



Memory of the Marginals: The Constitutional Approach to Exclusion, Marginalization, and Stigmatization

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Abstract

This article examines the phenomenon of marginals—groups institutionally excluded or symbolically expelled from the constitutionally defined socio-political community. It investigates the dual dynamics of integration and disintegration, exploring the strategies, mechanisms, and tools that either foster inclusion or perpetuate exclusion, marginalization, and stigmatization. These processes are embedded in constitutional texts, collective memories, and narratives, manifesting through textual, visual, and performative constitutionalism. Adopting a socio-legal and constitutional-imaginary perspective, the study emphasizes not only formal exclusionary mechanisms but also symbolic practices that degrade and stigmatize, thereby shaping exclusionary constitutional imaginaries. In contrast, it also highlights imaginaries of inclusion to underscore the broader implications of these inclusion/exclusion dynamics on entrenched marginalization. A key focus is the role of exclusionary constitutional strategies and imaginaries in shaping constitutional memory politics. These imaginaries label marginals, establishing symbolic boundaries of “otherness” and “non-belongingness” that permeate both legal frameworks and societal perceptions. The article analyses the institutional and symbolic toolkit used to draw these distinctions, rooted in constitutional imaginaries and collective memory, drawing on works by scholars like Belov, Přibán, and Komárek. It explores how these tools marginalize groups, depriving them of legitimate participation in the socio-political order. The analysis begins by outlining deliberate strategies of social disintegration, such as constitutional marginalization and stigmatization, before briefly addressing the constitution’s traditional role as a rational, integrative framework. While acknowledging the well-documented integrative mechanisms of democracy—elective, deliberative, participatory, and direct—the article assumes familiarity with these concepts and focuses instead on their counterparts: the models, processes, and instruments of constitutional disintegration. Partial disintegration, through exclusion and stigmatization, emerges as a central theme. The study also positions the constitution as a “memory project,” bridging law and politics. It examines collective memory and strategies of “exclusionary oblivion,” alongside retrospective

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constitutional imaginaries that reinforce marginalization. This includes a discussion of transitory memories and memory politics, illustrating how past exclusions shape contemporary constitutional narratives. In its final sections, the article juxtaposes constitutional imaginaries of inclusion and exclusion through two case studies. These contextualize the theoretical framework, grounding abstract concepts in practical examples. By doing so, the study not only critiques the mechanisms of marginalization but also underscores the potential for constitutional imaginaries to foster inclusion, offering a nuanced perspective on the ongoing tension between integration and disintegration within constitutional orders.

Keywords Marginalisation · Stigmatisation · Constitutional imaginary · Bulgaria · Poland

1 Introduction

This paper is devoted to the marginals—the groups of people that are institutionally excluded or symbolic-imaginarily expelled from the constitutionally framed socio-political community. It explores the approaches, strategies, and instruments for integration, but also for structural exclusion, marginalization, stigmatization, and socio-political disintegration. They are enshrined in constitutional texts and textures, but also collective memories and constitutional narratives.

Integration and disintegration are produced via textual, visual, and performative constitutionalism [10]. That is why, the paper departs from a socio-legal and constitutional-imaginary perspective. It is focusing not just on the institutionalized forms of exclusion, but also on the symbolic stigmatization, marginalization, and degrading that are producing exclusionary constitutional imaginaries. The constitutional imaginaries of inclusion are presented as counterpart of the exclusionary imaginaries in order to better highlight the impact of the inclusion/exclusion mechanisms on the production of entrenched, institutionalized, and narrated marginalization.

Hence, one of the main analytical objects of this paper are the exclusionary constitutional strategies and imaginaries and their projection and impact on constitutional memory politics. They are set of constitutional imaginaries which aim at labelling the marginals and drawing of symbolic-imaginary demarcation lines of otherness and non-belongingness.

The paper is exploring the institutional tool-kit for drawing the symbolic boundaries of distinction in ‘the legal and societal flesh’, but also in the collective constitutional imagination and memory of the community. It focuses mostly on the constitutional imaginaries [38, p. 417–428; 32, p. 1–17; 6] and other forms of symbolic-imaginary constitutionalism [10] that produce margins of stigmatization and deprivation from justified participation in the constitutionally framed socio-political community.

The paper starts with the main variants for deliberate social disintegration through constitutional marginalization and stigmatization. It continues with an outline of the predominant concept of the constitution as a rational and textual project for socio-political integration. The integrative function and role of the constitution is demonstrated without entering in detail regarding the instruments for constitutional

integration. Indeed, the integrative preconditions of democracy, the tools for promotion of democratic inclusion through the forms of elective, deliberative, participatory, and direct democracy, their deficiency and current crisis are widely researched in the literature. Thus, while presuming the knowledge regarding this integrative status quo, the paper just reminds the reader of the huge importance of socio-political integration for the maintenance of a justified and efficient political and constitutional order.

Hence, the main focus of the research is on the models, processes, and tools for constitutional disintegration and especially the forms of partial disintegration through exclusion, marginalization, and stigmatization.

The paper explores also the memories of marginals. It approaches the constitution as a memory project. The phenomenon of collective memory is presented in as embedded on the edge between law and politics. The main strategies for exclusionary oblivion [13] are presented together with some of the retrospective constitutional imaginaries of marginalization, stigmatization, and exclusion. Thus, the paper engages with transitory memories and transitory memory politics [7, 8].

The final parts of the paper are devoted to constitutional imaginaries of inclusion and the constitutional imaginaries of exclusion. This is done on the basis of two case-studies aiming at contextualizing the abstract set of concepts that are proposed by the preceding analysis.

2 Constitutional Marginalization, Stigmatization, and Exclusion

Disintegration may be holistic phenomenon related to macro processes referring to the society as a whole. The current paper is not interested in this macro social aspect of constitutional disintegration that may eventually trigger constitutional disorder and dissent, constitutionalism in flux or implosion of democracy. These phenomena, while extremely important, have been researched elsewhere [9, 11]. Rather, it explores the targeted exclusion—institutionalized, narrated or collectively imagined—of certain types of stigmatized persons defined as constitutional marginals through range of strategies, e.g. limitation of rights, labelling, marginalization, stereotyping, stigmatization, etc.

These strategies are not necessarily incompatible with the integrative function of the constitution. Instead, they may aim at deconstruction of the society as fact and its construction and reconstruction as imaginary artefact. In other words, they aim at producing visions of the state, people, and society that exclude the groups imagined and narrated as marginals from the detector of constitutional relevance defined by the authoritative narrators (e.g. constitutional or ordinary legislator, supreme or constitutional courts) or by semi-authoritative narrators such as the political discourse players or the constitutional theory.

In order to justify such ‘pre-inclusionary exclusion’ or ‘pre-integrative disintegration’ these marginalization strategies need the convincing power of relevant constitutional imaginaries. These are the exclusionary constitutional imaginaries. That is why, we should explore both the strategies for institutionalized exclusion and the strategies for imaginary exclusion of the marginals focusing mostly on the latter.

A definition of the strategies for targeted disintegration and differentiation between discrimination, labelling, stigmatization, stereotyping, and marginalization is epistemologically necessary. These strategies are organized in two main groups. The first one encompasses the institutionalized forms for exclusion. They include limitation of rights, discrimination, and segregation (with its subtypes and corresponding ideologies, strategies, and instruments). The second group involves the narrative strategies for production of discriminatory and exclusionary constitutional imaginaries. It comprises the strategies of labelling, stigmatization, stereotyping, and marginalization.

Marginalization, stigmatization, and exclusion are the three dimensions of disintegrative and discriminatory labelling as legal, socio-legal, and symbolic-imaginary phenomenon. It is a twofold phenomenon for the following reasons. It detaches certain social groups from the society as arranged, institutionalized, and imagined by the constitutional legislator and all other constitutional players and narrators that have the legal or *de facto* authority to shape the constitutional parameters of the community. This is the impact of marginalization, stigmatization, and exclusion on the marginals.

Reversely, but interconnectedly, the institutional (legal) or narrative (socio-legal and socio-imaginary) exclusion of the marginals gives the legal, social, and symbolic-imaginary shape of the constitutionally framed community. Thus, marginalization, stigmatization, and exclusion have also broader societal impact. The instruments for their accomplishment are by necessity impacting the individuals, their groups, and the society as a whole. This is important, because marginalization, stigmatization, and exclusion are techniques for constitutional engineering [47] related to the constitutional law in books, in action, and in imagination. Thus, they are having deeper repercussions on the constitutional anthropology of the constitutionally framed socio-political community.

The exclusionary constitutional imaginaries are interrelated with marginalization, stigmatization, and exclusion as socio-political practices and strategies for drawing the shapes and borders of the political community. These shapes and borders have also temporal dimension. They project themselves on the temporal axis that stretches between the constitutional past, constitutional present, and constitutional future [13]. Hence, exclusionary constitutional imaginaries are important element of constitutional memory politics.

In that regard, exclusionary imaginaries of stigmatization are implicitly presupposing inclusive imaginaries of constitutional integration. Nevertheless, it must be emphasized that stigmatization, marginalization, and exclusion does not necessarily lead to disintegration. On the contrary, they may be used as strategies for production of cohesion and integration—including transtemporal integration—of the ‘full’ or ‘proper’ members of the constitutional community. Moreover, inclusive and integrative constitutional imaginaries are not always mere reflection, reaction or repercussion of exclusionary constitutional imaginaries. Symmetry between them may exist, but is neither automatic, nor necessary. This will be shown later in the paper when discussing the concrete imaginaries of marginalization, stigmatization, and exclusion as well as the inclusive-integrative constitutional imaginaries.

Marginalization is produced by institutional tools that are part of rational, textual, and legal constitutionalism. However, here we are focusing on the socio-legal and symbolic-imaginary aspects of marginalization. In that regard, constitutional dis-

courses and narratives that are intrinsic element of textual, performative, visual, and emotional constitutionalism produce stigmatization, marginalization, and degrading through constitutional imaginaries and other forms of symbolic-imaginary constitutionalism such as constitutional myths and mythologies, normative ideologies, constitutional utopias, and constitutional taboos [10]. At times, marginalization and stigmatization is not a constitutional goal per se, but a side effect of constitutional imaginary strategies for promotion of different visions for the state and the society that may have even the shapes of constitutional utopias.

Contemporary constitutions are imaginary projects. They rely on huge symbolism in their selective, integrative, and marginalizing strategies and are characterized by distinct reliance on collective memories carefully selected by the drafters. This is despite their claims for neutrality, entrenched in rationalist Modernity and supposedly produced by textual means [10]. Modern constitutions aim at shaping the community in a non-neutral way by appealing to collective emotions, constitutional anthropology, and the collective subconscious and unconscious. Thus, at times, constitutions are emotional projects of marginalization stretched between the fears, antagonisms, and stigmas from the past, the present, and the future.

The exposure of the mechanisms and types of marginalization, stigmatization, and exclusion is made to an extent counter-intuitively. This is due to the fact that constitutions are usually and traditionally presented as key factors for socio-political integration. Thus, they are expected to serve as inclusive framework for comprehensive mobilization via participation of the constitutional community. However, this integrative role of the constitution is much more a normative aim (functioning differently through diverging mobilization and integration strategies and tool-kits in authoritarian and democratic societies) rather than indispensable feature of the constitution. Instead, it is not unusual for the constitutions to draw explicit demarcation lines for exclusion or inclusion in the community. This is the case also in democratic and liberal democratic contexts where, apart from the qualitative and quantitative limitations to political pluralism (e.g. quantity hurdles and thresholds, grounds for unconstitutionality of political parties etc.), there are also forms of symbolic-imaginary, narrative-based, and frequently also memory politics related exclusion, marginalization, and stigmatization. They are shaping undesired types of people—anti-liberal and anti-democratic marginals—thus producing excommunicated and stigmatized fragments of the society. However, the marginalization in non-democratic and illiberal contexts (different forms of totalitarianism and authoritarianism, populist constitutionalism [15–18], illiberal democracies, but also illiberal neo-liberalism and authoritarian liberalism [54] and technocratic and oligarchic regimes) is traditionally more varied and intense.

3 Constitution as a Memory Project

Unlike history, which may—and should—be established on the basis of facts, collective memory rather resembles an emotion. It is malleable, subject to a number of different influences, most notably through the politics of memory, involving the state-ordered establishment of the official narrative “on the basis of carefully selected

collective memories of past events that have received some level of official recognition—the higher the recognition, the more powerful it will be” [44, p. 154]—with constitution being amongst the most impactful ones. The authorities thus engage in memory politics in the hopes of shaping and designing “social perceptions not only of themselves as ruling elites, but also of the national identity, composed of collectively accepted memories rather than historical facts” [27, p. 592]. This engagement includes also constitutions—as noted by Norman W. Spaulding, “in modern liberal democracies [...] national narratives also confer political legitimacy—they define the discursive space for the negotiation and justification of political power by regulating the collective memory of a nation’s fundamental commitments” [51, p. 1998]. In this section, we will focus on this relationship between constitutionalism, politics and memory, pondering why do they take such a particular shape.

3.1 Collective Memory: Between Law, Politics, and Exclusion

Collective memory, the phenomenon first observed and theoretically developed by Maurice Halbwachs, may be described as “a social memory, one which is not created individually, but within a group, with one person having a wide array of collective memories functioning on different levels.” Importantly, collective memories “can be and are influenced by a number of factors, in particular by governments, both on the local and the national level” [43, p. 211], with one of the main instruments employed to initiate a shift taking the form of the law.

Law may influence collective memory in a wide variety of ways: from the less easily recognisable as impactful on memory elements of the public life, i.e., the Durkheimian legal rituals that took over the role of religion in the present day as the space within which social links are forged [44, p. 53], such as public commemorations, cultural heritage ordinances, rules on street naming and the placement of monuments [43, p. 211], to the more obvious points of intersection, such as legal institutions of memory, i.e., those institutions of law that have as their primary or secondary goal an impact on the social perceptions of the past, reparations, international tribunals, lustration, truth (and reconciliation) commissions, legal amnesia and memory legislation [44, p. 95–151].

Somewhere in between the two exist elements in law that, while carrying a rather significant amount of ‘memory weight’, they engage with it in subtler, less obviously direct ways than legal institutions of memory. Among these, the constitution takes on a particular role. As the basis of the law in the country, the narratives enclosed within permeate the whole legal system, carrying with it various collective memories, some directly, when referencing particular events or people from the past or when looking into the future, others indirectly, through constitutional interpretation. Those two aspects of constitutional memory will be analysed in the section below, with an attempt at providing their definition at the end of this second part of the paper.

First, however, it is necessary to remark on a particular element of the law and memory’s intersections, directly relating to the article’s theme of marginals, that is collective forgetting. Whenever something is collectively remembered—selected and preserved in the official narrative for the future generations—there are certain notions, events, and peoples that do not fit the state-approved collective memories,

and as such subject to collective forgetting. This process has as its objective the upholding of the group's "unity, sheltering it from facing the difficult past, helping it manage the presence of too many, often contradictory memories and preserving its elite's power" [44, p. 36].

At the same time, the collectively forgotten memories of the marginals do not disappear completely. Rather, they become a part of the counter-narrative, turning into what Michel Foucault called counter-memories [24, p. 160]. These are memories which, while pushed to the margins, might resurface once again in case of a regime change through the process of collective-memory inversion. In that sense, "the counter-memories of the former oppositions, now in power, become the official collective memory of the state, whereas those propagated by the former authorities turn into counter-memories themselves" [46, p. 30]. New constitutions established in transitional situations oftentimes take an important part in the process of collective memory inversion, most notably through the direct aspect of constitutional memory.

3.2 Collective Memory and the Constitution: Direct and Indirect Aspects

Constitutions have a particular relationship with collective memory. They are entangled in strategies for collective remembering and oblivion [13]. They include both an "assessment of the past and setting goals for the state construction" and a "system of values and anti-values embedded in the[ir] text" [1, p. 162]. Uladzislau Belavusau proposed the term 'mnemonic constitutionalism' to describe the phenomenon that occurs when the "authority and legitimacy of a state" is situated within "the boundaries of a certain historical paradigm, whereas current and future attitudes and behaviours of state actors derive from and are limited by moral lessons of the past." While this past is most often placed within the constitution, certain "legal provisions which traditionally shape the substructure of national constitutional law, like for example, citizenship laws or statutes shaping collective identities" [5, p. 18], are also—Belavusau argues—of major importance when it comes the investigations of what actually constitutes mnemonic constitutionalism.

The question remains, however, whether every element of this relationship between the constitutional law and memory—of Belavusau's mnemonic constitutionalism—should be considered as a part of constitutional memory. We posit that, given the difficulty in changing most constitutions and a relative easiness of modifying 'regular' bills of parliament which relate to the matters of collective memory, the term constitutional memory should focus on the constitution. In an attempt to analyse more deeply and define this particular 'face' of law and memory intersections, we first propose an engagement with what we call two aspects of constitutional memory: direct and indirect.

The direct aspect of constitutional memory refers to those elements of collective memory which are explicitly enshrined in the text of the constitution. The official narrative of the state is most often placed in the preamble, i.e., the pre-normative part of the constitution. While often snubbed by constitutional lawyers turning their focus to the main body of a constitution's text, these "historical invocations referring to the national collective memory" [27, p. 593] play an important role in terms of justification and interpretation of the constitution, sometimes even providing the coun-

try's citizens with some rights and obligations [45, p. 185]. In the preamble, "certain stages of the formation of national statehood are highlighted"—these may include, for example, "national liberation struggle, war with external enemies, liberation from colonial dependence or occupation regime, social revolution, restoration of territorial unity and formation of the nation-state" [45, p. 163].

In some instances, however, the direct aspect of constitutional memory may be visible also in parts of the constitution different from the preamble. As noted above, on the one hand constitutions are not easily modified, and on the other major changes in the official narrative typically take place in transitional situations through the process of collective memory inversion. Those unique political moments may lead to the constitution also including particular elements directly relating to collective memory in its parts which are different from the preamble. These may impose certain obligations on the state in regard to the preservation of cultural heritage (relating to the protection of certain monuments, establishment of museum, etc.) or the non-repetition of certain difficult events from the past (the ban on parties of certain ideology, for example, fascist, Nazi or communist) [1, p. 162]. Ultimately, the direct aspect of constitutional memory may take the form of particular rights and rules relating to the past in a variety of ways.

Such is the case of East Timor, the constitution of which "enshrines a range of substantive values that move beyond a narrow, formalist focus on governmental powers and limits," relating also to provisions concerning "issues of national 'personality' and cultural heritage," including linguistic matters. These are a reflection of the country's singular historical challenges stemming from the Portuguese colonialism, Indonesian occupation, and the struggle for independence during which the language and cultural heritage of the former metropole allowed the nascent country to forge its distinct identity [33, p. 43–46].

While not following a major transition, the gaining of a supermajority in the parliament by FIDESZ in the 2010 Hungarian parliamentary elections led to the promulgation of a new Basic Law in 2011 that attempted, if not a collective memory inversion, then at least some level of a collective memory correction. In addition to a substantive preamble (the National Avowal of Hungary), the current Hungarian Constitution contains a list of commemorative days and rules relating to the prosecution of Nazi and communist crimes [26, p. 43–45]. Furthermore, the Hungarian authorities established the concept of a historical constitution, "thus alleging a continuity between constitutional past and present, 'erasing' from constitutional memory not only the Communist but also a post-Communist and democratic recent past" [27, p. 607], as such widely extending the temporal scope of the country's constitutional imaginary.

Thus, looking at the big picture, the direct aspects of constitutional memory fulfil the aforementioned role of Durkheimian legal rituals, expressing "the sacred matrix of historical consciousness of society, the 'sacred history' of the people. Fixing it at the level of the Constitution as the basic law, allows protecting the sacred pages of history and the sacred historical heroes from being discredited" [BUSHUEV in 1, p. 163]. Through its different forms, the constitutional memory in its direct aspect protects the nation through providing of a narrative they may be proud of, shielding it from the potentially more nefarious moments in their history, gives the society a

number of rights rooted in the past and promises to take care of its heritage—as such allowing the citizens to look into the future with a solid foundation in the past.

Where the constitutional memory in its direct aspect was visible in the text of the constitution and remained static, its indirect aspect is more elusive and dynamic, constantly evolving [20, p. 5], representing “a field of meaning in which we continuously negotiate who we are and what we are to do together” [49, p. 22]. As such, it is strongly linked to the question of collective identity, its “representations, imagination and organisational forms” that shift and adapt in “respect to social relations and historical situations” within which collective identity “is constructed and contested, [whereby] it can be challenged and exchanged” [25, p. 22]. Just like collective memory shifts following the different social and political changes, even though the written history remains the same, so does indirect constitutional memory, adapting—and being adapted—to the new circumstances and challenges.

Working in a similar way, constitutions may change not in the sense that their wording is necessarily modified, but through the different

forms of silent, creeping constitutional change, and by fundamental changes which arise over time, and transform the original document to the point that the original constitution is barely recognisable. The wording may in fact remain unchanged, but altered political circumstances and social contexts give the terms a different meaning, so that their interpretation represents an act of adaptation to the changed reality. These adjustments and alignments to current reality are carried out by political forces and social interpreters, the medial public and the citizens themselves. However, these constitutional metamorphoses become even more obvious where there is an authoritative interpreter of the constitution that makes binding decisions. In this respect, over a longer period of time, it is constitutional courts in particular which determine the meaning, but by no means the wording, of a constitution [53, p. 216].

Spaulding argues that all the various courts and tribunals engaged in interpreting and applying the law “primarily [...] bear the explicit institutional burden of collective memory,” being “mnemonic institutions par excellence” [51, p. 1999]. Through the interpretation of the constitution, however, a different level of a mnemonic engagement with law is achieved, a reflection of “the state’s nature as a living and experiencing entity” [20, p. 5]. With such interpretations, indirect constitutional memory is produced, as assertions on the past are put forward “to guide decisions about the future—as they tell stories about the nation’s past experience to clarify the meaning of the nation’s commitments, to guide practical reason, and to help express the nation’s identity and values” [49, p. 21].

This process, as any involving those in the positions of power and collective memory, is highly politicised. To follow Hans Vorländer, next to its written text, the constitution has a major political role: it is “one of the symbolic forms in which the political worlds of meaning, the supporting and guiding ideas of order of a political community are represented and condensed into a set of rules laying claim to a binding normativity” [53, p. 215]. Thus, constitutional memory in its indirect aspect “plays a special role in organizing a polity and in authorizing its law” [49, p. 23]. Moreover,

“every approach to constitutional interpretation is also implicitly an account of constitutional memory,” as such involving not only collective memory but also dealing with “different problems of erasure” [2, p. 326].

This is the reason why high politicisation of constitutional memory in its indirect aspect leads to major silences and various instances of collective forgetting, not only on a purely legal level—in regard to certain laws or decisions that “are in contradiction with others” [20, p. 8]—but also towards the marginals, with the dissonance most visible in the matters of constitutional interpretation following a major change, given the rights of the excluded to be remembered [44, p. 164–178] on the one hand and on the other the constitution’s political orientation:

But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter.¹

With such an internal construction of constitutional memory, collective forgetting of state behaviour towards those marginalised is not visible and needs to be actively uncovered, as in the case of the US in regard to the Reconstruction Amendments [51, p. 2001] or, again in the case of the US, the fact that although “women contested their lack of political authority in the constitutional order over two centuries, there is no trace of their arguments in constitutional law” [49, p. 24]. However, certain indirect constitutional memories may be so deeply entrenched in the national psyche that processes of collective evoking [41, p. 270] as to which major figures should be considered “relevant makers of constitutional meaning” in the present day [2, p. 345] may prove extremely difficult, with “any reform project” forced to “proceed exclusively within a framework compelling to the majority self-understanding” [39, p. 288]—the official narrative of the state.

3.3 Collective Memory and Constitutional Imaginary: A Co-existing Relationship

Before moving on to the closer investigation of the ways in which those narratives relate to the eponymous marginals in the next section, the relationship between collective memory in general, and constitutional memory in particular, has with constitutional imagery needs to be acknowledged. Similarly to collective memory, constitutional imaginaries are not an easily definable concept [6–8].

A subset of political imaginaries [14, p. 11], those “systems of belief and practice that permeate” through all the different social strata and levels of governance within a state [36, p. 239], Jan Komárek proposes to understand constitutional imaginaries “as sets of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule” which “are as important as institutions and office-holders,” providing “political action with an overarching sense and purpose recognized

¹ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821).

as legitimate by those governed” [32, p. 2]. In a similar, if a slightly different vein, Marija Bartl defines constitutional imaginaries as “those imaginaries that have fundamentally shaped the ways in which we have gone about making and re-making our societies, whether they are expressed in constitutional texts or not,” allowing the researchers to gain particular insight into the functioning of the different communities [4, p. 3; 7].

In turn, Jiří Příbáň proposes to understand constitutional imaginaries “as systemic constructs describing functionally differentiated modern society as one polity and distinguishing between legal and political legitimacies and illegitimacies in it. The systems of positive law and politics construct their imaginary of constitution as the legitimate form of government” [38, p. 421].

As Paul Blokker notes, the very “notion of constitution invokes a constitutive, productive, and potentially creative dimension and relates to the particularly powerful modern social imaginary of constituent power” [14, p. 11]. Thus, it is in a way organic that in the open catalogue of the fundamentals of constitutional imaginaries Komárek places “the nature of statehood and sovereignty, the constitution and its identity, democracy, rights (human and/or fundamental), institutions that implement and protect them (judicial review or not)” [32, p. 2]. Among these, of particular interest to us is the main question, as to the place of collective memory among those various “contradictory representations of what constitutes society” that ground constitutional imaginaries [14, p. 11].

There is clearly a particular relationship between the concepts of collective memory and constitutional imaginary. First, certain historical links, giving each constitution its own unique character, need to be acknowledged. These take two forms: on the one hand, “the basic constitutional principles of a particular country” are the result of the unique history of the state in question, and of the memories of defending them” [48, p. 404].² On the other, the “symbolical and mythical dimension of constitutions is frequently attributed to an overall constitutional, ‘fictional’ narrative that underpins and supports the written document,” usually appearing within the preambles [14, p. 11], as noted above in relation to direct constitutional memories.

Second, there is the question of underpinning political legitimacy: where collective memories root the authorities’ power in the past, constitutional imaginaries in a way function as “responses to the most general question of the possibility of a legitimate political order and collective self-rule materialising in the rule of law” [38, p. 421]. Third, the two are often contradictory within themselves, as next to the official narrative you have a myriad of counter-narratives—be that relating to collective memory or constitutional imaginary—with, as one of us noted elsewhere, the contradictions within constitutional imaginaries not standing in the way of establishing “the realm of symbolic-imaginary constitutionalism” [10, p. 114], just as the many counter-memories do not prevent from some collective memories being selected as official, thus carried further through all the different levels of state governance.

Fourth, they both have a past-future orientation: akin to collective memories, constitutional imaginaries constitute “a bridge between reality and vision, past and future embedded in a narrative structure” [52, p. 112]. Fifth, the two are potent forces influ-

²For specific examples see: [41, p. 281].

encing the present rather than simple echoes of the past: where collective memories are neither history nor an afterthought about the yesteryear, constitutional imaginaries, as Pribáň stresses, “need to be distinguished from cultural myths and economic or political dogmas and cannot be treated as mere residues of mythological and ideological imaginations operating in otherwise functionally differentiated systems and falsely constituting idealisations of social unity and totality” [38, p. 419].

And sixth, they are both intertwined within the legal system of a country in a number of unobvious ways: the constitutional imaginaries “identify and understand [the] self-referential and self-subversive forces of social imaginaries and the interdependence of legitimacies and illegitimacies in positive law, politics and other social systems” [38, p. 421], while the impact of collective memories may be traced to various institutions of the state.

It is this last point that is perhaps particularly interesting here: as Bartl supposes, “any broadly shared conception of how the world works, and should work (a social imaginary) will end up incorporated in laws, regulations, institutions, organisations, or governmental and social practices” [4, p. 3; 7], putting it on the way to becoming one of the fundamentals of constitutional imaginary. Collective memory is clearly among such broadly shared conceptions, one with a twist, however—as noticed earlier in this section, it is easily malleable by politicians, who employ it to shape different social conceptions, thus standing in a way aside from the other ones.

Therein lies the key to the understanding of the relationship between collective memory and constitutional imaginaries: both are social products that coexist, influencing each other and the reality surrounding them. Collective memory will most often act like the wind blowing into the back of constitutional imaginary, at times acting as one of the fundamentals of constitutional imaginary, in particular in the form of the indirect aspect of constitutional memory; at the same time, when enshrined in the constitution in its direct aspect, it will cast its particular shadow on the actual realisation of the constitutional imaginary in question. And, of course, due to the highly political nature of the phenomenon, next to the selected memories, there will also lay collectively forgotten silences. This brings us back to the issue of the marginals, who in a way live at the edges of collective memories—and thus at the edges of constitutional imaginaries.

4 The Constitution as Project for Socio-Political Integration

4.1 Constitutional Integration as Conceptual and Pragmatic Project of Modernity

So far, we have discussed how selecting some narratives as official and discarding others leads to exclusion; at the same time, constitutions claim to be integrative projects. The predominant constitutional theories put the emphasis on socio-political integration through the constitution as integrative pillar of the community. Integration may be imposed (e.g., in the case of political decisionism), negotiated (contract theories), legally shaped and framed through rule of law (liberal constitutionalism), produced via mass participation (radical democratic, participatory, and other versions of democratic constitutionalism), resulting from rational and reasonable politi-

cal communication (deliberative democratic theories) etc. It can even be presumed as quasi-natural national heritage as some organic, nationalist, and historic-conservative theories suggest. Hence, from theoretical perspective, constitutional integration may be naturally embedded in the destiny of the community, all-encompassing and compulsory, discursive and voluntary, political, legal and socio-political, imposed or bargained, predetermined or negotiated.

The integrative function of the constitution is frequently exposed in constitutional theory [28, p. 193–208]. Constitutions are supposed to produce socio-political integration through law. According to the conceptual mainstream socio-political integration is key task of public law. The approaches differ, however, whether integration can be achieved in the form of ethno-historic nation as ‘historical community of destiny’ or in the context of a multicultural political nation as ‘negotiated community of shared beliefs’ [50; 40, p. 54–66]. Nevertheless, there is generally a consensus that public law in general and the constitution and constitutional law in particular must produce peace, order, security, and legitimate obedience. They must secure authority and efficiency by maintaining social cohesion and social integration through legitimate means of a just and democratic society ruled by law. The constitution must serve as the supreme legal framework of the community and as a social contract between the citizen, between their representatives, and between the state and the society. Both imaginaries—the liberal imaginary of the constitution as framework and shell and the liberal-democratic imaginary of the constitutional contract—reinforce the integrative role and function of the constitution.

The concept of the constitution as a socio-political contract is probably the most fundamental and wide spread in the theoretical and the political discourses. Social contract requires consent that is initial, permanent (or recurrent), and properly sustained. Thus, the constitutional contract is the fundamental legal bond that unites the constitutional past with the constitutional present, and the constitutional future. The constitutional contract requires voluntary obedience. It necessitates initial will for socio-political integration and subsequent quasi-permanent confirmation of the will for reintegration in the common constitutional project.

In that regard, socio-political integration is one of the ultimate conditions for democratic constitutionalism. It is also ultimate aim of the democratic constitutional process. Hence, each constitution must provide for system of tools for socio-political integration and for devices to secure their formal and substantial implementation.

Socio-political integration based on contractual theory has multiple dimensions. Its constitutional dimension is a particular one due to the fact that it is to an extent artificial, superimposed, constructed, and thus stemming from a plan. The constitutional plan for socio-political integration is both rational and emotional. It is pragmatic set of aims targeting specific model of society. Simultaneously, it is emotional project based on forms of symbolic-imaginary constitutionalism (constitutional myths, mythologies, ideologies, taboos, utopias, etc.) that is supposed to produce durable constitutional imaginaries.

In that regard, the constitutions are not only legal, social, and political projects. They are imaginary projects as well. That is why, they need a set of imaginaries of integration which are capable of sustaining the constitutional integration ‘in books’ and ‘in action’ through constitutional integration ‘in imagination’ and ‘constitutional

integration-as-imagination' [10]. The imaginaries of constitutional integration shall be outlined in one of the subsequent parts of this paper.

4.2 Imaginaries of Constitutional Integration and Inclusion

There are many imaginaries of integration and inclusion that are fully fledged or partially shaped, institutionalized and narrated in constitutionalism as theory, imagination, and performance. Three of them are most developed and wide spread. These are the liberal imaginary of the constitution as neutral legal framework, the democratic imaginary of constitution as a social contract stemming of a common will and using the common good as ultimate criterion of political action and behavior, and the imaginary of the constitution as a pillar of the constitutional project. The last imaginary is rather flexible. It can have deliberative democratic, participatory, or even nationalist versions.

The constitution as neutral legal framework in a normative ideology of liberal constitutionalism. According to it, the constitution integrates through legal framing. The constitution is framing the political process in general with its particular manifestations such as the electoral process, the participatory and deliberative process, the parliamentary process etc. Such an approach rests upon the belief in constitutional inclusion via legal integration and, ultimately, in the possibility for production and reproduction of democracy through law.

The social contract is one of the most important theories on the nature and origin of constitution. Simultaneously, it is also imaginary of constitutional integration. The social contract, while generally inclusive, also leaves room for marginalization and outsiders. These are the people or groups that do not agree with the terms of the contract and are left outside of its framework. They may also be the newcomers, e.g., new generations, migrants etc., who are facing a 'take it or leave it' deal.

The imaginary of the social contract may be mixed with the framework imaginary described above. If the social contract is renewable, flexible, and open for adjustment to the interests of the potential marginals then it may be functioning as an inclusive liberal framework and as transgenerational projects of open constitution-making. The further development of the constitutional contract may be accomplished through formal and institutional means, via constitutional interpretation or through authoritative narratives.

The social contract imaginary may have also a radical democratic version if the constitutional contract is stemming of a common will and using the common good as ultimate criterion of political action and behavior. This imaginary is both inclusive and exclusive. It is massively inclusive because it suggests the existence of an existential community of origin and destiny, faith and belief that can have a monolithic and detectable common will in pursuit of the common good as metaphysical category. It is at the same time extremely exclusive for those persons and groups that are not capable or not willing to submerge into the common will and the common good as metaphysical preconditions of the constitutional contract.

The third inclusive imaginary is the constitution as a pillar of the constitutional project in terms of constitutional nationalism and/or constitutional patriotism. This imaginary can have rather different outlook depending on the way it is formulated.

The imaginary of the constitution as a pillar of discursive project of narration and performance is generally rather inclusive. It allows for inclusion through communicative action [29] aiming to both reaffirm the fundamental constitutional principles and values (the value core of the constitution) but also to develop and adjust it to the interests and the visions for well-ordered state and society of the range of groups that shape the narrative project of linguistic sovereignty [10, p. 153]. Indeed, this imaginary has its inclusionary limits consisting, e.g. in the qualitative limitations to political pluralism. However, in principle, it is capable of promoting an inclusive constitutional project especially if constitutional patriotism is evoked in narrative and evolutionary rather than in absolute and involutory manner.

The hard version of constitutional unification via extensive constitutional nationalism is, instead, prone to constitutional exclusion. It is capable of being used for drawing hard demarcation lines and can produce different types of exclusion and thus also range of constitutionally marginalized persons and social groups.

5 The Constitution as Project for Segregation, Marginalization, and Exclusion: Strategies for Targeted Disintegration

5.1 Strategies for Targeted Disintegration and Borderline Imaginaries for Targeted Exclusion

Contrary to the predominant narrative, theory, and conceptualization of the constitution as integration force, project, and instrument in modern societies there is also a hidden agenda that uses constitution (in intrinsically anti-constitutional sense) as a project for segregation, marginalization, and exclusion. Constitutions are used as devices for defining the parameters of the constitutionally framed community. They are practiced as tools for explicit or implicit exclusion of different segments of the society or for preventing of outsiders, marginals, and intruders as defined by the political mainstream from entering the constitutionally framed socio-political community.

Thus, the constitutions may be used as membranes (allowing for partial one-side penetration of the community), gateways (permitting entry and exit on the terms of the gatekeepers) or walls blocking the entry-exit points of constitutional integration. They may also serve as signposts defining the modalities of the permissible behavior that defines the people as members or marginals in the constitutional community. These are important borderline imaginaries for targeted inclusion/exclusion in the constitutionally framed socio-political community.

There are different strategies and forms for targeted disintegration. They may be grouped in two groups. The first group includes the institutionalized forms of exclusion. These are the discrimination and the segregation. The second group consists of narrative strategies for production of discriminatory and exclusionary constitutional imaginaries. These strategies create imaginaries of constitutional segregation, marginalization, and exclusion.

5.2 Institutionalized Forms of Exclusion—Marginalization Through Discrimination and Segregation

The institutionalized forms of exclusion are the different variants of discrimination and segregation. They vary from limitation of rights, through curtailing of the constitutional status ending up in entrenched forms of discrimination such as gender exclusion, apartheid, ‘separate but equal’ policies etc. The most flagrant form of exclusion are the various forms of slavery.

The discrimination on the basis of gender, race, ethnos, religion and other entrenched features of the human beings has long history. The history of fight against these forms of exclusion grounded on unchangeable features of the human being is also rather long. It is also well explored, so here we are mentioning these forms of institutionalized exclusion just for completeness of the argument.

Same is true for the different exclusionary policies that aim at producing a political society open for certain categories of people while banned for other. Indeed, such policies such as segregation and apartheid are structured not just around legal institutions and direct or indirect means of compulsion. They are also promoted via different forms of symbolic-imaginary (anti)constitutionalism that are producing stigmatization, marginalization, and exclusion. These forms are fed by imaginaries of difference which ultimate goal is to justify an unjust society and to promote imaginaries of fear that legitimize the political and social exclusion.

The history of democracy is rich with examples of direct and indirect political exclusion. Direct exclusion usually relates to electoral and political disenfranchisement stemming from electoral census, limitation of access to certain political rights frequently paralleled by political or quasi-political censorship.

5.3 Narrative Strategies for Production of Discriminatory and Exclusionary Constitutional Imaginaries: Imaginaries of Constitutional Segregation, Marginalization, and Exclusion

Each constitutional model and political system define its desirable core, its permissible periphery, and the groups of people it frames as outsiders and marginals. Legally, this is done through qualitative and quantitative limitations to the political and societal spectrum. However, legal limitations, in order to be legitimate from the viewpoint of the constitutionally framed socio-political community and thus to be observed and implemented voluntarily, need to be rationally convincing and even more importantly—emotionally appealing. Rationality is an overpraised and in fact exaggerated ideal of Modernity which actually functions through imaginary, symbolic, and emotional proxies [10]. Hence, constitutional phenomena are typically apprehended via mix of signifiers of constitutional meaning that appeal to the constitutional conscious, subconscious, and unconscious. These proxies and phenomena are the constitutional imaginaries [6–8].

In that regard, in order to promote social cohesion and integration and define the limits of permissible toleration (according to the majoritarian will, elitist will, the constitutional legislator and other normative sources of exclusionary justification) the constitutional systems through their authoritative narrators make recourse to set

of constitutional imaginaries. These are the exclusionary imaginaries produced in the constitutional discourse through various types of binding, semi-binding or just convincing narrations, e.g. constitutional theory, valid constitutional interpretation, legislative will, agents of public opinion etc.

The exclusionary imaginaries are not necessarily a system. They may be systematized under specific societal and temporal condition in a concrete situation and society. Nevertheless, such system of exclusionary imaginaries is usually context dependent and context specific. Naturally, there is a degree of predictability for the emergence of exclusionary imaginaries. This means, that one can suggest that under set of preconditions the emergence of specific exclusionary imaginaries is highly likely or very possible. Also, there are specific types of marginals that are defined by the different political and constitutional regimes which can be predicted and typified. However, the set of exclusionary imaginaries in a given society must be explored in an unprejudiced way and the imposition of a general typologies or universal categories has to be done while considering the context—anthropological, historical, socio-political etc.

After that initial waver of context insensitivity, we can outline three main strategies for production of exclusionary imaginaries. These are the segregation, marginalization, and exclusion.

Segregation is typically practiced in racially divided societies. It is a strategy for creation of ‘oil in the water’ type of societal separation. Segregation rests upon racial imaginaries of otherness. Clearest examples are the figures of the slave, the indigenous person, and the ‘dangerous other’. In some countries, e.g., in India, as well as in some Spanish regions in the past a powerful example of segregation were the so called ‘untouchables’.

Exclusion is a radical form of societal division. It is used for radical disenfranchisement of groups of people which makes them structural marginals. The census based political rights in general and the census electoral right in particular are the most important example. The range of known instruments of political disenfranchisement—the gender, race, ethnicity, property, and tax census—rest upon different exclusionary imaginaries that are explicit or much more frequently implicit and tacitly presupposed as constitutional underwater and undercurrent of discrimination. The most evident exclusionary imaginaries are the imaginary figures of the poor, the pariah, the outcast, and the housewife.

The most fuzzy, obscure, but also complex form of exclusionary imaginary is marginalization. Indeed, segregation and explicit exclusion might also be considered as forms of marginalization. This is because they also rest upon exclusionary imaginaries and produce marginalization. Nevertheless, the marginalization strategies proper are also to an extent the most dangerous. This is due to the fact that they produce exclusion in a much more implicit way that is hard to combat with legal means but which produces durable results because of its intense emotional and symbolic-imaginary appeal.

Marginals are usually produced with paralegal means. In contrast with segregation and exclusion, marginalization is frequently a narrative phenomenon. It is shaped with linguistic techniques in range of authoritative and semi-authoritative narratives, but also in constitutional and constitutionally relevant signification discourses. These

include various forms of textual, visual, and performative constitutionalism. Thus, marginalization may be stemming from constitutional and constitutionally relevant texts, but also from similar textures—visual depictions, performative political and politically relevant practices.

In that regard, marginalization, in contrast to segregation and exclusion, is less institutionalized, less detectable in clear legal texts. Instead, it is extractable via interpretation of marginalizing contents available in visual and performative constitutionalism that signify elements of symbolic-imaginary constitutionalism and refer to emotional constitutionalism. Hence, marginalization content and signifiers serve as an occasion for subsequent and additional stigmatizing and marginalizing or destigmatizing and demarginalizing narratives.

Marginalization produces ‘cursed spaces’ and ‘cursed people’ [12]. Such cursed status may be temporal and permanent. Clear example of cursed stigmatization and marginalization are the forms of segregation and especially the status of the untouchables described above. The belongingness to ethno-religious groups that are object of targeted politics of fear (e.g. fear from migration, fear from terrorist behavior) are cases of quasi-permanent marginalization. Important examples of temporal marginalization are the sick people targeted as ‘virus spreaders’ through the forms of pandemic politics of fear in times of different health emergencies (the pest in the late Middle Ages and Covid-19 in recent years) [12].

6 Constitutional Imageries, Memory and Exclusion in Practice: Selected Cases from Central and Eastern Europe

In the sections above, we investigated the various theoretical aspects of the relationship between the constitutional imageries, exclusion and the ever-influential past. Before concluding this paper, we propose a practical engagement with these issues on selected case studies from Central and Eastern Europe.

This region, in which all but one country—Estonia—has adopted a new constitution in the aftermath of 1989, is a particularly interesting case study, a veritable time capsule of approaches to statehood prevalent in the 1990s, a time of George H. W. Bush and Bill Clinton’s presidencies and an omnipresent *Zeitgeist* of the ‘end of history’.³ Given that the authors hail from Bulgaria and Poland, respectively, the constitutions of the two countries are going to be the objects of this case study.

The 1991 Bulgarian Constitution relies on all the three imaginaries of constitutional integration and inclusion that are pivotal for the representative liberal democracies. These are the already mentioned liberal imaginary of the constitution as neutral legal framework, democratic imaginary of constitution as a social contract, and the imaginary of the constitution as a pillar of the constitutional project. It tries to serve as an inclusive framework produced by liberal competitive democracy.

Thus, the Bulgarian constitution does not provide for consociational matrixes for inclusion. Rather, it produces liberal-democratic and republican model for inclusion/

³ Hungary is the only country of the region to have adopted its new—or readopted an old one, as in the case of Estonia – constitution only in 2011. See: [45, p. 189–212].

exclusion. It does not provide for religious, ethnic, racial, or ideological instruments, strategies or imaginaries of exclusion. Indeed, the Eastern Orthodox religion is declared to be the traditional one, but it is not official religion. Moreover, the religious denominations are separate from the state and enjoy equal treatment and autonomy.

The pillar of social integration that aims at prevention of marginalization, stigmatization, and exclusion is the general equality clause provided in Article 6 of the Constitution. According to it:

1. All persons are born free and equal in dignity and rights.
2. All citizens shall be equal before the law. Neither any abridgement of rights nor any privileges whatsoever shall be admissible on the basis of race, nationality, ethnic identity, sex, origin, religion, education, convictions, political affiliation, personal and social status, or property status.

The constitution itself provides for pluralist integration containing forms for limitation of political pluralism that are commonly used in Western constitutionalism. They aim at producing functioning and efficient parliamentary system of governance and at limiting the forms for political participation that may endanger the liberal-democratic constitutional equilibrium.

The Bulgarian constitution does not provide for any form of targeted marginalization, stigmatization, and exclusion. There are neither parts of the constitutional past, nor specific groups of people which are constitutionally dismantled, disintegrated, or cursed. There is also no official enemy—ideological, historical, geopolitical, external, or internal—that is provided by the constitution.

The condemnation of the past is relatively recent phenomenon in Bulgaria. The communist regime has been declared to be criminal in the year 2000 by an Act of Parliament. Nevertheless, neither the communist ideology, nor the establishment of communist parties is prohibited.

Memory wars in Bulgaria are led mostly on societal level via ideological battles and even pop-art. The examples of such memory wars aiming at labelling, stigmatization, and exclusion of various segments of the society have been prolific in the last three decades after the fall of communism. These memory wars are led through textual, but mostly via visual and performative signifiers of meaning including art, architecture, pop-art, performative events etc. These symbolic-imaginary battles have been concentrated in the capital city of Sofia and were revolving mostly around the destroyed mausoleum of the communist leader Georgi Dimitrov, the partially deconstructed Monument of the Soviet Army and many other artefacts and bearers of ideological meaning.

Thus, the 1991 Constitution is not the source of constitutional imaginaries of marginalization, stigmatization, and exclusion. It provides for certain qualitative limitations for political pluralism, e.g. prohibiting in its article 11, paragraph 4 political parties on ethnic, racial, or religious basis or any parties which make it their object to seize state power by force. Nevertheless, there is no social, political or cultural group which is marginalized, stigmatized, and excluded. Thus, the 1991 Constitution provides a stable basis for socio-political integration. Marginalization, stigmatization, and exclusion are not constitutionally or legally entrenched. They are stemming

from the constitutional practice and from the identity battles, memory wars, and patterns for inclusion and exclusion on the ground and in the ‘law in action’. Thus, the socio-legal discourse is the main source of constitutional imaginaries of inclusion and exclusion.

The Polish constitution, adopted in 1997, was the last new constitution in the region until the 2011 Hungarian one; while the reasons for such a long temporal distance from the transition to communism remain outside the scope of this paper,⁴ its guiding principles followed for the most part other basic laws of the region. While its preamble constructing a particularly vivid imaginary [45, p. 208–209], of particular interest here are the constructions of marginalisation.

The Polish constitution does not, as Marek Piechowiak notes, speak directly to the questions of social exclusion [37, p. 141]. In does, however, in article 32,⁵ stipulate that

1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

This article, Cendrowicz argues, represents instructions to the authorities, granting an unconditional protection to all individuals and collective bodies [19, p. 25]. At the same time, as Piechowiak remarks, such a construction of the rule of equality is “unfortunate,” given that it does not speak about equality in law, equal legal protection or equal rights next to equality before the law—these had to be inferred by the Constitutional Tribunal [37, p. 141].

Other articles relating to social exclusion are Article 33 –.

1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.
2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

– the much more general Articles 1—“The Republic of Poland shall be the common good of all its citizens—and 2—“The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice,” and Article 30 –.

The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

⁴ See, e.g.: [42].

⁵ All articles of the Polish Constitution in this article are cited from the official English translation at the parliament’s website: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

To once again follow Piechowiak's observations, these rules themselves are not enough to prevent social exclusion, needing to be supplemented by more precise rights [37, p. 142] in the fourth part of Chapter II of the Constitution on the Economic, Social and Cultural freedoms and Rights (Articles 64–76), as well as the rule of social solidarity expressed in Article 20. This rule directly connects to the obligation of the protection of human dignity established in Article 30 [19, p. 25].

The imaginary established by the Polish constitution carries certain more common exclusions—such as in the case of foreigners, whose rights will be protected by Article 30, relating to their dignity as fellow humans, rather than Article 1, as in the case of Polish citizens [37, p. 144–145]—however the collective memories influencing the country's constitutional imaginaries have resulted in two particular exclusions that are of particular interest.

The first, less controversial one, relates to the prohibition of the functioning of fascist, Nazi or communist parties in Article 13. It states that

Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited.

Here, the impact of collective memories of the Polish difficult past on the legal text establishing the constitutional imaginary is clearly visible: the freedom of political association is restricted at the basics of the legal system, furthermore at the beginning of the constitution, resulting in a marginalisation of certain groups from the political life. As stipulated by Kamil Kłeczek, Article 13 means that in addition to the three directly prohibited types of political movements, also Maoism, Marxism, Marxism-Leninism, as well as the different types of communism, Bolshevik, Trotskyist and Stalinist—but not Eurocommunism, given that it was not a state system—are prohibited [31, p. 94; 97].

So far, there were several cases involving Article 13, among these two major ones. The first, in 2011, considered a first-right organisation which, upon trying to register several symbols considered fascist was referred to the Constitutional Tribunal by a District Court; the Tribunal, however, found that the Court did not provide enough arguments to support its decision and, as such, found itself without capacity to make a decision in this case, rather discontinuing the proceedings [35].

More recently, in 2020, the then Minister of Justice and Attorney General filed a motion to the Constitutional Tribunal to delegalize the currently functioning Communist Party of Poland, citing both Article 13 and Polish collective memories [21]; over four years later, the Constitutional Tribunal has yet to act on the motion, supposedly due to 'weakness in argumentation' of the motion [23]. Interestingly, should the Tribunal one day take a decision to delegalize a communist party in Poland, the country may find itself at odds with the European Court of Human Rights, which in the Vajnai case found that a prohibition of the display of communist symbols in Hungary contravened the Convention, due to a limited chance of a communist party

endangering the Hungarian state [26, p. 46]; a similar decision, perceiving limits on the political life as leading to marginalisation and exclusion of certain groups, could be taken in a hypothetical Polish case. At the same time, given the omnipresent collective memories of World War II and communism in Poland, this particular constitutional marginalisation seems to be widely accepted by the society.

The second, more controversial exclusionary constitutional imaginary on the basis of the Polish basic law relates to the question of same-sex marriage. According to Article 18 of the Polish Constitution, “Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.” Heavily influenced by the historic ties of the Polish society with the Catholic Church [55, p. 96], this particular wording has resulted in wide-ranging debates among jurists across generations as to what is the exact meaning of Article 18. For example, Bolesław Banaszkiewicz [3] argues that it closes off the door to even civil law same-sex partnerships, a viewpoint criticised Ewa Łętowska and Jan Woleński [34, p. 38–39] or Marlena Drapalska-Grochowicz [22]. Importantly, a study of the attitude of the Polish courts to the transcriptions of same-sex marriages of the Polish citizens which were entered into in other member states of the European Union conducted by Wojciech Zomerski [55, p. 95] shows that the institutional marginalisation and exclusion of homosexuals are a reality, stemming from a particular construction of the Polish constitutional imaginary, one not necessarily with a purely legal, but rather a collective memory basis. A recent, 2024 poll showed a growing support towards some form of legalisation of same-sex relationships [30], however no government so far has adopted a law attempting to regulate the issue, which would then be bound to be tested by the Constitutional Tribunal and close the matter from the legal perspective. Thus, it remains to be seen whether shifts in social perceptions will result in shifts in constitutional imaginaries.

7 Conclusion

Within this paper, the journey took us from the theoretical ruminations on the nature of marginalization, stigmatization and exclusion, through the analysis of the relationship between collective memory and constitutional imaginaries, up to the investigations of the ways in which those imaginaries, based on the carefully selected memories, strive to marginalize, stigmatize and exclude.

It has been demonstrated that the procedures for inclusion and exclusion in the constitutionally framed socio-legal community are interrelated on conceptual, legal, empirical, and imaginary levels. They are both a matter of institutional design and constitutional imaginary shaping of the constitutional phenomena of inclusion and exclusion. It has been shown that there is a wide variety of legal and imaginary strategies for marginalization, stigmatization, and exclusion. Many of them operate in time activating constitutional memories. Thus, marginalization, stigmatization, and exclusion are embedded in the constitutional pas—and are thus an object of constitutional memory politics.

What becomes particularly visible is how interconnected the social and the legal spheres are when it comes to the ways a constitution is put into practice. Decades

and centuries of a community's historical baggage coming into the present in the form of collective memories—whether or not a country was colonized or a colonizer, attitudes towards foreigners, religious norms impacting family life—they all shape the constitutional reality of any state. Importantly, while constitutional memories *per se* may not be as easily noticeable in the text of the constitution itself—for example, due to a particular moment in time which led to the drafters adopting a liberal democratic outlook—the constitutional imaginary of the country in question will have been already heavily populated with various specters of collective memories of the past, in a prime position to overpower the more open narratives promoted in the new constitution.

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