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Minority Rights (Un)Protection in the Republic of Croatia: the Dark Side of the Law

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It is often said that men are ruled by their imaginations;
but it would be truer to say that they are governed
by the weakness of their imaginations.
(Walter Bagehot [1967], 1963, 82)

Introduction

Almost six years ago, on 1 July 2013, the Republic of Croatia became the 28th EU member state. The realization of this strategic goal, which was compared in the country only to the 1992 international recognition,[1] came after a long and complex integration process. In order to join the EU, Croatia was subjected to a rigorous application of membership conditionality: the 1993 Copenhagen criteria were stricter applied than in the previous EU eastern enlargements of 2004 and 2006, and the country had to satisfy some additional criteria, developed by the EU with the 1999 Stabilization and Accession Process (SAP) as part of its enlargement policy towards the Western Balkans.

Among the various requirements Croatia had to fulfill on its road to the EU, an emblematic problem was given by the protection of minority rights. If compared to other countries of Central and Eastern Europe which acceded the EU in 2004 and 2006, Croatia had a unique situation in relation to national minorities. The reason was not given by the relatively large number of minority groups present within its territory, but rather by the country's recent past.[2] As a result of the violent break-up of Yugoslavia, Croatia experienced in the 1990s the war and ethnic conflict, as well as a decade of ultra-nationalist rule which led to the establishment of an authoritarian regime and international isolation. The 1990s were thus marked by a hostile approach toward national minorities, in particular the Serb community, but also other ethnic minority groups. It was only in 2000 that, thanks to the change of government, a new political climate emerged; it allowed the parallel launch of the processes of democratization and Europeanization within which minority rights became a central theme. In fact, the perspective of the EU membership for Croatia (and more generally the Western Balkans) was envisaged by the EU institutions as an incentive for democratization and reconciliation against the post-war ethnic intolerance and regional tensions. The protection of minority rights thus became one of the crucial aspects of Croatia's integration process.[3]

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[1] D. Jovic, 'Croatia and the European Union: a long delayed journey', in *Journal of Southern Europe and the Balkans*, No. 1, Vol. 8, 2006, p. 85.

[2] S. Tritunovska, 'Minority Rights Protection', in *International Journal on Minority and Group Rights*, No. 6, 1999, p. 463.

[3] C. Gordon, G. Sasse, S. Sebastian, *Specific report on the EU policies in the Stabilisation and Association process*, EURAC Research, January 2008, p. 4. The EU conditionality on minority rights is notably enclosed in the Copenhagen political criterion, which expressly refers to the "respect for and protection of minority rights" as a precondition for accession. In addition, the 1999 SAP introduced some other requirements, aimed at stabilizing the post-conflict majority-minority relations: a) regional cooperation (i.e. the requirement to establish a network of close contractual relationships with other Western Balkans countries); b) good neighbourly relations (which encouraged Croatia, but also other countries of Western Balkans to work with each other in a manner comparable to the relationships that exists between EU members), and c) the respect for international obligations (in particular, the full cooperation with the ICTY).

Under the EU conditionality, Croatia's approach towards national minorities became more collaborative; it also changed the normative framework within which minorities are regulated, including the Constitution. On the eve of Croatia's accession to the EU, the European Commission expressed appreciation for the difficult reforms undertaken, and congratulated Croatia for reaching out for reconciliation. Moreover, Croatia's accession to the EU made believe that the time of ultra-nationalism and ethnic conflict belong to the dark period of the 1990s, and that democracy and reconciliation would be preserved and safeguard within the broader European framework. However, recent events show us that exactly the opposite took place. Following the EU accession, Croatia has experienced a significant resurgence of nationalism and historical revisionism as a reason for division along ethnic lines. Despite the normative framework which incorporates the EU standard on minority rights, international observers are warning that reconciliation has stalled, democracy is backsliding, and the most important human rights problem is still the discrimination and violence on grounds of race, ethnic origin, and national belonging.[4]

Why the incorporation of EU standards is not safeguarding democratic consolidation and post-conflict reconciliation in Croatia? Existing studies generally assume that Croatia presents a respectable normative framework on minority rights,[5] but that the main problem is given by the lack of the EU post accession monitoring for its implementation.[6] By contrast, this paper focuses on nation building and minority rights protection in Croatia with the aim to show that the Croatian normative framework on majority-minority relations contains a "dark side". This "dark side" is embodied in the concept of the nation, which heavily marks the Constitution, and have a direct impact on legislation. Croatia has, in fact, the features of a nation state *of* and *for* the Croat ethnic community. Under the EU conditionality these features were largely dormant (thus probably ignored by the EU), but reawakened following the EU integration. The main argument of the paper is that in a country, which is perfectly designed for a dominant ethnic group, national minorities have no future: as members not of the dominant ethnic group they will always be (and they are) politically subordinate to the dominant nation; as individuals they will be (and they are) continuously discriminated. In order to prove such assumptions, the paper analyses the country's Constitution and its impact on legislation, particularly the 1991 Citizenship Act and the 2002 Constitutional Act on Minority Rights, as well as Constitutional Court's case law. It uses an interdisciplinary approach which integrates constitutional law with nationalism studies and memory studies.

1. The Croatian Christmas Constitution: a document full of imaginations

The fundamental framework within which majority-minority relations are constructed in the Republic of Croatia is provided by the country's Constitution. The latter was adopted on 21 December 1990, therefore it is popularly known as the Christmas Constitution.

The Constitution opens with a preamble, which is entitled "Historical foundations". Although the preamble deals with ethnic relations, it only occasionally received some attention, and thus still lacks of an exhaustive interpretation. This is mainly because constitutional law is not sufficient to determine its proper meaning; on the contrary, it can lead (and it has led) to some erroneous interpretations. In order to properly understand the preamble, constitutional law needs to enter into a dialogue with other disciplines, particularly nationalism studies and memory studies. By applying such interdisciplinary dialogue, it can be sustained that the preamble to the Croatian Constitution is largely composed of three parts: a) the constitutionalization of collective memory, which acts as a foundation of b) national identity and legitimize c) the existence of today's Croatia as an independent nation state. In other words, the preamble represents an example of nation building through the

[4] See for example, ECRI Report on Croatia, 5 May 2018.

[5] See for example A. Petričušić, 'Wind of Change: The Croatian government's Turn towards a Policy of Ethnic Reconciliation, in EDAP, No. 1, 2004, p. 1.

[6] See generally, G. Schwellnus, L. Mikalayeya, 'It ain't over when it's over: The Adoption and Sustainability of Minority Protection Rules in New EU Member States, in *European Integration Online Papers,* 2009, p. 17.

Constitution.[7] What follows is an exam of the three parts of the preamble by revealing their impact on majority-minority relations.

a) *The Constitutionalization of Collective Memory: Myths and Symbols of the Nation*

The preamble begins with an expression of the "thousand year national independence and state continuity of the Croatian nation and the "historical right of the Croatian nation to full sovereignty", as manifested by a series of states: the creation of Croatian principalities in the 7th century; the independent medieval Kingdom of 9th century; the Kingdom of Croats under Austro-Hungarian domination (1527-1868) […]; the accession of an independent Croatia to the State of Slovenes, Croats and Serbs (later Kingdom of Yugoslavia, 1918-1939); the Banate of Croatia (1939-1941); the decision of the Joint Anti-Fascist Council in 1943 in opposition to the proclamation of the Independent State of Croatia (1941), and the existence of the People's (later Socialist) Republic of Croatia (1947-1990). It then states that in the historical overthrow of communism in 1990, the Croatian nation reaffirmed its millennial statehood and established the Republic of Croatia by the present Constitution and the victory in the Homeland War (1991-1995) (added in 1997). All of these are considered to be historical facts, thus the preamble claims that it contains real history. This led some constitutional law scholars to assert that the description of Croatian national history in the preamble to the Constitution amounts to a kind of "history lesson" conceived of in order to make the Constitution more accessible for young people, which is claimed to confirm the position that contemporary Constitutions also have a pedagogical dimension.[8]

Yet the main problem is that the preamble to the Croatian Constitution is lying. History based on facts is totally different from what it has been assumed to be in the preamble. First, terms such as nation and nation state are relatively new phenomenon, which emerged in the 19th century. Croats are thus not a multimillennial nation, but a relatively recent nation. Second, the thousand year independence and continuity of the present day Croatia with a series of states listed in the preamble is an non-existent tradition. For example, the Croatian medieval state existed, but it was not an independent nation state. Medieval states were dynastic states, centered on the ruler. Moreover, Croatia has never been established through the history as a viable independent state as its territory was always part of broader empires, larger states or federations.[9] The first Croatian nation state is hence the one established in 1991, following secession from the former Yugoslavia. In addition, the basis for the 1991 independence and international recognition were not certainly given by the multimillennial statehood, as the preamble claims, but by the last 1974 Yugoslav Constitution, which endorsed the principle of self-determination, including the right of secession. The preamble is thus backdating history for thousands of years. This is because it does not contain Croatian history (as has been erroneously assumed), but the collective memory of Croatian nation.

Collective memory (i.e. the way in which societies and groups of different types collectively remember the past) has been traditionally cited as an essential component of nation building.[10] Memory is not, however, a synonym for history. While history's goal is the discovering of historical facts, memory's goal is the creation of national identity. Collective memory tends to create myths about nation's past (fictitious historical narratives), and is thus often associated to invented traditions, fabrication of history or historical revisionism. Nations are imagined communities,[11] and they need collective memory in order to survive. Whether immaterial (myths and symbols) or material

[7] On nation building through the Constitution see A. von Bogdandy, S. Häußler, F. Hanschmann, R. Utz, 'State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches', in *Max Planck Yearbook of United Nations Law*, Vol. 9, 2005, p. 579.
[8] See P. Häberle, 'The 1991 Croatian Constitution in the European Legal Comparison' in *Croatian Political Science Review*, Vol. 37, No. 1, 2000, p. 50.
[9] See J.V.A. Fine, *When Ethnicity Did Not Matter in the Balkans. A Study of Identity in Pre-Nationalist Croatia, Dalmatia and Slavonia in the Medieval and Early Modern Periods*, Ann Arbor: University of Michigan Press, 2006, p. 3.
[10] C. Calhoun, 'Nationalism and Ethincity', in *Annual Review of Sociology* Vol. 19, 1993, p. 211.
[11] B. Anderson, *Imagined Communities*, London: Verso, 1983.

(monuments, museums, etc.) collective memory provides for a sense of cohesion and unity and defines the imagined boundaries between the common WE-identity and the otherness.[12] The fact that the national memory is always constructed does not mean that it represents per definition a negative phenomenon. Everything depends on how the past is reconstructed: if the past is reconstructed in service of peace projects, collective memory can serve as a useful tool for reconciliation, especially in post-conflict societies. Conversely, the past can be manipulated for political strategies in order to justify divisions, conflicts and even wars.

The preamble to the Croatian Constitution follows the second path. In fact, the Croatian Constitution represents a formidable example on how Constitutions should not be written if the goal is reconciliation. By contrast, it is a very good example of how to use the Constitution as a tool for promoting ethnic divisions. More precisely, the preamble (as well as some other provisions) constitutionalizes all the key components of Croatian collective memory: a) the ethnogenesis myth; b) the myth about WWII (implicitly), and c) the myth about the Homeland War (1991-1995).[13] All of these myths were created in the 1990s under ultra-nationalist ideologies. Nationalism exchanged history for myths, and myths come to function as official history, penetrating into the collective memory. The preamble to Croatian Constitution is heavily marked by such developments; it was penned by the first Croatian President, Franjo Tudjman, notably known for promoting revisionist versions of history.[14] For example, the ethnogenesis myth (the multimillennial existence of the nation) glorifies the history of a very old nation, but also its suffering and perennial claim to have its own nation state. In the 1990 (when the Constitution was adopted), Croatia was still one of the constituent republics of the former Yugoslavia, and the ethnogenesis myth had the aim to distinguish as much as possible Croats from other Yugoslav nations (which are all ethnic groups with almost same language and history). In other words, the ethnogenesis myth was (and still is) aimed at creating boundaries between Croatian nation and the otherness, thus legitimizing also the birth of Croatia as an independent nation state.

The myth about WWII is more complex. The preamble clearly states that modern Croatia is founded on anti-fascist values and that it has been constructed in opposition to the Independent State of Croatia (the Nazi puppet state which existed from 1941 to 1945, run by the Ustasha – the Croatian fascist movement; hereinafter NDH regime). However, this seems only a symbolic statement; in fact, constitutional provisions which define national symbols tell us a different story. According to the Article 11 of the Constitution, the official symbols of the present day Croatia are the chessboard coat of arms and the Croatian national anthem, which are depicted as historical Croatian symbols (from the Middle Ages). Nonetheless, these symbols together with *kuna* (the current Croatian official currency) were also used by the NDH regime. Although they were symbolically compromised during WWII, the Constitution has restored them as official symbols of the present day Croatia. The 1997 constitutional reform added to this a new official denomination of the Croatian legislative body, which was named "Hrvatski državni Sabor", the same title which was used during the NDH regime (it was then changed into Croatian Sabor thanks to the 2000 constitutional reform). Article 11 of the Constitution still reflects, however, the WWII revisionism officially promoted by the state under the Tudjman regime of the 1990s. Notably, Tudjman claimed that the NDH regime was not simply a quisling creation and a fascist crime, but also an expression of the historical yearnings of the Croat nation for its own independent state. As a result, Article 11 probably represents the "darkest side" of the Croatian Constitution; it opens the gate for conceiving today's Croatia in continuity with the fascist Ustasha regime.

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[12] C. Calhoun, 'Nationalism and Ethincity', cit.

[13] D. Gavrilović, V. Perica, (eds.), *Political Myths in the Former Yugoslavia and Successor states. A Shared Narrative*, The Hague: Institute for Historical Justice and Reconciliation, 2011.

[14] V. Pavlaković, 'Flirting with Fascism: The Ustaša Legacy and Croatian Politics in the 1990s,' in D. Gavrilović, *The Shared History and The Second World War and National Question in ex Yugoslavia*, Novi Sad: CHDR, 2008.

The latter issue is not only theoretical. For example, in 2015 under the new rise of nationalism the Croatian President of the Parliament proposed to change the official denomination of the legislative body from "Hrvatski Sabor" to "Hrvatski državni Sabor", thus using again the same title which was used during the NDH regime. A few months earlier, a popular initiative (signed by 3900 people, including many academics) has been addressed to the current President of the Republic, Kolinda Grabar Kitarović, to urge legislative changes aimed at including the pro-fascist chant "For the Homeland Ready" as an official chant of the present-day Croatian Army. In the same period, the controversial former Minister of Culture, Zlatko Hasanbegović, started to promote historical revisionism aimed at downplaying the Ustasha regime and undermine the anti-fascist values even though the latter are contained in the Constitution. This culminated in the vision of the Homeland War of the 1990s (that is the armed conflict which took place in Croatia from 1991 to 1995 as a result of the violent Yugoslav break-up) as the only war that Croats had ever won, implying in this way that Croats who had fought as Partisans in WWII were traitors because they fought for Yugoslavia and not for Croatia, and that therefore the true Croats are represented only by the Ustasha.

In fact, the myth about WWII is strictly connected in Croatia to the myth about the Homeland War. An explicit reference to the Homeland War was introduced in the preamble by the 1997 constitutional reform. The latter has been viewed by some Croatian constitutional law scholars as very relevant as it introduced a "constitutionally expressed determination and readiness" for the establishment and preservation of the Republic of Croatia as independent sovereign and democratic state.[15] More recently, the 2010 constitutional reform (adopted in order create the constitutional basis for Croatia's full membership in the EU)[16] further changed the part of the preamble dedicated to the Homeland War by adding: "the victory of Croatian nation and Croatia's defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995), wherein the Croatian nation demonstrated the will to establish and preserve Croatia as an independent state."

The new constitutional definition of the Homeland War resembles the official narrative of the war of the 1990s, which emphasizes its defensive character and considers it as the resistance of Croatian nation to the greater Serbian aggression. In particular, the term "defenders" was introduced in the 1990s as an official and legal title for Croatian soldiers in the war, reinforcing in this way the assumption that Croats were leading a defensive war on their own territory, which united all patriotic forces of the same ethnic group against the others.[17] The constitutionalization of such definition of the Homeland War is very problematic if the intent of the country is to move towards reconciliation: first, it does not clarify that Croatia considered as its own territory part of Bosnia-Herzegovina, and that Croatia's intervention in Bosnia-Herzegovina, formally justified as a support to the Croat community, led to the creation of a new autonomous region, *Herceg-Bosna*, with the intention of annexation and realization of the myth of Greater Croatia. Second, it does not take into account its civilian victims, mainly Serbs, and the exodus of approximately 300,00 Serbs following the military actions. Croatia was thus accused of ethnic cleansing of its Serb population. Finally, on 5 August Croatia celebrates the Day of Victory in the Homeland War, which is an increasingly divisive celebration and, in some cases, an open exaltation of the NDH regime; in neighbouring Serbia the celebration is identified with ethnic cleansing aimed at expelling the Serbs from Croatia.

By constitutionalizing collective memory, the Croatian Constitution became both the author and the narrator of nation's past; it can be thus considered as a *lieu of mémorie*. However, the past that the Constitution is narrating is extremely divisive and based on non-democratic rather than democratic values: the ethnogenesis myth draws demarcation lines between the common WE-identity and the otherness; the myth about WWII is flirting with fascism, and the myth about Homeland War

[15] S. Sokol, 'Promjene Ustava Republike Hrvatske', in S. Sokol, B. Smerdel (eds), *Ustavno pravo*, Zagreb: Narodne novine, 2009, p. 36.
[16] See B. Smerdel, 'Republic of Croatia', in L. Besselink, P. Bovend Eert, H. Broeksteeg, R. De Lange, W. Voermans, (eds.), *Constitutional Law of the EU Member States*, Deventer: Kluwer, 2014, p. 191.
[17] D. Gavrilović, V. Perica, (eds.), *Political Myths in the Former Yugoslavia and Successor states. A Shared Narrative*, cit., p. 70.

is a narrative about self-victimization and apportioning all blames to the other side. The fact that such divisive and non-democratic values based collective memory has been inserted into the Constitution has opened a constitutional space through which dormant non-democratic ideologies can be reawaken. This is not an exaggeration: for example, the Council for dealing with the legacies of undemocratic regimes (set up by the government and mainly composed of academics) held in 2017 that the fascist Ustasha chant "For the Homeland Ready" should be considered in certain circumstances in line with the national Constitution.[18]

b) *The Foundation of National Identity and the Legitimation of the Nation State*

After introducing key components of Croatian national memory, the preamble to the Croatian Constitution deals with concepts of nation and nation state. In Croatia, the concept of the nation is one which prevails in Germany and other Eastern European countries (including the Western Balkans). According to this concept, *ethnos* prevails over *demos*, meaning that the nation is defined in terms of ethnic origins, race, language, etc. The nation state is the state which incorporates the nation and is primarily defined in terms of ethnic homogeneity.[19]

Following this formula, the preamble continues by referring to the inalienable right of the Croatian nation to self-determination and state sovereignty, and declares that the Republic of Croatia is established as the nation state of the Croatian nation and a state of members of other nations and minorities who are its citizens. This statement is crucial for establishing the constitutional framework of majority-minority relations. In fact, the preamble claims that Croatia is the state of an collective individual (the Croatian nation defined in terms of ethnicity) entitled to the statehood, and of other nations and national minorities that do not belong to it.[20] The fact that the preamble privileges the members of one ethnically defined nation over the residents represents a departure from currently accepted democratic constitutional norms which view the individual citizen as the basic subject of the Constitution. In Croatia the subject of the Constitution is not an individual, but an collective individual (the ethnically defined nation).[21] Yet, this perfectly resembles the Balkan nationalism, which is conceived as being all about 'blood and belonging'.[22]

The constitutional definition of the ethnic nation has an incredible impact on other constitutional provisions. First, the preamble explicitly states that sovereignty resides in a particular nation (in fact, it opens by declaring a historical right of Croatian nation to full sovereignty). Second, the concept of ethnic nation incorporates not only ethnic Croats living on the territory of Croatia, but also ethnic Croats abroad (the so called diaspora). As a result, the ethnic nation is imagined here as a trans territorial community (according to the Article 45 of the Constitution Croats abroad have right

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[18] See The Council for Dealing with the Consequences of Undemocratic Regimes, 'Dialogue document: postulates and recommendations on specific normative regulation of symbols, emblems and other insignia of totalitarian regimes and movements', Zagreb, 28 february 2018.

[19] See U.K. Preuss, 'Constitutional powermaking for the new polity: some deliberations on the relations between Constituent power and the Constitution', in *Cardozo Law Review*, No. 14, 1992/1993, p. 639. More generally, the force of attraction of this concept of nation-state in the Western Balkans has been heavily criticized by several authors. According to R. Iveković, *La balcanizzazione della ragione*, Roma: Manifestolibri, 1995, p. 71 the nation state, that is a state with one single nationality, is an absurd idea within a mixed country if it is to designate one single ethnic identity. Similarly, A. Hastings, *The Construction of Nationhood. Ethnicity, Religion, Nationalism*, Cambridge: Cambridge University Press, 1997, 101 argues that this model of nation-state is very distant from the reality of the Balkans, where nations never coincide with states: some states are multi-national and some nations have a national core but significant populations in neighbouring states. Each state thus experiences the problem that the minority in that state constitutes the majority in the neighbouring state. For these reasons, the creation of nation-states in the Western Balkans inevitably entails conflict, and gives rise to enormous injustices for minorities.

[20] In this sense, see also S. Mancini, 'Secession and Self-Determination', in *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, p. 481, and R.M. Hayden, 'Constitutional Nationalism in the Formerly Yugoslav Republics', in *Slavic Review*, No. 4, 1992, p. 654.

[21] See R.M. Hayden, 'Constitutional Nationalism in the Formerly Yugoslav Republics', cit., 656.

[22] M. Ignatieff, *Blood and Belonging*, Toronto: Viking, 1993.

to vote).Third, "national equality" (i.e. the equality of people belonging to Croatian nation) is among the greatest values of the constitutional order (Article 3 of the Constitution), while the equality of members of all nations and minorities is separately declared (Article 15 of the Constitution; it grants also their cultural autonomy). In other words, an unequal position of minority groups has been constitutionalized.

c) *The Position of National Minorities in an Ethnically defined Nation State*

Since the original version of the preamble, the definition of Croatia as a nation state of Croatian nation and a state of other nations and national minorities has been accompanied by providing a list of minority's groups living within its territory. The initial 1990 version of the preamble included: "Serbs, Muslims, Slovenes, Czechs, Slovaks, Italians, Hungarians, Jews and others, who are guaranteed equality with citizens of Croatian nationality and the realization of ethnic rights". The 1997 constitutional reform then changed this initial list by erasing Albanian, Bosnian and Slovene ethnic groups from the list of autochthonous national minorities and adding a specific reference to the victory in the Homeland War in the Constitution's preamble. The measure represents a clear example of the hostile attitude Croatia had in the 1990s not only towards the Serb community, but also other national minorities. The erasure of the three ethnic groups from the preamble caused great discontent among citizens of those ethnic origins. The Venice Commission, which examined this measure, observed in its opinion that "it became clear later, when the electoral law was adopted, that this amendment had negative effects on the representation of the minority groups whose mention in the Preamble was deleted."[23]

Thus, the opinion of the Venice Commission clearly shows that the practical effects of changes like this can be ignored or not comprehended by supranational organizations. The 1997 constitutional reform created two types of national minorities: the autochthonous minorities and the "others". Therefore, three excluded minority communities protested that they were deprived of the status of the autochthonous minorities, even though they constituted numerous minority communities in Croatia. Nonetheless, until the 2010 constitutional reform the preamble of the Constitution stated: "the Republic of Croatia is established as the nation state of the Croatian nation and the state of the members of autochthonous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians and the others who are citizens, and who are guaranteed equality with citizens of Croatian nationality and the realization of national rights in accordance with the democratic norms of the United Nations Organization and the countries of the free world."[24] This created an unequal position not only between Croatian nation and national minorities, but also between different national minorities which were distinguish in two groups (autochthonous minorities and the others).

Finally, the preamble was further amended by the 2010 constitutional reform. However, in relation to majority-minority relations the 2010 Euroamendments represent a pseudo constitutional changes. On the one hand, with the aim to demonstrate the democratic orientation of Croatia on its road towards the EU, as well as solve past injustices,[25] but most probably under the EU pressures, a

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[23] Opinion of the Venice Commission on the Croatian Constitutional Law of amending the Constitutional Law of 1991, 20 June 2000.

[24] According to the 1991 census, in Croatia there were 12,032 Albanians, 214 Austrians, 43,469 Muslims, 458 Bulgarians, 9,724 Montenegrins, 13,068 Czechs, 22,355 Hungarians, 6,280 Macedonians, 2,635 Germans, 679 Poles, 6,695 Roma, 810 Romanians, 706 Russians, 5,606 Slovaks, 581,663 Serbs, 21,303 Italians, 320 Turks, 2,494 Ukrainians, 22 Vlachs, 600 Jews and 3.012 other ethnic and national minorities. In comparison, according to the last census in 2001 in Croatia there were 15,082 Albanians, 247 Austrians, 20, 755 Muslims, 331 Bulgarians, 4,926 Montenegrins, 10,510 Czechs, 16, 595 Hungarians, 4.270 Macedonians, 2,902 Germans, 576 Poles, 9,463 Roma, 475 Romanians, 906 Russians, 2,337 Ruthenians, 2,712 Slovaks, 201,631 Serbs, 19,636 Italians, 300 Turks, 1,977 Ukrainians, 22 Vlachs and 576 Jews. The 2001 census indicated a drop in number of almost all national minorities represented in population. It is particularly sharp in a case of the Serb ethnic group as the result of what occurred in 1995.

[25] See B. Smerdel, 'Republic of Croatia', cit., p. 191.

list of 22 national minorities was added to the preamble: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians and others who are its citizens (…). On the other hand, a list of 22 national minorities has been introduced without changing the concept of an ethnically defined state. On the contrary , such concept has been reinforced by introducing an extremely divisive narrative on the Homeland War (1991-1995) directly in the preamble of the Constitution. Probably, the EU ignored the power that this narrative has for the dominant ethnic group (it is a key component of Croatian national memory and identity), and the impact that such narrative has on national minorities, especially the Serb community. Moreover, the constitutionalization of the myth about Homeland War as a just, legitimate and defensive war of liberation precluded the possibility in the country to recognize its own guilts in the Yugoslav Wars of the 1990s even though "dealing with the past" represents a precondition for the EU (cultural) integration. Reconciliation stopped here in Croatia, therefore before the EU accession.

2. The 1991 Citizenship Act and the ethnic principle

The constitutional definition of Croatia as primarily an ethnically Croatian state paved the wave to the implementation of the supremacy of ethnic nation through the legislation. Of course, the main example is given by the Croatian Citizenship Act. The latter was symbolically adopted on 8 October 1991, that is the same day the country's declaration of independence was enacted.[26] Since its adoption in 1991 the Citizenship Act has been heavily criticized for its ethnic overtones, open discrimination against ethnic non-Croats and Croatia's policy of granting its citizenship to ethnic Croats abroad, particularly to those living in the 'near abroad' in Bosnia-Herzegovina.[27] Although the Citizenship Act has been amended in 1992 and under the EU conditionality in 2011, it key features still remains robust.[28] The Croatian Citizenship Act basically reflects the concept of the nation contained in the preamble to the Constitution. In other words, it represents a tool of nation building, which advantages the majority ethnic group.

More particularly, the Citizenship Act envisages four basic modes of acquiring Croatian citizenship. First, a specific procedure was initially introduced for residents of Croatian ethnicity. It was of crucial importance after the 1991 proclamation of independence as the legal continuity with the previous citizenship of the Socialist Republic of Croatia was the determining factor for the establishment of the initial citizenry of the newly independent Croatia. Today, the dominant mode of acquisition of Croatian citizenship is the *ius sanguinis* principle (acquisition by descendant). The *ius soli* principle (acquisition by birth on territory) is added as a residual dimension for acquiring Croatian citizenship in order to prevent statelessness. The last most controversial mode of acquiring Croatian citizenship is naturalization. In fact, the Citizenship Act foresees two modes of acquiring Croatian citizenship through naturalization: "regular", and "facilitated" naturalization.[29]

The regular naturalization is applied to ethnic non-Croats, that is national minorities (in particular nations from the former Yugoslav republics). In order to be naturalized, a resident must have at least five years (up to 2011) of registered residence in Croatia, and the following conditions should be met: a) that he or she has renounced a foreign citizenship or will submit proof that he or she will be released from a previous citizenship if admitted to Croatian citizenship; b) that he or she is familiar with the Croatian language and Latin script, as well as Croatian culture and the social system; c) that it can be concluded from the applicant's conduct that he or she respects the legal order and the customs of the Republic of Croatia.

[26] F. Ragazzi, I. Štiks, V. Koska, EUDO citizenship observatory, Country report: Croatia, February 2013.
[27] Ibidem.
[28] Ibidem.
[29] J. Omejec, 'Initial Citizenry of the Republic of Croatia at the Time of the Dissolution of Legal Ties with the SFRY, and Acquisition and Termination of Croatian Citizenship', in *Croatian Critical Law Review*, No. 3, 1998, p. 99.

On the contrary, the facilitated naturalization is mainly applied to the "diaspora", that is ethnic Croats without previous or current residence. Non-resident ethnic Croats are classified in three categories: a) emigrants and their descendants in the overseas and European states; b) Croats living in Bosnia and Herzegovina (who represent about 16 per cent of the total population of that country), and c) Croat ethnic minority living in the "near abroad" (other former Yugoslav republics and European states). The generous provisions for inclusion of ethnic Croats regardless of their residency reflects the notion of Croatia which is primarily imagined as a nation state of trans territorial Croat ethnic community.[30] The goal of facilitated naturalization is to expand the sovereign power of the state beyond the limits of its territorial borders. As has been argued, it also does not just institutionally recognize the existing Croat communities abroad, but it imagines and constructs diaspora communities where they otherwise do not exist.

In the past, the distinction between regular and facilitated naturalization produced the following situation: Croatian citizenship was granted to ethnic Croats abroad with no genuine link to the country whereas national minorities (in particular Croatian Serbs who left Croatia during the armed conflict of the 1990s) had to provide proof of previous residence and citizenship not demanded to ethnic Croats. In addition, until the 2011 amendments, the Citizenship Act included for ethnic non-Croats a subjective category of *respect towards the Croatian culture*, which has been often used in the 1990s to deny Croatian citizenship to ethnic non-Croats with long-term residence in Croatia. It was only in the 2000s that, mainly thanks to the EU conditionality, the administrative practice in the area revealed a greater degree of inclusiveness towards ethnic non-Croats, without, however, withdrawing privileges offered to ethnic Croats abroad.

Following the 2011 amendments to the Citizenship Act, some changes to the process of facilitated naturalization have been introduced. Croatian emigrants and their descendants' entitlements to Croatian citizenship through facilitated naturalization procedures have been limited up to the third generation straight-line relationship. In addition, in the processes of naturalization of members of Croatian emigration, the law introduced the 'citizenship test' already envisaged in the process of regular naturalization (exam of applicants' familiarity with the Croatian language and Latin alphabet, Croatian culture and social system). However, the Citizenship Act still identifies the same categories of applicants for both the regular and facilitated naturalization. In other words, it still provides preferential treatment for ethnic Croats abroad and members of the Croatian emigration, whilst non-ethnic Croats with the residency in Croatia have to meet higher residency requirements in the process of regular naturalization (raised from five to eight years of registered residency in 2011).

The 2011 developments did not thus lead to major changes in the dominant concept of Croatian nation. Although, national minorities (especially Croatian Serbs) today face no significant obstacles in acquiring proof of Croatian citizenship,[31] the 2011 amendments did not abolish the element of ethnic preference in the processes for the facilitated naturalization but introduced only a more detailed procedure for determination of a candidate's entitlement to membership in Croatian people. In line with the preamble of the Constitution, the Citizenship Act preserves its ethnocentric character most obviously by maintaining strong ties to and influence on the diaspora. This shows how within the institutional framework of the EU it is possible to maintain ethno-centric citizenship laws. Currently, Croatia is changing again the Citizenship Act to make it easier for descendants of Croatian emigrants to obtain citizenship. The draft amendments to the Citizenship Act passed a first reading in Parliament at the end of January 2019. The amendments erase a current restriction that establish only those whose parents or grandparents have Croatian citizenship can apply, and lifts a requirement that an applicant speaks Croatian, understands Latin script and has knowledge of Croatian culture and 'social

[30] See F. Ragazzi, I. Štiks, V. Koska, Country report: Croatia, cit.

[31] Although some issues related to the citizenship policies of the 1990s remain unresolved. For example, the status of persons of non-Croat ethnic origin who were permanent residents of Croatia before the 1991 Law on citizenship still awaits regulation. See S. Imeri (ed.), *Rule of Law in the Countries of the Former SFR Yugoslavia and Albania: Between Theory and Practice*.

structure'. In other words, the new amendments to the Citizenship Act when definitely approved will erase the 2011 amendments to the Citizenship Act introduced under the EU conditionality.

3. The 2002 Constitutional Act on the Rights of National Minorities its *falsa nominatio*

The legal framework on minority rights is today regulated in Croatia by the 2002 Constitutional Act on the Rights of National Minorities (hereinafter Constitutional Act). It replaced the legislative framework on minority rights, which was previously composed of the 1991 Constitutional Act on human rights and freedoms and on the rights of ethnic and national communities and minorities, but also of the 1995 Constitutional Act on the "temporary" non-application of the 1991 Constitutional Law on human rights and freedoms and on the rights of ethnic and national communities and minorities. The example resembles Croatia's style minority rights protection in the 1990s: the adoption of law on minority rights establishing at the same time its temporary non application.

The situation was significantly improved with the establishment of the new legal framework for minority protection. The 2002 Constitutional Act was adopted under international pressures (mainly Council of Europe and the EU) and is based on the internationally established minority protection standards. It affirms minority rights as both individual and collective, and contains a number of provisions that guarantee the full respect of the principles of non-discrimination outlined in various international agreements; protection against any activities which could endanger the existence of any minority or community; the right to protect their identity, culture and religion; public and private use of national minority's language and script; and the right to education and equal participation. In addition, it guarantees the exercise of certain rights and freedoms, depending on the numerical representation of the members of national minorities in the Republic of Croatia or in one of its areas. It authorizes, however, the units of local self-government to opt for the official use of two of more languages and scripts, taking into account the size of any national minority or community. In fact, the Constitutional Act guarantees a certain number of seats in the Parliament and in the bodies of local self- government to minorities.[32]

The legislative framework on minority protection is today further composed of the 2000 Law on the Use of the Languages and the Alphabets of National Minorities, which guarantees that minority languages and their scripts are to be equal with the Croatian language before the law; the 2000 Law on Education in the Languages and Alphabets of National Minorities, which authorizes the educational authorities to provide for education in minority languages. Furthermore, the electoral legislation guarantees the exercise of political rights to minorities; the Electoral Law provides for proportional representation and assures in the national parliament three seats for the Serb minority, one seat each for Italian and one for Hungarian minorities, while other minorities are divided into two groups of which each is entitled to elect one representative. Minority representatives are elected in a special constituency, while the rest of population votes in ten electoral constituencies. At the state as well as local levels, minorities have the right to have representatives in elected bodies as well as judicial and administrative bodies of municipalities and cities.

The fact that Croatia regulates minority rights through a constitutional law has been praised by several scholars. What is, however, less known is that the 2002 Constitutional Act is not a constitutional law, but an organic law. The difference between the two sources of law is quite relevant. In fact, the Croatian Constitution introduces several types of laws, among which the constitutional and organic laws. It establishes also what should be regulated by the two types of laws, but in a very confusing way. On the one hand, it is stated that the protection of minority rights should be regulated by constitutional law, but also that minority rights should be regulated by an organic law. This confusion has been, however, clarified by the Croatian Constitutional Court.[33]

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[32] See A. Petričušić, 'Wind of Change: The Croatian government's Turn towards a Policy of Ethnic Reconciliation, cit.
[33] See Constitutional Court of the Republic of Croatia, decisions U-I / 2566/2003; U-I / 3438/2003; U-I / 3307/2005.

In deciding on the constitutionality of the 2002 Constitutional Act it stated that regardless its denomination it has to be considered as an organic law, that is an intermediate source of law positioned between the Constitution and the ordinary law. Consequently, minority rights listed in the 2002 Constitutional Act do not have a constitutional status as the source of law which contains them is an organic law. Paradoxically, the decision of the Constitutional Court should not be considered negatively. In fact, the Constitutional Court has not the power to declare the unconstitutionality of constitutional laws (as their legal force is the same of the Constitution). This means, for example, that hypothetical further changes to the 2002 Constitutional Act aimed at diminishing minority rights, could not have been declared unconstitutional. On the contrary, by declaring the 2002 Constitutional Act as an organic law, the Court introduced the possibility to review its constitutionality. The ways in which it used this power remains, however, questionable.

4. Constitutional Court's Case Law and the Croatian Constitutional-National Identity

Alongside the Constitution and legislation, the Croatian Constitutional Court has also dealt with the concept of national identity. The most relevant decision is that on the 2010 amendments to the Constitutional Act on the Rights of National Minorities, which introduced a new voting model in the country in relation to national minorities. The decision was adopted on 29 July 2011, therefore under the implementation of the EU standards on minority rights.

The 2010 amendments to the Constitutional Act prescribed that those national minorities that exceed one and a half percent of the population on the day of entry into force of 2010 amendments were guaranteed at least three seats in the Parliament (this is mainly the Serb community); on the contrary, national minorities that constitutes less than one and a half percent of the general population were given dual voting rights (that is a right to vote for general elections lists, and a special right to elect at least five of their minority parliamentary representatives in special electoral units). The aim of the Croatian government, which proposed the reform, was to introduce a model of positive discrimination for its national minorities' right to parliamentary representation. The basis for introducing positive discriminations are in fact contained in the 2002 Constitutional Act, which provides for special support and protection of national minorities, including passing positive measures in their favor.

In deciding if it is acceptable to grant national minorities dual voting rights, and to grant this right to some and not all national minorities, the Constitutional Court struck down the 2010 amendments to the 2002 Constitutional Act on the basis that the dual voting is in contradiction with principles of equality and democratic multiparty system (which are listed in the Article 3 of the Constitution and together with other principles represent the highest values of the Croatian constitutional order). The central part of the Court's decision is structured around the concept of national identity. First, the Court invoked the preamble to the Constitution (in particular, the paragraph 2, which establishes Croatia as a nation state of Croatian nation, and a state of other nations, and national minorities by listing 22 national minorities). Without elaborating a doctrine or at least an exhaustive interpretation of the preamble, it simply stated that the constitutional identity of the Republic of Croatia is determined by the paragraph 2 of the preamble.

In addition, the Court invoked some other constitutional provisions, in particular Article 1 of the Constitution, which establishes that "power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens", and Article 3 which lists national equality together with equal rights, (...) the rule of law and a democratic multiparty system as the highest values of the Croatian constitutional order. Again, without providing for an exhaustive interpretation, the Court claimed that on the basis of "Historical Foundations and the invoked relevant constitutional provisions, the Constitution accepted the civil concept of the state in which all its citizens – which includes members of the Croatian people and members of all the national minorities – make up "the people". (…) Dual voting rights thus singled out one minority group of citizens from the total body of "the people" using the criterion of national affiliation and that it "acknowledged and

recognized" it as a separate "part of the people", which is in breach of the constitutional tenet about the "one and integral people" which, as the community of citizens, realizes power in the Republic of Croatia.

The decision of the Constitutional Court is, however, questionable. First, the claim that the preamble contains the civil concept of the nation is forced and does not reflect its wording and meaning. The Constitutional Court already established that the Constitution should be read as a unity and thus the preamble should be interpreted also with its paragraph 1, which introduced the collective memory of the Croatian nation. Even if not interpreted in relation to constitutional memory, the paragraph 2 still contains the determining features of ethnic nationalism: the concept of a nation defined in terms of ethnicity, the concept of nation state defined it terms of ethnic homogeneity, etc. By denying that the preamble contains the ethnic concept of the nation, this concept penetrated into the constitutional identity of the country.

Second, the decision of the Constitution Court started to be invoked by some Croatian constitutional law scholars who more realistically admitted that the preamble is based on the ethnic principle, but also concluded that Article 1 of the Constitution introduces the civil concept of the nation, and that thus in Croatia *demos* prevails over *ethnos*.[34] The only explanation provided for this statement is given by the fact that preambles usually do not constitute the normative part of the Constitution. Yet it is truth that constitutional preambles do not have usually legal force; nonetheless, they could be perceived as an integral part of the Constitution or may serve as an interpretative tool. In Croatia, the Constitutional Court clearly established that the Constitution is a unity, meaning that constitutional provisions should not be interpreted separately, and it also used the preamble as an interpretative tool.

In addition, the preamble to the Croatian Constitution has an enormous symbolic and therefore political significance; it shaped the legislation, and the ethnocentric Citizenship Act is the main example of this. Finally, even if one accepts that Article 1 of the Constitution establishes the civil concept of the nation based on equality of citizens, this concept still does not prevail in Croatia. In the country in which the nation is primarily defined in terms of race, language and culture, the equality of citizenship is basically impossible. In such a country, national minorities will be always politically subordinated to the dominant ethnic group.[35] For this reason positive discriminations are here a synonym of measuring the level of democracy. Nonetheless, the Constitutional Court preferred a different approach. It also stated that it has followed the legal opinions of the Venice Commission. In fact, the Venice Commission considers the right to dual vote as an exceptional measure. This is because ideally, in a well-integrated society, persons belonging to minorities are members of or vote for parties which are not organized on ethnic lines, but are sensitive to the concerns of minorities. The Croatian reality, however, does not reflect this ideal situation: Croatia is a deeply divided society, and divisions are marked along ethnic lines. Croatia thus needs positive discriminations in order to protect its national minorities. What it seems is that the Court used a concept of civil nation only to reject positive discriminations towards national minorities, thus protecting the unquestionable sovereignty of the Croatian nation. As already stated in the introduction, in a country which is constructed for a dominant ethnic group national minorities have no future.

What should be done?

In countries such as Croatia, where the ethnic principle dominates the Constitution the EU conditionality will have a limited impact. This does not mean that the EU conditionality should be criticized and considered as a failure, or that the post monitoring mechanisms should be introduced. The EU conditionality helps democratization, and in the case of Western Balkans reconciliation by providing a guidance, but the will to preserve democracy and reconciliation should come first and

[34] See J. Toplak, D. Gardasevic, 'Concepts of National and Constitutional Identity in Croatian Constitutional Law', in *Review of Central and East European Law*, Vol., 42, 2017, p. 263.
[35] In this sense see also R.M. Hayden, 'Constitutional Nationalism in the Formerly Yugoslav Republics', cit., p. 658.

foremost from inside the country, its political institutions, and society. In Croatia, what has to be still understood is that the respect for and the protection of national minorities represents an issue of safeguarding democracy. Protecting minority rights does not mean state weakness, a threat for the majority ethnic group or give rights to the previous aggressor, but enrich the country with different languages, cultures and heritages. The EU represents the main example of this; united in diversity. Listing 22 national minorities in a constitutional framework perfectly designed for one nation not only did not solve past injustices but is also ridiculous. Thirty years after the Yugoslav disintegration Croatia obtained everything it wanted: it won the war, Croats became a nation, Croatia exists as an independent state, it entered in the EU. Time has arrived to change the preamble of the Constitution. Can we simply state that Croatia is a state found on the equality of all of its citizens?