But, again, this does not mean that imagining consists in mechanically subsuming a particular example under pre-existing principles. This is for two reasons: First, imagination, as defined above, is never entirely *domesticated* by reason.[26] It might eventually produce examples that undermine our beliefs, instead of supporting them. Second, and perhaps more fundamentally, the relationship between principles and examples is not one of single-sided dependence, where examples merely replicate what is already contained in principles. Principles too depend on examples to the extent that they are too abstract to be grasped firmly. Put bluntly, we do not know exactly what broad legal principles (such as liberty and equality) mean, until we have assessed the cases in which they apply.

The charge of excessive broadness is more difficult to deal with. Indeed, constitutional imagination, as described above, is not only undistinguishable from legal imagination roughly defined – it is part of it. Some more effort to work out specific features of constitutional imagination is undertaken in

[25] Cf. H Arendt, *On Revolution* (Penguin Books, New York, NY, 2006).

[26] For Kant imagination is hidden 'in the depths of the human soul' (see (n 8) 273) and cannot be viewed as a conscious or reflective activity.

the next section, where I will identify and examine uses and practices of imagination that present traits commonly associated with, if not inherent to, modern and contemporary constitutional thinking. The use of and reliance on founding narratives is perhaps the best example of how modern constitutionalism rests on the work of imagination. But that said, I do not want to rule out the possibility that constitutional imagination might encompass practices and ways of thinking that belong to non-constitutional legal realms. Yet it might well be that the shift toward a cosmopolitan constitutional imagination described below (section V) results in stripping constitutional imagination of some of its most characteristic traits (such as the supporting narrative of 'We the People') and eventually turning it into something a 'traditionalist' constitutional scholar may regard as less distinctively constitutional in nature.[27]

III. Two uses of imagination in constitutional thinking

Thus far, I have explained why imagination produces examples that support reflective judgment. Notably, most examples mentioned by Arendt are historical ones. It is to history that imagination turns when looking for suitable examples that can serve as a basis for judgment. But historical examples provided by imagination are – in Arendt's view – not mere historical facts. They are couched in narrative forms, i.e. as parts of meaningful stories. It is Arendt's conviction that the efficacy and power of an example depends, in large part, on which narrative informs it.[28] To gain 'exemplary validity',[29] examples must be interwoven in narrative structures that are anchored in social and political imaginaries. To see why, consider again one of Arendt's favourite examples, that of the French Revolution: What made the French Revolution a world-historical

[27] An anonymous reviewer has pointed out that what I am labelling in this article as a shift in constitutional imagination is in effect a 'de-constitutionalisation' of imagination. Note, however, that this presupposes that the meaning of constitution is fixed and inextricably rooted in statist founding narratives and imaginaries. Such a view finds support on a strand of contemporary literature that criticises global constitutionalism for dismissing the very core of constitutionalism (cf. Kuo (n 5)). From a non-essentialist perspective, however, controversies over the meaning of constitution cannot be resolved by positing a specific feature of the constitution as its essence. A concept's meaning depends – to a considerable extent – upon its usage. Hence, what needs to be taken into consideration are emerging practices among constitutional interpreters (such as constitutional experts) – and this is essentially what I am doing in this article. I look at how imagination works, when constitutional ideas transcend the *conventional* boundaries of constitutional law.

[28] LP Thiele, *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative* (Cambridge University Press, Cambridge, 2006) 48.

[29] See (n 16) 123.

event, according to Arendt, were not the historical facts themselves, but the narrative meaning that 'spectators' (i.e. outsiders or later observers) read into it.[30] As it is well known, the example of the French revolution unfolds, in Arendt's eyes, as a narrative of a radical new beginning and is instilled with the pathos of political freedom, which inspired later generations of activists in France and elsewhere.

Clearly, on this interpretation, imagination does more than generating examples. It fosters a sense of narrativity. But what about constitutional imagination? Are precedents and legal examples couched in narrative forms? A considerable body of socio-legal scholarship thinks they do. These scholars draw on the insight that a major key to understanding law – including constitutional law – is provided by socially available narratives.[31] To quote Robert Cover: 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'[32] This means that to take deep root in the minds of the citizens and thus gain their support, constitutions must be anchored in citizens' social and narrative imaginary. Ideally, citizens must see themselves as part of the story that begins with the establishment of the constitution by 'We the People'.[33] To this end, 'the sharing of resonant examples is required. Effectively, the practical judge must become a storyteller who entices his listeners to become co-interpreters of the story being told, and as such co-solvers of the wicked problem being tackled.'[34]

For twentieth-century constitutional theories such as originalism or Ronald Dworkin's moralism, the founding moment of a constitution plays a decisive role in selecting appropriate examples and precedents. Consider Dworkin's famous image of constitutional law as a 'chain novel',[35] in which the establishment of the constitution is the first and foremost chapter of the novel. Dworkin's approach to constitutional review rests on the claim that the constitutional development should exhibit the highest possible degree of moral and narrative coherence eventually turning

[30] See (n 25) 43.

[31] Cf. N MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press, Oxford, 2005); RP Burns, *A Theory of the Trial* (Princeton University Press, Princeton, NJ, 1999).

[32] RM Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97(1) *Harvard Law Review* 4.

[33] Perhaps the best-known foundation stories belong to religious tradition or to the ancient classics of world literature, such as the Oresteia of Aeschylus or the history of the receipt of the Ten Commandments through Moses on Mount Sinai (see S Almog, 'From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law' (2002) 13 *Fordham Intellectual Property, Media & Entertainment Law Journal* 1.)

[34] LP Thiele, *The Power of Example: The Narrative Roots of Practical Judgment*; paper presented at the Western Political Science Association Annual Meeting (Los Angeles, CA, 2013).

[35] R Dworkin, *Law's Empire* (Harvard University Press, Cambridge, MA, 1986) 228.

constitutional review into a holistic endeavour: Each *chapter* of the constitutional *novel* must adapt to the previous ones.[36] In so doing narrativity in constitutional law has an important heuristic function: it serves as a device for scrutinising the relevance of precedents and examples: 'The facts of a particular (legal) case are constructed and reconstructed at each stage of the process […], through a selection of those features […] of the situation which […] are regarded as pertinent. That selection of pertinent traits will evoke a mental image or will be judged "relevant" to one of a stock of narratives which represent the social knowledge of the group concerned.'[37]

This is one way of looking at constitutional imagination. There is another. In the last decades, narrative models compete with new strands of constitutional theory for which founding narratives play no decisive role in theorising about the legitimacy of constitutional law. On the contrary, many constitutional theorists are critical of the excessive use of founding narratives – for at least two reasons. The first one has to do with the alleged internationalisation of constitutionalism. A widely shared assumption among legal and political theorists is that the language of constitutionalism is becoming increasingly influent in international legal discourse – with at least one big exception: the grand historical narrative of 'We the People' lacks a functional equivalent on the international scene.[38] To date, the idea of a global constituent people is, at best, a theoretical abstraction, with no powerful narrative on democratic self-determination to account for it.[39] What advocates of global constitutionalism illustrate is rather the emergence of a global constitution-like order as an incremental and piecemeal process, without a clearly demarcated beginning, plan, or purpose.

A second source of criticism is normative and can be traced back to Frank Michelman's talk of an 'authority-authorship syndrome'[40] in modern constitutionalism. Michelman criticises that founding narratives run the risk of turning the question of the authority into one of authorship.

[36] See also Michael McConnell for whom Dworkin did not go far enough. In his view, the chain novel metaphor is more useful, when applied more broadly to the constitutional order, thus including other authors. See M McConnell, 'The Importance of Humanity in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution' (1997) 65 *Fordham Law Review* 1269.

[37] BS Jackson, *Law, Fact, and Narrative Coherence* (Deborah Charles Publications, Liverpool, 1988) 170.

[38] See (n 5) Fox-Decent.

[39] Cf. C Möllers, 'Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung' in A von Bogdandy (ed), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundlagen* (Springer, Berlin, 2003) 1.

[40] F Michelman, 'Constitutional Authorship by the People' (1999) 74 *Notre Dame Law Review* 160.

On his view, it is morally deceptive to think that 'we owe respect to a constitution having such-and-such prescriptive content just because of who that constitution's authors were'.[41] Normative authority should not be reduced to authorship. In principle, a constitution can be legitimate (both in a normative and empirical sense) even if their authors were usurpers.

Given these criticisms, it is not surprising that many legal and political theorists, and among them especially global constitutionalists, eschew constitutional narratives as means of interpretation and justification. In their view, examples are not meant to conform to shared narratives within a community; that is, they should not function as means that effectively preclude the capacity of taking dissenting or new views into account. Instead, they argue (in a Kantian vein) that imagination should broaden and deepen the context of judgment and, in so doing, foster self-reflective attitudes. The ideal is that of a 'Socratic' process of public reasoning[42] in which each participant attempts to imagine and adduce (real or hypothetical) examples that challenge one's and other people's positions so as to promote the ability to stand back from and reflect on one's claims. In this way, judgments can be more easily justified to culturally diverse audiences and better reflect slowly but steadily shifting normative standards within a society.[43]

The gradual move away from constitutional narratives – with the consequent abandonment of the idea of the constituent people – can be considered as a shift from *interpreting* the constitution as part of a national narrative to continuously *justifying* it as an object of differing, often conflicting, views.[44] Fundamental to this shift are the different roles of imagination. While for narrative accounts imagination serves primarily to identify meaningful moments in the chain of historical events making up the constitutional story, global constitutionalists keep faith with the Kantian original formula of imagination as a mind-broadening activity.[45]

[41] F Michelman, 'Is the Constitution a Contract for Legitimacy?' (2003) 8(2) *Review of Constitutional Studies* 126.

[42] See (n 6).

[43] M Steilen, 'The Democratic Common Law' (2011) 10 *The Journal of Jurisprudence* 437.

[44] Kumm calls it a 'turn from legal interpretation to the public reason oriented justification' (n 6) 142.

[45] Imagination proves to be indispensable for proportionality reasoning, the alleged 'common grammar for global constitutionalism' (M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8(2) *International Journal of Constitutional Law* 263). For Alexy, proportionality reasoning allows for a mental representation of the actual arguments presented by the various parties in the political arena. In his view, this form of 'argumentative representation' complements democratic representation (cf. R Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572).

IV. A shift toward a cosmopolitan constitutional imagination?

As shown in the previous section, global constitutionalism implies a shift from a narrative to a more analytical and reflexive orientation in thinking about (constitutional) law. This is a major shift in constitutional imagination, but not the only one on which global constitutionalism is premised. The second shift concerns the spatial scope of constitutional imagination. Is imagination confined to the scope of the constitution or does it reach out to include foreign experiences? For Arendt, reflecting and judging properly involves training one's imagination to engage with multiple perspectives or, simply, 'to go visiting':[46]

> (...) critical thinking, while still a solitary business, does not cut itself off from 'all others'. To be sure, it still goes on in isolation, but by the force of imagination it makes the others present and thus moves in a space that is potentially public, open to all sides; in other words, it adopts the position of Kant's world citizen. To think with an enlarged mentality means that one trains one's imagination to go visiting.[47]

People live in different places, make different experiences and differ in their political views. According to Arendt, imagination does not make these differences disappear, but it fosters understanding. It helps bridging distance to what is unfamiliar and unknown, so that one can better appreciate alien customs and ways of thinking.[48] In Arendt's view, the images and examples produced by imagination are not only 'the leading-strings [or go-carts] of judgment',[49] as Kant noted, but an important condition for the emergence of a cosmopolitan standpoint (what Arendt calls the position of a 'world-spectator'). In *Politics and Truth* Arendt explains, what it means to take up a cosmopolitan standpoint:

> Political thought is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoint of those who are absent; that is, I represent them. This process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective; this is a question neither of empathy, as though I tried to be or feel like somebody else, nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not.

[46] See (n 12) 43.

[47] See (n 12) 43.

[48] See on this Appadurai, for whom globalisation delivers the images and narratives of foreign lives (A Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press, London, 1998).

[49] See (n 8) 269.

> The more people's standpoints I have present in my mind while I am pondering the issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.[50]

For global constitutionalism, Arendt's cosmopolitan account of representative thinking is an ideal feature of constitutional review to which judges should aspire[51]. Translated into constitutional language, representative thinking means not only that judges have to play the case many times in their imagination from different points of view, but also that these points of view should not be confined to a specific cultural or national context. What makes constitutional reasoning truly representative is the fact that the views and, specifically, the examples taken into consideration are not the familiar ones. Constitutional imagination should be free of national constraints. It is by appealing to examples from other legal and cultural contexts that judgments will take on a more 'objective' or 'neutral' shape, thus strengthening their legitimacy in the eyes of the legal community.

Concretely, then, Arendt's requirement 'to go visiting' translates into the necessity to imagine how foreign legal cultures would deal (and have dealt) with the case in question. Yet there is a host of prominent cases[52] in which judges have done just that – imagining and citing foreign examples and precedents.[53] As is known, this practice has not gone unchallenged in legal and political scholarship. Especially among US legal and political theorists, judicial recourse to foreign law is still far from being a widely accepted practice. For the more *traditionalists* among US legal scholars, judges should enforce democratically sanctioned legal rules within their legal community, instead of importing foreign law in support of their own reasoning. Ernst A Young, for example, criticises recourses to foreign law as inherently undemocratic. In his view, the major purpose of judicial

[50] H Arendt, *Between Past and Future: Aight Exercises in Political Thought* (Viking, New York, NY, 1968) 241. Elsewhere she argues that the 'greater the reach—the larger the realm in which the enlightened individual is able to move from standpoint to standpoint—the more "general" will be his thinking'. See (n 12) 43.

[51] Cf. V Perju, 'Proportionality and freedom—An essay on method in constitutional law' (2012) 1(2) *Global Constitutionalism* 360.

[52] Consider, for example, the *Atkins v Virginia* case, in which the Supreme Court banned the execution of the mentally retarded. In another, much-discussed case (*Lawrence v Texas*), judges deal with the question whether states can punish homosexual acts.

[53] Whether courts increasingly rely on foreign precedents and example to get a better understanding of the domestic case in question may be disputed, especially with respect to US constitutional law (cf. FB Cross and JF Spriggs, 'Citations in the US Supreme Court: An Empirical Study of Their Use and Significance' (2010) 2 *University of Illinois Law Review* 489).

recourse to foreign law is to sidestep profound democratic disagreements over issues about which there is traditionally profound dissent in democratic societies (such as over issues of abortion, gay/lesbian rights and criminal law).

> Opponents of the death penalty who have striven in vain to persuade their fellow Americans to abandon the measure will find more support by extending their sphere of argument to take in foreign opinions and practices. Appeals to foreign law are thus a symptom not of convergence of values at the international level but rather of *divergence* at the national level.[54]

In general, responses to this kind of criticism are centred on the importance of epistemic modesty: when facing a hard case, it makes perfect sense to learn from the methods and arguments deployed by other trained professionals in dealing with comparable cases, no matter whether domestic or foreign. But this argument, compelling as it is, has two major shortcomings. *First*, defences of foreign law citations focus on the second stage of constitutional reasoning, that of reflecting upon the appropriateness of (foreign) examples. But they tend to ignore that these examples must first be brought to mind and that this mental process cannot be explained solely in rational cognitive terms. As mentioned, imagination involves a degree of freedom or spontaneity in searching for suitable examples. In this sense, if judges cite foreign law this has not only to do with its alleged usefulness as persuasive authority for resolving constitutional disputes, but also, more fundamentally, with the fact that their imagination moves freely on time and space, thus beyond the boundaries of domestic constitutional law. By way of example, consider *Lawrence v Texas*, in which the US Supreme Court struck down a Texas law that made homosexual activities a criminal offence. In his majority opinion Justice Kennedy cited examples of how European courts had approached this issue. The degree to which these examples were appropriate is open to dispute, but what is remarkable, in the first place, is that the examples that came to his mind were foreign ones. It may appear to be an obvious fact, but it is one that is easily overlooked.

This brings me to the second, more important, shortcoming. Examining constitutional imagination should not be seen as a privilege of judges and legal experts. Recall Young's criticism. In his view the recourse to foreign examples aims at evading legal controversies and bypassing democratic disagreements within a society. But this objection has a false presupposition. It falsely presupposes that only the judges' imagination navigates an 'implicit

[54] E Young, 'Foreign Law and the Denominator Problem' (2005) 119 *Harvard Law Review* 163.

map'[55] of a legal space that is not confined to the conventional boundaries of constitutional law. What I am alluding to is the problem that social understanding of legal rules may not necessarily be reflected in the constitutional law. In these cases, it is but natural for citizens appeal to other sources of law to represent their point of view.

> Citizens can reach out freely to how equality and freedom have been interpreted in other political communities. When the historical development of their own societies fails to recognize a dimension of a freedom and equality which they see as central to their standing as free and equals, they might be able to find that dimension articulated in other democratic polities. The experiences in self-government of other communities can expand a citizen's normative vocabulary by framing aspects of his own self that had found as yet no expression in his political order. For instance, claims of religious discrimination must overcome the burden of novelty in societies that are largely homogeneous from a religious standpoint; the same is not true in communities of thriving religious diversity. Similarly, the dimensions of the constitutional right to property in Eastern European countries coming out of half a century of communist rule will be inevitably different from its meaning in older democracies.[56]

According to Perju references to foreign law are justified when social interpretation of law and traditional constitutional law drift apart and the constitution loses its representative function. Thus constitutional judges do not necessarily act illegitimately when they import foreign law to support a specific interpretation of constitutional law that finds no expression in domestic constitutional thinking. On the contrary, they are addressing a responsiveness problem, namely that often minorities' views do not find any support in mainstream domestic constitutional thinking. In this sense, considering foreign law offers a corrective to the 'thoughtlessness' of domestic constitutional law.

I suspect that to many this may sound unduly optimistic. Critics may urge that reference to foreign legal examples might in some cases backfire, engendering unconstitutional or anti-cosmopolitan attitudes, to the detriment of internal minorities, whose voice will remain unheard, if not silenced outright. To give an example, consider the former Hungarian constitution, which allowed lawsuits, the so-called *actio popularis*, initiated by civil society groups. As Bojan Bugarič points out, the '*actio popularis* provision was unusual in Europe and had become the most effective way in Hungary

[55] C Taylor, *A Secular Age* (Harvard University Press, Cambridge, MA and London, 2007) 173.

[56] V Perju, 'Cosmopolitanism and Constitutional Self-Government' (2010) 8(3) *International Journal of Constitutional Law* 344.

to keep the government in constitutional line. The new constitution eliminates *actio popularis* review, substituting instead a constitutional complaint on the German model',[57] which limits the access to the Court to those invididuals whose constitutional rights have been violated by a public authority. In stark contrast with the *Lawrence v Texas* case, the case of the new Hungarian constitution shows how an opponent of minority rights (i.e. Orbán's Fidesz party) can avail itself of a foreign example (i.e. the German model of constitutional complaint) to suppress a progressive constitutional practice (i.e. the *actio popularis* provision).

Clearly, this example is but one in a series of examples, which illustrate how easily 'good' foreign examples can be rejected in favour of 'bad' foreign examples.[58] Note, however, that there is nothing in what I have argued so far to suggest that for global constitutionalism reliance on foreign examples alone suffices to expand the imagination of constitutional actors in ways that necessarily engender cosmopolitan outcomes and enhance constitutional responsiveness. Instead, my argument is centred on two related but distinct developments that together make up what I called the shift in constitutional imagination implied by global constitutionalism: (1) a move from a narrative to a more analytical and reflexive orientation in thinking about (constitutional) law and (2) an increasing tendency to 'go visiting' to foreign jurisdictions for inspiration and instruction. In the above-mentioned case of the abolition of the *actio popularis* the example of the German *Verfassungsbeschwerde* serves a mere substantiating function.[59] It is used selectively and strategically to justify a predetermined legal decision. Its function is not to broaden the spectrum of available legal options and, thus, enhance reflexivity and inform debate. In this sense, the Hungarian case clearly does not serve as an example of the first development.[60]

[57] B Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2014) 79 *LSE 'Europe in Question', Discussion Paper Series 10*. Working Paper available at: <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper79.pdf>

[58] Kim Scheppele has provided other examples of how foreign legal examples are being leveraged by Prime Minister Viktor Orban to limit minority rights. Cf. KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' in C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, Cambridge, 2016).

[59] For a criticism of the use of foreign law along these lines, see Posner (RA Posner, 'Foreword: A Political Court' (2005) 119 *Harvard Law Review* 85).

[60] To minimise the influence of strategic 'cherry-picking', theorists of global constitutionalism, like Vlad Perju, have endeavoured to connect the two above developments in such a way as to subordinate the second to the first. In Perju's view, 'the most that can be achieved by expanding the pool of normative references (…) is to inject a degree of reflectiveness into the constitutional discourse at the specific request of citizens, or of other constitutional actors' (Perju (n 2) 353).

But while cases like the Hungarian one warn us against idealising the use of foreign examples, it is misleading to think that the ability to 'go visiting' to foreign jurisdictions can have a deleterious impact on judicial review. Legal experts or judges do not depend on foreign law as a 'fig leaf' to hide their objectives. Domestic examples or other sources could just as easily be deployed to substantiate a predetermined legal decision.[61] By contrast, a truly reflexive orientation in constitutional thinking is premised upon the faculty to let imagination roam freely and engage with examples that may challenge our preconceptions of constitutional law. As mentioned, this does not mean examples supplied by imagination have a privileged normative status or must be regarded as binding. The account of imagination described here is procedural in that it does not require any particular outcome. It values imagination as a remedial to cognitive 'pathologies' common in legal or political thinking (such as blind reliance on conventions) that may hinder genuine reflection and affect decision-making.[62]

V. Conclusion

Imagination does not amount to thinking in the strict sense. Instead, it visualises what is absent by providing images of it. Imagination is therefore essential for constitutional thinking: there can be no memory of precedents, no narrative reconstruction of constitutional history and no projections of the constitutional future without imagination. Constitutional imagination may remain rooted in national past and its narratives or it can take a more *presentist* root and reach out to provide images and examples of foreign experiences. Global constitutionalism is premised on the assumption that the latter tendency (gradually) prevails. This tendency has two interrelated shifts, which are distinct but stimulate each other: (1) a shift from *interpreting* the constitution as part of a grand national narrative of 'we the people' to continuously *justifying* it as an object of differing and potentially conflicting views. (2) The tendency of constitutional imagination to cross the national legal context and 'to go visiting' in the sense of imagining how foreign legal cultures address analogous legal issues. I called this tendency a shift towards a cosmopolitan constitutional imagination.

[61] S Fredman, 'Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law' (2015) 64(3) *International and Comparative Law Quarterly* 649.

[62] As Mary Ann Glendon argued, foreign law 'does not provide blueprints or solutions. But awareness of foreign experiences does lead to the kind of self-understanding that constitutes a necessary first step on the way toward working out our own approaches to our own problems' (MA Glendon, *Abortion and Divorce in Western Law* (Harvard University Press, Cambridge, MA, 1989) 142).

The shift in constitutional imagination may be seen as a further step towards an *expertocratic* understanding of constitutionalism in which a cosmopolitan mindset is valued more highly than the national narratives of citizens. But this seems to underestimate the extent to which citizens themselves open up the national imaginary to include foreign examples and experiences. As recent surveys indicate,[63] cosmopolitan sensibilities are more widely held across liberal societies than one would expect and have their roots in what sociologists call cognitive or virtual mobility, i.e. the narrative imagining of oneself inhabiting a foreign country.[64] Others, like Appadurai, have shown how technological advances have facilitated the development of a cosmopolitan imaginary space making it possible for more people than ever before to imagine a life abroad in 'faraway worlds'.[65]

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[63] See T Kuhn, *Experiencing European Integration: Transnational Lives and European Identity* (Oxford University Press, Oxford, 2015).

[64] Cf. S Koikkalainen and K David, 'Imagining Mobility: The Prospective Cognition Question in Migration Research' (2016) 42(5) *Journal of Ethnic and Migration Studies* 759.

[65] See (n 48) 53.