

CONSTITUTIONAL AND LEGAL PROTECTION
OF STATE AND NATIONAL SYMBOLS
IN CENTRAL EUROPE

Studies of the Central European Professors' Network

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The primary aim of the series is to present and address legal issues that are strongly related to the Central European region, taking into account the particular legal traditions, culture, and approach of the countries therein. The authenticity of the books can be seen in the fact that renowned authors from the Central European region write about the legal instruments of countries of the Central European region in English. The book series aims to establish itself as a comparative legal research forum by contributing to the stronger cooperation of the countries concerned and by ensuring the “best practices” and making different legal solutions available and interpretable to all of the states in Central Europe. However, it also aims to provide insights and detailed analyses of these topics to all interested legal scholars and legal practitioners outside the region so that they might become acquainted with the legal systems of Central European countries regarding a great variety of subjects.

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EDITED BY
ZOLTÁN J. TÓTH



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FOREWORD



The present book is a comparative legal work, which has been produced in the framework of the Professors' Research Network, an academic cooperation of Eastern and Central European researchers in the field of jurisprudence in the Central European Academy of the University of Miskolc.

The research underlying the book focused on the legal protection and normative regulation of symbols of comprehensive communities, which are of paramount importance to society and which permeate (most of) a given society. The framework of social coexistence is the state; the ideological basis of the state and the ultimate source of its identity, as well as its main basis of legitimacy, is the nation, either in its political or in its cultural sense. The constitutive elements of the state (and directly of society) are also those traditional communities (religious communities, nationalities, other identity-based constituent parts of a state) whose identity and autonomy are traditional values that deserve to be protected. The principles and values of these communities are embodied or expressed in a system of symbols that is not only an expression of collective self-identification, but also a force for community building (or preservation) in itself.

Besides the recognition of their individuality and self-worth, dignity, and the individual rights that derive from those, human beings are political animals with an identity shared with others—therefore, they belong to communities. Consequently, their social relationships, social existence, and self-definition as part of the community are protected. Recent (European or American) leading legal scholarship has so far paid little attention to the community aspect of the individual human being, or to communities themselves as entities that can be considered for their own sake, independently of their members; therefore, it has largely ignored the issue of collective rights protection as well (except for hate crime and hate speech). Research on this topic is by all means justified, and so is research on the recognition, materialization, or enforcement (or lack thereof) of collective rights of communities (and the individuals who make up communities) in Central and Eastern European states.

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In accordance with this, following an introductory chapter that provides a summary of European characteristics concerning legal protection of symbols, each of the “national chapters” presents, above all, a brief legal and constitutional historical overview on the regulation of state, national, and community symbols in the given state and the contemporary constitutional protection thereof. Then, each chapter reviews the features of the protection of state symbols (anthem, flag, coat of arms, or other symbols), both at the level of criminal law (and/or law of minor offenses) and at the level of civil and administrative law; the characteristics of protection of national symbols, including an examination of the elements of identity (in a broad sense) of the nation in relation to each of the abovementioned branches of law; and the legal protection of symbols of communities with the same identity, also in relation to these areas of law, concerning both legislation and administrative or judicial practice.

It is hoped that the chapters, which follow a unified methodology, will, on the whole, provide a deeper insight into the sometimes rather complex relationship of Central European countries to state and national symbols, and may serve as a sufficient basis for understanding similarities and differences and for further comparative legal analysis.

Budapest, September 2022

The Editor

CHAPTER I

THE PROTECTION OF STATE AND NATIONAL SYMBOLS ACROSS EUROPE: AN OVERVIEW OF CONSTITUTIONAL LAW AND CRIMINAL LAW REGULATIONS



ZOLTÁN J. TÓTH

1. The development of the system of state symbols

The common meaning of symbol is an “image, object, etc., that suggests or refers to something else.”¹ With semiological accuracy:

A sign is a stimulus—that is, a perceptible substance—the mental image of which is associated in our minds with that of another stimulus. The function of the former stimulus is to evoke the latter with a view to communication.²

1 Cowie, 1989, p. 1304. The term is defined similarly by the *Cambridge Dictionary*: A symbol is “a sign, shape, or object that is used to represent something else” (Cambridge Dictionary online: <https://dictionary.cambridge.org/dictionary/english/symbol>). The definitions related to the sociopolitical use of the term was collected by Lindmark. These—in addition to “ringing together of ideas and objects”—place an emphasis on cultural definition (being determined by tradition) (Lindmark, 1971, pp. 64–68).

2 Guiraud, 1978, p. 22. A sign, therefore, reveals the intention of communication, that is, it is always the result of a voluntary activity. So, this “definition excludes natural indications” (Ibid.), that is, the indications associated with the operation of causal inferences (e.g., smoke cannot be a sign of fire, clouds cannot be a sign of rain, etc.).

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The sign, at least in the traditional Saussurean terminology,³ is a relationship between two phenomena: a signifier and a signified.⁴ In this sense, symbol is a signifier, referring to an independent signified. Thus, in the ordinary sense, a symbol is a sign whose function may simply be the communication of information (in this sense, a sign is a signal).

However, it may have a deeper and more abstract meaning. That is, it may represent ideas or objects of value.⁵ The white flag (“parley flag”), for instance, is a *signal*, to the extent that it communicates the *information* that those waving it are surrendering. A yellow flag on a ship signals an outbreak or quarantine. In its representative function, a flag may be a state flag *representing* the state and its sovereignty, or a royal flag representing the ruler or their personal power, etc.⁶ This reveals that a symbol is more than a simple signal for communicating information. A symbol is a sign depicting or expressing some sort of moral substrate, and, at the same time, it compels us to establish a certain approach toward itself (to identify with it or honor it, or, on the contrary, to resist or disavow it).⁸ If a sign refers to individual or group identity (this is the case with state and national symbols), then, in a semiological sense, it is an insignia.⁹

Symbols have been used from very early in the human story; they were present even in the first written historical sources. Initially, in antiquity and in the Middle Ages, their use was primarily military; from the second half of the Middle Ages, they were already used as symbols of power in Europe. From that same time on, signs began to fulfill the need for a symbolic expression of the identity of a given person, family, or even a broader community (town, county, or followers of a specific religion, etc.). Those signs not only expressed, in an abstract way, the identity

3 Barthes, 1977, p. 35.

4 Guiraud, 1978, p. 25.

5 Firth, 1973, pp. 332 and 334–335; O’Grady et al., 1996, pp. 627–631. Similarly: “A sign is straightforward in its function....Signs give us a simple message that is of immediate momentary relevance.

A symbol, on the other hand, is a visual image or sign representing an idea” (Hennessy, 2019, p. 6).

6 Firth, 1973, pp. 332–336. To put it in another way: the former is a *code*, “a system of explicit social conventions,” while the latter means *hermeneutics* (Guiraud, 1978, p. 41).

7 Smith, 1975, p. 7.

8 As Firth put it: “a symbol has instrumental value”; “symbols [can be] instruments of expression, of communication, of knowledge and of control.” (Firth, 1973, pp. 76–77.) “The instrumental nature of a symbol as a means of expression is especially clear with political and religious symbols. Flag, national anthem...can evoke powerful emotions of identification with a group and be used as rallying points for group action.” (Firth, 1973, p. 77). “[I]n facilitating communication...performance of a symbolic act allows ideas to be shared and reformulated without use of words...” (Firth, 1973, p. 79.) “A proposition that symbols are instruments of knowledge raises epistemological issues” (Firth, 1973, p. 82); while “[s]ymbols as instruments of control, or...as instruments of power...can be a powerful means of affecting someone else’s behavior.” (Firth, 1973, 83–84.)

9 “Insignia are marks which indicate the adherence of an individual to a social group. Their function is to express the organization of society and the relation between individuals and groups.” (Guiraud, 1978, p. 84.)

of the concerned person or community, or the values or characteristics they found important,¹⁰ but also provided an opportunity for emotional bonding.

Community symbols were already used by ancient peoples: in Egypt, as well as among the Persians, Medes, and Parthians, flag-like symbols (insignia) or banners were used, made of several different materials (metal, cloth, leather, etc.).¹¹ These insignia were of spiritual origin; symbolized the connection between the community and otherworldly powers; and were usually set at the top of a pole or mast, and thus became general symbols of victory and self-assertion.¹² According to Firth, the first such symbols were Asian inventions and were transmitted to Europe later, probably by the Saracens.¹³ According to a multi-edition publication launched by the UK-based Flag Institute, “The earliest known flags were used in China, to indicate different parts of the army.”¹⁴ The oldest such objectified insignia was a metal standard from Iran, made about five thousand years ago.¹⁵ Thus, banners and flags¹⁶ were invented outside Europe and arrived there during the Roman Empire,¹⁷ while the first coats of arms were created in medieval Europe.

Suits of armor appeared in the eleventh and twelfth centuries, and spread by the end of the twelfth and the beginning of the thirteenth century, replacing coats of plates. The plate of armor appeared after that and became dominant by the fourteenth century. During this development process, the knights’ armors gradually became heavier and covered more of the body (helms, which appeared in the twelfth century, covered the entire head, and removing them was a lengthy procedure). Due to that, recognizing armored knights became difficult, and it was no longer

10 Firth, 1973, p. 336.

11 Smith, 1975, p. 38.

12 Cirlot, 1984, p. 108.

13 Firth, 1973, p. 330.

14 Wills, 2008, p. 5.

15 Smith, 1975, p. 34.

16 The use of terms varies; the terms flag, standard, banner, pennant, and ensign were used in a different manner in each community, geographical region, and age; thus, it is not possible to introduce terminological uniformity (at least in terms of the past and historical aspects) (cf. Smith, 1975, p. 12). However, from among the two main terms used today (flag, ensign), in a narrower sense, “flag” is generally applied to a use on land (state flag, war flag), while ensign is rather applied for use at sea (state ensign, war ensign, naval ensign) (cf. e.g., Smith, 1980, p. 11; Znamierowski, 2001, p. 32). In a broader sense, the word “ensign” is also used as a synonym for “flag,” and in the broadest sense, it represents the collective term for all state symbols, representing a sort of moral highness.

17 According to our historical knowledge, squared flags (vexilla) were first used by the Roman cavalry; they also represent the origin of the name of the discipline dealing with flags today (vexillology) (Barker, 2015, p. 16) Symbols similar to vexilla (carved animals attached to poles, stylized sculptures of various mythical animals, or other forms with or without a flag) were used also elsewhere, both before and after the Roman vexillum, mostly outside Europe. The first depiction resembling a vexillum is from Egypt 3400 BC, and was detected on pottery of the Gerzean period (Znamierowski, 2001, p. 9). These are called vexilloids, as distinguished from the Roman vexillum itself (Smith, 1975, pp. 30, 34).

possible to identify individuals in a battle.¹⁸ In addition, the use of the cross on banners became common in Europe, and this made it even more difficult to determine whether a person in armor was friend or foe.¹⁹ For knights or soldiers on the same side to recognize one another, they began to use unique distinguishing marks from the eleventh and twelfth centuries onwards.²⁰ These were attached to a surcoat worn over the armor (hence the term “coat of arms”) or (later) to their shield. The use of these distinguishing marks was initially not subject to any provisions, and neither state nor customary law norms regulated it. However, the display of such symbols pursued not only practical goals, but over time it became accepted proof that the person wearing the symbols was a member of the nobility—being someone who maintains an “army” or controls subordinate knights. Therefore, the overlords of the twelfth and thirteenth centuries had similar symbols made for themselves for reasons of prestige—even if they otherwise never went into battle. These overlords had several vassals who also created their own coats of arms, which could not be identical to one another.²¹

The regulation of coats of arms were improved by tournaments, a means for knights to keep themselves entertained in times when no wars were fought. (The institution of herald was also created then, as the person who kept register of the coats of arms of the knights participating in the tournaments. That function later expanded and changed to serving a certain noble and carrying his messages or forwarding his commands in battle, resulting in a social ascent of heralds to nobles).²² Also, the noble symbol at issue was placed in a more “due” place compared to a cloak: it began to be applied to the shield, more often not in the form of a painting rather than a piece of cloth. By the thirteenth and the fourteenth centuries, as opposed to arbitrary reservation, the order of the royal donation of coats of arms developed²³ and became one of the rights of the sovereign. The symbols also became more and more complex, and the intention was for them to express more and more things, until the possibilities provided by the shape and size of the shield proved to be insufficient, so the shield itself (and the figure on it) formed nothing more but the central part of a much more detailed, solemn (and ornate) symbol system in terms of

18 The Bayeux Tapestry depicts the Battle of Hastings of 1066, where William I (“the Conqueror”), the then-Duke of Normandy, triumphed over the Anglo-Saxon armies. The turning point of this battle was that even though the Normans believed their leader to be dead, he lifted his helmet so that everyone could identify him and realize that he was alive. After that, the Normans turned the outcome of the battle. This would not have been possible a century later, due to the appearance of the heavy armour and the accompanying great helm (cf. Slater, 2018, pp. 12, 14).

19 Znamierowski, 2001, p. 14.

20 Slater, 2018, p. 12.

21 The reasons for that were not merely practical, but—due to the authority symbolized by the coat of arms—factors of prestige also played a role. For example, the Court of Chivalry was established to resolve these disputes in the fourteenth-century England (Slater, 2018, p. 43).

22 Slater, 2018, pp. 13, 36–37.

23 Rác, 2002, p. 494.

which certain “heraldic” rules developed in the form of customary law.²⁴ The “coat of arms of coat of arms” was also created, as the rulers wanted to have not only their own coats of arms but also those of the conquered territories (regardless of whether that represented actual power or merely a claim in that regard). This later became the “greater coat of arms.”²⁵

Today’s modern flags (at least in Europe) originate in the colors and symbolics of the coats of arms. The shield or its colors were depicted on banners attached to poles.²⁶ These banners were elongated and thin, designed primarily for combat purposes. As peaceful means of identification, however, rectangular, nearly square shape flags (typically 1:2 and 2:3 scale), as we know them today, proved more practical. As a result of the emerging nation states, flags became national symbols, as opposed to royal symbols, which denoted less and less personal power but rather a territory or a group of people; such state symbols were adopted in several countries during the seventeenth to the nineteenth centuries (the earliest of which was the Dutch flag, created at the end of the sixteenth century, almost in the form known today, with plain stripes instead of heraldic devices (but with orange, white, and blue stripes instead of today’s red-white-and-blue ones)).²⁷

Among the threefold symbol system known today and used in almost all countries, the national and state anthems (where the latter mostly developed from the former, or independently of them in some cases) are the youngest, but perhaps they demonstrate the mindset of a nation best, not just through lyrics but also through the mood, tune, and beat of the music.²⁸ The word used in English (“anthem”) is misleading, as in most languages the term applied for the musical piece used as national/state symbol derives from the word “hymn,”²⁹ which at the same time refers to the ecclesiastical origin and initial religious content of such pieces. The first known anthem, the English “God save the King/Queen” was of the same nature. It was first performed publicly in 1745³⁰ with music composed by Thomas Arne (although the tune itself had most probably existed already in the seventeenth century). With the formation of nation states, each of the European nations had an anthem of their own, either as a result of an organic development, that is, by the acceptance of the people, or in an artificial way, with the express intention of creating an anthem (in certain cases,

24 Barker, 2015, pp. 17–19; Slater, 2018, pp. 52–69.

25 See, in more detail, for the history of heraldry: Slater, 2018, pp. 10–49; Smith, 1975, p. 43–44.

26 Smith, 1975, p. 44.

27 Znamierowski, 2001, p. 116; Smith, 1980, p. 151; Barker, 2015, p. 20.

28 “National anthems are official patriotic symbols—the musical equivalent of a country’s motto, crest, or flag. As such, they represent the nation’s identity or character—its mood, desires, and goals as put forth by those in power. Anthems...become a nation’s calling card. They are modern totems—signs by which nations distinguish themselves from one another or reaffirm their “identity” boundaries.” (Cerulo, 1989, p. 78.)

29 Cf. Boyd, 1980, p. 46, in pp. 46–75.

30 The melody of the *Wilhelmus*, the Dutch anthem, is older than that of the English anthem. The composition of the melody is dated between 1568 and 1572, but it was recognized as an anthem only in 1932.

based on an open competition for composers).³¹ The independent states, established as a result of the end of colonialism or the disintegration of otherwise artificially united countries, also followed this tradition, but here the artificial creation of anthems dominated, and musical pieces were typically composed by certain invited composers (and/or lyricists);³² in some cases, the anthem was instrumental, without lyrics.³³

2. The concept of nation and its effect on the “state” or “national” nature of the regulated symbols in a given country

The concept of “nation” (*natio*) existed in the Middle Ages and in early modern times, but not yet in its modern sense: “nation” meant an estate-based, territorial or regional, or language-based community. In the modern age, however, the industrial revolution resulting from the Enlightenment was associated with the disintegration of traditional rural communities based on large families. As a result, huge factories and modern industrial cities appeared and spread, and the new metropolitan lifestyle caused depersonalization, which gave rise to a need of new elements of identity. This is how the modern concept of “nation” came into being: this time it meant a group of people who belong to the same country (live there or want to live there), have the same economic interests, and share the same ethnicity (origin), culture, tradition, customs, language, and history

However, if we dig deep, this concept of nation actually entails two different expectations, and has two different implications: based on the differences in identity-forming criteria, *we can distinguish between the concepts of political nation and cultural nation*. On the one hand, the concept of “political nation” is the result of the monarchical form of state (which, almost without exception, prevailed at the time of the appearance of the modern concept of nation), since in these monarchies, a new community-forming force emerged and spread, ensuring the voluntary pursuit of the goals of the central power (so much that many states that had not existed before but simply developed, also adopted this centralized, monarchical form of government).³⁴

31 That is what occurred in Hungary (cf. Nettl, 1967, pp. 131–132), but similar competitions were launched also in Romania, New Zealand, and several other countries (Cerulo, 1989, p. 78).

32 Boyd distinguished five types of anthems. There are “hymns,” in which they pray to God, “marches,” which are of military origin; “operative anthems,” written in the style of nineteenth-century Italian opera; “folk anthems,” which are rooted in folk music; and “fanfares” (Boyd, 1980, p. 47).

33 One of the oldest anthems, the Spanish *Marcha Real* was composed without lyrics. Its melody, as it is known today, was recognized as a royal anthem in 1770 (and as the Spanish national anthem soon thereafter). In addition, the anthems of San Marino, Bosnia, and Herzegovina, and Kosovo are also instrumental. It is interesting that the anthem of the European Union, Beethoven’s “Ode to Joy,” also lacks lyrics (Farrington, 2019, pp. 525–533), thus expressing the equality and equivalence of countries (nations) in the EU.

34 Such as Greece, Belgium, or Romania.

The concept of “cultural nation,” on the other hand, developed in regions (and from there spread to others) where the so-called titular nation only had a narrow majority (or even a minority) in its own state, or where certain nations could not have a country of their own or a significant segment of their members remained outside their homeland. This occurred, for example, in Eastern and South-eastern Europe. Also, the concept of cultural nation was exploited in newly unified states whose peoples had belonged to separate states for a long time, but the memory of the common past was preserved and gained new meaning.³⁵

“Political nation” is nothing but the *people* itself, that is, the totality of *people of the same nationality, living in the same state* (living in a specific territory, under the same sovereign) (“state nation”). Accordingly, to pursue political unity, everyone belongs to the nation on whose territory they live. (Such a concept of nation has been developed and applied to this day in France and in the United States, where everyone is “French” or “American,” regardless of their origin, color, religion, mother tongue, etc.). The intention behind this principle is to prevent minority movements—so-called movements of nationalities—from breaking up the state by tearing territories or citizens from it. However, for the same reason, the “majority” does not intend to deny any minority political rights in France, and no citizen’s “Frenches” can be questioned by anybody in principle. Thus, citizens of the first, second, or third generation (whose roots usually go back to the present-day countries of the former French colonial empire), or even residents who do not even speak the language although their families have lived in France for centuries (e.g., Bretons or Corsicans) are considered part of the same body of the nation as any other citizens.

In the case of the *cultural nation*, the same ethnicity, culture, and language are the elements that define identity. With respect to the general concept of nation, “cultural nation” essentially means a *group of people with the same ethnicity, culture, tradition, custom, language, and history*. This is the situation in most European countries. An identity of cultural nation may develop spontaneously, in an organic manner (e.g., England), or in an artificial way, from the top to the bottom (e.g., Italy). Thus, the cultural nation does not include every citizen of a given country—only those who belong to the titular nation and share the same cultural identity—but includes all who are not citizens of the state to which the titular nation belongs and share the same language, culture, and tradition, due to which they declare a common identity. In addition, there are nations—in a cultural sense—that do not have countries of their own at all.

Of course, those two concepts of nation are not mutually exclusive but exist in parallel; however, one may be deemed dominant over the other in a given country. For example, in France, some support the concept of cultural nation and consider every non-French citizen to be French if they have French roots and identity, while they do not consider French those citizens whose traditions and customs are different from French traditions and customs. In fact, the two concepts of nation compete with each other—everywhere.

35 For example, that was the case in Italy or Germany.

For those reasons, we can see “national” symbols (too) among the symbols representing the community as a whole in those cases where a “titular” nation also exists, representing most of the citizens of a given state. However, this is not so in all such situations. If no titular nation exists or does not form an absolute majority in a country, then the symbols become “state” symbols (for example in Montenegro) or they are not regulated in the constitution at all (as in Switzerland). The practice of individual countries diverges most regarding the anthem (the anthem is “national” in most countries, but it is “state anthem” in many). The other two symbols (the flag, and particularly the coat of arms) are “state” symbols in most European countries.³⁶

Of course, there may be other state and national symbols beyond the aforesaid three main types. Perhaps the most famous example is the state maxim of France (“Liberty, Equality, Fraternity”),³⁷ but there may be significant figurative emblems

36 In the 43 European countries (see these and the criteria for determining the sample below) where the constitution regulates at least one of these symbols, the general rule is that the concerned symbols are considered “state” symbols by the constitution of the given state. This is expressed by the terms “state symbol,” “of the state,” “of the republic,” or “of the [name of the given state].” In 23 countries (Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Cyprus, Georgia, Germany, Hungary, Italy, Kazakhstan, Kosovo, Kyrgyzstan, Lithuania, Moldova, Montenegro, North Macedonia, Norway, Poland, Russia, Spain, Ukraine, and Uzbekistan) all symbols regulated in the constitution are “state” symbols. In 12 countries (Andorra, the Czech Republic, France, Liechtenstein, Monaco, Romania, Serbia, Slovakia, Slovenia, Tajikistan, Turkey, and Turkmenistan) there are both “state” and “national” symbols. The anthem is typically “national” (from among the examined countries, the anthem is “national” in each country—that is, in 10 countries—where it is regulated a symbol), the flag is considered “national” more rarely and other symbols more rarely still; the rest of the symbols are “state” symbols (the coat of arms is considered a state symbol in every country where it is regulated). In the Czech Republic, among the seven different symbols, only the anthem is considered national; in France, the “emblem,” that is the flag—the *Tricolour*—and the anthem are considered national symbols, while the maxim and the “principle” are state symbols; in Liechtenstein, from among the two regulated symbols, the coat of arms is a state symbol and the “colors” are national symbols; in Monaco, the flag is a state symbol and the coat of arms is associated with the ruler; in Romania, the flag, the coat of arms and the seal are considered state symbols, while the “National Day” and the national anthem are regulated in addition to those; in Serbia, the anthem is national, there is a separate state and a national flag, while the large and small coats of arms are state symbols; in Slovenia, the anthem is national, the coat of arms is a state symbol, and there is also a separate state and a national flag; in Tajikistan and Turkmenistan, from among the three classic symbols, only the anthem is considered national, while the coat of arms and the flag are state symbols; in Turkey, from among the two symbols mentioned in the constitution, the flag is state and the anthem is national symbol. In seven countries (Albania, Belarus, Estonia, Ireland, Latvia, Malta, and Portugal), the constitution only provides for “national” symbols (noting that the constitution of Malta does not define the nature of the George Cross); finally, Belgium is the only country whose constitution provides for symbols, but its wording does not clearly specify whether they are considered state or national symbols (“the Belgian nation adopts red, yellow and black colors, and as arms of the kingdom the Lion of Belgium with the motto: UNION IS STRENGTH”). The phrase “Belgian nation adopts” indicates the latter (even if the term “nation” here refers clearly to the concept of political nation, as opposed to cultural nation), and the expression “of the kingdom” indicates the former.

37 According to some, Art. 193 of the Belgian constitution also provides for a similar state motto regulated as an independent symbol; in fact, however—as we will see—the motto “Union is strength” is merely part of the description of the coat of arms, as opposed to a state symbol independent from the coat of arms.

also in the history of a given country (such as, the protection of the George Cross in Malta or regulation concerning other symbols). In this latter context, we should point out the protection of the so-called national colors, which is different from the protection of the flag or banner, as it reflects the independent protection of a combination of colors representing national identity.

3. The independence and correlation of state symbols

State symbols have now become the manifestation of statehood, basically fulfilling *two* functions: 1) in relation to other states, they express state sovereignty and independence, and distinguish the given state from others (*external or representative function*); 2) in relation to the citizens of the given state, they function as an expression of a sense of belonging (*internal or identification function*).³⁸ In addition, in the case of the so-called nation states, national symbols may also receive protection beside the state symbols, which express the unity of the nation (if any) providing that most of the citizens of the given country, regardless of whether the members of this—so-called cultural—nation live in the territory or are the citizens of the given state. In such cases, as it was mentioned before, most of the inhabitants of this country belong to the so-called titular nation. This is currently the case in nearly all European countries (and in all the Central and Eastern European countries analyzed during our research).

It is a requirement of international (customary) law for state symbols to be distinguishable from one another³⁹—however, in the case of flags, this sometimes only means a difference in color shade or in the ratio of the width and the length of the

38 Cf. Halász, 2014, pp. 31–38. (The same two functions can be construed also in terms of national symbols *par excellence*; cf. e.g., Schweitzer, 2019, pp. 211–218.)

39 It is also a requirement of customary law (although not prescribed by any international convention) that a state should at least have a flag to distinguish itself from other states, however, this cannot be enforced. Certain international conventions refer to state symbols indirectly. For example, Art. 20 of the Vienna Convention on Diplomatic Relations 1961 provides that “The mission and its head shall have the right to use the flag and emblem of the sending state on the premises of the mission, including the residence of the head of the mission, and on his means of transport.” That is, the Convention assumes that states usually have such symbols—although it does not directly stipulate that they are required to have them. (Similarly, Art. 29 para. 1. of the Vienna Convention on Consular Relations 1963 provides that “the sending state shall have the right to the use of its national flag and coat of arms in the receiving state in accordance with the provisions of this article”; para. 2. of the same article provides the following: “The national flag of the sending state may be flown and its coat of arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.” In addition, as part of the diplomatic customary law, the rules of etiquette applied in international state relations define in detail the order of the use of the flag, and, secondarily, that of the coat of arms and the anthem. As regards the latter, see Znamierowski, 2011, pp. 45–47.

flag.⁴⁰ At the time when the present form of international law was not yet developed, it was possible for political communities not in contact with one another (e.g., neither at war nor trading, due to the geographical distance between them) to have the same symbol (typically a flag). But in our globalizing world, that would cause several problems; therefore, international law customarily prohibits it for obvious reasons, or, rather, it “ensures” that states choose different symbols. There are, however, tradition-based frameworks with which (almost) all states comply.

The first such customary law requirement is that states should, at minimum, identify themselves and express the unity of their citizens with the threefold system of symbols a coat of arms, a flag, and an anthem.⁴¹ At the least, when a state becomes independent, that is, when a new sovereign comes into being (in the sense of international law and political science), it creates its own system of symbols, with most of them adopting or choosing from the symbols created during their existence as a non-independent political community, if they one. States that became independent during the colonial era in the twentieth century provide typical examples of this, as they had no coats of arms or anthems (or flag, as a matter of fact, as in many cases the territory that became independent did not cover a single people or tribe but was arbitrarily designated by the colonial powers), so they had to specifically create those at the beginning of their independent statehood. Of course, this is not unique to former colonial countries: for example, Slovenia declared its independence in 1991 and started to create a new symbol system after that, just like Bosnia and Herzegovina.⁴²

Customs and international legal traditions played the main role not only in the designation of such scope of symbols (that is, in the determination of what type of symbols were required), but also in the creation of specific symbols. For example, in the case of coats of arms, the rules of heraldry are decisive, so the (external) structure of the vast majority of state coats of arms are similar to each other (though

40 For example, the only difference between the flags of Romania and Chad are the shades of the colors; and only the ratio of length to width distinguish the flags of Monaco and Indonesia.

41 This applies almost without exception. Nonetheless, Turkey has no coat of arms or emblem; but to abide by the formalities of international law and international customs, Turkey uses the star-crescent image appearing in its flag as a non-official, *de facto* national emblem.

42 Between 1992 and 1998, Bosnia and Herzegovina took inspiration from the coat of arms of the Kotromanić dynasty, which ruled from the 14th to the 15th centuries. However, this historical symbol of six golden lilies (*fleurs-de-lis*) was not accepted by the non-Bosniak nationalities (Serbs and Croats). And since none of these three nations is in absolute majority in Bosnia and Herzegovina, new symbols had to be found that would break with the past completely. For example, due to the lack of majority support in the federal parliament, the flag was introduced single-handedly by Carlos Westendorp, UN High Representative for Bosnia and Herzegovina (the position was created after the conclusion of the Dayton Agreement in December 1995), at the beginning of 1998, as the relatively most-supported symbol of the three plans developed for the state flag. All this was done for a rather banal reason—there was simply no more time to spend on the issue, given that the Winter Olympics would begin in Nagano in February 1998, and it would have been awkward if the country’s athletes had attended the opening ceremony without a flag, or if it had not been possible to raise the flag of the country in honor of those achieving podium finishes (Kolstø, 2006, pp. 676–701).

perhaps some non-key elements might be missing).⁴³ However, some (many non-European and few European) states did not follow these rules; they created an emblem instead of a coat of arms.⁴⁴ (Coat of arms and emblems, and, in rare cases, the seal used instead of them,⁴⁵ are called “armorial bearings” or, in short, “armorials.”) A disadvantage of emblems (the name of which is misleading in that it is also applied for animals, plants, objects, or other motifs used to express statehood)⁴⁶ is that they render the pictorial symbol to be protected rather difficult to categorize; nonetheless, its obvious advantage is that it better expresses the specific worldview, mindset, and values of a given country (and/or of the people or nation constituting it, or any other group, such as a tribe). In the case of flags, the rectangular shape can also be considered traditional (the only exceptions being the flags of Switzerland and Nepal),⁴⁷

43 As regards the typical elements of coats of arms, see e.g., Wills, 2008, p. 7; as regards the heraldically regular arrangement possibilities (that is, metals and colors), partitions and ordinaries of the shield, see Smith, 1975, pp. 28–29.

44 Most of these states (but not all of them) gained their independence or their current form of government in the last hundred years: China, Indonesia, Thailand, India, the Maldives, Brunei, Nepal, Israel, Bhutan, Saudi Arabia, Pakistan, Sri Lanka, Yemen, Mongolia, Vietnam, North Korea, South Korea, Laos, Kuwait, Afghanistan (both before and after the Taliban takeover), Oman, Bangladesh, Iran, Algeria, Sudan, Angola, Somaliland, Mozambique, Cape Verde, Guinea-Bissau, Ethiopia, Eritrea, Djibouti, Papua New Guinea, Taiwan (Republic of China, which is not officially recognized by most countries, but is practically sovereign), Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, Belarus, North Macedonia, and Italy.

45 For example, Myanmar, Mauritania, Ruanda, the Comoros, and Madagascar has no coat of arms or emblem but only a seal; in the era of the absolute monarchy, Japan also had an “imperial seal.”

46 For example, Canada (or more precisely, the king of England, who constitutes the Canadian head of state) has a coat of arms, but the “emblem” of Canada is the maple leaf, which can be seen also on its flag as a national symbol.

47 In addition, the flags have many similarities that make them comparable. The discipline of vexillology classifies the parts of the flags as follows. The staff is the pole itself from which the flag is flown (this does not constitute a part of the flag, but all the other parts of it are defined relative to it). The field is the basic area or background color of the flag (e.g., in the flag of Vietnam the base is red). A charge is the emblem placed on the field of the flag (e.g., in the Vietnamese flag, it is the yellow star in the middle). As regards the basic charges of the flags, see Znamierowski, 2001, p. 27. The hoist is the part of the flag closest to the staff, while the fly is the part placed farthest from it. In a broader sense, canton means any quarter of a flag divided into four parts; however, it is mostly used in a stricter sense, meaning the upper quarter nearest the staff (e.g., the miniature Union Jack in the flags of the sovereign countries that belong to the British Commonwealth is in this canton, as are many other important symbols and emblems in other countries). In addition, the ratio of the width to the length of the flag also plays a significant role (cf. Wills, 2008, p. 7; Znamierowski, 2001, p. 26). Moreover, several other similarities can be observed in the flags of different states, which can be divided into groups based on their visual content and appearance. The most important groups are the following: tricolor (the term originates from the three colors of the French flag—the *Tricolour*—blue, white, and red in a vertical arrangement, though the three or stripes may also be arranged horizontally); in a strict sense, the term is applied to flags with three classic equal stripes, but today, the term is also applied to flags with stripes of unequal width or divided diagonally into three parts (cf. Smith, 1975, p. 30); tribar (flags with three stripes but only two colors, e.g., the flag of Austria, Spain, or Nicaragua); bicolor (flags with two stripes, arranged vertically, horizontally, or diagonally, e.g., the flag of Poland); cross (where the cross is vertical, centrally placed, and extends to the whole flag, pl. Georgia); “Scandinavian cross” (a cross with upright set closer to the hoist than to the fly—unsurprisingly, typical of the flags of

as well as the commonly used colors,⁴⁸ while the customary requirement for anthems is that they expected to be a piece of music (whether of folk music or created by a specific composer) that can also be performed as a short orchestral work. (As we have seen above, the existence of lyrics is not such a criterion; nevertheless, with four exceptions, all state anthems have lyrics).

In addition, many states draw inspiration from the symbols of other states. The reason for this may also be that the given country intends to express a close emotional or cultural community with another state or its people; also, a country may use the symbols of other countries as a model simply for aesthetic (or even convenience) reasons when creating its own symbols. The latter represents the exception—for example, the melody of the British national anthem was previously adopted by many countries when creating their anthem—in fact, Liechtenstein still uses this melody with its own lyrics as its anthem—and the former is the general rule.⁴⁹ There are many examples of cultural or, indeed, economic, political or other practical influence (the stars-and-stripes American flag dating from 1777 influenced many countries in the world;⁵⁰ the British Union Jack had an effect on Commonwealth countries; the hammer-and-sickle had an impact on the former communist states (state socialist countries based their flag on that of the former Soviet Union); the star and crescent in the flags of Muslim states originally appeared on the Turkish flag;⁵¹ the use of Slavic colors is present in many Slavic countries, in different variations, based on the Russian model; the French tricolor influenced the choice of flag in countries sympathizing with the French revolutionary ideas and had an impact on the former French colonies, etc.).⁵²

Scandinavian countries, such as the flags of Denmark, Finland, Iceland, Norway, and Sweden); and “saltire” (a diagonal cross from corner to corner, e.g., the flag of the United Kingdom), cf. Wills, 2008, p. 6; Smith, 1975, p. 24.; “couped cross” (e.g., Switzerland); “bordered” (e.g., the Maldives, Grenada); “triangled” (e.g., the Czech Republic); “serrated” (e.g., Qatar); “fimbriated” (e.g., Guyana); and flags that do not fit into any traditional categories (e.g., North Macedonia, Brunei, Seychelles, Zambia, etc.).

48 For our analysis, white, black, and gray, which are lacking hue, are also considered colors; thus, we use the term “color” in its ordinary sense, applying it not only to chromatic but also to achromatic colors. Red, blue, white, yellow, green, and black are the colors used most often in flags. On the contrary, orange, brown (which is not applied as a livery color in any flag; it appears only in figures, e.g., in the coat of arms or emblem on the flag), grey and purple are rarely used, and there are colors that do not appear in flags at all (e.g., pink). For the indication of the so-called “livery colors,” an international code is applied, compiled by the International Federation of Vexillological Associations (Znamierowski, 2001, p. 28).

49 Cf. Nettle, 1967, pp. 39–47.

50 Among the flags still in use today, the flags of Liberia and Malaysia were inspired by the flag of the USA.

51 In addition, black (which may have been the color of Mohammed’s banner) and green (adopted by the Fatimid dynasty) are also typical colors in the flags of Muslim countries. (Cf. Firth, 1973, p. 336–337.)

52 Cf., e.g., Firth, 1973, pp. 336–338. These are the so-called flag families. (See, in more detail: Znamierowski, 2001, pp. 100–129.)

4. The constitutional regulation⁵³ of state and national symbols in European countries

In all countries of Europe, except for the United Kingdom, a so-called written constitution is in force, whose provisions can be examined as the constitutional regulation of a given state. The British Constitution is not enacted in the form of such a single public-law document, so we will dispense with its comparative analysis in the following, noting that there are, of course, symbols in the United Kingdom as well, but no separate laws were adopted on them.⁵⁴ In the following, we will review the countries of Europe, with the exception of the aforementioned United Kingdom, namely the constitutions of the following countries (using the common but unofficial name used in everyday communication): Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kosovo, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, and Uzbekistan.

We drew up that list based on the geographic concept of Europe, but we modified (supplemented) it in certain cases, for cultural reasons or in consideration of the actual political situation. We also tried to involve those entities in the comparative legal analysis that have the (external and internal) features of statehood, even though this is not easy to clearly determine in certain cases. The inclusion of most of the

53 The sources of the text of the state constitutions examined are, partly, the OSCE/ODIHR database “Legislationline” (<https://legislationline.org/>), and, where it was necessary to be updated, the official websites of the given state’s parliament, government or constitutional court.

54 The United Kingdom does not have a separate national coat of arms, but the royal coat of arms is applied which took its current form in the nineteenth century (except in Scotland, where a modified form of that coat of arms is used). There are also no statutory requirements for its use; as to who can use it, apart from the queen/king, where and on what occasions (the government, government bodies, courts, etc.), only customary law provides guidance, which is of course constantly changes, as it is typical for the historic legal development of the entire English law. Originally (even after the conquest of Wales in the thirteenth century), the flag was the English Saint George Cross flag, which is still known today, from which a mixed flag of the English Saint George Cross flag and the Scottish Saint Andrew flag was created, as a symbolic representation of the personal union established between England and Scotland in 1601. Today’s flag, the so-called Union Jack was created as a result of the 1801 union between Ireland and Great Britain, by the unification of the motifs of the earlier flag and that of the Irish Saint Patrick flag, the use of which is also not regulated by law. Finally, there are no certain knowledge about the sources of the anthem, there are speculations and historical debate about its author; the first known time when it was publicly sung was in 1745 after a theatre performance, and it was first mentioned as the anthem in 1825. There has been no written legal regulation concerning its use ever since; even the part of its lyrics directed against the Scots was removed on the basis of customary law, and not by means of a statutory legal provision.

listed countries in the sample does not require any further explanation. All the states that can be considered as part of Europe in a geographical sense, and recognized by the vast majority of other European countries, were included in the analysis (including Kazakhstan, Georgia, and Azerbaijan, which have some European territory). We supplemented this with the members of the Council of Europe (having similar characteristics); that is how (the Republic of) Cyprus⁵⁵ and Armenia were included in the analysis, since even though they may not belong to Europe geographically, they most certainly do so in a cultural sense. As of March 16, 2022, the Russian Federation has not been a member of the European Council, and even though it is entitled to membership in principle, Kazakhstan is not (and has never been) a member; nonetheless, Russia (and Kazakhstan) are subjects of the comparative legal examination. Since many republics of the former Soviet Union, now independent states, are part of Europe in a geographical and cultural–political sense, including not only the Baltic states—Russia, Belarus, and Moldova—but also Armenia, Azerbaijan, and Georgia, and since Kazakhstan also has territory belonging to Europe (and, thus, we included it in the analysis), we saw no reason to omit Kyrgyzstan, Uzbekistan, Tajikistan, and Turkmenistan, which have similar political and legal system to the said countries (or to Russia itself, or to Belarus), and inherited a similar political heritage from the former Soviet Union. We omitted the *de facto* states lacking international recognition (that is, recognition by most European countries), for example, Transnistria, (the Turkish Republic of) Northern Cyprus, Abkhazia, Artsakh (the former Nagorno-Karabakh), and South Ossetia. We also have not examined the Vatican. However, Kosovo is part of the sample, since it is recognized by about two-thirds of the European states (that is, 34 countries) and many other UN member states as well, and it actually functions as a state in the Balkans. Finally, we did not consider the regulation of national symbols, the autonomy, etc. of the member states, cantons, or autonomous regions without independent state sovereignty, unless protection is provided to the concerned symbols by the constitution of the sovereign state, ensuring the given autonomy.

Turning now to the general European features of the constitutional regulation of state symbols, written constitutions of European countries usually regulate the state (and/or national) symbols (to which we will jointly refer as state symbols) at the beginning of the constitution, among the most important, fundamental provisions. The only exceptions are Bulgaria, Norway, and Russia. Moreover, the state symbols are most often regulated together with the official language or languages, and the capital (and sometimes the official state religion) of the given state. This, of course, does not mean that the latter ones are also “state symbols.”⁵⁶

55 Among the European countries (and UN member states) Cyprus is not recognized only by Turkey.

56 It should be noted that the regulation of the capital (or the indication of the name of the capital) is often discussed in literature among state symbols; although there is no doubt that the capital is a place of special importance for a given state (and its citizens), it cannot be considered a symbol in a sense we apply in our analysis. (More so, because the “insult” of the capital, the defamation of the name of the capital, or any similar offenses are not regulated by law in any European country; at

As regards the constitutional regulation, we can distinguish between states whose constitution regulate each of the three traditional symbol types (I); those whose constitution mention only two of them (II); those whose constitutional provisions concern only one of them (III); and those where reference to (any) symbol types is omitted in the constitution (IV) This classification is further refined by the fact that sometimes other state symbols are also regulated in the constitution of a given country.

Ad I). In the relatively most frequent type among the 53 examined countries (25 countries apply this type of regulation in total), each of the three classic state symbols (coat of arms, flag, and anthem) appears in the constitution.

I/A). In 20 countries, these three symbols (and only those) are regulated in the constitution.⁵⁷ In most of them, that is, in 11 countries (the constitutions of Andorra, Belarus, Georgia, Kazakhstan, Kyrgyzstan, North Macedonia, Russian Federation, Serbia, Tajikistan, Turkmenistan, Uzbekistan), the symbols of the given state are merely mentioned, without a precise description of the coat of arms or flag, or without specifying the musical piece used as anthem. In addition, the constitutions of two states (Armenia and Moldova) determine the coat of arms and the flag, and merely mentions the anthem as an existing state symbol.⁵⁸ There are seven (typically Central Eastern and Central European) countries, where the main features of the appearance of all three main state symbols are defined in the constitution. (This is the case in Azerbaijan, Croatia, Hungary, Lithuania, Montenegro, Slovenia, and Ukraine).

As regards the flag, Azerbaijan and Slovenia deserve special attention, as the ratio of the width and length of the flag is also determined at a constitutional level.⁵⁹ The regulation of Hungary is unique to the extent that not only the colors of the flag (and their arrangement) are determined in the constitution but also the things

most, the illegal use of the name of the capital may be unlawful as an infringement of trademark or geographical indication.) Similarly, important historical figures, memorial sites, animals, plants, mythical creatures, fables, folk songs, etc., which are considered to be central elements of the respective folklore, cannot be considered “symbols” in a strict sense, or be discussed in connection with the legal regulation. Those are addressed by the scholarships of history, ethnography, literature, etc., their investigation from the aspect of legal science, in the context of the regulation of symbols is not justified, and it would stretch the framework of the current scope of analysis. Thus, other symbolic contents provided for in the constitutions are not “symbols” and other normative contents are not symbols of the “state” or the “nation” but should be deemed as the constitution’s (own) symbols. (Cf. Smuk, 2014, p. 1.)

57 Andorra (Art. 2), Armenia (Art. 21), Azerbaijan (Art. 23), Belarus (Art. 19), Croatia (Art. 11), Georgia (Art. 2), Hungary (Art. I), Kazakhstan (Art. 9), Kyrgyzstan (Art. 11), Lithuania (Art. 15–16), Moldova (Art. 12), Montenegro (Art. 4), North Macedonia (Art. 5) (only mentioned), Russian Federation (Art. 70), Serbia (Art. 7), Slovenia (Art. 6), Tajikistan (Art. 3), Turkmenistan (Art. 15), Ukraine (Art. 20), Uzbekistan (Art. 15).

58 Both expressly provide that this will be determined by a separate law.

59 “The ratio of the width to the length is one by two” (Constitution of Azerbaijan, Art. 23, para. II, sentence 4); “the ratio of the width of the flag to the length thereof is one to two” (Constitution of Slovenia, Art. 6, para. 2, sentence 2).

symbolized by each color.⁶⁰ The constitutions of Serbia and Slovenia mention that there is a difference between the state flag and the national flag,⁶¹ and the constitution of Ukraine includes a similar reference regarding the anthem.⁶² Moreover, in Serbia and in Ukraine, the small and large state coat of arms are also distinguished⁶³ (as well as in the Czech Republic).⁶⁴

I/B). There are five countries (Albania, Bulgaria, the Czech Republic, Romania, and Slovakia) where other symbols also exist in addition to the above standard threefold symbol system.⁶⁵ The most frequent among such additional symbols is the state seal, recognized as a state symbol by the constitutions of all five countries.⁶⁶ (It is interesting that the state seal is recognized as a state symbol in the constitutions of only two additional European countries, namely in Austria and Kosovo. This means that apart from Austria and Kosovo, the seal is only regulated in countries where all three of the traditional symbols are provided for in the constitution.)⁶⁷ In Romania, beyond the anthem, flag, coat of arms and the state's seal, there is another special symbol, "National Day," which is December 1 in the constitution.⁶⁸ Finally, the Czech Republic has the most complex state symbol system regulated at a constitutional level (not only among the said five countries but all the countries in Europe). In

60 "The flag of Hungary shall feature three horizontal bands of equal width colored red, white and green from top to bottom as the symbols of strength, loyalty and hope, respectively" (Constitution of Hungary, Art. I, para. 2).

61 "The flag of the Republic of Serbia shall exist and be used as the national flag and state flag" (Constitution of Serbia, Art. 7, para. 3); "the flag of Slovenia is the white-blue-red Slovene national flag with the coat of arms of Slovenia." (Constitution of Slovenia, Art. 6, para. 2).

62 "The state Anthem of Ukraine is the national anthem set to the music of M. Verbytskyi..." (Constitution of Ukraine, Art. 20, para. 5).

63 "The coat of arms of the Republic of Serbia shall be used in the form of the Large Coat of Arms and Small Coat of Arms." (Constitution of Serbia, Art. 7, para. 2); "the Great state Coat of Arms of Ukraine shall be established with the consideration of the Small state Coat of Arms of Ukraine and the Coat of Arms of the Zaporozhian Host..." (Constitution of Ukraine, Art. 20, para. 3).

64 Constitution of the Czech Republic, Art. 14, para. 1. (For more detail, see below.)

65 Albania (Art. 14), Bulgaria (Art. 164–167), the Czech Republic (Art. 14), Romania (Art. 12), Slovakia (Art. 9).

66 "The seal of the Republic of Albania is a red shield with a black, two-headed eagle in the center. At the top of the shield, in gold, is the helmet of Skanderbeg" (Constitution of Albania, Art. 14, para. 3); "the state seal shall depict the coat of arms of the Republic of Bulgaria" and "The rules for the placing of the state seal and the display of the national flag shall be established by law. The rules for the placing of the state seal and the display of the national flag shall be established by law" (Constitution of Bulgaria, Art. 165 and 167); "The state seal of the Slovak Republic is formed by the state emblem of the Slovak Republic encircled by the inscription "Slovenská republika" [the Slovak Republic]." (Constitution of Slovakia, Art. 12, para. 3). In addition, Art. 14 para. 1 of the constitution of the Czech Republic and Art. 12 para. 4 of the constitution of Romania mention the seal.

67 In Austria, in addition to the state colors, the flag and the coat of arms, there is only one reference to the role of the seal as the subject of further legislation: "Detailed provisions, in particular as to safeguard of the colors, the coat of arms, and the seal of the Republic, are settled by Federal law" (Constitution of Austria, Art. 8a, para. 3). In Kosovo, the seal is explicitly included among the indicted state emblems (in addition to the flag and the anthem), but a detailed definition of its appearance is, again, absent (Constitution of Kosovo, Art. 6, para. 1).

68 Constitution of Romania, Art. 12, para. 2.

addition to the traditional three symbols, the so-called small and large coat of arms are distinguished, indicated as “small and large state emblems” by the constitution. Moreover, the constitution identifies the state seal, the “state colors” and “the flag of the president of the Republic” as symbols.⁶⁹

Ad II). The second large group consists of nine countries where only two of the three traditional symbols (anthem, flag, and coat of arms) are identified as state symbols (and some of them provide for further special symbols as well).⁷⁰

II/A). The first sub-category of this group consists of those five countries where only the flag and the anthem are regulated (but not the coat of arms). Portugal and Turkey belong to this subcategory, where only these two symbols are indicated at a constitutional level, as well as France, Kosovo, and Malta, where additional special state symbols are also provided for. The regulation adopted in France is unique in Europe for several reasons. First, the “national emblem” is the flag itself, that is, the tricolor, instead of the coat of arms. Second, and this is unique in Europe, the “maxim” rooted in the French Revolution (“Liberty, Equality, Fraternity”) is also a state symbol. Third, there is a “principle of the Republic,” saying “government of the people, by the people, and for the people.” Although this is not a “symbol” (nor is the French official state language governed by the same article), but has a role equivalent to a symbol. In Kosovo, the seal is identified as a (traditional) state symbol in addition to the flag and the anthem,⁷¹ just like the George Cross in Malta, which has a significant role also as an emblem depicted on the flag.

II/B). The second sub-category is characterized by the fact that only the flag and the coat of arms are regulated in the constitution (but not the anthem). This is the case in three states: in Monaco (where the state coat of arms is also the coat of arms of the prince and it is regulated as such),⁷² in Austria (where, in addition, the “state colors” are regulated and the seal is mentioned as a state symbol), and in Estonia (where the “national colors” are regulated in addition). It is interesting that in Estonia, not only the flag but also the coat of arms is “national,” and not “state” symbol, which differs from European practice (the coat of arms is typically “state,” and not “national” symbol in European countries).

69 “The small and large state emblem, the state colors, the state flag, the flag of the president of the Republic, the state seal, and the national anthem are the state symbols of the Czech Republic.” (Constitution of the Czech Republic, Art. 14, para. 1.) Moreover, even more national symbols exist at the level of regular statutes: a military emblem, national distinctive emblem, and emblem of the president’s Castle Guard (cf. Knoll, 2011, p. 1–4).

70 Austria (Art. 8a), Estonia (Art. 7), France (Art. 2), Kosovo (Art. 6), Malta (Art. 3–4), Monaco (Art. 7), Poland (Art. 28), Portugal (Art. 11), Turkey (Art. 3).

71 These two symbols are only mentioned in the constitution of Kosovo, with reference to separate legal regulation. A separate law regulates the appearance, display and protection of state symbols, distinguishing national symbols, which are not regulated in the constitution, and state symbols, and refers the regulation of the protection of the former to a separate law.

72 “The Standard of the Prince consists of the coat of arms of the House of Grimaldi upon a white ground” (Constitution of Monaco, Art. 7, para. 1).

II/C). Finally, the third sub-category of the second group of countries encompasses the states that regulate at the constitutional level only the coat of arms and the anthem (but not the flag). There is only one such country in Europe, namely Poland, which, however, expressly provides for the “national colors” (instead of the flag) as an additional symbol.

Ad III). There are nine countries where only one of the three main state or national symbols are identified at a constitutional level.⁷³ The vast majority of these countries (seven out of the nine) regulates the flag (but not the anthem and the coat of arms), and two of them regulate the coat of arms (but not the flag and the anthem). The constitutions of Cyprus, Germany, Ireland, Italy, Latvia, Norway, and Spain (*III/A*) only provide for the flag and no other additional or special symbols. Two of those countries have particularly intriguing constitutional regulations. The first one is Cyprus, the constitution of which, on the one hand, does not describe the appearance of the flag, nor does it authorize any separate laws to do so, but merely says the following: “The Republic shall have its own flag of neutral design and color, chosen jointly by the president and the vice president of the Republic.”⁷⁴ On the other hand, it includes detailed provisions on the use of the flag of Cyprus, as well as the use of the Greek and Turkish flags along with it (or, for private persons, even separately).⁷⁵ The second one is Spain; the Spanish constitution allows certain self-governing communities to use their own flags or banners (also along with the Spanish flag).⁷⁶ Finally (*III/B*), the constitution of Liechtenstein and Belgium regulate exclusively the coat of arms as state symbol (but not the anthem and the flag). However, instead of providing for the flag, both regulate the “national colors.”⁷⁷ (There is no state in Europe that regulates the anthem as a single symbol.)

73 Belgium (Art. 193), Cyprus (Art. 5), Germany (Art. 22), Ireland (Art. 7), Italy (Art. 12), Latvia (Art. 4), Liechtenstein (Art. 5), Norway (Art. 120), Spain (Art. 4).

74 Constitution of Cyprus, Art. 4, para. 1.

75 Constitution of Cyprus, Art. 4: “...2. The authorities of the Republic and any public corporation or public utility body created by or under the laws of the Republic shall fly the flag of the Republic and they shall have the right to fly on holidays together with the flag of the Republic both the Greek and the Turkish flags at the same time. 3. The Communal authorities and institutions shall have the right to fly on holidays together with the flag of the Republic either the Greek or the Turkish flag at the same time. 4. Any citizen of the Republic or any body, corporate or unincorporate other than public, whose members are citizens of the Republic, shall have the right to fly on their premises the flag of the Republic or the Greek or the Turkish flag without any restriction.”

76 “The Statutes may recognize flags and ensigns of the Self-governing Communities. These shall be used together with the flag of Spain on their public buildings and in their official ceremonies” (Constitution of Spain, Art. 4, para. 2).

77 The constitutional regulation of Belgium is particularly interesting, since it does not explicitly specify that the “national colors” would be red, yellow, and black colors, and it does not explicitly indicate that the coat of arms of Belgium would be the official state coat of arms of Belgium; instead, the constitution only says that the “Belgian nation” “adopts” them. To quote it: “The Belgian nation adopts red, yellow and black colors, and as arms of the kingdom the Lion of Belgium with the motto: UNION IS STRENGTH.” (One might think of asking whether the motto is an official state symbol in Belgium, as, for example, in France; however, in Belgium, the constitution does not refer to it as

Ad IV). Finally, in the constitutions of 10 European countries (Bosnia and Herzegovina,⁷⁸ Denmark, Finland, Greece, Iceland, Luxembourg, the Netherlands, San Marino, Sweden, and Switzerland), there are no references to state (or national) symbols at all.

Overall, at a constitutional level, in most of the 53 European countries with written constitutions examined according to the above approach, the constitution indicates the name of the state (and/or national) symbols. Forty-three European countries provide for at least one such symbol, and the constitution of only 10 countries include no reference to state symbols. In 25 of the countries, all three classical symbols can be found (supplemented with a few additional symbols in five of them). Only two symbols are provided for in nine countries (in a diversity of variations), and only one in nine others. If we separately examine how specifically the constitutions of these 43 countries define the symbols, we will see that their description or designation can be considered typical (for example, the indication of the specific song or musical piece that serves as the anthem). Only 13 countries have constitutional regulations that merely mention the relevant symbol(s),⁷⁹ and in three others, some types of symbols are not described or otherwise defined in the constitution itself.⁸⁰

However, regardless of whether these symbols are simply mentioned in the constitution or whether it also gives their definition or description, it is also typical that constitutions often refer the symbols for further detailed regulation. This type of express statutory delegation occurs in most of the constitutions of the 43 countries that at least mention symbols at a constitutional level; to be precise, it occurs in 24 European countries.⁸¹ Another interesting fact is that there are

an independent symbol, but merely as part of the description of the state coat of arms, so, unlike in France, we do not consider it an independent state symbol (that is, independent of the coat of arms).

78 Among the said 10 countries, only the constitution of Bosnia and Herzegovina includes at least a reference to the state symbols, when providing that “Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency” (Art. I, para. 6).

79 Andorra (Art. 2), Belarus (Art. 19), Georgia (Art. 2), Kazakhstan (Art. 9), Kosovo (Art. 6), Kyrgyzstan (Art. 11), North Macedonia (Art. 5), Norway (Art. 120—only in the case of the flag, as there are no other symbols in the constitution), Russian Federation (Art. 70), Serbia (Art. 7), Tajikistan (Art. 4), Turkmenistan (Art. 15), and Uzbekistan (Art. 15).

80 Moldova (Art. 12—only the anthem is mentioned, the rest is regulated), Romania (Art. 12—only the coat of arms and the seal is mentioned, the rest is regulated), Armenia (Art. 21—the anthem is only mentioned).

81 Albania (Art. 14), Armenia (Art. 21), Austria (Art. 8a), Azerbaijan (Art. 23), Bulgaria (Art. 167—but only on the “use” of the symbols, not on their determination), Croatia (Art. 11), Czech Republic (Art. 14), Georgia (Art. 2), Hungary (Art. I), Kazakhstan (Art. 9), Kosovo (Art. 6), Kyrgyzstan (Art. 11), Lithuania (Art. 15—only in the case of the flag and the coat of arms), Moldova (Art. 12), North Macedonia (Art. 5), Norway (Art. 120—only in the case of the flag, there are no other symbols in the constitution), Poland (Art. 28), Russian Federation (Art. 70), Serbia (Art. 7), Slovakia (Art. 9), Slovenia (Art. 6—but only on the “use” of the symbols, not on their determination), Turkey [Art. 3—but only in the case of the flag, as regards its detailed description, but not in the case of the anthem (and the coat of arms is not even mentioned in the constitution)], Turkmenistan (Art. 15), Ukraine (Art. 20).

12 countries whose constitutions contain special procedural provisions for the determination of state symbols. Most of these require the regulation of a statute adopted in a special way (usually with a qualified majority) compared to the regular legislative process (“constitutional law,” “organic law,” “cardinal act,” etc.),⁸² but some of the constitutions define special procedural provisions themselves (e.g., the constitution of Bosnia and Herzegovina⁸³ or Ukraine,⁸⁴ as well as the constitution of Cyprus⁸⁵). The most extraordinary, however, appears to be the Turkish constitution, since it includes an eternity clause concerning the regulated state symbols, namely the flag and the anthem (and concerning also the capital, Ankara, provided for in the same article, and two other articles on the republic as the form of state and its essential features). The eternity clause stipulates that these provisions are unchangeable, as they “shall not be amended, nor shall their amendment be proposed.”⁸⁶

It is also interesting that, in addition to or instead of the national flag, some (six, to be precise) constitutions, as already mentioned above for these countries, provide for national colors as an explicit national symbol.⁸⁷ That occurs in Austria,⁸⁸ the Czech Republic,⁸⁹ Estonia⁹⁰ (in these constitutions, the flag and the colors are regulated parallelly, as separate symbols), as well as in Liechtenstein,⁹¹

82 Azerbaijan (Art. 21), Georgia (Art. 2), Hungary (Art. I), Kazakhstan (Art. 9), North Macedonia (Art. 5), Romania (Art. 12), Russian Federation (Art. 70). The constitution of Monaco prescribes that “the use of these standard and flag is governed by the provisions of the *sovereign ordinance* dated April 4, 1881” (Art. 7).

83 “Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency” (Constitution of Bosnia and Herzegovina, Art. I, para. 6).

84 “The Great state Coat of Arms of Ukraine shall be established...by the law adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine” (Constitution of Ukraine, Art. 20, para. 3). “The description of the state symbols of Ukraine and the procedure for their use shall be established by the law adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine.” (Constitution of Ukraine, Art. 20, para. 6).

85 “The Republic shall have its own flag of neutral design and color, chosen jointly by the president and the Vice-president of the Republic” (Constitution of Cyprus, Art. 4, para. 1).

86 Constitution of Turkey, Art. 4.

87 This greatly facilitates the identification of cases of flag desecration, as it enables action to be taken against acts that desecrate the ideological content carried by the national symbol, and not only an object. (Another possible solution, of course, is if the legislature or the bodies applying the law abandon the often-hopeless attempts to delimit the conducts of flag desecration, that is, to distinguish them from other acts that do not violate the flag itself. The objective problems of this sort of practical distinction are highlighted, e.g., by Levinson, as he draws attention to the fact that it would be impossible to precisely define the actions that can be committed against the different media depicting the flag or its colors in various forms and visual images (cf. Levinson, 1993, pp. xv–xx).

88 “Colors of the Republic of Austria” (cf. Constitution of Austria, Art. 8a, para. 1).

89 “State colors” (cf. Constitution of the Czech Republic, Art. 14, Art. 1).

90 “National colors of Estonia” (cf. Constitution of Estonia, Art. 7).

91 “National colors” (cf. Constitution of Liechtenstein, Art. 5).

Belgium, and Poland⁹² (where the constitution provides for national colors instead of the state or national flag). We also mentioned above that, as an additional, constitution-level state symbol, the seal is regulated in a few European countries (Albania,⁹³ Austria,⁹⁴ Bulgaria,⁹⁵ the Czech Republic,⁹⁶ Kosovo,⁹⁷ Romania⁹⁸ and Slovakia⁹⁹), while, respectively, one constitution provides for the flag of the president of the Republic (Czech Republic),¹⁰⁰ for a “National Day” (Romania),¹⁰¹ for a maxim (France),¹⁰² a principle (France),¹⁰³ and a certain specific emblem (the “George Cross” in Malta¹⁰⁴). There are additional distinctions in a few certain countries: between the small and the large state coat of arms in the Czech Republic,¹⁰⁵ Serbia,¹⁰⁶ and Ukraine;¹⁰⁷ the state and the national flag in Serbia¹⁰⁸ and Slovenia;¹⁰⁹ the state and the national anthem in Ukraine;¹¹⁰ and the distinction between the state symbols and the national symbols in Kosovo (where the latter are not regulated in the constitution).¹¹¹ Finally, with regard to the flag, it should be noted that there are only two countries (Azerbaijan and Slovenia) that provide for the ratio of the width and the length of the flag,¹¹² and only one (Hungary) whose constitution presents the symbolism behind the colors of the flag, that is, the meaning of each color.

92 “Colors of the Republic of Poland” (cf. Constitution of Poland, Art. 28, para. 2).

93 Constitution of Albania, Art. 14.

94 Constitution of Austria, Art. 8a.

95 Constitution of Bulgaria, Art. 165.

96 Constitution of the Czech Republic, Art. 14, para. 1.

97 Constitution of Kosovo, Art. 6, para. 1.

98 Constitution of Romania, Art. 12, para. 4.

99 Constitution of Slovakia, Art. 9, para. 3.

100 Constitution of the Czech Republic, Art. 14, para. 1.

101 Constitution of Romania, Art. 12, para. 2.

102 Constitution of France, Art. 2, para. 4.

103 Constitution of France, Art. 2, para. 5.

104 Constitution of Malta, Art. 3, para. 2.

105 Constitution of the Czech Republic, Art. 14, para. 1.

106 Constitution of Serbia, Art. 7, para. 2.

107 Constitution of Ukraine, Art. 20, paras. 3–4.

108 Constitution of Serbia, Art. 7, para. 3.

109 “The flag of Slovenia is the white-blue-red Slovene national flag with the coat of arms of Slovenia.” (Constitution of Slovenia, Art. 6, para. 2)

110 Constitution of Ukraine, Art. 20, para. 5.

111 “The appearance, display and protection of the flag and other state symbols shall be regulated by law. The display and protection of the national symbols shall be regulated by law” (Constitution of Kosovo, Art. 6, para. 2).

112 Constitution of Azerbaijan, Art. 23, para 2; Constitution of Slovenia, Art. 6, para. 2.

5. Criminal law protection¹¹³ of the state and national symbols in Europe

5.1. Theoretical aspects of the protection of symbols under criminal law

The legislative decision on the punishability of the violation of state symbols is based on the political evaluation on the collision of two values worth being protected. On the one hand, there exists the dignity of the national community and the state (which, in most cases, embodies the titular nation and/or the totality of its citizens), the protection of which is essentially the protection of the dignity of the individuals who make up the community. On the other hand, one of the most important fundamental rights is freedom of expression, which protects the communication of one's ideas in whatever form. In the jurisprudential thinking, three modes of justification have been elaborated to protect freedom of expression. This protection can serve 1) searching for the truth, 2) democracy, and 3) personal liberty. The service of truth and the service of democracy can be called the instrumental or collective or utilitarian justification of freedom of expression, whereas the principle of individual autonomy can be called the constitutive or individual or deontological justification thereof.

From a historical point of view, initially John Stuart Mill's argument for searching for the truth became the key concept that grounded theoretical conceptualization. According to Mill, there are three cases in which an opinion can be suppressed, and all three of them have negative implications for society as a whole; hence, the persecution of opinions is incorrect from a utilitarian perspective.

The first case is when the opinion is true. No matter how uncomfortable or harmful an opinion is, it may nevertheless be true; not even the majority can state that they possess the ultimate truth or that they are infallible. Suppressing an opinion that is true is wrong not because it is unjust, but because it leads society astray—in other words, it leads to bad decisions in practice.

The second case is when both the suppressed opinion and the majority opinion are partially true; in this case, the former can complete the latter; hence, the partially true opinion can contribute to the development of knowledge. In this case, it is not a problem (or it can even be an advantage, according to Mill) if the promoters of the suppressed, partially true opinion advocate it as an ultimate and perfect truth, because a radical opinion is much more likely to make the audience or the readers think.

Finally, the third case is if the suppressed minority opinion is false and the majority opinion is true. Many believe that banning a false opinion (sanctioned by the state) can be useful; however, this is not the case. A false (and harmful, immoral, shocking, etc.) opinion can be used to clash with both the truth and possible

113 The sources of the text of the criminal codes analyzed are the OSCE/ODIHR Legislationline database (<https://legislationline.org/>) or other official websites (except for Greece—see below).

counterarguments, hence the majority, true opinion can be reinforced by reacting to the false arguments. If we do not allow an opinion to be challenged, then the “truth” will be degraded to pure prejudice or dogma. (These latter are in fact two separate results—so, according to Mill, the abovementioned three possibilities are in fact four possibilities.)¹¹⁴

The second possible justification of freedom of expression is the service of democracy, which is likewise a utilitarian argument.¹¹⁵ According to this notion, freedom of expression is important, because a democracy cannot be imagined without it; the free debate in public affairs is in the interest of every member of the political community. People can only express their will in a given issue if they are aware of the underlying facts, arguments, and counterarguments; if people are precluded from gaining knowledge in public affairs, then they are virtually denied the right to make responsible and informed decisions.

Finally, the argument of autonomy,¹¹⁶ that is, the constitutive justification of freedom of expression, protects free speech as the expression of personality, irrespective of any external social aim;¹¹⁷ therefore, with this approach, the protection of

114 In Mill’s own words: “We have now recognized the necessity to the mental well-being of [human-kind] (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds....First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds and not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience” (Mill, 2001, pp. 49–50).

115 The first wording of this thought can be read in Meiklejohn’s book; cf. Meiklejohn, 1965, pp. 9–10. [It must be added that Meiklejohn kept in mind the model of municipal local self-government, so his views (e.g., the possibility of free participation and speaking at the “meeting”) can only be used to a limited extent at national level, and that speech is only meaningful to the public when it comes to political matters (i.e., public affairs); otherwise, it may be limited.]

116 However, autonomy can be not only the autonomy of the communicator but also of the recipient. According to Scanlon, for instance, the state can only address the rights of its citizens in so far as this state intervention leaves citizens with the opportunity to continue to regard themselves as “equal, autonomous, and rational agents” (cf. Scanlon, 1972, p. 215).

117 According to constitutive or moral justifications, freedom of speech is to be defended solely on the grounds (regardless of the consequences of the protection) that it is an essential feature of a just political community to regard all responsible members (responsible moral agents) as responsible persons, however, the justification of autonomy has two dimensions. On the one hand, any morally responsible individual has the right to be aware of opinions that convince him that his previous view was wrong; on the other hand, they also have the right to declare their own convictions, regardless of whether anybody else considers these convictions to be true or valuable (Dworkin, 1996, pp. 200–201).

free speech is an end in itself, and the expression of personality is an intrinsic value. In Ronald Dworkin's view, the search for truth and the service of democracy are two parts of the *instrumental justification* of freedom of expression, while the argument of individual autonomy (which ensures the self-expression and the deployment of the personality) is called the *constitutive justification* of freedom of expression.¹¹⁸

However, freedom of expression is not an unrestrainable right; the rights of individuals or the interests of communities can be legitimate aims and reasons for limitation. This aspect is reflected (as it will be shown) in the legislation of most of the European states, and justifies the protection (including criminal protection) of symbols expressing the unity of the community under constitutional provisions.

The protection of state symbols (including also national symbols protected by the state) may appear at several different levels in the countries of the world. Regardless of whether the constitution provides for the state symbols, they exist in (almost) every country. In almost every case, a country has (at least) its own flag, anthem, and coat of arms, in terms of which provisions may be prescribed in several different branches of law. Also, these provisions may be rather diverse, depending on how strong the natural community cohesion is in the given country, or how they intend to create it on a political basis. For example, in the USA the Pledge of Allegiance to the flag held at the beginning of a school day serves to express and create patriotic feelings.¹¹⁹ However, at the same time, as a sign of respect for political opinion (and of the fact that freedom of speech has a prominent social value), speech related to national symbols (as long as it does not pose a "clear and present danger" to society, that is, it does not incite hatred and violent acts) is not punishable.¹²⁰

In the United States, as opposed to most of the European countries, the desecration of state symbols (especially the most common case in practice, flag desecration) is supposed to be, virtually, an admissible form of political expression, including political dissent, which usually means resentment against a state symbolized by any state symbols (typically the flag) or protest against a specific state measure, and is basically related to the freedom of expression.¹²¹ Flag burning or other forms of desecration of the flag or other symbols is an act falling into the scope of political and public speech (permitted or prohibited, depending on the given country). As it is well known to everyone, it is allowed in the United States, because due to the right to free speech (the freedom of political expression), and the classical liberal political philosophy behind it, a more important social interest is related to the dissemination of ideas and the possibility of influencing public opinion than to the protection of the ideological content embodied in a symbol (which can be disputed in terms of its

118 Cf. Dworkin, 2009, pp. v–ix.

119 Cf. Kolstø, 2006, p. 677.

120 For the history of the test of "clear and present danger": its development from its first appearance in 1919 in the *Schenck* case (and the *Frohwerk* and *Debs* cases decided in parallel) to the so-called *Brandenburg* test as it is used today, elaborated in 1969, and its impact outside the US, cf. Barnum, 2006, pp. 263–292.

121 Cf. Duggal and Sridhar, 2006, p. 146.

essence in a democracy). However, this idea was enforced not by political legislation, but in several steps by the Supreme Court of the United States, which also has the right of judicial review.

First, in *Stromberg v. State of California*,¹²² the Supreme Court created the possibility of extending the freedom of speech, protected by the First Amendment of the Constitution, from “pure speech” to “symbolic speech.” Many years later, in 1969, in *Street v. New York*¹²³ the Supreme Court annulled a court decision holding responsible a citizen for a misdemeanor who burned an American flag while protesting due the death of a civil rights activist,¹²⁴ yet without mentioning the relationship between political speech and flag burning or the constitutional aspects of their conflict; in *Texas v. Johnson*,¹²⁵ the Supreme Court specifically held that sanctioning flag burning as a means of political expression is unconstitutional.¹²⁶ Finally, in *United States v. Eichman*,¹²⁷ the Supreme Court annulled the federal Flag Protection Act 1989, which was adopted as a response of the US Congress; so, as a result of its case law protecting the freedom of speech, the US Supreme Court consolidated, to this day, the protection of political speech against the protection of national or state symbols.¹²⁸

On the contrary, in Germany, the *Bundesfervassungsgericht* (German Federal Constitutional Court), by its decisions rendered on the same day in 1990 in the so-called *German National Flag Case*¹²⁹ and *German National Anthem Case*,¹³⁰ recognized the criminal law protection of national symbols and the punishment of those who commit acts violating it—without any specific violent acts or any intention for incitement to violence—as constitutional. According to the *Bundesfervassungsgericht*, the freedom of speech cannot be exercised without limits, and these limits are set by the federal constitution (specifically by Art. 5 para. (2) and (3) thereof), even though it found that the sanctions imposed by the criminal courts in the specific cases for the conducts at issue (the act of a manager of a publisher, who displayed, on a cover of a book, a collage of a human torso urinating on a flag held aloft during a military oath ceremony, and the act of an editor who parodied the German anthem for sociopolitical reasons in a Nuremberg city magazine) were disproportionate for the protection of the freedom of expression and the right to artistic expression included in it as an independent partial right, and annulled those specific criminal court judgements.¹³¹

122 283 U.S. 359 (1931).

123 394 U.S. 576 (1969).

124 For details of the court decision, see Constitutional law, 1968, pp. 1041–1044.

125 491 U.S. 397 (1989).

126 See e.g., Dorsen, 2000, pp. 417–442; for the subsequent social outrage and legislative reactions, see Dorsen, 2000, pp. 424–427; see also Wood, 1989, pp. 375–380.

127 496 U.S. 310 (1990).

128 Dry, 1990, pp. 69–103; Darling, 2004, pp. 101–119; Dorsen, 2000, 428–430.

129 104, BverfGE 81 (1990).

130 105, BverfGE 81 (1990).

131 Cf. e.g., Krüdwagen, 2002, pp. 689–698; Bleise, 1992, pp. 471–477; Saunders, 2017, pp. 177–180.

In Europe as a whole, state (and/or national) symbols (or some of them) are typically regulated by norms of constitutional nature (but not necessarily included in the constitution). However, while the description of the state coat of arms and the flag is necessarily included in the domestic law (more so, because official contacts and events necessary for international relations could not take place in the absence of the regulation of these symbols), it sometimes occurs that the anthem is recognized purely on a “customary law” basis, that is, without being regulated by domestic state norms. And even if the anthem is provided for by such norms, it is usually not as detailed as the regulation of the coat of arms or the flag. This is understandable also because legal regulation, which typically applies linguistic, or very rarely pictorial, means, and appears in a written form, is less suitable for the complex, precise description of anthems and for the display of vocal symbols (thus, instead of describing the anthem itself, the law addresses the manner in which it should be played, but the necessity of that is questionable at best).

In addition to constitutional norms, the internal legal regulation may encompass administrative norms (typically, the determination of the details of the use of the symbol), civil law norms (for example, the possibilities of the depiction of the symbols to be registered as parts of trademarks or the regulation of the violation of personality rights related to symbols), as well as norms regulating misdemeanors and criminal law norms. Since the most important aspects of the protection of symbols are the possibilities of criminal law protection, and since the sources for research available also in English typically cover this area, in the following, we will review the criminal law regulations related to the protection of the state symbols of the 53 European countries under examination. Each of the 53 countries with written constitution has a separate criminal code, which includes the acts sanctionable under criminal law (or at least most of them),¹³² and on the basis of which the regulations related to the protection of symbols of the same countries can be analyzed. It should be noted that, in this regard, the reason the United Kingdom falls out of the scope of our analysis is not its lack of a written constitution but its lack of a single criminal code. Nevertheless, the situation of the United Kingdom should not be neglected, so, before examining the regulations of the 53 countries with single criminal codes, it must be highlighted that in the United Kingdom, just like in most of the countries following common law traditions, the violation of the state or national symbols is not punishable under criminal law.¹³³

132 Typically, offenses arising from the provisions of international criminal law, possibly committed under special legal order, or other so-called *extra ordinem* offenses (e.g., military or war crimes, or crimes against humanity) may remain outside of the regulation of the criminal code of a given state, but sometimes other special sanctionable acts (e.g., press policing misdemeanors) may also be regulated outside the criminal code.

133 As it will be discussed below, not even the range of national symbols is codified in the United Kingdom, so, *ab ovo*, no punishment may arise in relation to them. As it is well known, in the United States the freedom of speech expressly extends to the desecration of national symbols, developed by the case law of the US Supreme Court. In Australia, even though several proposals were made to

In the vast majority of the 53 analyzed European countries, the violation of state symbols is also sanctioned by criminal law means; freedom of speech extends to the desecration of official state (or other protected national) symbols in just a small number of countries.¹³⁴ About three-quarters of European countries, that is, 40 states, make the violation of at least one state symbol or its use as a means to commit other unlawful acts punishable by law;¹³⁵ while the criminal codes of the rest of the

protect at least the flag (most recently, in 2006, see Bronwyn Bishop: Protection of the Australian National Flag (Desecration of the Flag) Bill 2006. Explanatory Memorandum. The Parliament of the Commonwealth of Australia House of Representatives, 2005-2006. [https://www.legislation.gov.au/ComLaw/Legislation/Bills1.nsf/0/FD41445B3F4DCDB3CA257146002C4B7E/\\$file/06016em.pdf](https://www.legislation.gov.au/ComLaw/Legislation/Bills1.nsf/0/FD41445B3F4DCDB3CA257146002C4B7E/$file/06016em.pdf)), these were not adopted by the Australian legislature, thus, the violation of symbols is not punishable there either. (As regards the subtle Australian case law, see Meagher, 2008, pp. 73–102.) The only exception is New-Zealand, where desecration of the flag constitutes a criminal act under Art. 11, para. 1 of the Flags, Emblems, and Names Protection Act 1981 (Act no. 47 of 1981), which also declares the flag “the New Zealand Ensign.” (According to it, “Every person commits an offense against this act who, (a) without lawful authority, alters the New Zealand Flag by the placement thereon of any letter, emblem, or representation; (b) in or within view of any public place, uses, displays, destroys, or damages the New Zealand Flag in any manner with the intention of dishonoring it.”) Based on the division developed by René David (David, 1985, pp. 22–31), India is not considered a common law country, because its traditional and religious norms give it a rather different character (David, 1985, pp. 484–515); as it is usual in similar countries, the regulation in India protects the national symbols in a very conservative manner (cf. e.g., Kohli, 2010, pp. 215–228). It is an interesting fact that the Japanese legal system, which otherwise is strongly influenced by the law of the United States, does not favor the freedom of speech in this regard: a disciplinary measure (warning), which was applied against a school music teacher on the basis of an act from 1999 on the protection of the national anthem (National Anthem and Flag Law 1999—which was adopted somewhat late compared to other countries in the world) was found lawful by the Supreme Court of Japan. The sanction was imposed because the concerned teacher refused to play the Japanese anthem at a school festival, since she believed that it glorified the emperor (cf. Tsuji, 2019, pp. 751–776).

134 There is, of course, no international legal prohibition on this; it is not prohibited by the European Convention on Human Rights or the case law of the European Court of Human Rights, either. (The issue itself is a matter for state regulation, and the unconstitutionality of criminal law protection of state symbols has not been raised so far. The only case that has touched on this issue is the case of *Jehovah's Witnesses of Moscow v. Russia*, in which the ECtHR ruled in 2010 that the Russian ordinary courts’ reliance on the fact that the religious organization incited hatred against (among other things) state symbols as a reason for its dissolution does not follow from the facts of the case, i.e., it was unfounded. On this basis (and for many other reasons), therefore, the dissolution of the religious association was contrary to the Convention. [See *Jehovah's Witnesses of Moscow and Others v. Russia* (application no. 302/02), 10 June 2010, paras. 149–153.]

135 The countries that follow it are (with the articles of the criminal code of the given country that render the violation of a state symbol sanctionable in parentheses): Albania (Art. 268), Armenia (Art. 331), Austria (Art. 248), Azerbaijan (Art. 324), Belarus (Art. 370), Bulgaria (Art. 108), Croatia (Arts. 349, 356), Denmark (Art. 110 e), Estonia (Arts. 245, 249), France (Art. 433-5-1), Georgia (Art. 343), Germany (Art. 90a), Greece (Arts. 155, 191A), Hungary (Art. 334), Iceland (Art. 95), Kazakhstan (Art. 372), Kosovo (Art. 141), Kyrgyzstan (Art. 352), Italy (Arts. 292–293, 299), Latvia (Art. 93), Liechtenstein (Arts. 248, 317), Lithuania (Arts. 127, 128), Luxembourg (Art. 232 *bis*), Moldova (Art. 347), Montenegro (Arts. 198, 200), North Macedonia (Arts. 319, 178, 181), Norway (Arts. 165, 166), Poland (Art. 137), Russian Federation (Art. 329), San Marino (Arts. 338, 407), Serbia (Arts. 317, 173 and 175), Slovakia (Art. 364), Slovenia (Art. 297), Spain (Art. 543), Switzerland (Arts. 270, 298),

examined countries, that is, 13 countries, lack such sanctionable acts.¹³⁶ (If we add the United Kingdom, which does not have a separate criminal code, then there are a total of 14 states in Europe that allow for free speech in that regard.)¹³⁷

Ad I). Looking at the countries that do *not* render the violation of state symbols punishable (Andorra, Belgium, Bosnia and Herzegovina, Cyprus, Czech Republic, Finland, Ireland, Malta, Monaco, Netherlands, Portugal, Romania, and Sweden), we can see that they provide a rather diverse picture, and no regularities can be established as to why a violation of symbols is not sanctioned in these countries. Although the criminal policies of these countries have a common result, there are different underlying reasons. Some of them are classic “liberal” countries in favor of freedom of speech (traditionally, in addition to common law countries, Scandinavian legal systems belong to this group, for example Sweden and Finland, but the Netherlands also belongs among them). There are also countries, where the influence of another country, which is geographically close and/or politically and culturally dominant, is evident (e.g., the influence of the English common law, in favor of freedom of speech, on Ireland or the former colony, Malta). In some cases, due to social and/or historical reasons, the expression of unified statehood is not very strong, and in order to prevent internal tensions, the criminal-law protection of symbols did not seem justified—that is, to pacify those who might intend to violate them (this is the situation in the case of the protection of state symbols of Belgium where the “Belgian” identity is not very strong, or Cyprus, where the symbols, no matter how neutral they might be, are suitable for inciting the tensions between the Greeks and Turks living in the country).

A similar motive could have justified the—octroyed—regulation of Bosnia and Herzegovina, where, to prevent internal tensions in the federal state divided by the three major state-forming nationalities, hit by a bloody war in the first half of the nineties, and currently united under harsh pressure from the international community, it was also reasonable not to bring the violation of the symbols of the federal state under the scope of criminal law. Although our research did not

Tajikistan (Art. 342), Turkey (Arts. 300, 341), Turkmenistan (Art. 178), Ukraine (Arts. 338, 339), Uzbekistan (Art. 215).

136 Andorra, Belgium, Bosnia and Herzegovina, Cyprus, Czech Republic, Finland, Ireland, Malta, Monaco, Netherlands, Portugal, Romania, and Sweden.

137 The continental part of Europe follows a stricter political thought also in other respects, which limits the freedom of speech more. According to a 2014 survey, defamation and slander was sanctioned in 23 out of the then 28 member states of the European Union; only five EU member states lacked criminal-law limitations of the freedom of speech and allowed only civil-law action against defamatory statements (cf. Tóth, 2015, p. 490). It is interesting that, according to this survey, the non-EU member Eastern European countries gave room for the freedom of speech to a much greater extent (and avoided criminal law sanctions for defamation and slander), most likely because they had experience of what may happen when the means of criminal law serve the interests of the central power and, thus, suppress criticism and opinions. The latter countries included Armenia, Bosnia and Herzegovina, Georgia, Macedonia, Moldova, Montenegro, partly Serbia (defamation was abolished but libel was preserved there), Tajikistan, and Ukraine.

cover the internal regulation of the member states of the analyzed federations, neither of the two member states of Bosnia and Herzegovina, that is, neither the Federation of Bosnia and Herzegovina (the Bosnian–Croatian Federation) nor the Republik of Sprska applies the classic protection of symbols; the violation of “national” symbols (which does not cover state symbols) are only punishable if committed as a hate crime (with an instrumental nature)¹³⁸—similarly to the situation in Kosovo. However, neither of the said effects is exclusive; that is the reason why other Scandinavian or Nordic countries (e.g., Norway, Denmark, or Iceland) criminalize the desecration of state symbols; similarly, we can draw no conclusions merely from the form of state or the size of a given country (Monaco and Andorra omits criminalization, while San Marino or Liechtenstein embraces it), or even cultural similarities (Portugal does not render the violation of symbols punishable, while Spain does)—despite, of course, the conclusion that the fact that a country belongs to one group or the other cannot be traced back to a single, common cause representing a similar motive.

Ad II). As for the 40 countries whose criminal codes render the violation of state symbols punishable, they also provide a rather diverse picture. As mentioned, Kosovo only sanctions the defamation of national (and not state) symbols if it is capable of inciting hatred or constitutes a hate crime;¹³⁹ in other words, its regulation does not fit in the regulatory scope of the traditional protection of state symbols, but in an extended criminalization of hate crime: in this case, only an expression of hatred against national minorities (or the majority nationality that forms the state) is explicitly punishable under criminal law.¹⁴⁰ (In addition, as we will see below, in the case of North Macedonia, Serbia, and Slovenia, there is hate crime,¹⁴¹ as well as classic protection of symbols.) In Slovakia, the violation of

138 Criminal Code of Federation of Bosnia and Herzegovina, Art. 163, “Inciting National, Racial or Religious Hatred, Discord or Hostility”; Criminal Code of Republik of Sprska, Art. 359, “Incitement to violence and hatred.”

139 Kosovo (Art. 141), Slovakia (Art. 364).

140 Criminal Code of the Republic of Kosovo, Art. 141 (“Inciting discord and intolerance”), para. 3 “Whoever commits the offense provided for in para. 1 of this Art. by means of...exposing national, racial, ethnic or religious symbols to derision...shall be punished by imprisonment...”; Criminal Code of Slovak Republic, Art. 364 (“Disorderly Conduct”): “Any person who, either verbally or physically, commits gross indecency or disturbs peace in public or in a place accessible to public, in particular by...b) desecrating the state symbol,...shall be liable....”

141 Criminal Code of the Republic of North Macedonia, Art. 319 (“Causing hatred, discord or intolerance on national, racial, religious or any other discriminatory ground”), para. 1: “Whosoever by...mocking of the national, ethnic, religious and other symbols, by burning, destroying or in any other manner damaging the flag of the Republic of Macedonia or flags of other states,...directly or indirectly, causes or excites hatred, discord or intolerance on [protected attributions], shall be sentenced to imprisonment...”; Criminal Code of the Republic of Serbia, Art. 317 (“Instigating National, Racial and Religious Hatred and Intolerance”), para. 1: “Whoever instigates or exacerbates national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia, shall be punished by imprisonment...”; para. 2: “If the offense specified in para. 1 of this Art. is committed by...exposure to derision of national, ethnic or religious symbols,...the offender shall be punished by imprisonment...”; Criminal Code of the Republic of Slovenia, Art. 297 (“Public

state (domestic) symbols is only regulated and rendered punishable as an instrumental offense of the nature of public nuisance.¹⁴² Therefore, in fact, not 40 but only 38 countries belong to the group in which traditional protection of symbols (also) exists.

These 38 countries with “real” protection of symbols can be divided into five larger sub-groups: some of them (II/A) only protect their own state symbols; while some (II/B), in addition to their own, also protect the symbols of other states, but that protection does not cover symbols falling outside the scope of state symbols; in certain countries (II/C), in addition to the violation of their own state symbols (and/or the symbols of other states), the violation of the symbols of international organizations are also punishable (not including war crimes, e.g., the misuse of the red cross, which is a crime under the international law of war);¹⁴³ other states (II/D) have special regulations, where the scope of the protection under law covers also additional symbols (e.g., those of a member state of a federation); finally, there are countries which protect symbols of foreign states (or other symbols, typically those of international organizations), but—curiously—this protection does *not* cover their *own* state symbols.

II/A). There are 12 states that provide criminal-law protection to their own state symbols and only those.¹⁴⁴

The protection of all three classical symbols is covered by the legislation of the following countries: Albania, which criminalizes the “humiliation” of the Republic and its symbols; Belarus, which renders the “violation” of the state symbols punishable; Kazakhstan, Latvia and Turkmenistan, where the conduct punishable in terms of all three traditionally protected state symbols is the “desecration” of these symbols; and Hungary, where the violation of “national” symbols is called outright “blasphemy.”

Hungary is special in that the criminal code, as of 1 July 2013 when Act C of 2012 came into effect, in addition to the three classic symbols (which is called not “state” but “national” symbols), provides protection to an extraordinary, specifically

incitement to hatred, violence or intolerance”), para 1: “Whoever publicly incites or stirs up hatred, violence or intolerance with respect to nationality [...] shall be sentenced to imprisonment...”; para. 4: “If an act...is committed by...desecration of ethnic, national community, national or religious symbols,...the perpetrator shall be sentenced to imprisonment....”

142 Criminal Code of the Slovak Republic, Art. 364 (“Disorderly Conduct”), para. 1: “Any person who, either verbally or physically, commits gross indecency or disturbs peace in public or in a place accessible to public, in particular by “b) desecrating a state symbol,...shall be liable [to criminal punishment].”

143 See below.

144 Albania (Art. 268), Azerbaijan (Art. 324), Belarus (Art. 370), France (Art. 433-5-1), Georgia (Art. 343), Hungary (Art. 334), Kazakhstan (Art. 372), Kyrgyzstan (Art. 352), Latvia (Art. 93), Russian Federation (Art. 329), San Marino (Arts. 338, 407), Turkmenistan (Art. 178).

national symbol, namely the “Holy Crown“ which is considered a historical relic.¹⁴⁵ The Holy Crown is not similar to the other three symbols, but it represents the historical (and, consequently, the constitutional) identity of the Hungarian nation, a prominent symbol of the history of public law, and serves as the basis of the most important theory of Hungarian constitutional development, the so-called Holy Crown doctrine.¹⁴⁶

In 2000, the Hungarian Constitutional Court examined the constitutionality of the offense of “blasphemy of national symbol” as regulated in the old Criminal Code protecting the anthem, the flag, and the coat of arms, and ruled that it constitutes a constitutionally justifiable limitation on the freedom of speech; in other words, freedom of speech does not extend to the desecration of national symbols. The offense of “blasphemy of national symbol” was regulated in Art. 269/A of the Criminal Code in effect at that time (Act IV of 1978): “Any person who—before great publicity—uses an expression to dishonor or degrade the national anthem, the flag or the coat of arms of Hungary, or commits any other similar act, if such act does not result in a criminal act of greater gravity, is guilty of a misdemeanor punishable by imprisonment for up to one year.” In its Decision 13/2000. (V. 12.) CC, the Constitutional Court did not find the regulation of this offense unconstitutional, and ruled that the national symbols (the Hungarian anthem, the flag, and the coat of arms) “are constitutional symbols of the country’s external and internal integrity, which is why there are constitutional arguments in favor of their criminal-law protection. The enhanced public-law and criminal-law protection of institutions that express and display national sovereignty is constitutionally accepted in European legal cultures, and this is also a justified limitation of the freedom of expression.”¹⁴⁷ ¹⁴⁸ Since banning the “blasphemy” of any of these symbols does not prevent people from expressing opinion about them or

145 “Any person who—before the public at large—uses an expression to dishonor or degrade the national anthem, the flag or the coat of arms, or the Holy Crown of Hungary, or commits any other similarly slanderous act is guilty of a misdemeanor punishable by imprisonment...” (Criminal Code of Hungary, Art. 334.)

146 As regards the essence of the Holy Crown doctrine, see Eckhart, 1941.

147 As we have seen above and we will see below, this constitutional idea is essentially identical to the opinion of the German *Bundesverfassungsgericht* or the Spanish constitutional court on the criminal-law protection of national symbols (and differs from, e.g., the liberal opinion expressed in the USA, absolutely in favor of the freedom of speech.

148 Cf. CC decision no. 13/2000. (V. 12.), [61], [69]. The Constitutional Court of Hungary added: “Ensigns and symbols are as ancient as the history of mankind and human communities. Symbols, on the one hand, have always expressed the belonging of the individuals using the signs to a certain community, and, on the other hand, they have represented the whole community to the outer world. Although today mankind, as a whole, and large regions have symbols as well, the ensigns of national communities organized in the form of states have particular significance....[N]ational symbols have a twofold meaning: on the one hand, they are external forms of representing statehood, the sovereignty of the state and, on the other hand, they are tools to express belonging to the nation as a community. These symbols can be and are widely used by the members of the community, both individuals and legal entities...” [CC decision no. 13/2000. (V. 12.), 61, 67.]

criticize the regulation thereon, nor does it sanction the artistic actions or expressions of scientific criticism, the stipulation of the Criminal Code on it is not unconstitutional.¹⁴⁹

Out of the three domestic symbols, only two are protected in the following countries: Azerbaijan,¹⁵⁰ France,¹⁵¹ Georgia,¹⁵² Kyrgyzstan,¹⁵³ the Russian Federation¹⁵⁴ and San Marino.¹⁵⁵ With the exception of France, these countries omit the criminal-law protection of the anthem (and protect the coat of arms and the flag). France, on the other hand, does not protect the coat of arms (which is not even provided for in the constitution), regulating it as a form of “contempt,” and criminalizes only the “insulting” of the flag and the anthem. The regulation of San Marino is special, as, in addition to the traditional protection of symbols, it also punishes the unauthorized commercial and advertising use of the symbols as state trademarks (which, in other states, constitutes a regulation on civil-law /commercial law or trademark law/ or administrative level).¹⁵⁶

II/B). In addition to the given country’s own symbols, the criminal code of 9 European countries provide protection to the symbols of other states (but to state symbols only).¹⁵⁷ The following countries provide protection to all three main types of symbols, both in terms of their own state symbols and those of other states, in the following respective frameworks: as “contempt of state symbols” in Armenia, as “violation of symbols of the Greek state” and (in the case of reciprocity) as “violation of the symbols of another state” in Greece,¹⁵⁸ as “defilement of state symbols” in

149 ” The Constitutional Court holds that expressing negative opinions concerning the national symbols as well as scientific views, artistic expressions and criticism related to the history, value and public law significance of the ensigns, and also putting forward proposals on modifying or ceasing them are naturally out of the scope of criminal sanctioning as they are part of the constitutional freedom of expression.” [CC decision no. 13/2000. (V. 12.), 61, 70-71.]

150 “Violation of the National Flag or State Emblem of the Republic of Azerbaijan.”

151 “Contempt.”

152 “Desecration of the State Coat of Arms or of the national flag.” (The anthem is not protected, even though it is also mentioned in the constitution as a national symbol.)

153 “Desecration upon the National Emblem of the Kyrgyz Republic or the State Flag of the Kyrgyz Republic.” (The anthem is not protected, even though it is also specified in the constitution as a national symbol.)

154 “Outrages upon the National Emblem of the Russian Federation, or the State Flag of the Russian Federation.”

155 “Insult of the Republic and its emblems.”

156 Penal Code of San Marino, Art. 407 (“Illegal reproduction of the emblem of the Republic”): “Anyone who, without authorization, reproduces on goods or objects intended for trade the flag with emblem or the emblem of San Marino, unless the act constitutes a more serious offense, shall be punished with a fine....”

157 Armenia (Art. 331), Greece (Arts. 155, 181), Italy (Art. 299), Moldova (Art. 347), North Macedonia (Art. 319—hate crime; Arts. 178,181), Norway (Arts. 165, 166), Poland (Art. 137), Tajikistan (Art. 342), Turkey (Arts. 300, 341) and Ukraine (Arts. 338, 339).

158 I owe special thanks to Emmanouil Billis, Ilias G. Anagnostopoulos and Pantelis V. Bratis for translating the relevant provisions of the Greek Civil Code effective as of 2019 to English. In the course of my research, the Greek was the only criminal code that I could not find in any world language. (However, the old Greek Criminal Code, which was effective before 2019, can be found in English: Billis, 2017.)

Moldova, as “undermining the reputation of the Republic of North Macedonia” and as “undermining of the reputation of a foreign state” in North Macedonia, and as “degrading the symbols of state sovereignty” and (in the case of reciprocity) as “offenses against the flag of a foreign state” in Turkey. The regulation of North Macedonia is special in that it provides exemption from criminal law liability to journalists and in other exhaustively listed cases.¹⁵⁹

Only the violation of the coat of arms and the flag is rendered punishable in Italy,¹⁶⁰ Poland¹⁶¹ and Tajikistan (in Italy and Poland, the violation of the symbols of foreign states is only punishable in the case of reciprocity). Finally, in Ukraine, by an offense named “outrage against state symbols,” (as the only country in the group) provides a different regulation in terms of domestic and foreign symbols, and while it protects all three of its own state symbols, it only protects the flag and the coat of arms from among the symbols of foreign states, and only if they were “officially installed or raised flag or coat of arms.” In addition, in Ukraine, the special criminal offense of illegal hoisting of the national flag of Ukraine at a river or sea vessel is punishable separately.

II/C). In 9 countries, beside the domestic (and, in 8 countries from among them, beside the foreign) state symbols, the symbols of international organizations also receive protection.¹⁶² (We do not include here the misuse of the red cross or other similar war crimes,¹⁶³ which constitute a criminal offense in all of the examined European countries.)¹⁶⁴ The only country that, in addition to the protection of the

159 Criminal Code of the Republic of North Macedonia, Art. 182-a (“Exclusion from liability...”): “There shall be no liability for the crimes referred to in Arts. 178, 179, 181, 182 for a journalist while practicing the profession, as well as for other persons, if the expressed humiliating opinion has been given in defense of freedom of public speech or of other rights or when protecting the public interest or other justified interests, or with honest intention or belief in the good intention of the opinion.

160 Cf. Penal Code of Italy, Arts. 292–293, 299 (“Insult or damage to the flag or other emblem of the state”; “Offense to the flag or other emblem of a foreign state”). The law also protects other, unspecified symbols, but only pictorial ones (“emblem”).

161 Criminal Code of the Republic Poland, Art. 137. para. 1: “Whoever publicly insults, destroys, damages or removes an emblem, banner, standard, flag, ensign or other symbol of the State shall be [punished]”; para. 2: “The same punishment shall be imposed on anyone, who on the territory of the Republic of Poland publicly insults, destroys, damages or removes an emblem, banner, standard, flag, ensign or other symbol of another State, publicly displayed by a mission of this state or upon an order of a Polish authority.”

162 Croatia (Arts. 349, 356), Estonia (Arts. 245, 249), Liechtenstein (Arts. 248, 317), Lithuania (Arts. 127, 128), Montenegro (Arts. 198, 200), Norway (Arts. 165, 166), Serbia (Arts. 173, 175), Slovenia (Arts. 163, 164).

163 Some countries render these acts punishable not in the general criminal code, but through separate laws or promulgated international conventions.

164 In general, the unlawful use of the red cross, and, additionally, often that of the red crescent, and rarely that of the red crystal, or perhaps that of “any similar” symbols is punishable as a war crime or military crime. In Belarus, the use of the symbols of international organizations, neutral or hostile (!!!) states, and military deception by using them is punishable; in Finland, the misuse of symbols pursuant to the Geneva Conventions is punishable in general; in some states (e.g., the Czech Republic, Lithuania, Slovakia, Spain), the unlawful use of the symbols of the UN and other states, and in Kosovo, Montenegro and Serbia, the unlawful use of the UN and other similar international organizations is punishable.

domestic state symbols, does not provide protection to any foreign state symbols but protects the symbol of a (single) supranational entity, is Bulgaria; in addition to the defamation of the coat of arms, the flag or the anthem of the Republic of Bulgaria, it renders the defamation of the flag or anthem of the European Union punishable.¹⁶⁵

Croatia protects the Croatian state flag, coat of arms and national anthem, as well as those symbols of other states, from exposure “to public ridicule, contempt or gross disparagement,” and punishes the same criminal offense committed against the symbols of certain, specified international organizations (namely the United Nations, European Union, Council of Europe, International Red Cross “or any other recognized international organization”).¹⁶⁶ In Estonia a person is punishable if they tear down, damage, profane or otherwise defame the Estonian flag, national coat of arms or any other official symbol of the Republic of Estonia, of a foreign state or an official symbol of an (any non-specified) international organization, or if they defame the national anthem of Estonia or that of a foreign state.¹⁶⁷ Also in Liechtenstein, the vilification of all of the traditional domestic and foreign state symbols (flag, coat of arms, anthem¹⁶⁸), as well as the vilification of the “intergovernmental institutions” is punishable under the conditions prescribed in the criminal code.¹⁶⁹ In Lithuania, the desecration of all three domestic state symbols, and the officially displayed foreign state emblems or flags is rendered punishable, and, under the latter conditions, the desecration of symbols of the European Union or an (any) “international public organization” is also punishable.¹⁷⁰

In Montenegro, mockery of any of the three, both domestic and foreign, traditional state symbols, is punishable (however, as a special provision, the latter act is only punishable if the offended state has diplomatic relations with Montenegro); mocking either two specified organizations of which Montenegro is a member—the

165 Criminal Code of the Republic of Bulgaria, Art. 108, para. 2.

166 Criminal Code of Croatia, Art. 349 (“damaging the reputation of the Republic of Croatia”) and Art. 356 (“damaging the reputation of a foreign state and international organization”). In terms of the latter criminal offense, the following special procedural provision is applicable: criminal proceedings can only be initiated based on an approval from the state attorney of the Republic of Croatia who may grant such approval after having obtained consent from the state, international organization or person against whom the criminal offense has been committed.

167 Penal Code of the Republic of Estonia, Art. 245 (“Defamation of official symbols of Republic of Estonia”) and Art. 249 (“Defamation of official symbols of foreign state or international organization”).

168 However, in terms of the anthem, there is a difference between the protection of the domestic anthem and the anthems of foreign states: while the vilification of the anthem of Liechtenstein is punishable is general, without limitation, in the case of the vilification of the anthem of a foreign state, the act must be performed during the playing of the concerned anthem at a public event. (cf. Criminal Code of the Principality of Liechtenstein, Art. 248, para. 2; Art. 317).

169 Vilification of the emblems of the intergovernmental institutions can be punished only if the concerned emblem was installed by a domestic authority or a representative office of the foreign state or if it was installed by the intergovernmental institution in accordance with the general rules of international law or under intergovernmental treaties. (cf. Criminal Code of the Principality of Liechtenstein, Art. 317).

170 Criminal Code of Lithuania, Art. 127 (“desecration of state symbols”) and Art. 128 (“desecration of symbols of a foreign state, the European Union or an international public organization”).

United Nations Organization and the International Red Cross (whether by the violation of their symbols or otherwise)—is similarly punishable.¹⁷¹ However, Montenegro, similarly to North Macedonia and Serbia which will be discussed below, provides impunity from criminal liability in several cases in order to protect the freedom of speech.¹⁷²

In Norway, in terms of the “Norwegian or foreign official coat of arms, mark or seal,” not the violation or mockery, but only the deceptive use and misuse, e.g., unauthorized acting on behalf of a state body, is punishable.¹⁷³ Similarly, only the abusive or deceptive use is rendered punishable in terms of the symbols of international organizations.¹⁷⁴ In Serbia and Slovenia, in addition to the “violation of national symbol” presented above, which offense is punishable in the context of hate crime, the traditional protection of state symbols also includes the punishment of the offenses committed against domestic symbols and the symbols of foreign states (all three types in both cases), which means that a person who “publicly ridicules” (in Serbia) or “publicly dishonors” (in Slovenia) any of them is punishable.¹⁷⁵ Finally (similarly to Montenegro and North Macedonia), Serbia defines grounds for excluding criminal liability in certain cases justified in order to protect freedom of expression.¹⁷⁶

II/D). There are 6 countries where not only the violation of the symbols of the given state (and/or other states, and/or international organizations) is punishable, but also that of the symbols of “internal” entities or communities (which do not have sovereignty), such as member states, autonomous territories, or local governments. The most common in that regard is the punishment for violating the symbols of provinces, member states or autonomous territories, in addition to the punishment for

171 Criminal Code of Montenegro, Art. 198 (“Tarnishing the Reputation of Montenegro”) and Art. 200 (“Tarnishing the Reputation of Foreign states or International Organizations.”).

172 “Perpetrators shall not be punished for offenses set forth in Arts. 198 to 200 of this Code where the presentation was given within a serious criticism in a scientific, literary, or artistic work, or while performing an official duty, journalistic profession, political activity, while defending a right or protecting justified interests, provided that the manner of expression or other circumstances show that he has not done it with the intention to discredit or where he proves the veracity of his allegation or that he had a well-founded reason to believe in the veracity of what he was stating or disseminating.” (Criminal Code of Montenegro, Art. 201.)

173 Penal Code of Norway, Art. 165 (“Misuse of public uniform, distinctive sign or title, etc.”).

174 Penal Code of Norway, Art. 166 (“Misuse of international distinctive sign”).

175 Criminal Code of the Republic of Serbia, Art. 173 (“Disparaging the Reputation of Serbia”) and Art. 175 (“Ruining the reputation of a foreign state or international organization”); Criminal Code of the Republic of Slovenia, Art. 163 (“dishonoring the Republic of Slovenia”) and Art. 164 (“Dishonoring a foreign country or international organization”).

176 “There shall be no punishment of the perpetrator for offenses specified in Arts 173 through 175 if the statement is given within the framework of serious critique in a scientific, literary or art work, in discharge of official duty, performing journalist duties, political activity, in defense of a right or defense of justifiable interests, if it is evident from the manner of expression or other circumstances that it was not done with intent to disparage or if he proves the veracity of his allegations or that he had reasonable grounds to believe that what he said or disseminated was true.” (Criminal Code of the Republic of Serbia, Art. 176.)

violating the federal symbols. In Austria, for example, the violation (spiteful insult, disparagement or other kinds of degradation) of the flag or anthem of "federal provinces" ("*Bundesländer*") (provided that they are displayed on a public occasion or at an event open to the public) also constitutes a criminal offense.¹⁷⁷ In Germany, the flag and anthem of the states (*Länder*), as well as their coat of arms and even their state "colors" are protected—even though the federal constitution only specifies the constitutional protection of the federal flag.¹⁷⁸ In Switzerland, "attacks" on Swiss national emblems are punished, including attacks on cantonal symbols. The federal flag, as well as the cantonal and foreign flags are expressly specified, but, in general, the violation of any "Swiss national emblem" or "a national emblem of a foreign state" constitutes a crime; this protection therefore covers other objectified symbols besides the flag and the coat of arms, but—due to its nature—does not extend to sanctioning the violation of the national anthem.¹⁷⁹

In Spain, the criminal law regulation covers also the ensigns or symbols of Autonomous Communities. As it can be seen above, the Spanish constitution provides protection to the symbols of Autonomous Communities, but the criminal-law protection is stronger in the case of Spain (that is, in the case of the Spanish state and not the Autonomous Communities), because it covers not only the flag named in the constitution, but all symbols,¹⁸⁰ and the constitutionality of that was recognized even by the Constitutional Court of Spain. In one of its more recent decisions, rendered in 2020,¹⁸¹ in relation to Art. 543 of the Spanish Penal Code, the Constitutional Court of Spain ruled that the regulation that renders the scorning of the Spanish flag punishable is not unconstitutional. In the concerned case, the employees of an outsourced cleaning company of a military compound demonstrated against the civilian company to improve their working conditions, and as the part of that, during a flag-raising ceremony, one of the civilian employees shouted that "here you have the silence of the f***ing [*puta*] flag," and "we have to set that f***ing [*puta*] flag on fire." The concerned person submitted a constitutional complaint (*amparo*) against the final decision imposing a penalty. The Constitutional Court ruled that the flag as

177 Austria, Art. 248 ("Disparagement of the state and its symbols" / "*Herabwürdigung des Staates und seiner Symbole*").

178 Germany, Art. 90a ("Disparagement of state and denigration of symbols" / "*Verunglimpfung des Staates und seiner Symbole*"/), para. 1: "Whoever publicly, in a meeting or by disseminating material 1. uses abusive language against or maliciously disparages the Federal Republic of Germany or one of its Länder or its constitutional order or 2. denigrates the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its Länder..."; para. 2: "Whoever removes, destroys, damages, renders unusable or defaces, or commits defamatory mischief on a flag of the Federal Republic of Germany or of one of its Länder which is on public display or a national emblem which has been mounted in a public place by an authority of the Federal Republic of Germany or one of its Länder... The attempt is punishable."

179 Criminal Code of the Swiss Confederation, Art. 270 ("Attacks on Swiss national emblems") and Art. 298 ("Attacks on the national emblems of a foreign state").

180 Criminal Code of the Kingdom of Spain, Art. 543 ("On offending Spain").

181 Case 190/2020.

a symbol of the Spanish unity is constitutionally entitled to criminal law protection, and that the mockery of the flag caused an intense feeling of humiliation among the military personnel in the concerned case and it was not connected to the protection of the labor rights of the employees of a civil company.¹⁸² In principle, the decision is significant because it recognized, as did the constitutional courts of several other European countries (e.g., that of Germany and Hungary), that the protection of national/state symbols can be a legitimate, constitutionally recognized limitation on the freedom of speech.

The regulation of the protection of symbols are also doubled in Uzbekistan, where the Uzbek criminal code, in addition to the state flag, state emblem and state anthem of the Republic of Uzbekistan, also protects the similar own symbols of the Republic of Karakalpakstan, which is an autonomous territory in Uzbekistan.¹⁸³ Finally, the regulation of Luxembourg is unique throughout Europe, since it not only punishes the unauthorized use (for example, for advertising purposes) of the state symbols (so not their violation), but also that of the symbols of local governments and other official symbols, as well as the unauthorized use of the symbol of the Grand Duke. There is no other state that protects not only its own symbols or the symbols of its member states or autonomous territories, but also the symbols of local governments at a criminal law level.¹⁸⁴

II/E). Finally, there are two countries whose criminal law, based on their own special regulations, only protects the symbols of foreign states/nations and international organizations (e.g., EU, UN, CoE), but not their *own* state symbols. One of them is Denmark. According to the Danish criminal code: “Any person who openly insults any foreign nation, foreign state, its flag or any other recognized symbol of nationality or the flag of the United Nations or the Council of Europe shall be liable,”¹⁸⁵ but there is no similar provision for the punishment of the same acts when they are committed against Danish state or national symbols. Thus, the protection of the freedom of speech is “polite,” just like in the case of Iceland (the reason of which might be that the domestic symbols are not specified in the constitution of either country). The criminal code of Iceland, very similarly to that of Denmark, provides that “any person who publicly insults a foreign nation or foreign state, its supreme official, its head of state, its flag or other recognized national symbol, or the flag of the United Nations or the flag of the European Union, shall be subjected to a fine.”¹⁸⁶ The only

182 As regards that case and its assessment, see Cuenca, 2021, pp. 125–145.

183 Criminal Code of Uzbekistan, Art. 215 (“Disrespect to state Emblems”).

184 Criminal Code of the Grand-Duchy of Luxembourg, Art. 232bis.: “[It shall be punished] those who have made use for unauthorized purposes the coat of arms of the Grand Ducal House, those of the state and of the municipalities, the national flag, the flag of shipping and aviation, as well as all crests, emblems and symbols used by the authorities and by the public establishments. There is unauthorized use of the coat of arms and symbols concerned, in particular when it is made: a) for fraudulent purposes, b) for commercial, industrial, professional or advertising purposes, except in the cases provided for by laws and regulations, or authorized by the government.”

185 Criminal Code of Denmark, Art. 110 e.

186 Criminal Code of Iceland, Art. 95.

difference in the area of symbol protection is that one of the dedicatedly protected international organization is the UN in the case of both countries, while the other is the Council of Europe in the case of Denmark, and the European Union in the case of Iceland (although Iceland is not an EU member state); otherwise, both are generally worded and do not limit the protection of symbols under criminal law to the flags of other states, but extend it to any symbol that is considered state (national) symbol by the given state.

Overall, the criminal law protection of the state symbols (and, only to a small extent, national symbols in a strict sense) prevails in most part of Europe, in about three-quarters of the European countries. In two of these countries, the violation of such symbols is only punishable as a hate crime (and in three additional countries, *also* as a hate crime),¹⁸⁷ under various names (defamation, vilification, desecration, mockery, etc., of the state symbols/emblems/etc.). There are only three countries (Luxembourg, Norway, and San Marino) where the violation or desecration of a symbol is not punishable, only its unlawful (e.g., abusive or unauthorized commercial) use.

From among the 53 countries with written constitutions, 38 countries apply criminal-law protection of symbols in a strict sense (that is, not regulated as hate crime or an instrumental act of public nuisance). Among those, there are 36 countries where the violation of domestic state (or national) symbols is punishable (whether only those or those *as well*),¹⁸⁸ and only two where it is not.¹⁸⁹ In total, the violation of the symbols of foreign countries is punishable in 21 states¹⁹⁰ (among them, only in the case of reciprocity in four ones); the criminal regulation of 11 countries allow for the punishment of the defamatory violation of the symbols of international organizations;¹⁹¹ the symbols of cantons, member states, or autonomous territories, etc., are protected by the criminal code of five countries (that is, the criminal code of the given territory etc. or the federal criminal code);¹⁹² finally, there is only one state (Luxembourg) that allows for punishment for the abuse of the symbols of local governments and other state bodies (although it is not a defamatory crime, that is, not the “defamation” but only the abusive, deceptive use of symbols is punishable).

187 As it was mentioned before, Kosovo and Slovakia belong to the former group, while North Macedonia, Serbia and Slovenia belong to the latter.

188 Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Croatia, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, Montenegro, North Macedonia, Norway, Poland, Russian Federation, San Marino, Serbia, Slovenia, Spain, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, and Uzbekistan.

189 Denmark and Iceland.

190 Armenia, Bulgaria, Croatia, Denmark, Estonia, Greece, Iceland, Italy, Liechtenstein, Lithuania, Moldova, Montenegro, North Macedonia, Norway, Poland, Serbia, Slovenia, Switzerland, Tajikistan, Turkey, Ukraine.

191 Bulgaria, Croatia, Estonia, Liechtenstein, Lithuania, Montenegro, Norway, Serbia, and Slovenia.

192 Austria, Germany, Spain, Switzerland, and Uzbekistan.

6. Conclusion

Even though Europe is often perceived as a continent “no longer in need” of its old culture, and where the protection of community (mainly the state and national) symbols fades into the obscurity of the past, and, thus, these symbols no longer have any substantive significance, we can see, on the contrary, that both the constitutions and the criminal codes consider that these values ought to be protected, and the latter allow for the desecration and violation of these symbols to be punished with sanctions under criminal law (even if the harmfulness to society of such offenses does not reach the level of a violent crime committed against a person, and, therefore, they are typically sanctioned by either a fine or some sort of criminal-law measure, and imprisonment is indeed a rarely applied punishment). All this is typical not only of Central European countries but of Europe as a whole (in contrast to the liberal Anglo–Saxon tradition, in which countries the defamation of symbols, as long as it does not constitute any other violent offense or a direct incitement to such offense, falls under the protection of the freedom of speech). So, at the level of legal regulation as regards the protection of state or national (or, in a broader sense, community) symbols, there is no significant difference between Eastern and Western Europe in a geographical sense, or between the former socialist countries and the countries that have long been capitalists. In that regard, neither can a connection be established with the form of state (monarchy or republic), or the nature of the state organization (federal or unitary state).

Thus, there seems to be a broad consensus on this attitude: community (state, national) symbols protect the rights of *individuals* held together by the community (state, nation) through the fictional interests of the communities, and the relationship of the individuals to these communities is seen as a value to be preserved. This shows that, in contrast to the more individualistic Anglo–Saxon and common law approach, most European countries have found a balance between the protection of individual rights (including freedom of expression) and the protection of the interests of the community, what is reflected as well in the constitutional regulation and the possibility of criminal defense of violations of state and national symbols in most of the European countries.

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LEGAL PROTECTION OF STATE, NATIONAL AND COMMUNITY SYMBOLS IN CROATIA



DALIBOR ČEPULO

1. Introduction

Symbols of communities express their basic values, historical roots, experiences, endurance, and stability. They connect members into the whole, motivate them to action, and serve as the identity basis of the community. The attitude of the state as a supra-community toward its own symbols and the symbols of other communities, among which the nation has a principal role, indicates the position of communal and individual values in the state as well as the fundamentals on which it rests.

The subject of this chapter is the constitutional and legal protection of the Croatian state symbols, national symbols, and symbols of national minorities and religious communities as the most important communities in Croatia. It analyzes normative framework in constitutional, administrative, criminal, and private law, and indicates the legal status of principal values as expressed through the symbols upon which the state and respective communities are grounded. The study is limited to this framework and does not include other symbols or slogans, or deals with hate speech, unless directly connected with the protection of the examined symbols.

The study encountered serious challenges to which it had to respond. The principal challenge was a lack of methodological, empirical, and comparative basis in the literature, which made it necessary to set the conceptual and methodological ground of the research and identify its empirical basis. An equally difficult challenge was the topical and disciplinary complexity of the research that included symbols of three different types of communities that should be examined within several legal

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disciplines. Another problem was a lack of the respective regulations in the Croatian legal system concerning national symbols, and religious symbols in particular. Finally, the contextualization of the symbolic basis proved to be a challenge, given the complex Croatian tradition that greatly affects the reception of symbols in contemporary time and often turns the respective discourse into a political debate. These challenges determined the framework of the research and shaping of its goals: providing for a review and analysis of the respective regulation, its contextualization, and any indication of deeper layers of determination.

In implementing these goals, we will first present the historical basis of the research, i.e., the process of formation of the respective symbols and their use and status over time, necessary to understand their today's reception in public, legislative policy, and legal practice. The historical overview will also provide the empirical material that will be used in defining the conceptual basis of the research, i.e., in formulating operative definitions of the examined symbols. These preliminary settings are the basis for the principal part of the research that will present and analyze the normative framework, including the main features of the case law, related to the protection of individual symbols in each of the three groups. That will include necessary contextualization and discussion on the major controversies that affected the legislation and legal practice. Finally, the study will try to identify the main structural features related to the regulation of the respective symbols and specificities of the regulation in Croatia after the proclamation of its independence.

2. Symbols of power, national and religious symbols in Croatia from the mid-nineteenth century to 1990

The formation of the modern Croatian symbols was part of the Croatian nation-building process that in the 1830s emerged in the Kingdoms of Croatia and Slavonia, an autonomous land in the Hungarian part of the Habsburg monarchy. The principal demand of the Croatian nineteenth century nation-building was territorial unification of “the Croatian lands,” parts of the former medieval Croatian Kingdom, into the single “proto-state” of the Kingdoms of Croatia, Slavonia, and Dalmatia.¹ The projected unification was not realized, yet the king acknowledged its historical basis, so the name of the Kingdoms of Croatia, Slavonia, and Dalmatia (“the Triune Kingdom”) entered into the official use as the name of the country.

¹ Goldstein, 2011, pp. 61, 68. I wish to express my gratitude to my colleagues at the Faculty of Law, University of Zagreb who read and commented this paper or its parts during the writing, in particular to Doc. Dr. Marko Bratković, Prof. Dr. Aleksandar Maršavelski, Prof. Dr. Saša Nikšić and Prof. Dr. Snježana Vasiljević.

The Croatian national symbols were coined on this basis in 1848 and were soon after accepted as official symbols of the land. In that year, in accordance with the triune name of the land, the historical coats of arms of Croatia, Slavonia, and Dalmatia were merged into a single three-part coat of arms, and their characteristic colors were united in a red-white-blue flag.² The united coats of arms and the tricolor flag were immediately accepted in public use, and from the very beginning, they were used in official practice as well. Gradually, these symbols became the official symbols of the autonomous government (“state”) of the Kingdoms of Croatia and Slavonia, as well as the symbols of the virtual territorial integrity of the Triune Kingdom. The particular Croatian flag and the coat of arms were legally recognized in the Croatian–Hungarian Settlement of 1868, but neither the Settlement nor laconic decree of the Croatian–Slavonian government provided for precise description of these symbols or their elaborated protection.³ Therefore, in practice, they appeared in different forms, so the tricolor flag most often appeared with the coat of arms in the middle, but sometimes without it, the Croatian “chequered” coat of arms appeared with different number of fields (mostly 25) and different initial field (mainly white). Gradually, the Croatian “chequered” coat of arms prevailed in popular use thus becoming a single symbol of the all-Croatian national and territorial unity, even though the three-part coat of arms remained exclusive in official use until 1918 and occasionally until 1924.⁴ Different versions of the Croatian coat of arms and tricolor flags were widely used not only in Croatia–Slavonia but also in Dalmatia and other Croatian regions, as well as among Croatian émigrés in overseas countries, thus becoming widely accepted national symbols.⁵ However, even the use of this single symbol varied in regard to numbers of fields and colors of the initial field. In 1846, the ceremonial song “Our Beautiful Homeland” was composed that gradually, being performed on public events and on official occasions, became accepted as the *de facto* official anthem.⁶

Apart from the emergence of these symbols of power and national symbols, particularly important in this period was the standardization of the Croatian language. Led by Ljudevit Gaj, Croatian linguists in the 1830s shaped the variant of the Štokavian dialect grounded in the Croatian literary tradition⁷ into the common “Illyrian” (i.e., South

2 The Croatian coat of arms consisted of several red and white fields (“chessboard”); the Slavonian coat of arms consisted of a blue shield with two horizontal white beams (rivers) in the middle, separated by a red field with a marten on it, and a six-pointed star in the right-hand upper corner; the Dalmatian coat of arms presented three crowned golden lions’ or leopards’ heads on the blue shield (Jareb, 2010, pp. 17, 27, 56).

3 The ban’s decree of 1876 provided for rudimentary description of the coat of arms and the flag as well as for a few casuistic clauses on the use (Ibid., pp. 89–90).

4 Ibid., pp. 117ff, 175.

5 Ibid., pp. 118, 122ff, 207.

6 According to oral tradition the ceremonial song “Our Beautiful Homeland,” based on the poem “Croatian Homeland” by Croatian poet Antun Mihanović, was composed in 1846 by Josif Runjanin, an Austrian Army cadet of Serbian-Orthodox origin (Tomašek, 1990, pp. 30–35).

7 Ljudevit Gaj conceived his variant of the Štokavian dialect based on the written Croatian literary tradition as well as on the rather rich philological tradition of dictionaries and grammars. For more on the shaping of the Croatian language, see Šokčević, 2016, pp. 235ff)

Slavic) language, which was the basis of the projected “Illyrian” unification. Most Croats and all Serbs spoke Štokavian but neither Serbs nor Slovenes accepted “the Illyrian movement.” It soon turned into an exclusively Croatian national integration movement with the Gaj’s variant of the Štokavian as the basis of the standard Croatian language.⁸ However, the Serbian philologist Vuk Karadžić already codified the Serbian language based on the Serbian (Štokavian) vernacular.⁹ In this way, two similar languages appeared, having a common linguistic basis, yet having two different literary and cultural traditions. However, Karadžić spoke of the single Serbian language, the single literary tradition, and the single Serbian nation, declaring all speakers of the Štokavian dialect, including Štokavian Croats, to be Serbs.¹⁰ This ethno-linguistic discourse neglected the Croatian national identity and gradually became the source of serious controversies that culminated in the twentieth century, making the question of the name and features of the Croatian language a first-class political and symbolic issue.¹¹

In addition to language, one of the important Croatian identity features was the wide acceptance of the Catholic faith and its symbols as a longstanding hallmark of the Croatian tradition that accompanied the Croatian national identification.¹² Apart from that, the national romanticism of the 19th century “discovered” the continuity of cultural development in Croatia as a distinctive element in comparison to some neighboring nations, which gave rise to the idea of “the millennial Croatian culture” as one of the elements of the Croatian national identity.¹³ This element got its symbolic expression in the form of the medieval wickerwork pattern,¹⁴ which became more widely established as a national symbol between the two world wars, but did not reach the symbolic power of the coat of arms or language. The Croatian *ban*, the head of the Croatian autonomous executive, and the Croatian Diet, both of medieval origin,¹⁵ emerged in the nineteenth century as immaterial symbols of the Croatian

8 Goldstein, 2011, pp. 59–61.

9 Up to Vuk Karadžić, Serbian literary tradition was almost exclusively grounded on the “Church-Slavic language” of the Orthodox Church with hardly existing literary tradition in Štokavian (Šokčević, 2016, pp. 232–233).

10 In one of his most important articles “Serbs All and Everywhere?” Vuk Karadžić defined Catholic speakers of the Štokavian dialect as “Serbs of the Roman faith,” and consequently substituted denomination “Croat/Croatia” with various regional denominations (Miller, 1998, p. 27).

11 Goldstein, 2011, pp. 79, 176–177.

12 The Evangelical faith was not widespread in Croatian areas, where it was mainly related to the ethnic Hungarian and ethnic German population, while the “Greek-Eastern Church” (i.e., the Serbian Orthodox Church), the Jewish faith, and Islam were in principle related to ethnic Serbs, Jews, and Muslims who had settled from Bosnia and Herzegovina. The affiliation of Croats with Catholicism was not intransigent, but open to a certain degree toward these religions (Budak, 2010, p. 7; Čepulo, 2002, p. 170ff; Dobrovšak, 2014, 30ff).

13 Budak, 2010, p. 7.

14 Wickerwork pattern was widespread in the early medieval Croatian Kingdom, yet under the influence from the Langobard and Carolingian culture and not as an exclusive Croatian artefact (Budak, 2010, p. 7; Jareb, 2010, 182ff).

15 The institution of the ban enjoyed uninterrupted continuity from the tenth century to 1921, and the Diet has existed from the thirteenth century to 1918 and then again from 1939 to today, yet with breaks in four different states.

statehood and autonomous power. Finally, image of the crown of the early medieval Croatian ruler was promoted by the end of the century but only modestly exploited in practice till 1920s.¹⁶

After the disintegration of the multicultural Habsburg Monarchy in 1918, the Kingdom of Serbs, Croats, and Slovenes was founded as a nation–state of the single “three-named people” with a single Serbo–Croatian–Slovene language. The complex coat of arms of the new state that should unite coats of arms of the three “tribes” was in fact the Serbian coat of arms amended with symbols of the Croats and Slovenes. The Croats were represented with the historical Croatian coat of arms with 25 fields and the initial red field. The state flag combined the national colors of the three peoples in a new combination (blue-white-red). At first, the concept of South Slavic national unity was widely accepted among Croats, but the imposition of this idea based on the language and tradition of the most numerous and politically dominant Serbian people soon provoked revolt, which was accompanied by extensive public use of the Croatian national symbols.¹⁷

The political crisis in the country culminated in the assassination of three Croatian members of the state parliament in 1928, and the *coup d'état* of King Alexander in 1929. The king changed the country's name to the Kingdom of Yugoslavia and introduced radical Yugoslav unitary ideology. Only the public display of the Yugoslav flag was allowed and the use of national names and symbols for political purposes was banned or severely restricted. The regime was moderately liberalized after the 1934 king's assassination by radical Croatian (*Ustasha*) and Macedonian (VMRO) nationalists. The “Croatian question” was resolved in 1939 by a political compromise and formation of an autonomous unit of the Banovina of Croatia in a quarter of the state territory. The Banovina of Croatia officially accepted as its symbol the historical coat of arms with 25 fields, and initial red field, crowned over by the crown of dynasty Kardorđević. The wickerwork pattern was extensively used in official communication, and the tricolor flag in practice.¹⁸

The Kingdom of Yugoslavia and the Banovina of Croatia disappeared in the short April 1941 war. Shortly afterward, Germany and Italy established the Nazi fascist puppet state, the Independent State of Croatia (ISC), under the leadership of the *Ustasha* movement that collectively persecuted the Jews, Roma, and Serbs. Soon after the founding of that state, its symbols were precisely arranged. The coat of arms of the Independent State of Croatia consisted of the historical Croatian coat of arms with the initial white field, elements of wickerwork, and the capital “eared” letter U (symbol of the *Ustasha* movement), and the same elements were incorporated

16 The symbolic use of the medieval Croatian crown was particularly intensified since the millennial celebration of the Croatian Kingdom in 1925. It was extensively used in official practice of the Banovina of Croatia (1939–1941) as well as in the Independent State of Croatia (1941–1945) (Jareb, 2010, pp. 133–134, 183).

17 *Ibid.*, 2010, pp. 194ff.

18 *Ibid.* pp. 238–240.

into the red-white-blue flag.¹⁹ Other decrees banned the Cyrillic script, introduced a radical reform of orthography with the state Office for the Language responsible for the purity of the Croatian language in public use;²⁰ the wickerwork pattern was used extensively in official and public communication.²¹

On the other side, the communist-led partisan resistance movement proclaimed Democratic Federal Yugoslavia in 1943, and the federal system based upon the Soviet model was constitutionalized in 1946. Croatia, like the other six republics, was defined as the federal state with its own constitution and its own state symbols based on historical symbols (the “chequered” coat of arms, tricolor flag) that, in the spirit of Soviet heraldry, were amended with “socialist features” i.e., red star, ears of grain, anvil, sun and sea. The song “Our Beautiful Homeland,” which has been continuously performed as de facto Croatian anthem, was officially proclaimed the anthem of the Socialist Republic of Croatia in the amendment to its Constitution in 1972. The basis of the language practice in the new state was the semi-official 1954 Novi Sad Agreement among a group of linguists and writers from Bosnia and Herzegovina, Croatia, Montenegro, and Serbia on the common language of Serbs, Croats, and Montenegrins under the name Serbocroatian or Croatoserbian. However, most of the Croatian linguists, writers and other cultural actors criticized that solution as the basis for imposing the name and the language standards of the Serbian language.²² The 1974 Constitution of the Socialist Republic of Croatia²³ defined the official language in Croatia as “the Croatian standard language...called Croatian or Serbian language.”²⁴ This ambiguous definition reduced, but did not remove, tensions over the language.

Political liberalization in the second half of the 1960s was reflected in the less restricted public use of the Croatian historical coat of arms without prescribed ideological features. However, occasional yet still fairly inconsequential cases of penal persecution became more frequent after the mass repression against the nationalist “Croatian Spring” movement in 1971 and with the radicalization of Yugoslav crisis in the 1980s. The indictments primarily targeted the public use of the Croatian coats of arms and flags without “socialist insignia,” but penalties were occasionally imposed

19 It is not clear why *Ustasha*s chose the initial white field on the coat of arms—as an opposition to the coat of arms of the Kingdom of Serbs, Croats, and Slovenes/Yugoslavia, or based upon some historical document (Ibid., p. 272).

20 Samardžija, 2006, pp. 20–21.

21 Jareb, 2010, pp. 183, 275.

22 Croatian linguists recognized the common linguistic basis of the Croatian and Serbian languages, but also demonstrated the individuality of the two languages and insisted on the right of each people to call a language by its own name (Goldstein, 2011, pp. 176–177).

23 Ustav Socijalističke Republike Hrvatske, *Narodne novine*, 8/1974, 31/1981, 5/1986, 24/1989, 71/1990, 31/1990.

24 Full text of the Art. 138 of the 1974 Constitution of the Socialist Republic of Croatia reads: “Language in public use in the Socialist Republic of Croatia is Croatian standard language—standard form of the language in popular use by Croats and Serbs in Croatia that is called Croatian or Serbian language.”

for displaying the coat of arms with the initial white field or for linking national colors and religious symbols.²⁵

After the multiparty elections in Croatia in 1990, the new Croatian parliament amended the Constitution of the Socialist Republic of Croatia in July and removed ideological features from the previous state symbols, replacing the red star in the tri-color flag with the Croatian coat of arms. However, since the new Constitution of the Republic of Croatia did not provide for a precise description of these symbols, versions of the coat of arms with both white and red initial fields were used in practice until there was definite regulation of the matter in December 1990.²⁶

The transition of power and the process of building up Croatia's independence were confronted with the armed rebellion of a part of the Serbian population in Croatia, supported by the Yugoslav People's Army, Serbia, and Montenegro. The rebel forces seized almost a third of the Croatian state territory, denouncing the Croatian state and its symbols as "*Ustasha's*," and proclaimed the Serbian para-state that sought integration with Serbia and Montenegro.²⁷ The independence of the Republic of Croatia was proclaimed in such circumstances, on June 25, 1991, and recognized on January 15, 1992 by all the Member states of the then-European Economic Community. Among the conditions for recognition, these countries particularly insisted on the adoption of the broad guarantees of human rights and the rights of national minorities, in particular the rights of Serbs in Croatia.²⁸

The establishment of the new government affected the attitude toward religion and religious communities. The previous strict form of the model of separation of church and state was replaced with a cooperation (concordat) model.²⁹

3. Concepts of state symbols, national symbols, and symbols of national minorities and religious communities in Croatia

Before moving on to the analysis of particular types of symbols, it is necessary to clarify their concept and scope, in particular the specific and "fluid" concept of the national symbols.

The concept of state symbols is the easiest to define due to its formal and rather exact nature. State symbols are those that represent the state and enjoy special formal status. Conventional state symbols are the coat of arms, flag, and anthem, but each state provides specific state symbols of its own. These symbols point to

25 Jareb, 2010, pp. 311, 313.

26 Ibid., p. 343–348, 348; "*Crveno ili bijelo polje*," Jutarnji list, May 13, 2020.

27 Goldstein, 2011, pp. 212–222; Šokčević, 2016, pp. 537ff.

28 Tatalović and Lacović, 2011, p. 380.

29 Petrak and Staničić, 2020, p. 13.

the fundamentals of the state, reflect the tradition and historical experience of state-building, manifest the integrity of the state territory, and unite members of the nation–state (citizens) as its human basis. For these reasons, state symbols are also emblems of the political community of all its members (citizens) i.e., the “nation,” regardless of the ethnicity of individual members.

However, such definition of a nation is in principle applicable to Western states and nations that emerged in the synchronous processes of nation-building and state-building at the end of the 18th and through the 19th century, but not to the concept of the nation in Central Europe where nation and nation–state did not emerge simultaneously.³⁰ The concept of the nation in the countries of Central Europe therefore in principle does not correspond to the concept of the nation as a community of all citizens.

Modern nations in Central Europe, unlike Western countries and nations, were constituted as ethnocultural entities at the time when they were part of the broader empires, and in the mature stage of their nationalism, they sought for their own nation–states as a basis of their protection and development.³¹ Nation–states in Central Europe were thus formed as the states of the particular “core” or “constituent” ethnocultural nations that marked the state and its identity, while other ethnocultural entities (nations) in the state became national minorities. The concept of the nation in the countries of Central Europe in the past as well as today primarily implies the affiliation of an individual to a particular ethnocultural community established as the “core” of the political community of citizens. From this, it follows that the discussion of what Croatian national symbols are must begin with the question of what is “the Croatian nation”—only after that the concept of “the Croatian national symbols” can be defined.

The already presented historical overview indicated that the processes of the Croatian nation-building and state-building were part of the respective Central European tradition that sought for establishment of national states of particular nations.³² The respective Croatian historical experience in the nineteenth and twentieth century affected the definition of Croatia in the 1974 Constitution of the Socialist Republic of Croatia, as the nation–state of the Croatian people.³³ That definition was accepted as the basis of the definition of the Republic of Croatia in the preamble

30 Čepulo, 2019, p. 3; Smith, 1986, pp. 229, 230.

31 Smith, 1986, pp. 241–242.

32 Čepulo, 2019, pp. 4–6.

33 The Art. 1 of the 1974 Constitution of the Socialist Republic of Croatia defined Croatia as “the national state of the Croatian people, the state of the Serbian people in Croatia, and the state of the nationalities living in it.” Yugoslav constitutions and constitutional doctrine distinguished between “nations,” that constituted Yugoslavia based on the right of self-determination, secession and association, and “nationalities,” a politically correct term for “national minorities.” The decisions of the 1943 Antifascist Council of Peoples Liberation of Yugoslavia, that were seen as fundament of the Yugoslav constitutional order, identified Serbs, Croats, Slovenes, Macedonians and Montenegrins as “the nations,” and the doctrine perceived them as the constituent nations.

of the current 1990 Constitution of the Republic of Croatia:³⁴ “The Republic of Croatia is the nation–state of the Croatian people, and the state of the members of the autochthonous minorities..., and the others who are its citizens.”³⁵ The mentioned definition indicates the “constituent” meaning of “the Croatian people,” as an ethnocultural community, for the Republic of Croatia. From such a determination of the Republic of Croatia and the Croatian people (nation) follows, for example, the constitutional obligation of the Republic of Croatia provided in Art. 10 of the Constitution to guarantee special protection to parts of the Croatian people in other states. However, the “normative” part of the Constitution is based on the civic concept with the people’s sovereignty and equal rights of citizens proclaimed as the fundament of the Republic of Croatia in Art. 1 that is complemented with the rest of the Constitution. In fact, this “demos” concept predominates over “ethnocultural” concept in the general Croatian constitutional scheme³⁶ with the Croatian Constitutional Court gradually developing the concept of “the constitutional identity” that includes both dimensions.³⁷

The concept of the nation is the basis for defining the concept of the Croatian national symbols as symbols of the Croatian people as an ethnocultural and political community, which is at the same time the constituent nation of the Republic of Croatia. This is the fundamental conceptual ground upon which the national symbols can be defined more closely. In this regard, the Croatian national symbols can be defined as those whose content or nature symbolizes the Croatian nation and the affiliation of individuals to it, and which in this meaning have long been accepted by the Croatian nation as an ethnocultural and political community.³⁸ The “list” of elements of the Croatian identity compiled by the Croatian historian Neven Budak seems to match this definition: Croatian language, Latin script, affiliation to the Western civilization, affiliation to Christianity or Catholicism, millennial culture, and tradition of the statehood.³⁹

34 Ustav Republike Hrvatske, *Narodne novine*, 6/1990, 135/1997, 113/2000, 28/2001, 76/2020, 5/2014.

35 Quoted provision defines constituencies of the Republic of Croatia as a) “the Croatian people” as collective (nation), b) individual members of the 22 enumerated national minorities, and c) other citizens of the Republic of Croatia. It should be mentioned that similar definitions of national sovereignty are accepted in the preamble of the Constitution of the Republic of North Macedonia and in the Art. 1 of the Constitution of Republic of Serbia while Art. 3 of the Constitution of the Republic of Slovenia defines Slovenia as the state of its citizens but reserves the right of self-determination for the Slovenian people only. Bosnia and Herzegovina is defined as the state of three constituent peoples (Bosniaks, Croats and Serbs). The constitutions of the Republic of Kosovo and of Montenegro do not provide for such provisions.

36 Toplak and Gardašević, 2017, p. 270.

37 *Ibid.*, 288–289. See the discourse on the concept of the constitutional identity in Croatia (*Ibid.*, 265ff, 278ff).

38 The fact that these symbols are (primarily) national symbols of the Croatian people does not imply their “exclusivity”—the Croatian flag and the colors of the Croatian coat of arms are widely accepted among fans of the Croatian national football team regardless of their ethnicity or nation.

39 Budak, 2010, p. 7.

These are the elements that have formed the basis of national cohesion; they integrate members of the Croatian nation and provide them with distinctive features concerning other nations. Some of these elements itself have a form of a symbol such as the Latin script, others have indirect expressions such as the millennial culture represented by wickerwork, or tradition of statehood represented in the Croatian Parliament.

It seems that, based on these considerations, the principal Croatian national symbols are formal and informal variants of the Croatian “chequered” coat of arms and tricolor flag and their characteristic features (combination of red and white fields, red-white-blue colors), national anthem, name of the nation and the state, Croatian language, and Latin script, while considerably less important is the wickerwork pattern. Apart from that, we believe that the name of the nation and the name of the state should also be considered as the symbols that represent the nation and the state *de rerum natura*, and later we will provide for more arguments in favor of that.

Apart from these symbols, the main symbols of Christianity and the Catholic Church should probably be included among Croatian national symbols too, and such an attitude could be supported not only by substantive-historical reasons but also by a legal argument concerning the respective agreement of the Republic Croatia and the Holy See.⁴⁰ However, the question of “delimitation” of the national and religious dimension of the same symbol or of principal identification of the context that turns a religious symbol into a national symbol exceeds the limits of this paper. Still, some “mingled” cases will be mentioned later, and the question of regulation of religious symbols will be discussed in the respective chapter.

Part of the national symbolism belongs to the capital of cultural artefacts. The list of such potential symbols can be extensive,⁴¹ but in the chapter on national symbols only the basic regulation will be referred to, without entering into a substantial discussion on the individual symbols. We will be rigid concerning national symbolism of the natural beauties, even though some of them, such as the Adriatic islands or the Plitvice Lakes, are internationally recognized as the Croatian images. However, this paper deals with complex representation of the national identity and none of these phenomena incorporates Croatian tradition like, for example, Thingvellir, the rocky seat of the Iceland’s medieval “parliament.”

40 The preamble of the Agreement between the Holy See and the Republic of Croatia on Cooperation in the Field of Education and Culture points to “the irreplaceable role of the Catholic Church in the education of the Croatian people and its historical and substantive role in the social, cultural and educational fields” and to the fact that “most citizens of the Republic of Croatia are affiliated with the Catholic Church.” See the Law on the Ratification of the Agreement between the Holy See and the Republic of Croatia on Cooperation in the Field of Education and Culture (Zakon o potvrđivanju Ugovora između Svete Stolice i Republike Hrvatske o suradnji na području odgoja i kulture, *Narodne novine. Međunarodni ugovori*, 2/1997).

41 We can mention the image of the medieval royal crown, the 12th century Baška stone tablet in the Croatian language and Glagolitic script, the Glagolitic script itself, the image and the walls of Dubrovnik, the Zagreb Cathedral, the Ban’s Palace, the building of the Croatian Parliament, etc.

The concept of symbols of national minorities and religious communities are easier to define due to the formal or traditional definability of these communities, and because our definition of national symbols can be *mutatis mutandis* extended to symbols of national minorities as well.

National minorities are individually enumerated in the preamble of the Constitution of the Republic of Croatia, and the Constitutional Law on the Rights of National Minorities (CLRNM)⁴² authorizes the official bodies of these minorities to provide for the signs and symbols of national minorities. In addition to these formally established symbols of the national minorities, we will, analogous to the symbols of the Croatian nation, take in account unofficial variations of the coat of arms and flag, as well as the languages and scripts of the national minorities as their national symbols.

Religious symbols, whose origins are traditional, are determined by religious communities themselves on the ground of the constitutionally proclaimed separation of church and state, and guaranteed religious freedoms, while the state provides a framework for their free and equal use and protection.⁴³

Finally, it must be mentioned that the use of the term “national” in the Croatian legislation contradicts the meaning of that term in our definition of “the national symbols.” The term “national” that appears in the Croatian laws is used in its “civic” meaning and refers to the affiliation with the state or with the community of all citizens: national parks, the National Council for Science, Education and Technology, national theaters, the national classification of professions, national subsidies for elderly people, and the national pension, to name a few.⁴⁴ Obvious differences are the laws on national minorities that are founded upon ethnocultural identification and explicitly regulate symbols of national minorities (“nations,” in substantial meaning). However, we will skip over the challenge of a complex and demanding conceptual discourse that emerges from this ground and stay with our operative definitions of the key concepts, including the definition of “the national symbols” as substantially relevant for this study.

4. Constitutional and legal protection of state symbols

The conventional symbols of the state that are specially protected in the Croatian legislation are the coat of arms, the flag, and the anthem. The Law on the Coat of Arms, the Flag and Anthem of the Republic of Croatia, and the Flag and Sash of the

42 Ustavni zakon o pravima nacionalnih manjina, *Narodne novine*, 155/2002, 47/2020, 80/2020, 93/2011.

43 Ustav Republike Hrvatske, Arts. 40–41.

44 See the results for derivatives of “*nacionalno*” in the IusInfo.hr search engine.

President of the Republic of Croatia of December 21, 1990 (LCAFA),⁴⁵ proclaims that the coat of arms, flag, and anthem represent the Republic of Croatia and express affiliation to the Republic of Croatia. These symbols enjoy special protection provided by this and other laws and it seems obvious that they should be considered as the state symbols.

Apart from that, as already noted, we think that the name of the state also represents the state and therefore should be considered the state symbol too. Even though this law does not regulate it, the name of the state enjoys special protection by some other laws, comparable to the protection of the coat of arms, flag, and the anthem. The 2019 Law on Institutions in its Art. 18 implicitly defines the name of the state as the state emblem: “The words “Croatia,” “Republic,” “state” and their derivatives as well as other state emblems...”⁴⁶

As for the flag and sash of the president of the Republic, the LCAFA defines the sash as “the sign of presidential honor” and omits to define the presidential flag. Neither presidential flag nor sash enjoy the protection provided by this and other laws comparable to the coat of arms, state flag and the anthem. In fact, the sash seems to be a remnant of the period of the semi-presidential system of government (1990–2000) that was adapted to the strong personality of the first president of the Republic Franjo Tuđman. This system was replaced with a parliamentary system in 2000 by amendments to the constitution that removed the definition of the president of the Republic as “the head of the state” and essentially reduced his power. However, it seems that complementary provisions on the flag and sash passed unnoticed at the time and have remained unchanged since then. Nevertheless, all the presidents elected after Tuđman bypassed the provided use of the sash in their inaugurations as it has been perceived as “the monarchist” emblem.⁴⁷ Because of all this, it seems that the sash and the presidential flag do not have the meaning of the state symbols.

Anyway, the focal symbolic point of the Croatian state is the coat of arms. The first coat of arms and flag of the Republic of Croatia were provided by Amendment LXVI to the Constitution of the Socialist Republic of Croatia, adopted by the Croatian Parliament on July 25, 1990. The amendment defined the state symbols of the Republic of Croatia (the amendments changed the name of the republic as well) to be the historical Croatian coat of arms with 25 red and white fields, the tricolor flag with the historical Croatian coat of arms in the middle, and provided that their images shall be described by the law.

45 Zakon o grbu, zastavi, i himni Republike Hrvatske te zastavi i lenti predsjednika Republike Hrvatske, *Narodne novine*, 155/2002, 47/2020, 80/2020, 93/2011.

46 Dragan Zlatović enumerated presidential flag and sash among “the other state emblems” yet without any particular reflection to that (Zlatović, 2022, Ch. 4).

47 “*Poput Chaveza*,” *Jutarnji list*, 41 (January 2015). The use of the sash has been occasionally discussed in public but, interesting enough, it has not been the case with the presidential flag. Possible reasons are its lesser “pomposity” and more discrete use—it is much smaller than the ordinary flag and waved in the presidential residence at the outskirt of Zagreb, in some ceremonies and on the president’s car.

These provisions were accepted with only minor modifications by the Constitution of the Republic of Croatia of 22 December 1990 that also accepted “Our Beautiful Homeland” as the state anthem. The anthem was slightly changed with the verse on the whirr of the river being replaced by the verse on “the deep blue sea” that emphasized the maritime dimension of Croatia.

The images of the coat of arms and the flag are precisely described by the LCAFA. The law provides for the coat of arms that begins with a red field, and has the “crown” above it that consists of “the oldest known Croatian coat of arms” and the historical coats of arms of the Republic of Ragusa, Dalmatia, Istria, and Slavonia.⁴⁸ The law describes in details the image of the tricolor state flag with the coat of arms in the middle, and provides for the text and melody of the anthem. The law stipulates that the coat of arms, flag and anthem may be used only in the form provided by the constitution and the law, and that nothing can be changed in the coat of arms and flag. Exceptionally, the law allows parts of the coat of arms or flag to be used as integral parts of other emblems or signs if provided by the statute or other provisions of the legal persons under the condition that it does not offend the reputation and dignity of the Republic of Croatia. The use of all three symbols is free in artistic and musical creation and for educational purposes, provided that the reputation and dignity of the Republic of Croatia are not offended.

This law also regulates the official use of the coat of arms on seals and stamps, in official inscriptions, on the seats of the state and public bodies, in official acts and in other occasions provided by the law. It similarly defines the occasions and ways of displaying the flag as well as the performance of the anthem. Similar provisions, *mutatis mutandis*, refers to the use of the flag and sash of the president of the Republic. The law prohibits the public display of worn-out and damaged coat of arms or the flag of the Republic of Croatia.

The law defines the violations of individual provisions of the law. This in particular refers to the use of the respective symbols in a way that is not provided by law, or to the violations of obligation of their mandatory use, and their use in a way that offends the reputation and dignity of the Republic of Croatia, the use of damaged symbols, etc. For these offenses, only fines are provided, as well as the protective measures in the respective cases (confiscation, temporary seizure, revocation of the permission to perform particular activity).

48 Part of the professional public criticized the “crown” of the coats of arms from a heraldic and historical point of view, and part of the public was reserved (Jareb, 2010, pp. 354–355). In 2017, the proposal to review the conformity of provided description of the coat of arms with the Constitution was submitted by the citizen who argued that the “crown” over the coat of arms never existed in Croatian history and that the description of the law does not provide for a description of “the oldest known Croatian coat of arms.” The Constitutional Court dismissed the proposal as not being based on the relevant constitutional ground. Constitutional Court, U-I/1729/2017.

Certain cases related to the use of the coat of arms were decided by the Constitutional Court.⁴⁹

Special protection of the state symbols in penal law is provided by the current Criminal Code of 2011 (CC 2011),⁵⁰ which in Art. 349 provides for the criminal offense of the “violation of the reputation of the Republic of Croatia.” This article incriminates mockery, contempt or rude belittling of the Republic of Croatia, its flag, coat of arms or anthem with the sentence of imprisonment provided for up to one year. The protection of the reputation of a foreign state and the European Union and the most important international organizations is provided in the same way (CC 2011, Art. 356).

Both these incriminations are almost identical to the incriminations from Art. 151 and Art. 186 of the previous 1997 Criminal Code (CC 1997)⁵¹ with two significant differences. One is that in the Criminal Code 2011, the previous maximum sentence of three years of imprisonment has been reduced to one year. This mitigation is not explained in the Commentary of CC 2011,⁵² edited and written by principal authors of the law, but one might conclude that the *ratio* of this change was mitigation of the respective penal policy aimed to reduce obstacles to freedom of the speech and criticism of the state institutions in offenses that do not have a character of a hate speech. The law was prepared at the time that preceded the Croatian accession to the European Union in 2013 with the focus on modernization of the Croatian penal institutions.⁵³ However, this change seems to downplay the significance of the state’s reputation and the symbols that represent it.

Another indicative change, correlated with the protection of the state symbols, is present (or absent) in the already mentioned Art. 349 of the CC 2011, that omitted the last part of the sentence from the Art. 151 of the CC 1997. The omitted part referred to the protection of the reputation of “the Croatian people or ethnic and national communities or minorities living in the Republic of Croatia” (the text under the brackets was erased). The Commentary of CC 2011 explained this change by reference to the revised criminal offense of the hate speech in Art. 325 (*ex* CC 1997, Art.

49 In one case, the constitutionality of the bylaw that provided for the use of the coat of arms on the car license plates was challenged before the Constitutional Court. The Court ruled out that the regulation was in accordance with the Constitution. Constitutional Court, U-II / 4187/2018. In another case, a well-known Croatian designer that sued the Republic of Croatia before the Commercial Court challenged the use of stylized white-red fields in the government’s referendum campaign on Croatia’s entry into the European Union as a violation of his copyright. However, the Constitutional Court found that both the designer’s works and symbols used in the campaign were derivations of the original Croatian coat of arms, and rejected the constitutional complaint. Constitutional Court, U-III/511/2018.

50 Kazneni zakon (2011), *Narodne novine*, 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021.

51 Kazneni zakon (1997), *Narodne novine*, 110/1997.

52 Turković and Maršavelski, 2013, p. 419.

53 See the Introduction of Ksenija Turković, professor of Criminal Law at the Faculty of Law, University of Zagreb, and the head of the Working Group for Drafting the Criminal Code 2011. *Ibid.*, pp. xxv-xxviii.

174) whose description covers the erased content.⁵⁴ Art. 325 incriminates, among others, the public incitement to violence and hatred “directed against a group of people or a member of a group because of their racial, religious, national or ethnic affiliation, origin, color of the skin, gender, sexual orientation, gender identity, disability or any other characteristics” for which a prison sentence of up to three years is provided. Thus, the new law omitted the explicit protection of the Croatian people and protection of ethnic and national minorities in the Republic of Croatia due to their general protection on the ground of “religious, national or ethnic affiliation.”⁵⁵ According to some interpretations, the motive for this change was to avoid overlap of two criminal offenses.

The jurisprudence of the Supreme Court with accent on suspended prison sentences in such cases follows general trend of penal policy of the Croatian courts.⁵⁶

The name of the state and state symbols are also protected as intellectual property. Thus, the Law on the Seal⁵⁷ stipulates that signs containing the name or abbreviation, coat of arms, emblem, flag or other official symbol of the Republic of Croatia or some part of it as well as their imitation shall not be registered, except with the approval of the competent authority of the Republic of Croatia (Art. 9.1.9). The respective examination of the sign should consider the general appearance of the coat of arms (such as, whether it consists of red and white squares and include historical coats of arms in the crown), and not its detailed match with the legal description (such as the color of the initial field). Also, only the official signs “Republic of Croatia” and “RH” are checked, but verbal and figurative signs containing the

54 Turković and Maršavelski, 2013, p. 419.

55 In addition, note the Anti-discrimination Law (*Zakon o suzbijanju diskriminacije*, *Narodne novine*, 112/2012) that provides for protection from discrimination because of language, religion, or national affiliation, among others.

56 We will present two of the several decisions of the Supreme Court of the Republic of Croatia related to Art. 349, CC 2011 and Art. 151, CC 1997. The judgment of the Supreme Court from 2011 is grounded upon Art. 151 CC 1997, and refers to the group of young people who removed the flag of the Republic of Croatia from the mast near the monument to the deceased Croatian war veteran, took it and burned in a public place. In another event at the same place, they removed the state flag on the Day of the Croatian statehood. Based on the appeal of both defendants, the Supreme Court slightly reduced the previous sentences and sentenced them to four and to three months in prison, suspended to three years. Supreme Court, I Kž 940 / 10–6. The 2016 judgment of the Supreme Court of Croatia refers to the removal of the flag in Vukovar from a four-meter-high mast. The Supreme Court rejected the appeal of the state Attorney and upheld the first-instance judgment by which, pursuant to Art. 349, CC 2011, a sentence of three months’ imprisonment was imposed, which was replaced by community service for 180 hours. Supreme Court, I Kž 531/16–4. See also other decisions of the Supreme Court: I Kž 703/1998-3; I Kž 641/1999-3; I Kž 115/1997-3; I Kž 564/01-3. These cases and probably most of similar cases happened in regions that were occupied during 1990-1995 rebellion. Considering appearance of such cases in the media one could conclude that their number significantly lowered down as a reflex of general soothing of the respective tensions through the time.

57 *Zakon o žigu*, *Narodne novine*, 14/2019.

words “Croatia,” the abbreviation “HR” or the domain “.hr” cannot be registered, if they can be related to the state institutions.⁵⁸

Detailed provisions on the use of the coat of arms are also provided in the Law on Stamps and Seals with the Coat of Arms of the Republic of Croatia.⁵⁹ That includes misdemeanor provisions that provide for fines and protective measures that prohibit the performance of the respective activity.⁶⁰

The use of the name of the state and of the state symbols are also regulated by the Law on Institutions⁶¹ and the Law on Associations.⁶² The Law on Institutions stipulates that the name of institution cannot contain the name of the state (“Croatia,” “Republic,” “state”) or its derivatives nor it can contain the coat of arms and the flag of the Republic of Croatia, including their imitations, unless provided by law or with the approval of the Croatian government or authorized state body. The Law on Association is more flexible as it provides that these same symbols as well as the “names and symbols” of other states can be contained in the name and the sign of the association in a way that does not offend their reputation and dignity (Art. 15). The sanction in both cases is refusal of registration in the court register.⁶³

A somewhat narrower scope of protection is provided by the 2002 Law on the Legal Status of Religious Communities.⁶⁴ The law stipulates that the word “Croatia” and its derivatives, coat of arms and flag of the Republic of Croatia can be included in the name and features of a religious community in a way that promotes the reputation and dignity of the Republic of Croatia (Art. 8).

Finally, the Law on the Proclamation of Vukovar as a Place of Special Homeland Piety⁶⁵ should be mentioned. The law stipulates that only the flags of the Republic of Croatia, of Vukovar–Srijem County, and of the City of Vukovar may be displayed in the places provided by this law, and the state anthem shall be performed in accordance with the LCAFA. Exceptionally, the symbols of other countries can be displayed during the visits of foreign delegations or commemorations of deaths of foreign citizens. The aim of this law is to protect the dignity of the places where the most serious war crimes were committed in the war for Croatian independence.

Thus, in Croatia the coat of arms, flag, and anthem are explicitly considered and protected as the state symbols by the special law. The name of the state is

58 “Državni zavod za intelektualno vlasništvo. Priručnik za ispitivanje žigova,” 2015, 4.2.9.

59 Zakon o pečatima i žigovima s grbom Republike Hrvatske, *Narodne novine*, 33/1995.

60 The High Administrative Court rejected in 2013 the complaint of some citizen related to his request for approval of his personal stamp, seals and personal forms provided with the coat of arms of the Republic of Croatia, based on the argument that he is part of the direct power of the people that is above the authorities of the president of Republic, president of government and other high functionaries. Us-8946/2011-4.

61 Zakon o ustanovama, *Narodne novine*, 76/1993, 29/1997, 47/1999, 35/2008, 127/2019.

62 Zakon o udrugama, *Narodne novine*, 74/2014, 70/2017, 98/2019.

63 See also in Zlatović, 2022, Ch. 4.

64 Zakon o pravnom položaju vjerskih zajednica, *Narodne novine*, 83/2002, NN 73/2013.

65 Zakon o proglašenju Vukovara mjestom posebnog domovinskog pijeteta. *Narodne novine*, 25/2020.

also provided by law as the state symbol and enjoys protection comparable to these symbols. The flag and sash of the president of the Republic do not seem to be the state symbols even though they are regulated together with a coat of arms, flag, and anthem by the same “principal” act. Various dimension of the images and the use of the state symbols are regulated by various acts in the fields of constitutional, administrative, criminal, and commercial law in, as it seems, balanced and sufficient way that does not produce serious problems in legal practice. Removal of explicit protection of the reputation of the Croatian nation and ethnic and national minorities in CC 2011 did not provoke any particular reactions among legal practitioners or the public.

5. Constitutional and legal protection of the national symbols

In contrast to the rather developed regulations related to the state symbols, the protection of national symbols seems to be only modestly present in the Croatian legal system, yet is nevertheless burdened with controversies that occasionally provoke wider public interest. Two issues particularly stand out—the question of the Croatian coat of arms with the initial white field, and the protection of the Croatian language—while the Latin script does not provoke such interest. Other Croatian national symbols that we mentioned in previous section are hardly present in the legal regulation, except for the Croatian Parliament that enjoys protection as one of the principal institutions of power and will therefore not be included in this discourse.

We will first point to the problem of standardization and protection of the Croatian language and Latin script. Their status is in principle determined by Art. 12 of the Constitution of the Republic of Croatia. It stipulates that the Croatian language and Latin script are in official use in Croatia, and that under conditions provided by law, other languages and Cyrillic or other script can be introduced in individual local units in addition to the Croatian language and Latin script. The Constitution also guarantees Croatian citizens the right to submit petitions to the European Parliament and to the European ombudsperson in Croatian language, and to address the institutions and advisory bodies of the European Union and receive their answers in Croatian language (Art. 141).

The number of laws regulate mandatory use and the ways of use of the Croatian language and Latin script as the official language and script in representative bodies, executive and administrative bodies, administrative and judicial proceedings, education as well as in other public bodies and proceedings. It is not possible to summarize here this extensive regulation, nor is it necessary due to the “conventional” content of that regulation focused on the rules of the use of the Croatian language and not its substance. Instead, we will briefly present the balanced regulation on the

use of the language in three specific laws. The Law on Institutions stipulates that the name of institution must be written in the Croatian language and in Latin script. The Law on Commercial Companies⁶⁶ provides that the company name be written in the Croatian language and the Latin script, or in the official language of an EU Member state and Latin script, with other components written in Croatian. Both laws allow the name of an institution or company to contain certain foreign words only if they are common in the Croatian language, if there is no corresponding word in the Croatian language, or if it is a dead language. The Law on Associations is more flexible, as it provides for the name of the association to be in the Croatian language and Latin script, yet it allows it to be in the language and script of national minority or in the foreign or dead language, if that is provided by the statute of the association. Apart from that, the name of the association in the Croatian language and Latin script can also contain individual words in a foreign or dead language. The only sanction for violating these rules is the inability to register the respective entity.

These laws are rather rare example of the legal protection of the Croatian language because Croatia, unlike some European countries, does not have a “language code” or the respective legal regulation.⁶⁷ The Minister of Science and Education recommends specific language that is standard for use in schools, out of several that exist, and this recommendation is conventionally accepted in schools⁶⁸—yet one has free choice of the language standard in public and private use. Several prominent Croatian linguists and cultural actors criticize this model as generating confusion and contaminating the language, and continuously advocate the enactment of a language code. However, most linguists oppose this attitude and stand behind existing model as the one that allows spontaneous development of the language, and there are no indications that this policy will change.⁶⁹

The absence of the “substantial” language regulations might be surprising at first, given the symbolic importance of the Croatian language for the Croatian national identity and the high sensitivity of this issue throughout history. In fact, following the formation of the Croatian state and abandonment of previous political

66 Zakon o trgovačkim društvima, *Narodne novine*, 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013, 110/2015, 40/2019.

67 Initiators of the Croatian “language code” in 2022 referred to France, Lithuania, Russian Federation, Slovakia, Slovenia Spain and Switzerland as the countries with such law. The practical argumentation they mentioned referred to intense anglicization of the language and part of the reserves to such law they explained with a fear of analogy with the Independent State of Croatia. “*Zakon o jeziku imaju Rusi, Slovaci i Francuzi*,” *Večernji list*, 14 January 2022.

68 Currently in use in schools, based upon the recommendation of the Minister of Science and Education from 2013, is “Croatian Orthography” of the Institute of the Croatian Language and Philology. See at: ihj.hr/uploads/content/Preporuka_pravopis.pdf.

69 Proponents of the adoption of the “language code” have so far made two draft-laws that were not accepted either by the respective Ministry or Parliamentary committee. The new initiative on such a code has recently been launched among part of the cultural actors, this time with the announcement that the new bill will not provide for sanctions. The initiative was almost immediately criticized by the Institute for the Croatian Language and Philology. “*Sprema se novi zakon o jeziku*,” *Index*, 12 February 2022; “*Tko piše zakon o jeziku?*,” *Jutarnji list*, 1 February 2022.

constraints, there was a wave of extensive and rather chaotic use in public of terminological, grammatical, and syntactic solutions that deviated from previous standards and emphasized Croatian language specificities. One could have expected the establishment of a new language norm with the primary role of the state and the state legislation in its promotion. Indeed, some prominent linguists proposed significant changes in the language norm in line with the particular and suppressed variant of the Croatian orthography, as well as the enactment of the language code that would help establish the new norm.⁷⁰ However, all relevant state and cultural institutions declared themselves against radical changes, and all Croatian governments since that time remained opposed to the model of the state-controlled language policy.⁷¹ In the meantime, the aforementioned turbulent language practice, which covered only a very narrow segment of the language anyway, gradually vanished, and the traditionally high public sensitivity over the negation of the Croatian language calmed down.⁷² Occasional fierce discussions on language policy and the language code now take part in principle among linguists and philologists,⁷³ yet a speech of one Serbian deputy in Serbian in the Croatian Parliament still provoked reactions from the public.⁷⁴

It seems that the guarantees of the status of the Croatian language and its free and unrestrained use in the public sphere without risk of an accusation of nationalism resulted in the gradual weakening of the heated tensions. Thus, seemingly paradoxically, the establishment of the independent Croatian nation–state resulted in a weakening of the political tensions related to one of the central national symbols, as well as with the sustained position of the state concerning the regulation of the language issues.⁷⁵

70 Pranjković, 2006, p. 49.

71 Mamić, 2006, p. 69.

72 The Croatian media and public paid rather marginal interest to the news on the 2021 edition of primary school's textbook in Serbia that neglected existence of the Croatian language and stated that Croats are using the Serbian language that they call "the Croatian language." Answering to the protests of the Croatian national minority Serbian ombudsperson proclaimed it as contrary to the European Charter for Regional or Minority Languages and the Serbian Ministry of Education requested the publisher for change of the critical part of the manual. However, the definition in the manual is based on the long-standing definition of the Institute for the Serbian Language of the Serbian Academy of Sciences and Arts accepted by most of the Serbian philologists. Much bitter reactions in Croatia provoked the Serbian Law on the Cultural Heritage of 2021 that in the Art. 23.1.4 proclaimed Dubrovnik's literature production until 1867 to be a part of Serbian and Croatian cultural heritage. In Croatia, that provision was associated with Greater Serbian politics of 1991 and especially with Serbian-Montenegrin aggression on Dubrovnik. "*Sporan udžbenik*" Jutarnji list, 4 October 2021; "*Dobroslavić: Srbijanski zakon o kulturnom nasljedstvu*," Jutarnji list, 17 January, 2022; "*Priznanje Beograda*," Jutarnji list, 21 January 2022.

73 See for example, "*Hrvatski jezik neće izumrijeti*," Jutarnji list, 21 February 2022.

74 "*Panika u Saboru*," Jutarnji list, 6 November 2017.

75 For opposite interpretation of the Croatian language policy as nationalist and purist, see Kordić, 2010, pp. 16ff.

The controversies related to the language have not been characteristic for the Latin script even though it is also a national symbol with distinctive significance concerning the “Serbian” Cyrillic script. Possible reasons for this are probably less in the “abstract” and non-national denomination and features of the Latin script but more in the fact that, unlike the Croatian language, the use of the Latin script has not been seriously challenged through the history.

While the tensions related to the Croatian language have considerably calmed down, the question of the use of the historical Croatian coat of arms with an initial white field has until recently attracted considerable public attention. Public use of such a coat of arms after the proclamation of the Republic of Croatia provoked public debates in the ideologically divided country, but since its use was legitimized by the first-instance misdemeanor courts, the topic gradually lost its public attraction. Due to that, the recent judgment of the High Misdemeanor Court from August 2021 deserves particular attention, as it may have set the final legal stone on this issue.

Judgment was passed in the case of the public display of the “chequered” coat of arms with the initial white field and the inscription “God and Croats” on the beret cap, worn by the defendant at a social party at the fire station in a small town in northern Croatia. The first-instance court sentenced the defendant to 30 days of imprisonment suspended for three years on the ground of the public display of prohibited symbol and of disturbing the public order. The first-instance court pointed out that the accused wore the “chequered” coat of arms with the initial white field, which is a symbol of the Nazi-fascist Independent State of Croatia.” The court further pointed out that in history, the “chequered” coat of arms with the initial red field was established as the official Croatian coat of arms, while the coat of arms with the white field was not merely an old Croatian coat of arms but was permanently marked as an *Ustasha* emblem due to its use in the ISC, and removed from the use after the defeat of ISC.

However, the High Misdemeanor Court altered the decision and acquitted the defendant. The High Court pointed out that the reasoning of the first-instance court could be accepted only if the coat of arms with the initial white field was used exclusively during existence of the ISC, which was not a fact. Apart from that, the court noted that the coat of arms of the ISC also contained the “eared” letter U and wickerwork. The court further considered that the coat of arms with the initial white field was used both before and after the ISC and that the use of such a coat of arms does not evoke memories to it. The court’s reasoning included a historical summary on the use of the coat of arms with the initial white field from the Middle Ages to 1990. All this was the ground for the court’s conclusion that both variants of the coat of arms with the initial white and red field are historical Croatian coats of arms, and that public display of both versions did not constitute a misdemeanor.⁷⁶

It follows that the appeal court grounded its reasoning upon the value-negative definition of the Independent State of Croatia and its specific symbols, and then

⁷⁶ High Misdemeanor Court, Jž 1553/2019.

concluded, *a contrario*, that other symbols used in the ISC, that were not specific to the ISC, did not express criminal nature of the ISC and should not be banned. The court then found that the coat of arms with the initial white field is one of the two versions of the Croatian coat of arms used publicly before and after the ISC, that the specificity of the ISC's coat of arms is the combination of the historical Croatian coat of arms with white field and several other elements (the "eared" letter U as the symbol of the criminal *Ustasha* movement, and wickerwork), and that therefore the plain "chequered" coat of arms with the white field is not specific to the ISC, so its public use is not illegal.

It should be mentioned that due to ambiguities related to the use and legal regulation of various symbols from the Croatian past, the Croatian government appointed in 2015 a "Council for Dealing with the Consequences of the Rule of Non-Democratic Regimes" with a plural composition of members from among the scientists. The council adopted recommendations aimed to serve as an orientation to legislation, government, judiciary, and administration in dealing with the respective forms of hate speech, yet it seems they have not reached the expected outcomes.⁷⁷

Apart from these controversies, we shall also mention a sort of legal lacuna in Croatian civil law related to the protection of national and religious symbols. Unlike Art. 2:54 of the Hungarian Civil Code,⁷⁸ Croatian Civil Law does not provide for any regulation that particularly refers to personality rights related to a person's affiliation to the Croatian nation or other national, ethnic, racial, or religious group. There also seems to be no relevant case law.⁷⁹

Nevertheless, we will present the judgment of the Supreme Court from 2000, which indicates the possibility of civil protection of national and religious symbols within the existing normative framework. It was the case of revision proceeding before the Supreme Court against the judgment of the second-instance court that confirmed the first-instance revocation of the decision of the disciplinary tribunal of a certain company to terminate the employment of the plaintiff. The committed injury consisted in tearing down of a calendar sheet with a picture of the Catholic

77 The conclusions of the council allowed an explicit ban on all *prima facie* disputed features of hatred, including a several features and slogans of *Ustasha*, Nazi, fascist and Serbian–Chetnik provenance. However, the document remained rather ambiguous in the most controversial issue (the slogan "For the Home—Ready") that essentially limited its reach. At the time of writing of this article, negotiations were under way between the Croatian government and representatives of Jewish national minority as well as other national minorities on clearer incriminations and stricter sanctions particularly motivated by the use of this slogan in hate-speech. See "Vijeće za suočavanje s posljedicama vladavine nedemokratskih režima. Dokument dijaloga," 2018, pp. 27–29; Omejec, 2019, pp. 15ff; "Kraus opet ponovio," *Jutarnji list*, 21 June 2021; "Jutarnji doznaje," *Jutarnji list*, 23 April 2022.

78 Act V of 2013 on the Civil Code.

79 According to oral information of several experts in Croatian Civil Law Art. 1047 of the Croatian Law on Obligations (*Zakon o obveznim odnosima*, *Narodne novine*, 155/2002, 47/2020, 80/2020, 93/2011) that regulate the claim to remove the source of potential damage has not yet been applied in the cases related to the national or religious symbols.

church in Serbian part of Srijem and the coat of arms of the Community of Refugees and Exiles from Vojvodina.⁸⁰ The disciplinary tribunal assessed the tearing of the calendar as rude and indecent behavior toward another employee and the basis for termination of employment, but the first-instance court did not accept this argument. The Supreme Court found that the rude offense to the national feelings of the employees constituted a serious violation of duty but did not find it in this case since the injured employee explicitly stated that the plaintiff's conduct did not violate his national feelings.⁸¹ Thus, the violation of somebody's feeling of the national and religious affiliation through the violation of the national coat of arms and symbols of the Catholic faith were accepted as relevant, but not identified in this particular case.

Finally, let us mention the protection of "cultural goods of the greatest national importance for the Republic of Croatia" provided by the Law on Protection and Preservation of Cultural Goods⁸² as well as by the Criminal Code of 2011 in complementary arts. 319–321. These laws protect material and immaterial cultural heritage ("cultural goods") and provide for a systemic infrastructure and regulation of the respective issues. The denomination "national" in this case refers to the Republic of Croatia as the community of all citizens and to the protection of the respective heritage regardless of its ethnocultural or religious provenance. Of course, that also includes the "Croatian national symbols," that make far the largest part of the protected symbols, yet the law does not distinguish "the Croatian national symbols" in ethnocultural meaning as we defined them.⁸³

Overall, it seems that the establishment of the Croatian nation–state has not resulted with the advanced legal protection of the principal national symbols, as could have been expected, but on the contrary, in a kind of "sustainability" in regulation of certain sensible issues of such provenance. Thus, the discourse on the regulation of the Croatian national symbols is primarily the discourse on the lack of the regulation. Some of the interrelated reasons for that might be a "sedating" effect of the formation of the Croatian state as "the protector" of national values in general, "respective" conformity of the government that avoids regulating the issues that could endanger fragile political coalitions, and even the fear of accusations for

80 Vojvodina is the province of Serbia with the multiethnic population, including the Croatian national minority.

81 Supreme Court, Rev 1217/1999–2.

82 Zakon o zaštiti i očuvanju kulturnih dobara, *Narodne novine*, 69/1999, 151/2003, 157/2003, 100/2004, 87/2009, 88/2010, 61/2011, 25/2012, 136/2012, 157/2013, 152/2014, 98/2015, 102/2015, 44/2017, 90/2018, 32/2020, 62/2020, 117/2021, 117/2021.

83 The list of cultural goods of the greatest national importance for the Republic of Croatia, that is still in the process of formation, includes the goods regardless of their ethnocultural and religious provenance. The list was not yet visible at the internet at the time when this paper was written but was obtained directly from the Ministry of Culture. The goods not yet included in that list are protected by other laws regardless of their ethnocultural or religious provenance. It is worth to stress the difference with the already mentioned Serbian law that explicitly provides for protection of the editions of the Dubrovnik's literature tradition till 1867 as the Serbian cultural heritage (in ethnocultural meaning). See fn. 72 above.

“nationalism,” the allegedly inherited Croatian “original sin.” However, this is more a random list and not the complete answer on the question that anyway cannot be answered in this paper.

6. Constitutional and legal protection of symbols of national minorities and religious communities

Even though members of the national minorities in Croatia make up only 7.67% of the total population,⁸⁴ Croatia is one of the most multicultural countries in Europe according to the number of recognized national minorities⁸⁵ with a highly developed minority regulation. Such breadth has its origin in the influence of the international community as well as in the awareness in Croatia itself about the importance of the guarantees of minority rights for social peace. Broad guarantees of the rights of national minorities with special emphasis on the Serb minority were established during the process of Croatia’s international recognition in late 1991 and 1992.⁸⁶ The rather definite ground of this regulation was set in 2002, at the beginning of the process of Croatia’s accession to the European Union with the implementation of the guarantees of these rights being in the focus of the accession process. This institutional infrastructure was further amended and tested before the Constitutional Court, and today its principles are not questioned either by the national minorities or by the majority.⁸⁷

The protection of the rights of members of national minorities, including the protection of symbols of these communities, is based on the standards of the United Nations and European Union and documents of the OSCE Office of the High Commissioner⁸⁸ as well as on the relevant bilateral agreements concluded by the Re-

84 According to the 2011 census. The respective results of the 2021 census were not yet published at the time when this article was completed.

85 Mesić, 2003, p. 165. The preamble of the Croatian Constitution encounters twenty-two national minorities: Serbs, Czech, Slovak, Italian, Hungarian, Jewish, German, Austrian, Ukrainian, Ruthenian, Bosniak, Slovene, Montenegrin, Macedonian, Russian, Bulgarian, Polish, Roma, Romanian, Turk, Vlach, and Albanian.

86 Bandov, 2011, pp. 190–191.

87 The provisions on the fixed numbers of national minority representatives in the Parliament was challenged before the Constitutional Court in 2010 and respectively revised after its decision in 2011. Currently, Serbian national minority have three granted seats in the Croatian Parliament, Hungarian and Italian minority have one representative each, Czech and Slovak minorities together vote for one representative, and all other minorities are divided into two groups, each of which elects one common representative. See Toplak and Gardašević, 2017, pp. 265–275. This issue is still latently politically disputable, yet it is so by far as a part of a disputable Croatian electoral system in general.

88 Art. 1 of the Constitutional Law on the Rights of National Minorities directly refers to the extensive list of acts of international law and international documents.

public of Croatia.⁸⁹ Of particular importance are the Council of Europe's Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, ratified in 1997.⁹⁰

The basic constitutional preconditions for the protection of symbols of national minorities are provided in the Constitution of the Republic of Croatia, which guarantees equality of members of all minorities with other citizens. It stipulates that equality and protection of the rights of national minorities shall be regulated by the special "constitutional law" passed by the procedure for passing organic laws. In addition, the Constitution guarantees members of all national minorities the freedom of expression, freedom to use their language and script, and cultural autonomy (Art. 15), which can be reduced only by law in the case of particularly serious reasons explicitly stated in the Constitution, and under the condition of proportionality in every single case (Art. 16). As already mentioned, the Constitution explicitly provides that in addition to the Croatian language and the Latin script, another language and the Cyrillic or some other script can be provided for the official use in individual local units (Art. 12).

In addition to these constitutional provisions, the basis for the regulation of the respective rights is the already mentioned Constitutional Law on the Rights of National Minorities (CLRNM), which incorporated the highest standards of protection at the time of its adoption in 2002.⁹¹ In spite of its name, it is an organic law that has no constitutional force, but was passed by the two-thirds majority of all members of the Croatian Parliament and provides the basis for other laws that further regulate the rights guaranteed by the CLRNM. This law is complemented by the Law on the Use of Languages and Scripts of National Minorities (LULSNM),⁹² passed in 2000 by a qualified majority of the Parliament members.

The CLRNM guarantees members of national minorities the right to use their language and script in private and public spaces, the right to education in their own language, the use of their signs and symbols, cultural autonomy and the preservation and protection of cultural goods and traditions, the right to publicly manifest their faith, the right to access the media, and to perform these activities in their own language and script (CLRNM, Art. 7). This includes the right to use surnames and first names in their own language, the right to the public use of one's own language and script on signs, inscriptions, and other information, in accordance with the law (CLRNM, Art. 9–10). In addition, members of national minorities have the right to education in their own language and script, including the right to education in pre-school and educational institutions that can be established for a smaller number of students than provided for the teaching in Croatian language and Latin script. Apart

89 The Republic of Croatia has concluded such bilateral agreements with Italy, Hungary, Macedonia, Serbia, Montenegro, the Czech Republic, and Austria.

90 Tatalović and Lacović, 2011, p. 381.

91 Ibid., p. 383.

92 Zakon o uporabi jezika i pisma nacionalnih manjina u Republici Hrvatskoj, *Narodne novine*, 51/2000, 56/2000, 155/2002.

from the general part, the program of education in the language and script of a national minority must also contain content related to the specificities of the national minority, including language, history, and culture (CLRNМ, Art. 11). Several measures are envisaged to facilitate the promotion of minority content in the media and facilitate the accessibility of that media to minorities, as well as the establishment of media in their own language and script. The use of these rights is “balanced” by the instructive provision of Art. 8 of CLRNМ, which points to the interpretation and application of this and other relevant laws in a way that will provide for the respect of members of national minorities and of the Croatian people and develop understanding, solidarity, tolerance, and dialogue between them.

The basic framework for the equal official use of a minority language and script is a unit of local self-government (municipality or city) in which such use is mandatory when members of a national minority make up at least one-third of the population according to the last census. In addition, equal official use of language and script is also provided when it is set by international agreements that form part of the internal Croatian legal order as well as when it is provided by the municipality, city, or county statute (CLRNМ, Art. 12). The latter means that equal official use of the minority language and script can be introduced by the local governments even when the condition of a share of one-third of the minority population is not met.

The CLRNМ establishes the framework, and the LULSNМ provides for the conditions and methods of official use of minority languages and scripts in representative and executive bodies of municipalities, cities, and counties, and in proceedings before state administration and judicial bodies. Thus, equal use of the minority language and script may be provided by the county, for the county organs, in whose territory the language of the national minority is in equal official use in individual municipalities or cities (LULSNМ, Art. 4). Equal official use of languages and scripts in the municipality, city, and county is provided, as a rule, in representative and executive bodies, in proceedings before administrative bodies of local self-government and state administration (LULSNМ, Art. 5). The equal use of language and script is introduced, as a rule, for the whole unit, and exceptionally for a part of it and in a reduced scope (LULSNМ, Art. 6). The law specifies the way of equal use of language and script in bilingual or bi-scriptural form (such as the same font size of seals and stamps, signboards of executive and administrative bodies of local units and state administration, official materials of representative bodies, etc.) as well as bilingual and bi-scriptural forms of public documents and official forms (LULSNМ, Art. 8–9). In municipalities or cities where the language and script of a national minority are in equal official use, written traffic signs and other signs, names of streets, squares, settlements, and geographical locations are printed bilingually or multilingually (LULSNМ, Art. 10). The law also provides for the equal use of language and script before state bodies of the first-instance and legal persons with public authority and describes in detail the procedure in these cases, with bilingualism or bi-scripturalism as a rule. The Croatian language and the Latin script are used as a principle in second-instance procedures unless the parties who used the language and script

of the national minority in the first instance directly participate in that procedure (LULSNM, Art. 12–29).

According to the report of the government of the Republic of Croatia on the implementation of the CLRNM for 2020, the legal assumption of a share of at least one-third of the members of a national minority was met in 27 local units that mainly provided for the harmonization of their statutes with the provisions of the CLRNM.⁹³ Apart from that, the official use of minority languages and script was also provided in 26 individual units that have not met the assumption of one-third of the minority population.⁹⁴ The right to preserve traditional names, labels, names and events of importance for the history and culture of national minorities was used altogether by 32 municipalities, cities, and counties, and the right to regulate the use of flags and symbols and celebrations of national minorities by 55 local units and counties.⁹⁵

Problems in exercising certain rights from the LULSNM appeared in several units, while the right to use minority language and script in proceedings before administrative and judicial bodies was mostly ignored by the members of national minorities.⁹⁶ The situation regarding the implementation of the right to education in the language and script of national minorities was assessed as very successful.⁹⁷ However, the Committee of Ministers of the Council of Europe warned of the insufficient presence of the Cyrillic script in municipalities and on signs indicating the names of individual settlements. It also warned of the need for additional efforts to teach the minority languages and promote their use in education, public administration, and media.⁹⁸ The Bulletin of the Serbian National Council for 2021 stressed the problem of Cyrillic script in the city of Vukovar, which will be presented later, and warned about the potential lack of teachers educated in the Serbian language and culture, and on the case of destruction of the Serbian national flag in one city in the northern Croatia.⁹⁹

As a rule, the protection of the languages and scripts of national minorities in Croatia seems to be successfully implemented in regulation and in practice. However, the challenges remain regarding specific minority policy related to the

93 In 21 municipalities and two cities there were more than one-third of members of the Serbian national minority, and in one municipality more than one-third of members of the Czech, Hungarian, Slovak and Italian national minorities. Vlada Republike Hrvatske, 2021, p. 5.

94 It was the case with Italian language (the county of Istria, seven Istrian towns, and twelve municipalities in Istria), Czech language (one city and one municipality), Hungarian language (three municipalities), and Serbian language (one municipality) (Ibid., p. 6).

95 Ibid., pp. 8–9.

96 The report stresses the problems in the implementation of bilingualism or multilingualism regarding the titles of various documents, materials for sessions of municipal and city councils or county assembly, of issuing public documents, as well as problems related to the same size letters in traffic signs and written signs in traffic, names of streets and squares, names of settlements and geographical localities. Ibid., p. 6–7.

97 Ibid., p. 29.

98 Dabić, Horvat and Đaković, 2021, pp. 374, 388.

99 Ponoš and Vukobratović, 2022, pp. 46, 52–53, 59.

Roma minority¹⁰⁰ and particular problems associated with the use of the Serbian language and the Cyrillic script, mostly related to the burdens of the past. The most pronounced problem of the kind has been equal official use of the Serbian language and Cyrillic script in Vukovar that erupted in 2013. The Vukovar case indicates the importance of legal protection of symbols, but also demonstrates the limits of the regulation confronted with strong tensions related to symbols. Part of the local community in Vukovar identified the restoration of equal use of Cyrillic script as a symbolic revival of their wartime sufferings, and the Serbian community saw the denial of equal use of the Cyrillic script as a negation of their legally guaranteed rights to their own identity.

The problem erupted in the protests against the installation of bi-scriptural plaques on the state office buildings in Vukovar in early 2013, in accordance with Art. 12 of the CLRNM, which provides for the official use of minority languages and scripts, as well as with the city's 2009 statutory provisions.¹⁰¹ The protesters prevented the installation of the respective plaques, demanding the delay of installation, and the new attempt resulted in open conflict between the police and the demonstrators. The new city council then passed a statutory decision exempting the entire city from enforcement of Art. 12 of the CLRNM, with reference to Art. 8 of the LULSNM, which provides for the balanced application of the law. At the same time, the citizens' initiative for a referendum was launched, demanding a 50% share of the particular minority's population as a condition for the equal official use of minority language and script. The Croatian government challenged the constitutionality of the decision of the City Council statutory decision (suspension of Art. 12 of CLRNM) before the Constitutional Court, and the Croatian Parliament challenged the constitutionality of the referendum question. The Constitutional Court decided on both issues in the same session on August 12, 2014. In its first decision, the court repealed the respective provisions of the city council.¹⁰² In its second decision, the court declared the referendum question as not being in accordance with the constitution, calling it irrational and as against the very identity of the Croatian constitutional

100 Cf. Vlada Republike Hrvatske, 2021, pp. 29–33.

101 According to the 2001 census, the share of the Serbian population in Vukovar was 32.88%, and according to the 2011 census, it was 34.87%, which matched the condition provided by the CLRNM for equal official use of the Serbian language and script. A complementary statutory provision from 2009 was passed by the Vukovar City Council with coalition majority made by the Croatian Democratic Union (HDZ) and the Serbian Democratic Party. The main reason for the 2013 protests seems to be the dissatisfaction with the slow processing of Serbian war crimes in the Vukovar area during the mandate of the left-liberal Croatian government. However, the resistance continued during the mandates of the government of the HDZ supported by the Serbian Democratic Party. "Vukovar neće nikada biti Bykobap," Jutarnji list, January 19, 2013. "Foto: Milanoviću ne testiraj i ne izazivaj," Jutarnji list, 2 February 2013; "Spriječeno postavljanje ploča s ćirilicom," Jutarnji list, September 2, 2013; "Novi incidenti," Jutarnji list, October 8, 2013.

102 Constitutional Court, U-II/6110/2013.

state.¹⁰³ Apart from that, the court obliged the government of the Republic of Croatia to amend the CLRNM within a year in order to provide for the respective government's competence in cases when local governments fail to implement the law or obstruct their respective obligations.¹⁰⁴ In both these decisions the Constitutional Court obliged the Vukovar City Council to provide, within one year, for the regulation of the rights of members of national minorities "to the extent that does not jeopardize the very essence of these rights, but at the same time respects the needs of the majority stemming from the still living consequences of the Greater Serbia aggression in the early 1990s, and the need for proper and fair treatment of the Serbian national minority in the City of Vukovar." By this decision, the Constitutional Court in fact provided for the gradual introduction of the rights guaranteed by the LULSNM.

Following the Constitutional Court's decision, the Vukovar City Council passed in 2015 a statutory decision according to which the City Council evaluates every year conditions related to the extension of the rights of the Serbian minority, and every second year at the latest, adopts an amendment recognizing these rights. The City Council also passed a second statutory decision, according to which city councilors from the Serbian minority have the right to receive written materials in Serbian language and Cyrillic script upon their written request, and to the extent allowed by the city budget. This decision also provided for the right of Serbian minority members to the documents in Serbian language and Cyrillic script, yet only upon their demand approving their legal interest. However, the printing of the bilingual seals and stamps could be provided only after conditions for the extension of the Serbian minority rights are met. The Ministry of Administration soon suspended the second decision (conditioned right to the documents in the minority language and script), and the Croatian Parliament submitted to the Constitutional Court a request for the review of constitutionality and legality of both decisions. The Constitutional Court rejected to accept the proposal to review the constitutionality and legality of the first statutory decision (periodical evaluation of the conditions for the extension of the minority rights), referring to the historical-political conditions, yet repealed the second statutory decision (conditioned right to documents). The court also expressed concern that the rights of the Serbian minority have not been extended despite the court's decision in 2014. The court particularly emphasized that the provision on the gradual extension of these rights must not be abused and postponed indefinitely. Therefore, the Constitutional Court ordered the city council to inform the court of the respective decision of that year, warning that the court could initiate the constitutional proceeding by its own initiative. The Constitutional Court also warned the Croatian government of the obligation to adopt legal measures imposed on it in

103 The Court considered the referendum question as not being allowed by the Constitution since it challenged the basic Constitutional values. Constitutional Court, U-VIIR/4640/2014.

104 The government adopted the respective draft-law in 2015 but further procedure has been on hold since then, probably due to the estimation of the government's inability to provide for the qualified majority of all deputies. "Republika Hrvatska. Ministarstvo uprave. Prijedlog zakona," 2015.

2014, warning that it would inform the Croatian Parliament about the possible non-fulfilment of this obligation.¹⁰⁵ However, nothing happened after these warnings. In the meantime, a new census was conducted in 2021, the results of which might have a decisive legal impact on this case.¹⁰⁶

Attention in the media was also paid to the judgment of the European Court of Human Rights in the case of dismissal of Serbian ethnic origin teacher for failing to use the standard Croatian language in class, being considered unable to adapt due to his pre-retirement age. The European Court ruled that the dismissal constituted an interference into the applicant's private life that was disproportionate to the aim pursued, considering the specific postwar circumstances in Eastern Slavonia. This judgment indicates the problems as well as efficiency of international legal protection.¹⁰⁷

It is evident that the CLRNM paid the greatest attention to language and script. Still, it also provided for the freedom to use (other) signs and symbols of national minorities, if they stand out along with signs and symbols of the Republic of Croatia and the minority anthem being performed after the anthem of the Republic of Croatia (CLRNM, Art. 14). The competence to provide for the signs and symbols of individual national minorities belongs to the Coordination of National Minority Councils of each minority that should encompass more than half of the local councils of the respective minority. The decisions of these coordinative bodies on the symbols of their own minorities should then provide a consent of the Council for the National Minorities that consists of national minorities' deputies in the Parliament and of members of the national minorities appointed by the government upon the proposal from the organizations of the national minorities (CLRNM, Art. 35–36). However, it seems that the provided procedure has not been respected in each case.¹⁰⁸ The Council for the National Minorities gave a consent to the decision of the Serbian National Council¹⁰⁹ on the flag of the Serbian national minority in 2006 and the statute of the Serbian National Council provides for description of the image of the flag of the Serbian minority (the historical blue-white-red tricolor, yet without the coat of arms) and the anthem.¹¹⁰ That flag differs from the flag of the Republic of Serbia but

105 Constitutional Court, U-II/1818/2016. Three judges attached separate opinions, and the decision provoked public debates.

106 The respective results of the 2021 census were not known at the time when this article was finished. Decline of the share of the Serbian minority in Vukovar below one-third of total population can probably "solve" the legal side of the problem but not its substance.

107 European Court, 73544/14. "*ESLJP: Učitelj srpske nacionalnosti*," Jutarnji list, December 17, 2020.

108 "*Bez propisa*," iPress, October 2, 2013.

109 CLRNM, Art. 33 explicitly acknowledged status of the Coordination of the National Minority Councils to the Serbian National Council.

110 Statutarna odluka o jeziku, znamenju, simbolima i praznicima srpske nacionalne manjine u Republici Hrvatskoj, <https://snv.hr/o-vijecu/dokumenti/> (15 April 2022), Arts. 5–7.

the anthem is identical.¹¹¹ Apart from that, the unofficial coat of arms is occasionally used in practice.¹¹² Council for the National Minorities also gave a consent to the decisions on the flag, coat of arms and anthem of the Czech national minority in 2007,¹¹³ and the Ruthenian national minority in 2009,¹¹⁴ and on the flag and coat of arms of the Bosniak national minority in 2018.¹¹⁵ Hungarian, Italian, and Roma national minorities have not instituted their national coordinative bodies and therefore have not utilized their right on the officially acknowledged symbols. However, the historical Italian flag, that is also the flag of the Italian Republic, has been waved in public in the places with considerable presence of the Italian minority since the foundation of the Republic of Croatia¹¹⁶ and Roma use blue-green flag with the red wheel and anthem introduced at the First World Romani Congress in London in 1971.¹¹⁷ The Hungarian national flag is also flown in public in the places with Hungarian national minority. Art. 26 of the Law on Misdemeanors against Public Order and Peace¹¹⁸ provides for fines in case of unauthorized public display of the flag of a foreign state.

The basis for criminal law protection of the use of languages and symbols of national minorities is the Criminal Code of 2011. It provides for imprisonment of up to one year for denying a member of a national minority the right to freedom of expression or cultural autonomy, and for unauthorized denial or restriction of the right to use its own language and script (CC 2011, Art. 126). Respective protection is also realized within the already mentioned Art. 325 of the CC 2011 (hate speech),

111 The flag of the Serbian national minority does not include coat of arms that makes part of the flag of the Republic of Serbia, and has different proportions and tonality of colors (“*Bez propisa*,” iPress, 2 October 2013; Heimer 2007).

112 In practice, the coat of arms of the Serbian minority established in 1997 is used on the respective occasions, and the flag and other symbols of the Serbian Orthodox Church are used at the church ceremonies (Sekulić, 2021).

113 Flag of the Czech national minority is equal to the flag of the Czech Republic, coat of arms consists of the red-white-blue basis with the lion from the Czech national coat of arms in the middle, stylized Croatian “chequered” fields at the bottom, and inscription “Czechs in the Republic of Croatia” (Heimer, 2007).

114 Ruthenians use the Croatian state tricolor with Ruthenian coat of arms instead of the Croatian coat of arms. “*Ured za ljudska prava i prava nacionalnih manjina. O svjetskom danu Roma*”; “*Rusini u Hrvatskoj*.”

115 Bosniak minority instituted as their symbols the variant of historical Bosnian coat of arms as well as white flag with the described coat of arms in the middle, which both essentially differs from the coat of arms and flag of Bosnia and Herzegovina. “*Hrvatska: usvojeni grb i zastava*,” PreporodINFO, 30 January 2018.

116 Italian “nationality” in the former Yugoslavia used as its symbol the Italian national flag with a red star in the middle. After proclamation of the Republic of Croatia red star was removed and the Italian national flag remained in the factual use as the symbol of Italian national minority. Art. 6 of the Statute of the Italian Union in Rijeka (Statuto dell’Unione Italiana, <http://www.unione-italiana.eu/index.php/it/documenti-fondamentali>, 15 April 2022) provides for its flag and anthem defined as Italian “national flag” and “national anthem” that are in fact the flag and anthem of the Italian Republic. “*Bez propisa*,” iPress, 2 October 2013; Heimer 2007.

117 “*Romi.hr*.”

118 Zakon o prekršajima protiv javnog reda i mira, *Narodne novine*, 47/1990, 55/1991, 29/1994.

when unlawful acts are committed concerning racial, religious, national, or ethnic affiliation or language and other characteristics of the person.

Unlike such extensive regulation of national minority rights, particularly language and script, the regulation of the use and protection of symbols of religious communities and religious symbols in Croatian legislation is hardly present at all.¹¹⁹

The Constitution of the Republic of Croatia guarantees equality for its citizens regardless of religion (Art. 14) and provides for freedom of conscience and religion, and freedom to demonstrate faith or other belief publicly (Art. 40). According to the Constitution, all religious communities are equal before the law and separated from the state. They are free, in compliance with the law, to publicly conduct religious services, open schools, colleges, or other institutions, welfare and charitable organizations that enjoy the protection and assistance of the state in their activities (Art. 41). These are also general preconditions for the protection of religious symbols.

However, not much more than this can be said. The 2002 Law on the Legal Status of Religious Communities, which is of fundamental importance in regulating the position of religious communities, primarily protects the symbols of the Republic of Croatia (and not symbols of religious communities) when they are used as part of religious community symbols.¹²⁰ It allows a religious community that is legally part of a religious community based outside the Republic of Croatia to include the name of that community in its own name. It also provides for the administrative fairness in the use of symbols of religious communities as it prohibits the name and features of a religious community from being identical to the name and features of an already registered religious community.

The symbols are not mentioned in the agreements that the Republic of Croatia or the Croatian government signed with individual religious communities.¹²¹ They are not mentioned even in the agreements with the Holy See, including the one that stressed the historical and substantive role of the Catholic Church in the Croatian society.¹²²

However, this situation has not provoked wider public reactions or serious problems in practice even though complaints of particular groups are registered and dissatisfaction of parts of society manifested. Thus, certain atheist groups continuously complain about the presence of the Roman Catholic symbols in courtrooms, prisons, and hospitals, considering such a practice unconstitutional given the

119 On legal regulation of religious symbols in Croatia see Savić, 2021, pp. 25ff.

120 In Chapter 4, we already mentioned Art. 8 of this law which provides that the word Croatia and its derivatives, the coat of arms and the flag of the Republic of Croatia can be included in the name and features of a religious community in a way that emphasizes the reputation and dignity of the Republic of Croatia. The precondition of “emphasizing” the reputation of the state differs from the “passive” requirement of “not offending” it, which is conventionally provided in similar regulations. However, it is likely that this conceptual difference is just accidental.

121 Agreements concluded between the Republic of Croatia and individual religious communities see in: Petrak and Staničić, 2020, pp. 246–324.

122 See footnote 40.

principle of separation of church and state. The ombudsperson confirmed low scale of complaints on religious discrimination in her practice, most of them being related to the public display of religious symbols in public institutions.¹²³ On the other side, some theatre performances provoked bitter and sustained reactions from the Catholic Church and some conservative groups in 2017 and 2018 due to the insulting symbolic content of these performances, but these reactions did not receive a court epilogue.¹²⁴ All these and similar reactions obviously indicate a systemic problem but they have passed as rather isolated incidents without triggering wider reactions.

The common denominator of these objections coming from opposite political sides is a lack of regulation on the respective matters that seems to be part of a broader problem of insufficient or inadequate regulation related to issues with a pronounced religious dimension, such as the right to abortion.¹²⁵ The main reason for such situations seems to be the backlash of all Croatian governments and political parties from heated public controversies, given the potential of such debates to jeopardize fragile political balance or even endanger social peace. However, rather surprisingly, the public reactions to such challenges do not seem to correspond to their social significance—the debate on the public use of religious symbols reached only moderate level in Croatia, the mass protests and counter-protests about the right to abortion lasted rather short time and the heated debate on that issue rather quickly disappeared from the public space with only occasional re-appearances. That might be an indicator that in the Croatian society the commitment to maintain social peace and relative political stability prevails over the need for a complete regulation of these issues¹²⁶ that opens deeper questions on the regulatory politics.

123 “2020 Report on Religious Freedoms: Croatia.”

124 “*Marulićevi dani*,” *Jutarnji list*, 24 April 2017; “*Nadbiskup Želimir Puljić*,” *Večernji list*, 26 January 2018.

125 The Constitutional Court ruled in 2017 that the 1978 law governing abortion in Croatia and still in force was not unconstitutional, but called on the Croatian Parliament to pass a new law within two years that would include preventive and educational measures to make abortion exceptional. Nothing has been done in the meantime except that in May 2022 the leading conservative party (HDZ) declared that the coalition in power could not reach agreement on this issue that prevents the bill regulating abortion be send to the Parliament. U-I-60/1991. “*Bačić: dok ne bude dogovora vladajućih*,” *Jutarnji list*, May 13, 2022.

126 Here we should briefly mention the research of Zrinščak and Staničić that points to a significant gap between “church religiosity” and “personal religiosity” in the Croatian society. Croatian believers of various religions are distanced from the churches of their respective faiths and critically evaluate their activities. These results provoke for more elaborate discussions (Zrinščak and Staničić, 2022, pp. 13–16).

7. Conclusion

Croatian symbols of power and principal national symbols emerged through the nineteenth century in the framework of the autonomous Kingdom of Croatia and Slavonia. From then until today, these symbols have been more-or-less continuously in use as symbols of the Croatian constitutional identity and identity of the Croatian nation as ethnocultural entity with the “constituent” meaning regarding the Republic of Croatia.

Current regulation of these and other examined symbols is characterized by developed regulation of the state symbols, rather developed yet partly sustained regulation of the national symbols, extensive regulation of symbols of the national minorities, particularly concerning language and script, and insufficient regulation of religious symbols. This situation reflects the complex internal legal, political, and social dynamics in building of the new Croatian constitutional and legal order, influences from the international environment as well as the impact of the challenges from the past.

The developed regulation of the state symbols is based upon conventional matrix and it complies to the need of symbolic confirmation of the new state. What is surprising is rather sustained or almost absent regulation related to national and religious symbols as well as rather sustained interest of public for these issues that were hard to expect concerning the frustrations from the past. Both can probably be attributed to the sense of security of the largest part of society concerning formation of the national state that provides for the principal guarantees of free use and protection of national symbols, contrary to the previous historical experiences. This sense of security seems to instigate the social conformity and reluctance to challenge existing political constellations with a of risk political and social disturbances, at the expense of resolution of the controversies of fundamental importance.

Comparison of the obviously insufficient regulation of religious symbols with the extensive regulation of the highly sensitive national minority issues, indicated the focused involvement of the international community to the national minority regulation as probably the main reason for such essentially different outcomes. That raises several questions related to the readiness of the Croatian society to face controversial yet fundamental issues in sensitive spheres of regulation. That story is by no means more complex than it appears at first sight, yet primary responsibility of the government and political elites, which by their nature have the leading role in articulation of the rational and responsible politics, can hardly be challenged.

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CHAPTER III

LEGAL PROTECTION OF STATE, NATIONAL AND COMMUNITY SYMBOLS IN THE CZECH REPUBLIC



KATEŘINA FRUMAROVÁ

1. Introduction

It is characteristic for every community that is organized to identify itself in some way, both externally and internally. Its members share common goals, values, and attitudes, and they respect and protect them. It is the symbols that serve as one of the important means which embodies the existence of a particular community externally (in relation to other entities) and at the same time the affiliation of its member to this group. Symbols also reflect a certain solidarity of the members of the community and their internal and emotional ties to it. The symbols express the history and traditions, values, and ideas of the community. All this applies regardless of whether such a community is a state or another important community in its territory, especially a territorial self-governing unit (a municipality or a region), a national minority, or a religious community. In these communities, in particular, symbols play an important role and perform several functions. Therefore, these symbols are subject to the relevant national legislation. As a rule, its content is the definition of these symbols, the basic rules for their use, and the means of their legal protection. From the point of view of various forms of protection, four basic levels can be distinguished: constitutional protection, administrative protection, criminal protection, and protection under private law (especially copyright). The following text will focus on the analysis of the state, national and community symbols in the Czech Republic, especially from the point of view of their legal protection.

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2. State symbols in the Czech Republic

The issue of state symbols, their legal regulation and protection is very important for every state. This is because it is through state symbols that the existence of the state and at the same time the affiliation to this state are embodied and externally symbolized.¹ The constitution of the state as well as its state symbols are what the state presents most outwardly to others. The national emblem and the national flag are of fundamental importance in this respect. After all, their use as state symbols is also envisaged by international law (the Vienna Convention on Diplomatic Relations of 1961 and Vienna Convention on Consular Relations of 1963²). In this regard, these are not only state symbols, but also identification symbols (of the state) in the international environment. They are protected under conditions of non-interchangeability and notification to other countries. They represent signs of a sovereign state power.³

The above also applies without reservation to the Czech Republic. The state symbols of the Czech Republic serve for the external representation of the Czech state: they are an expression of its existence and sovereignty. They symbolize the history and tradition of Czech statehood; they are an abstract symbol of the values of the Czech state. The state idea is also expressed in the state symbols as one of the state-creating elements of the state. The state idea strengthens the state in value, ideology, and emotion.⁴ It is a set of values through which citizens identify with the state and express that they want to live in such a state.⁵

State symbols perform several functions. In addition to their representative function, they have in the Czech Republic's negotiations within the international community, they also have an identification function. They serve to be used by the entities acting on behalf of the state, both internally and externally. They also fulfill the function of integration, when on various occasions they express the belonging of the citizens of the Czech Republic to their own state.⁶

The legal grounding of the state symbols should correspond to the abovementioned meaning and significance. As a rule, they are subject to the constitutional regulation. In the Czech Republic, the state symbols are regulated directly in the Constitution of the Czech Republic (Art. 14). However, the issue of state symbols represents a multidisciplinary issue, where not only constitutional, state law and international law influences accumulate, but also political and historical aspects, as well as aesthetics and heraldry.

1 Filip, 2003, p. 154.

2 Art. 20 of the Vienna Convention on Diplomatic Relations of 1961 and Art. 29 of the Vienna Convention on Consular Relations of 1963.

3 Filip, 2003, p. 155.

4 Pavlíček et al., 2011, p. 399.

5 Pražák, 1900, p. 6. For more details on Czechoslovak and Czech statehood, see Pavlíček et al., 2011, pp. 399–403.

6 Filip et al., 2010, pp. 268–269.

2.1. Historical excursion

The official state symbolism of the Czech Republic is very closely connected with the historical development of the Czech state, which began to be constituted during the ninth century. The state symbols reflect the historical and political events of the state, the development of society and its traditions. According to Adler, “state signs also radiate certain emotional values” and should be a link between the various groups of the state’s population.⁷ The preamble of the current Constitution of the Czech Republic points to the importance of all these values, which are reflected in the state symbols. It states:

We, the citizens of the Czech Republic in Bohemia, Moravia, and Silesia, at the time of the renewal of the independent Czech state, faithful to all good traditions of the ancient statehood of the Czech Crown and Czechoslovak statehood, determined to build, protect, and develop the Czech Republic....⁸

An important milestone in the development of Czech state symbolism is the year 1918, when the independent Czechoslovak Republic was established. Until the beginning of the 20th century and the establishment of the republic, it was mainly the symbolism of the reigning monarch. The first symbols in the Czech lands began to appear in the 12th century.⁹ The oldest known emblem (Přemyslid) was a black “flaming” eagle on a silver field.¹⁰ A significant moment was the accession of King Přemysl Otakar II to the Czech throne in 1253. The silver crowned two-tailed lion, which is the basis of Czech state symbolism to this day, has become the state symbol (the symbol of the Czech king). Another important milestone was the year 1752, when Empress Maria Theresa issued a rescript that introduced a unified state symbolism for the Czech and Austrian lands (Austro–Hungarian monarchy).¹¹

The new era of the state symbolism begins with the aforementioned establishment of an independent Czechoslovak state in 1918. Immediately after the establishment of the Czechoslovak Republic, a provisional constitution was adopted.¹² Pursuant to Section 14 of this constitution, the government issued regulation no. 300/1919 coll., which established the state coat of arms. This very brief by-law (it had only two provisions) established the first (and at that time only) state symbol of the new republic, the state coat of arms, and at the same time defined its graphic form—a silver two-tailed lion in a jump on a red background.

7 Hácha, Hoetzel and Weyr, 2020 [1929–1938], p. 1103.

8 Preamble of the Constitution of the Czech Republic.

9 Sedláček, 2008, p. 3.

10 For details see Gerloch, Hřebejk and Zoubek, 2013, p. 114.

11 The history of state symbolism was elaborated in detail by Sedláček, 2002, pp. 5–150, or by Novák, 1990, pp. 3–166.

12 Act no. 37/1918 coll., On the Provisional Constitution.

In 1920, the Constitutional Charter of the Czechoslovak Republic was adopted (it replaced the provisional constitution), which in Section 5 already explicitly enshrined (some) state symbols. It was stated here that the colors of the republic are white, red, and blue. Furthermore, the Constitutional Charter mentioned the state coat of arms and flags, but left their specific regulation to a special law.¹³ This act became act no. 252/1920 coll., which issued provisions on the national flag, state coat of arms and state seals. From the point of view of heraldry and vexillology, the law precisely described the appearance of the state symbols. Specifically, it was the national flag and the presidential standard. The small, medium, and large state coat of arms and state seal were also regulated. The law also included a graphic design of the state symbols. In addition, the law contained the basic rules for the use of the state symbols.¹⁴ The specific rules were to be laid down by the government in its regulation. Violation of these rules was an administrative offense.¹⁵ Another important legal regulation was act no. 269/1936 coll., On the Use of Flags, state Coats of Arms, and other symbols, as well as uniforms and signs, and on measures against defective markings. This act changed act no. 252/1920 coll. in some respects, but in particular significantly amended it, namely in the issue of the use of the state symbols and in the issue of the regulation and use of non-state symbols (e.g., signs of local self-government and other public corporations, military uniforms, uniforms of public authorities, etc.). These were relatively detailed rules for the use of these signs and symbols, and the sanctions were also set for violating these rules (it was possible to impose a fine or a short-term prison sentence). Again, it was a matter of administrative liability for an administrative offense.

The Constitutional Charter of 1920 was replaced by the Constitution of 1948,¹⁶ which was already a product of the emerging communist regime in the Czechoslovak Republic. President Edvard Beneš refused to sign the Constitution and abdicated. Even so, it was accepted. Although the Constitution formally maintained some institutes of parliamentary democracy, the actual constitutional conditions and practices were quite different. This Constitution also explicitly regulated the issue of state symbols (Section 169), to the same extent as the Constitution of 1920. The state colors (white, red, and blue) were enshrined here, and in relation to state coat of arms and flags, regulation was still left to a special law. However, the new law was not passed at this time. This meant that the previous regulation was still formally in force. Specifically, act no. 252/1920 coll. and act no. 269/1936 coll. In practice, however, this issue was completely subordinated to the ideology of the communist regime and its needs.

13 Weyr and Neubauer, 1931, p. 36.

14 The issue of state symbols in this historical period is addressed in the publication: Vojtíšek, 1921, pp. 1–95.

15 A fine or a short-term prison sentence could be imposed for the offense.

16 Constitutional act no. 150/1948 coll., Constitution of the Czechoslovak Republic.

The Constitution of 1948 was replaced by the Constitution of 1960. This Constitution represented the definitive transition from parliamentarism to the unity of state power, ended the period of people's democracy and established socialism in the country. The new name of the country was the Czechoslovak Socialist Republic. The Communist Party was officially declared the leading force in the state and society (Article 4 of the 1960 Constitution). This constitution also regulated the state symbols (Section 110). Specifically, it was the state coat of arms and the national flag, including the definition of their appearance. Probably the most significant change concerned the appearance of the state coat of arms of the Czechoslovak Socialist Republic. It was still based on a two-tailed lion in a red shield, but instead of a crown, the lion had a five-pointed star over his head (a symbol of communist ideology). According to the Constitution, details concerning state symbols and their use were to be regulated by law. This act became act no. 163/1960 coll., On the state Coat of Arms and the state Flag (act no. 252/1920 coll. and act no. 269/1936 coll. were repealed. The act no. 163/1960 coll. regulated not only the state coat of arms and the state flag, but also the standards of the president of the Republic, the state seal and their use.

In 1989, significant political changes took place in the Czechoslovak Republic, especially the abolition of the communist regime and the return to a pluralist democracy.¹⁷ The Czechoslovak Republic is once again becoming a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and citizens. The change in the political climate associated with the fall of the totalitarian system of power naturally required a change in the state coat of arms, which was not only to express the renewal of democratic principles, continuity of historical development, but also to capture the federal organization of the Czechoslovak state. After very difficult negotiations, Constitutional act no. 102/1990 coll., On the state Symbols of the Czech and Slovak Federal Republic, was adopted. This constitutional law amended the coat of arms of the Czech and Slovak federal republic, when the national councils of both republics first approved the national coats of arms. Constitutional act no. 102/1990 coll. stipulated that the state symbols of the Czech and Slovak Federal Republic are, in addition to the state coat of arms, also the state flag, the standard of the president of the Republic, the state seal, and the national anthem. In relation to the depiction of the state coat of arms, the five-pointed star (the symbol of communism) was removed and the traditional crown was restored.

Unfortunately, despite the return to democracy and Czechoslovak (especially First Republic) traditions, the federal organization did not last long. The Czechoslovak Federation disintegrated and on January 1, 1993, two independent states were established—the Czech Republic and the Slovak Republic. The newly adopted Constitution of the Czech Republic (which is effective to this day) regulated the issue of state symbols in Article 14. This article stipulates that the state symbols of the

¹⁷ The events are often referred to as the “Velvet Revolution.”

Czech Republic are large and small state coats of arms, state colors, state flag, flag of the president of the Republic, state seal, and state anthem. State symbols and their use are to be regulated more specifically by law. This act became act no. 3/1993 coll., On the state Symbols of the Czech Republic. The independent Czech Republic took over, among other things, both state coats of arms (small and large) of the former Czech Republic (part of the then federal Czechoslovak Republic) by this law, only for the small coat of arms was the Spanish shield changed to Gothic. The last law adopted in this area in the Czech Republic was act no. 352/2001 coll., On the Use of state Symbols of the Czech Republic, in 2001.

It can therefore be summarized that the legal regulation of the state symbols of the Czech Republic has undergone a long and interesting development, while it has significantly reflected historical and especially political changes in the state and society. For a long time, it was associated with the symbolism of today's independent Slovak Republic, because until 1993, both countries formed a common state. The fact that it still strongly refers to the traditions of the statehood of the Czech Crown and the Czechoslovak statehood can be highlighted as a great positive of the current legal regulation of the state symbols. The core of the legal regulation is the Constitution of the Czech Republic and the related act no. 3/1993 coll., On the state Symbols of the Czech Republic and act no. 352/2001 coll., On the Use of state Symbols of the Czech Republic. The following part of the text will be devoted to the analysis of these laws.

2.2. Current state and legal regulations

At present, the basis of the legal regulation of state symbols is the Constitution of the Czech Republic. Article 14 of the Czech Constitution stipulates that the state symbols are large and small state coats of arms, state colors, the state flag, the flag of the president of the Republic, the state seal, and the state anthem.¹⁸ The order of the state symbols reflects their importance.¹⁹ Furthermore, the Constitution merely states that state symbols and their use are regulated by law. It can therefore be concluded that the constitutional regulation of state symbols is very brief, it is limited to stating the existence of the state symbols in the form of their exhaustive list. Regarding their importance and function, it would be more appropriate to define at the constitutional level their form (appearance), or at least the form of the most important (such as the state coat of arms or state colors).²⁰

The constitutional regulation of the state symbols is thus logically followed by statutory regulation. Specifically, there are two acts, namely the act no. 3/1993 coll., On the state Symbols of the Czech Republic and act no. 352/2001 coll., On the Use of

18 See: Appendix, pp. 352-353.

19 Filip et al., 2010, p. 269.

20 See Klíma, 2009, p. 194.

state Symbols of the Czech Republic. The following part of the text will be devoted to the analysis of these laws.

The Act on state symbols is relatively brief, it contains only a list of state symbols and a description of their form (appearance). The appearance of individual state symbols (their graphic representation) forms an appendix to this act.

2.2.1. Large and small state coats of arms of the Czech Republic

The state coat of arms is generally one of the most important state symbols of any state. From a historical (and heraldic) point of view, the oldest Czech (Přemyslid) state coat of arms in our country was a black, flaming eagle (with red flames) in a silver field. However, from the middle of the 13th century, a silver two-tailed lion²¹ in a jump, with a golden crown, in a red shield, became a Czech symbol.²² Other territorial parts of the Czech lands, especially Moravia and Silesia, also have historical symbols. In the case of Moravia, it is a silver-red checkered eagle with a gold crown, in gold armor, in a blue field. The symbol of Silesia is a black eagle with red armor and a crown in a golden shield.

After the establishment of the Czechoslovak Republic in 1918, government decree no. 300/1919 coll., Which establishes the state coat of arms, was adopted based on the provisional constitution. This very brief by-law (it had only two provisions) established as the first and at that time the only (!) state symbol the state coat of arms and at the same time defined its graphic form.²³ The regulation stipulated that until the final legal regulation of the state coat of arms, the state coat of arms of the Czechoslovak Republic would be considered to be the current coat of arms of the Kingdom of Bohemia (silver two-tailed rampant lion, with a gold crown and a red shield). This provisional regulation was replaced in 1920 by the Constitutional Charter of the Czechoslovak Republic and the subsequent act no. 252/1920 coll., which issues provisions on the state flag, state coat of arms and state seals. The constitutional regulation contained only a list of the state symbols (including the state coat of arms), a more detailed regulation contained act no. 252/1920 coll. In contrast to the current regulation (containing only the small and large state coats of arms), small, medium, and large state coats of arms were enshrined. The large state coat of arms had a very complicated and complex form, which tried to include the symbols of all the territories that were then part of the Czechoslovak Republic. Therefore, in addition to the Czech symbol, there was also the symbol of Slovakia, Subcarpathian Russia, Moravia, Silesia, Cieszyn, Opava, and Racibórz. The change came after communism and socialism were established in the Czechoslovak Republic. Only one state

21 The two tails are supposed to symbolize the union of Bohemia and Moravia and also, from the point of view of mysticism, the uniqueness and power of the Czech king (because the two-tailed lion does not exist in nature).

22 Gerloch, Hřebejk and Zoubek, 2013, p. 114.

23 Sládeček et al., 2016, p. 203.

coat of arms was introduced, which represented a two-tailed lion jumping on a red shield. The traditional golden crown was replaced by a five-pointed star, which was a symbol of a communist ideology. After returning to democracy in 1989, there is a return to the traditional image—the Czech lion has a crown over its head again (not a five-pointed star). Until the disintegration of the Czechoslovak Federal Republic, the state coat of arms included both the coat of arms of the Czech Republic, and Slovakia.

On January 1, 1993, an independent Czech Republic was established, which has a large and a small state coat of arms.²⁴ The large state coat of arms consists of a square shield, in the first and fourth red field of which is a silver two-tailed lion in a jump with a gold crown and gold armor (emblem of Bohemia). In the second blue field is a silver-red checkered eagle with a gold crown and gold armor (the emblem of Moravia). In the third golden field is a black eagle with a silver crescent, with a golden crown and red armor (emblem of Silesia). The small state coat of arms consists of a red shield, in which there is a silver two-tailed lion in a jump with a gold crown and gold armor.

2.2.2. State colors

Among the state symbols are the state colors. According to the rules of heraldry, these colors are derived from the state coat of arms so that the first of them corresponds to the color of the coat of arms sign, and the second to the color of the shield.²⁵ In the Czech lands, therefore, since the 13th century, it was white and red.²⁶ When the independent Czechoslovak Republic was established in 1918, it adopted these two traditional colors. However, in practice, problems have begun to emerge (e.g., when marking state borders), as the neighboring countries (Austria and Poland) have the same colors. The Czechoslovak Republic solved this situation by adding a third color to these two colors, namely blue. Together with the traditional couple, it created the so-called Slavic tricolor, which was banned during the First World War. In addition, the same colors were characterized by the flags of the important allies, such as France, Great Britain, and the United States. In addition, the blue contained the provincial emblems of Moravia, Slovakia, and Subcarpathian Russia.²⁷ The Constitutional Charter of the Czechoslovak Republic of 1920 explicitly stated that the colors of the republic are white, red, and blue. These state colors (including their binding order) have been preserved as the colors of the Czech state until today.²⁸ At present, however, the Constitution of the Czech Republic only stipulates that state

24 See: Appendix p. 353.

25 Klíma, 2009, p. 194.

26 White lion on a red shield. However, if the Czech monarch also had the higher title of Roman emperor, they were given priority to the imperial colors (black and yellow).

27 Sedláček, 2008, p. 24.

28 See: Appendix, p. 352.

colors are one of the state symbols. However, the enumeration and order of these colors are regulated *only* by the Act on state Symbols.

2.2.3. State flag

The state flag is generally one of the most important symbols of any state. Even during the Austro-Hungarian Empire, national flags and banners spread in Bohemia in the 19th century, the color form of which was derived from the Czech coat of arms (white lion on a red background).²⁹ These banners and flags³⁰ were formed by the upper white stripe and the lower red stripe. Around the middle of the 19th century, these flags began to be generally accepted as one of the Czech national symbols.³¹ This flag was also raised on October 18, 1918, the day of the founding of the Czechoslovak Republic, at the house of the Prime Minister of the Provisional Foreign Czechoslovak Government, T. G. Masaryk (in the USA). Without the people of the Czech lands knowing about this event in America, they used the same white and red flags in the spontaneous declaration of independence on October 28, 1918. The harmony of the foreign and domestic anti-Austrian resistance was symbolic.³²

After the change (extension) of the state colors, when the color of blue was added to the white and red colors, it was necessary to reflect this change in the appearance of the state flag. Act no. 252/1920 coll. therefore stipulated that the state flag consisted of a lower red stripe and an upper white stripe, between which a blue wedge was inserted.³³ The extent of the parts of the flag was expressed in the law graphically (by depicting the flag).³⁴ In this form, the flag was used in the following decades, including the governance of the Communist Party. After the disintegration of Czechoslovakia into two independent states, the Czech Republic took over this flag as its state flag. Slovakia did not agree with this step and objected to the conflict with the Constitutional act no. 542/18992 coll., On the dissolution of the Czechoslovak Federal Republic.³⁵ However, the independent Czech Republic objected that with the demise of the Czechoslovak Federal Republic, state symbols became free and could therefore be used.³⁶

29 Sedláček, 2008, p. 26.

30 For the differences between the flag and the banner, see Hácha, Hoetzel and Weyr, 2020 [1929–1938], p. 183.

31 Svoboda, 1996, p. 44.

32 Sedláček, 2008, p. 26.

33 See: Appendix, p. 352.

34 It was a length-to-width ratio of 3:2.

35 Art. 3 of this Constitutional act prohibited the successor states (ie the Czech Republic and the Slovak Republic) to use the state symbols of the Czechoslovak Socialist Republic.

36 At the same time, the Czech Republic did not feel bound by the law of the defunct state (the Czechoslovak Federal Republic). See Pavlíček et al., 2011, p. 403; Klíma, 2010, p. 158.

2.2.4. *Flag of the president of the Republic*

This state symbol relates to the establishment of the Czechoslovak Republic in 1918.³⁷ The appearance of the flag was first amended by act no. 252/1920 coll. The basis of the flag was a large state coat of arms, on a white background with a border formed by flames (white, red, and blue colors). Part of the flag was the motto “*Truth wins.*” This motto, which is still part of the flag of the president of the Republic, has deep religious roots. It dates to the Hussite times. Over time, there have been partial changes in the appearance of the flag. The addition of linden branches (linden is the Czech national tree) is notable. The current appearance of the presidential flag is regulated by the Act on state Symbols. The flag of the president of the Republic is white, with a border consisting of flamingos alternating white, red, and blue. In the middle of the white field is a large state coat of arms. Below it is the motto “*Truth wins*” on a red ribbon lined with yellow (gold) linden branches.³⁸

2.2.5. *State seal*

At present, the use of the state seal is limited, but in the Middle Ages it was of fundamental importance, especially from the point of view of the legal validity of the written documents. At that time, the seal of the monarch usually performed the function of the “state” seal. However, in the “no king” periods, an alternative solution had to be found. This situation occurred in the Czech lands in the 15th century, when the victorious Hussites acquired the first state seal in today’s sense in 1432. It depicted a shield with a two-tailed lion, and a Latin inscription referred to it as the seal of the Crown of the Kingdom of Bohemia.³⁹

After the establishment of the republic, the state seal was regulated as one of the state symbols by act no. 252/1920 coll. It was interesting that the small and large state seal was enshrined in this act. Both seals were kept by the prime minister. The small state coat of arms was depicted on the small state seal, and the large state coat of arms on the large state seal. Around the large and small coat of arms was the inscription: Czechoslovak Republic. The president had his own seal with a large state coat of arms and the inscription “president of the Czechoslovak Republic.” However, it was no longer one of the official state symbols. The changes took place in connection with the acceptance of socialism and communism. There was only one state seal and it was kept by the president. It consisted of the state coat of arms, linden branches and the inscription “Czechoslovak Socialist Republic.” The current state seal of the Czech Republic has a similar appearance, only there is—logically—a

37 Previously, the emperor’s flag was used in the Austro-Hungarian monarchy, only in the 19th century. It was used to identify ships, later cars, or places where the emperor was present at the time. In more detail Sedláček, 2008, p. 30.

38 See: Appendix, p. 353.

39 Filip, 2003, p. 159.

different inscription, namely “CZECH REPUBLIC”.⁴⁰ The state seal is kept by the president of the Republic.

2.2.6. State anthem

The last of the exhaustively listed state symbols of the Czech Republic is the state anthem. Medieval spiritual songs, sung on church and secular occasions, can be considered the forerunners of the modern state anthem in the Czech environment. The first of them originated in the 10th century (“Hospodine pomiluj ny”), the most famous of which are the Saint Wenceslas Chorale dating from the 12th century and the Hussite chant “Who are God’s Warriors?”⁴¹ From the end of the 18th century, hymns without religious significance began to prevail. In December 1834, at the premiere of the play *Fidlovačka*, the song “*Kde domov můj*,” composed by František Škroup to the words of Josef Kajetán Tyl, was heard at the Estates Theater in Prague for the first time. It gradually gained popularity and after the fall of the absolutist regime in the 19th century; it definitely established itself as the unofficial Czech national anthem.

In Czechoslovakia, the issue of the anthem was first dealt with by the Ministry of National Defense, which ordered military bands to play alongside the Czech anthem, always the Slovak “*Nad Tatrou sa blýska*.” For the avoidance of doubt as to whether it is one or two anthems, the Czechoslovak government issued a resolution that it is an integral national anthem. Even before the Second World War, there were suggestions about the possibility of replacing the song “*Kde domov můj*” with another song, but it was out of the question for the general public.⁴² However, the state anthem was first explicitly mentioned as a state symbol in the Constitutional act no. 102/1990 coll. After the disintegration of the federation, the first verse of the song “*Kde domov můj*” remained the Czech national anthem. The text and music notation of the national anthem are annexed to the Act on state Symbols.

3. Use and legal protection of state symbols

State symbols represent the existence of every sovereign state. They reflect the values and traditions of the state, its history, and its present. The state presents itself externally through state symbols in the international environment. However, state symbols have an equally significant effect inside the state. They unite the citizens of the state, support their belonging and ties to the state, and recall the basic ideas

40 See: Appendix, p. 353.

41 Pavlíček et al., 2011, p. 399.

42 Sedláček, 2008, p. 39.

and values on which the state is built. The meaning and uniqueness of state symbols is also reflected in the need to protect the state symbols by various legal means. Therefore, the legal order of the Czech Republic not only explicitly enshrines the state symbols, but also lays down rules for their use, as well as the adverse consequences if the statutory rules concerning state symbols and their use are violated. In principle, we can distinguish four levels of legal protection of the state symbols: constitutional protection, administrative protection, criminal protection, and protection under private law.

3.1. Constitutional protection

As mentioned above, the basic legal regulation of the state symbols of the Czech Republic is contained directly in the Constitution of the Czech Republic, i.e., in a legal regulation of the highest legal force. After all, this has been the case since the very establishment of the Czechoslovak Republic in 1918. Art. 14 of the Constitution, which contains their exhaustive list, is devoted to the state symbols. Furthermore, it only states that the state symbols and their use are regulated by law. The constitutional regulation of Czech state symbols is therefore very, very brief and does not say much about the state symbols. Criticism can be made especially of the fact that the constitution does not define the specific form (description) of these symbols, or even the most important⁴³ (such as the state coat of arms, state flag, or state colors⁴⁴). *De lege ferenda*, it would be appropriate to consider extending the constitutional regulation in this regard. The constitution does not even provide a closer look at the meaning of the state symbolism.⁴⁵

On the other hand, it is possible to outline some basic elements of the protection of state symbols from this minimalist constitutional regulation. The very fact that the existence of the state symbols is enshrined directly in the Constitution of the Czech Republic, which takes the form of a constitutional law, is very important. This fact increases the strength of the anchoring of state symbols in the Czech legal system, as any change in the constitutional regulation is a difficult procedure. Stricter conditions are prescribed for amending or repealing a constitutional law than in relation to ordinary law. Constitutional laws must always be adopted by a qualified majority, i.e., three-fifths of the votes of all deputies and three-fifths of the votes of the senators present. The president of the Republic cannot veto their adoption. The enshrinement of the state symbols directly in the constitution thus emphasizes their importance for the Czech state and society, as well as increases the stability and immutability of their regulation. The state symbols of the Czech Republic are defined

43 Sládeček et al., 2016, p. 204; Klíma, 2009, p. 194.

44 With their artistic solution, these symbols embody the existence of the state, its history, territorial development, state establishment, and other important facts, therefore it would be appropriate to enshrine their form directly in the Constitution.

45 We must therefore derive it from the preamble of the Constitution of the Czech Republic.

in the constitution in the form of an exhaustive list. This means that it is a final and closed list, which cannot be further expanded (either by statutory regulation or by another legal act). It is thus clearly stated which symbols have the status of a state symbol with all the legal consequences and which do not. The legal rules governing their use, as well as the norms punishing their misuse or unauthorized use, apply only to such formally defined state symbols.

Art. 14 of the Constitution of the Czech Republic provides that the state symbols and their use will be regulated in more detail by law. The constitutional regulation of the state symbols is thus logically followed by statutory legislation. Specifically, these are the Act on state Symbols of the Czech Republic and the Act on the Use of state Symbols of the Czech Republic. These laws are very closely connected with the Constitution of the Czech Republic and, based on an “order of the Constituent Assembly,” develops the constitutional regulation of state symbols and regulates their use in practice.

The Act on state Symbols is a relatively brief legal regulation, the only content of which is a detailed description of the form (appearance) of the state symbols. This act also includes an appendix, which contains a graphic representation of the state symbols, and a text and music notation for the state anthem. The uniqueness and meaning of state symbols are such that only in such a form can state symbols be depicted and used. It is a manifestation of the so-called official harmonization.⁴⁶ The Act on state Symbols thus has, in relation to Art. 14 of the Constitution of the Czech Republic, a legally constitutive character. and a character that is bindingly depicting and determining.⁴⁷

One of the most important ways of protecting the state symbols of the Czech Republic is the fact that the legislator precisely and clearly defines who can use state symbols and in what way. This regulation is a key element in the protection of the state symbols and prevents their misuse or inappropriate use. Art. 14 of the Constitution of the Czech Republic directly provides for the statutory regulation of the use of the state symbols. Its fulfilment is ensured by the Act on the Use of state Symbols of the Czech Republic, both by setting the rules for their use and by regulating the administrative liability for offenses in the event of their violation. In this respect, we consider it an administrative regulation.

It can be summarized that Art. 14 of the Constitution of the Czech Republic in conjunction with the Act on state Symbols of the Czech Republic and the Act on the Use of state Symbols of the Czech Republic represent a close and logical connection between the constitutional and administrative level of protection of the Czech state symbolism.

46 Filip, 2003, p. 156.

47 Klíma, 2010, p. 214.

3.2. Administrative protection

The essence of the administrative level of protection are the statutory rules for the use of the state symbols and the related administrative liability for offenses if these statutory rules are violated. It should be noted at the outset that this is not an achievement of the current legislation. Since the establishment of the Czechoslovak Republic in 1918, the issue of the use of the state symbols has been regulated by law, as have penalties for violating these legal norms.

The basic and general requirements that apply to the use of all Czech state symbols are the requirement of suitability and a dignified way of using the state symbol. The Act on the Use of state Symbols stipulates that they may be used only in an appropriate and dignified manner. This means that it is not enough for a person or authority to be legally entitled to use a state symbol. At the same time, the entitled subject must use the relevant state symbol appropriately and with dignity (and always regarding the given situation or occasion in which the state symbol is used).⁴⁸ These conditions must be carefully weighed in each case and consider the specific circumstances of the situation.

The law further defines the category of so-called entitled persons. These are institutions, authorities or other entities and persons who may use the state symbols by law. This is a relatively extensive list, which is also exhaustive. These are primarily public authorities, such as the parliament, the president of the Republic, the government, ministries, and other administrative authorities, courts, the Supreme Audit Office, or the Czech National Bank. Furthermore, territorial self-governing units (i.e., municipalities and regions) are also entitled entities. Authorized persons are also the armed forces (army) and security forces (e.g., police officers, customs officers, and others). Another group of eligible entities is represented by schools, state cultural and scientific institutions, state funds, but also athletes representing the Czech Republic, the ambulance service or volunteer firefighters. In the case of public entities, it is often the obligation to identify oneself through these (state) symbols, both internally and externally in relation to other states and groupings.⁴⁹ From the point of view of private entities, it is usually possible to use them on appropriate occasions. The obligation or the possibility of using the state symbols in the manner prescribed by law and for purposes permitted by law also implies the prohibition of their use in another way or for other purposes.

It should be emphasized that the Act on the Use of state Symbols of the Czech Republic regulates in detail which of these authorized persons may use individual state symbols. It is therefore not a “general” power to use all state symbols by all authorized entities. The legislator carefully weighs who and on what occasions can use

⁴⁸ Judgment of the Supreme Court of the Czech Republic of 1712.2019, no. 23 Cdo 184/2019, where the court stated that state symbols and their imitations can also be used for business purposes, but this must be done appropriately and with dignity.

⁴⁹ Filip, 2003, p. 155.

a particular type of a state symbol, and in what way. For example, in relation to the small and large state coat of arms, it is specified exactly on which buildings, documents, service uniforms, insignia or other objects (banknotes, ID cards, etc.) these symbols can be depicted. In cases where the law imposes or allows the use of a large state coat of arms, the entitled person may also use a one-color imitation of metal, stone, glass, ceramics, or other material. All official stamps can then contain only a small state coat of arms. The imprint of the official stamp is always of one color.⁵⁰

Rules are also laid down for the use of the national flag.⁵¹ Some eligible entities (especially public authorities) may have a national flag displayed permanently on the buildings in which they are located. In addition, all entitled persons fly the national flag on public holidays or other occasions of national importance (e.g., a day of state mourning⁵²). Other persons and authorities may use the national flag in an appropriate and dignified manner at any time.⁵³ The law also sets out very precise “technical” rules on how the national flag must be flown. The situation where the national flag is flown together with the flags of other states is also solved by law (the national flag must always occupy the most honored place).

Compared to the national flag, the use of the flag of the president of the Republic is relatively limited. This flag may only be used to indicate the president’s seat⁵⁴ during his presence in the Czech Republic, or to indicate the means of transport used by the president. The flag of the president of the Republic may also be used in connection with the exercise of his powers.

Another state symbol is the state seal. The use of the state seal is no longer as common as it used to be. It is currently used to seal international treaties and instruments of ratification, credentials of diplomatic agents, or in other cases where an international treaty or law so provides.

50 Most court decisions are devoted to the issue of “incorrect” use of the stamp on public documents. There is a consensus that partial deficiencies in the color design of the coat of arms on the stamp or in the parameters (dimensions) of the stamp do not cause nullity or illegality of the decision. This is only a formal defect. See the judgment of the Supreme Administrative Court of the Czech Republic of September 1, 2004, no. 7 Afs 35 / 2003-67, or the decision of the Constitutional Court of the Czech Republic of 24 January 2006, no. II. ÚS 277/05. As the Constitutional Court stated, “The argument of the alleged invalid coloring of a small state coat of arms in the imprint of a state authority stamp is a typical example of legal formalism and lacks any attributes of a reasonable and meaningful interpretation of the law” (the decision of the Constitutional Court of September 22, 2004, no. I. ÚS 33/03). The Supreme Court of the Czech Republic expressed a similar opinion, for example in the decisions of 27 January 2005, no. 20 Cdo 1725/2003, or of May 27, 2005, no. 20 Cdo 1280/2003.

51 Exner, Fojtík and Svoboda, 2004, pp. 5–9.

52 Decision of the Supreme Administrative Court of the Czechoslovak Republic of October 1, 1929, no. 17592/29 in the matter of punishment for not flying the national flag on a public holiday.

53 “The offense of unauthorized use of the national flag is not committed by the owner of the car, who lends his car to another person, who then provides the car with the national flag without the owner’s cooperation.” Judgment of the Supreme Administrative Court of the Czechoslovak Republic no. 4699/31.

54 Prague Castle or Lány Chateau (the president’s summer residence).

The use of the state anthem is regulated in briefest and most general terms. The law only stipulates that the national anthem can be played and sung on public holidays and other occasions, if usual.

It is remarkable that the use of the state colors is not regulated by law at all.

If the legal rules governing the state symbols and their use are violated, the relevant person is liable for the administrative offense. Section 13 of the Act on the Use of state Symbols defines the factual nature of the offenses. If we generalize them, two groups of infringements can be distinguished. The first group represents abuse, gross insult, destruction, damage, or theft of the state symbol of the Czech Republic. The second group includes infringements consisting in the use of a state symbol in violation of the rules laid down by law (e.g., the symbol is used by an unauthorized person, or the symbol is depicted on a document or object on which the law does not allow it).

Both natural and legal persons may commit these offenses. The state, municipality, or region also bears responsibility if it commits an infringement. Thus, even a public entity can be punished for such an offense (e.g., if a state body uses the state symbol illegally, the state can also be fined for the offense). If the perpetrator of the offense is a natural person, fault must always be examined, as this is a subjective responsibility. However, negligence is sufficient to cause fault. In the case of a legal person, on the other hand, no fault is assumed, this is an objective liability. However, the reasons for liberation are set. Indeed, a person can be released from the liability if they prove that they have made all the efforts that could have been required to prevent the offense.

Administrative authorities decide on guilt and punishment for offenses. The offenses in the protection of the state symbols are dealt with by municipal authorities of municipalities with extended powers. Infringement proceedings are always initiated *ex officio*. Classical criminal law principles are applied in the proceedings, such as the principles: *nullum crimen sine lege*, *nulla poena sine lege*, the presumption of innocence, *ne bis in idem*, *in dubio pro reo*, and others.

A typical administrative penalty that can be imposed for these offenses is a fine. Depending on the specific type of the offense, a fine of up to CZK 10,000 or to CZK 30,000 can be imposed. Instead of a fine, a sanction of a moral nature can also be imposed—essentially a reprimand. However, a fine and a reprimand cannot be imposed at the same time.

3.3. Criminal law protection

The protection of the state symbols under the criminal law is rather complementary and not very extensive. The protection under the Criminal Code⁵⁵ is provided only to certain state symbols. It is necessary to mention in particular the criminal offense of the Illegal Production and Possession of state Seal and Official

⁵⁵ Act no. 40/2009 coll., Criminal Code.

Stamp (Section 349 of the Criminal Code). Anyone who manufactures without authorization, provides or keeps a state seal or stamp of a public authority with the depiction of a state coat of arms or a stamp, the imprint of which is a mandatory part of public documents, or an object capable of fulfilling their function, is criminally liable. The state seal, which is kept by the president of the Republic, is thus protected here.⁵⁶ Furthermore, the small state coat of arms, which is part of the official stamp, is indirectly protected. This stamp is affixed to several important public documents⁵⁷ (e.g., a court judgment). Thus, the good faith of persons in the authenticity and truthfulness of these documents is also protected. Legal and natural persons can commit this crime. It is an intentional crime and can be punishable by up to one year's imprisonment or a ban on an activity.⁵⁸

It is also possible to draw attention to the criminal offenses of Abuse of Internationally Recognized and state Symbols and Abuse of Flags and Armistice (Section 416 and Section 416 of the Criminal Code). The first of these crimes affects, among other things, conduct where the flag or symbol of a neutral state or a state that is not a party to the conflict is misused during the war.⁵⁹ The second offense, on the other hand, concerns the misuse of the flag or coat of arms of a state which is a party of an armed conflict.⁶⁰ In both cases, therefore, these are war crimes that protect against the misuse of state symbols during a war.

In practice, too many offenses or crimes associated with state symbols do not occur. Probably the best-known case in this area is the case of “hanging red shorts at Prague Castle” (the seat of the president of the Republic). In September 2015, several members of the art group Ztohoven exchanged the presidential flag at Prague Castle for huge red shorts. It was a protest against Czech President Miloš Zeman. The police of the Czech Republic and the Public Prosecutor's Office accused the members of the group of the criminal offenses of theft, rioting, and damage to another's property. The court first acquitted the accused in the proceedings, based its conclusions on the exercise of political rights, which are guaranteed by the Charter of Fundamental Rights and Freedoms. Specifically, there was to be the freedom of expression (Art. 17 of the Charter). The court called the act a recession and handed over the case as a administrative offense. However, an appeal was lodged against this court decision. The Court of Appeal overturned the verdict, stating that the right to freely express opinions could not take precedence over the protection of property (the roof was damaged and the presidential flag was taken away when the flag was changed). The

56 The state seal expresses the consent and the confirmation of some important legal acts (eg international treaties).

57 See the judgment of the Supreme Court of the Czech Republic of October 23, 2001, no. 7 Tz 252/2001, according to which the conduct of an offender who has the notary's stamps made illegally must be qualified as a criminal offense of illegal production and possession of a state seal and an official stamp.

58 Šámal, 2012, pp. 3262–3265.

59 Implementation of Arts. 38, 39 of the Additional Protocol to the Geneva Conventions—Protocol I.

60 This offense is based on Article 8 of the Rome Statute of the International Criminal Court.

case was re-discussed and the members of the group were sentenced to suspended sentences (six months' suspended sentence of one year). At the same time, they had to pay over CZK 60,000 in damages (for the stolen flag and for the damage to the roof).

We can therefore point out that, in this case, the usual kinds of the crimes were basically used (without any connection to the state symbols and their protection). However, even this state and the concept of criminal law protection of state symbols can be considered sufficient.

3.4. Private law protection

Within the framework of private law protection, it is possible to consider the protection of the state symbols from the point of view of copyright. This is regulated in the Czech Republic mainly by the Copyright Act.⁶¹ The state symbols could fulfill the characteristics of a “copyright work” in the sense of the Copyright Act with all the resulting legal consequences. In this respect, however, Section 3 of the Copyright Act, which regulates exceptions to the protection under copyright, is essential. This provision provides for exhaustive exclusions from the substantive scope of the Copyright Act for certain objects for which there is a public interest in their free distribution and public access to them. These are therefore exceptions justified by public interest. The legal and political reason for these exclusions is to ensure public interest in the free use of certain “objects,” which could possibly meet the conceptual features of works under the Copyright Act, which could defeat the purpose of their free use (public interest in it). As this is a restriction of copyright, the interpretation of these exclusions must always be rather restrictive.⁶²

The Copyright Act does not define the concept of “public interest.” It is an indefinite legal concept, a phenomenon typical and relatively numerous occurring in the Czech legal system. Both case law and doctrine have tried and are trying to interpret this concept. For example, the Constitutional Court of the Czech Republic stated that not every collective interest can be described as a public interest of society.⁶³ According to the First Republic Supreme Administrative Court, “there is a public interest if a work is done in order to meet the needs of a wider entity (state, territorial, or social entity, etc.).”⁶⁴ The current Supreme Administrative Court noted

61 Act no. 121/2000 coll., Copyright Act.

62 Telec and Tůma, 2019, p. 71.

63 Judgment of the Constitutional Court of the Czech Republic of March 28, 1996, no. I. ÚS 198/95.

64 Judgment of the Supreme Administrative Court of the Czechoslovak Republic no. Boh. A. 14.224.

that it is a concept that by its nature, outlines the possibility of generalization.^{65,66} If we look at the administrative doctrine, then, for example, Vopálka defined the public interest as “the general interest of the community, based on a common will to solve certain issues.”⁶⁷

The provisions of Section 3 of the Copyright Act specifically stipulate that protection under copyright does not apply to so-called “official works.” The legislator demonstratively calculates what these official works belong to, and the list also includes the state symbols.⁶⁸ This means that all state symbols of the Czech Republic are subject to this exclusion. The consequence of this exclusion is the fact that the use of these works (including the state symbols) does not require the permission of the author, nor is it necessary to provide a reward.⁶⁹

Unfortunately, the Copyright Act does not address in practice the frequent situation where a work is not created by the author as an official work (i.e., primarily for the public interest) and becomes an “official work” only later (at a time when the author’s copyright to the work already exists). This is a consequence of the fact that the creation of a work (and the creation of a subjective copyright) on the one hand and the acquisition of the official nature of that work on the other do not fall at the same time. This leads to a conflict of public interest and private copyright protection, at a time when the author’s subjective copyright to such a work already exists and persists. The moment an “ordinary” work becomes “an official work,” the existing copyright protection ceases *ex nunc*, and the work thus becomes copyright free.⁷⁰

It must be concluded that such an interference with subjective copyright may in principle take place with the consent of the author (or another copyright owner).

Within the meaning of Article 11 of the Charter, this can only happen if the competent entity (i.e., in the case of state symbols the state) has acquired the right to dispose of the work in this way (i.e., to officialize it). This may happen primarily based on the express or implied consent of the copyright owner, or in connection with the special regime of certain works, such as staff works, collective works, tailor-made works, or works intended for competition. If the “officialization” of the work took place without the consent of the copyright owner, from a constitutional point of view, it would in principle be an interference with the constitutionally guaranteed right to own property, resp. an expropriation of private property, and this could only happen based on law and for compensation (Article 11 of the Charter).

65 Judgment of the Supreme Administrative Court of the Czech Republic of 8 February 2011, no. 1 Ao 7 / 2010-92.

66 The European Court of Human Rights ruled on this notion, for example, in its judgment of February 21, 1986 in the Case of James and Others v. The United Kingdom, stating that “the Court will respect the legislator in his idea of what the public interest is, unless his judgment clearly lacks a reasonable basis.”

67 Vopálka, 2011, p. 385.

68 There are also, for example, legislation, decisions, measures of a general nature and others.

69 Telec and Tůma, 2019, pp. 71–73.

70 *Ibid.*

However, it should be added to the above that the exclusion does not affect the copyright to certain ways of depicting or creative processing the state symbols. For example, in a situation where it is an artistic representation of a large state coat of arms in the form of a sculpture, the copyright of the artist will be preserved. As for the national anthem, the subject of copyright and protection is not its text and music notation. However, this again does not mean that there are no copyrights of, for example, the performers of the Czech national anthem.⁷¹

4. National symbols (identity symbols) of the Czech Republic and their protection

In addition to the abovementioned “official” state symbols of the Czech Republic, there are other artifacts that embody the Czech state and the Czech nation, both externally and internally in the state itself. These symbols express the distinctive existence of the Czech Republic and its nation, recall its history, and reflect the generally held values and ideas of the state and society. It can therefore be said that they perform similar functions as the state symbols of the Czech Republic. There are several such symbols, but there is no legal catalogue of them and the degree of society’s agreement on which should be respected as national symbols and which no longer may differ. In any case, however, these “unofficial” national symbols must be distinguished from the state symbols of the Czech Republic, which are enshrined (exhaustively) in the Constitution of the Czech Republic. Even national symbols, or some of them, are enshrined in the legal system and are legally protected. In addition, other normative systems provide protection, such as a system of moral norms or customary norms.

The list of “unofficial symbols of the Czech Republic” is not enshrined anywhere. However, it can be generally agreed that these “other” national symbols in the Czech Republic include national holidays, state honors, the name of the state “Czech Republic,” the capital city of Prague, the motto “Truth Wins,” the coronation jewels, the national tree (a lime), and the Czech language.⁷² It can be said that the state symbols of the Czech Republic (symbols *stricto sensu*) and these “unofficial” symbols form the Czech state symbols *largo sensu*.⁷³

Although public holidays are not enshrined in the Constitution of the Czech Republic as one of the state symbols, they can undoubtedly be considered the unofficial

71 <https://www.mvcr.cz/clanek/statni-symboly-ceske-republiky.aspx>.

72 This list can in no way be considered exhaustive. For example, in one of its decisions, the Supreme Administrative Court also identified the president of the Republic as a symbol of the state (judgment of the Supreme Administrative Court of the Czech Republic of June 28, 2006, no. vol. 19/2006).

73 Filip, 2003, p. 160.

state symbols, one of the most important. The days we celebrate as public holidays point to the roots of the legitimacy of state power. When the values on which a state is built change, so do public holidays.⁷⁴ Through the public holidays, the state demonstrates its distinctive existence both toward its citizens and the international community. Public holidays strengthen the bond between citizens and the state, but also the connection of the nation as such. If citizens stop realizing the meaning of the state's existence, the reasons for the creation and duration of their state, they usually stop celebrating public holidays and commemorating important days and events for the nation and the state.⁷⁵ Then, unfortunately, citizens and their state sometimes find themselves in an identity crisis.⁷⁶ All current state holidays, other holidays, and important days of the Czech Republic express the sources of national identity and democratic value orientation of the Czech state. At the same time, the Czech Republic is subscribing to the idea of a common Czechoslovak statehood.⁷⁷

Public holidays are expressly regulated by law (Act No. 245/2000 coll., On Public Holidays, Other holidays, Significant days, and non-working days). However, this is a brief act, which consists of an exhaustive list of days, which are included public holidays, other holidays, and important days. Of course, public holidays are the most important. These are the following events and days: January 1—Day of the Restoration of the Independent Czech state; May 8—Victory Day; July 5—Day of the Slavic Prophets Cyril and Methodius; July 6—Day of the Burning of Master Jan Hus; September 28—Day of the Czech statehood; October 28—Day of the establishment of an independent Czechoslovak state; and November 17—Day of the struggle for freedom and democracy and International Student Day. By its nature, these are the key events significant from the point of view of historical development and the current democratic form of the Czech state. In addition, the law regulates the so-called other holidays, these are traditional holidays that are, by their nature, recognized and celebrated not only in the Czech Republic but also in other countries. The other holidays are January 1—New Year; Good Friday; Easter Monday; May 1—Labor Day; December 24–26—Christmas holidays.

The fact that a certain day is declared a state or other holiday by law is reflected in labor law. These days are, by law, non-working days. At the same time, the celebration of these holidays is very closely connected with the use of the official state symbols by the Czech public authorities and the citizens themselves. For example, the national flag is always flown on public holidays, just as the Czech anthem is played and sung these days.

In addition to these holidays, the law also regulates so-called significant days. These are again days or events that are mostly closely related to the Czechoslovak statehood, the recent history and present of the Czech Republic. Important days

74 See Pulec, 1980, p. 184.

75 Gerloch, Hřebejk and Zoubek, 2013, p. 121.

76 Jellinek, 1906, p. 478

77 On the development of holiday law in the Czech Republic, see Suchánek, 1999, pp. 103–114.

of the Czech Republic are, for example: January 27—Holocaust Remembrance Day and Prevention of Crimes against Humanity, March 8—International Women’s Day, March 12—Czech Republic Accession Day to the North Atlantic Treaty (NATO), June 10—Remembrance Day of the victims of the extermination of the village of Lidice, June 27—Memorial Day of the victims of the communist regime, November 11—War Veterans Day and more. Significant days are working days.

State honors are also closely connected with the existence of the Czech state. State honors symbolize the values that are recognized by the state and appreciate the deeds that have fulfilled them.⁷⁸ This issue is also regulated by law in the Czech Republic. This is act no. 157/1994 coll., On state honors in the Czech Republic. In general, by bestowing or awarding state honors to individuals, the state recognizes their outstanding civic merits in building a free democratic society, the results of their work, efforts to defend the homeland, heroic and other exceptional deeds. The right to bestow and award state honors belongs to the president of the Republic. The state honors are bestowed and awarded only on January 1 and October 28.

State honors are divided into orders and medals. Orders are a higher form of honors, medals are a lower form. The Order of the White Lion⁷⁹ is awarded as the highest honor to those persons who have made a particularly excellent contribution to the Czech Republic. The Order of Tomáš Garrigue Masaryk⁸⁰ is an award for people who have made an outstanding contribution to the development of democracy, humanity, and human rights. We also distinguish between two types of medals: the Medal for Heroism and the Medal of Merit.

The importance of state honors and the emphasis on the moral qualities of their holders are reflected in the Criminal Code. One of the punishments that can be imposed according to the Criminal Code is the penalty of loss of honorary titles or state honors. The court may impose this sentence if it convicts the offender of an intentional crime committed with a particularly reprehensible motive for unconditional imprisonment for at least two years. The legal system thus protects the values and symbolism of state awards. The current regulation no longer knows the constitutional sanction, which consisted in the possibility of the president withdrawing the award from a person who has become unworthy of wearing them. The reason was a negative experience from the past, when the communist regime abused this right in relation to its opponents.

The name of the state, the Czech Republic, is also one of its symbols. Although the name of the state is not included among the state symbols regulated in the Constitution of the Czech Republic, the Constitution works with it.⁸¹ Already the Preamble of the Constitution begins with the exclamation “We citizens of the Czech

78 Filip, 2003, p. 161.

79 The white lion is a basic attribute of the Czech state coat of arms.

80 T.G. Masaryk was the first Czechoslovak president, he significantly contributed to the establishment of an independent Czechoslovak Republic in 1918.

81 Even at the time of the establishment of an independent Czechoslovakia after the end of the First World War, the name of the state was not regulated in the legal system.

Republic in Bohemia, Moravia, and Silesia....” The constitution then declares that the Czech Republic is a sovereign, unified, and democratic state governed by the rule of law based on the respect for the rights and freedoms of a man and citizen. The name “Czech Republic” is the official name of the state by which it presents itself internally and externally, and at the same time it implies a form of state establishment (the republic).⁸² The name “Czech Republic” is also found on the state seal, which is one of the state symbols of the Czech Republic.

Undoubtedly, the Czech coronation jewels are also a symbol of the Czech state for every citizen. The Czech coronation jewels are a set of items from the collection of St. Vitus’s treasure and served as badges (insignia) of the government and power of Czech kings. They were awarded at the coronation. The jewels include the St. Wenceslas crown; the royal scepter; the royal apple; the leather cases for the crown, the scepter, and the apple; and the pillow under the crown and the coronation cloak. One of the most important kings of the Czech lands, Charles IV, had the St. Wenceslas crown made in the 14th century for his coronation as the Czech king. He dedicated the crown to the first patron of the country, St. Wenceslas. This crown is the fourth oldest in Europe. Other items became part of the jewels later.⁸³

The protection of the coronation jewels is ensured primarily by the norms of administrative law. The crown jewels have been declared a national cultural monument by a government decree. This was done as early as 1962 (they became the second national cultural monument after Prague Castle, the seat of the president). The national cultural monuments are the most strictly protected form of cultural heritage in the Czech Republic. This issue is regulated in more detail by the Act on state Monument Care. This act contains a set of legal tools that are to ensure a sufficient care for the monument, prevent its damage, destruction, or other threats. Another protection lies in the safekeeping of these jewels and the regulation of the possibility of access to them. They are stored in the St. Vitus Cathedral in Prague, from where they are brought out only on special occasions. At the same time, in 1993 the Czech government issued Resolution No. 19, which regulated the distribution of keys to the Czech coronation jewels. The entrance door to the chamber is equipped with seven locks. Based on this resolution, the keys to this door are held by the president of the Republic, the prime minister, the archbishop of Prague, the speaker of the Chamber of Deputies, the president of the Senate, the Dean of the Metropolitan Chapter at St. Vitus and the mayor of the capital city of Prague.

The national tree—the linden—is another important national symbol of the Czech Republic. It became so in 1848, when representatives of the Slavic nations met at the All-Slavic Congress. Linden trees, or lime trees of freedom, are woody

82 Gerloch, Hřebejk and Zoubek, 2013, p. 124.

83 There is also a legend associated with the crown jewels, which says that those who put the crown on their head unjustifiably will die within a year. This legend is associated with the Reich’s Protector, Reinhard Heydrich. He had himself photographed on November 19, 1941 with the royal crown on his head (as a proof of his power). On May 27, 1942, shortly after this event, the protector was assassinated, and he died.

plants that were planted in the honor of the establishment of the Czechoslovak Republic (1918), but also the independent Czech Republic (1993). They are generally called “trees of the Republic.” At the same time, they are trees that resemble Czech national freedom and democracy. The largest plantings of these trees took place in October 1919 on the first anniversary of the Republic, the 10th anniversary of the Czechoslovak Republic in 1928 and the 50th anniversary of the Czechoslovak Republic in 1968. These memorial trees celebrate the establishment of the Czech state and support national pride.

The protection is provided to these trees again most in the regime of administrative law, respectively environmental law. The linden trees of the republic are classified as important trees for their message, many of which have been declared a so-called memorial tree, based on Act no. 114/1992 coll., On Nature and Landscape Protection. The legal protection of these trees is associated with this status.⁸⁴ At the same time, it should be emphasized that the linden and linden branches are also a part of the depiction of some state symbols of the Czech Republic. Specifically, we find them on the presidential flag and state seals. This aspect also emphasizes the importance of this tree for the Czech nation. In addition, the linden symbol is depicted on other important objects such as banknotes or military uniforms.

The Czech language is undoubtedly also a symbol of the Czech nation and state. It is an important expression of national identity and Czech statehood. The Constitutional Charter of 1920 stipulated that the principles of language law would be regulated by a special law, which would be considered part of the Constitutional Charter. This special law became act no. 122/1920 coll., which immediately stated in the introduction that the Czechoslovak language is the state, official language of the Czechoslovak Republic.⁸⁵

Unfortunately, the current Constitution of the Czech Republic does not mention the existence of the Czech language as a state language. However, there have been attempts to change this. Probably the most important attempt was the proposal to amend the Constitution of the Czech Republic (the inclusion of a new Art. 14a), which was to regulate the Czech language and enshrine it at the constitutional level. This new article was to stipulate that the national language of the Czech Republic and the official language of all public authorities is the Czech language. It was also stated that the state takes care of the protection of the Czech language as an integral part of the state and national identity. The draft amendment to the Constitution was not adopted. Despite the fact that the Czech language does not directly enjoy constitutional protection, it can be considered that its meaning and use are sufficiently regulated by statutory regulation. Examples are the Act on the Collection of Laws and International Treaties, the Act on the Rules of Procedure of the Chamber

84 There are about 2000 memorable linden trees in the Czech Republic.

85 On the application of this act in practice and in relation to the languages of national minorities, see Decision of the Supreme Administrative Court of the Czechoslovak Republic no. 2607/23 of February 14, 1923 (Boh. A no. 1968/1923).

of Deputies, the Act on the Rules of Procedure of the Senate, the Education Act, the Administrative Procedure Code, the Tax Code, and others.

The slogan “Truth Wins” is on the flag of the president of the Republic. It was already displayed on the presidential flag of the first Czechoslovak Republic and was very popular among the Czech nation. However, the motto “Truth Wins” has been used since Hussite times (“Truth of the Lord Wins”).⁸⁶ Constitutional act no. 102/1990 coll.—due to political neutrality—replaced the inscription on the president’s flag with the Latin translation “*Veritas vincit.*”⁸⁷ The current version has returned to the traditional motto in the Czech language.

Its capital city, Prague, can also be considered a national symbol of the Czech Republic. Art. 13 of the Constitution stipulates that the capital of the Czech Republic is Prague. The following Art. 14 of the Constitution then regulates the state symbols of the Czech Republic. Thus, there is a clear connection between the two provisions and the importance of Prague as one of the symbols of the Czech land, both for its citizens and externally in relation to the international community and foreign states. The capital is usually the seat of the head of state, the most important public authorities, as well as the seat of diplomatic missions of foreign states, thus expressing the recognition of the sovereignty of the host state. The capital city of Prague also meets these parameters. At the same time, it is a city that has become the center of its political, economic, and cultural life in the historical development of the Czech state. Prague is very closely connected with the history of the Czech nation and state, from the very beginning of the Czech state, through the Middle Ages to the present. It has been the natural center of the Czech state for over a thousand years.⁸⁸ Following the constitutional arrangement, the position of the capital city of Prague is regulated in detail by a separate law, namely act no. 131/2000 coll., On the capital city of Prague. This act regulates in detail the position and competence of the capital,⁸⁹ its bodies and their powers, legislation, and several other issues. Again, therefore, the regulation and legal protection are, in essence, of an administrative nature.

5. Community symbols in the Czech Republic and their protection

The different communities that exist in each state are important, play certain roles and contribute to the development and formation of values, the fulfilment of

86 Sedláček, 2008, p. 33.

87 It was a period when our state was a federation of two republics, and therefore it was not appropriate for the inscription to be only in Czech, not in the Slovak language, so a Latin inscription was chosen.

88 Pavlíček et al., 2011, p. 409.

89 Prague has the status of both a municipality and a region (a higher territorial self-governing unit).

rights and freedoms or the achievement of other goals in a society. These communities and their members always share certain common goals, values, and attitudes. They then identify the community both inside and strengthen its internal structure, and at the same time characterize and define this community externally. The position and mission of these communities also reflect the symbols that these communities use. Territorial self-governing units (municipalities and regions), national minorities, and religious communities can currently be included among the most important communities in the above sense. Therefore, the symbols of these communities will be given closer attention.

5.1. Symbols of territorial self-governing units as territorial communities of citizens of the Czech Republic and their protection

One of the most important communities in the Czech Republic are the territorial self-governing units. They can be characterized as a territorial community of citizens who have the right to self-government. Self-government must be seen as a democratic form of care for the citizens' own affairs, independent and under state supervision.⁹⁰ The idea of self-government is compatible only with democracy, based on a plurality of social and political interests, and as such rests on a partnership between the state and public corporations as self-government entities. The right to territorial self-government is a constitutionally guaranteed right, as the Constitution of the Czech Republic in Art. 8 stipulates that the self-government of territorial self-governing units is guaranteed.⁹¹ The basic territorial self-governing units are municipalities and the higher territorial self-governing units are regions. The basic mission of these units is to take comprehensive care of the development of their territory and the needs of their citizens. Thus, they are always relatively independent communities of citizens, which primarily pursue the interests of this community and its members, their fulfilment and development, within a certain territorial district. Municipalities and regions are corporations built on the membership principle. It is always an association of people in a certain territory, which manages its affairs relatively independently. Of course, this does not preclude cooperation with other municipalities, regions, or other entities, including the state.

These distinctive communities of citizens are characterized, like the state, by certain elements, regarding attributes that define the relevant territorial self-governing unit both internally (in relation to its members) and externally (in relation to other units and other entities). These attributes undoubtedly include the symbols of territorial self-governing units. These symbols strengthen the citizens' relationship with their municipality or region and express their affiliation with the territorial

90 Decision of the Constitutional Court of the Czech Republic of September 19, 1994, no. Pl. ÚS 5/93.

91 Furthermore, the entire Chapter 7 in the Constitution of the Czech Republic is devoted to territorial self-government. The Constitution is supplemented by three basic acts: the Act on Municipalities, the Act on Regions and the Act on the Capital City of Prague.

self-governing unit, its members, and its interests. We can therefore say that, similarly to the state symbols, the symbols of territorial self-governing units also fulfill the role of identification, representation, and integration.

The basic symbols of the territorial self-governing units (municipalities and regions⁹²) are the coat of arms and the flag. The issue of the coat of arms and the flag is regulated by the Act on Municipalities, the Act on Regions and the Act on the Capital City of Prague. The Constitution of the Czech Republic does not deal with them. The Act on Municipalities stipulates that municipalities may have the coat of arms and flag of the municipality (Section 34a). The coat of arms and the flag are awarded at the request of a municipality. It is important to emphasize that this is a right of the municipality, not an obligation, to have a coat of arms and a flag. It therefore depends on the consideration of the territorial self-governing unit whether it wants to have its own coat of arms, flag, or both of these symbols. This construction should be considered appropriate, as the issue of the symbols of the municipality falls exclusively within its self-governing competence, and it would not be appropriate for the state to make it an obligation. In this respect, it is a difference compared to the regulation of the state symbols of the Czech Republic (in relation to the state, there is no free consideration of whether and which state symbols it will have or will not have). Both symbols are granted at the request of the municipality by the speaker of the Chamber of Deputies (i.e., the speaker of one of the chambers of the Parliament of the Czech Republic). This is therefore an important power of the legislature in relation to territorial self-government. The legal regulation in relation to the coat of arms and the flag of the regions and the capital city of Prague is constructed the same way.

Regarding the form and appearance of the flag and the coat of arms of the municipality (or the region), the legislation does not lay down any rules in this regard. However, one of the committees of the Chamber of Deputies—the Committee on Science, Education, Culture, Youth and Sports—oversees compliance with the rules of heraldry and vexillology during the process of approving the flag and the coat of arms. This committee (which also includes the Subcommittee on Heraldry and Vexillology) gives its recommendation to the Speaker of the Chamber of Deputies to award the symbol. As part of this process, the committee also assesses the compliance with the basic rules of both fields. Applications, granted coats of arms and flags are kept in the Register of Municipal Symbols (REKOS).⁹³

According to the basic rules for creating the coat of arms of a municipality (or the region), the new symbol must not be the same as the existing coat of arms of the municipality in the Czech Republic and must not be identical with the state coat of arms or the coat of arms of the region. The character should be as simple as possible,

92 Čarek, 1985, p. 453.

93 At present, all 14 regions and their flags and emblems are registered here, as well as 5,465 municipalities (5,428 flags, 5,245 coats of arms). As of January 2022, there were a total of 6,258 municipalities in the Czech Republic. For more details see <https://rekos.psp.cz/>.

and should contain as few figures as possible. The coat of arms may not include company logos, trademarks, etc. Realistic depictions of specific buildings or natural formations are not permitted in the content of the coat of arms of the municipality. Such figures must be heraldically stylized. Depictions of saints or real characters are approved only in very exceptional cases. Texts or separate letters are not used in the municipality coat of arms.⁹⁴ For flags, the ratio of its width to length must be the same as for the state flag (2:3). The new flag must not be interchangeable with the already existing flags of the municipalities of the Czech Republic, state flags, and generally known regional flags of the self-governing units of the existing states. The flag of the municipality should be simple, distinctive, unmistakable, and in line with the principle of flight. The colors of the newly created flag must be based on the same colors as the coat of arms of the municipality.

Another significant difference between the state symbols and the symbols of territorial self-governing communities lies in the impossibility of changing the form (appearance) of the symbol. The state symbols and their depictions are strictly required by law and cannot be changed.⁹⁵ On the other hand, the coat of arms and the flag of a municipality or a region can be changed. Again, the request of the municipality (region) and the decision of the Speaker of the Chamber of Deputies is sufficient.

The question is whether, in addition to the coat of arms and the flag, local governments can have other symbols. The law does not address this issue at all. Given that the issue of the municipal (regional) symbols belongs to the independent competence of the territorial self-governing units, as well as the fact that the issue is not comprehensively and exhaustively regulated by law, it is necessary to allow the municipality or region to determine and use “other municipal (regional) symbols” than the coat of arms and the flag.⁹⁶ These can be, for example, the colors of the municipality, the seal of the municipality, its logo, motto and more.⁹⁷

As far as the protection of the symbols of territorial self-governing units is concerned, there is no constitutional protection at the level of constitutional law. Perhaps in exceptional cases, we could consider the possibility of a territorial self-governing unit to file a constitutional complaint against the illegal intervention of the state in the constitutionally guaranteed right to self-government. The complaint is submitted to the Constitutional Court of the Czech Republic. This remedy would be hypothetically usable in a situation where the Speaker of the Chamber of Deputies would unreasonably refuse to give a coat of arms or a flag to the self-governing unit and thus interfere with its right to self-government. However, such a case is not known in practice.

94 For more details on the rules of creating the coat of arms of the municipality, see <https://rekos.psp.cz/heraldicke-zasady/>.

95 A change would only be possible by changing the Act on the State Symbols of the Czech Republic.

96 Furek, 2008.

97 Břeň, 2019.

The Act on Municipalities, the Act on Regions and the Act on the Capital City of Prague provide a certain protection for the symbols of self-governing communities. This is by regulating the use of these symbols. However, this is a very general and at the same time brief regulation. The coat of arms and the flag can always be used without restriction by the concrete territorial self-governing unit and by entities that are established by the unit. Other entities may always use the coat of arms of the municipality or region with its consent.⁹⁸ There is no legal claim to consent. If the consent is granted by the municipality or the region, it may stipulate the conditions for the use of the symbol. On the contrary, the use of the flag is unrestricted for other entities, i.e., the consent of the municipality or the region is not required (and therefore it cannot be regulated in any way, for example by setting conditions for its use). The other communal symbols and their use are not regulated by law at all. Therefore, they can be used again in free mode, without the possibility of restrictions by the municipality (the region).⁹⁹ Legal regulation of the use of symbols of municipalities and regions can be considered a means of administrative protection.

Another important means of administrative protection of the municipal symbols is given in the form of a liability for the administrative offense. From this point of view, the Act on Certain Misdemeanours, which regulates misdemeanors in general internal administration, is crucial. The administrative offense is committed by a person who damages, or abuses or grossly disparages a symbol protected by law other than the state symbol of the Czech Republic.¹⁰⁰ And it is the symbols of territorial self-governing units that can be considered as these “other” symbols. The perpetrator of the offense can be a natural person or a legal entity. The state, municipality or region also bears responsibility if it commits an infringement. If the perpetrator of the offense is a natural person, fault (subjective responsibility) must always be examined. As for fault, the law requires intent. In the case of a legal person, on the other hand, it is not based on fault, it is an objective liability. However, there are legal grounds for liberation. The liability can be released if the person proves that he or she has made all the efforts that could be required to prevent the offense.

The administrative authorities (the municipal authorities) decide the offenses. The infringement proceedings are always initiated *ex officio*. Classical criminal law principles are applied in the proceedings, such as the principle *nullum crimen sine lege*, *nulla poena sine lege*, the presumption of innocence, *ne bis in idem*, *in dubio pro reo* and others. A typical administrative penalty that can be imposed for these offenses is a fine. A fine of up to CZK 3,000 can be imposed for the offense. Instead of a fine, a sanction of a moral nature can also be imposed, namely a reprimand. However, a fine and a reprimand cannot be imposed at the same time.

98 However, as regards the use of only some element of the coat of arms, other entities do not need the consent of the municipality. See Judgment of the Municipal Court in Prague of August 30, 2013, no. 8 A 186 / 2010–37.

99 Furek, 2008.

100 It would be possible to include the use of the symbol of a territorial self-governing unit without the consent of the municipality (region) under this administrative offense.

Regarding the protection from the point of view of criminal law, it can be stated that the Czech legislation does not contain specific criminal offenses that would relate directly to the protection of the municipal symbols. Regarding the specific circumstances of the case, we could nevertheless consider the fulfilment of some common types of crimes, such as property crimes (if the damage to the symbol exceeds 10,000 CZK and other formal and material features of a particular crime were met) or a crime of disorderly conduct.

Finally, it is necessary to analyse the possible private law protection of symbols of municipalities and regions. Thus, to answer the question whether these symbols are protected under copyright law. These symbols can potentially fulfill the characteristics of a “copyright work” within the meaning of copyright law, with all the legal consequences that follow. In this respect, however, section 3 of the Copyright Act, which regulates exceptions to protection under this act, is essential. This provision provides for exhaustive copyright exclusions for certain subjects for which there is a public interest in their free distribution and public access to them. These are therefore exceptions justified by the public interest.

Section 3 of the Copyright Act stipulates that the protection under copyright does not apply to so-called “official works.” The legislator demonstratively states what is included among these official works, while the list also includes symbols of territorial self-government units. This means that the subject of exclusion is all the symbols that the territorial community of citizens has and uses.¹⁰¹ The consequence of this exclusion is that the use of communal symbols does not require the permission of the author, nor is it necessary to provide a reward.¹⁰²

Unfortunately, the Copyright Act does not address in practice the frequent situation where a work is not created by the author as an official work (i.e., primarily for the public interest) and becomes an “official work” only later (at a time when the author’s copyright to the work already exists). This leads to a conflict of public interest and private copyright protection. Regarding the constitutional basis of copyright protection (Arts. 11 and 34 of the Charter of Fundamental Rights and Freedoms), it should be noted that such an interference with the subjective copyright can only take place with the consent of the author. If this were to happen without the consent of the copyright owner, it would be an interference with the constitutionally guaranteed right to own property.

However, it should be added to the above that the exclusion does not affect the copyright to certain ways of depicting municipal symbols. For example, in a situation where it is an artistic representation of the municipal coat of arms in the form of a sculpture, the copyright of the artist will be preserved.

101 The exclusion therefore applies to the coat of arms, flag, and other symbols, if the municipality or region has them.

102 Telec and Tůma, 2019, p. 71.

5.2. Symbols of national minorities in the Czech Republic and their protection

The important minorities (not only) in the Czech Republic are national minorities.¹⁰³ Their existence, as well as their status and rights, are reflected and protected directly at the constitutional level. Art. 3 of the Charter of Fundamental Rights and Freedoms states that everyone has the right to decide freely on his or her nationality. At the same time, it explicitly forbids influencing a person's decision-making about his or her nationality, and all forms of coercion leading to denationalization are also prohibited.¹⁰⁴ However, as Bobek rightly points out, the Charter does not specify what is meant by the terms "nationality" and "nation."¹⁰⁵ One of the most important works of the 20th century on this topic defines the nation and belonging to it (i.e., nationality) through two elements: subjective (volitional) and objective (cultural). The point is that a certain group of people must share common objective features of the community (e.g., language, tradition, religion), which we can call "culture." At the same time, the individual must identify with this community (the individual's will to be a member) and at the same time the community must accept this individual as its member.¹⁰⁶ We can agree with this definition.

The Charter deals with the national minorities and their rights in more detail in Title Three. The Charter states that belonging to any national minority must not be to the detriment of anyone. The Charter does again not define the concept of a national minority.¹⁰⁷ This definition is found only in the Act on the Rights of Members of National Minorities. According to this act, a national minority is a community of Czech citizens living in the Czech Republic, who differ from other citizens usually by common ethnic origin, language, culture, and traditions, form a large minority of the population and at the same time show the will to be considered a national minority. The purpose of their existence is a joint effort to preserve and develop their own identity, language, and culture, as well as to protect their interests. A member of a national minority is therefore a citizen of the Czech Republic who declares

103 "There is a consensus among the Contracting states of the Council of Europe that the special needs of minorities and the obligation to protect their security, identity and way of life should be recognized, not only to protect the interests of minorities themselves but also to preserve cultural diversity." Judgment of the Grand Chamber of the ECtHR in the Case of Chapman vs. The United Kingdom of January 18, 2001, complaint no 27238/95.

104 Jílek, 2000, pp. 12–24.

105 Wagnerová et al., 2012, p. 112.

106 Gellner, 2006, pp. 52–57.

107 In this respect, it is not only a problem in the Czech Republic. "The court states that it is not its task to express an opinion on whether or not the Silesians are a "national minority," let alone to formulate a definition of this term. Undoubtedly, creating such a definition would be a difficult task, especially since none of the international treaties—not even the Council of Europe's Framework Convention for the Protection of National Minorities—define the term "national minorities." Judgment of the Grand Chamber of the ECtHR in the Case of the Party of Freedom and Democracy (ÖZDEP) v. Turkey of 8.12.1999, complaint no. 23885/94.

themselves to be of a nationality other than Czech and expresses a wish to be considered a member of a national minority together with others who declare themselves to be of the same nationality.¹⁰⁸ A national minority is a community of persons that meets all the above criteria, “it is not enough that a certain community of persons shows a will to be considered a national minority.”¹⁰⁹

The Charter further stipulates that the citizens forming national minorities are guaranteed all-round development, in particular the right to develop their own culture together with other members of the minority, to disseminate and receive information in their mother tongue, and to associate in the national associations. Under the conditions laid down by statutory regulation, they are also guaranteed the right to education in their language, the right to use their language in official communication and the right to participate in resolving matters concerning the national and ethnic minorities.¹¹⁰ The implementation of these rights is regulated in more detail in the Act on the Rights of Members of National Minorities, but also in other acts (e.g., the Act on Municipalities, the Act on Regions, the Education Act, the Act on Czech Television and others).

The Czech Republic therefore clearly protects and supports the all-round development of national minorities. This support covers several areas, such as the development of culture, traditions, the use of the mother tongue, etc. Undoubtedly, we can also include support for the use of various symbols and signs identifying and uniting a particular national minority. However, specific legislation is lacking in this regard. Among the most numerous national minorities in the Czech Republic are the Slovak, Ukrainian, Polish, Vietnamese, German, Russian, and Roma minorities (this is data obtained from the census in the Czech Republic in 2021). In addition to the Roma minority, the other minorities are citizens who claim a nationality linked to another, foreign state. In relation to these members of national minorities, it is therefore necessary to address the question of whether and how the state symbols of foreign states can be used (by them) in the Czech Republic, and whether these foreign state symbols are protected in the Czech Republic.

Unfortunately, it must be stated at the outset that the issue of the use of foreign state symbols in the Czech Republic is not sufficiently regulated. The only exception is the regulation of the hoisting of the Czech national flag if it is hoisted together with the flags of other states. The Act on the Use of state Symbols sets out precise rules for the placement of the Czech flag for these situations. This issue is only partially addressed by international agreements on consular and diplomatic missions. However, further adjustments are currently lacking. Similarly, the first Czechoslovak regulation, specifically act. No. 252/1920 coll. did not solve this issue (and

108 Critically on the narrowing concept of the minority according to this act versus the broad concept of the minority according to the Charter, see Wagnerová et al., 2012, p. 543.

109 Decision of the Supreme Administrative Court of the Czech Republic of August 17, 2021, no. 7 As 324/2020-42.

110 On the rights of national minorities, see Pospíšil, 2006, pp. 1–187.

neither Regulation No. 512/1920 coll., which regulated the use of state symbols of the Czechoslovak Republic, paid attention to it). However, the Supreme Administrative Court of the Czechoslovak Republic, in its judgment of 1926, prohibited the association from using a badge made in the colors of a foreign state.¹¹¹ Probably the most attention was paid to this issue by act No. 269/1936 coll. The act stipulated that in the territory of the Czechoslovak Republic, state symbols of foreign states may be used permanently only by consuls of these states and extraterritorial persons. Other persons could use foreign state symbols only with the permission of the provincial office. Permission could only be granted if the applicant has proved that the foreign state does not object to the use of its symbol in our territory. It should be emphasized in this regard that the Act on the Use of state Symbols of the Czech Republic and the rules set out therein cannot be applied by analogy to the use of state symbols of foreign states in the Czech Republic. As the Supreme Court of the Czech Republic stated, “It cannot be successfully concluded that the intention of the Czech legislator in this case should be to subject the use of all state symbols of foreign states to the regime of this act.”¹¹²

The Roma minority in the Czech Republic is also a national minority, its members are not nationals of any foreign state. This national minority also has its own symbols, typically the Romani flag and the Romani anthem. The Roma flag consists of a blue stripe in the upper half, a green stripe in the lower half and a red chakra with 16 rays in the middle. The chakra symbolizes the Indian origin of the Roma nation. The flag was created in 1933 by the General Union of Romanian Roma and in 1971 was approved as the official Roma flag at the first International Roma Congress in London. The Romani anthem is considered to be the Romani song “*Gejlem, gejlem.*” This song was declared the Roma anthem again at the first International Roma Congress in London (1971). There is no special legal regulation concerning the explicit use and protection of Roma symbols in Czech law

The use of the symbols representing the relevant national minority is part of a broader catalogue of the rights of persons belonging to national minorities. The Czech Republic recognizes these rights, guarantees their exercise, and provides them with protection. At the same time, however, this corresponds to the obligation of members of the national minorities to use the symbols and other features of their minority exclusively in a lawful manner.¹¹³ In this respect, the case of the activist Miroslav Brož is known, who hoisted the so-called Czech–Roma flag on his balcony

111 Decision of the Supreme Administrative Court of the Czechoslovak Republic, no. Boh. Adm. 5706/1926.

112 Judgment of the Supreme Court of the Czech Republic of 17 December, 2019, no. 23 Cdo 184/2019.

113 This can be deduced by analogy, for example, from the judgment of the Supreme Administrative Court of the Czech Republic, where the court stated: “the right of a national minority to use the language of a national minority in official communication, resp. the right to the assistance of an interpreter may not be abused to intentionally and purposefully prolong the proceedings.” Judgment of the Supreme Administrative Court of the Czech Republic of 30 October 2014, no. 6 As 149/2014–21.

on April 8, 2021.¹¹⁴ A man placed a red chakra on the state flag of the Czech Republic. In essence, he combined the Czech and Roma flags. While he wanted to point out the importance of the Roma community and its connection with the Czech state, he did so in an illegal way. The Act on the Use of state Symbols of the Czech Republic stipulates that there must be no text, images, emblem, etc. on the state flag. The man thus grossly despised the state flag as a state symbol and committed an administrative offense. He was fined CZK 1,000.¹¹⁵ If a person had hoisted the Czech national flag and the Roma flag next to it properly and in accordance with legal rules, his or her actions would have been legal (the national flag must always be flown in the most honorable place).

The Czech Republic had already dealt with a similar case in 2013. At that time, the artist T. Rafa organized an exhibition of flags in Prague entitled “Tender for the Czech–Roma flag.” The state flags of the Czech Republic issued here were combined in various forms with the Roma flag. The author and the organizers wanted to symbolize the coexistence of the Roma minority and the Czech nation with their proposals. The police of the Czech Republic had all seven flags assessed by an expert, and in three cases they concluded that this was an administrative offense. The artist was fined CZK 2,000. However, on appeal, this decision was annulled and the misdemeanor proceedings were terminated.¹¹⁶ It was stated that this was a manifestation of freedom of art and freedom of expression, not an illegal act (i.e., it was not a denigration or damage to the national flag). It should be added that the inscriptions on the national flags can be found in the Czech Republic in connection with sports matches (especially football, hockey). Fans often write the name of their city or club on the national flag. Even in these cases, they are committing an administrative offense.

As for the protection of the use of the symbols of national minorities, it can be found at the level of administrative and criminal law. Administrative law protects the exercise of the rights of persons belonging to the national minorities in the form of a liability for administrative offenses. The use of the symbols by minorities (of course in a lawful manner—see above) can undoubtedly be considered an integral part of the exercise of their rights. The offense is committed by a person who restricts or prevents a member of a national minority from exercising his or her rights. This could be, for example, a situation where a member of the Roma national minority would be prevented from using, for example, Roma flags on certain occasions. A fine of up to CZK 20,000 or a reprimand may be imposed for such an administrative offense against a civil cohabitation.¹¹⁷ In addition, a liability for other types of offenses is not excluded, but they are no longer explicitly linked to belonging to a

114 International Roma Day.

115 <https://moderniobec.cz/uzivani-obecnich-symbolu/>.

116 https://www.idnes.cz/praha/zpravy/prazsky-magistrat-zrusil-pokutu-za-vystaveni-cesko-romske-vlajky.A150123_171843_domaci_fer.

117 Art. 7 of act no. 251/2016 coll., On certain offenses.

national minority. These may be, for example, offenses against property (intentional destruction or damage to the Roma flag). If the infringement reaches a higher degree of social harm or higher damage is caused, the liability for the crime may also arise. The Criminal Code states that if a crime is committed out of national hatred, it is an aggravating circumstance.¹¹⁸ In the case of several criminal offenses, the commission of a criminal offense on the grounds of belonging to a certain nationality means the fulfilment of a qualified factual basis and the associated higher, i.e., stricter, punishment.¹¹⁹

A positive fact in the Czech Republic is the fact that the protection of the rights of members of national minorities is institutionalized. The Government Council for National Minorities operates at the national level. It is an advisory body of the Government of the Czech Republic, whose members are also members of the national minorities. The Council comments on draft legislation and other measures concerning the rights of persons belonging to national minorities, prepares various recommendations for the government, ministries, and other administrative authorities to meet the needs of persons belonging to national minorities, especially in the fields of education, culture and media, mother tongue, social and cultural life. It also proposes the distribution of funds spent from the state budget to support the activities of members of national minorities.¹²⁰

The protection of minorities and their rights is implemented not only at the national level, but also at the regional level and at the local level. A municipality in whose territorial district, according to the latest census, at least 10% of the municipality's citizens belonging to non-Czech nationalities live, the municipality establishes a committee for national minorities if the association representing the interests of the national minority so requests.¹²¹ At least half of the members of the committee must be the members of the national minorities. The regulation at the regional level is similar.¹²² According to the latest census, a region in whose territorial district at least 5% of the region's citizens who declare themselves to be of a nationality other than Czech live establishes a committee for national minorities if an association representing the interests of a national minority so requests in writing. At least half of the members of the committee must be members of national minorities.

118 Art. 42 of the Criminal Code.

119 The ECtHR also calls for a strong investigation of every racially, nationally or religiously motivated crime. See Judgment of the ECtHR in the Case of *Lakatošová a Lakatoš vs. Slovakia* of 11 December 2018, complaint no. 655/16, or Judgment of the ECtHR in the Case of *Balázs vs. Hungary* of 20 October 2015, complaint no. 15529/12.

120 <https://www.vlada.cz/cz/ppov/rnm/historie-a-soucasnost-rady-15074/>.

121 Art. 117 of act no. 128/2000 coll., On Municipalities.

122 Art. 78 of act no. 129/2000 coll., On Regions.

5.3. *Symbols of churches and religious societies and their protection*

The Charter of Fundamental Rights and Freedoms states that the Czech Republic is based on the democratic values and must not be bound by an exclusive ideology or religion (Article 2). It is an expression of the liberal foundation of a state that upholds religious and worldview neutrality.¹²³ It is this attitude that makes it possible to fulfill worldview and religious pluralism and to establish tolerance and harmony in the state and society in this respect.¹²⁴ As for religious neutrality, it presupposes the secularization of the state.¹²⁵ The secularized state declares its neutrality in relation to dogmas arising from different religions. The state must not influence the content of religious freedom, nor evaluate its citizens' faith or absence of it. At the same time, the state must allow for the external manifestations of religious beliefs, of course in accordance with the rule of law. At the same time, however, it is necessary to emphasize the words of the Czech Constitutional Court that

the cultural development of Europe and its corresponding development of democratic constitutional law thinking as a result of the state secularization does not mean abandoning the historical value tradition, including religious traditions.¹²⁶

The Charter guarantees freedom of religion to everyone, including the possibility to change it or remain without religion at any time (Art. 15). It is a guarantee of the internal autonomy of the individual in religious matters, in which the state must not interfere (the so-called *forum internum*).¹²⁷ Most important, however, is Article 16 of the Charter, which states that everyone has the right freely to manifest his religion or belief, either alone or in community with others and in public or private. Churches and religious societies manage their affairs independently of the state authorities.¹²⁸ The exercise of these rights may be restricted by law if the measures in a democratic society are necessary to protect public security and order, health and morals, or the rights and freedoms of others. In this article of the Charter, the external

123 On the importance of neutrality in these aspects, see Judgment of the Grand Chamber of the ECtHR in the Case of *Bayatyan vs. Armenia*, of 7 July 2011, complaint no. 23885/94.

124 Wagnerová et al., 2012, pp. 84–86.

125 Art. 2 of the Charter of Fundamental Rights and Freedoms guarantees religious pluralism and religious tolerance, resp. the separation of the state from concrete religions (the principle of a confessionally neutral state). This principle is implemented by the cooperation model of the relationship between the state and the churches and their mutual independence. See Decision of the Constitutional Court of the Czech Republic of November 27, 2002, no. Pl. ÚS 6/02, or Decision of the Constitutional Court of the Czech Republic of 1 July 2010, no. Pl. ÚS 9/07.

126 Decision of the Constitutional Court of the Czech Republic of November 27, 2002, no. Pl. ÚS 6/02.

127 Wagnerová et al., 2012, p. 394.

128 In more details see Madleňáková, 2014, pp. 1–224.

manifestations of a religion and faith are regulated and guaranteed.¹²⁹ In this respect, the state has an obligation not only not to interfere in the exercise of this right, but also to create favorable legal and factual conditions for its exercise, including its protection.¹³⁰

Part of the realization of religious freedom is the use of religious symbols.¹³¹ It can be stated that this issue has not yet been explicitly addressed in the Czech legal system. An exception is the Act on the right of assembly, which prohibits participants in the assembly from having their faces covered in such a way that it is impossible or difficult to identify the person. This ban also affects the wearing of religious symbols in the form of burqas or niqabs. In the Czech Republic, the case of a Somali girl and her forced departure from high school was the most publicized (due to the ban on wearing a Muslim headscarf—a hijab). The Public Defender of Rights in the Czech Republic (“ombudsperson”) took the view that there was an indirect discrimination. In the case of some school subjects and their teaching, the ban may be justified (e.g., teaching physical education), but the situation can be solved alternatively (Muslim sports scarves). Only in some cases is the ban justified, for example in relation to the protection of life and health, where the legal system prescribes the use of personal protective equipment in teaching, which precludes having a Muslim headscarf at the same time.¹³² Courts, including the Supreme Court of the Czech Republic, have also dealt with this case. That court recalled that Art. 9 of the Convention and Art. 14 of the Charter guarantee the protection of expressions of religion and belief and the exercise of religious freedom.¹³³ Within the meaning of these provisions, expressions of religious belief may be restricted by law and only if that restriction pursues a legitimate aim (protection of public security and order, health, morals and the protection of the rights and freedoms of others). At the same time, this restriction must be necessary in a democratic society, that is, there must be no other measure that would pursue the same goal and with less interference with religious freedom. The Supreme Court therefore found in this case that the ban on wearing headgear by Muslim students during theoretical schooling was not justified by a legitimate aim and constituted an indirect discrimination within the meaning of Section 3 of the Anti-Discrimination Act.¹³⁴

In summary, the Czech Republic strives to respect the principle of religious neutrality. The state does not interfere with the freedom of religious beliefs and their

129 Both spheres, ie forum internum and forum externum, are considered to be inseparable. See Decision of the Constitutional Court of the Czech Republic of November 27, 2002, no. Pl. ÚS 6/02 or Decision of the Constitutional Court of the Czech Republic of 1 July 2010, no. Pl. ÚS 9/07.

130 Judgment of the ECtHR in the Case of Otto-Premigier-Institut vs. Austria of September 9, 1994, complaint no. 13470/87.

131 Chocholáč, 2016, p. 9.

132 Report of the Public Defender of Rights on the inquiry into the prohibition of wearing headgear, dated 2 July 2014, no. 173/2013/DIS/EN.

133 Judgment of the Supreme Court of the Czech Republic of November 27, 2019, no. 25 Cdo 348/2019.

134 Ibid.

expressions, it tries to create conditions for their realization and to protect the exercise of this right. This protection includes, among other things, the protection of the right to use religious symbols, within the limits set by Czech law. The Czech legal system does not contain an explicit and comprehensive regulation of means of protection in relation to the symbols of religious communities and their use. However, this does not mean that such protection does not exist in Czech law. However, it is provided under the ordinary remedies' regime. Under administrative law, it is primarily a matter of liability for a misdemeanor against civil cohabitation. Legislation in the Czech Republic also prohibits radio and television broadcasters from including programs that would encourage religious intolerance. Violation of this obligation is again a misdemeanor. Protection is also provided by civil courts, in accordance with the Anti-Discrimination Act. If a person is discriminated against for religious reasons (including the use of religious symbols), the person can apply to the court to stop the discrimination and receive reasonable satisfaction. If a religiously motivated crime is committed, criminal liability arises. Finally, in certain cases, protection can also be sought before the Constitutional Court, in the form of a constitutional complaint for violation of the constitutionally guaranteed freedom of religion. The Public Defender of Rights also plays a positive role in the field of protection.

6. De lege ferenda

In conclusion, it can be stated that Czech law reflects the existence, significance, as well as the need to protect the state, national, and community symbols. The most important place is occupied by the state symbols of the Czech Republic. Therefore, they are also enshrined directly in the Constitution of the Czech Republic, i.e., in a legal regulation of the highest legal force. However, some criticism can be made of the brevity of the constitutional legislation, which consists in a mere exhaustive list of the state symbols of the Czech Republic. Regarding their importance for the Czech state and its citizens, it would be appropriate to adjust their form directly in the Constitution and to emphasize the importance of national symbolism. As far as the protection of the state symbols of the Czech Republic is concerned, the constitutional law protection is closely linked with the administrative law protection. The rules laid down by the act regulating the use of state symbols, as well as the liability for offenses if these rules are violated are the main tools for their protection. On the contrary, the criminal law regulation is rather complementary. However, from a *de lege ferenda* point of view, this situation can be considered satisfactory and the level of protection sufficient. Practice also shows that the offenses associated with state symbols are sporadic. From the point of view of private law, it is necessary to draw attention to the fact that state symbols are not subject to protection under the Copyright Act. They are explicitly excluded from the scope of this act. This is due to

the public interest (and the state's interest) in making these works as accessible to the general public as possible. However, this is always done with the consent of the author. Here, too, the legislation can be considered satisfactory.

In addition to the abovementioned "official" state symbols of the Czech Republic, there are other artifacts that express the distinctive existence of the Czech Republic and its nation, recall its history, and reflect the generally held values and ideas of the state and society. It therefore plays a similar role as the state symbols of the Czech Republic. Even these symbols, respectively, at least some of them are enshrined in the Czech legal system and are legally protected. In addition, other normative systems provide protection, such as the system of moral norms or customary norms. The list of "unofficial symbols of the Czech Republic" is not enshrined in the legal system, but it is possible to agree upon a certain catalogue of symbols where these unofficial symbols of the Czech Republic could be included. From a *de lege ferenda* point of view, it would not even be possible or appropriate to enumerate them in law. On the contrary, it is beneficial that there may be a discussion in society about what to consider as these symbols and why. In addition, due to historical, political, or other events, these symbols may evolve and change (though not fundamentally). The protection of these symbols is ensured mainly within the framework of administrative law. Some of them are part of the state symbols and thus indirectly enjoy their protection. Perhaps the only consideration *de lege ferenda* in this area is whether to enshrine the Czech language as a national language and a symbol of our state in the Constitution of the Czech Republic.

The symbols of the most important communities in the Czech Republic are also protected by Czech law, at least at a basic level. These are mainly symbols of the territorial self-governing units, national minorities, and religious communities. Czech law seeks to comprehensively support the development of these communities and help realize the various rights of their members. These rights undoubtedly include the right to use community symbols. The main role in terms of their protection is played by administrative protection again (typically, it is the responsibility for offenses and the possibility of defense under the Anti-Discrimination Act).

Overall, it can be concluded that the current legislation on the state, national and community symbols is sufficient in the Czech Republic, including ensuring their protection, both in constitutional, administrative, criminal, and private law. From a *de lege ferenda* point of view, therefore, there is no need to make any major adjustments or changes. On the other hand, it is also true that these symbols are respected by the citizens of the Czech Republic and illegal actions associated with them are rare.

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LEGAL PROTECTION OF STATE, NATIONAL AND COMMUNITY SYMBOLS IN HUNGARY



PÉTER KRUZSLICZ–NORBERT TRIBL

1. Introduction: The symbolic function of constitutional historical narrative in Hungary

Symbols and history are closely related. On the one hand, symbols develop through history. The historical origin of the symbols plays a very important, often, a main role in developing their symbolical function. The most well-known symbols, such as coats of arms, flags, or anthems, are all coming with their history that, at least concerning the Hungarian national and state symbols, will be presented in the next chapter. On the other hand, history itself can become a source of symbol. The first approach is the common historical experience of a political community. The nation is one of the most relevant factors for building up the national identity. Similarly, to the language, the religion, the common history, and the common experience of the community (nation) are very important identity determining factors. But as the present chapter proves, history itself can be seen as a symbol. Not because of the history of the symbols, neither thanks to the identity creating role of the historical experience nor by different past events, as they happened, but through the historical narrative, a particular lecture on national history can become a national symbol, which, as it will be demonstrated, is also constitutionally declared.

When looking for symbols in national constitutions, more precisely in the Fundamental Law of Hungary, it is obvious that not only constitutional provisions about traditional national or state symbols can retain one's attention. In the Hungarian constitution, the Fundamental Law of Hungary, it is evident that the presentation

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of some aspects about constitutional and political history of Hungary has a very important role. These historical events have been constitutionally declared, which means that the constitutional historical narrative has a symbolic role. Not historical facts are constitutionally declared, those are well-known and researched by historians, often also interpreting by them with different conclusions. But there are historical references in in the Fundamental Law of Hungary, getting a constitutional importance, and being relevant for establishing a constitutional narrative. This constitutional historical narrative, just like other historically related more obvious symbols also creating narratives such as national holidays, would become symbolic in a more general and abstract way. Those references are numerous in the Fundamental Law of Hungary, and, in our opinion, the narrative they tell through the constitutional text has a symbolic function.

Such an historical narrative is, first and foremost, the symbol of the continuity of the political and institutional community that the Fundamental Law simply identifies as Hungary. This narrative is also the symbol of its legality and legitimacy at the same time. By those historical references, contemporary Hungary is accepted and legally constructed because of historical elements creating its proper nature. The historical narrative not only creates identity but also strengthens the legitimacy of the political community and its institutions. But the historical narrative is most obviously also important as it would reveal some constitutional characteristics of Hungary.

On the one hand, it highlights a special and organic constitutional development, and the historical references in the Fundamental Law clearly emphasize that. On the other hand, the importance of constitutionality throughout Hungarian history is underlined by the historical narrative not only because of historical constitution but also because of its different components mentioned by the constitutional historical narrative. The separation of the monarch from the national sovereignty,¹ for example, especially with the doctrine of the Holy Crown, will have a very important meaning—more than a symbolic one, but a symbolic meaning nonetheless. And the various events chosen from Hungarian history will all add to the description and thus to the constitutional definition of Hungary—again in a very symbolic way.

The fact that the Hungarian Constitution was an unwritten constitution for many centuries will, naturally, give special importance to the lecture on the constitutional historical narrative. Not only in a symbolic approach but also in a more direct way, as the so-called achievements of the historical constitution are constitutionally defined as guidelines for constitutional interpretation.² Thus, history is not only a past but also a presence in the Hungarian constitutional reality. But it does not mean that history cannot also appear at a more symbolic level, such as that mentioned above.

1 Rácz, 2016, p. 16.

2 Art. R, para. 3 of the Fundamental Law of Hungary states: “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution.”

Also, the historical constitution was not a constant constitutional normativity; it has changed and developed over centuries. One of the most passionate debates about constitutional history is always about conservatism and progress in Hungarian constitutional development, and the interpretation of constitutional documents or costumes from this aspect. An organic constitutional development has, of course, its own dynamic, and scholars are analyzing and describing this evolution, but with a very important consequence as the results of their analysis about such a matter can impact the national identity³ by defining the constitutional narrative.

By definition, every achievement about limitation by legal norms of the exercise of public power becomes very important for a constitutional history. Those achievements can as such also serve as symbolic elements for constitutionalism. They are the real symbols of Hungarian constitutionalism, which is not symbolized or not only symbolized by the Fundamental Law as a positive legal norm. Even the name (Fundamental Law) chosen for the Hungarian constitution, is demonstrating the fact that though, this is the positive source of Hungarian constitutional normativity, Hungarian constitutionalism can have other sources, guidelines. To put it in that way, the constitution's name is also symbolic as it strengthens the special function of constitutional historical narrative. The historical achievements concerning the limitation of the exercise of public power are numerous; they are mentioned in this constitutional historical narrative to serve more as symbols for constitutionalism than as valid and effective constitutional norms for constitutional interpretation. For instance, references to the separation of powers, to the independence of justice, or even to privileges from the 11th century in Hungarian history, are mostly symbolic standing for the early idea of constitutionalism in Hungarian history.

But historical narrative is not only about constitutionalism. It is, in a more general and abstract way, about the national identity. Of course, it is not always easy, solely from an academic perspective, to admit the speciality of this or that historically demonstrated character for a political or institutional community.⁴ Every modern nation claims to be unique and special, but defining the different elements making them unique is a more complicated task. As for a historical narrative, this definition, in our opinion, must not be scientifically proved or developed. This is a more political role of the constitution when creating as the Fundamental Law of Hungary states not only the basis of a legal order but also “an alliance among Hungarians of the past, present and future,”⁵ to give such a historical narrative once again about constitutional development to highlight the importance of constitutionalism with specific, freely chosen historical events. Those events and achievements give a constitutional interpretation of national history to bring into light some characteristics of nation's/country's political evolution, creating the Hungarian constitutional identity.

3 Eckhart, 1941, p. 3.

4 Bónis, 1942, pp. 1–2.

5 In the National Avowal of the Fundamental Law of Hungary.

Such elements for an identity creating, or in a more general way, symbolic historical constitutional narrative, can be mostly found in the constitutional preamble, the so-called National Avowal of the Fundamental Law of Hungary. First, the beginning of Hungarian constitutionalism is brought back to the foundation of Hungary by the King Saint Stephen: “We are proud that our King Saint Stephen built the Hungarian state on solid ground.” In parallel with the official national holiday of the August 20, the day of Saint Stephen recalls the founding of Hungary—the constitutional historical narrative goes back to this first historical fact. It symbolizes the ancient and continuous existence of Hungary. Also, this symbol would emphasize that the Hungarian state and, in a certain way, Hungarian constitutionalism, do not exist only from the period of modern constitutional states. This is a symbolic declaration of the thousand-year-old Hungarian state in the Hungarian constitutional narrative.

The reference to Saint Stephen also brings into light another special historical element that also has a symbolic, more general importance: as the National Avowal reminds us, he “made our country a part of Christian Europe one thousand years ago.” On the one hand, the fact that Hungary as a “country” is integrated for a thousand years into Europe, which obviously should be interpreted more like a civilization than a continent, would highlight a choice of values. On the other hand, those values are not only European but those belonging to Christian Europe. Christianity and its role will be highlighted in another paragraph, also lending an historical perspective, when the National Avowal states that “We recognize the role of Christianity in preserving nationhood,,” at the same paragraph, the constitutional text adds that “We value the various religious traditions of our country.” So, emphasizing a special role of Christianity not as a religion but as one would, say, a cultural and a political factor in the foundation and the preservation of the state and the nation is a second element of this national constitutional narrative that apport a unique character to it. Those are symbols of a European and Christian value-based construction.

Two other important elements serving as main pillars for the structure of this historical narrative are the fights for independence related to the community’s survival, the freedom of its members, and the traumas of the 20th century. The Fundamental Law declares: “We are proud of our forebears who fought for the survival, freedom, and the independence of our country,” and “We promise to preserve our nation’s intellectual and spiritual unity, torn apart in the storms of the last century.” And concerning those storms, the National Avowal also declares: “We do not recognize the suspension of our historic constitution due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship. We do not recognize the communist constitution of 1949, since it was the basis for tyrannical rule; we, therefore, proclaim it to be invalid.” And even if originally tragic, but from a more positive perspective, the National Avowal continues: “We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution.”

So, first, there is, in the constitutional historical narrative, a reference to the history during modernity of fights for national independence, which were the guarantee of the continuous existence of the political community and the state institutions, but also, as modern constitutionalism demands, of the freedom, the liberty of people. In the Hungarian constitutional historical narrative, the independence of the “country” must be always in connection with the protection of rights. Only an independent, sovereign Hungary can protect its citizens’ rights. The symbol of fights for independence is standing for this special element, as well. That is also why even the tragic fights could be considered as successful as they contribute to the future protection of rights when the state became independent (again).

But then, the historical constitutional narrative highlights a very tragic twentieth century. This sad character of this period is repeated at the end of the National Avowal when it concludes, “After the decades of the twentieth century, which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal.” The history of the twentieth century in the Hungarian constitutional historical narrative symbolizes the losses. First, after World War I, the loss of an important part of the nation’s territory and Hungarian citizens. Then, during and after World War II, the loss of national sovereignty. Those historical events and facts are without a positive outcome. They explain the need for a new regime that is also important when a new constitutional order is adopted. So, here, there is no symbol of continuity, on the contrary, “the need for renewal,” to quote the Fundamental Law, appears.

Finally, from a more technical, constitutional perspective, there are two other elements that must be mentioned about historical constitutional narrative even though they have not only a symbolic but also a direct effect on modern Hungarian constitutionalism. First, in an inversed chronology, to continue with the tragic twentieth century, especially, because of the loss of national sovereignty, a break is declared by the National Avowal, when it states: “We date the restoration of our country’s self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990. When the first freely elected organ of popular representation was formed.” And the emphasis on the renewal the National Avowal adds also “We shall consider this date to be the beginning of our country’s new democracy and constitutional order.” This break even though important on a more precise constitutional level, as well, remains mainly symbolic. For instance, the acts adopted during this period, remain in force, but a distance is taken from this chapter of Hungarian history. It allows also to highlight the importance of the renewal which would be based, as it was stated, on the spirit of 1956, symbolizing the heroic fight for the national independence and citizens’ freedom in the most obvious way.

The last element is the Holy Crown. The National Avowal states that “We honor the achievements of our historic constitution and we honor the Holy Crown, which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation.” The chosen terminology (honoring) shows that there is a special, a lot more than symbolic meaning attributed to the historic constitution, and especially to the Holy Crown. The achievements of the historic constitutions are guidelines for the

interpretation of Hungarian constitutional norms. But, in our opinion, they also symbolize the continuity of Hungarian constitutionalism and course, its existence and its importance,

The Holy Crown is a lot more complicated “object.”⁶ The interpretation of its constitutional meaning in Hungarian public law created a lot of debates among scholars and politicians.⁷ The constitutional preamble states that it embodies the constitutional continuity of statehood and the unity of the nation. As a contemporary symbol, it is with the concept of incorporation that its constitutional function can be and will be presented in the next chapter. According to the declaration in the National Avowal the Holy Crown embodies, so obviously not only symbolizes but also inherently holds, the continuity of statehood and the unity of the nation. Both of those two expressions, continuity of statehood and unity of nation, also give the idea that there is more than a simply symbolic, even if it is also symbolic, meaning behind this declaration. The statehood reflects the institution but in a very general and abstract way, it can be everything in relation with the institutional organization of Hungary, and the unity of the nation gives an even more wide approach for the definition of the political community.

Even though the Holy Crown but also the so-called achievements of the historic constitution play a direct role in the definition of contemporary constitutionalism of Hungary. They are, by their nature, related to history, hence, they also have a symbolic function as it appears clearly in the National Avowal as they are symbolizing the continuity and the unity of the institutional existence of Hungary as a state but also of the political community behind in a constitutionally defined way. As symbols, they are also part of the constitutional historical narrative that is, once again, as itself, a symbol. Four different elements were mentioned to demonstrate and explain the symbolism of this narrative: the reference to the founding king, to the choice of European and Christian value, the fight for independence and freedom and the tragedies of the twentieth century. Even though those are historical events, their declaration in the constitutional preamble has also a symbolic function.

2. National and state symbols in Hungary

After the analysis of the historical narrative as a symbol for Hungarian nation and state, the list of contemporary symbols is to be observed. Switching to the contemporary symbols does not mean that history will not play a very important role in this second chapter. On the contrary, the fact is that history continues to be a particularly important factor in elevating symbols for the Hungarian nation, the

6 Bertényi, 1996, p. 26.

7 Eckhart, 1941, p. 4.

Hungarian state, and the Communities in Hungary. It has been stated that the main source for symbols is history, as common historical experience is one of the most relevant factors in shaping identity. It has such a function for the nation as a political community, and for the state as the institutional structure, and for the other communities being part to the Hungarian nation but distinguishing themselves with a particular identity. However, the approach is entirely different as the actual symbols can be listed, described, and presented in detail.

When introducing the Hungarian national, state symbols and the symbols of communities in Hungary, for different reasons which will be pointed out, it is important to ask two fundamental questions. Also, to list the Symbols, it is evident that those questions should be answered, especially when our list of symbols is not only based on the constitutional and legal provisions but also the practical use of those. Thanks to the answers to those questions, it will be possible to have an exhaustive list of symbols, but also it helps to categorize them for their better understanding. The first question about symbols concerns their meaning: what they are standing for, what they are symbolizing.⁸ A symbol cannot exist without an object: by its nature, by definition, behind the symbol, an existing social or political reality can be revealed. Regarding the national, state, and community symbols, answering this question is not only about explaining whether the symbol is used for the national, state, and community symbols; it is also about the essential element of those symbolized, which aspect is brought into the light.

The second question that will be the first to be answered is even more complex, as it is about the reason for the existence of those symbols. Why do they exist? What is the purpose of those symbols? It has already been analyzed partially when the Hungarian history of symbols and even more evident when the symbolic role and the whole symbolism of historical narrative, of so-called common historical experience, was presented. First, however, it should be recalled and categorized so that the contemporary symbols can be listed correctly. As much as a symbol does not exist without the object that it symbolizes, it cannot exist and cannot be described and analyzed without knowing its purpose. Those purposes are as many reasons for the existence of the symbols as they are also a component of their symbolic nature. Even though symbols are often considered abstract signs for general social or political reality, they have a very pragmatic goal. The very fundamental existence of those symbols depends on that: those who can achieve that goal are the only ones we can consider as real symbols as much for a nation as for a state or any community.

Most scholars researching national, state, and community symbols agree that two functions are relevant to determining the purpose of the symbols.⁹ Those symbols have a so-called external and internal function. The external function of the symbols is representation. Symbols are (and should be) representative of what they are standing for. If a symbol is not representative and does not refer to a clear

⁸ Halász and Schweitzer, 2010, p. 21.

⁹ Halász and Schweitzer, 2020.

idea of the object it is standing for, it cannot be considered a symbol. But the external function is to be complemented by the internal one. This internal function is about integration. Symbols are and should be integrative for the components of the general social or political realities that use them as symbols. A symbol, as it could be understood also under the first historical chapter, as vivid and apparent as it could be, which is not capable of bringing together those components, cannot be a real symbol. It will lose its importance and fall in desuetude. The external, representative, and internal integrative functions are the main reasons for the existence of symbols. As stated above, those functions should be fulfilled by them to be considered symbols. Those two functions are somehow obvious and existential for symbols as they reflect the two aspects of the identity of their object: being different from the others and identical for all components sharing the same identity.

Also concerning the answer to the second question about the reasons for the existence of the symbols, in line with the above given solution, more interestingly, it can be revealed that a symbol when representing and helping to integrate, emphasizes not only the existence of its object but more precisely its continuity and stability. Without going further in such a conceptual and theoretical analysis, to define the symbols, it can be relevant to highlight their special characteristic. A symbol should reflect not only the existence but the certainty of the existence of its object. As much for a nation as for a state or the communities, this is a fundamental goal behind the representative function of their symbols. Moreover, regarding the integrative function, the fundamental goal is the acceptance, of the legitimacy of the symbol(s). This aspect of legitimacy appears as much toward the symbol, itself, as the components of the object should accept the symbol that it is standing for, then toward the object of the symbol that the symbol can legitimize. A primarily accepted symbol can help to give legitimacy to its thing as much as a firmly integrated general social or political reality can make the symbol, reflecting it.

To go back to the first thing to decide about a symbol, its object: what the symbol stands for. Entirely in line with the considerations mentioned above and even with the title of the essay, the symbols of the nation, the state, and the communities will be listed and described. However, as those are particularly abstract ideas even though they reflect some social and political realities that are very general, it is interesting to think about the exact object of the symbol and what it is precisely symbolizing. It is possible to distinguish clearly between the symbols regarding their objects. It will be the foundation of the categorization of symbols as they are presented.

First, state symbols—often considered the official national symbols, but the term state symbol will be used to make a clear distinction—should be defined. Those symbols are about the representation and the integration, as understood above, of the constitutional construction of the state concerning its historical origins. state symbols can be especially representative of national sovereignty as the source of public power being the *differentia specifica* of the modern state. Secondly, the symbols of the nation, once again not to be confused with the official national symbols, which is another category, are to be mentioned. Those are about the people, also a

component of the modern state, but in a highly abstracted reality of them, composing members of a most general but precise political community. For other communities, it is the same approach, their existence as a set of their members is to be represented, and the people composing them are to be integrated with their symbols.

Whether they are official national, according to the chosen terminology, state symbols, or the symbols of the nation as a political community, in a more positive approach, they are, and for contemporary symbols this is the general rule, consecrated as such in constitutional provisions. As symbols are about the legal construction of the state and the nation, it is logical that national constitutions decide about them. Once again, that is the case for most states and nations and constitutions. It does not mean there cannot be symbols other than those provided by constitutions. On the contrary, some symbols can exist by costumes or traditions; also, constitutional provision, as the case of Hungary demonstrates, can give free room to use other symbols than those constitutionally consecrated. Finally, some symbols can be elevated and established by other legal sources than the constitution, for example, cardinal laws or any other acts adopted by national parliaments or even by national governments. In the case of Hungary, the symbols are defined as such and protected by the Fundamental Law of Hungary.

A constitution, such as the Fundamental Law of Hungary, plays its role in defining the symbols of the state and the nation. Those symbols consecrated by constitutional provisions will be considered constitutional symbols also often protected by constitutional sanctions. And even without special rules on their protection, it is to be assumed that by the fact that a symbol is defined at the level of a constitution, it can benefit from constitutional protection. So national constitution, in this case, the Fundamental Law of Hungary, has a normative function regarding the definition and the protection of symbols. But as much as symbols can exist without constitutional consecration, the constitution itself can be considered as a symbol more of the state than of the nation.

Such a symbolic character of the national constitutional document can be easily recognized, especially when those documents are considered historical. Following considerations developed in the first chapter, not only because of the timeframe passed after their adoption but also because of their historical importance, events, persons, or in this case, legal documents can become symbols. The example of the Universal Declaration of Human and Citizen Rights or the Constitution of the United States of America can be recalled as older constitutions becoming symbols as documents. But the Fundamental Law of the German Federation after World War II can also be mentioned as a more recent example of becoming a symbol more likely because of its historical function that made it almost unchanged even after the reunification of Germany. Those constitutions are not only containing the definition of symbols and can contain special provisions about their protection, but are, as documents, ignoring their normative content, symbols about the sovereignty of the State, its stability, and its existence as in the case of the United States of America, but also about some changes regards to former regime as in the case of France or Germany.

In line with those introductory remarks, we will define as symbols in Hungary the so-called official national symbols that are the symbols of the state, also according to the Fundamental Law, such as the coat of arms, the flag, the anthem, and the decorations, even though those last ones are not established, for the obvious quantitative reasons by the Fundamental Law. Then two other symbols defined and protected as such by the Fundamental Law are to be described; they are more related to the Hungarian identity or the exercise of the national sovereignty: the Hungarian language and the official currency of Hungary. Two other special Hungarian symbols are presented without constitutional basis: the Holy Crown, very briefly, and the National Assembly's building. Finally, other symbols such as national holidays, sites, and monuments will also be very shortly mentioned because even though they are actual symbols, they are more related to the national historical narrative. With those categories, a complete list of Hungarian symbols can be given, also the symbols of communities will be also shortly mentioned in complement.

2.1. Official national symbols and other state symbols in the Fundamental Law of Hungary

As previously stated, some symbols are defined and protected by the Hungarian constitution, the Fundamental Law of Hungary. As it appeared in our chapter about the history and historical narrative, the constitutional sources of Hungary can be determined at different levels. The written source, the Fundamental Law, is the main source of Hungarian constitutional law. However, according to the special historical development of Hungarian constitutional law, but also because of the reference to it in the Fundamental Law, the so-called historical constitution of Hungary can also be relevant. In general, the historic constitution is a tool of interpretation and not a positive source of constitutional provisions. But, according to the case law of the Constitutional Court of Hungary and Hungarian constitutional doctrine, it can also become relevant when in its interpretation, other sources are brought into light for Hungarian constitutionalism. The Fundamental Law of Hungary can be considered as a symbol; even though, we are hesitant to recognize yet such a nature of the Fundamental Law, we also mentioned that historical constitution could be considered a symbol, even though, for the abovementioned reasons, it is more than a symbol in contemporary Hungarian constitutional law.

Therefore, when looking for constitutional provisions about national, state, or even community symbols in Hungary, we can research as much of the text of the Fundamental Law as we can enlarge our view of the historic constitution. Both of those sources can be considered as symbols, themselves; the historic constitution undoubtedly is one, and the Fundamental Law may become one, but in this chapter, they can be more interpreted as sources of symbols. Especially the text of the Fundamental Law guides the research for the definition of symbols. The historic constitution can be used for such a purpose without repeating what the first chapter has already analyzed. Hence, the definition of national and state symbols in Hungary

should be started by analyzing the constitutional provisions, especially those of the Fundamental Law.

2.1.1. The name of the state or the country

First, it would be obvious to deny the symbolic function of the name of a country or a state. One would say that as it directly refers to the state or the country in question, there is no symbolic function behind it. It is important to recall that a symbol, by definition, would refer in an abstract and general way to an object symbolizing. Also, as mentioned above, it is to be remembered that for national and state Symbols, the function is often about the acceptance of the national political community and the institutional structure of the state, its stability, continuity, or some of its unique characteristics.

In our opinion, the name of a state or a country may be a symbol because of those particular elements of national and state symbols.¹⁰ For instance, the reference to the Republic in the name of the French Republic, represents more than the simple definition of the form of the state. Republic became a symbol in France after the French Revolution and the execution of the King, as France symbolically let the old regime behind. Even though empires and monarchies followed the Revolution in the 19th century in France, the world republic remained a symbol; it is continuously used even today when referring to the political community, the nation, and the state; it has an external and internal function as any symbols.

In Hungary, in our view, article A) of the Fundamental Law declaring that “The name of our country shall be Hungary,” also has a symbolic function. Not only because all the other constitutional provisions will be defined by it, as it is the first created structure. Hence, also national and state symbols will refer to it, as they are, by constitutional definition, symbols of Hungary, but also because it is not only a direct reflection of the existence of a constitutional reality, it is symbolic; the name “Hungary,” even constitutionally, should be considered a symbol. It is not referring to the political community of the nation, nor the state and its special structure, nor the form of government, as is often the case with official names. Instead, it defines the country—the homeland, the motherland—as Hungary. It is more than a constitutional definition of a state; it is the fundamental and symbolic determination of the political community, the geographical countryside, and the supreme national power—simultaneously.

Some criticisms expressed at the time of adopting the Fundamental Law were about the lack of reference to the form of state or even to the form of government in this constitutional provision. Those criticisms forgot that the form of state and government has not changed. Hungary remained a parliamentary republic. And the lack of reference to those special issues in this first constitutional provision about the state could rather be explained by its symbolic role. Contrary to the abovementioned

¹⁰ Takács, 2015, p. 50.

French case, in Hungary, it is not a special character that is to be symbolized by the name of the country, but its continued existence in the Basin of Carpathia with a stable political community and a solid constitutional structure. In Hungarian constitutional history, only short episodes of the republican form appeared: even though Hungary was a kingdom without a king for a short period from April of 1849, and for a longer one between the two world wars, as a republic, it only existed for a couple of months after World War I, and for a couple of years after World War II; it would stabilize that form of government only after the regime change of 1990. Moreover, the term “republic” has never gained a symbolic function.

With its simplicity, defined as the name of the country, of the motherland, the political community, and the state at the same time, the name, Hungary may be a national and state symbol, the first that the Fundamental Law mentions. It is not only referring directly to the existence of the Hungarian nation and the Hungarian state. It is also symbolizing the continuity of social, geographical, and political reality, not emphasizing a special character of the state that could become a symbol of it, but simply representing its object in a more general and a more abstract approach not despite of but maybe, especially because of its common and simple denomination. Hence, according to the Fundamental Law of Hungary, we state that the first national and state symbol is the name of the homeland, Hungary.

2.1.2. The coat of arms

Hungary’s first and most sophisticated official national symbol is the coat of arms.¹¹ It is defined as such by article I) of the Fundamental Law, in its first paragraph as the first national symbol, article I is about official national symbols. The Fundamental Law defines Hungary’s coat of arms as follows:

The coat of arms of Hungary shall be a vertically divided shield with a pointed basis. The left field shall contain right horizontal bars of red and silver. The right field shall have a red background and depict a base of three green hills with a golden crown on the top of the higher central hill from which a silver patriarchal cross rises. The Holy Crown shall rest on the top of the shield.

With the flag and the national anthem, the coat of arms is often the state’s most well-known official national symbol. That is also the case in Hungary. In Hungary, the coat of arms has a long history, its use is very well determined in law and costumes. Its symbolism cannot be denied. It symbolizes Hungary, once again, its continued existence as a political community, even before the rise of the modern term of nation, and its constitutional and institutional structure, even before modern constitutionalism. Its different components, consecrated as such over its long history,

11 Rácz, 2002, p. 493.

especially its medieval period,¹² also symbolize some characteristics of the Hungarian nation and state.

The patriarchal cross is the first component of the coat of arms that appeared and became of use by Hungarian kings. Its first use can be discovered on coins of money issued by the King Béla III in the 1190s. It was a sign to declare national independence against the Byzantine Empire becoming a closer risk for the Hungarian independence in this medieval period. For King Béla III, who achieved the central part of its education in the Byzantine court during his childhood, it was important to show that Hungary is an independent, sovereign country with modern terms, even though the influence of the Byzantine Empire became very present during his reign. Therefore, Béla III's court chose as a symbol of independence the patriarchal cross from that historical period, and it became the first component of Hungarian national characters and a continuous part of its coat of arms.

The second component is the background with red and silver bars. It appeared for the first time on the official hanging seal of King Imre in 1204 that its court used for an official diploma issued in the name of the King. Red and silver are the official colors of the royal family, the House of Árpád. As such, they are also used on the so-called Árpád-flag, or Árpád bared flag, one of the most ancient historical flags of Hungary. As much as the patriarchal cross reflects the independence of Hungary, the red and silver bars are symbolizing the identity of its first, historical royal family. Even though, those colors were first used for seals; they became very popular as symbol of the royal house for the last period of its reign.

Third, the hills appeared in the period of Anjou kings, in the 13th and 14th centuries. The explanation is straightforward, and the symbol is easy to understand. After the decline of the first Hungarian Royal House, the Árpáds, whose extinction was due to the lack of male inheritance, the Anjou took the Hungarian throne. As they are not representing the first royal family anymore, they are only related to it by marriage, the representation of the country became more relevant. The hill symbolized the country, and very soon, it became tripled. According to scholars, they represent the three main mountains of the Hungarian countryside. At the same time, the number of red and silver bars was eight consistently. Once again, according to most scholars, the four silver bars represent the four main rivers of the Basin of Carpathia. That is how the symbol of the first royal family became a symbol of the country after its extinction in the use of Anjou kings. The three hills for the three main mountains, and four silver bars for the four main rivers as the coat of arms should not symbolize the royal family any longer, but a country ruled by a new family of monarchs.

The fourth component is the crown. The crown or more exactly the crowns as there are two of them integrated to the coat of arms, are very interesting symbols, one would say, they are more than symbolic especially with regard to Hungarian constitutional heritage about the Holy Crown, discussed in the first section. The first

¹² Feiszt, 1986, p. 7.

golden crown on the top of the higher central hill symbolizing the king, of course. Nothing very particular can be found for this symbol. The king became represented by the crown at the beginning of the 15th century all over Europe, for instance, international treaties started to be concluded not only in the name of the kings, but also in the name of the crown to give more constancy to their normative content, not only engaging the king but also his heirs. The emplacement of the crown shows that he rules the country, and the patriarchal crown in the middle of the hill, growing up from the crown, represents the fact that the king rules by the grace of God, who remains the highest source of authority.

But the fact that the second crown, the Holy Crown, is placed on top of the whole shield is a very symbolic and obvious representation of the doctrine of the Holy Crown. So, when across Europe, the use of the crown became a common symbol to make a distinction between the person of the king and its ruling authority. In Hungary, two crowns were used. It is important to remember, as a first manifestation of the concept, that during the captivity of the King Sigismund I, in the name of the Crown, the Hungarian aristocrats were already ruling—sealing their correspondence and the diploma they issued, with the image of the crown.

Also, it is to be mentioned that the so-called small coat of arms was also in use, it is the same coat of arms only without the Holy Crown on the top of it. The coat of arms with all its components was developed by the end of the medieval period. Also, its use was less codified than it is today. The last component, the crown, or for the complete coat of arms, the two crowns, are the signs of the last change or evolution of symbols. First, the independence of the ruling royal family, then its identity appeared. After the extinction of the Royal House, the symbols of the land were added to the coat of arms. Finally, the representation of the ruling authority reappeared in a very particular way, in a historical trouble period, with two crowns, the first symbolizing the monarch, the second, in a very abstract and constitutional nuanced content, the nation—considered, in that period, as the community of aristocrats.

Even though the Holy Crown has its special meaning, it is the small coat of arms that was in use during the periods without a king. First, it became an official national symbol of Hungary in April 1849, which is - why it is also called as the Kossuth coat of arms (on April 14, 1849, the Hungarian National Assembly dethroned the Habsburg family following the proposal of Lajos Kossuth who became governor of Hungary, and the Holy Crown was lost from the coat of arms). Second, during the People's Republic after World War I, the official coat of arms became the one without the Holy Crown. Only during Socialism, a complete change of symbols was introduced with a whole new coat of arms only composed of socialist symbols. When the regime changed, it was a matter of discussion whether the small coat of arms or the complete one should be reintroduced, finally, the first democratically elected National Assembly opted, for historical reasons, for the second option. The historical coat of arms became the official national symbol again. And of course, the Fundamental Law also opted for this coat of arms enriched with many symbolic components during the long medieval history of Hungary, serving as a symbol of the

continuous existence of Hungary and reflecting some essential characteristics also for modern times.

2.1.3. *The flag*

The flags are the most common and modern official national symbols.¹³ Those are in common use not only to decorate public places or buildings, but also to support national teams during sports events. Nowadays, national flags are, for the most of them colored in vertical or sometimes in horizontal bands with some symbolic colors. The Hungarian flag is no exception. The second paragraph of the same article I) about official national symbols states: “The flag of Hungary shall feature three horizontal bands of equal width colored red, white, and green from top to bottom as the symbols of strength, loyalty and hope, respectively.”

The Hungarian flag is a lot more recent than the coat of arms, and by its nature, it has a less developed symbolic content. The official national flag of Hungary is resulted from the 19th century. According to scholars, the three colors were used in a symbolic way for the first time in the first year of the century, in 1801, by Palatine Joseph in an official ceremony.¹⁴ The flag became a symbol especially during the revolution and the war of independence in 1848 and 1849. Therefore, as a symbol, the flag is not only modern in a way that it reflects, without special, more sophisticated or developed content or the nuanced components added to it over the centuries, the identity of a community, but also because this is already a modern, national community that is represented by the flag. This was especially true during the 19th century when Hungary’s national identity developed in a modern way, in parallel with the flag.

For most scholars, the three colors are taken from the coat of arms: the red and the white are the red and the silver of the House of Árpád as the founder and first ruling authority of Hungary, and the green represents the land, as the green of the hills on the national coat of arms: the hills became green in the coat of arms already in the 16th century. However, the colors became symbolic already during the 19th century, and that is this symbolism that the Fundamental Law repeats: the red is the color of the strength, the white stands for loyalty, and the green is symbolizing hope. The double symbolism, an already mentioned characteristic of any official national symbols, is quite evident with the flag: it is a symbol of the nation and, of course, also of the state, at the same time, it is also symbolizing by its components some special characters of it: a strong, loyal, and hopeful nation.

The use of the flag with the abovementioned three colors became official in 1848, according to Act XXI. After the failed war of independence, it became forbidden, but its use was introduced again after the so-called Compromise in 1868. Since then, the red-white-green colored flag has been the official national symbol of Hungary. The

¹³ Horváth, 2005, p. 200.

¹⁴ Halász and Schweitzer, 2020.

only question that raised about the flag, was whether it should be used with the coat of arms. The different coat of arms succeeded in the middle of the flag. Moreover, in 1956, demonstrating the importance of the use of the flag as a symbol of national identity and protestation, the flag with a hole punched in the middle became famous. The socialist coat of arms was unanimously removed by the people in October of 1956. After the failed revolution, surprisingly, the communists did not reintroduce the flag with the socialist coat of arms.

As contemporary official national symbols, the flag is used just as described by the Fundamental Law of Hungary without any coats of arms in the middle. Interestingly, the constitutional provision about the flag emphasizes the symbolic meaning of the color. One would doubt the normative content of such a constitutional provision. It is pretty exceptional that in a national constitution, the symbolic meaning of an official national symbol such as a flag is mentioned. This is most likely a declarative provision, also its phrasing strengthens such an interpretation. However, the constitutional explanation of the second symbolic function about special characters reflected by the symbol is more than simply symbolic. It would emphasize that even such a simple symbol could have an important meaning.

Finally, it is also to be mentioned about the coat of arms and the flag as official national symbols that the Fundamental Law contains a very interesting provision. According to the fourth paragraph of the same Article I:

The coat of arms and the flag may also be used in other historically developed forms. The detailed rules for the use of the coat of arms and the flag, as well as state decoration shall be laid down in a cardinal act.

As much as coat of arms and flag are important as official national symbols, and their importance is underlined by the fact that their use should be fixed by a cardinal act which is the Act CCII of the year 2011; the Fundamental Law, in accordance with the special role that it reserves for history and historical constitution also about symbols, expressly permits the use of other historic forms.¹⁵ The act mentioned above provides with special form of coat of arms for the president and the prime minister of Hungary. Also, historical flags are used for national ceremonies or in the National Assembly.

2.1.4. The national anthem

The third and the last official national symbol defined by the same article I of the Fundamental Law of Hungary is the national anthem. Its third article reads as following: “The national anthem of Hungary shall be the poem Himnusz by Kölcsey Ferenc set to music by Erkel Ferenc.” As much as the coat of arms and the flag, national anthem is one of the most important national symbols of a nation and a state.

¹⁵ Ivánfi, 1989, p. 150.

The use of national anthems became common at the same time as the national flag. In the case of Hungary, also in the 19th century with nationalism and a somewhat more romantic approach in the foreground, it was decided that a national anthem should be written and set to music. It is a symbol of national identity, less historical, but with a strong meaning that one can deduct from the text and music.¹⁶

For public ceremonies singing together was always important. In Hungary, despite the religious diversity, this function was filled with religious songs before the national anthem. Although, as by the Catholic Hungarians, the so-called Our Holy Mother was often used, while Protestants sang the Ninetieth Psalm. It was not only a religious act; it was also about manifesting the common identity of the people for official ceremonies. Maybe that is one of the reasons why it is the famous poem of Kölcsey written in the form of a prayer that became the Hungarian national anthem with, of course, patriotic content (Oh, my God, the Magyar bless / With Thy plenty and good cheer! / With Thine aid his just cause press, / Where his foes to fight appear. / Fate, who for so long did'st frown, / Bring him happy times and ways; / Atoning sorrow hath weighed down / Sins of past and future days). Singing together the national anthem remained an important part of national and other official ceremonies contrary to other countries where national anthems are more listened than sang.

Ferenc Kölcsey finished the writing of the poem exactly on January 22, 1823. This date also became Hungarian Culture Day. In establishing this, even the date of the writing of national anthem got a symbolic function in Hungary. The national and the cultural identities are, as it demonstrates, strongly related. More than twenty years later, because the poem was chosen to become a national anthem, music should have been composed for it. In the framework of a national competition, which was very popular by that time, the proposal submitted by Erkel Ferenc won the jury's price; from 1844, it was used as music by Erkel for official ceremonies. The national anthem became so popular that it was out of the question to change it, even though for different reasons, especially during socialism, its use was restricted and even completed or substituted with the singing of other ideologically chosen songs.

Despite of its popularity from the beginning, a parallel use of the so-called Appeal, in Hungarian, "Szózat" of Vörösmarty Mihály remained constant. Vörösmarty wrote the poem in 1836. With very rhythmic phrasing and a strong patriotic content (Oh, Magyar, keep immovably / your native country's trust, / for it has borne you, and at death / will consecrate your dust! / No other spot in all the world / can touch your heart as home—/ let fortune bless or fortune curse, / from hence you shall not roam!), it became very fast popular, and the music composed by Egressy Béni in 1840 allowed Hungarians to sing it before the anthem. Because of its popularity and as it became a very symbolic text and music, the tradition remained, and even today, it is used, without constitutional consecration, as a "second" national anthem: the

16 Kállay, 1989, p. 594.

official anthem is sung at the beginning and this other poem as set to music at the end of ceremonies.

According to article I) of the Fundamental Law of Hungary, the national official symbols are the coat of arms, the flag, and the national anthem. Those constitutionally established symbols are to be completed by the national decorations, as, for the already mentioned obvious qualitative reasons, they are not expressly listed by the constitutional provisions giving only reference to it when prescribing the obligation to rule about them in cardinal law, by national decorations. Those symbols are defined by constitution, except for decorative purposes; however, history played an important role in their evolution and influenced their meaning, so a flexibility in their use is permitted exactly because of history. As for their symbolic role, it is to be mentioned that they are symbols as much as they are holding symbols with their different components in a more historical way such as the coat of arms or even in the constitutionally defined form as the flag, or because of their textual and musical content concerning the national anthem.

2.1.5. The national holidays

After defining official national symbols, the Fundamental Law declares the national holidays in article J). Hence, they are constitutionally regulated just after the national symbols. They are naturally and closely linked to symbols and have symbolic meanings. The first section explained how national memorials with a particular narrative about national history have a symbolic role. This narrative is rhythmized and strengthened by memorial dates. In addition, those national holidays have the function of creating a strong national identity. As it will be demonstrated, they are linked, as much as any other symbols, to the continuity of the nation and the state, and reveal, highlight some of their special characteristics. As much as they are important for national identity, they are also about celebrating the nation and the state by their symbolic function. Moreover, they bring into light some historical events giving them special importance in the historical narrative.

Article J) defines in its first paragraph national holidays as follows:

The national holidays of Hungary shall be: a) the 15th day of March in memory of the 1848–49 Revolution and War of Independence, b) the 20th of August in memory of the foundation of the state and of King Saint Stephen the state Founder, c) the 23rd day of October in memory of the 1956 Revolution and War of Independence.

The same article's second paragraph adds: "The official state holiday shall be the 20th of August." Thus, Hungary has three national holidays; August 20 is the official holiday of the state. As discussed before, it is enough to summarize the symbolism of those dates about the existence and the continuity of Hungary as a political community and a state or about its independence which is an essential component of national identity.

The official state holiday is about celebrating the state and its existence through history. It is about the very beginning, the foundation of the Hungarian Kingdom, as the above-quoted provision of the Fundamental Law explains. The two other national holidays are also about the importance of independent Hungary but remembering some historical events when this independence was at risk and lost by Hungary. The Fundamental Law also explains the symbolism behind those dates. It can be seen as a specialty, just as we saw concerning the flag's colors, without real, normative content. However, as their symbolic nature gives those dates their definition as national holidays, those explanations can be interesting, also because, as has been already mentioned, different interpretations could be developed in another historical period about the same historical events.

The importance of the historical narrative with its symbolism is also underlined by the fact that in different forms, we can find other commemorative dates as well, as parliamentary regulations or even governmental decrees introduced different commemorative dates. Those dates are not national holidays, of course, but are also symbolic, contribute to creating national identity and give special character to it. The January 22, Hungarian Culture Day, has already been mentioned. February 25 is the commemorative day for the victims of communism, the April 16 for the Hungarian victims of the Holocaust. October 6 and November 4 are national morning day, remembering the execution of the leaders of the 1848–49 war of independence and the loss in the war for independence of 1956. Also linked to 1956, June 16 is consecrated to the memory of the reburial of Imre Nagy and his fellow martyrs. June 4 is the day of the unity of the nation—torn apart after World War I with the peace treaty signed on that day.

Common historical experiences and historical memories create a common identity. This already symbolic function is undeniable for national holidays and other commemorative dates. They are, with the memory of those events, symbolic for composing elements of such a national identity. The continuous and secular existence of a state is a very fundamental element. But also, the frequent fights for its independence could become one. The tragic character of the Hungarian historical narrative, also highlighted by the national anthem, strengthened by memorials about victims and lost, is also a very particular component of the national identity. As components of Hungarian identity, they are also strongly related to the nation and the state which are celebrated with those special elements, components. The national holidays and the commemorative dates have undoubtedly, as already explained above, a doubled symbolic meaning as much as the official national symbols.¹⁷

2.1.6. The Hungarian language and Hungarian Sign Language

As a new symbol under constitutional protection, the Fundamental Law contains provisions, in article H) just before the constitutional definition of the national

¹⁷ Schweitzer, 2018, p. 70.

symbols, about the Hungarian language and Hungarian Sign Language. According to most scholars, the fact that Hungarian language and Hungarian Sign Language are benefitting, after the adoption of the Fundamental Law of Hungary, from a constitutional protection, is a demonstrative sign of their symbolic function. By their nature, those are symbols at a very different level than the official national symbols or even the national holidays. However, as much as common historical experience is creating national identity, the common language is undoubtedly also having this function. And as a contributing element to national identity, it can be considered also as a symbol. Just like the name of the country, it is not the language as such with its semantic elements that is a symbol. The symbolism of the language and of sign language is due, once again, to its identity-creating function, and to its special character.

The National Avowal, as a constitutional preamble to the Fundamental Law, reinforces such an interpretation about the symbolic function of the Hungarian language and of the Hungarian Sign Language. One of its paragraphs states that “We commit ourselves to promoting and safeguarding our heritage, our unique language and the languages and cultures of national minorities living in Hungary.” Linked to the cultural heritage with an underlined unique character, the Hungarian language as much as Hungarian Sign Language can be considered also as national symbols. It is also essential to highlight the inclusive approach of those constitutional provisions, on one hand, not only the Hungarian language but also Hungarian Sign Language is defined as protected heritage and can be considered as symbols. On the other hand, the languages of national and ethnic minorities also benefit from the same role and protection, so they can also be regarded as constitutionally protected community symbols for the communities of those minorities using the same language.

The constitutional protection founding the symbolic function of the Hungarian language and Hungarian Sign Language is established in article H) of the Fundamental Law. As it has already been mentioned this article is placed just before the article I) about official national symbols. The emplacement of the article is not due to a special importance, it can be simply explained that with the fundamental definitions, the first paragraph of this article H) about the definition of the official language. It is quite logical that the provision declaring that “The official language shall be Hungarian” would be followed by other paragraphs about the language. The second paragraph states that “Hungary shall protect the Hungarian language.” The third paragraph adds that “Hungary shall protect the Hungarian Sing Language as a part of Hungarian culture.”

As it appears from the above-quoted constitutional provisions, Hungarian language and Hungarian Sign Language became symbols under constitutional protection because of their strong connection with national culture—for Hungarian Sign Language, the constitutional paragraph expressly underlines this connection—hence, they are also linked to and are creating national identity. The protection of languages as part of national cultures benefit, today, from different legal tools, as part of cultural diversity, especially in the context of globalization, their protection

is aimed by international legal instruments. Also, in the framework of the European integration, the protection of languages became very important. It is interesting to recall that the Court of Justice, usually very restrictive with the application of such a legal protection, ensured the protection of national constitutional identity for the protection of national languages as part of national culture and identity in more than one case.

Finally, it is to be mentioned that the Hungarian language and Hungarian Sign Language could also become constitutional symbols because of their unique nature. Of course, that is not a legal but a linguistic question, however, the fact that a Finno-Ugrian language could survive despite of the cultural influence coming from the neighboring regions, in the Basin of Carpathia, is also a symbol of independence, cultural difference and give a special nuance to the Hungarian national identity. It could be also behind the constitutional protection of Hungarian language and Hungarian Sign Language as symbols.

2.1.7. *The official currency*

The symbolic function of the official currency of a contemporary state is a very complex subject. Even the fact that Fundamental Law is paying interest to the official currency, shows its symbolic role. After the official symbols in article I, and the national holidays in article J), in article K), it is declared that “*The official currency of Hungary shall be the forint.*” And this constitutional provision is not only about a monetary question, with those articles, the Fundamental Law is defining in a concrete but also in a symbolic way what it calls Hungary, so Hungarian nation and Hungarian state. This particular provision is a part of this definition—also in a symbolic approach. Of course, the official currency cannot be a symbol at a same level than the official symbols or even national holidays. It is not related to the culture or identity as historical experience, cultural heritage, official language, or sign language. However, the constitutional definition of the official currency already lets one think it has a symbolic role.

The symbolic function of the official currency is related to its strongly interconnected nature with national sovereignty.¹⁸ It is important to remember that in the medieval kingdoms, the coins were representing the monarch’s figure. This fact inherited from ancient Rome, reflects the king’s monopoly to mint money, but it has also a symbolic meaning, one could remember Jesus Christ’s famous answer to give the emperor what belongs to him. After the rising of modern nation–states, the official currency also became a sign of sovereignty, a symbol of national independence. The Hungarian constitutional provision brings into light this symbolic character of the official currency, a sign, and as such a symbol of national independence and national sovereignty.

18 Smuk, 2015, p. 398.

Of course, for a Member state of the European Union that engaged itself to introduce the common European currency, the euro at the time of its accession, this constitutional provision will be an obstacle. But, the revision of the constitution is very common for Member states of the European Union, especially because of their membership. The most probably when euro will be introduced in Hungary as an official currency, this constitutional provision could be changed. And very naturally, it will also be a sign, to say so, a symbol of the loss of another constitutional prerogative closely related to national sovereignty. This very old symbol of national independence and national sovereignty can also have a special meaning in the context of globalized financial markets, where and when, the money became more like a product, however, this context is only strengthening the symbolic function of the official currency as the Fundamental Law recognizes it.

2.2. Other symbols related to national sovereignty and to national identity

After the presentation and the explanation of national symbols that are established by the Fundamental Law, reflecting different level of symbolism, but always related to the national political community or institutional structure, some other symbols may also be mentioned. Those are not expressly declared by the Fundamental Law; however, their symbolic role can be identified, and they can also be protected even in a constitutional approach. The symbolic function of those can be very abstract and especially important, to have such a function, those are very general symbols with a very precise, concrete meaning. The list of those symbols could be very long, however, for obvious quantitative reasons, in this essay, we would like to concentrate only on national decorations, and two special symbolic objects: the Holy Crown which importance as it is more than a symbol, was already explained, and the National Assembly.

2.2.1. State decorations

State decorations are listed among the official national symbols, and they should be presented as such. Not only because of the reference to them in article I) of the Fundamental Law of Hungary, but also because of their obvious symbolic function. Signs of the recognition of merits by the national community, those decorations are, by their nature, symbols that bring together their owners and the abovementioned community in a very symbolic way. It is also to be mentioned that the use of the decorations benefits from the same constitutional protection than the use of other national symbols. The only reason of their absence from the text of the Fundamental Law is quantitative, as they are numerous, it is not possible to enumerate and explain their symbolism in the constitutional provisions.

State decorations, also because of their symbolic function, are subject of long historical evolution. Their development as signs of recognition of merits, can only be understood parallelly to national history. Of course, their historical origin can add

some profound meaning to their symbolic value. Even though such a symbolic value, as already mentioned, is inherent to their nature: they are close and direct symbols. In line with the historical evolution of the national community and the state, it is also because of their very direct symbolic function that the regime of state decoration was always reformed when the state has changed its regime. In the case of Hungary, the last reforms were done at the time the Fundamental Law was adopted, so the symbolic change in the regime of decoration needs no further explanation, the former reform introduced after the change of regime in 1990, based on the regime established in 1946 after World War II, was nuanced and more historical decorations were reintroduced.

So, the contemporary regime of state decoration was established after 2010, and the reform was inspired by historical roots. As most important state decorations in Hungary, the Hungarian Saint Stephen Order, the Corvin-Chain, the Hungarian Order of Honor, but also the Hungarian Order of Merit and the Cross of Merit are to be mentioned without forgetting the Kossuth and Széchenyi Prizes.

The Hungarian Saint Stephen Order is the highest and the most prestigious state decoration in Hungary. It was first established by Mary Theresa in 1764 and re-introduced to the Hungarian regime of state decorations in 2011. It can be offered for the most excellent merits and life achievements. Only three of them are given per year.

The Corvin Chain is a state decoration that creates a permanent society of its owners. Only 15 persons can have the Corvin Chain at the same time. They are, themselves, deciding for the replacement of those whose death liberates a membership. Corvin Chain was originally established by the governor Miklós Horthy and was re-introduced in 2001. The members of the Corvin Chain Society are selected for their outstanding merits in the field of sciences, arts, education, and culture.

Those two highest levels of Hungarian state decorations have strong historical roots. The Saint Stephen Order is named in memory to the founder king whose symbolic role was already mentioned in the section about historical narrative; it is logical that the most prestigious Hungarian state decoration should be named after him. The Corvin Chain was named after Mathias Corvinus, a Hungarian king during the Renaissance whose name is linked to a flourishing cultural life. It is also interesting that the founders of the decorations did not give their own names to the state decoration, but there is also symbolism behind the chosen person and the head of state establishing the decoration.

The Hungarian Order of Merits can be offered to 30 persons per year, it is also one of the most prestigious recognition of merits. Then the Hungarian Order of Merits and the Cross of Merits should be also mentioned. Those are divided to several categories: classes and levels, with special rules about their offering. They were first established after World War II and re-introduced after the change of regime in 1990. Also, Kossuth and Széchenyi Prizes are listed among the highest state decorations. The first ones are given to artists, the second ones to scientists for their achievements.

As stated before, state decorations as such are very direct symbols, even though their symbolism can be explained at different levels, they are to be considered as fundamental national symbols and even though they are regulated by cardinal law, their protection can be considered as constitutional.

2.2.2. The Holy Crown

The very special nature of the Holy Crown has already been mentioned several times. The Holy Crown, also from a more general perspective, but especially in a constitutional approach, is obviously more than a symbol in Hungary. For some, the Holy Crown incorporates the national sovereignty, it is materially holding in it and not only symbolizing in the most general and abstract way even the existence of Hungary. For others, it is a more indirect, however also more than symbolic reflection of the national sovereignty that could be found in the Holy Crown. Even without going further in the study of the so-called Holy Crown doctrine and all the different constitutional debates that took place around the concept and the theory concerning the Holy Crown, it is obvious that this object is to be also listed among the national symbols, even though its meaning is above the symbolism of an object.

Incorporating, holding, or simply reflecting the national sovereignty, the Holy Crown is one of the most sacred and well-known (yet often debated) and very special concept and doctrine, but also, even if considered more than that, it is an obvious symbol in Hungary. Its symbolic function can be simply demonstrated by the role that is constitutionally and legally attributed to the Holy Crown, but also by its emplacement in the hall of the National Assembly, another symbol itself. Independently of its constitutional function or the concept and the doctrine about it, the Holy Crown also symbolizes the continuity and the independence of Hungary. It is enough to recall how it became the source of national sovereignty, replacing the person of the monarch in the medieval history of Hungary, and how the leading aristocracy assimilated itself with the Holy Crown, being the incorporation of a national community even before the rise of nationalism and the Hungarian concept of nation.

As a symbolic object, the Holy Crown benefits from constitutional protection. Even more, for some scholars, it is the source of national constitutionalism in Hungary. Special legal provisions regulate its emplacement, and a guard has been established for its physical protection, also with symbolic roles and functions. The Holy Crown is as much as, once again only from a perspective of symbolism, the object which symbolizes the Hungarian political community but also as strongly linked to or even considered as the source of national sovereignty. It is the symbol of the institutional construction, the constitutional state, and finally, with those two aspects, in a more general and abstract way, it symbolizes Hungary in all different aspects. The Holy Crown is obviously more than a symbol, as discussed in the first chapter as well. However, it is also a constitutionally protected symbol.

2.2.3. The National Assembly

Finally, among symbols, after the Holy Crown, with very different meanings and under a very different aspects, the National Assembly and its building should also be mentioned. Formally, it is according to a parliamentary resolution that it gained a symbolic function, but as it is usual for symbols, it could be considered one of the national symbols, even before it has been legally recognized as such. As a building and more abstractly as the space where the nation is represented, and according to the concept of representation, the national sovereignty is exercised, the National Assembly has always had a symbolic meaning.

The costumery, unwritten Hungarian constitution, often underlined the special role of the national parliament. However, the symbolism behind the National Assembly became more explicit in the second half of the 19th century when Hungarian parliamentarism was reinforced. Similar to British parliamentarism, it also originated in an unwritten constitutional context; it became the most important institution that considered itself sovereign. The construction of the symbolic building of the National Assembly was achieved almost by the end of this period, beginning the 20th century as a symbol of its characteristics and function.

The National Assembly is where, in line with the concept of national sovereignty and the theory of representation, the general will of the Hungarian nation is expressed. The building of the National Assembly is the symbolic space where the nation, in its representation, is present. This idea of representation gives a special symbolic function to a building which also symbolizing in its different parts some characteristics of the Hungarian nation and the constitutional framework of Hungary. Not only are statues or stylistic ornaments symbolic but also the emplacement of the building or its structure with two houses with a great hall between them demonstrating the unity of the nation. Finally, the disposition of the Holy Crown in this hall gives even more symbolic importance to the building.

In contrast to the Holy Crown, however, the National Assembly is only symbolic. And as a symbol, it is not only the reflection of the idea of national sovereignty. It symbolizes, especially today, the importance of a parliamentary regime regarding the modern, democratic form of public authority, but also standing as a symbol for the concept of representation, so of a certain institutional component of the Hungarian constitutional structure. Finally, at a third level, it reflects some particularities of Hungarian history, culture, and arts. By those, the National Assembly has some symbolic components whose importance can also be considered special because of its more general and symbolic function.

2.3. Community symbols

Numerous and various symbols can be identified as community symbols in Hungary. To categorize them, three different types of communities symbolized by those symbols can be listed. First, municipalities and other territorial authorities

like, for instance, counties and regions can be mentioned. Those benefitting from the constitutionally protected prerogative for self-government also got the right to define their own symbols. Their historical role and existence, as was demonstrated concerning national symbols, are also a source of those symbols. In Hungary, the historical role of counties is typical, and their symbols became more important at the same time as the symbols of important aristocratic families.

Secondly, the religious communities can also have their symbols. Those symbols are as historical as national symbols, sometimes, as was also mentioned, they are the most ancient, and national symbols are also using them. Also, as it was mentioned before, some of their symbols were used even before the use of national symbols, to symbolize the national community, as well. Religious communities are even today considered important and constitutionally protected institutions in Hungary according to the Fundamental Law, their symbols are also protected.

Thirdly, the communities of national minorities have also to be mentioned. Those communities are also constitutionally recognized and protected; their symbols are also important. For Hungarian nation and nationalism during the whole 19th century, it was an important, not only theoretical, but also practical question to integrate national and ethnic minorities to the concept of nation. Finally, by the end of the historically tragic 20th century, the constitutional protection of those communities was declared, at the same time, the concept of their inherent nature to Hungarian nation, developed in the second half of 19th century was also maintained.

It would be impossible to study all the different symbols of local and regional self-government, religious communities, and communities of national or ethnic minorities. They generally use the same holder of symbols as the nation or the state, such as coats of arms, flags, etc. Their symbolism can be as old and somehow also as important as the symbolic function that represents the symbols of the nation or the state. However, the most obvious rule about those symbols is that they should be defined in a way that they can be clearly distinguished from national official, constitutional, or state symbols. The protection of state symbols cannot be ensured only if the symbols of other communities or institutions differ. Also, harmony should be guaranteed among those symbols; that is why at a national level, some professional and academic organs were established to control and advise, especially municipalities when those would like to create their own symbols. The symbols of municipalities, religious communities, and communities of national and ethnic minorities are also constitutionally protected similarly to national and state symbols.

3. Rules on the use and protection of national symbols in Hungary

In the Hungarian legal system, there are five sources of law for the use and protection of national symbols, but there is no comprehensive regulation.¹⁹ The Fundamental Law of Hungary enshrines state symbols of sovereignty, like the coat of arms, the flag, and the national anthem.²⁰ The use and protection of these symbols are regulated in detail in various legal sources, as follows: (i) Act CCII of 2011 on the Use of the Coat of Arms and Flag of Hungary and state Decorations, (ii) Section 334 of the Hungarian Criminal Code on the Defamation of national symbols, (iii) Government Decree No 132/2000 (VII. 14.) on certain aspects of flag hoisting of public buildings, (iv) Decree 37/2012 (VIII. 22.) KIM on the authorization required for the grant of protection of trademarks and designs containing the coat of arms or the flag and finally (v) Act I of 2000 on the Commemoration of the Foundation of the state of Saint Stephen and the Holy Crown which is more a solemn commemoration than a law laying down precise legal rules for the protection of national symbols. In the following, the most important provisions of these legal sources will be used to present the most important rules on the protection of national and state symbols in the Hungarian legal system.

3.1. Act CCII of 2011 on the Use of the Coat of Arms and Flag of Hungary and state Decorations

According to the reasoning behind the proposal of the act, national symbols are symbols that express the innermost feelings of the nation and embody its unity and the permanence of which is in the national interest, and this requires stability not only in the way they are shaped and described but also in the way they are used. Article I) of the Fundamental Law defines national symbols in a form unchanged from the previous Constitution, so there was no compelling constitutional reason for a fundamental change in the regulation of the use of national symbols at the time of the adoption of the act. Still, the reasoning states that, in the light of the experience of 16 years since the former act on the use of national symbols had been adopted, the time was ripe for an update of the regulation content. Accordingly, the proposal maintained the essential difference in the functions of the coat of arms and the flag and set the rules and limits of use: the coat of arms has been regulated as a symbol of statehood, while the flag has been regulated as a symbol of nationalism, a traditional symbol of national feeling, which could be used more freely and with fewer restrictions. Under the act, the use of the coat of arms by the speaker of the National

19 The text of these sources of law is available in Hungarian only. The official Hungarian law searching system operated by the Ministry of Justice is available via the link www.njt.hu.

20 Art. I of the Fundamental Law.

Assembly, the president of the Republic, the prime minister, the president of the Constitutional Court, the president of the Curia, state bodies, and public institutions are still guaranteed by the act. In contrast, in the case of other budgetary bodies, ministerial decrees determine the rules for the use of the coat of arms based on the act's authorization.

According to the preamble of the act CCII of 2011, it is created by the National Assembly to implement the rules of Fundamental Law.²¹ The aim of the act is the recognition of the constitutional significance of national symbols and their place in the national consciousness and the recognition of the customs of using symbols that have become traditional, and in recognition of outstanding achievements.

The coat of arms of Hungary of the Parliament, members of Parliament, the president of the Republic, the Constitutional Court, members of the Constitutional Court, the commissioner for Fundamental Rights and his deputy, the state Audit Office, the National Bank of Hungary, the member of the government, the central state administration bodies, the Hungarian Defense Forces, the Court of Justice, the National Office of the Courts, the Public Prosecutor's Office and bodies performing administrative functions and their offices, local government, national minority self-government, public bodies, and persons entitled to represent those mentioned above may use and place them in their buildings and premises without permission in the performance of their official duties.²² The president of the Republic shall be entitled to use the coat of arms with two angels as shield holders, and the prime minister shall be entitled to use the coat of arms encircled with turkey oak and olive branches.²³

The coat of arms of local and national minority self-government must be distinguishable from the coat of arms of Hungary. To promote the professional creation of the coats of arms of local governments and national minority self-governments under the heraldic tradition, the government shall establish a National Coat of Arms Commission. The local government and the national minority government shall seek the opinion of this commission before creating or amending its coat of arms.²⁴

A natural person may not use the coat of arms in the exercise of his or her profession or vocation, nor may a legal person or an organization without legal personality—other than the bodies and persons referred to above—use the coat of arms in the course of its activities, as an organizational symbol or as part of its activities. A law may provide otherwise for a person or a specific group of persons.

On national holidays, the flag of Hungary shall be hoisted in a solemn ceremony with military honors in front of the Parliament.²⁵ Based on the article J) of the Fundamental Law, the national holidays of Hungary shall be the 15th day of March, in memory of the 1848–49 Revolution and War of Independence; the 20th day of

21 Cf. Art. I (4) of the Fundamental Law.

22 Act CCII of 2011, Art. 1, para. 1.

23 Act CCII of 2011, Art. 1, para. 2.

24 Act CCII of 2011, Art. 4.

25 Act CCII of 2011, Art. 6.

August, in memory of the foundation of the state and King Saint Stephen the state founder (the official state holiday) and the 23rd day of October, in memory of the 1956 Revolution and War of Independence.

At international fairs (in particular, exhibitions and trade fairs) and international cultural or social events, the Minister responsible for the coordination of government action may authorize the occasional use of the coat of arms by the holder of the right to organize or participate in such events. However, this can only be achieved if the holder has received public funding for organizing or participating in the event and the importance of the international fair, event and the activity of the organizer or the holder of the right to participate justifies the use of the coat of arms.²⁶

A private person may use the coat of arms, and the flag for national identification, subject to the restrictions set out in Act CCII of 2011. In addition, the occasional use of the coat of arms and the flag is permitted on national holidays, during related and other social events (in particular political, economic, scientific), other commemorations of a national character, and military honors. Using the flag together with the coat of arms is also permitted on these occasions; however, when using the coat of arms and the flag, everyone must respect their authority and dignity.²⁷

The National Assembly of Hungary, in accordance with the sovereignty of the state, has established four types of state decorations to honor and recognize outstanding achievements. These are the (i) Order of St. Stephen of Hungary; (ii) the Hungarian Corvin Chain; (iii) the Hungarian Order of Honour; and (iv) the Hungarian Order of Merit and Hungarian Cross of Merit.²⁸

The Order of St. Stephen of Hungary—a renewal of the Order of St. Stephen founded by Queen Maria Theresa on May 5, 1764—is intended to recognize the most outstanding special merits, outstanding life's work, and significant international achievements in the service of Hungary.²⁹ The Hungarian Corvin Chain is awarded in recognition of outstanding achievements in the fields of science and art, as well as in the promotion of education and culture. (The recipients of the Corvin Chain are the Hungarian Corvin Chain Board members.)³⁰ The Order of Hungarian Honor is awarded in recognition of outstanding service or heroism in the interests of Hungary and the nation.³¹ The Hungarian Order of Merit and the Hungarian Cross of Merit are awarded in recognition of outstanding and exemplary activities in the service of the nation, in promoting the country's development, advancing the country's interests, and enriching universal human values.³²

26 Act CCII of 2011, Art. 9.

27 Act CCII of 2011, Art.12.

28 Act CCII of 2011, Art.13.

29 Act CCII of 2011, Art.14.

30 Act CCII of 2011, Art.15.

31 Act CCII of 2011, Art.16.

32 Act CCII of 2011, Art.17.

The detailed rules of flag hoisting of public buildings are stated in Government Decree no. 132/2000. (VII. 14.) on certain aspects of flag hoisting of public buildings, which lays down mainly technical rules, such as rules on the size and cleaning of the flag.

3.2. Section 334 of the Hungarian Criminal Code

Section 334 of the Hungarian Criminal Code contains the rules of the “Defamation of national symbols” according to which:

person who verbally insults or humiliates or otherwise dishonors the national anthem, flag, or coat of arms of Hungary or the Holy Crown in front of a large audience is guilty of a misdemeanor and shall be punished by imprisonment for up to one year unless a criminal offense of greater gravity is established.³³

As we have already indicated, the major national symbols of Hungary (primarily state symbols), such as the national anthem, the flag, and the Hungary coat of arms, are defined in article I) of the Fundamental Law. These are the ones that are primarily protected by criminal law. However, it is interesting to note that, in view of its special role in Hungarian history and the development of the constitution, the Hungarian Criminal Code also protects the Hungarian Holy Crown. The offense is committed through the use by the person committing the offense of insulting or degrading expressions or other forms of desecration of national symbols protected by law. However, the offense can only be established if committed in public and only if a more serious offense is not committed. The offense may be committed by any person but may only be committed intentionally.

3.3. Act I of 2000 on the commemoration of the foundation of the state of Saint Stephen and the Holy Crown

Act I of 2000 the so-called “Millennium Law,” is a commemorative law, a kind of tribute to the state’s founding, concerning the custody and protection of the Hungarian Holy Crown. Its solemn preamble states:³⁴

The generation that has been allowed to step from one millennium to the next, looking both to the past to take stock of the nation’s past thousand years and to the future to prepare for the next millennium. A thousand years ago, with the coronation of our first king, Saint Stephen, the Hungarian people were united with the peoples of Europe in the Christian faith. Since then, Hungary has been an integral

³³ Act C of 2012 on the Criminal Code, is available in English: https://njt.hu/translation/J2012T0100P_20220401_FIN.pdf.

³⁴ The text of the law is not available in English. The translation is the author’s own.

part of Christian Europe. This has ensured the survival of the Hungarian nation and its dominant role for centuries. Today, Hungary is still founded on the work of Saint Stephen. The work of King Stephen led to the establishment of a prosperous state in the Carpathian Basin. Over the centuries, the Hungarian state has contributed to the development of the Christian world by holding off the attacks of the West. Over the past thousand years, we have developed our own unmistakably individual culture, which is also an inseparable part of the diverse community of European nations. The Hungarian state and the Hungarian nation became suitable for the historical role he fulfilled for a thousand years because of the visionary personality of Saint Stephen, his sense of mission, and his iron will, trusting in divine providence. It was the adoption of the Christian faith and the building of the Christian state that enabled the Hungarian nation to repel the attacks on its existence, to maintain its moral fibre not only in times of triumph but also in times of conquest, occupation, dismemberment, and dictatorship, and to survive conquering empires that are believed to be eternal. The Holy Crown is a relic of the continuity and independence of the Hungarian state, living in the nation's consciousness and the tradition of the Hungarian public law. On the occasion of the thousandth anniversary of the founding of the state, Hungary will raise the Holy Crown to its rightful place and place it under the protection of the National Assembly, which represents the nation, from the nation's museum.

By Act I of 2000, the National Assembly established the Holy Crown Council to protect and preserve the Holy Crown and its insignia. The members of the Council shall be the president of the Republic, the prime minister, the Speaker of the National Assembly, the president of the Constitutional Court, the president of the Curia,³⁵ the president of the Hungarian Academy of Sciences, and the president of the Hungarian Academy of Arts. The president of the Republic is the chair of the Council. If the president of the Council is prevented from attending to his/her duties, the vice chair of the Council shall act as chair. The Council meets as necessary, but at least once a year. The chair shall convene meetings of the Council. A quorum shall exist when at least three members of the Council are present. The Council shall take its decisions by a simple majority, and the decisions of the Council, taken within the scope of its functions, are binding on the body which holds the fiduciary functions of the Holy Crown and its insignia.³⁶

35 The Supreme Court of Hungary.

36 Cf. Arts.1–5.

4. The protection of national symbols in the case law of the Hungarian Constitutional Court

The Hungarian Constitutional Court has dealt with the protection of national symbols in several decisions,³⁷ among which the protection of national symbols under criminal law stands out. Below we present in detail the most important decisions and findings of the Constitutional Court, which determine the (criminal) protection of national symbols in Hungary.

Perhaps the most important decision of the Constitutional Court concerning the protection of national symbols is Decision 13/2000. (V. 12.) CC. In the case, the Constitutional Court examined the provisions of the former Hungarian Criminal Code, Act IV of 1978, concerning the desecration of national symbols. Two petitions were received, merged by the Constitutional Court and examined in a single procedure. According to the petitioners' position, Section 269/A³⁸ of the former Criminal Code violated the freedom of expression as a fundamental right under article 61 (1)³⁹ of the former Hungarian Constitution.

According to one of the petitioners, the provisions of the Criminal Code diminished too much value and used the wrong instrument to ensure respect for national symbols through legal means. According to the other petitioner, insulting national symbols was a specific aspect of expressing an unusual opinion in Hungary.⁴⁰ According to the same petition, it is discriminative that the Criminal Code protects only the national symbols of Hungary. The Constitutional Court rejected the petitions. As previously explained, state symbols enshrined in the Fundamental Law are still protected by criminal law in Hungary.

In the case, the Constitutional Court reviewed the constitutional and criminal law of certain European countries in relation to national symbols, the relevant international conventions, and the case law of the European Court of Human Rights. In the comparative analysis, the Constitutional Court examined the nature of the constitutional regulation of national symbols in the practice of European countries. In this context, the Constitutional Court has noted that most European constitutions

37 The most important of these are: CC decision no. 48/1991. (IX. 26.); CC decision no. 31/1994. (VI. 2.); CC decision no. 535/B/1996; CC decision no. 1464/B/2007; CC decision no. 13/2000. (V. 12.); CC decision no. 14/2000. (V. 12.); CC decision no. 18/2004. (V. 25.); CC decision no. 4/2013. (II. 21.); CC decision no. 16/2013. (VI. 20.).

38 Art. 269/A—Violation of National Symbol: “The person who—before great publicity—uses an expression outraging or humiliating the national anthem, the flag or the coat of arms of the Republic of Hungary, or commits any other similar act, unless a graver crime is realized, shall be punishable for a misdemeanor with imprisonment of up to one year, labour in the public interest, or fine.”

39 There is no substantive difference between Hungary's current Fundamental Law and the relevant provisions of the former Constitution. The Art. IX of the Fundamental Law contains the provisions to freedom of expression. The Fundamental Law of Hungary is available in English: https://njt.hu/translation/TheFundamentalLawofHungary_20220525_FIN.PDF.

40 There are no significant differences between the previous and current rules in this aspect.

contain rules on specific national symbols, which are generally placed at the beginning of the constitutions, in the context of sovereignty, among the fundamental provisions. According to the Constitutional Court, in the west, north, and south, the European constitutions most often specify the national colors; some include the national anthem, the capital, the official language, the oath, and the use of slogans or mottos as national symbols. Central and Eastern European constitutions are coat of arms oriented. Almost without exception, the flag, the anthem, and the capital are included in all constitutions alongside the coat of arms. In addition, the official language and the state seal are common.

According to the Constitutional Court, there are two types of constitutional regulation of the national symbols: constitutions that describe the content of the national symbols, such as the elements of the coat of arms. In contrast, other constitutions leave the regulation of the national symbols to the legislature. Constitutions usually provide exclusive legislative competence—often by a qualified majority, for the use and protection of national symbols. The decision stated that some constitutions also contain that national symbols are respected and enjoy special legal protection. (It should be noted that in an earlier decision, the Constitutional Court stated that fundamental Constitutional rights could only be those explicitly enumerated in the constitution. Among these, the constitution does not grant any person a subjective right to use national symbols.⁴¹)

Based on comparative analysis, the Constitutional Court also found that the violation of national (state) symbols is punishable by criminal law in several European countries. Such provisions are contained, for example, in the Austrian, German, Swiss, Italian, Spanish, Portuguese, and Polish criminal codes. Moreover, the criminal codes of these countries define the offense in partly different, partly similar, or identical terms: national colors, other national and state symbols, and national emblems—including, in the case of federal states, the symbols, flags, coats of arms of the Member states, provinces, cantons, etc.—are protected by criminal law.

The German, Italian, Portuguese, and Polish criminal laws give the same protection to national symbols of foreign countries as to national symbols at home. The criminal codes of each state have structurally placed this offense among the offenses against the state. The criminal laws of the listed states contained similar punishments to the (former) Hungarian Criminal Code. Based on all the above, the Constitutional Court concluded that the protection of national (state) symbols under criminal law could not be considered a Hungarian specificity.

A comparative study by the Constitutional Court has shown that many European countries have criminal law rules restricting freedom of expression in relation to state symbols. In these democratic countries, it is therefore considered necessary to prevent the expression of opinions that are offensive to the symbols of the state; to

41 Cf. CC decision no. 31/1994. (VI. 2.).

prevent the expression of opinions that are offensive to those who profess a sense of belonging to that state.

According to the Hungarian Constitutional Court, the freedom of expression has generally been extended in European constitutional democracies. At the same time, the scope of the legal objects protected by criminal law has been narrowed. In democratic societies, notwithstanding national historical traditions, these protected legal objects include national symbols, *inter alia* because of constitutional provisions. Consequently, parliaments have a wide discretion to include national symbols among the objects protected by criminal law.

In its decision, the Constitutional Court pointed out that the symbols are part of the history of humanity and human communities. On the one hand, symbols have expressed the affiliation of the individuals using the symbol to a particular community. On the other hand, they have also represented the community. Although there are now symbols for the whole of humanity and large regions, the symbols of national communities that the state has organized are of particular importance. According to the Constitutional Court, the notion of a nation as a community has historical significance and is temporal and territorially relative. The nation has been inextricably linked to state power in the historical process of nation–state formation. National symbols reflect this historical process and have thus become symbols of statehood. National symbols have also had the power to preserve and maintain the idea of sovereignty in times of loss or limitation of statehood.

National symbols, therefore, have a dual meaning, the Constitutional Court pointed out. On the one hand, they can be regarded as external forms of display of statehood and state sovereignty. On the other hand, they are also a means of expressing belonging to the nation as a community. Under the conditions laid down by law, these symbols may be widely used by community members, both natural and legal, to express their conviction of belonging to the Hungarian nation or state.⁴² It should be noted that the Constitutional Court has pointed out that the national symbols regulated in the former Constitution (identical to the national symbols regulated in the current Fundamental Law) are closely linked to the constitutional regime change of 1989–1990 and the establishment of constitutional democracy.

In its decision, the Constitutional Court pointed out that the significance of the national symbols included in the text of the former Hungarian Constitution has increased during the change of regime because of the country's recent history—the transition from a totalitarian state to a democratic society—which is also underlined by the criminal law protection of certain conduct that violates these symbols. According to the Constitutional Court, the fact that, from 1948 until the constitutional

42 The law on the use of national symbols in force at the time of the Constitutional Court's decision explicitly recognized the possibility of expressing national sentiment through national symbols and, while preserving the prestige of the symbols, allowed individuals to use them to express national belonging and, on an *ad hoc* basis, on various national holidays and social events. As we have seen in the previous chapters, the current rules in force does not differ in substance from the rules in force at the time of the Constitutional Court's decision.

change of regime, state independence and national symbols were closely linked is an essential element in assessing the specificity of history. Belonging to an independent Hungarian state, the national feeling took a back seat to internationalism, the coat of arms was changed, arrests were regularly made on national holidays, and the use of the national symbol aroused political suspicion. The Constitutional Court pointed out that the constitutional importance of national symbols and the increased and special protection of these constitutional values is supported and made clear by the provision of Art. 76(3) of the former Hungarian Constitution, which required a two-thirds majority of the members of National Assembly to adopt the law on the coat of arms, the flag, and their use. It should be noted that Hungary's Fundamental Law, which entered into force in 2012, did not change this criterion and still requires a two-thirds vote of the Members of the National Assembly to amend the existing law or adopt a new law on national symbols.

In its decision, the Constitutional Court pointed out that pluralism of opinion is only one of the essential criteria of democracies. Democracies are characterized by the existence of institutions and symbols representing the unity of the country, which, while not uncritical, are in some respects outside the pluralism of opinions that should be constitutionally protected. According to the Constitutional Court, this principle is reflected in the case of the president of the Republic, who expresses the unity of the nation, whose person is inviolable under the Constitution, and whose criminal protection is guaranteed by a special law. According to the Constitutional Court, the statement that the president of the Republic expresses the unity of the nation expresses, in the present context, the impartiality of the function of the president of the Republic rather than the fact that an attack on the president is considered an attack on a national symbol (flag, coat of arms, anthem). In the specific regulation of the protection of honor, the legislator may choose to impose more severe sanctions or to allow greater freedom of criticism of the conduct of public office and office holders.⁴³

According to the Constitutional Court, the national symbols enshrined in the Constitution (Fundamental Law) are even more constitutional symbols of the external and internal integrity of the country than the president of the state bound to a term of office, and there are therefore constitutional arguments in favor of their protection under criminal law. Increased public and criminal law protection of institutions expressing and representing national sovereignty is constitutionally accepted in European legal cultures and is a justified limitation of freedom of expression. The Constitutional Court has ruled that negative opinions on national symbols, the expression of scientific opinions, artistic expressions or criticisms of the history, value or public significance of symbols, or proposals to change or abolish them, cannot be subject to criminal sanctions but are part of the constitutional freedom of expression.

⁴³ Cf. CC decision no. 48/1991 (IX. 26.).

In the Constitutional Court's view, the petitioner's claim that the rule of the Criminal Code had been discriminatory was not well-founded. The provision of the Criminal Code in question only grants criminal protection to national symbols defined and protected by the Constitution (Fundamental Law). It is within the legislature's discretion whether, in addition to the national symbols defined in the Constitution (Fundamental Law), it should also give criminal protection to the national symbols of foreign states. Given the above, the Constitutional Court rejected the petitions.

The Hungarian Constitutional Court made much shorter but more significant findings in *Decision 535/B/1996 CC*, where the petitioners sought a declaration of the unconstitutionality of article 3 (1) of act LXXXIII of 1995 on the Use of the National Symbols of the Republic of Hungary and the Name of the Republic of Hungary because it generally prohibited the use of the coat of arms and the distinguishable elements of it by social organizations. In its decision, the Constitutional Court held that the constitutional provisions on national and state symbols are linked to such paramount values as the sovereignty of the people and of the state, national identity, and the integrity and inviolability of the state's territory.

It is worth noting that the concept of national identity appears in the 1996 decision of the Hungarian Constitutional Court. The well-known "identity clause" of the European Union in Art. 4(2) of the Treaty on the European Union⁴⁴ was introduced into the European Union's legal order by the Maastricht Treaty in 1992. The protection of the national identity of Member states was introduced as a requirement in the EU legal order by the Maastricht Treaty. In contrast, the equality of Member states before the Treaties (first turn) and respect for the fundamental functions of the state were only introduced by the Lisbon Treaty. The first version of the currently known text of the TEU was drafted when the Constitutional Treaty was drafted and originally used the term "essential Member state functions," which was understood as part of national identity but was later included in the Lisbon Treaty in its current form to protect the sovereignty of Member states.⁴⁵

The Hungarian Constitutional Court has referred to the notion of constitutional and national identity in the past ten years in several decisions⁴⁶. However, the practice of the body concerning national symbols shows that the role of national identity in Hungarian constitutional culture goes back much deeper than the primacy of EU law. Rather, its roots go back to the regime change and the decades preceding it

44 "The Union shall respect the equality of Member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member state."

45 Cf. Blanke and Mangiameli, 2013, pp. 187–188.

46 Cf. CC decision no. 22/2016. (XII. 5.); CC decision no. 2/2019. (III. 5.); CC decision no. 32/2021. (XII. 20.).

when the country was under foreign occupation and temporarily deprived not only of its sovereignty but also of its national identity.⁴⁷

The Hungarian Constitutional Court pointed out in its Decision 32/2021. (XII. 20.) CC at the end of 2021,⁴⁸ that the man, as the most elementary constituent of all social communities, especially the state, is born into a given social environment, which can be defined as man's traditional social environment, especially through its ethnic, linguistic, cultural and religious determinants. These circumstances create natural ties, determined by birth, which shape the identity of community members. These natural ties or qualities, determined by birth, are considered circumstances that influence a person's self-determination, which, on the one hand, are created by birth and, on the other hand, are qualities that are difficult to change. Therefore, protection under constitutional law should not be abstract, static protection of the individual removed from his or her historical and social reality: It must consider the dynamic changes in contemporary life.⁴⁹

It is this link that connects national identity and national symbols at the level of the individual. For the individual, national identity is, in many cases, realized through national symbols. (This is due to the symbolic nature of national symbols since the purpose of all symbols is to convey or simplify content.⁵⁰)

As regards the concrete decision of the Constitutional Court about the national symbols, it stated in its decision that article 3(1) of the act prohibits the use of the coat of arms of a private person, legal entity, or unincorporated organization only as a rule and that a law may provide for an exception to the prohibition, such derogations are laid down by the act itself. According to the Constitutional Court, the constitutional definition of national and state symbols with new content is an indispensable result of the historical change like the state and the sovereignty of the people due to the change of regime. Consequently, legislation abolishing the rights of use deriving from licences granted under previous political regimes⁵¹ is not unconstitutional, and the petition was therefore dismissed.

Indeed, it is indirectly related to national symbols, but we must also mention *Decision 4/2013. (II. 21.) CC*⁵² of the Hungarian Constitutional Court since the Constitutional Court expressed its views on using symbols and freedom of expression in this case. The petitioner requested the annulment of the clause "five-pointed red star" in Section 269/B (1) of act IV of 1978 on the (former) Hungarian Criminal Code as part of an ex-post norm control since, in his view, it infringes freedom of expression.

47 Cf. Bíró-Nagy, 2016.

48 The summary of the decision is available in English: <https://hunconcourt.hu/announcement/decision-of-the-constitutional-court-on-the-interpretation-of-the-provisions-of-the-fundamental-law-allowing-the-joint-exercise-of-powers>.

49 CC decision no. 32/2021. (XII. 20.), [33]–[35].

50 Cf. Halász and Schweitzer, 2020.

51 In the petition, the petitioner invoked an entitlement from before the regime change.

52 Codices summary is available: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-1-003>.

The petitioner explained that the impugned legal provision, the criminal statutory provision of the use of symbols of despotism, criminalised the dissemination, use, and display in front of a large public gathering of symbols that had been symbols of political dictatorships that violated fundamental human rights.⁵³

In its decision, the Hungarian Constitutional Court stated that the institutional protection obligation of the state to protect fundamental rights might justify state intervention in a proportionate, that is, constitutionally justified, way. To protect human dignity and the constitutional order and values, the Constitutional Court considered it a legitimate aim for the legislator to prohibit conduct contrary to this criminal law. However—according to the Constitutional Court—the legislator must ensure the functioning of a legal institution with a precise definition and safeguards against the arbitrary application of the law if the legal institution involves a restriction of a fundamental right.⁵⁴ According to the Constitutional Court, The public formulation, dissemination of views expressing identification with dictatorial regimes or criminalisation of similar purported conduct may be constitutionally acceptable if the criminal law is sufficiently precise, specific, and definite to ensure that it does not constitute a disproportionate interference with freedom of expression or that the statutory definition is related to scope as narrow as possible to achieve the aim pursued.

The Constitutional Court also found freedom of expression in its Decision 16/2013. (VI. 20.) CC. In this decision, the board, referring to its previous practice, held that a restriction of a fundamental right is permissible in a given case, even though the denigration of national symbols does not in itself entail a violation of a fundamental right of the individual. Therefore, the Constitutional Court considered that the protection of the honor of symbols that ultimately express statehood and all national values took precedence over the individual's constitutional right to freedom of expression.⁵⁵

5. Summary

In Hungary we can distinguish between national symbols: the national symbols enshrined in the Fundamental Law, which can be understood as state symbols, and the category of national symbols not enshrined in the Fundamental Law. The former is narrower in scope and based on a taxative list in the Fundamental Law. These state symbols can also be considered symbols of sovereignty, and, as such, their use and protection are based on legal provisions.

53 CC decision no. 4/2013. (II. 21.), [2].

54 CC decision no. 4/2013. (II. 21.), [61].

55 CC decision no. 16/2013. (VI. 20.), [44].

This protection is implemented through a two-way system: on the one hand, the violation or desecration of the state symbols provided for in the Fundamental Law is protected by criminal law, which is embodied in the offense of Defamation of national symbols provided for in article 334 of the Hungarian Criminal Code, according to which:

a person who verbally insults or humiliates or otherwise dishonors the national anthem, flag, or coat of arms of Hungary or the Holy Crown in front of a large audience is guilty of a misdemeanor and shall be punished by imprisonment for up to one year unless a criminal offense of greater gravity is established.

On the other hand, the use of these symbols is governed by a specific cardinal act under the Fundamental Law, which is currently the Act CCII of 2011 on the Use of the Coat of Arms and Flag of Hungary and state Decorations. Furthermore, the provisions of the law on the use of the flag and the coat of arms are supplemented by two decrees. These lay down the rules on the flag hoisting of public buildings and the rules on the authorization required for the protection of trademarks and designs bearing the coat of arms or the flag.

In addition to these rules, the practice of the Constitutional Court is of particular importance in the Hungarian legal system, which has developed an extensive practice in the past thirty years in the context of the protection of national symbols, especially about the criminal law protection. The Constitutional Court contrasted the protection of national symbols with the freedom of expression. It held that the criminal law protection of national symbols is not contrary to the Fundamental Law given their function. Still, the criminal law regulation must be interpreted restrictively.

Although the Fundamental Law does not list the Hungarian Holy Crown as a state symbol, the Criminal Code protects it, which embodies Hungary's historical constitution and constitutional order and the history of the Hungarian nation. Furthermore, the Hungarian Holy Crown expresses the unity of the Hungarian nation, which, given the events of the twentieth century, found itself in a special situation due to the Treaty of Trianon: the political nation was separated from the cultural nation. The situation brought about by the Treaty of Trianon and the country's dismemberment caused a rupture in Hungarian national identity that still defines historical memory and national consciousness today. Therefore, the Hungarian Holy Crown⁵⁶ is the link that embodies the unity of the Hungarian nation with its homeland for those torn apart by the border.

56 Cf. László, 2003, pp. 421–510.

Another group of national symbols is those not constitutionally protected,⁵⁷ i.e., their use and protection are not regulated by law. These symbols (in many cases a historical event, a building, or a place), like symbols regulated by the state, express national identity, reinforce or even serve as a means of expressing a sense of national identity and belonging to the nation. The role of these symbols, however, can only complement the former category, and their violation can at most raise moral concerns but no legal consequences.⁵⁸

57 For instance the national memorial sites, which are sites of decisive importance in the history of the nation, which are of outstanding significance in the self-image of the Hungarian nation, the Hungarian nation and the nationalities living in the territory of the country, and which can be the site of nationally significant state commemorations. The declaration of a national memorial site falls within the competence of the National Assembly. Cf. Halász and Schweitzer, 2020.

58 It is worth noting that many of these symbols are a consequence of the Treaty of Trianon, such as the symbol of Greater Hungary.

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LEGAL PROTECTION OF STATE,
NATIONAL AND COMMUNITY SYMBOLS
IN POLAND



ALEKSANDRA SYRYT

1. Introduction

National and state symbols emphasize the character and independence of the country to which they belong. They usually derive from the history of a nation and thus serve to build patriotic attitudes and national identity. Polish national symbols include the flag, emblem, and anthem, and they are established by law in a special act and are constitutionally protected. Some researchers say that other things, such as traditions, folk costumes, legends, places important for forming statehood, military uniforms, etc., can also be considered as national symbols.

In Polish literature, the issue of national and state symbols has been the subject of various studies, especially in the legal–historical context and criminal protection. The ongoing discussion in Poland on amending the act on the emblem, colors, and anthem of the Republic of Poland and on state seals is an opportunity to summarize the legal status to date and the position of doctrine on this issue. It is also an opportunity to verify the solutions in force in the context of assessing the degree of legal protection.

The chapter on state, national, and community symbols in Poland will be the analysis of symbols that have a formalized character (flag, emblem, anthem). The author will also refer to such signs, which, although not specified in normative acts, are traditionally associated with the Polish state and the Polish nation, and have reference primarily to history and religion. Although Poland is not a multinational

Aleksandra Syryt (2022) Legal Protection of State, National and Community Symbols in Poland. In: Zoltán J. Tóth (ed.) *Constitutional and Legal Protection of State and National Symbols in Central Europe*, pp. 177–215. Miskolc–Budapest, Central European Academic Publishing.

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state, it protects national and ethnic minorities through a special law. The chapter will therefore also present this issue, i.e., the attitude of the Polish state to the protection of symbols of ethnic and national minorities.

The study will present the history of Polish national symbols and explain their present shape. In particular, the issue of the formation of the national emblem and the anthem of Poland will be presented. Next, the author will point to the legal basis for recognizing certain symbols as national symbols. In this respect, constitutional and statutory solutions will be presented. Furthermore, the author will discuss the guarantees of protection of national symbols based on normative acts and case law. Legal protection will include constitutional, administrative, and criminal dimensions. Aspects of civil law protection will also be highlighted.

The analysis will assess whether the current legal solutions in Poland properly and sufficiently ensure the protection of national symbols and whether they are conducive to the formation of a sense of belonging to a particular state and nation in society.

The main research method will be the analysis of historical documents and studies (regarding the history of national symbols) and the analysis of normative acts and the selected jurisprudence of the courts (regarding the shape and protection of national symbols). A complimentary review of the literature on the subject will be made.

2. The concept, types and meaning of national and state symbols

Humans are social beings, which results in their natural ability to join different groups and identify with them. Among those groups, there is a community that can be described as a nation. It develops for a long time and is expressed in the relationship of generations, which consists of ancestors, living people and their descendants. A nation can maintain its historical continuity, assume the heritage in the form of language, emblem, flag, cultivate it and pass it on to the next generations as a value related to society.¹ The sign-symbolic structure of culture enables people to capture and express some order and meaning that are present in the world.² In the case of national community, signs-symbols that structure and express it—there are certain national signs-symbols.³ It is also an important element of building awareness about statehood. Part of being attached to a nation is a common understanding of its symbols. They usually refer to events and facts commonly recognized as crucial

1 Frankiewicz, 2012, p. 20; Winczorek, 1998, pp. 52–53.

2 Pisarek, 1983, p. 8; Kieliszek, 2011, p. 241.

3 Kłosowska, 1996, p. 100.

in the history of a given nation or state. They are related to the common values a given community is guided by.⁴ Therefore, they are important for national identity.⁵ Therefore, a set of individual national signs and symbols becomes a structure that connects a given group of people into a specific nation and at the same time, more or less clearly distinguishes it from other communities.⁶ They connect the group of people into a community of people who culturally perceive and shape reality in a similar way.⁷

State symbols are closely related to the historical tradition and history of a given nation and state. They characterize the existence of a nation and a state and have a strong impact on the sense of national identity, which means that in the light of EU law, this issue remains in the sphere of national law regulation.⁸

The importance of symbols for the shaping and functioning of individual communities does not have only a cultural dimension. They are the subject of sociopolitical discourse. They identify the state among other countries and constitute an element connecting citizens in the territorial and cultural community.⁹ The basic functions of national and state symbols include those associated with distinguishing a state from other states and confirming its identity.

In the context of European legal culture, emblems, colors and songs are recognized as symbols of particular importance. Rarely these are the seal, the state's motto, and the president's flag. In Polish literature, the concept of national symbols is distinguished from state symbols, although the referents of these two categories are often convergent or even the same. The distinguishing feature is that in the case of state symbols, the legislator recognized the symbols of a specific country to be official.¹⁰ Therefore, representatives of the doctrine of Polish law recognize state symbols such as national symbols that have obtained legal fixation and regulation, thus affecting the manifestation of the legal personality of the state¹¹.

The reference to traditional symbols that are known in history is especially visible in the case of states regaining independence. On the other hand, the rejection or modification of the former symbolism is characteristic of countries undergoing

4 Borucki, 2013, p. 3.

5 Paweł Sarnecki states that state symbols confirm the identity of Poland and placing them in "Chapter I" of the Constitution is a reference to the fragment of the Preamble to the Constitution "in gratitude to our ancestors for their work, for the fight for independence paid for by enormous sacrifices, for the culture rooted in the Christian heritage of the nation" and a direct reference to the national heritage (Sarnecki, 2007, p. 2).

6 Kłoskowska, 1996, p. 100.

7 Kieliszek, 2011, p. 242. This means that national and state symbols also have educational and culture-forming functions (Lizak, 2016, p. 39).

8 Kubuj, 2016, para. 28–32.

9 Hernacka–Janikowska, 2020, p. 47.

10 Grabowski, 2011, p. 33.

11 Komarnicki, 1992, p. 236.

significant political system or ideological changes, which was also visible in the shaping of state symbols in Poland.¹²

The determination of state symbols belongs to the educational sphere of a constitutional act, and it has a socio-inclusive character.¹³ For this reason, the constitutional regulation of state symbols is usually limited to basic regulations and usually refers to ordinary laws.

3. Legal basis for regulating national and state symbols in Poland—general issues

An analysis of the protection of national and state symbols requires indicating its legal sources. As far as Poland is concerned, to understand certain mechanisms, it is necessary to quote historical normative acts and to clarify the political and legal contexts that accompanied the formation of both given symbols and their legal regulations. Older solutions have been followed up and are largely reflected in the current legislation¹⁴.

The current Polish state coat of arms prototype is the one from 1927. It was used in Poland, although not unchanged, by various states with ideologically different systems. The similarity of subsequent designs of the Polish coat of arms is apparent. The state of coats of arms from 1927, 1952 and 1990 distinguishes many important elements that allow to symbolically describe the changes taking place in the state¹⁵.

Until the adoption of the constitution of the People's Republic of Poland,¹⁶ the issue of state symbolism was a matter of customary law, and it was partially regulated by acts of a lower order. In the period of the Second Polish Republic (1918–1939), this issue was first regulated by the act of August 1, 1919 on the emblems and colors of the Republic of Poland.¹⁷ Art. 1 of the above act provided for the use of emblems and colors by state offices according to the models attached to it, until the borders of the Polish state were determined and the emblems, state colors and the titles of state offices and institutions were determined by the constitution. The act contained specimens of the coat of arms of the Republic of Poland, colors, seals, banners, diplomatic and war flags, as well as military banners and banners, as well as flags and emblems of individual ministries. The use of these signs by entities other than public (i.e., non-state institutions and private persons) required the permission

12 Wiszowaty, 2011, p. 31.

13 Sarnecki, 2007, p. 2.

14 Grabowska, 2010; Grabowska, 2016, pp. 175–186.

15 Grabowski, 2011, p. 33.

16 Constitution of the People's Republic of Poland of 22 July 1952, Journal of Laws no. 33, item 232, as amended. See also: consolidated text of 1976, no. 7, item 36.

17 Journal of Laws no. 69, item 416 as amended.

of the Minister of the Interior. The provision of Art. 2 of the act mentioned above was of a criminal law nature. The use of state marks without permission, or even with permission, but in a manner “in breach of the honor due to the Republic of Poland” sanctioned alternative and cumulative penalties. These were fines ranging from 10,000 to 10,000 marks and imprisonment ranging from three days to six months unless other laws provided for more severe penalties. Undoubtedly, the mark in the form of “dishonor to the Republic of Poland” was highly appraised. The concept of worship is multidimensional and there is even to this day a dispute in terms of its understanding.¹⁸ However, the concept of worship has evolved over the years due to the ongoing socio-economic changes.¹⁹

That law was a temporary solution. It was replaced by the Regulation of the president of the Republic of Poland of December 13, 1927, on state emblems and colors and on signs, banners, and seals.²⁰ According to the regulation, the state emblems were: 1) the state coat of arms,²¹ 2) the flag of the Republic of Poland, owned only by the president of the Republic of Poland.²² The state colors were white and red in two horizontal, parallel stripes of equal width and length, the upper one was white and the lower one was red (a shade of cinnabar). The flag of the state was established as a flag of state colors.²³

The regulation of 1927 broadened and clarified the extent of state marks and the level of their protection. This act stipulated that person guilty of using the state coat of arms or the state eagle, the flag of the Republic of Poland, the flag of state colors or the flags and other military signs in a manner that violated the honor due to the Republic of Poland would be subject to a prison sentence of one month to two years or imprisonment for up to six weeks. Art. 22 of the Regulation penalized conduct essentially in insulting a country’s honor by improper use of national symbols. The courts competent to adjudicate in this regard were regional courts. Penalization extended by the indication that this offense is also committed when the act was committed in relation to similar signs that may give the impression of a state coat of arms, a state eagle or a banner and the signs described in this provision. The indicated shape of the standard enlarged the subject of protection and emphasized its importance. Acts considered inappropriate were penalized, even in relation to symbols that, although they did not correspond strictly to state symbols, were like them and thus allowed for the separation of Polish statehood. Although there is currently no similar legal norm in the Polish legal system, and the expanding interpretation is generally negated in criminal law, an analogous view can be found in both doctrine and jurisprudence.

The Presidential Regulation of 1927 imposed an obligation to obtain appropriate permits for the use of state marks, prohibiting the use of state eagle seals by private

18 Zgoliński, 2019, pp. 340–341.

19 Kozłowska-Kalisz, 2013, p. 219.

20 Journal of Laws of 1939 no. 2, item 8 as amended.

21 It was an image of a White Eagle with golden talons, on a rectangular shield in a red field.

22 It was a red flag with the image of the national eagle in the center and with a border around it.

23 Kubuj, 2016, para. 4.

entities. Failure to comply with these obligations was slightly less severe because the penalty was a fine from 10 to 500 zł, and the penalty was imprisonment for up to three months. It was also possible to impose both penalties together. The courts competent to adjudicate in such cases were the private courts. It sanctioned, in addition, the conduct consisting in deficiencies related to the production of seals and the supervision over their production. The penalty for such acts was a fine of 50 to 500 zł, a custodial sentence of up to six months, or both penalties imposed together. Also, in this case, the judicial powers were conferred on the district courts. The above was the provision of Art. 21 and 22 of the Regulation, respectively.²⁴

State symbols were also protected by the Criminal Code of 1932. In Chapter XXV of the Criminal Code of 1932, “Crimes against public order,” Art. 153 penalizing behavior consisting in insulting the emblem, banner, flag, banner, or other Polish national emblem and damaging or removing signs of this kind issued to the public. The penalty for committing the crime was a prison sentence or imprisonment of up to two years. Therefore, the provision distinguished in its content two types of enforcement activities, i.e., insult and removal or damage. For the sake of preservation in the form of insult, there is no requirement that the state mark be issued in public.²⁵

The state symbols of other countries were protected by the standard provided for in Art. 112 §1 of the 1932 Criminal Code, in accordance with the principle of reciprocity. Penalized with imprisonment of up to one year were conducts consisting in insulting, damaging, or removing the emblem, banner, or flag of a foreign state, which were displayed to the public by the representative office of that state. Therefore, the protection of foreign state symbols was narrower, had a smaller scope, and was sanctioned with a lower penalty. The behaviors which make up the causative act were interpreted in a similar way as in the case of Art. 153 of the 1932 Criminal Code.²⁶

The matter of state symbols was regulated neither in the constitution of March 17, 1921 nor in the constitution of April 23, 1935. However, such an announcement was included in the Act on the emblems and colors of the Republic of Poland of 1919.²⁷

During World War II, the significance of Polish state symbols took on greater importance. One should agree with Igor Zgoliński that citizens have a greater attachment and identification toward personifying signs in the face of state crises, irrespective of their aetiology. This fact proves their significant integrating role²⁸.

The 1944 Polish Army Criminal Code²⁹ omitted the obligation to respect Polish state symbols. However, the legislator sanctioned the behavior detrimental to foreign state marks, similar to the provision of Art. 112 of the 1932 Criminal Code. The provision of Art. 101 of the Criminal Code of the Polish Army states that anyone who, in

24 Zgoliński, 2019, p. 342.

25 Makarewicz, 1932, p. 252.

26 Zgoliński, 2019, p. 343.

27 Sarnecki, 2007, p. 1.

28 Zgoliński, 2019, p. 343.

29 Decree of the Polish Committee of National Liberation of 23 September 1944 Criminal Code of the Polish Army, Journal of Laws no. 6, item. 27..

the territory of the Polish state, commits insult, damage, or removal of the emblem, flag, or cockade of a foreign state, issued in public by his representative, shall be subject to a prison sentence of up to two years.

The constitutionalization of state symbols in Poland took place in the People's Republic of Poland Constitution of 1952. It was a novelty, as previously, the matter had not been subject to constitutional regulations. However, the state symbols were not given greater importance by the constitution-maker, and he placed regulations concerning them in the final part of the constitution of the Polish People's Republic³⁰. The basic change in symbolism was expressed in the image of the state's coat of arms, in which the crown was removed from the eagle. The coat of arms was referred to as the "emblem." The Banner of the Republic of Poland was removed from the collection of state symbols, referring to the tradition dating back to the beginnings of the Polish state.³¹

At that time, the protection of national symbols by criminal law was also provided for by the 1969 Criminal Code. The offense was classified as one of the crimes against public order. A more precise definition of the subjects of protection in other chapters has depreciated the sense of the different assignment. Art. 284 §1 of the 1969 Criminal Code penalized an offense consisting in insulting, damaging, or removing a publicly displayed Polish emblem, banner, flag, cockade or other state mark, or a mark of an allied state or symbol of the international workers' movement. The punishment for its Commission was a term of imprisonment of up to three years. The insulting of a monument or other work displayed in public to commemorate a historical event or to commemorate a person was also subject to penalization. Art. 284 §1 of the 1969 Criminal Code was also applicable in the event of committing an act to the detriment of an allied state if that state ensured reciprocity. Its content guaranteed both the protection of Polish signs and the signs of other countries (only allied countries), as long as they ensured reciprocity in this respect. The symbol of the international labor movement is also under protection. The above means that the 1969 Criminal Code significantly extended the scope of protection.³²

Amendments to the constitution of the People's Republic of Poland,³³ which were introduced by the act of December 29, 1989, on the amendment to the constitution of the Polish People's Republic, included the name of the state and the sphere of symbols, including the state emblem and coat of arms. The solutions introduced in 1952 turned out to be extremely durable and—apart from the restoration of the crown to the eagle in 1989, others have survived to this day.³⁴ The issue of state symbols was made more

30 Sarnecki, 2007, p. 1. Lech Jamróz emphasizes that the Constitution of the People's Republic of Poland had primarily an ideological function, and to a lesser extent a legal one (Jamróz, 2009, p. 239).

31 Grabowski, 2012, p. 61.

32 Zgoliński, 2019, pp. 345–346.

33 Journal of Laws no. 75, item 444 as amended. See also: Ciemniewski, 2009, pp. 27–46; Rogowski, 2008, pp. 314–330.

34 Wiszowaty, 2011, p. 33.

specific by the act of January 31, 1980, on the emblem, colors and anthem of the People's Republic of Poland,³⁵ which in its amended form is still valid today.

During the work on the Constitution of the Republic of Poland of 1997,³⁶ it was postulated that national and state symbols should be regulated at the constitutional level.³⁷ During the works of the Constitutional Commission of the National Assembly, the issue of national symbols appeared within two issues. One of the considerations topics was the place of the provisions on symbols in the systematics of the constitution. The basic question was whether they were to be included in the chapter devoted to the constitutional principles of the state, or in a separate chapter devoted solely to the symbolism of the state, or perhaps they should be included in the final provisions of the Constitution.³⁸ The prevailing concept was expressed in most of the draft Constitutional projects, which were the subject of the work of the Constitutional Committee, according to which the provisions devoted to state symbols became the subject of Chapter I, which formulated the basic principles of the Polish political system.³⁹

In the course of the work of the Constitutional Committee of the National Assembly, there were also comments from the Polish Heraldic Society, signalling that a mistake was made when using the term “emblem” to describe the state's coat of arms. Therefore, there was a good opportunity to regulate this matter in accordance with the heraldic tradition. Ultimately, the provision's content was not changed and the opportunity to correct the error reported for years was not used.⁴⁰

Art. 28 of the Constitution RP regulates the issue of state symbols in “Chapter I,” which raises the importance of the issues in question and speaks in favor of recognizing it as one of the integral elements characterising the Polish state. This provision refers to the previous regulations and includes the emblem, colors and the anthem of the Republic of Poland as the basic state symbols. At the same time, the detailed arrangements in this regard are left to the legislator.

The Constitution RP provides national symbols—the emblem, colors and the anthem—with legal protection, which results in the need to establish appropriate provisions, primarily statutory ones, introducing criminal and penal-administrative protection, and administrative provisions regulating the situations of official use of these symbols.⁴¹

When analyzing this constitutional provision, it should be noted that by inserting Art. 28 in the first chapter of the constitution, entitled “*Rzeczpospolita*,” the protection provided for state symbols acquires a deeper meaning. “Chapter I” of the

35 Journal of Laws no. 7, item 18 as amended.

36 Constitution of the Republic of Poland of 2 April 1997. Journal of Laws of 1997 no. 78, item 483, as amended (Constitution RP).

37 Szymański, 1990.

38 Bulletin of the Constitution Committee of the National Assembly 1995, no. XIII, p. 88.

39 Chruściak, 1997.

40 Bulletin of the Constitution Committee of the National Assembly 1995, no. XV, p. 57.

41 Sarnecki, 2007, p. 3.

Constitution contains the so-called systemic principles that “form the foundation of the entire constitutional law and determine the nature of the state system.” Chapter I of the Basic Law is thus a chapter defining the state’s identity. As emphasized by Bogusław Banaszak “state symbols are important for integrating citizens with the state and expressing their national identity.”⁴²

Moreover, referring to the rationale of the Supreme Court’s judgment of July 2, 2013, national symbols are values within the system of moral rules. They are an expression of national identity and a nation’s history, and the respect and veneration associated with them is the common good of society as a whole.⁴³

Detailed regulations on state symbols are included in the act of January 31, 1980, on the emblem, colors and the anthem of the Republic of Poland and on state seals. This act, in Art. 1, para. 2 stipulates that “to honor and respect these symbols is the right and duty of every citizen of the Republic of Poland and all state bodies, institutions and organizations,” and Section 3 provides this issue to be regulated by separate provisions. Criminal liability for violating the principle of respect for state symbols is regulated by Art. 137 of the Criminal Code⁴⁴ or Art. 49 §2 of the Petty Offenses Code.⁴⁵ This protection is also visible in other areas of law.⁴⁶

42 Banaszak 2009, pp. 12, 28.

43 Judgment of the Supreme Court in the case brought by T. Spółka Akcyjna in W. against the Chairman of the National Broadcasting Council for cancellation of the decision, after examination, at a hearing held in the Labour, Social Insurance and Public Affairs Chamber on 2 July 2013, of the plaintiff’s cassation appeal against the judgment of the Court of Appeal of 11 August 2011, ref. no. III SK 42/12.

44 National symbols are dealt with in Art. 137 §1 “Whoever publicly insults, destroys, damages or removes an emblem, banner, flag, flag or other state symbol shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.” The legislator also criminalises infringement concerning national and state symbols of other countries. Pursuant to Art. 137 §2, “The same punishment shall be imposed on anyone who, on the territory of the Republic of Poland, insults, destroys, damages or removes an emblem, banner, flag, flag or other sign of a foreign state, displayed publicly by a representative office of that state or by order of a Polish authority.” See the simulation of the proportionality test from Art. 31(3) of the Polish Constitution of the indicated norms carried out by Bartłomiej Figiel in relation to interference in the freedom of expression and the analysis of this provision in the context of the principle of adequacy (Figiel, 2016, pp. 202–204).

45 It follows from this provision that anyone who contravenes the provisions on the emblem, colors and anthem of the Republic of Poland is liable to a custodial sentence or a fine.

46 See e.g., Pokojowa, 2018. Although the rules for commercial use of the emblem, colors and anthem have been liberalised, the registration of trade marks containing images of national symbols is still subject to significant restrictions. As a rule, registration is refused. The Supreme Administrative Court, in its judgment of 21 April 2010, stated that the image of an eagle placed in a trademark applied for by the Free Trade Union of Drivers may indicate organizational links between the union and state institutions. This judgment corresponds with the judgment of the ECJ of July 16, 2009, C-202/08 P and C-208/08 P concerning refusal to register a trademark depicting a maple leaf, which is a symbol of Canada. The Court held that state symbols cannot be registered, regardless of whether or not they are likely to mislead as to the applicant’s links with the institutions of the state whose symbol is used in the mark. The Court emphasized that the broad protection of national symbols is also manifested in the fact that the prohibition of registration applies not only to the exact reproduction of that symbol, but also to its imitation.

It should be emphasized that the crime included in Art. 137 is universal and intentional. To incur criminal liability for insulting the national symbol, this act must be committed in public. In addition, it is also important to analyze the intention to perform a specific causative action. In relation to behavior in the form of destruction, damage or removal, the intent to perform this act may take the form of a direct or resulting intention. However, in the case of insult, the intent of the act is identified only with the direct intention.⁴⁷

Cult toward national symbols is a special subject of protection, while the sense of dignity of citizens becomes an indirect one. Although “insulting” from Art. 137 of the Criminal Code refers to the objects covered by Art. 137 this activity treats about the feelings of people who show respect for state symbols. Insult should therefore be understood as demonstrating in any way a lack of respect for the object covered by legal protection. An example will be any action that means insult, disgrace, ridicule, or disgrace. Therefore, it will be such an action of the perpetrator, which—in an unequivocal way—will be the perpetrator’s manifestation of a negative attitude, showing him contempt or depreciation of this symbol, and at the same time will be made in an offensive form. In addition to taking the action of insulting, it can be found in Art. 137 of the Criminal Code, activities consisting in destruction, damage, and removal. Also, in relation to these forms of behavior, it is necessary to punish these activities in public.⁴⁸

The next causative action is destruction. However, the legislator did not specify in Art. 137 of the Criminal Code, a legal definition. It will be useful to refer to the provisions of Art. 288 of the Criminal Code regarding the destruction of movable property. Within the meaning of the provisions of the Criminal Code, destruction is the act of making physical changes to a given thing.

What is more, it is assumed that an executive action in the form of destruction of things is complete annihilation of it or far-reaching damage resulting in the fact that it no longer belongs to the kind to which it belonged at that time, i.e., before the execution of the prohibited act. The damage is a violation of the shape of things but without its destruction. The last activity provided for by the legislator related to the protection of national symbols is the crime of removing a specific symbol. On the other hand, removal consists of removing the national symbol from its place of establishment⁴⁹.

Because of the relevant importance of national values expressed in the Constitution RP, the legislator in Art. 137 §1 of the Criminal Code granted protection to the interests of the Republic of Poland related to respect for state symbols.

Protection of the symbols of the Republic of Poland in the Criminal Code currently boils down to the prohibition of insulting, destroying, damaging, or removing them. It is, therefore, parallel to those contained in previous Polish criminal

47 Commentary on Art. 137 of Polish Criminal Code.

48 Commentary on Art. 137 of Polish Criminal Code.

49 Commentary on Art. 137 of Polish Criminal Code.

regulations. However, it should be emphasized that the legislator introduced in the content of the provision also other elements than those listed in the Constitution RP, such as the emblem, colors, and anthem. The term “state mark” used in Art. 137 §1 of the Criminal Code, on the other hand, includes the emblem, banner, flag and “other state signs.” Not all of them have their legal definitions because the legislator did not specify, for example, the model of the banner, so this concept functions only on the level of colloquial language⁵⁰. The Criminal Code does not use the concept of symbols. It uses the term “other state marks.” This reinforces doubts about the subject of protection. By means of Art. 137 §1 of the Criminal Code, marks of material nature are protected. Therefore, it does not cover colors and the national anthem. The sign is undoubtedly the emblem, i.e., the symbol and the flag, as a material substrate of colors. The very colors referred to in the Constitution remained outside the protection of this norm of criminal law⁵¹.

In the literature, one can find the position that the insulting of the state anthem will be subject to a criminal law assessment through the prism of Art. 133 of the Criminal Code. However, this view is debatable, as is the inclusion of the anthem in the count of “other state trademarks” from Art. 137 §1 of the Criminal Code. On the other hand, Art. 49 §2 of the Code of Offenses provides for a custodial sentence or a fine for violating the provisions on the emblem, colors and anthem of the Republic of Poland. This act can be committed both deliberately and unintentionally. It seems that only on the basis of this provision can one currently seek the criminal protection of the national anthem⁵².

Every citizen has a duty to obey the law and to respect national symbols. Nevertheless, not every public use of national symbols gives rise to legal consequences. An example may be the decision of the Court of Appeal in Katowice of October 29, 2008, on fans who drunkenly sang “Poland, White-Red!” during the game. According to the court’s order, the manifestation of such behavior does not constitute an insult to national symbols. The following argumentation can be found in the content of the document:

Therefore, since the defendants, while singing in a state of intoxication “Poland, White-Red,” expressed their identification with the Polish state, it is impossible—despite the critical assessment of their behavior—to conclude that at the same time they intended to insult Polish national colors, even in the situation when in certain fragments of the event they dropped the Polish flag on the ground or dragged it on the ground. There are no unquestionable grounds for accepting that they wanted to express contempt for the state flag in such a form and that this was the motivation for their actions.

50 Lis, 2017, p. 226.

51 Zgoliński, 2019, p. 348.

52 Ibid.

Accordingly, the match participants were not held criminally responsible for insulting the national symbols because their actions were not intentional.⁵³

It should be stressed that the protection provided for by the Act of 1980 and the criminal law protection do not exclude each other. The axiology preferred by the legislator has been consistently considered in Art. 137 of the Criminal Code. Therefore, violation of the standard under Art. 1, para. 2 of the Act of 1980 may be a sufficient condition for the application of sanctions (e.g., by the broadcaster of a television program), regardless of whether there has also been a violation of Art. 137 of the Criminal Code (constituting an insult). Moreover, Art. 14 of the Act on the emblem imposes on citizens the obligation to maintain seriousness during the reproduction of the national anthem. Particularly important for the discussed issue is Art. 15 of the act stating that “the emblem and colors of the Republic of Poland are placed, and the anthem of the Republic of Poland is performed or reproduced in a manner ensuring their due honor and respect.”

Moreover, Art. 16 prohibits the affixing of national symbols to objects intended for trade. The norms above show that national symbolism is a value valued by the Polish legislator, who, in addition to the criminal sanctions discussed below, introduced specific regulations aimed at influencing the attitude of individuals toward the emblem, flag, and national anthem.

Recently, there has been a discussion on adopting a new act on state symbols. A draft law on state symbols of the Republic of Poland was submitted for public consultation. The act prepared as part of the Ministry of Culture, National Heritage, and Sports is primarily aimed at adapting state symbols to the requirements of new digital technologies and introducing corrections postulated for a long time by heraldists and musicologists (in the case of the national anthem). It is intended to replace the existing 1980 regulation. The bill builds a coherent system of state symbols, which include: 1) the emblem of the Republic of Poland depicting the image of the White Eagle in the crown; 2) the emblem of the Republic of Poland depicting the image of the White Eagle in the crown placed in the red field; 3) the colors of the Republic of Poland constituting components of the state flag; 4) the anthem of the Republic of Poland and the rules for their use. The main objective of the proposed act is to adapt national symbols to new digital techniques (the proposed act will introduce digital graphic and musical attachments to the project), organize the legal status regarding the use of symbols by state institutions, legal and natural persons, increase their protection and refresh the appearance. The act, among others, organizes heraldic terminology, the arrangement of anthem verses in accordance with the chronology of events, distinguishes the “state flag” from the “national flag” and introduces a national bow. It also increases the availability of symbols for citizens. The process of implementing the proposed regulation and the related costs were

53 Decision of October 29, 2008, ref. no. II AKz 777/08.

spread over many years, so as not to burden the state budget and the budgets of local government units.⁵⁴

The use of national symbols occurs in certain circumstances, most often during state ceremonies. However, there are also cases when national symbols are used outside the ceremony. Examples are various manifestations, assemblies and strikes caused by the existing sociopolitical situation. Sometimes, it is problematic to use national and state symbols in artistic activities. Often, actions occur during such events, which can be interpreted as a manifestation of insult to symbols and national signs.⁵⁵

Examples include the use of the symbol of Fighting Poland—the sign of the Polish underground state from the Second World War was used and the fight for access to in vitro was used as the slogan “Polish Fighting.” Participants of the protest were accused of insulting the Fighting Poland sign by publicly displaying a banner on which the reworked Fighting Poland sign was displayed in such a way that gender symbols were placed at its bottom bases. The court acquitted the persons concerned and considered that the Fighting Poland trademark was not insulted, and the combination of it with gender symbols did not lead to a decrease in its value⁵⁶.

Otherwise, a notification was submitted about the possibility of committing an offense under Art. 137 of the Criminal Code regarding insulting the state symbol in such a way that the symbol of the White Eagle during the equality march of July 8, 2018, was placed on a rainbow background—one of the symbols of the LGBT+ community. The prosecutor’s office discontinued the investigation in this case. It justified this because the subject of the proceedings does not have the features of a national flag, so it can be considered a banner at most. Due to the change in the banner’s colors and the eagle, it was found that we are not dealing with the national flag and emblem, and therefore the subject of the notification was not subject to protection under Art. 137 of the Criminal Code. In addition, it was emphasized that a given background could not be identified only with the LGBT+ environment because the rainbow is also a sign of religious and mythological significance. However, the prosecution did not consider that the biblical rainbow has seven colors, and the symbol of the LGBT+ environment six—and a given symbolism finds a specific justification.⁵⁷

Another example is the trial of Jan Kapela. He was accused based on Art. 49 §2 of the Code of Offenses for reworking the anthem. The national anthem modification consisted of changing the words referring to the government’s anti-refugee policy. The author of the work was found guilty twice by the courts of two instances. The

54 Full text of the draft and results of the consultation on Ministry of Culture and National Heritage.GOV: <https://bip.mkidn.gov.pl/pages/posts/projekt-ustawy-o-symbolach-panstwowych-rzeczypospolitej-polskiej-3610.php>.

55 Hernacka–Janikowska, 2020, p. 59.

56 Judgement of District Court of Warsaw of October 5, 2017, ref. XI W 1413/17.

57 “Kuriozalna decyzja prokuratury! Orzeł na tęczowym tle, to nie zniewaga symboli narodowych: ‘To aluzyjna interpretacja flagi.’” <https://wpolityce.pl/polityka/415911-prokuratura-orzel-na-teczowym-tle-to-nie-zniewaga-symboli>.

cassation to the Supreme Court was brought by the ombudsperson, stating that the lower courts were guided by automatism in interpreting the law in relation to the situation, without considering the objective premises and intentions of the author. The Supreme Court decided that the subject of refugees requires publicity. In the way Mazurek Dąbrowskiego was interpreted by the accused, he found nothing reprehensible. The Supreme Court considered that only a socially harmful act could be considered an offense, and the manifestation of the author of the text was not socially harmful⁵⁸.

Because the permanent symbols of national and state-regulated status are the emblem, the flag (with national colors) and the anthem, the further argument will consider these signs and indicate the legal framework for their application and protection. When discussing the current regulations in the context of the protection of national symbols, one should refer primarily to the Constitution RP, the Act on the emblem, colors and anthem of the Republic of Poland and on state seals, the Criminal Code, and the Code of Offenses,⁵⁹ which does not mean that this subject is not present in other acts, especially in executive regulations.

4. Legal grounds for the protection of the national flag and colors

The issue of the flag is closely related to the coat of arms. The colors shown on the flag correspond, in accordance with the principles of heraldry, to the color of the coat of arms. The Polish flag combines the white of the eagle and the red of the shield.⁶⁰ From the 12th to 18th centuries, historical Polish state banners usually depicted a White Eagle on a red background. Usually, the state coat of arms was placed on a red background, but also the red-white-red flags divided horizontally were used. Over the centuries, the shade of red changed (crimson, dark dirt, amaranth).⁶¹ The first cases of using white and red as national colors were recorded at the end of the 18th century.⁶²

The first case of legal regulation of the issue of national colors was the resolution of the Sejm functioning during the November Uprising (at a time when Poland was not on the map) of February 7, 1831, on the national bow. The resolution was

58 Siedlecka, 2019.

59 See more: Kilińska-Pękacz, 2015, pp. 1–13; Zgoliński, 2019, pp. 339–353; Szeleszczuk, 2020, pp. 147–164.

60 The red color obtained in the process of dyeing cloth at that time was called crimson or carmine, hence these colors were for a long time considered typical for Polish coats of arms and banners, Znamierowski, 2003, p. 158.

61 Kubuj, 2016, para. 16.

62 Znamierowski, 2003, p. 159.

justified by the need to give a uniform badge to Poles, and it was recognized that the national bow will be white with red.⁶³

In the 19th century, the colors white and red became a symbol of Polishness, also used outside the Polish lands. These colors were used not only by Poles but also by foreigners wishing to express their Polish sympathies. Polish symbols and colors accompanied Poles fighting during the Spring of Nations in 1848 and during the Turkish–Russian war. During the January Uprising, the patriotic attitude was expressed by displaying Polish national symbols, banned by the tsarist authorities in 1831–1832. Interestingly, many flags and banners from that period had a red color placed on the upper lane and white on the lower lane. The white-red flags in the form used to this day appeared in 1916 during the celebration of the 125th anniversary of the adoption of the Constitution on May 3, 1791.⁶⁴

The issue of the colors of the Republic of Poland was regulated for the first time in the act of August 1, 1919, on the emblems and colors of the Republic of Poland. In Art. 1, it was considered that the colors of the Republic of Poland are white and red, in parallel longitudinal strips, the upper one being white and the lower—one red. The act provided for national colors. By including them in the normative act, these colors became state colors. The legislator has limited the possibility of using national symbols, including national colors. Art. 2 of the act of 1919 prohibited the use of the flag by private persons without the permission of the Minister of the Interior. The model of the flag is set out in Model 5 annexed to the act. The act also specified the specimens of special flags used by state authorities and institutions, military flags, and maritime flags. Among them was the flag for diplomatic representatives of the state, which was distinguished from the basic design by the coat of arms of the Republic of Poland placed on the upper white belt. It should be noted that the flag designs attached to the 1919 act were black and white. Colourful images of state symbols were published in 1921 by the Ministry of the Interior.⁶⁵

The Act of 1919 was repealed by the Regulation of the president of the Republic of Poland of 13 December 1927 on state emblems and colors and on signs and seals.⁶⁶ In Art. 2 of the Regulation, it was found that the national colors are white and red in two horizontal parallel strips of equal width and length, the upper one being white and the lower one being red. The red color corresponds to the color of cinnabar. Art. 5 of the Regulation stipulated that the national flag is a tarp of state colors. The regulation did not prohibit the use of the flag, and only the use of state emblems, seals and special flags was subject to restrictions.⁶⁷

63 Russocki, Kuczyński and Willaume, 2006, p. 19.

64 Rosner, 2003, pp. 172–194.

65 These patterns were included in the brochure “Emblem and colors of the Republic of Poland” by Stanisław Łoza. According to the design introduced then, the red of the shield and flag should have a crimson tint (Znamierowski, 2003, p. 160).

66 Journal of Laws no. 115, item 980.

67 Arts. 15 and 16 of the Regulation of the president of the Republic of Poland of 13 December 1927 on emblems and colors of the state and on signs and seals.

The Regulation of 1927 changed the state coat of arms and thus also changed the flag used by authorities, offices and institutions abroad. It was distinguished by a state coat of arms, in accordance with the model from 1927, placed in the middle of the white belt. The Polish authorities used this flag in exile during World War II and after its end until 1990.⁶⁸

The issue of colors in the Polish People's Republic was regulated in Art. 89, para 2 of the People's Republic of Poland constitution of 1952.⁶⁹ It was also the first Polish constitution to regulate these issues. Detailed regulations concerning the design of the flag and the rules for its use were left to the lower-ranking legal acts. Such solutions were contained in the decree of the state Council of December 7, 1955 on the emblem and colors of the Polish People's Republic.⁷⁰ In Art. 3, para. 2 of the decree, the flag's proportion was incorrectly set at 3:8. This error was corrected, and the flag's ratio was changed to 5:8, returning to the commonly used proportions of national and state flags.⁷¹ The 1955 decree did not restrict the use of the white-red flag, in Art. 13, however, introduced criminal liability in the event of unlawful use of the coat of arms, the flag with the coat of arms and special flags.⁷²

Subsequent changes in the scope of Polish state symbols took place in 1980 when a law comprehensively regulating this issue was adopted.⁷³ In Art. 4, the wording of the 1955 decree regarding colors and the state flag was almost literally repeated. Art. 15 of the act ordered the use of symbols with respect, while the circumstances of using the flag were to be determined by the act or regulations issued on its basis. The 1980 act significantly changed the graphic design of the flag⁷⁴. A new shade of red was introduced, darker than cinnabar. The attachment also provides precise technical coordinates for the colors white and red. Since 1980, the issue of red coloring has not been discussed.

The revision of the Polish People's Republic constitution made on 29 December 1989 did not cover the provisions on state colors and the flag. It was limited only to changing the name of the country. Art. 4 of the act introduced several transitional

68 Grabowski, 2011, p. 44.

69 "The colors of the People's Republic of Poland are white and red."

70 Journal of Laws no. 47, item 314. See Arts. 2 and 3 of the Decree.

71 Regulation of the prime minister of March 20, 1956, on the correction of an error in the Decree of December 7, 1955, on the emblem and colors of the People's Republic of Poland and on the state seals, Journal of Laws no. 7, item 4. According to current legislative standards, it should be recognized that this was not a correction of an error, but an amendment to the Decree.

72 Art. 13 of the act criminalised behavior involving the unlawful use of the emblem of the People's Republic of Poland, the state flag with the emblem of the People's Republic of Poland, the Polish flag or the image of the eagle specified in the decree. The punishment for this act was imprisonment for up to one year and a fine of up to 10,000 zlotys. It was possible to stop at imposing only one of these penalties. To determine whether the perpetrator had exhausted the prerequisites of the offense, it was necessary to make a primary finding, which consisted in attributing and assessing his/her behavior with regard to the content of administrative law provisions.

73 Journal of Laws of 1980 no. 7, item 18.

74 Annex 2 to the act.

periods for the use of the flags of old designs. The longest transitional period concerned military marks, which had to be changed by December 31, 1997.

The regulations concerning colors and flags in the period of political transformation of 1989 are contained in the 1980 act on the emblem, colors and anthem of the Republic of Poland⁷⁵. As in the case of the Constitution, no new legal act was adopted, but minor changes were made to the content of the applicable provisions. The political changes that took place in 1989 did not lead to a change in the colors or pattern of the state flag. However, the flag with the coat of arms was changed, introducing a new model of the state coat of arms in accordance with the 1990 model (Annex No. 3 to the act). Similar changes included military flags, air force, navy and other special flags.⁷⁶

By amending the regulations after 1989, the norms defining the state colors as white and red, the ordinary white and red flag and the white and red flag with a coat of arms were maintained. Thus, the concepts of national colors and the national flag were not restored. At the same time, the use of the white-red flag with a coat of arms is strictly regulated, and this right is not granted even to the president of the Republic of Poland.⁷⁷

The flag issue was regulated in the Constitution RP. Art. 28, para. 2 states: "The colors of the Republic of Poland are white and red." This is a repetition of the 1989 standards. Detailed regulations The Constitution RP leaves it to the act. the Act on the Emblem, Colors and Anthem of the Republic of Poland and on state Seals of 1980 is still in force today. It has been amended many times, including in 2004, Art. 5, introducing section 2 in the following wording: "Everyone has the right to use the colors of the Republic of Poland, in particular in order to emphasize celebrations, holidays or other events."⁷⁸ In addition, Art. 6a was added by virtue of which the Flag Day of the Republic of Poland was established on May 2.⁷⁹

The act of January 31, 1980, on the emblem, colors, and anthem of the Republic of Poland and on state seals obliges every citizen to worship and respect all symbols listed in the act. National colors in Art. 4 and Art. 5 are defined as white and red, in a horizontal position, in two strips of the same width, the upper one is white and the lower one is red. They constitute the flag of the Republic of Poland, which all citizens can use to emphasize the importance of the ceremony, distinguish an important event or celebration.

Despite the existing provisions protecting the national flag and colors, the problem of insulting the national flag (regulated in Art. 137 of the Criminal Code)

75 Art. 43, para. 1 act on the emblem, colors and anthem of the Republic of Poland.

76 Znamierowski, 2003, pp. 162–183.

77 Znamierowski, 2003, pp. 162–183; Grabowski, 2011, pp. 45–46.

78 Act of 20 February 2004 amending the Act on the emblem, colors and anthem of the Republic of Poland, Journal of Laws no. 49, item 467.

79 This date is linked to May 2, 1945, when Polish soldiers who took part in the conquest of Berlin hung the Polish flag on the Siegessäule column, a victory column located in the Grosser Tiergarten Park, commemorating Prussia's triumph over Denmark in 1864.

was repeatedly the subject of decisions of Polish courts. There are known cases in which the perpetrator's actions were overwhelmingly symbolic, as well as those in which the behavior of the convicted person bore only the hallmarks of a hooligan's act.

The Court of Appeal in Szczecin heard the appeal against the judgment of the District Court in Gorzów Wielkopolski in a case concerning insulting the national flag. The case was examined in the light of the following facts. KB was accused of acting in a hooligan's act, i.e., publicly and for no reason, thus showing gross disregard for public order, insulting the national flag of the Republic of Poland, hitting it on the railings, causing the breakage of the trunk, and then swung and threw the flag at the windshield of a moving passenger car, causing the breakage of the windshield in the vehicle and causing damage in the amount of PLN 2094.08, and exposing the driver and the owner of the RK vehicle to a direct risk of loss of life or serious injury. The district court found KB guilty of the accused acts, imposed a sentence of five months imprisonment and obliged the convicted person to repair the damage caused partially. The accused's attorney raised the fact that the subjective side of the "insult" was not taken care of at all by the court and a priori assumed that anyone who hits the flag on the railings and throws it at the windshield of the car commits an act prohibited under Art. 137 of the Criminal Code. According to the defense, the actions taken by the convict (i.e., hitting the flag on the rails and throwing it at the vehicle) should not be interpreted in the category of insult, which is to be an expression of contempt or ridicule or insult to national symbolism. The above allegations were not shared by the Court of Appeal, upholding the judgment of the lower instance, "considering the appeal of the defendant's lawyer to be manifestly unfounded." The General Court referred to a plea alleging that KB's action was indeed an insult to the national flag. It was considered that the District Court correctly interpreted the concept of "insult": the very word "insults" contains several activities that can be undertaken to fulfill the analyzed premise. Such behavior is spitting on the flag or trampling it, but it is also activities with a lower intensity of negative emotion and less expression. Throwing a flag at a moving car and jerking a flag against a railing is an intentional act, expressing disregard for state symbolism. The court argued that the decision was based on a system of moral rules of Polish society, in which, in its opinion, national colors play a special role.⁸⁰

In April 2010, an incident occurred in Wrocław, during which the national flag was insulted. On the night of April 14–15, 2010, a woman identified as M.P. tried to set fire to a national flag displayed in a public place. However, when this failed, the convict wrote a vulgar slogan on the flag that was honoring recently deceased President Lech Kaczyński. An important circumstance is undoubtedly the fact that the perpetrator herself reported to the police and admitted to the acts. She explained her behavior with the desire to express her opposition to the ongoing national mourning. M.P., through expression, wanted to draw attention to the attitudes adopted by Poles

⁸⁰ Judgment of the Appeal Court in Szczecin of 4 July 2013, ref. no. II AKa 114/13.

after the catastrophe that were not authentic, in her opinion. The convict explained that her actions were not intended to insult the national flag. Eventually, the District Court found M.P. guilty of committing an offense under Art. 137 §1 of the Criminal Code sentenced the convicted person to six months of imprisonment in suspension for three years and supervision of the probation officer and acquitted the convicted person of insulting the president.

In Wrocław, two men, having previously consumed alcohol, after unsuccessful attempts at arson, threw the flag into the mud and then placed it in the trash can. The perpetrators were convicted based on Art. 137 of the Criminal Code—they were fined PLN 1,000.

Polish jurisprudence does not reveal a tendency to the milder treatment of perpetrators who wanted to express certain ideas through unlawful actions. In addition, in the indicated cases, a person acting for no apparent reason, in a state of intoxication, was sentenced to a less onerous punishment.

Insulting national colors may also occur through satirical practices. Such behavior took place with one of the entertainment programs, whose guests placed the miniature flag of Poland in the imitation of dog droppings. The content of this broadcast caused that the chair of the National Broadcasting Council (NBC), acting pursuant to Art. 53 sections 1 and 2 in connection with Art. 18(11) of the Broadcasting act imposed a fine of PLN 417,000 on the publisher. The decision was justified by the fact that the national symbol was insulted during the broadcast. Such behavior was considered contrary to the Act on the emblem, particularly with Art. 1. The Chairman stated that Art. 18 of the Broadcasting Act and imposed a financial penalty on the sender.⁸¹

The plaintiff challenged the decision of the chair and applied for its repeal in its entirety, indicating, among others, the violation of Art. 54 and 73 of the Constitution RP and Art. 10 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. The District Court in Warsaw annulled the chair. The General Court drew attention to the general nature of Art. 1(2) of the Act on the emblem, which does not provide for sanctions and refers to Art. 137 of the Criminal Code, which deals with insulting national symbols. The court considered that the flag was not insulted during the KW broadcast because the action of the guests invited to the program was not an action aimed at depreciating the flag. In the court's opinion, the broadcaster only referred to certain behaviors, and the broadcast was not intended to promote them within the meaning of Art. 18(1) of the Broadcasting Act.⁸²

The president of NBC appealed the decision of the district court; the Court of Appeal in Warsaw changed the judgment of the lower court. He considered that to violate the standard contained in Art. 1 of the Act on the emblem may occur when the perpetrator expresses a lack of due respect and reverence for the flag. At the same time, the conditions of Art. 137 §1 of the Criminal Code. The behavior presented in

81 Judgment of the Supreme Court of 2 July 2013, ref. no. III SK 42/12.

82 Ibid.

the program was considered offensive, even assuming that its purpose was not to insult the state symbol. The Court of Appeal in Warsaw did not share the assessment of the District Court that the sender did not encourage the public to act against the dignity of the national flag.

Eventually, the Supreme Court heard the case. The adjudicating panel of the Supreme Court, referring to the compliance of punishment of the sender with Art. 10 of the ECHR referred to the test for the jurisprudence on freedom of expression. The Supreme Court also concluded that

despite the broad constitutional protection of freedom of expression, additionally strengthened by Art. 14 of the Constitution, it is possible to introduce restrictions on the exercise of this freedom by television broadcasters. In the opinion of the Supreme Court, to “promote” certain behaviors, it is not necessary when interpreting Art. 18(1) of the Broadcasting act, so that the broadcast of a specific broadcast is accompanied by the intention to convince the recipients of the content contained therein or so that the creators of the broadcast should demonstrate action in the direct or possible intention. That court considered that a program promoting certain attitudes is one whose content and form of expression may encourage viewers to imitate the behaviors shown in it or present some ideas as “right and proper.”

The Supreme Court concluded that, given such elements of the broadcast as the presentation of behaviors hitting the dignity of the flag as a game, the reactions of the audience or the popularity of the host, it could be concluded that it was, in fact promoting attitudes that were contrary to the law. The Supreme Court agreed with the finding of the Court of Appeal, stating that the violation of Art. 1(2) of the Act on the emblem, it is not necessary to prove the crime under Art. 137 of the Criminal Code. It is sufficient to show the symbol a lack of reverence and respect.⁸³

The above findings confirm that the Polish law has protected the flag and national colors. In the doctrine, there is even a specific right of the citizens of the Republic of Poland to use national symbols. On the part of public authorities, this creates an obligation to create a sphere for the realization of this right and a guarantee related to the protection of values which are the national colors and flag. At the same time, in the public debate it is emphasized that using white and red colors in commercial activity is possible and not punishable, because the law protects only the official, defined by law, combination of white and red colors. Its modifications are allowed; so are their modifications or paraphrases which do not infringe the values represented by national symbols. It follows from this statement that we are not dealing with symbols protected by the Act on the emblem, colors and anthem of the Republic of Poland if they do not meet strictly specified statutory requirements. In the case of colors, these are the requirements specified in Appendix No. 2 to the act by indicating their trichromatic coordinates and the permissible difference

83 Ibid.

between the white and red color. Colors not falling within these parameters in the statutory sense will not be national colors. Similarly, a canvas not meeting the proportions indicated in the act will not be called a protected flag. This approach seems to be reasonable, if we assume that everyone is characterized by a certain culture expressed, *inter alia*, by respect. However, there are doubts whether persons who consciously use the national colors and references to the national flag should not be subject to responsibility for infringing what is an external and material expression of the nation's identity.

Possible violations related to the flag and national colors may also be due to less awareness that certain behaviors toward the flag constitute a violation of the law. Unlike in the case of the anthem, education on how to deal with the flag and national colors is at a lower level, so civic education should be developed in this area.

5. Legal grounds for the protection of the national emblem

The emblem is the oldest of Polish symbols. The Polish state coat of arms depicting a crowned White Eagle appeared on the denarii of the first Polish King Bolesław Chrobry after his coronation in 1025. The image of the White Eagle has been used as the state emblem since 1295.⁸⁴

An emblem placed on a special shield is referred to as a coat of arms. The emblem of Poland, referred to as the White Eagle, is traditionally placed on a red heraldic shield. The current coat of arms of the Polish state uses a French shield.⁸⁵ A white eagle on a red shield is a heraldic coat of arms, not an emblem. Such a misnomer can be found in Polish legal acts regulating the issue of state symbols since 1952.

The White Eagle is considered by Poles not only as a state symbol but also as a national symbol. The Polish state ceased to exist due to territorial annexations by neighboring countries in the years 1772–1795 (partitions). During this period, Poles, who were deprived of their state until 1918, developed a peculiar cult of the White Eagle, treating it as a national symbol.⁸⁶ The partitioning states banned the use of this symbol. Meanwhile, it was a constant motif in literature and patriotic songs. The image of the White Eagle recurred twice as one of the symbols of non-sovereign states created in parts of the Polish lands in the first half of the 19th century (the Duchy of Warsaw, established in 1807 by Napoleon Bonaparte; the Kingdom of Poland, a Russian protectorate created in 1815 by Tsar Alexander I). The symbol was also used during the November and January Uprisings.⁸⁷ Polish emigrants also used

84 Jaworska, 2006, pp. 3–5; Znamierowski, 2003, p. 111.

85 Znamierowski, 2003, pp. 27–29.

86 Jaworska, 2006, p. 6.

87 Rosner, 2003, p. 193.

the White Eagle as a symbol of nationality. After Poland regained its independence in 1918, the White Eagle again became the official emblem of the Republic of Poland but remained a national symbol.

After Poland regained independence in 1918, there was no doubt that the eagle was to be the national emblem. What was disputable was its likeness. In a decree issued by the Minister of Internal Affairs on December 1, 1918, a coat of arms designed with an eagle without the crown was introduced since Poland was a republic. As a result of numerous protests,⁸⁸ the regulation was amended by the act of 1 August 1919 on emblems and colors of the Republic of Poland,⁸⁹ according to which the coat of arms referred to the eagle used at the time of Stanisław A. Poniąkowski,⁹⁰ In this form, it was in force until 1927, when it was replaced with the emblem designed by Zygmunt Kamiński.⁹¹ The new image of the eagle was conceived as a synthesis of Polish historical eagles. Despite many critical remarks, especially in heraldic circles, the coat of arms in the version introduced in 1927—in a slightly modified version due to political transformations—has been used until today.⁹²

Regulation of the president of the Republic of Poland introduced the new state coat of arms of 13 December 1927.⁹³ According to Art. 1(1) of the regulation “the state coat of arms, i.e., the image of a White Eagle with its head turned to the right with wings outstretched, a golden crown, beak and talons on a rectangular shield in a red field.” It was pointed out that the crown should be of the closed type with a cross, and if open, it should be per the models of coats of arms. The finials of the bands on the eagle’s wings should be trefoil shaped, as the five-leaved ones are associated with the Bolshevik or Masonic star.⁹⁴

The state coat of arms introduced in 1927 is in a modified version, used until today. It was subjected to numerous changes stemming from political transformations.

During World War II, Polish territory was occupied, but the legal authorities of the Republic of Poland functioned in exile. Their existence after 1945 was symbolic, given the recognition of the People’s Republic of Poland by the Allied states. One of the actions of the authorities in exile was to establish, by the decree of the president of the Republic of Poland in Exile of 11 November 1956, a new design of the state coat of arms, which differed in the introduction of a closed crown topped with a cross and had changed proportions of the shield. It was a reaction to the repeal in

88 Górecki, 2008, p. 51.

89 Journal of Laws no. 69, item 416 as amended.

90 The act of August 1, 1919, on emblems and colors of the Republic of Poland stipulated that, until the borders of the Polish state were defined, and the Constitution specified the emblems and colors of the state, as well as titles of offices and state institutions, the offices of the Republic of Poland should use the emblems and colors according to the appended models. The Coat of Arms of the Republic of Poland designates the White Eagle with its head turned to the right with wings up, golden talons, crown and bill in a red rectangular field.

91 Górecki, 2008, p. 52; Znamierowski, 2003, p. 129.

92 Kubuj, 2016, para. 10.

93 Journal of Laws of 1927 no. 115, item. 980.

94 Znamierowski, 2003, p. 129.

1955 by the People's Republic of Poland authorities of the act of 13 December 1927 and the introduction of a new design of the state coat of arms.⁹⁵

An attempt to change the 1927 coat of arms was made in the 1950s. The state coat of arms issue was regulated by the constitution of the People's Republic of Poland. Given this, it should be noted that between 1944 and 1989, there were three models of the state coat of arms. The first was used from the 1940s until 1955, despite the lack of legal regulations introducing this design. It presented an image of a White Eagle with a deformed beak, without a crown, placed on an elongated red shield framed by a general's serpent. This coat of arms differed from the 1927 design, which symbolized a break with interwar traditions.⁹⁶

Formally, the national coat of arms from 1927 was in force, and the regulation on this issue has not been repealed. The first Polish constitution to regulate the issue of the state coat of arms was the constitution of the People's Republic of Poland of 1952, and it was placed at the end of the act in Chapter IX. The constitution described the national emblem in Art. 89(1) very briefly, specifying only that it would refer to the tradition of the White Eagle. Detailed regulations were left to legal acts of a lower rank.

The 1927 design of the Second Republic of Poland's coat of arms was repealed by the Decree of the Council of state of December 7, 1955, on the emblem and colors of the Polish People's Republic and state seals.⁹⁷ The design of the state coat of arms, since 1952 referred to in Polish legal acts as the emblem, is set out in the graphic appendix. A nomenclatural error in using the term "emblem" in the state coat of arms description has become a permanent element of Polish legal norms.⁹⁸ The design of the coat of arms from 1955 was a slightly modified version of the design from 1927. The eagle was deprived of the crown, manifesting political changes, and breaking with tradition. The crown—the symbol of the sovereignty of the Polish state—was removed. The coat of arms was also modified by removing the border placed in the state coat of arms in 1927, which was criticized by heraldists in the interwar period.

Another change in the state coat of arms design took place in 1980. At that time, a law was passed that comprehensively regulated state symbols, including the entitled entities and the rules of their use. The provisions of the act of January 31, 1980, on the emblem, colors and national anthem of the People's Republic of Poland were preceded by a preamble, which in a very solemn way defined the meaning of Polish national symbols for the nation.⁹⁹ Art. 2(1) of the act of 1980 described the national emblem as almost identical to the one used in the regulation of 1955. Starting

⁹⁵ Ibid.

⁹⁶ Górecki, 2009, p. 164.

⁹⁷ According to Art. 1. para. 1. of the Decree, "The emblem of the People's Republic of Poland shall be the image of a white eagle with its head turned to the right and its wings unfurled, and with golden beak and talons in a red field of a rectangular shield with the lower edge extended in the middle."

⁹⁸ Kubuj, 2016, para. 15.

⁹⁹ Journal of Laws of 1980 no 7, item 18.

from 1927, finials had a five-leaved shape, and in 1980 their shape was changed to resemble five-pointed stars with sharp ends.

Political transformations in Poland since 1989 have influenced the shape of the coat of arms. The revision of the constitution, among other things, covered the name of the state and the sphere of symbols, including the emblem and the state coat of arms. Despite suggestions to design a new coat of arms, it was decided that Poles would treat the 1927 design and its numerous versions as a symbol of the state, which should be respected.

Under the provisions of Art. 1, point 19 of the Act on amending the constitution of the People's Republic of Poland of 29 December 1989, Art. 103(1) of the constitution was amended to read: "The emblem of the Republic of Poland is the image of a White Eagle with a crown in a red field." Art. 3 of the amending act established transitional periods regarding the emblem used until 1989. The regulations concerning the coat of arms were also changed in the existing act on the symbol, colors, and anthem of the Republic of Poland of 1980.¹⁰⁰ Art. 2(1) was amended to read: "The emblem of the Republic of Poland is the image of a White Eagle with a golden crown on its head facing right, with outstretched wings, with a golden beak and talons, placed in a red field of a shield."¹⁰¹

The amendments to the act concerned only selected provisions relating to the emblem and the flag. In the title of the act and the unchanged provisions, the name of the People's Republic of Poland was retained. In the amended Art. 2(1), the state's name appears as the Republic of Poland, while in the unamended Art. 2(2), the name People's Republic of Poland was retained. This error was not rectified until 1997, with the reform of the government administration.¹⁰²

The Act on the emblem, colors and anthem of the Republic of Poland and national seals of January 31, 1980, is still in force today. It has been amended many times. Appendix No. 1 to this act contains a model of the emblem of the Republic of Poland. In the graphic appendix, there is an image of the White Eagle with a golden beak and talons on the background of a red French heraldic shield, according to the 18th-century design. A golden crown on its head symbolizes the state's sovereignty in the Polish heraldic tradition.¹⁰³ The postulate of restoring the crown on the eagle's head was widely expressed during the political breakthrough period and supported by experts. It related to a desire to return to the traditional image of the White Eagle. The restoration of the crown was also symbolic—it meant a break with the ideology of the People's Republic of Poland. The 1990 national coat of arms design refers to

100 Art. 43, para. 1 of the Act on the emblem, colors, and anthem of the Polish People's Republic.

101 Art. 1 para. 2 of the act of February 9, 1990, amending the provisions on the emblem, colors and anthem of the Republic of Poland (Journal of Laws no. 10, item 60).

102 Act of 4 September 1997 on divisions of government administration, Journal of Laws no. 141, item 943.

103 Znamierowski, 2003, p. 6.

the symbolism of the Second Republic of Poland period.¹⁰⁴ The eagle is depicted in a fighting position, with the bill spread apart and wings spread.

A band with trefoil-shaped ends on its wings has two additional vestigial petals, and such a shape of the ends of the surmounting band was not previously found in Polish emblems and coats of arms. It should be remembered that, under the act, the Council of Ministers, by way of regulation, determines the designs and dimensions of official boards with the emblem and the manner of their placement on the indicated objects and sportswear of the national team.

The state coat of arms issue is regulated in the Constitution.¹⁰⁵ Art. 28(1) states: "The emblem of the Republic of Poland is the image of a White Eagle with a crown on a red field." Provisions of the new Constitution repeat norms from 1989, and detailed regulation of the state symbolism has been left to statutory provisions.

Using the Polish coat of arms has been questionable for several decades. Low legal awareness of Poles caused that already in the period of the People's Republic of Poland, there was a high degree of freedom when it came to the coat of arms designs used. The turn of the political system did not bring about any changes in this respect. The problem is even more severe because it does not concern only the deviation from the legally binding design of a state coat of arms when it comes to using this symbolism by natural persons. It may even be assumed that the way of decorating private space, even with the symbol of the White Eagle, is an individual matter. However, the Polish national emblem is subjected to a kind of characterization in public space. Coats of arms which do not conform to the model may be found in public administration offices.¹⁰⁶

Deviations from the design of the state coat of arms usually concern the shape of the crown or its lack; the use of a design of a coat of arms from the communist period modified to make it similar to the current pattern; the use of a band around the shield, the wrong color of the shield, an inappropriate color of the emblem. Another category includes coats of arms adjusted to the décor of a room or building. Such practice is common in many courts of law, which contain brass or copper (metalwork), wood, and other eagles. An analysis of this phenomenon carried out by the Supreme Audit Office showed that employees of public administration offices have little knowledge of Polish state symbols. In most of the audited offices, the emblem of the Republic of Poland placed in the official premises did not comply with the specimen included in Annex No. 1 to the act. Discrepancies concerned mainly the lack of a shield, changes in the image of the eagle, but also colors and details in the image itself.¹⁰⁷

104 Opinion of the Polish Historical Association and the Polish Heraldic Society on the Polish national emblem, "Mówią Wieki" 1989, no. 6, p. 26.

105 Constitution of the Republic of Poland of April 2, 1997. Journal of Laws of 1997 no. 78, item 483, as amended (Constitution RP).

106 This practice led the president of the Supreme Audit Office to order an audit of the use of state symbols in 2004.

107 Sułkowska, 2006, p. 117.

6. Legal grounds for the protection of the national anthem

The national anthem and its tradition are part of the intangible national heritage.¹⁰⁸ Its protection is justified by the normative content of Art. 5 of the Constitution RP, which states that the programmatic principle of state activity is, *inter alia*, guarding the national heritage and Art. 6 of the Constitution, which confirms the existence of the state's obligation to provide access to cultural assets that are the source of identity of the Polish nation. Thus, as Bogusław Banaszak notes, the state authorities “have the task of creating legal regulations favoring the dissemination of culture”¹⁰⁹. The consequence of granting the national anthem special legal protection is the possibility for an individual to realize a cultural right, which is the right to cultural identity. In this sense, the anthem is the cultural element on which the individual builds their identity.¹¹⁰

The national anthem is undoubtedly an element of intangible national heritage. Intangible heritage is defined in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. According to Art. 2 of this Convention, “Intangible cultural heritage means the practices, ideas, messages, knowledge and skills—as well as the instruments, objects, artefacts and cultural spaces associated with them—that communities, groups and, in some cases, individuals acknowledge as part of their cultural heritage.” The article further stresses that communities build a sense of their own identity through participation in intangible heritage.¹¹¹

In this context, the anthem is related to cultural rights, understood as human rights, concerning the area of realization by an individual or group of needs within the culture. Cultural human rights are most often classified as the so-called second generation of rights,¹¹² but a complete catalogue has not been developed. Most commonly, cultural rights are understood as the right to participate in cultural life, the right of access to cultural goods and the freedom of artistic creativity. A separate cultural right is a human right to cultural identity.¹¹³ As Piotr Andrzejewski notes, the human right to cultivate a chosen cultural option is his fundamental subjective right. This right consists of “freedom of thought, conscience, religion, teaching, worship, and observance.”¹¹⁴

108 “The values that make up the heritage of Polish culture also include songs with patriotic content, which, also on a legal level, do not have the same rank as the national anthem. These include, for example, Bogurodzica and Rota” (Zeidler, 2007, p. 31).

109 Banaszak, 2009, p. 55.

110 Kosińska, 2014, p. 121.

111 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage drawn up in Paris on 17 October 2003 (Journal of Laws 2011, no. 172, item 1018). Pursuant to Art. 9 of the Constitution, “the Republic of Poland shall observe international law binding upon it,” and therefore the definition of intangible heritage included in the aforementioned Convention may be deemed binding.

112 Hołda, Hołda and Ostrowska, 2008, p. 53.

113 Kosińska, 2014, p. 122.

114 Andrzejewski, 1993, p. 142.

Therefore, using the anthem and its heritage is a cultural right. The function of this right is to build the national and cultural identity of both the individual and the social group—the nation. The conscious exercise of this right also shapes the collective memory of society. As Marcin Michał Wiszowaty rightly notes, the special protection of symbols of the Republic of Poland has been limited to the prohibition of insulting, destroying, or removing them (Art. 137 of the Criminal Code). Such acts may be committed only with direct intent.¹¹⁵ Moreover, under Art. 49(2) of the Code of Petty Offenses, anyone who contravenes the act's provisions on the emblem, colors and anthem of the Republic of Poland shall be subject to a penalty of arrest or fine.¹¹⁶

In the history of Poland, the role of the anthem has been played in many songs. The oldest, dating from the 13th century, “*Gaude Mater Polonia*,” was the anthem of the Piast dynasty.¹¹⁷ The first Polish anthem was the song “*Bogurodzica*,” whose oldest text was written down in 1407. It is also the oldest hymn written and performed in Polish.¹¹⁸

Most hymn songs were written from 1795 to 1918, i.e., when the Polish state did not exist. It was also then that the song *Dąbrowski's Mazurka*, which is now the anthem of the Republic of Poland, was written. It is also known as the Song of the Polish Legions in Italy or the song “*Poland is not lost yet [Jeszcze Polska nie zginęła...]*.” The song was written in Italy in 1797, and its author was Józef Wybicki.¹¹⁹ The song, which was written to commemorate the departure of the Polish Legions from Reggio, quickly became popular among Poles. The popularity of *Dąbrowski's Mazurka* was so great that in the period of the Warsaw Duchy, it was treated as the unofficial Polish national anthem. In the 19th century, *Dąbrowski's Mazurka* was one of the most famous liberation songs in Europe. It had a powerful impact on other Slavic nations, becoming the prototype for many anthemic songs¹²⁰.

The popularity of *Dąbrowski's Mazurka* did not lead to its recognition as the national anthem. After Poland regained independence in 1918, the second song aspiring to the role of the official anthem was “*Boże, coś Polskę*.”¹²¹ The first years of independence did not bring a solution to the anthem issue. The adoption of the March Constitution in 1921 was accompanied by the singing of “*Boże, coś Polskę*.”¹²² This constitution omitted the point of national and state symbols, including the anthem. Official Polish delegations were then greeted with the sounds of such songs

115 Wiszowaty, 2011, p. 42.

116 Kijowski, 2004, p. 137.

117 Panek, 1996, p. 5.

118 Panek, 1996, p. 16.

119 On the circumstances of the hymn's creation see more: Borucki, 2013, pp. 25–32.

120 E.g., the Pan-Slavic anthem, the Sorbian anthem, the Croatian anthem, the Ukrainian anthem or even the Bulgarian anthem (Grabowski, 2011, pp. 47–48).

121 Rosner, 2003, p. 195.

122 Kijowski, 2004, p. 122.

as “*Rota*,” “*Warszawianka*,” “*Mazurek Dąbrowskiego*” or “*Boże, coś Polskę*.”¹²³ Several relatively low-ranking documents contributed to recognizing the *Dąbrowski’s Mazurka* as the official anthem. In his order of March 22, 1921, the Minister of Military Affairs ordered that military honors be rendered during the performance of this piece and the anthems of the allied countries, thus making them equal in terms of military ceremonial.¹²⁴

Dąbrowski’s Mazurka was for the first time specified as the Polish national anthem in the order of the Minister of Military Affairs on November 2, 1921, concerning the performance of the national anthem during military ceremonies.¹²⁵ On October 15, 1926, the Ministry of Religious Denominations and Public Education issued a circular concerning the national anthem being obligatory during school ceremonies. This act included the text of *Dąbrowski’s Mazurka*, consisting of four stanzas.¹²⁶ In a circular of February 26, 1927, the Ministry of the Interior announced the exact text as the only binding national anthem.¹²⁷ This date is considered the moment of official recognition of *Dąbrowski’s Mazurka* as the national anthem of the Republic of Poland. The literature assumes that the anthem issue was treated as an element of common law. Until 1939, the anthem was not regulated by higher-ranking legal acts.¹²⁸

The anthem was, for the first time after 1945, regulated by a low-ranking legal act. On April 20, 1948, the Ministry of Education introduced *Dąbrowski’s Mazurka* to be used as an anthem among students.¹²⁹ The constitution of the Polish People’s Republic did not regulate the anthem issue, and it was considered that these issues belonged to the sphere of customary law.¹³⁰

The regulations concerning the national anthem were elevated in the 1970s under the Resolution of the Council of state of March 8, 1973, on the principles of national and local celebrations of state occasions.

The national anthem was regulated in the revised constitution of the People’s Republic of Poland in 1976.¹³¹ In Art. 89 of the constitution, a third section was added, on the strength of which *Dąbrowski’s Mazurka* became the anthem of the People’s Republic of Poland. Immediately after the amendment of the constitution in 1976, a consolidated text was promulgated, because of which the numbering of some articles changed. The provision regulating the anthem issue was included in Art. 103(38).

Detailed regulation of national and state symbols was made by the act of January 31, 1980, on the Emblem, Colors and Anthem of the People’s Republic of Poland.

123 Panek, 1996, p. 31.

124 Kijowski, 2004, p. 123.

125 Ibid.

126 Panek, 1996, p. 31.

127 Kijowski, 2004, p. 124.

128 Ibid.; Górecki, 2008, p. 53.

129 Panek, 1996, p. 32.

130 Kijowski, 2004, p. 131.

131 Act of February 10, 1976, on amending the constitution of the Polish People’s Republic, Journal of Laws no. 5, item 29.

The issues indicated in the title of the act were put in order. Art. 12 of the act reiterated, following the constitution, that *Dąbrowski's Mazurka* is the national anthem, established the literary text of the anthem and its musical notation, and entrusted the Minister of Culture and Art with supervision over the musical interpretation of the anthem. Art. 13 of the act defined the circumstances in which the anthem would be performed. Art. 14 introduced precise rules regulating the behavior of persons during the performance or playing of the anthem.

The revision of the constitution made on 30 December 1989 did not refer to the national anthem. Neither did the amendments to the Act on emblem, colors and anthem of 1980, which took place immediately after the political transformation, introduce any changes in this respect. After 1989, the Act on emblem, colors and anthem was repeatedly amended without significant changes relating to the national anthem. Confirmation of stability in this respect is the Constitution RP.

In work on the new Constitution, over a dozen drafts were submitted. In most of them, the regulation concerning national symbols was included in Chapter I.¹³² An exception was the project signed by President Lech Wałęsa, which included a chapter on “symbols and the capital of the Republic of Poland,¹³³ and a civic project, which included Chapter XIII, “Symbols and the capital of the state.”¹³⁴

Work on Art. 28 of the Constitution and the drafting of Chapter I was done by the Subcommittee on the Foundations of the Political and Socioeconomic System. When starting the drafting of the future Art. 28, the members of the Commission drew attention to the European tradition of placing regulations concerning national symbols in Chapter I of the Constitution, even though there were proposals to move this regulation to the end of the Constitution in the detailed rules.¹³⁵

The original linguistic formulation of Section 4 also caused some editorial problems. According to this, “the emblem, colors, and anthem shall be honored and protected.” At the suggestion of Jerzy Ciemniewski, this passage was amended because “reverence” is not a legal but an emotional category.¹³⁶ The final version of art 28 was adopted during the deliberations on December 11, 1996.¹³⁷

The Constitution RP regulates the anthem issue in Art. 28(3), including the issues of the coat of arms, colors, and the capital. The content of Art. 28(3) is consistent with previous constitutional regulations, and leaving detailed regulations to the law (Art. 28(5) of the Constitution) does not constitute a deviation from the previous

132 This was the case with the draft submitted by the Democratic Left Alliance (Art. 19 in the “Basic Articles” chapter), the draft submitted by the Constitutional Committee of the Senate of the first term (Art. 9 in the “General Principles” chapter), or the draft submitted by members of the Democratic Union Parliamentary Club (Art. 11 in the “Republic” chapter); Chruściak, 1997, pp. 94, 141, 266.

133 This chapter was placed in the draft as the third in order—after the chapters “The Republic” and “The Constitutional System of the Republic”; Chruściak, 1997, p. 72.

134 Chruściak, 1997, p. 327.

135 Bulletin of the Constitution Committee of the National Assembly 1995, no. XIV, p. 17.

136 Bulletin of the Constitution Committee of the National Assembly 1995, no. XI, p. 210.

137 Bulletin of the Constitution Committee of the National Assembly 1997, no. XLII, p. 3

regulations. Under Appendix No. 4 to the act of 31 January 1980 on the emblem, colors and anthem of the Republic of Poland and national seals, as amended, the anthem of the Republic of Poland is *Dąbrowski's Mazurka*.

The national anthem enjoys special legal protection. This protection is not only constitutional but also statutory.¹³⁸ Specification of the legal protection of the national anthem in Art. 28(4) of the Constitution RP has found expression in the act of January 31, 1980, on the emblem, colors and anthem of the Republic of Poland and on state seals, which has been amended many times. Complex issues relating to the anthem are contained in Art. 12 *et seq.* of the act. Under Art. 12 of the act, “*Dąbrowski's Mazurka*” is the national anthem of the Republic of Poland, and its literary and musical texts constitute an appendix to the act. Under Art. 12(4) of the act, the Minister responsible for culture approves the musical text of the national anthem in arrangements for choral, instrumental, and instrumental–vocal ensembles. In the light of Art. 14(1) of the act, persons present during the public performance or playing the anthem shall stand in a respectful posture; moreover, men in civilian clothes shall remove their headgear, while persons in uniforms with headgear, not being in an organized group, shall salute. During the performance or playing of the anthem, flag posts shall salute by dipping the flag.” Furthermore, proof of the legislator’s special care for the anthem is expressed in Art. 16 of the act, according to which: “The symbols of the Republic of Poland may not be placed on objects intended for commercial circulation.” Under Art. 13, the national anthem is played publicly in the arrangements provided in the act (Art. 12), particularly during anniversaries and holidays of a state nature. Art. 14 of the act requires the recipients of the anthem to maintain solemnity and calm during its playing. This protection is also confirmed by Art. 15 of the act, which stipulates that the anthem of the Republic of Poland shall be performed or played in a manner ensuring due reverence and respect.

Evidence of the unique role played by the national anthem in the life of contemporary Polish society was the adoption by the Sejm of the resolution of March 1, 2007, to commemorate the 80th anniversary of the proclamation of *Dąbrowski's Mazurka* as the national anthem. This resolution emphasizes the historical role played by the Mazurka in the life of the nation.¹³⁹ The broad legal protection afforded to the

138 Skrzydło, 2013. As the author of the commentary emphasizes: “The symbols of the Republic listed in Art. 28 are legally protected both in the sphere of criminal law, as well as in the administrative and civil law spheres.” It is also worth adding that the special meaning of Art. 28 has been confirmed in Art. 1 of the Act on the emblem, colors and anthem of the Republic of Poland and on state seals.” Kosińska, 2014, p. 112; Rychlik, 2016, pp. 125–139; Szeleszczuk, 2020, pp. 147–164.

139 Resolution of the Sejm of the Republic of Poland of 1 March 2007 on the celebration of the 80th anniversary of the proclamation of the *Dąbrowski's Mazurka* as the Polish national anthem (The Polish Monitor no. 16, item 178). The historical role of the *Dąbrowski's Mazurka* in the life of the nation is particularly emphasized by the passage: “For eighty years the *Dąbrowski's Mazurka*—a song close to the heart of every Pole—has been the official anthem of the Polish state. For more than two hundred years it has accompanied our struggle for freedom and independence, encouraged us to have faith and perseverance in our nation despite the lack of its own state.”

Dąbrowski's Mazurka in the form of a specific law finds its justification precisely in this song's significant role in building national identity.

These findings confirm that the *Dąbrowski Mazurka* enjoys special legal protection. The regulations specify how the anthem is to be sung and how the listeners are to behave. It is also indicated that men are obliged to remove their headgear. It is forbidden to modify the contents of the anthem of the Republic of Poland.

Education has a major role in fostering respect for the anthem. In the Polish legal system, in this aspect, the school fulfills its task by devoting a lot of space to the anthem. The anthem is performed during school and academic ceremonies and is an inseparable element in education. This causes the attitude of respect for the anthem to be shaped in students, which translates into respecting the law connected with the protection of this national symbol.

7. Legal protection of other signs and symbols significant for the Polish nation—the most important examples

Although formally, the national symbols are the national colors, the national emblem, and the anthem, in Poland, there are also other symbols of national identity that have impacted the formation of Polish society and Polish statehood. Some of them are under legal protection.

The identity of a nation is determined, among other things, by its language. The Constitution RP states in Art. 27 that the Polish language is the official language of the Republic of Poland. This provision does not violate the rights of national minorities under ratified international agreements. Art. 35 of the Constitution develops the issue of protecting the rights of national minorities and recognizes that the Republic of Poland provides Polish citizens belonging to national and ethnic minorities with the freedom to maintain and develop their own language, preserve customs and traditions and develop their own culture. National and ethnic minorities have the right to establish their own educational, cultural and institutions for the protection of religious identity and to participate in the settlement of matters concerning their cultural identity.¹⁴⁰

The Polish language's legal protection principles are regulated by the Act on the Polish Language of October 7, 1999.¹⁴¹ The preamble to this act follows that this act was enacted because the Polish language constitutes a fundamental element of national identity and is an asset of national culture. The legislator also considered the experience of history when the fight of the partitioners and occupants against

140 See more: on national minorities rights in the act of January 6 2005 on national and ethnic minorities and on the regional language (Journal of Laws of 2017 item 823).

141 Journal of Laws of 2021 item 672.

the Polish language was a tool of deprivation. The aim of issuing the act became the necessity of protecting national identity in the process of globalization. It is an expression of the conviction that Polish culture is a contribution to the construction of a common, culturally diverse Europe, and the preservation of this culture and its development is possible only through the protection of the Polish language.

This act regulates the principles of the protection of the Polish language, the use of the Polish language in the performance of public tasks and the use of the Polish language in trade and in the performance of the provisions of the labor law in the territory of the Republic of Poland.

The opinion-giving and advisory institution in matters related to the use of the Polish language is the Council for the Polish Language (Art. 12(1) of the act).

According to Art. 15 of the act, anyone who in the territory of the Republic of Poland, contrary to the provisions of Art. 7a,¹⁴² in trade with consumers uses only foreign-language naming of goods or services or prepares offers, warnings and consumer information required under other regulations, operating instructions, information about the properties of goods or services, warranty conditions, invoices, bills or receipts exclusively in a foreign language, shall be subject to a fine. The same punishment shall be imposed on anyone who, on the territory of the Republic of Poland, contrary to the provisions of Arts. 7 and 8 of the act, in the course of trade or in the performance of labor law regulations, draws up a contract or another document exclusively in a foreign language.

An important element shaping national identity, in which national symbols are used, is national days. The concept of national days in Poland has not been legally regulated in any normative act, nor has the manner of celebrating them been specified, which the Supreme Audit Office recognized in 2005 as a “legislative mistake.”¹⁴³ Only the Act on the Emblem, Colors and Anthem of the Republic of Poland and on state Seals imposes, in Art. 7, the obligation to hoist the state flag on the buildings of government administration bodies and other state bodies and state organizational units, as well as local government bodies and local government organizational units during national/state days. The current list of state and national holidays includes: February 19—Polish Science Day (established in 2020 as a public holiday);¹⁴⁴ March 1—National Day of Remembrance of “Cursed Soldiers” (established in 2011

142 The provision refers to the obligation to use the Polish language in trade with consumers and in the performance of labor law provisions, the Polish language shall be used if: 1) the consumer or the person performing the work has his/her residence in the territory of the Republic of Poland at the time of the conclusion of the contract and 2) the contract is to be performed or carried out in the territory of the Republic of Poland. In particular, the naming of goods and services, offers, warranty terms and conditions, invoices, bills, and receipts, as well as warnings and information for consumers required under other regulations, operating instructions, and information about the properties of goods and services, must be made in Polish.

143 Information on the results of control of the use of state symbols by public administration bodies—Department of Control Strategy of the Supreme Audit Office, reg. no. 76/2005/D/04/505/WSK, Warsaw, April 2005.

144 Journal of Laws of 2020, item 181.

as a public holiday),¹⁴⁵ March 24—National Day of Remembrance of Poles saving Jews under German occupation (established in 2018 as a public holiday),¹⁴⁶ April 14—Polish Baptism Day (established in 2019 as a public holiday),¹⁴⁷ May 1—public holiday, informally known as Labour Day (established in 1950),¹⁴⁸ May 3—May 3rd National Day (established in 1919,¹⁴⁹ again in 1990),¹⁵⁰ May 8—National Victory Day (established on April 24, 2015 “to commemorate the victory over Nazi Germany”);¹⁵¹ July 12—Day of the Struggle and Martyrdom of the Polish Village (established on September 29, 2017, as a public holiday in “tribute to the inhabitants of Polish villages for their patriotic attitude during World War II”);¹⁵² August 1—National Day of Remembrance of the Warsaw Uprising (established in 2009 as a public holiday);¹⁵³ August 31—Day of Solidarity and Freedom (established in 2005 as a public holiday);¹⁵⁴ October 19—National Day of Remembrance of the Steadfast Clergy (established in 2018 as a public holiday);¹⁵⁵ November 11—National Independence Day (established in 1937,¹⁵⁶ again in 1989),¹⁵⁷ December 27—National Day of the Victorious Greater Poland Uprising (established in 2021 as a public holiday).¹⁵⁸

The organs of public authority, by means of normative acts (laws and resolutions), establish public or national days (in the past these terms were used interchangeably). There are also laws or parliamentary resolutions establishing holidays that are not state or national days (despite the occurrence of the word “national” in the name of some days).

National holidays are an opportunity to manifest national values. Unfortunately, it seems that legal awareness of the use of national symbols is still quite low, with the result that legal violations of these symbols can occur.

Noteworthy is also the symbol of Fighting Poland, which appeared on Warsaw walls in 1942 during World War II. This symbol combined Poland—the letter “P” with fighting—the letter “W.” The letters joined together in the shape of an anchor symbolized hope. The sign resulted from clandestine activities coordinated by the Bureau of Information and Propaganda of the Main Headquarters of the Union for Armed

145 Journal of Laws of 2011 no. 32, item. 160.

146 Journal of Laws of 2018 item 589.

147 Journal of Laws of 2019 item 656.

148 Journal of Laws of 1950 no. 19, item 157.

149 Act of 29 April 1919 on the National Holiday of the Third of May, Dz.Pr.P.P. 1919 no. 38 item 281.

150 Journal of Laws of 1990 no. 28, item 160.

151 Journal of Laws of 2015, item 622.

152 Journal of Laws of 2017, item 1953.

153 Journal of Laws of 2009 no. 206, item 1588.

154 Journal of Laws of 2005 no. 155, item 1295.

155 Journal of Laws of 2018, item 2156.

156 Journal of Laws of 1937 no. 33, item 255.

157 Journal of Laws of 1989 no. 6, item 34.

158 Journal of Laws of 2021, item 2156.

Struggle—Home Army, which focused on implementing armed actions, diversion and distribution of leaflets and newspapers by *Szare Szeregi* (Grey Regiments).¹⁵⁹

In 2014, the Law on the Protection of the Fighting Poland Emblem came into force.¹⁶⁰ Art. 1 indicates that the symbol is an asset of the general members of the nation and is an attribute of the Poles' fight against the German aggressor during the Second World War. Art. 2 mentions the obligation of Polish citizens to surround the given symbol with reverence and respect. According to Art. 3 of the act, a person who publicly insults the symbol in question shall be punished with a fine per the Code of Conduct in Petty Offenses Cases.

An important national symbol, albeit not formalized, but important from the point of view of identity is the image of Our Lady of Częstochowa. It is protected as a religious symbol, but also for non-believers it is an element of Polish tradition and culture.¹⁶¹

The symbols that allow individuals to identify with a given community or nation are not only formalized symbols, but also those that have developed traditionally in history and are linked to values that are important for a given nation. It seems that the law does not fully appreciate the importance of these symbols. At the same time, it can be considered that they can be protected under other laws, including those concerning the protection of cultural heritage, the protection of language, or the protection of religious values.

8. Conclusions

The issue of national and state symbols is important in the history of Poland and the Polish nation. By referring to the beginnings of statehood and linking them to important events in the life of the state and the nation, these symbols are a lasting element of belonging to a given national community. It is part of the broader issue of a nation's right to self-determination¹⁶² and building a national identity. National or state symbols become a visible sign of the separateness that unites a given community. They make it possible to identify with it.

In Poland we speak of national symbols and state symbols, although these terms are often used interchangeably, as their designations have the same content; correctly, state symbols should be understood as those which are regulated by law and constitute the point of identification of the state among other states.

159 Gładkowski, 2017.

160 Act of 10 June 2014 on the protection of the Fighting Poland Sign (Journal of Laws, item 1062).

161 The protection of religious symbols is also linked to the protection of religious feelings, protected in Polish law by criminal law (see more: Sobczyk, 2021, pp. 145–159 and the literature and case law cited therein).

162 For more on the issue of the right to self-determination see Muszyński, 2022, 571–580.

State and national symbols in Poland are the flag, emblem, and anthem; additionally, language is an important element in building cultural and national identity. It connects community.

After Poland gained independence in 1918, shaping legal solutions concerning protection of national symbols was important in public discourse. Acts of statutory and sub-statutory rank were created in this respect. This matter was not the subject of constitutional regulations. Regardless of that, the inter-war solutions were the basis for shaping the protection of national and state symbols in Poland; therefore, the present legal solutions cannot be analyzed in isolation from those of the past; the persistence of the given arrangements is evidenced by the fact that despite the change of regime after the communist state period, no new act concerning the protection of these symbols was passed. It was not until 2021 that a new bill was presented, which is supposed to adjust the protection of symbols to the requirements of the present day (especially in the digital perspective), but it is also an attempt to verify the current symbols in the context of the values they represent (e.g., there is a discussion on the removal of certain stanzas from the anthem).

Currently, the protection of national and state symbols in Poland is shaped at the constitutional, statutory, and sub-statutory level. This testifies to the great importance that the political system and the legislator attach to this subject; however, this protection is not equal for all symbols. An additional problem is that there is no coherent conceptual grid regarding the issue. Individual acts use different formulations, which hinders uniform application of the law. And so, we have in Polish law state symbols (Criminal Code), symbols of the Republic of Poland (act on emblem, colors, and anthem of the Republic of Poland and on state seals). The Constitution lists the symbols in question generically but does not call them collectively either symbols or state signs.

Constitutionalization of the protection of state and national symbols shows the value they have in building national and cultural identity. Providing constitutional protection to national and state symbols is an expression of the realization of the state's objectives in Articles 5 and 6 of the Constitution consisting in the injunction to guard the national and cultural heritage. It is also the starting point for the realization of cultural rights by citizens.

A characteristic feature of Polish legal solutions is the fact that the protection of national and state symbols is regulated by a special act devoted to this issue; a separate act is also in place regarding the Polish language. Apart from this, some national symbols are also protected by criminal law based on the Criminal Code and the Code of Offenses (e.g., the emblem, the flag). In Polish law there are also regulations protecting given symbols in the civil context (especially when it comes to using them in business transactions), as well as in the administrative context.

Regulations concerning protection of national symbols are quite general and vague. For this reason, in practice, they leave a great deal of room for interpretation, as evidenced by the different ways in which cases involving acts against national and state symbols have been resolved.

Penalization of infringements of national symbols in Art. 137 of the Criminal Code does not include the anthem. Violations in this respect may be analyzed from the perspective of the Misdemeanors Code.

Penalization of violations of certain national symbols causes a discussion about proportionality and adequacy of state interference in the freedom of speech (and, more broadly, in the freedom of expression).

Addressing the issue of protecting national symbols should not only consider legal aspects but should go deeper. Shaping specific attitudes toward the state and the law is closely related to education, including civic education. Respect for the nation and the state, and therefore also for national symbols, should be shaped from the very beginning. If the values in question are presented as being important for the individual and society, and it is shown how to behave, then there is less risk of these values being violated. It is important to explain the use of national symbols. It is not uncommon for violations of these symbols to result from a lack of knowledge of the limits of the use of these symbols and the consequences of crossing these limits.

Doubts related to the fact that the provisions on the protection of state symbols date back to different periods of time make it reasonable to enact a new act in this respect and to verify the existing provisions contained in criminal statutes, especially from the perspective of the adequacy of regulations; in particular, it is necessary to organize the conceptual grid and to clarify what state and national symbols/signs are; it is important to formulate provisions that will strengthen the building of national and cultural identity in the Polish nation, with respect for the values on which the Constitution of the Republic of Poland is based.

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CHAPTER VI

LEGAL PROTECTION OF STATE, NATIONAL AND COMMUNITY SYMBOLS IN SERBIA



DALIBOR ĐUKIĆ

1. Introduction

The topic of this chapter is primarily the legal protection of state, national and community symbols in the public order of the Republic of Serbia. The first part of the book chapter contains the brief overview of the legal protection of state, national and community symbols in these periods: in the principality and kingdom of Serbia, in the Yugoslav kingdom and in the communist Yugoslavia. The 2nd part of the book chapter scrutinizes the constitutional regulation of state, national and community symbols in the Republic of Serbia. The other parts are thematic and dedicated to the protection of state symbols, national symbols, and symbols of different kind of communities at the level of criminal, civil, and administrative law.

“Symbols are signs, but not every sign is a symbol.”¹ The exact definition of the symbol is hard to formulate. “Symbol” is a Greek word originating from the verb *symvallo* which referred to putting together parts that had been divided.²

In classical times Greek and Latin words related to symbol had a variety of meanings, arranged round a notion of matching entities: a sign or mark whereby one person gave another to understand something; a token; a contribution of money to a feast; a share of a reckoning; a commercial treaty between a pair of contracting cities

1 Mønnesland, 2013, p. 7.

2 Firth, 1973, p. 47.

Dalibor Đukić (2022) Legal Protection of State, National and Community Symbols in Serbia. In: Zoltán J. Tóth (ed.) *Constitutional and Legal Protection of State and National Symbols in Central Europe*, pp. 217–250. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2022.ztclpsnsce_7

guaranteeing security and protection to their respective merchants. The meaning of symbol ultimately developed into that of a concrete indication of abstract values. In particular, the term became associated in early Christianity with the set of beliefs forming the Creed, in the canon known as the “Symbol of the Apostles.”³

Symbols play an extremely important role in modern societies. They are present in almost every kind of human activity. “Words are the Signs and Symbols of Things.”⁴ In mathematics and natural sciences are used symbols (artificial language) because they allow certain kinds of operation to be performed.⁵ Expression through symbols and symbolization is essential, also, in art, politics, religion, communication etc. Emerson wrote in his essay on *The Poet* that “Things admit of being used as symbols, because nature is a symbol, in the whole, and in every part,” and he continues “We are symbols, and inhabit symbols.”⁶ Cassirer goes further proposing that a man should be defined as an *animal symbolicum*, instead of defining him as an *animal rationale*.⁷

This book is dedicated to a relatively small group of symbols, which impose an extremely strong influence on broad masses and specific communities. Those are state, national, and generally community symbols which are closely connected to the identity of the groups that those symbols represent. In this book chapter the terms nation and national will be used in the ethnic sense, and not in a sense of the state. That is because the identical use of those terms can be found in the countries of Central and Eastern Europe.⁸ National symbols usually have been appeared before the national states were established.⁹ Therefore, in this book chapter the legal protection of state and national (in the sense of ethnic) symbols will be distinguished, although sometimes they do not differ.

There are plenty of signs that different types of communities have used and still are using to express their identity, to unite their members and to distinguish themselves from other similar groups or communities. It would be extremely complicated, or even impossible, to identify and examine the legal protection of symbols of each type of different communities that exist in a particular state. Therefore, in this book chapter will be investigated the legal protection of symbols of religious communities and symbols of national or ethnic minorities in Serbia. The chapter also considers the rules that regulate the use and display of the symbols and traditional symbols of the Serbian Autonomous Province of Vojvodina. Thus, the legal protection of state, national and community symbols will be scrutinized, considering specifics of different

3 Firth, 1973, p. 54.

4 Oxford English Dictionary, 1686.

5 Firth, 1973, p. 56.

6 Emerson, 1950, pp. 325, 328.

7 Cassirer, 1954, p. 44.

8 E.g., Slavic word “*nacija*” or Hungarian “*nemzet*.”

9 Mønnesland, 2013, p. 7.

communities whose values, identity, history, and uniqueness those symbols express and convey.

2. Brief historical introduction

The creating of the modern Serbian state relied in many aspects on elements of medieval Serbian statehood. Already during the First Serbian Uprising, which began in 1804, there was a need for war flags and other symbols that would cleverly mark the emerging new state. “Because it is of special importance for every nation that is forming its own state to acquire a specific coat of arms. It is the most distinctive feature of the spiritual community made up of the people or the state. Like the flag, the state coat of arms is a sacred symbol: it is the embodiment of the sublime idea of the fatherland, the idea for which an individual should live, and for which that individual is prepared to die.”¹⁰ At the beginning of the 19th century, during the struggle for liberation, the Serbian people did not create new coats of arms, but renewed the use of old coats of arms, reminiscent of the medieval glory of the Serbian state. During the 19th century, the struggle for liberation from the Ottoman rule in Serbia was fought at the level of the struggle for the free use of Serbian national symbols. The parallel processes of nation building and struggle for the autonomy could be found in the 19th century history of other central European nations.¹¹

Shortly after the Principality of Serbia gained independence, pursuant to the provisions of the Berlin Peace Treaty (1878), preparations for the proclamation of the kingdom began. The idea of improving the appearance of the state coat of arms emerged then. The new design of the coat of arms was based on detailed historical and heraldic research conducted by famous Serbian historian *Stojan Novaković*. He published the results of his work in a special study,¹² which is one of the fundamental works of Serbian heraldry (science on coats of arms). The Law on the Coat of Arms of the Kingdom of Serbia was passed in 1882.¹³ The appearance of the coat of arms is regulated in Art. 1: “The coat of arms of the Kingdom of Serbia is a two-headed white eagle on a red shield with a royal crown. On top of both heads of the two-headed white eagle stands the royal crown and one fleur-de-lys is under each claw. On the chest of the eagle is the coat of arms of the Principality of Serbia, a white cross on a red shield with one furison in each corner of the cross.” The next article reads: “The coat of arms is covered with a purple ermine cloak, with the royal crown on top.”

10 Solovjev, 2000, p. 21.

11 E.g., Croatians. Čepulo, 2010, p. 144.

12 Novaković, 1884.

13 Law on the Coat of Arms of the Kingdom of Serbia, *Srpske novine*, Official Gazette of the Kingdom of Serbia, no. 135/1882.

The law envisages the drafting of the coat of arms, which will be determined by the decision of the Council of Ministers and which is planned to be kept in the Ministry of Justice. The draft was established on October 7, 1882, and was published in the Official Gazette.¹⁴ This is how the cleverest combination in the history of Serbian heraldry was created: the coat of arms of the Principality of Serbia (a cross with four furisons), merged with the coat of arms of medieval Nemanjić Serbia (double-headed eagle) and fleur-de-lys, which are often found on Serbian medieval coins.¹⁵ The Law did not prescribe the manner of use of the Serbian coat of arms and flag, nor sanctions for possible misuse of state symbols.

2.1. The period of a multinational state

In the vast majority of modern states, there are several ethnic groups, among which there may be significant differences. These differences may include ethnic origin, history, language, religion, etc. However, there are states in which more ethnic groups are of considerable size and such states are called multinational. There is no consensus on what percentage of minority groups should be in the total population of a country for it to be considered multinational.¹⁶ States with smaller national minorities, or migrants, cannot be considered multinational. It can be argued with certainty that multinational states are those states in which no ethnic group exceeds half of the total population, i.e., those states in which there is no absolute national majority. An example of such a state was the Kingdom of Yugoslavia, which was founded in 1918 under the name Kingdom of Serbs, Croats, and Slovenes. At the moment the joint state of Serbs, Croats and Slovenes was formed, the Kingdom of Serbia lost its statehood.

As it has already been said, the state symbols of the Kingdom of Serbia were defined in the tradition of medieval Serbian heraldry. However, in the newly created state, it was necessary to start creating new state symbols. The Corfu Declaration of 1917 foresaw that the future common state would have one state flag and one crown. It was envisaged that the new state emblems be composed of the existing particular emblems. The same declaration stipulated that Serbian, Croatian and Slovenian coats of arms and flags could be displayed and used freely. The exceptions are the state authorities, for which the display of the state flag as a symbol of unity was prescribed.¹⁷

After the constitution of the Kingdom of Serbs, Croats, and Slovenes on December 1, 1918, the coat of arms of the Kingdom of Serbia was used in the first days of the new state's existence.¹⁸ At the very beginning of its activities, the first government

14 Srpske novine, Official Gazette of the Kingdom of Serbia, no. 229/1882.

15 Soloviev, 2000, p. 204.

16 Mønnesland, 2013, p. 12.

17 Corfu Declaration, Krkljuš, 2003, p. 306.

18 Kostić, 1934, p. 8.

of the new state took measures with the aim of creating a project of a new coat of arms. As early as December 22, 1918, the Council of Ministers passed a decision determining the provisional appearance of the flag and coat of arms.¹⁹ At the session held on February 28, 1919, the Council of Ministers adopted the final appearance of the coat of arms. In accordance with that decision, the state flag was a tricolor with horizontally laid colors in blue, white and red. The same decision determined the appearance of the coat of arms, which was in fact a symbolic representation of the then accepted theory of the three-tribe nation. The state coat of arms is represented in the form of a white double-headed eagle with a shield on its chest. The shield was divided into three fields. On the right field was the Serbian coat of arms (a *crux quadrata* with furisons), on the left field was the Croatian coat of arms (“checkerboard” with 20 red and white fields), while on the lower part was the coat of arms of Illyria to represent Slovenia (white crescent turned upward, a white star with five feathers between its arms).²⁰

With minor changes, the provisions of the government decree of December 22, 1918, on the state coat of arms and flag, were transposed to Art. 2 of the first Constitution of the Kingdom of Serbs, Croats, and Slovenes, which was adopted on June 28, 1921.²¹ The most significant change concerned the “Slovenian” field of the coat of arms, which in accordance with the Constitution, instead of a single silver five-pointed star above a white crescent, has three six-pointed golden stars.²² Although it is not mentioned in the Constitution, the coat of arms had a purple ermine cloak on its sides, with a royal crown on top, similar to the coat of arms of the Kingdom of Serbia. The crown and the cloak were a feature of the state system, which signifies monarchies of the kingdom type.²³ In accordance with the practice in the Kingdom of Serbia, the Council of Ministers determined the source, i.e., the original coat of arms at a session held on May 3, 1922. The decision of the Council of Ministers, together with the picture of the coat of arms, was published in the official gazette.²⁴

After the enactment of the 1931 Constitution, which implemented the ideology of integral Yugoslavism,²⁵ the state symbols were not changed.²⁶ However, in the spirit of national unity, Art. 2 of the Constitution does not explicitly note that the state coat of arms contains the Serbian, Croatian and Slovenian coats of arms, yet it gives only a description of the coats of arms that make up the common state coat of arms.

19 http://www.arhivyu.gov.rs/active/en/home/glavna_navigacija/leksikon_jugoslavije/drzavni_simboli/grb.html.

20 The new coat of arms appears in the Official Gazette for the first time on the 3rd April 1919. Official Gazette of the Kingdom of Serbs, Croats, and Slovenes, no. 27/1919.

21 Constitution of the Kingdom of Serbs, Croats, and Slovenes, Krkljuš, 2003, pp. 328–359.

22 Art. 2 para. 1 of the 1921 Constitution.

23 Kostić, 1934, p. 9.

24 Official Gazette of the Kingdom of Serbs, Croats, and Slovenes, no. 229/1919, annex XXXI.

25 Mirković, 2017, p. 231.

26 Constitution of the Kingdom of Yugoslavia, Official Gazette of the Kingdom of Yugoslavia, no. 200/1931.

This is also the only difference between the provisions of this and the previous 1921 Constitution regarding the state symbols.

2.2. The period of the socialist state

The political actors resort to different strategies when designing symbols. The first strategy is to adopt the existing religious symbols to “place their ideological beliefs in a broader framework, and give them a generally acceptable character.” Another strategy is to take over the traditional political–historical and national symbols, which is typical for newly established regimes. The third option is to create completely new symbols and give a different meaning to the existing symbols, which usually happens after revolutions that have been carried out successfully.²⁷ This last strategy was applied by the communist authorities in the period after the Second World War. The coat of arms of the then Yugoslavia was designed in November 1943, during the preparations for the second session of the Anti-Fascist Council of National Liberation of Yugoslavia.²⁸ The 1946 Constitution of the Federal People’s Republic of Yugoslavia prescribed the appearance of the coat of arms and the flag (Articles 3 and 4): “The state coat of arms of the Federative People’s Republic of Yugoslavia represents a field encircled by ears of corn. At the base the ears are tied with a ribbon on which is inscribed the date 29-XI-1943. Between the tops of the ears is a five-pointed star. In the center of the field five torches are laid obliquely, their several flames merging into one single flame. The state flag of the Federative People’s Republic of Yugoslavia consists of three colors: blue, white, and red, with a red five-pointed star in the middle. The ratio of the width to the length of the flag is as one to two. The colors of the flag are placed horizontally in the following order from above: blue, white and red. Each color covers one-third of the flag’s width. The star has a regular five-pointed shape and a gold (yellow) border. The central point of the star coincides with the intersection point of the diagonals of the flag. The upmost point of the star reaches half way up the blue field of the flag, so that the lower points of the star occupy corresponding positions in the red field of the flag.”²⁹

The coat of arms reflected the new socialist reality,³⁰ representing the symbolic unification of the five Yugoslav peoples (Serbs, Croats, Slovenes, Montenegrins and Macedonians).³¹ With the Constitution of 1963, the state coat of arms was changed by adding another torch, which expressed the unity of all six federal republics.³² The state coat of arms had the same appearance in accordance with the 1974 Constitution

27 Đorđević, 1993, p. 1040; Naumović, 1995, p. 116.

28 Popović and Jovanović, 1979, p. 28.

29 Constitution of the Federal People’s Republic of Yugoslavia, Official Gazette of the Federal People’s Republic of Yugoslavia, no. 10/1946.

30 Mønnesland, 2013, p. 82.

31 Popović and Jovanović, 1979, p. 29.

32 Constitution of the Socialist Federal Republic of Yugoslavia, Official Gazette of the Socialist Federal Republic of Yugoslavia, no. 14/1963.

of SFRY.³³ Unlike the coat of arms, which completely broke the continuity with the centuries-old heraldic tradition of the South Slavic peoples, the colors of the flag remained identical to the colors of the Kingdom of Yugoslavia. The aim was to point out the state's continuity, and the Yugoslav tricolor was connected with the Pan-Slav flag adopted at the congress in Prague in 1848.³⁴ Of course, a red five-pointed star was placed on the Yugoslav tricolor. Apart from the Federation, the "socialist republics" also had their coats of arms and flags, and they regulated their appearance with their own constitutions.³⁵ Following the example of the Soviet republics, the coats of arms featured mantlings of leaves or ears of wheat, with a five-pointed star at the top and an emblem in the middle. The coat of arms of Serbia and Croatia shows a connection with the earlier heraldic tradition.³⁶ In accordance with Art. 4 of the Constitution of the People's Republic of Serbia, the coat of arms has a red shield with evenly positioned four furisons,³⁷ which have been a symbol of Serbia since the Middle Ages. However, in accordance with the ideology of the time, the cross was removed, around the arms of which the furisons were always placed. Regarding flags, the flags of Slovenia, Croatia, and Serbia were actually their traditional tricolors with a five-pointed star in the middle.³⁸ In this respect, the republic emblems were largely inspired by the history and traditions of the federal republics.

The use, detailed appearance, and protection of the coat of arms, flag, anthem, and other state symbols of the federation were regulated in detail by federal laws and other regulations, by international treaties, as well as by laws and regulations of the republics and provinces. Among them, the most important was certainly the Law on the Use of Coats of Arms, Flags and Anthems from 1977.³⁹ The analysis of all the mentioned regulations would go beyond the framework of a shorter historical analysis, adequate for the needs of this paper.

The first constitutions of socialist Yugoslavia did not regulate the issue of the national anthem. Its last Constitution of 1974 contains a short provision stating that the SFRY has an anthem,⁴⁰ which is determined by the federation through federal bodies.⁴¹ The Law on the Use of the Coat of Arms, Flag and Anthem from 1977 stipu-

33 Constitution of the Socialist Federal Republic of Yugoslavia, Official Gazette of the Socialist Federal Republic of Yugoslavia, no 9/1974.

34 Mønnesland, 2013, p. 82.

35 Đorđević, 1967, p. 669.

36 Soloviev, 2000, p. 96. According to J. Đorđević, it was a consequence of the fact that the Yugoslav peoples had their own special history, and the existence of historical, state-legal and symbolic elements in the construction of republics, which came to the fore in republic coats of arms and flags, is consequentially understandable (Đorđević, 1967, p. 669).

37 Constitution of the People's Republic of Serbia, 1947, Art. 4.

38 Mønnesland, 2013, p. 83.

39 Law on the Use of the Coat of Arms, Flag and Anthem of the Socialist Federal Republic of Yugoslavia and on the Use of the Face and Name of the president of the Republic Josip Broz Tito, Official Gazette of the SFRY, no. 21/77.

40 Constitution of SFRY, 1974, Art. 8.

41 Constitution of SFRY, 1974, Art. 281, para. 1.

lates that only a melody and a text determined by the Assembly of the SFRY can be performed as an anthem. The same law stipulates that, until the Assembly of the SFRY determines the national anthem in accordance with the Law, “*Hej Sloveni*” will be performed as the anthem, the unofficial anthem of the SFRY until then.⁴² This solution was reached after a series of failed competitions and attempts to come up with a new national anthem that would be in line with the social order at the time.

The dissolution of the SFRY led to the forming of independent states that have independently regulated their state symbols. Serbia remained part of the Federal Republic of Yugoslavia, which consisted of two republics: Serbia and Montenegro. The 1992 Constitution of the Federal Republic of Yugoslavia prescribed the appearance of the flag, with a color scheme that was the same as that of the flag of socialist Yugoslavia and the Kingdom of Yugoslavia. The aim was to emphasize continuity with the previous states. For the first time, the Constitution stipulated that the national anthem was the solemn song “*Hej Sloveni*.” However, the appearance of the coat of arms was not regulated by the Constitution; it was left to be regulated by the federal laws.⁴³ The 1993 Law on the Coat of Arms of the Federal Republic of Yugoslavia stipulates that the coat of arms of the FRY is a red shield with a double-headed silver eagle, with a quartered shield on its chest. In the first and fourth quarters, there is a silver cross with four furisons on a red field, and in the second and third quarters, there is a lion on a red field “in the passing” (*en passant*).⁴⁴ It is a somewhat successful fusion of symbols of the two republics that made up the FRY. The Law on the Use of the Flag, Anthem and Coat of Arms of the Federal Republic of Yugoslavia regulated in detail the appearance, use and legal protection of state symbols.⁴⁵ These state symbols remained in use until the end of the state Union of Serbia and Montenegro in 2006. The 1990 Constitution of the Republic of Serbia did not prescribe the coat of arms, flag and anthem of the Republic of Serbia, but only provided that these state symbols be determined “according to the procedure for amending the Constitution,” which means that citizens would vote on them in a referendum.⁴⁶

The first practical steps to re-establish the state symbols of Serbia on the Serbian heraldic tradition were made in 2004, after decades of using symbols from the period of socialist constitutionalism. At the extraordinary session on August 17, the National Assembly adopted the Recommendation on the use of the coat of arms, flag, and anthem of the Republic of Serbia.⁴⁷ In accordance with that act, the Coat of Arms of the Kingdom of Serbia from 1882 was reinstated, and a distinction was made

42 Law on the Use of Coats of Arms, Flag and Anthem, Art. 4, para. 4; Art. 40.

43 Constitution of FRY, Art. 4.

44 Law on the Coat of Arms of the Federal Republic of Yugoslavia, Official Gazette of the FRY, no. 66/1993.

45 Law on the Use of the Flag, Anthem and Coat of Arms of the Federal Republic of Yugoslavia, Official Gazette of the Federal Republic of Yugoslavia, nos. 66/93, 24/94.

46 Constitution of the Republic of Serbia, 1990, Arts. 5, 132–134.

47 Recommendation on the use of the coat of arms, the flag and the anthem of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 93/2004.

between the Large Coat of Arms and the Small Coat of Arms. Also, the appearance of the National and state flags and the flags of the president of the Republic and the Speaker of the National Assembly are regulated. The solemn song “*Bože pravde*” was chosen to be the anthem,⁴⁸ the text of which was modified and adapted to the republican form of government.⁴⁹ In the same year, the government of the Republic of Serbia adopted the Conclusion on the use of the coat of arms, flag, and anthem of the Republic of Serbia, which regulates in detail the circumstances and manner in which the coat of arms, flag and anthem of the Republic of Serbia are used.⁵⁰ The state symbols were changed by the Recommendation of the National Assembly, which was not binding. This was done to avoid the complicated procedure of determining state symbols, which was envisaged by the 1990 Constitution of the Republic of Serbia. After almost a century, the state insignia of Serbia was returned to use at a solemn ceremony held on August 30, 2004. The national anthem was sung by the Guard Orchestra, and the new national flag was ceremoniously raised on the National Assembly building. On that occasion, the speaker of the National Assembly, *Predrag Marković*, stated, among other things: “Wherever you see a Serbian coat of arms like this, there is the home of the state of Serbia. I would like to take this opportunity to thank everyone who has kept alive the memory of the insignia that have today been restored.”⁵¹

3. Constitutional regulation of state, national, and community symbols

The Constitution of the Republic of Serbia was adopted in 2006.⁵² In accordance with the tradition that existed in the Kingdom of Serbia, the Constitution determines state symbols. The coat of arms, flag and anthem are state symbols that formally symbolize state subjectivity, sovereignty, and identity.⁵³ The Constitution in Art. 7 stipulates that the Republic of Serbia has its own coat of arms, flag, and anthem. In regard to the coat of arms, the Constitution stipulates that the coat of arms be used as the Large Coat of Arms and the Small Coat of Arms.⁵⁴ This constitutional provision confirms the existence of small and large coats of arms, which were introduced by

48 The original text can be found in: Pavlović, 1986, pp. 194–195.

49 It is an anthem in the form of a prayer. Đukić, 2022, p. 67.

50 Conclusion on the use of the coat of arms, the flag and the anthem of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 95/2004.

51 Serbia: Adoption of the new flag, 2004, see <https://www.crwflags.com/fotw/flags/rs-2004.html>.

52 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, nos. 98/2006, 16/2022.

53 Pajvančić, 2009, p. 20.

54 Constitution of the Republic of Serbia, Art. 7, para. 2. See: Appendix, p. 357.

the 2004 Recommendation of the National Assembly on the Use of the Coat of Arms, Flag and Anthem of the Republic of Serbia.⁵⁵ Thus, one of the provisions of the non-binding Recommendation of the National Assembly became binding, and it became part of the text of the highest legal act in the country. The same applies to the flag of the Republic of Serbia. The Constitution stipulates that the flag of Serbia be used as the National Flag and as the state flag.⁵⁶ This constitutional regulation also includes provisions in the constitutional text that originate from the Recommendation of the National Assembly from 2004, which for the first time specifically regulates the use of the National and state flags. Unlike the previous Serbian constitutions, the actual Constitution only prescribed that the Republic of Serbia shall have coat of arms and flag, while leaving the more detailed regulation of their appearance and use to the legislator. In that way, the procedure for determining the appearance of state symbols has been simplified in relation to the previous Constitution from 1990.

Although the Serbian Constitution does not prescribe the appearance of the coat of arms and the flag, it stipulates that the anthem of the Republic of Serbia is the official song “*Bože pravde*” (God of Justice).⁵⁷ In this case, too, the Constitution relies on the 2004 Recommendation of the National Assembly. It is interesting that the previous constitutions of Serbia mostly regulated the appearance of the coat of arms and the flag in detail, slipping the issue of the anthem, while the current Constitution prescribed the anthem, and skipped the issue of the appearance of the flag and coat of arms. The text of the anthem itself is not stated in the Constitution and is left to the legislator to prescribe it. Having in mind all the constitutional provisions on state symbols, it can be concluded that the constitution-maker has only partially established the continuity with the practice originating from the Serbian constitutionalism of the 19th century. The Constitution stipulates that there are state symbols, but determining their appearance and regulating their use and legal protection is left to the legislator. There is no special procedure for passing the law on state symbols. The reason, among other things, could be that the reintroduction of Serbian state symbols enjoyed great support from public opinion and the citizens of the Republic of Serbia. The reinstated state symbols were enthusiastically accepted, as part of the renewal of Serbian statehood, which ended in 1918.

State territory is also mentioned in the literature as one of the state symbols.⁵⁸ In accordance with the Constitution, the territory of the Republic of Serbia is “unique and indivisible.” The Constitution is somewhat contradictory, because it prescribes the inviolability of borders, but also envisages the possibility of their changing in

55 Recommendation on the use of the coat of arms, the flag and the anthem of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 93/2004.

56 Constitution of the Republic of Serbia, Art. 7, para. 3. See: Appendix, p. 357.

57 Constitution of the Republic of Serbia, Art. 7, para. 4.

58 Popović and Jovanović, 1979, p. 39.

accordance with the complicated procedure of amending the Constitution.⁵⁹ Also, the capital is mentioned as one of the state symbols. Although the name of the capital does not have to be determined by the constitution, as was the case with the Serbian constitutions of the 19th century, the Constitution of the Republic of Serbia stipulates that the capital of the Republic of Serbia is Belgrade.⁶⁰ The part of the Constitution which regulates local self-government, regulates in more detail the legal position of the City of Belgrade, which in accordance with the Constitution has competencies entrusted to municipalities and cities, and it provides that the law on the capital may entrust it with other competencies.⁶¹ The constitutional regulation on the capital has its historical foundation, since it is a city that was the capital during most of the 19th century, as well as throughout the 20th century. State symbols include state holidays, decorations, and seals, as well as citizenship, on which the Constitution of the Republic of Serbia does not contain significant provisions.⁶²

The Constitution of the Republic of Serbia guarantees the right to provincial autonomy and local self-government.⁶³ The Constitution stipulates that there are two autonomous provinces in the Republic of Serbia: the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. Since the territory of the Autonomous Province of Kosovo and Metohija is under the United Nations Interim Civil and Military Administration,⁶⁴ the Constitution stipulates that the essential autonomy of that area would be regulated by a special law, which is prescribed to be adopted in the procedure envisaged for amending the Constitution.⁶⁵ In accordance with the principle of subsidiarity, which is the primary criterion for the delimitation of competencies between the Republic and the autonomous provinces, the Constitution only outlined the competencies of the autonomous provinces.⁶⁶ The only right that the autonomous provinces exercise directly pursuant to the Constitution, without reference to the legal regulation of the quality and scope of the rights of the provinces, is to determine their symbols and regulate the manner of their use.⁶⁷ The Autonomous Province of Vojvodina regulated the appearance and use of its symbols in the Statute, which will be discussed later. The fact that the Constitution completely left this matter to the autonomous provinces indicates the importance that this issue has for these forms of territorial autonomy.

In addition to the autonomous provinces, local self-government units have the right to independently determine their symbols and regulate the manner of their

59 Constitution of the Republic of Serbia, Art. 8. The problem also appears in connection with the procedure of changing the borders, since Art. 99, para. 1 stipulates that the National Assembly decides on the change of borders.

60 Constitution of the Republic of Serbia, Art. 9.

61 Constitution of the Republic of Serbia, Art. 189.

62 Popović, and Jovanović, 1979, pp. 38–41; Constitution of the Republic of Serbia, Art. 97.

63 Constitution of the Republic of Serbia, Art. 12.

64 Marković, 2019, p. 458.

65 Constitution of the Republic of Serbia, Art. 182.

66 Pajvančić, 2009, p. 235.

67 Constitution of the Republic of Serbia, Art. 183, para. 4; Pajvančić, 2009, p. 236.

use. The Constitution stipulates that local self-government units are municipalities, towns, and the city of Belgrade. Given that cities (including the city of Belgrade) have the same competencies as municipalities,⁶⁸ and that the Constitution guarantees municipalities the right to determine their symbols and their use,⁶⁹ it can be concluded that all local self-government units have this right. However, unlike the autonomous provinces, which exercise this right directly, based on the Constitution, local self-government units are instructed to exercise this right in accordance with the law and within the framework prescribed by the Law on Local Self-Government. However, it is about the original competence of the municipality, which has the instruments for its exercise.

The Constitution regulates the protection not only of state symbols, but also of symbols that express the national identity of the citizens of the Republic of Serbia. The preamble of the Constitution already states that the Constitution is adopted starting from the state tradition of the Serbian people and the equality of all citizens and ethnic communities. This expresses the continuity with Serbian statehood from the past. At the same time, the equality of all citizens and ethnic communities is placed on the same level with the state tradition of the Serbian people. Also, the preamble states that the Constitution is adopted because the Province of Kosovo and Metohija is an integral part of the territory of Serbia. The memory of the Battle of Kosovo is deeply engraved in the Serbian national identity and it has become a kind of symbol of the struggle for Serbian statehood.⁷⁰ The question of the legal nature of the preamble was left open by the constitution-maker, and conflicting opinions can be found in the literature in this regard.⁷¹

Significant elements of national identity are language and script. The Constitution stipulates that the Serbian language and the Cyrillic alphabet are in official use in the Republic of Serbia, while the use of other languages and scripts is regulated by law “based on the Constitution.” Although the Roman script is also used in Serbia, the Constitution stipulates that only the Cyrillic script is in official use. Thus, the script, which undoubtedly represents one of the symbols of Serbian identity, was declared an official script by the Constitution. To encourage the use of this script, which is inextricably linked with Serbian culture and literature, a special law has been passed, which will be discussed in more detail in the following chapters. Although the Serbian language and the Cyrillic script are in official use, the Constitution provides for the possibility of regulating the official use of other languages and scripts by law. The right to participate in decision-making in accordance with the law or to decide on issues related to the official use of their language and script is among the collective rights, guaranteed by the Constitution to national minorities.⁷²

68 Constitution of the Republic of Serbia, Art. 189.

69 Constitution of the Republic of Serbia, Art. 190.

70 Mønnesland, 2013, pp. 39–44; Đukić, 2022, p. 61.

71 Marković, 2006, p. 43; Simović, 2020, p. 191.

72 Constitution of the Republic of Serbia, Art. 75.

Therefore, although the Serbian language and the Cyrillic script have the status of the official language and script, this does not mean that the use of other languages and scripts is restricted or prohibited, leaving the legislator to regulate this area, in accordance with constitutional regulations on collective rights of national minorities.

The Constitution of the Republic of Serbia prescribes in principle that the Republic of Serbia protects the rights of national minorities, whereby “The state shall guarantee special protection to national minorities for the purpose of exercising full equality and preserving their identity.”⁷³ The constitution-maker included the protection of minority rights in the basic provisions of the Constitution. The rights of national minorities are additionally regulated within the framework of constitutional guarantees of human and minority rights. The constitutional provision regulating the right to preserve the specifics of national minorities is important for the topic of this paper. The list of special rights that preserve the identity of persons belonging to national minorities includes the right to public use of symbols of national minorities, as well as to the use of their language and script.⁷⁴ The scope of rights of persons belonging to national minorities may be extended, but only by the regulations of the autonomous provinces and provided a legal basis for it.⁷⁵

Apart from national minorities, there are other entities that enjoy certain collective rights. These include churches and religious communities.⁷⁶ The Constitution of the Republic of Serbia guarantees freedom of thought, conscience, and religion.⁷⁷ The freedom of religion or belief includes the freedom to perform religious rites as well as freedom of private and public expression of religious beliefs. Freedom of expression of religious beliefs usually implies the use of various religious symbols, often in public space.⁷⁸ Therefore, the Constitution indirectly

73 Constitution of the Republic of Serbia, Art. 14.

74 “Members of national minorities shall have a right to: expression, preservation, fostering, developing and public expression of national, ethnic, cultural, religious specificity; use of their symbols in public places; use of their language and script; have proceedings also conducted in their languages before state bodies, organizations with delegated public powers, bodies of autonomous provinces and local self-government units, in areas where they make a significant majority of population; education in their languages in public institutions and institutions of autonomous provinces; founding private educational institutions; use of their name and family name in their language; traditional local names, names of streets, settlements and topographic names also written in their languages, in areas where they make a significant majority of population; complete, timely and objective information in their language, including the right to expression, receiving, sending and exchange of information and ideas; establishing their own mass media, in accordance with the Law. Under the Law and in accordance with the Constitution, additional rights of members of national minorities may be determined by provincial regulations.” Constitution of the Republic of Serbia, Art. 79. The 2006 Constitution of Serbia guarantees the linguistic rights of minorities based on territorial and personal principles (Bakić, 2010, p. 385).

75 Pajvančić, 2009, p. 102.

76 Avramović and Rakitić, 2009, pp. 95–96.

77 Constitution of the Republic of Serbia, Arts. 43, 44.

78 Đukić, 2021, p. 155.

guarantees the freedom of religious organizations to display their symbols and to use them publicly.

The 2006 Constitution of the Republic of Serbia very summarily regulates the appearance and use of state symbols. The constitution regulates the protection of national symbols to some extent. Special attention was paid to the protection of the use of symbols of national minorities, which is related to the preservation of their identity. The right of autonomous provinces and local self-government units to determine and regulate the appearance and use of their symbols is also guaranteed. The Constitution, albeit indirectly, protects the right of religious organizations to use their symbols within the right to manifest religious beliefs.

4. Legal protection of state symbols

The legal order of the Republic of Serbia envisages the protection of state symbols from improper use, display in an inadequate form or in a manner contrary to positive legal regulations. The legal protection of state symbols takes several forms. Administrative, misdemeanor, and criminal protection of state symbols is most often mentioned in the literature.⁷⁹

The basic law that regulates the appearance, use, display and legal protection of state symbols is the law on the appearance and use of the coat of arms, flag and anthem of the Republic of Serbia from 2009.⁸⁰ Based on the authorizations from that Law, the Government of the Republic of Serbia has adopted in 2010 the decree on establishing the archetype of the large and small coats of arms, archetype of the flag and musical notes of the anthem of the Republic of Serbia.⁸¹ Thus, the practice from the time of the Kingdom of Serbia continued, that the Government determined the original coat of arms and flag. In the Republic of Serbia, substantive issues in the field of misdemeanors are regulated by the Law on Misdemeanors.⁸² That Law does not list misdemeanor offenses, but various types of offenses are prescribed by other laws. Regarding state symbols, a small number of regulations contain violations in that area, among which the most important are the Law on the Appearance and Use of the Coat of Arms, Flags and Anthems of the Republic of Serbia and the Law on Decorations of the Republic of Serbia.

79 Popović and Jovanović, 1979, p. 100.

80 Law on the design and use of the coat of arms, flag, and anthem of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 36/2009.

81 Decree on establishing the archetype of the large and small coats of arms, archetype of the flag and musical notes of the anthem of the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 85/2010.

82 Law on Misdemeanors, Official Gazette of the Republic of Serbia, nos. 65/2013, 13/2016, 98/2016, 91/2019, 91/2019.

The Law on the Appearance and Use of the Coat of Arms, Flag, and Anthem of the Republic of Serbia from 2009 stipulates that state symbols may be used only in the form and with the content determined by the Constitution and the law. A legal entity that uses the mentioned state symbols in a form or with a content or melody not provided for by the Constitution or the law, shall be punished by a fine for a misdemeanor.⁸³ The same law prohibits the use of the coat of arms and the flag “as merchant or trade mark, pattern or model, or any other kind of symbols to mark merchandise or services.”⁸⁴ Acting contrary to this provision of the Law is also punishable by a fine. Regarding displaying the coat of arms or flag of foreign countries in the Republic of Serbia, the law stipulates that they can be displayed only with the coat of arms or flag of the Republic of Serbia. An exception to this rule is allowed if provided for by an international agreement.⁸⁵ A legal entity that acts contrary to this shall be fined. A smaller fine is prescribed for the responsible person in the legal entity. The law also stipulates that the coat of arms and the flag may not be used when they are damaged or are unsuitable for use due to their appearance, and in that case, they shall be withdrawn from use. A legal entity that displays a flag or coat of arms that is not suitable for use will be fined for the offense, while a smaller fine is prescribed for the responsible person in the legal entity. Apart from legal entities, this offense can also be committed by natural persons, who in that case are fined the same amount as the responsible person in a legal entity.⁸⁶ The legislator also envisaged a protective measure that can be imposed in addition to the fine, which consists in confiscating the object with which the misdemeanor was committed.⁸⁷

The Law on Decorations regulates the names and grades of decorations in the Republic of Serbia, as well as the procedures for their bestowing and revoking.⁸⁸ This law stipulates that a company will be punished for an economic offense, and an entrepreneur for a misdemeanor, if it puts on the market a sign or object that has the appearance of a decoration of the Republic of Serbia. Along with the penalty, a protective measure of confiscation of the object is imposed, and in the case of a company, confiscation of the earned profit. In the case of natural persons, fines for misdemeanors are envisaged for persons who wear a foreign decoration without the consent of the ministry responsible for foreign affairs, then for persons who wear or use an object that looks like a decoration, as well as for persons who wear a decoration that was not awarded to them, or in a manner contrary to applicable regulations.⁸⁹

83 Law on the Design and Use of the Coat of Arms, Flag, and Anthem of the Republic of Serbia, Arts. 2, 41.

84 *Ibid.*, Arts. 5, 41.

85 *Ibid.*, Arts. 8, 41.

86 *Ibid.*, Arts. 6, 42.

87 *Ibid.*, Art. 43.

88 Law on Decorations, Official Gazette of the Republic of Serbia, nos. 88/2009–43, 36/2010.

89 Law on Decorations, Arts. 27–29.

Regarding the criminal protection of state symbols, it should be emphasized that criminal acts related to state symbols are classified in the group of criminal acts against honor and reputation. The Criminal Code of Serbia prescribes the criminal offense of defamation of Serbia, which consists of public exposure to the desecration of Serbia, its flag, coat of arms, or anthem. A fine or imprisonment for up to three months is prescribed for this criminal offense.⁹⁰ The subject of criminal protection is the reputation of the state, while the activity is exposure to desecration that can be verbal (oral or in writing) or an act, i.e., by certain actions. The Code stipulates that exposure to desecration must be public, which means that it must be done in such a way that an indefinite number of persons can learn about the act. The subject of the act is Serbia and its state symbols: the flag, the coat of arms, and the anthem. Exposure to desecration needs to be direct, which means that exposing state bodies or the highest state representatives to desecration is not part of this criminal offense. Unlike some countries in which exposure to the destruction of state symbols has been decriminalized, or reduced to the level of a misdemeanor, the Criminal Code of Serbia prescribes the criminal protection for state symbols. It is considered that this criminal offense is committed when one person learns about it and can be carried out only with premeditation, where it should include all the essential features of this criminal offense.⁹¹

The Criminal Code prescribes a fine or imprisonment of up to three months for a person who exposes to desecration a foreign state, its flag, coat of arms, or anthem.⁹² Therefore, the criminal legislation of Serbia does not make a major difference between exposing Serbia and its symbols to desecration and exposing other states and their symbols to desecration of. The only controversial question that arises here is whether any state can be a passive subject. In principle, all states and their symbols enjoy criminal protection, provided that the Republic of Serbia recognizes those states either *de jure* or *de facto*.⁹³ Prosecution for the criminal offense of defamation of a foreign state is undertaken with the approval of the Republic Public Prosecutor.⁹⁴ Although this issue is of a procedural nature by its nature, it is still regulated by the Criminal Code. When deciding on approving the prosecution, the Republic Public Prosecutor assesses if conducting criminal proceedings would be purposeful.⁹⁵

The Criminal Code provides a special defense, which applies to the criminal offense of defamation of Serbia, as well as the criminal offense of defamation of a foreign state. In accordance with Art. 176 of the Criminal Code, there will be no criminal offense if at least two conditions are cumulatively met. The first is that the criminal offense was committed while performing a certain activity (if the public exposure to the desecration was made within the framework of serious criticism

90 Criminal Code, Art. 173.

91 Stojanović, 2021, pp. 582–583.

92 Criminal Code, Art. 175.

93 Stojanović, 2021, p. 585.

94 Criminal Code, Art. 177.

95 Stojanović, 2021, p. 587.

in scientific, literary, or artistic work, in the performance of official duties, journalistic or political activity, defense of a right or protection of legitimate interests). The second condition is set alternatively. It is necessary that the perpetrator did not commit the act with the intention of belittling or proving the truth of his claim or “that he had a founded reason to believe in the truth of what he stated.” This defense greatly restricts the criminality of that behavior.⁹⁶

Administrative protection of state symbols includes numerous activities undertaken by state and self-governing bodies, which derive from the powers given to them by various laws and bylaws. These are activities that are not a misdemeanor or a criminal act in their nature, but they enable some type of legal protection of state symbols. This type of legal protection, among other things, includes inspection supervision, adoption of individual legal acts, taking various measures, performing certain actions in administrative proceedings, etc.

The Law on the Appearance and Use of the Coat of Arms, Flag, and Anthem of the Republic of Serbia protects the dignity of state symbols by provisions that do not contain any sanctions. Such are the provisions which stipulate that the flag and coat of arms of Serbia are always placed in a place of honor if they are displayed together with the national symbols of other countries, then the provisions which prohibit writing on state symbols and which allow the use of state symbols for artistic, teaching, and educational purposes “in a way that does not insult the public moral, reputation and dignity of the Republic of Serbia.” Precisely, to protect the dignity of the state, the Law stipulates that the flag may not be displayed during the night (unless it is lit) and in bad weather conditions. The raising and lowering of the flag is done with the usual honors. Prohibited methods of displaying the flag are prescribed: the flag may not touch the ground, nor may it be in the form of a base, mat, rug, curtain, or drapery, nor may it cover vehicles or other objects. Regarding the anthem, the Law prohibits any changes to the anthem during its performance, and it prescribes the obligation of all persons present to pay the usual honor in the form of standing up, greeting and the like.⁹⁷ The Law on state Administration stipulates that the coat of arms and the flag of the Republic of Serbia must be displayed on buildings in which state administration bodies are located.⁹⁸

Several regulations regulate the use of state symbols in the field of economy. The Law on Companies stipulates that “a company may use the coat of arms, flag, emblem, mark or other symbol of the Republic of Serbia or a foreign state, domestic territorial units and autonomous provinces, international organizations, with the consent of the competent authority of that state, domestic territorial units and

96 Stojanović, 2021, p. 586.

97 Law on the design and use of the coat of arms, flag and anthem of the Republic of Serbia, Arts. 3, 4, 7, 32, 33, 37 and 38.

98 Law on state Administration, Official Gazette of the Republic of Serbia, nos. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018, 30/2018, Art. 83.

autonomous provinces or international organizations.”⁹⁹ The same law stipulates that the company’s business name may contain the word “Serbia,” including all its forms, and the internationally recognized abbreviation “SRB,” provided that it obtains the prior consent of the competent authority. The same rules apply to other countries and international organizations.¹⁰⁰ The consent is not required when the business name of the founder of the company contains in its name the name of the state or international organization. Also, the Law stipulates that at the request of the state competent authority, the name of the state may be deleted from the business name of the company.¹⁰¹ Generally, the choice of a business name is free, but the use of the names of states and international organizations, as well as the use of the name of natural persons, is conditioned by their consent.¹⁰² In accordance with the Law on Ministries, the Ministry of Economy performs state administration tasks related to the use of the name of the Republic of Serbia in the business name of companies.¹⁰³ The ministry is preparing a draft decision, based on which the government of the Republic of Serbia will issue a decision giving prior consent for entering the name of the Republic of Serbia in the business name of the company.¹⁰⁴

The Law on Trademarks stipulates that a trademark may not protect a sign “containing or imitating a name, abbreviation, state coat of arms, flag or other official sign of the Republic of Serbia, except with the approval of the competent authority.”¹⁰⁵ In accordance with the Methodology Applied by the Intellectual Property Office to the Procedure Relating to the Registration of Trade Marks and the Procedures Based on Registered Trade Marks, state coats of arms, flags, abbreviations and symbols of all states and international organizations are excluded from trademark protection. Apart from the symbols of states and international organizations, signs imitating their official emblems are also excluded. A sign that imitates a symbol is a sign that is perceived as a symbol, which is excluded from trademark protection in accordance with the regulation. A mitigating circumstance is that when considering the application, the sign is considered in its overall appearance, and not just an element that can be related to the state symbol.¹⁰⁶ The intention of the legislator was to prevent the commercialization of certain terms and signs and to protect the authority of states and international organizations.¹⁰⁷

99 Companies Law, Official Gazette of the Republic of Serbia, nos. 36/11, 99/11, 83/14, 5/15, 44/18, 95/18, 91/19 109/21, Art. 25, para. 2.

100 Companies Law, Art. 29, paras. 1, 2.

101 Companies Law, Art. 29, paras. 3, 4.

102 Vasiljević, 2006, p. 103.

103 Law on Ministries, Official Gazette of the Republic of Serbia, no. 128/2020, Art. 4.

104 Unošenje naziva “Srbija” u ime privrednog društva, <https://www.privreda.gov.rs/lat/usluge/unosenje-naziva-srbija-u-ime-privrednog-drustva>.

105 Law on Trade Marks, Official Gazette of the Republic of Serbia, no. 6/2020. Art. 5.

106 The Methodology Applied by the Intellectual Property Office to the Procedure Relating to the Registration of Trade Marks and the Procedures Based on Registered Trade Marks, https://www.zis.gov.rs/upload/documents/pdf_en/pdf_zigovi/methodology.pdf, p. 66.

107 Marković and Popović, 2013, p. 146.

The Law on Legal Protection of Industrial Designs stipulates that protection may not be granted to industrial designs containing the state coat of arms, flag or symbol, including the name or abbreviation of the name of a state, unless the approval of the competent authority is obtained.¹⁰⁸ In the decision on the appeal, the government of Serbia “may recognize the industrial design in a modified form, if in that form the industrial design meets the conditions for protection and if the individual character of the industrial design is retained.”¹⁰⁹ The Law also stipulates that a registered industrial design may be annulled, and a proposal for the annulment may be filed by the public prosecutor, if the reason for announcing it null and void is based on the use of the state or other public coat of arms, flags or symbols.¹¹⁰

Regarding the use of state symbols in the media, the Law on Advertising stipulates that the use of state symbols of the Republic of Serbia (coat of arms, flag, and anthem) must be in accordance with the law governing the use of these symbols.¹¹¹ This is the previously mentioned Law on the appearance and use of the coat of arms, flag, and anthem of the Republic of Serbia. According to the Law on Advertising, legal protection is also provided to state symbols of foreign states and international organizations: “The use of flags, coats of arms, anthems and other symbols of foreign states and international organizations may not be undignified, and especially to be such as to expose them to desecration, or to insult the dignity of a foreign state or its citizens or an international organization.”¹¹² The laws governing the field of media do not provide for special protection of state symbols.¹¹³ The reason is that the legal framework set by the Law on the Appearance and Use of the Coat of Arms, Flag, and Anthem of the Republic of Serbia, as well as the relevant provisions of the Criminal Code, sufficiently guarantee legal protection of state symbols in the field of media and information.

The Serbian Government established a new state holiday in September 2020, with the aim of promoting national and state symbols. The Day of Serb Unity, Freedom and the National Flag is celebrated on the 15th of September, the day when the breakthrough of the Macedonian Front is celebrated.¹¹⁴ The promotion and legal protection of state symbols is extremely important in modern states which are simultaneously national and liberal. “The cultural essence of the state comes to the fore

108 Law on Legal Protection of Industrial Design, Official Gazette of the Republic of Serbia, nos. 104/2009, 45/2015, 44/2018.

109 Law on Legal Protection of Industrial Design, Art. 12.

110 Law on Legal Protection of Industrial Design, Art. 58, para. 5.

111 Law on Advertising, Official Gazette of the Republic of Serbia, nos. 6/2016 and 52/2019, Art. 18.

112 Law on Advertising, Official Gazette of the Republic of Serbia, nos. 6/2016 and 52/2019, Art. 18, para. 3.

113 Law on Electronic Media, Official Gazette of the Republic of Serbia, nos. 83/2014, 6/2016, 129/2021; Law on public information and media, Official Gazette of the Republic of Serbia, nos. 83/2014, 58/2015, 12/2016; Law on public service broadcasting, Official Gazette of the Republic of Serbia, nos. 83/2014, 103/2015, 108/2016, 161/2020, 129/2021.

114 Day of Serbian Unity, Freedom and National Flag marked, <https://www.srbija.gov.rs/vest/en/178351/day-of-serbian-unity-freedom-and-national-flag-marked.php>.

in its political institutions and in the official language, as well as in the symbolic sphere, in the selection of rituals, national heroes, and the like.”¹¹⁵

5. Legal protection of national symbols

Unlike the state symbols that are explicitly listed in the Constitution of the Republic of Serbia and relevant legislation, the list of national symbols that can enjoy legal protection is much longer. “National symbols are thus linked to national identity, collective memory and rites.”¹¹⁶ National symbols include almost everything connected to a specific nation: signs, monuments, language, religion, traditions, songs, folklore, architecture, literature, national myths and commemorations, food, sites and even flora and fauna (e.g., national flower) etc. In this part of the paper, the regulations governing the legal protection of national symbols in general will be presented, while in the next part of the paper, special attention will be paid to the protection of national symbols of national and ethnic minorities.

The Criminal Code prescribes several criminal offenses whose subject of protection is freedom of expression of national affiliation. The Constitution of the Republic of Serbia guarantees every citizen the right to express their national affiliation.¹¹⁷ The Criminal Code prescribes a fine, or imprisonment of up to one year, for a person who prevents another person from expressing his or her national or ethnic affiliation and culture.¹¹⁸ A qualified form of this criminal offense may be committed by an official in the performance of his or her duties. In that case, no fine is envisaged, only imprisonment for up to three years. Since national affiliation is often expressed using national symbols, it can be argued that the Criminal Code provides protection for the use of national symbols. Although the protection of the right to express one’s nationality is very broad, there is one limitation of that right. It must not be done in a way that violates positive legal regulations (e.g., on the use of state symbols) or insults the feelings of members of other nations.¹¹⁹

The Criminal Code criminalizes incitement to national, racial, or religious hatred or intolerance. Six months to five years of imprisonment for is prescribed for this criminal offense. The qualified form of this criminal offense consists of exposing national and ethnic symbols to desecration, or desecrating monuments, memorials, or graves. The qualified form of this criminal offense is punishable by imprisonment for a term of one to eight years. The most serious forms of this criminal offense occur

115 Tamir, 1993, p. 148.

116 Mønnesland, 2013, p. 9.

117 Constitution of the Republic of Serbia, Art. 47.

118 Criminal Code, Art. 130.

119 Stojanović, 2021, p. 503.

through abuse of position or authority, or when they produce severe consequences for the lives of people and national and ethnic groups living in Serbia, such as riots, violence, and the like.¹²⁰ Exposing the national symbols to desecration is associated with inciting national hatred and intolerance. This provision applies equally to the national symbols of the majority nation and to the national symbols of national minorities. Although several verdicts can be found in court practice for inciting national, racial, or religious hatred or intolerance, none of them were passed for exposing national symbols to desecration.¹²¹

The Law on Trademarks stipulates that a trademark cannot protect a sign which represents or simulates a national symbol.¹²² The reason is the fact that national symbols are part of the national cultural heritage, over which no one can establish a monopoly. The second reason is that the trademark has a commercial function, which is contrary to the nature of national symbols, and it therefore prevents their use for commercial purposes.¹²³ The Law on Legal Protection of Industrial Designs stipulates that protection cannot be granted to industrial design that contains national symbols. In this case, too, the government of the Republic of Serbia in its decision on an appeal “may recognize industrial design in a modified form, if in that form the industrial design meets the conditions for protection and if the individual character of the industrial design is retained.” The Law also stipulates that a registered industrial design may be declared null and void, and that the proposal for the annulment can be filed by the public prosecutor, in regard to industrial design that contains and imitates national symbols.¹²⁴

The laws governing the field of media regulate the protection of national identity and the affirmation of interethnic tolerance. The Law on Electronic Media states that one of the goals of the media services of the public media service is the preservation of national identity and interethnic tolerance.¹²⁵ The Law on Public Information and Media stipulates that the public interest in the field of information includes “preserving the cultural identity of the Serbian people and national minorities living in the territory of the Republic of Serbia.”¹²⁶ A similar provision is contained in the Law on Public Media Services, which regulates the activities of the public media service. One of the goals of the content produced by the public media service is the preservation of the national identity of the Serbian people and of national minorities, as well as the affirmation of the cultural values of the Serbian people and national minorities living in Serbia.¹²⁷ As national symbols are an expression of national identity,

120 Criminal Code, Art. 317.

121 Stojanović, 2021, p. 985.

122 Law on Trade Marks, Art. 5.

123 The Methodology Applied by the Intellectual Property Office to the Procedure Relating to the Registration of Trade Marks and the Procedures Based on Registered Trade Marks, p. 67.

124 Law on Legal Protection of Industrial Design, Arts. 9; 58, para. 5.

125 Law on Electronic Media, Art. 4.

126 Law on public information and media, Art. 15.

127 Law on Public Service Broadcasting, Arts. 3, 7.

it can be concluded that the laws governing the field of media in the Republic of Serbia, affirming the preservation of national and cultural identity of the Serbian people, allow the use of various national symbols in the media space. The same applies to national minorities, whose rights will be discussed in more detail in the next chapter.

Language and script have a special place among the symbols of national identity. The use of the official language and script is regulated by a special Law, which implements the constitutional regulation on the official language and script. In accordance with the Law on the Official Use of Languages and Scripts, the Serbian language and the Cyrillic script are in official use in the Republic of Serbia. The law also regulates the official use of the Roman script, as well as the languages and scripts of national minorities. The provisions of this Law which regulates the official use of the Roman script have been repealed. Since the Law was passed in 1991, a remnant of earlier Yugoslav understandings remained in the form of a provision stipulating that “Serbo-Croatian language is in official use in the Republic of Serbia, which is also called the Serbian language, when representing the Serbian language expression in its variants.”¹²⁸ When the name of the language was changed, the provisions governing the official use of the Roman script were repealed. In any case, municipalities can determine by their statutes the official use of the Roman script, which must be in accordance with the law. The official use of the Roman script was the cause for several lawsuits, mainly due to the lack of clear rules on the official use of that script.

The use of the official language is regulated in most countries in the world. The Serbian legislator went a step further and regulated the use of the Serbian language in public life and measures to protect the Cyrillic script. The Law on the Use of the Serbian Language in Public Life and the Protection and Preservation of the Cyrillic Alphabet declared the Serbian language a “means and a public good of national culture,” while the Cyrillic alphabet was declared the “mother script” of the Serbian language.¹²⁹ This Law prescribes the obligatory use of the Serbian language and the Cyrillic script in the work of state bodies and all other organizations that exercise public authority, public companies, public services and all educational institutions of all levels. Also, the Serbian language and the Cyrillic script must be used in the work and business of companies with a majority share of public capital (including companies in the field of scientific research), in professional and vocational associations representing their field, and in public media institutions of Serbia and Vojvodina. Also, cultural events that are fully or partially financed from public funds must have a logo written in Cyrillic alphabet, except for events of national minorities. The Law stipulates that the use of the Serbian language and the mother script applies to legal transactions and includes the display of business names, address of the seat, names

128 Law on Official Use of Languages and Scripts, Official Gazette of the Republic of Serbia, no. 45/91.

129 Law on the Use of the Serbian Language in Public Life and the Protection and Preservation of the Cyrillic Script, Official Gazette of the Republic of Serbia, no. 89/2021.

of goods and services and their characteristics, user manuals, warranty conditions, offers, bills (invoices) and certificates.¹³⁰

The law envisages the establishment of the Council for the Serbian Language, which would monitor the status of the use of the Serbian language in public life and the implementation of measures for the protection of the mother script, and give recommendations for improving that status.¹³¹ It is also envisaged that the regulations may establish tax and administrative reliefs for business and other entities that use the Cyrillic script. The same applies to the use of languages and scripts of national minorities. The law establishes the system of protection and preservation of the Serbian language and the Cyrillic alphabet, and it defines what reflects the social care for the protection and preservation of the Serbian language and its mother script. Supervision over the implementation of the law is entrusted to the ministry responsible for culture. There is also a misdemeanor liability for non-compliance with the provisions of the law, and the amount of fines for legal entities and the responsible natural persons in legal entities.¹³² One of the peculiarities of the Serbian language is the equal use of two alphabets: Cyrillic and Roman. The Cyrillic script is the symbol of Serbian national identity, which was neglected during the Yugoslav state. The use of the Roman alphabet in everyday life has prevailed primarily for practical reasons. After the restoration of Serbian statehood, there was a need to renew the use of the Cyrillic script and take measures to protect it. It is with this goal that the mentioned Law was passed, which does not affect the rights of national minorities and their freedom to use their language and script.

6. Legal protection of symbols of communities with the same identity

In this part of the paper, the legal protection of the symbols of the Autonomous Province of Vojvodina, local self-government units, then the symbols of national and ethnic minorities and finally the legal protection of religious symbols and symbols of religious organizations will be analyzed.

Autonomous provinces are autonomous territorial communities established by the Constitution, in which citizens exercise the right to provincial autonomy. As already mentioned, the Constitution of the Republic of Serbia prescribes that both

130 Law on the Use of the Serbian Language in Public Life and the Protection and Preservation of the Cyrillic Script, Arts. 6, 3.

131 Law on the Use of the Serbian Language in Public Life and the Protection and Preservation of the Cyrillic Script, Art. 4.

132 Law on the Use of the Serbian Language in Public Life and the Protection and Preservation of the Cyrillic Script, Arts. 5–11.

autonomous provinces determine their symbols and the manner of their use.¹³³ The highest legal act of the Autonomous Province is the statute, which is passed by the Assembly of the Autonomous Province with the prior consent of the National Assembly.¹³⁴ The Law on Establishing the Competences of the Autonomous Province of Vojvodina stipulates that the Autonomous Province of Vojvodina determines its symbols, and the manner of their use, in compliance with its Constitution and the Statute.¹³⁵

The previous Statute of the Autonomous Province (AP) of Vojvodina stipulated that the Autonomous Province has its own symbols and that they are the flag and the coat of arms. The Statute also prescribed that the appearance and use of symbols be regulated by the Assembly of AP Vojvodina by the decision of the provincial assembly, which must be in compliance with the Constitution and the Statute.¹³⁶ Regarding the initiative to assess the constitutionality of certain provisions of the Statute of AP Vojvodina, the Constitutional Court of the Republic of Serbia ruled that the mentioned provision is not in conformity with the Constitution because “basic standards of determination and clarity of legal norms, as a precondition for exercising the rule of law, have not been met.” The reason is the fact that this statutory provision stipulated that the appearance and use of the flag and coat of arms of AP Vojvodina will be regulated in compliance with the Constitution and the Statute, while neither the Constitution nor the Statute determine the appearance or manner of using these symbols. In any case, the Constitutional Court ruled that the issue of symbols is one of the issues that the province regulates independently, exclusively based on the Constitution, and which belongs to the matter regulated by the provincial statute.¹³⁷

To harmonize with the ruling of the Constitutional Court, a new Statute of the Autonomous Province of Vojvodina was adopted in 2014; it contains a detailed description of the symbols of that province.¹³⁸ The statute prescribes the existence of symbols and traditional symbols of AP Vojvodina. The symbols are the flag and the coat of arms. The flag consists of three colors: red, blue, and white, placed horizontally in relation to the spear and which are in the ratio 1:8:1. In the middle of the central and largest blue field, there are three yellow stars arranged in a circle, which mark three historical regions: Bačka, Banat, and Srem. The coat of arms is also a combination of the coats of arms of those regions placed on a shield that is divided into three fields. The traditional symbols are the traditional Serbian tricolor (red,

133 Constitution of the Republic of Serbia, Art. 183, para. 4.

134 Constitution of the Republic of Serbia, Art. 185.

135 Law on Establishing the Competences of the Autonomous Province of Vojvodina, Official Gazette of the Republic of Serbia, nos. 99/2009, 67/2012, 18/2020, 111/2021.

136 Statute of the Autonomous Province of Vojvodina, Official Gazette of the Autonomous Province of Vojvodina, no. 17/2009.

137 IUo-360/2009.

138 Statute of the Autonomous Province of Vojvodina, Official Gazette of the Autonomous Province of Vojvodina, no. 20/2014.

blue, and white), while the traditional coat of arms is actually the coat of arms from 1848, which contains a shield with the historical Serbian coat of arms (cross with four furisons). The statute stipulates for certain issues related to the appearance and use of symbols be regulated by a provincial assembly decision.

In 2016, the Provincial Assembly adopted the Provincial Assembly Decision on the appearance and use of symbols and traditional symbols of the Autonomous Province of Vojvodina, which repealed previous Provincial Assembly decisions on the use of the historical symbols and flag of AP Vojvodina.¹³⁹ This decision regulates in detail the manner of use and legal protection of symbols and traditional symbols of AP Vojvodina. In accordance with Art. 2 of the Decision, “Symbols of AP Vojvodina represent the Autonomous Province of Vojvodina as an autonomous territorial community of the Republic of Serbia.” Similar rules for displaying the flag and coat of arms of the Autonomous Province of Vojvodina are envisaged as in the republic Law that regulates the use of state symbols. Throughout the provisions on the use of symbols, the goal is to protect the reputation and dignity of the province. The flag and the traditional flag, as well as the coat of arms and the traditional coat of arms are completely equal in use. In accordance with Art. 8 of the decision, a traditional flag with a traditional coat of arms in the middle of the flag may also be used. Provincial symbols are always placed on the right side of the state symbols of the Republic of Serbia. The use of the coat of arms or the traditional coat of arms as an integral part of an emblem or a sign requires the consent of the Provincial Government. However, the decision prohibits the use of both coats of arms as “a trademark or service mark, pattern, model or other sign marking goods or services.” The originals of both coats of arms and both flags are kept in the Assembly of AP Vojvodina. The decision prescribes the violation of the responsibility of legal and natural persons for non-compliance with the rules on the use of the symbols of AP Vojvodina. Legal entities are subject to a fine for the use of symbols that violates the reputation and dignity of the province, for the use symbols of a different appearance than prescribed, for omitting to use the symbols when required, for using damaged emblems or for unauthorized use of coat of arms or traditional coat of arms as an emblem. sign, etc. The decision stipulates that the responsible person in the legal entity, entrepreneurs, and natural persons shall be fined in different amounts for the mentioned acts.¹⁴⁰ Attached to the decision, a detailed graphic presentation, and geometric constructions of the originals of both flags and both coats of arms were published.

The Provincial Assembly decision on the appearance and use of symbols and traditional symbols of the Autonomous Province of Vojvodina envisages the adoption of

139 Provincial Assembly decision on the appearance and use of symbols and traditional symbols of the Autonomous Province of Vojvodina, Official Gazette of the Autonomous Province of Vojvodina, no. 51/2016.

140 Provincial Assembly decision on the appearance and use of symbols and traditional symbols of the Autonomous Province of Vojvodina, Official Gazette of the Autonomous Province of Vojvodina, no. 51/2016, Art. 13.

the instruction on closer regulation of the use of symbols of the Autonomous Province of Vojvodina, which was also passed in 2016. This instruction regulates in more detail the use of provincial symbols in specific circumstances, such as use in official premises, at events, in correspondence of the provincial authorities, school diplomas, ID documents, etc. The procedure for obtaining consent for the use of the coat of arms by the bodies of local self-government units and organizations with public authorizations whose founder is AP Vojvodina is also regulated. The request for the use of the coat of arms of AP Vojvodina is submitted through the Provincial Secretariat for Education, Regulations, Administration and National Minorities-National Communities and should contain all relevant data including the purpose of using the coat of arms, technical description, deadline in which the consent is required.¹⁴¹ From all the above, it can be concluded that the Constitution, the Law on Establishing the Competences of the Autonomous Province of Vojvodina and provincial regulations provide legal protection for all symbols of AP Vojvodina. All provincial regulations were harmonized with the ruling of the Constitutional Court, which also dealt with provincial symbols when determining the compliance of the provincial Statute with the relevant provisions of the Constitution of the Republic of Serbia.

In addition to the autonomous provinces, local self-government units also have their symbols, i.e., municipalities, cities, and the city of Belgrade. The Law on Local Self-Government stipulates that local self-government units independently determine their symbols and their use. The law stipulates that local self-government units can have two types of symbols: the coat of arms and the flag.¹⁴² The same Law prescribes the restrictions that local self-government units should respect when standardizing the appearance and use of their symbols. Symbols of local self-government units may only be displayed with state symbols, symbols of local self-government units must differ from each other and statutory provisions governing the appearance of symbols must “correspond to historical and actual facts and these provisions may not offend general and state interests, national and religious feelings and public morals.” The competent body for determining the symbols is the assembly of the local self-government unit. The units of local self-government determined the existence of their symbols (flags and coats of arms) in their statutes, while special regulations regulated in detail the appearance and use of these symbols.¹⁴³ The content of these decisions does not differ much from the content of the Provincial Assembly Decision on the appearance and use of symbols and traditional symbols of the Autonomous Province of Vojvodina, which has already been discussed. The decisions also contain a provision on misdemeanor liability of legal and natural persons for violating the rules on the use of city or municipal symbols.

141 Granting approval to the use of the coat of arms of AP Vojvodina, http://www.puma.vojvodina.gov.rs/etext.php?ID_mat=767.

142 Law on Local Self-Government, Official Gazette of the Republic of Serbia, no. 111/2021.

143 E.g., decision on the manner of using the symbols of the City of Valjevo, Official Gazette of the City of Valjevo, nos. 13/2010, 2-1/2014, 11/2016.

The appearance and use of the symbols of the city of Belgrade are regulated in a similar way. The statute of the city prescribes the appearance of the coat of arms and the flag.¹⁴⁴ The decision on the use of the name, coat of arms and flag of the City of Belgrade regulates in detail the use of the city symbols and the manner of conducting inspection supervision over the implementation of that decision. The communal inspection is authorized to control the use of the name of the city and in case of non-compliance with the provisions of the mentioned decision, it will order the legal entity or the entrepreneur to correct all the shortcomings. Also, the communal inspector supervises the use of city symbols and is authorized to ban the use of those symbols and order their removal if they are used contrary to the provisions of the decision on the use of the name, coat of arms and flag of the City of Belgrade.¹⁴⁵ Penal provisions provide for fines for several breaches consisting of non-compliance with the provisions of the decision on the use of the name, coat of arms and flag of the City of Belgrade. Different amounts of fines are provided for legal entities, the responsible person in the legal entity, entrepreneurs, and individuals. The misdemeanor order for the mentioned misdemeanors is issued by the communal inspector, i.e., the communal militia.¹⁴⁶ The Instruction for the use of the flag and coat of arms of the city of Belgrade regulates in detail the use of city symbols, but does not contain regulations on their legal protection.¹⁴⁷ The Law on Communal Militia stipulates that the communal militia verifies the application of the law regulating state symbols, issues warnings and submits requests for initiating misdemeanor proceedings for actions contrary to the law regulating state symbols.¹⁴⁸ With regard to conducting the mentioned control, state bodies of territorial autonomy, local self-government units, and holders of public authority are excluded from its competence.

In addition to the legal protection of the symbols of territorial autonomy units, the regulations governing the legal protection of symbols of various forms of non-territorial autonomy are of special importance. The Law on the Protection of the Rights and Freedoms of National Minorities guarantees members of national minorities the freedom to choose and use their national symbols. The legislator has also prescribed certain restrictions here. A national symbol cannot be the same as a symbol of another state, and state or national symbols of the Republic of Serbia are always to be displayed alongside the symbols of a national minority. National symbols of national minorities (including flags and holidays) are proposed by National Councils

144 Statute of the City of Belgrade, Official Gazette of the City of Belgrade, nos. 39/2008, 6/2010, 23/2013, 7/2016, 17/2016, 60/2019.

145 Decision on the use of the name, coat of arms and flag of the City of Belgrade, Official Gazette of the City of Belgrade, no. 37/2016, Art. 62.

146 Decision on the use of the name, coat of arms and flag of the City of Belgrade, Arts. 64–66.

147 Instructions for the use of the coat of arms and flag of the City of Belgrade, Official Gazette of the City of Belgrade, no. 35/2003.

148 Law on Municipal Militia, Official Gazette of the Republic of Serbia, no. 49/2019, Arts. 2, 10.

of national minorities and are approved by the Council for National Minorities.¹⁴⁹ The Law on National Councils of National Minorities stipulates that the National Council independently decides on its name and symbols and determines proposals for national symbols, flags and holidays of national minorities. The same law stipulates that each National Council has its own statute that, among other things, regulates the symbol of the National Council, which must be different from all existing symbols of National Councils, which must be entered in the appropriate Register and which must not cause confusion regarding the National Council or the national minority it signifies.¹⁵⁰ The Law on National Councils of National Minorities stipulates that a legal or natural person “who disturbs or abuses the right to the use of national symbols” will be fined for a misdemeanor.¹⁵¹ The Council for National Minorities made several decisions confirming the national symbols and holidays of national minorities in the Republic of Serbia.¹⁵²

As already mentioned, the Constitution of the Republic of Serbia guarantees freedom of thought, conscience, and religion. The Law on Churches and Religious Communities stipulates that churches and religious communities are subjects of religious freedom.¹⁵³ The same law stipulates the citizens have the freedom “of public assembly for the purpose of expressing religious beliefs, in accordance with the Constitution and the law.”¹⁵⁴ The right to free expression, i.e., the manifestation of religious beliefs is guaranteed by the Constitution of the Republic of Serbia and the Law on Churches and Religious Communities. Also, the same acts guarantee the autonomy of religious organizations, which includes the right to self-determination and shaping the religious identity of religious organizations.¹⁵⁵ Within their autonomy, religious organizations exercise the right to regulate the appearance and use of their own symbols.¹⁵⁶ The Constitution of the Serbian Orthodox Church prescribes the appearance of its coat of arms and flag. Unlike state symbols, for which there are clear and precise rules on the manner of use, Serbian legislation did not regulate the display of symbols of religious organizations. The Law on Churches and Religious Communities does not prescribe the obligation of religious organizations to submit data on the appearance of their symbols and flags during registration.¹⁵⁷ In practice, it has been shown that religious organizations are free to display their symbols on

149 Law on the Protection of Rights and Freedoms of National Minorities, Official Gazette of the Federal Republic of Yugoslavia, no. 11/2002, Official Gazette of the Republic of Serbia, nos. 72/2009, 97/2013, 47/2018.

150 Law on National Councils of National Minorities, Official Gazette of the Republic of Serbia, nos. 72/2009, 20/2014, 55/2014, 47/2018, 6, 10.

151 Law on National Councils of National Minorities, p. 126.

152 E.g., Decision on Confirmation of the National Symbol and Holiday of the Hungarian National Minority in the Republic of Serbia, Official Gazette of the Republic of Serbia, no. 23/2006.

153 Law on Churches and Religious Communities, Art. 4.

154 Law on Churches and Religious Communities, Art. 5.

155 Đurić, 2013, p. 81.

156 Statute of the Serbian Orthodox Church, Art. 3.

157 Law on Churches and Religious Communities, Art. 18.

their religious buildings, as well as to use them during various religious ceremonies and processions.

The Criminal Code of the Republic of Serbia prescribes the criminal offense of inciting national, racial and religious hatred, which can be committed by exposing religious symbols.¹⁵⁸ This to some extent protects religious symbols from abuse and exposure to desecration.¹⁵⁹ The Law on Legal Protection of Industrial Designs stipulates that protection cannot be granted to industrial designs that contain religious symbols.¹⁶⁰ Also, the Law on Trademarks stipulates that a trademark cannot protect a sign that is a religious symbol.¹⁶¹ All of the above regulations prohibit the commercial use of religious symbols in an identical manner, which is regulated in more detail by bylaws.¹⁶²

A specific law protecting the unique symbol of Serbian national identity was passed in the second half of last year. It is about the Law on Preservation of the Cultural and Historical Heritage of the Holy Hilandar Monastery.¹⁶³ This Law regulates the manner the Republic of Serbia may provide assistance, in order to preserve the historical and cultural heritage of the Hilandar Monastery, which is located on Mount Athos in Greece. Hilandar Monastery is a special symbol of Serbian statehood and is considered to be “the most important Serbian religious symbol.”¹⁶⁴ The law stipulates that the Republic of Serbia undertakes activities related to “preservation and nurturing of historical, religious and cultural traditions of Hilandar Monastery”; their goal is, among other things, “the preservation, research, presentation and interpretation of the entire tangible and intangible cultural heritage of Hilandar Monastery.” The law also prescribes restrictions on the commercial use of “titles, names and characters of cultural and historical heritage and property within the Hilandar Monastery,” which may be exclusively used on the territory of the Republic of Serbia by the Hilandar Monastery or persons approved by the monastery.¹⁶⁵ The adoption of this Law created a legal framework for the authorities of the Republic of Serbia to undertake activities to protect one of the most important national and religious symbols, as well as to present the entire tangible and intangible cultural heritage of the Hilandar Monastery.

158 Criminal Code, Art. 317.

159 Đukić, 2021, p. 163.

160 Law on Legal Protection of Industrial Design, Arts. 9, 7.

161 Law on Trade Marks, Arts. 5, 9.

162 E.g., Methodology of Procedures of the Intellectual Property Office in the Procedure for Recognition of Industrial Design Rights and in Procedures According to Registered Industrial Designs.

163 Law on Preservation of Cultural and Historical Heritage of the Holy Monastery of Hilandar, Official Gazette of the Republic of Serbia, no. 94/2021.

164 Mønnesland, 2013, p. 263.

165 Law on Preservation of Cultural and Historical Heritage of the Holy Monastery of Hilandar, Arts. 3, 4, 7.

7. Conclusion

States have always strived to have appropriate signs of external marking that manifested their independence, sovereignty, uniqueness, as well as power and identity. Along with the struggle for the creation of an independent Serbian state, a diplomatic struggle for the freedom of use of Serbian state and national symbols in the Principality of Serbia was waged, to some extent in its shadow. All phases of creating an independent and sovereign Serbian state were marked by certain symbols which, along with the change in the status of the state, were adapted to the new circumstances. From the vassal Principality of Serbia and the internationally recognized Kingdom of Serbia, through the multinational Kingdom of Yugoslavia and the socialist federal Yugoslavia, state symbols expressed the ideas and political processes that dominated those states. Compared to other Central and Eastern European countries, Serbia started renewing its traditional state symbols relatively late. The process of regulating the legal protection of state, national and religious symbols in certain areas is still ongoing. The fact that the Law on the Fundamentals of the Education System last year introduced the rule that the school year begins with the intonation of the anthem of the Republic of Serbia illustrates this.¹⁶⁶

The renewal of the use of the symbols of the Kingdom of Serbia began based on the non-binding Recommendation of the National Assembly from 2004, whose provisions were included in the text of the valid Constitution adopted in 2006. The Constitution does not regulate in detail the appearance of state symbols, except to specify the title of the national anthem. The Constitution guarantees the right of autonomous provinces and local self-government units to independently regulate the appearance and use of their symbols. The only right that the autonomous provinces exercise directly pursuant to the Constitution, without reference to the legal regulation of the quality and scope of the rights of the provinces, is to determine their symbols and regulate the manner of their use. In addition to state symbols and symbols of the units of territorial autonomy, the Constitution of the Republic of Serbia contains provisions that protect symbols that express the national identity of the citizens of the Republic of Serbia, with special attention paid to the protection of language and script. The Constitution establishes the rights of national minorities, and the protection of their identity is of special importance. The Constitution also indirectly protects the freedom of religious organizations to use their symbols and to display them publicly.

The laws that regulate the appearance and use of the coat of arms, flag, anthem, and decorations of the Republic of Serbia prescribe the responsibility of legal and natural persons for violations of regulations on the use of state symbols. These are offenses for which a fine is envisaged, in different amounts depending on whether it is a legal entity or a natural person. Similar provisions on misdemeanor liability are

¹⁶⁶ Law on Amendments to the Law on Fundamentals of the Education System, Official Gazette of the Republic of Serbia, no. 129/2021.

contained in the regulations of AP Vojvodina and local self-government units. The Criminal Code prescribes the criminal offense of defamation of Serbia, which can be committed directly by exposing Serbia to desecration, or indirectly by exposing state symbols to desecration. Unlike some European countries, in Serbia, exposure to the destruction of state symbols has not been decriminalized. National and religious symbols enjoy criminal protection, especially when they are exposed to desecration with the aim of inciting national, racial, or religious hatred or intolerance.

Administrative protection of state symbols includes numerous activities undertaken by state and self-governing bodies, which are not of a misdemeanor or criminal nature, but which enable some kind of legal protection of state symbols. Such activities include taking measures for the state symbols to be used in a way that protects the reputation and dignity of the Republic of Serbia, verifying the fulfillment of conditions and giving approval for the use of state symbols and state name in the field of economy and protection of state symbols of foreign countries and international organizations. The Law on Trademarks and the Law on Legal Protection of Industrial Designs stipulate that state, national and religious symbols cannot be protected as trademarks or industrial designs. The reason is that these symbols are considered part of the national and world cultural heritage over which no one can hold a monopoly and which should not be used for commercial purposes. Language and script are also important national symbols. The law regulates the use of the official language and script, while guaranteeing the use of the language and script of national minorities.

Serbian legislation contains two specific laws that, among other things, make the legal framework for the protection of two important national symbols of the Serbian people. The first law regulates the use of the Serbian language and the Cyrillic script in public life. The Serbian language was declared the “means and general good of national culture,” while the Cyrillic script was declared the “mother script” of the Serbian language, which “represents the stronghold of national identity.” The adoption of affirmative measures to encourage the use of the Cyrillic alphabet fits into the general trend of the renewed use of national symbols. Although both alphabets (Roman and Cyrillic) are used equally in the Serbian language, the legislator has taken measures to protect the Cyrillic alphabet, which has been neglected for decades and which in its specific form represents the particularity and expression of the Serbian people’s identity. The second law regulates the protection of the most important religious symbol of the Serbian people, the Hilandar Monastery. The first specificity is that it is a monastery located outside the territory of the Republic of Serbia, while the second is that it provides legal protection to the complete cultural and historical heritage preserved in that monastery. These include some of the oldest preserved symbols of Serbian statehood, like the oldest medieval Serbian charter and coats of arms and flags from different periods of Serbian history.

In regard of the legal protection of state, national and community symbols in the Republic of Serbia, a certain pattern can be observed. The Constitution prescribes the existence of state symbols and protects the use of various national and community

symbols. The appearance, use and legal protection of state symbols are regulated by special laws. The statutes of the units of territorial and non-territorial autonomy prescribe the appearance of their symbols. Their autonomous regulations regulate in detail the graphic presentation and use of national and community symbols, as well as their legal protection at the level of misdemeanors. This pattern has been consistently applied when it comes to local self-government units. In this way, a balance was achieved between the protection of autonomy and self-government of different communities, but also the unity of the legal order and the legal protection of state, national and community symbols.

The functioning of modern societies cannot be imagined without the use of various symbols. State, national, religious and community symbols in general have a special meaning because they express the deepest beliefs and identity of many people. The legal protection of these symbols ensures the preservation of the dignity and reputation of different communities. Given that in the certain countries of Central and Eastern Europe after the period of socialist identity and symbolic engineering, there was a new use of traditional and historical state and national symbols, it would be desirable in the future to pay more attention to scientific processing of legal protection of state, national and religious symbols in modern legal systems, because it is a basic and very visible indicator of fair treatment of various communities, including the majority and minority. Because, “True peace is not merely the absence of tension: it is the presence of justice” (Martin Luther King).

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LEGAL PROTECTION OF STATE, NATIONAL AND COMMUNITY SYMBOLS IN SLOVAKIA



JÁN ŠKROBÁK

1. Definition of state symbols and symbols of self-governing entities and their legal regulation in the Slovak Republic

The state symbols and symbols of self-governing regions, towns and municipalities are among the most important symbols in the Slovak legal order, in Slovak society and culture. They can be seen as symbols of the state and the statehood, of the history of the state,¹ as symbols of state authority and its organs, but also of their performance of the state power, but also as symbols of the Slovak nation as a constituent nation.² The law regulates state symbols and provides a high level of protection to state symbols. The reason for this rigorous regulation is precisely the high symbolic value of state symbols, the protection of which is in the interest of preserving respect for the state, in the interests of preserving the cohesion of society³ and of preserving the state as such.

However, also other symbols representing not only the state as such, but also the constituent nation (some of which are regulated by law, others are not regulated by law and are informal in their nature) have a high symbolic value as well.

1 Drgonec, 2015, p. 220.

2 Palúš et al., 2016, p. 113.

3 According to the Slovak author Ľ. Cibulka, state symbols are “a certain tool for identifying citizens with their state.” See Svák, Cibulka and Klíma, 2009, p. 275.

The symbols of cities, municipalities and self-governing regions also enjoy legal protection in the Slovak Republic. On the other hand, in the case of other public entities, including self-governing bodies other than bodies of regional and municipal self-government, the regulation of their symbols under public law is minimal. A certain exception are universities.

The formal symbols of other communities, such as national minorities, sexual minorities, or other communities, have comparatively low levels of specific public regulation.

Symbols in different societies have always been not only a way to express affinity for certain values, but they have also been the object and instrument of social conflicts. In the Slovak Republic, a recent example is a legislative initiative by two members of the National Council of the Slovak Republic to ban the posting of rainbow flags symbolizing the LGBT+ movement on public buildings. This aspect of social conflicts cannot be circumvented in this chapter either.

The sources of law regulating the state symbols of the Slovak Republic and their use are, in particular, the Constitution of the Slovak Republic no. 460/1992 coll., as amended by later constitutional acts (article 8 and 9 thereof), act no. 63/1993 on the state symbols of the Slovak Republic and their use, as amended (hereinafter referred to in this chapter as “the state symbols act,” or “SsA”), act no. 300/2005 coll., the Criminal Code, as amended — in the text of the chapter hereinafter referred to as the “Criminal Code” and act no. 372/1990 coll. on infringements, as amended — in the text of the chapter hereinafter referred to as the “Infringements act,” provide for the protection of state symbols.

Other relevant sources of law governing certain aspects of the use of state symbols, but also formal or informal national symbols and symbols of cities and municipalities and universities are in particular:

- Act no. 369/1990 coll. on Municipal Establishment
- Act no. 302/2001 coll. on the self-government of higher territorial units (Act on self-governing regions)
- Act no. 241/1994 coll. on the city of Martin as the center of the national culture of Slovaks, as amended by Act No 182/2009 coll.
- Act no. 377/1990 coll. on the capital of the Slovak Republic, Bratislava
- Act no. 401/1990 coll. on the City of Košice
- Act no. 1/2014 coll. on the organization of public sports events and amending certain acts
- Act no. 131/2002 coll. on higher education and amending certain other acts.

The aim of the chapter is to examine the Slovak aspects of the research subject within the framework of the monograph; more specifically, to outline brief general and legal history and constitutional regulation of state, national and community symbols; protection of state symbols in the Slovak Republic both at the level of criminal law (and/or law of minor offenses) and at the level of civil and administrative

law; protection of national symbols and legal protection of symbols of communities (both also in relation to each of the abovementioned branches of law).

The structure of the chapter corresponds to the outlined objectives. The chapter consists of these parts: Excursion into the topic of history of state symbols in the Slovak Republic, constitutional and legal protection of state symbols of the Slovak Republic—divided into positive protection of state symbols (authorized persons and authorized uses of state symbols, state symbols and copyright, use of state symbols in business) and negative protection of state symbols (prohibited uses of state symbols, legal consequences of breach of legal obligations relating to state symbols at the criminal and administrative level). The chapter further contains an excursion into the use of foreign state symbols in the Slovak Republic and an excursion into the use of state symbols at sports events). Finally, it deals with national symbols (both formal and informal), with symbols of self-governing regions, towns, and municipalities and with community symbols in the Slovak Republic and their legal protection.

In terms of methodology, the method of heuristic inquiry (focusing mainly on normative texts, but also with a focus on scientific literature) was used in the research preceding the creation of the chapter, together with the methods of analysis, synthesis, deduction, and induction. Among the empirical methods, direct observation was mainly used. The chapter itself does not have a significant comparative dimension, since this function is fulfilled by the monograph as such.

2. Historical excursion into state symbols in the Slovak Republic

In Slovak historiography, there are different views on the historical origin of the two-armed cross as a symbol of Slovakia and of Slovaks. Some historians perceive it as part of the Great Moravian heritage, as a symbol that came to Great Moravia as part of the mission of the Saints Cyril and Methodius.⁴ The subsequent use by the House of Árpád and in the Hungarian state emblem is said to be linked to the symbolic of the northern part of Hungary (Upper Hungary, Principality of Nitra).

The two-barred cross, later placed on the middle peak of a mountain consisting of three peaks, has been part of the Hungarian heraldry⁵ and the coat of arms of the Kingdom of Hungary since the Middle Ages. However, unlike the coat of arms of the Slovak Republic, both the historical Hungarian heraldry and Hungary's current coat of arms depict the mountain in green color. The association of the left (from the point of view of the bearer) field of the Hungarian emblem, which contains a double cross on a trimount, with the historical territory of Upper Hungary, is explained as the

4 See Svák, Cibulka and Klíma, 2009, p. 296.

5 Drgonec, 2015, p. 339.

trimount being a symbol of the three mountain ranges: Tatra, Matra and Fatra.⁶ Of these mountains, two are now located in Slovakia (High Tatra, Low Tatra, Little Fatra and Great Fatra) and the third (Mátra) in Hungary. The coat of arms of the Slovak Republic can thus also be seen as a testimony of the common historical and cultural heritage of Slovakia and Hungary.

As a Slovak emblem, the argent double cross standing on the middle peak of a dark blue trimount in a red field started to be used in 1848. The representatives of the Slovak national revolutionary movement adopted the emblem from the left field of the emblem of Hungary, but replaced the green trimount with a blue one, as the white-blue-red tricolor corresponds to the Slavic colors.

After the creation of Czechoslovakia in 1918, the double cross on trimount as a symbol of Slovakia and Slovaks was incorporated into the coat of arms of the Czechoslovak Republic. After the creation of the war-time Slovak state in 1939, the double cross on trimount — although in an altered form—once again became its emblem. After the Second World War, Czechoslovakia was re-established, and the Slovak emblem again became part of the Czechoslovak coat of arms. However, in 1960, the double cross on trimount in the Czechoslovak coat of arms was replaced by a new communist symbol of Slovakia — it was a red, gold-rimmed pavise shield, with a blue depiction of the mountain of Kriváň with a fire of the partisans—symbolizing the Slovak National Uprising in 1944. Following the revolution in 1989, the representation of the Slovak emblem was revised again with effect from March 1, 1990.⁷ The coat of arms has once again become a double silver cross, elevated on a trimount on a red shield. Shortly after (April 20, 1990) it became part of the revised coat of arms of Czechoslovakia.

Following the break-up of Czecho-Slovakia and the creation of the Slovak Republic—as governed by the then new SsA — the double silver cross, elevated on a trimount on a red shield has been adopted as the coat of arms of the Slovak Republic in the form laid down in Section 2(1) of this act. As we are already talking about the current state of legislation, more detailed information will be provided in the third sub-chapter of this chapter.

The history of the Slovak national flag began in 1848,⁸ when the Štúr movement⁹ started to use the Slovak flag in a red-white double-combination similar to the one used at the time by the other western Slavic nations — Czechs and Poles. In the same year, however, a blue band was added in the context of the traditional Slavic

6 Although some authors question this link, e.g., Krošlák et al., 2016, p. 252.

7 Constitutional act no. 50/1990 coll. of the Slovak National Council on the name, coat of arms of the state, state flag, state seal and state anthem of the Slovak Republic. See also: Hlavová and Žatkuliak, 2002, pp. 70–71.

8 Vrtel, 2021, p. 219. The Slovaks demanded the introduction of their own Slovak national flag in the so-called Demands of the Slovak nation in 1848. Kohútová, 2008, p. 137.

9 The Štúr movement or the Štúr group (“Štúrovci”) was the the most important group of Slovak national activists, politicians and artists around 1848. They are named after their leader — Ľudovít Štúr. For further reading see for example Kučera, 2017, pp. 247–249.

tri-combination of colors. The lay-out of the flag was not stable¹⁰ (it was sometimes also used with the representation of the national emblem and the arrangement of the three colors only stabilized at a later stage).

At the time of the creation of the common state of Czechs and Slovaks in 1920 a blue wedge was inserted into the original white-red flag of Bohemia, creating the new Czechoslovak flag, which became the most prominent and recognizable symbol of Czechoslovakia. Today, the Czech Republic uses this flag, which has created controversy and sparked passions in the period shortly after the dissolution of Czechoslovakia.¹¹ At the time of the Slovak state during WWII, a white-blue-red tricolor was used as a state flag without depicting the coat of arms (a flag very similar to the current flag of the Russian Federation).

On March 1, 1990, the Slovak flag was reintroduced in a combination of three coloured stripes without a sign. However, that flag gave rise to a risk of confusion with—then essentially also new—flags of Russia¹² and Slovenia. The national emblem was therefore inserted in the front field of the flag and the flag took the form that continues to be used today (see the third subchapter).

The state anthem of the Slovak Republic is the song “*Nad Tatrou sa blýska*” — “Lightning over the Tatras.” The author of the song text is Janko Matúška, a Slovak romantic poet, a prominent representative of the Slovak 19th century national revival *Štúr* group. At the time of its creation (1844), its author was 23 years old and it was composed as a “protest song.” The melody comes from the folk song “*Kopala studienku*.”

Under Czechoslovakia, the first stanza of “*Nad Tatrou sa blýska*” was the second part of the state anthem. Between 1939 and 1945, the state anthem of the Slovak Republic was the song “*Hej, Slováci*,” which (with slightly different wording) was considered to be an anthem of all Slavic peoples (this song was also, at certain times, the state anthem of Yugoslavia, Serbia, Montenegro; the Polish state anthem — *Mazurek Dąbrowskiego* — has almost the same melody).

At present, the state anthem of the Slovak Republic is made up of the first two stanzas of “*Nad Tatrou sa blýska*.”

The Slovak state seal in its current form is the “youngest”¹³ Slovak state symbol. It is derived from the coat of arms. Its historical predecessor was the state seal from the period 1939 to 1945, which also consisted of a representation of the coat of arms

10 See Svák, Cibulka and Klíma, 2009, p. 298.

11 According to Art. 3 para. 2 of the Constitutional act no. 542/1992 coll. on the dissolution of the Czech and Slovak Federal Republic the Czech Republic and the Slovak Republic may not use the state symbols of the Czech and Slovak Federal Republic after the dissolution of the Czech and Slovak Federal Republic.

12 Russia re-adopted its historical flag in 1991. From a vexiological point of view, Russia had a priority right to this tricolor, as it had used it before Slovakia did (Svák and Cibulka and Klíma, 2009, pp. 298–299).

13 It was introduced by the 1990 Constitutional act no. 50/1990 coll. of the Slovak National Council on the name, coat of arms of the state, state flag, state seal and state anthem of the Slovak Republic.

(which, however, was graphically different from the one currently used by the Slovak Republic, e.g., the ends of its arms were not concaved) and a circular inscription, which, however, differed from the current circular inscription (in the current state seal, the circular inscription “Slovak Republic” is used, in the WWII the inscription was reading “Seal of the Slovak Republic”). Further difference was a significantly different font of the inscription. The current state seal has a linden leaf at the bottom of the circular inscription, the historic state seal had an isosceles double cross at the bottom of the circle, the symbol of the ruling *Hlinková* Slovak People’s Party¹⁴ and its ideology. The diameter of both state seals is the same: 45 mm.

3. Constitutional and legal protection of state symbols of the Slovak Republic

According to the Constitution of the Slovak Republic (Art. 8), the state symbols of the Slovak Republic are the coat of arms, the flag, the state seal and the state anthem. Art. 9 contains a brief description of the symbols and provides that a Law shall lay down the details and use of the state symbols. The existence of a constitutional regulation of state symbols, including their description, provides them with a higher degree of esteem and protection and significantly complicates their change.

However, since the Constitution does not provide additional specific protection to state symbols, and since the more detailed description of the state symbols is regulated within the SsA, we will draw mainly from its wording in the following text.

According to SsA, the coat of arms of the Slovak Republic consists of a silver double cross on a red early gothic¹⁵ shield, erected on the central, elevated hill of three blue hills. Extremities of the cross are amplified, and its ends are concaved. The coat of arms is used in color. Exceptionally, the color representation may be omitted if it is not possible or appropriate for objective reasons. The silver color of the double cross may also be replaced by white when depicted in color. Under the SsA, a one-color, metallic, stone or ceramic representation is also a coat of arms of the state, if this representation corresponds to the representation of the coat of arms. The coat of arms thus depicted is used, for example, in the main meeting chamber of the National Council of the Slovak Republic, where its monumental wooden sculpture is located above the presidential bench. A depiction of the Slovak coat of arms forms Annex 1 to the SsA.

The Slovak flag consists of three longitudinal stripes, white, blue and red, of the same width, arranged horizontally. The Slovak coat of arms is placed at the hoist side. The coat of arms is equidistant from the upper, fore and bottom edges of the

¹⁴ Kamenec, 1992, p. 31.

¹⁵ For more information on the topic of heraldic shield shapes, see Von Volborth, 1996, pp. 22–23.

flag and is equal to half the height of the flag. The aspect ratio of the flag is 2:3. A depiction of the Slovak flag forms Annex 1 to the SsA.

The state flag may also be used in the form of a banner (Section 10 of the SsA). The main difference here is in the method of affixing—the state banner is always firmly attached to a pole or a cross-beam. Another difference is the ratio of the sides; in the case of the state banner it is less rigid—it is only provided, that the length of the banner shall not exceed three times its width. state banner may also hung vertically, in that case, the coat of arms is also in a vertical position.

A depiction of the state banner forms Annex 3 to the SsA. The provisions of Section 8, with the exception of paragraphs 5, 9, 10 and 12, shall apply to the use of the state banner.

The Slovak state seal is round. In its center, the coat of arms is depicted, the colors of it being marked by heraldic hatching. A circular inscription is placed around the coat of arms. There is a linden leaf at the bottom of the circle of the state seal. The diameter of the national seal is 45 mm. A depiction of the state seal forms Annex 4 to the SsA.

The state anthem of the Slovak Republic are the first two stanzas of the “*Nad Tatrou sa blýska*” song.¹⁶

3.1. Positive protection of state symbols

“Positive protection of state symbols” consists of those elements of normative regulation that define state symbols and regulate, who has the right to use state symbols and how.

The negative protection of state symbols restricts or prohibits the use of state symbols by certain persons and/or in a certain way. This includes the regulation of tortious liability.

A part of legal protection of state symbols are rules, which give them an exclusivity status in relation to other symbols, in particular in relation to foreign state symbols. Therefore, the rules governing the use of foreign state symbols in the

16 The song has a total of six stanzas, only the first stanza was used as part of the Czecho-Slovak anthem.

The first two stanzas are worded as follows:

1. Lightning flashes over the Tatra,
the thunder pounds wildly,
Let's stop them, brothers,
they will surely disappear,
the Slovaks will revive.
2. That Slovakia of ours,
had been sleeping so far,
But the thunder's lightnings,
are rousing the land
to wake it up.

territory of the Slovak Republic may also be perceived in terms of the legal protection of Slovak state symbols.

Positive protection is already provided for in Section 1 of the SsA. state symbols may be depicted, produced and used only in the manner regulated by this act. Everyone is required to respect the symbols. Education for patriotism and respect for the state symbols of the Slovak Republic must be included in the national school education program.

A very specific feature of the coat of arms of the Slovak Republic is its relative graphical simplicity. Based on my own observation of various state symbols, it appears to one of the most graphically simple coat of arms in the world. This specificity can be seen as a very fundamental factor determining the regulation of the use of the coat of arms. Most of the world's states coat of arms can be drawn or painted by an ordinary person only with difficulty. However, even a small child can draw a simple and relatively faithful graphic representation of the Slovak coat of arms in a short time. This has several potential positive and negative impacts:

- the positive effect is that Slovaks are strongly identified with the coat of arms as their national emblem — symbols, that are very easy to reproduce graphically, understandably rather find a path to use in everyday life;
- the negative impact is that a simple graphic representation of a coat of arms can also be easily drawn in a degrading way or in a degrading context, although the person, who has done so, could argue, that it is not the (official) coat of arms, since the graphic representation in question does not correspond to the legal rules governing the representation of the coat of arms.

These specificities (among others) create a need for regulation not only of the coat of arms proper, but also of its simplified graphic reproductions:

- in paragraph 6a of the SsA the so-called emblem of the coat of arms is regulated, which, in accordance with subparagraph 1 of that article, consists of a double cross, erected on the central, elevated hill of three hills, extremities of the cross are amplified, and its ends are concaved,
- in paragraph 13b of the SsA the so-called national symbol is regulated (in accordance with paragraph 13b(1) the national symbol consists of a double cross erected on the central of three hills).

Neither the emblem of the coat of arms nor the national symbol are classified by law as a state symbol, however the fact, that law regulates them, also indirectly protects the coat of arms. If the simplified graphic representations of the double cross on three hills were not legally regulated, their defamation would also not be punishable.

Concerning emblem of the coat of arms and the national symbol, the chapter deals with them in more detail in Sections 4.1. and 4.2.

3.1.1. Authorized persons and authorized uses of state symbols

The SsA regulates the use of state symbols in a differentiated manner according to the group of entities using them. First of all, it regulates the use of state symbols by public entities, which use them to indicate that they act on behalf of the state, in the exercise of state authority, and by other persons, who use it to express, that they officially represent the state and the Slovak nation. On the other hand, it also regulates the use of state symbols by natural persons and legal persons who do not act as representatives of the state authority or as official representatives of the Slovak Republic and of Slovaks.

According to the Section 3(1) of the SsA, the coat of arms is to be used in the manner prescribed by that law by:

(a) the National Council of the Slovak Republic and the Office of the National Council,

(b) the president of the Slovak Republic and the Office of the president,

(c) the government,

(d) ministries and other bodies of central government,

(e) the Supreme Audit Office,

(f) the public prosecutor's office, the courts and the Constitutional Court,

(g) the persons designated by the state pursuant to special laws,

(h) diplomatic missions, permanent missions and consular posts of the Slovak Republic,

(i) the armed forces, the security forces, and the fire and rescue corps,

(j) state schools and state school establishments,

(k) local and regional self-government authorities,

(l) the Slovak Academy of Sciences and its authorities and other state scientific organizations, national museums and galleries and other organizations established by the state in the field of culture, and

(m) the National Bank of Slovakia and state banks.

For an example of persons authorized to use the coat of arms of the state to express the official representation of the Slovak Republic and Slovaks, we can refer to Section 3(3) of the SsA. According to this provision, the coat of arms is used to identify natural and legal persons representing the Slovak Republic at official international events. The Slovak Republic's sport representation uses the coat of arms in major competitions, including the preparation for the competition by depicting it in the manner laid down in this act on sports clothing. This provision was inserted in the Act only in 2019 as a reaction to the "scandal" concerning the new jerseys of the Slovak Ice Hockey national team, when the Slovak Ice Hockey Union—instead of the coat of arms—displayed its own logo on the jerseys, which is a stylization of the coat of arms (the blue trimount is replaced by white-blue stylized hockey sticks, forming a silhouette of the three peaks; instead of the classic silver double cross with amplified extremities and concaved ends in the red field there is a white, sharp-edged double cross depicted from the profile). The replacement of the coat of arms on the jerseys

has given rise to considerable reluctance, in particular by nationalist Slovak politicians¹⁷ and a nationally more sentient part of Slovak society, although it is common for top national ice hockey national teams to use stylized symbols on their jerseys (e.g., Swedish “*tre kronor*,” stylized Czech lion or Canadian maple leaf). It should be noted, that in Slovakia ice hockey is a “national sport” and national team matters can trigger very strong emotions. One of the critically perceived factors in this case was an accusation, that the Slovak Ice Hockey Union changed the design of the jerseys for commercial purposes (because it can exercise exclusive intellectual property rights over their own logo and therefore nobody would be able to sell replicas of the jerseys and other fan merchandise with their official design without a licence from the Slovak Ice Hockey Union).

In response to the said “scandal,” a rather extensive amendment to the SsA was introduced by act no. 126/2019. As a result of this amendment and the new provision in Section 3(3), the sporting representation of the Slovak Republic in a major international competition (i.e., for example, the World Ice Hockey Championship), but also in preparatory matches for such competition, may no longer use the coat of arms on its dresses other than in the manner provided for in this act. The use of the stylized or altered coat of arms would thus constitute an infringement of the law.

The SsA regulates also the manner, in which the authorized persons can use the state symbols. It should be recalled here that if the user is a state authority, Article 2(2) of the Constitution of the Slovak Republic applies to it, according to which state authorities may act only based on the Constitution, within its limits and to the extent and in the manner prescribed by Law. This rule also applies to the use of state symbols. Therefore, for example, a state authority is not only entitled, but also obliged to display the coat of arms of the state on the building, in which it resides.

It is neither necessary nor meaningful to mention all the provisions of the SsA which govern the specific modalities of use of state symbols by authorized persons. We will therefore only give a more concise outline:

Section 3(6) of the SsA governs the following use of the coat of arms of the Slovak Republic—to indicate *inter alia*:

- the borders of the Slovak Republic with other states,
- the buildings of the state authorities, the armed forces, the security forces and the fire and rescue corps, state schools and state schools, local authorities and institutions referred to in paragraph 1(l),
- polling stations, meeting rooms of state authorities, state schools and state school establishments, local government authorities, institutions referred to in paragraph 1(l), other official rooms of state authorities and their public relations rooms, classrooms of state schools, classrooms and Slovak national monuments,

17 <https://hokej.pravda.sk/reprezentacia/clanok/485183-hrnko-z-sns-kritizuje-hokejistov-za-nove-dresy-pohrozil-odobratim-dotacie/>.

- objects and areas protected under nature protection and monuments regulations, and
- Collection of Laws of the Slovak Republic.

As regards the state flag, the SsA governs its use in Paragraph 8 as follows: the state authorities, the armed forces, the security forces, the fire and rescue corps and the municipal and regional self-government authorities display the state flag on the buildings in which they are located, the state authorities also designate the official room of their highest official.

The state flag is further used on public holidays, as well as at a call of the Ministry of the Interior of the Slovak Republic (if it is a major official affair on the national level — e.g., an official visit by the head of another state) or by a municipality (if it is a local official affair).

The state flag is hoisted on a flagpole. In the case of international events in the Slovak Republic, in case of odd number of flags, the state flag is placed in the middle, in case of even numbers, on the left side from the front view in the middle pair. In the case of a major event of the Slovak Republic or a major event of a local nature, the national flag shall always be used; the national flag of another state is used only when an official delegation of another state is present. In this case, the Slovak flag is used in the place of honor (left side from the front view). If the state flag is used together with a municipal flag, both are placed side by side at the same height, with the national flag positioned on the left.

In the case of state mourning,¹⁸ the state flag is flown at half-mast.

The use of the state banner shall be subject, *mutatis mutandis*, to the provisions on the use of the flag, with some exceptions expressly provided for.

The use of the state seal is regulated very briefly in Section 12 of the SsA: it is used original document of the Constitution and constitutional laws of the Slovak Republic, international treaties, credentials of diplomatic representatives and in other cases in which its use is usual.

Pursuant to Section 13(2) of the SsA, the state anthem is played or singed on public holidays, commemorative days, anniversary and other significant national or local occasions; the state anthem of another state shall be played if its official delegation is present. The previous sentence is without prejudice to the right of natural and legal persons to play or sing the state anthem of another state.

Under Paragraph 6(3), the state anthem must also be played or singed before the opening of first and last meetings important bodies of the state and local government designated by law in every term of office, and at other major events.

18 The state mourning is proclaimed by the government; it is governed by Section 9a of the state symbols act, there are mandatory and optional grounds for its declaration.

3.1.2. Individuals and legal persons

In short, it can be stated right away, that natural persons and legal persons in the Slovak Republic may, in principle, use the state symbols of the Slovak Republic, but this use must be dignified and correspond to their status as state symbols.

Section 3(4) of the SsA provides, that other natural and legal persons may also use the coat of arms, except for the designation of their buildings, documents, stamps and uniforms; this shall not apply to natural and legal persons as provided for in specific legislation.¹⁹ All natural and legal persons may always use the coat of arms only in such a way, that its use is dignified and respect its status as a state symbol.

Under Section 11(2) of the SsA, both natural and legal persons may use both the state flag and the state banner; however, their use must also be dignified and respect their status as state symbols.

Understandably, natural persons and legal persons can play and sing the state anthem of the Slovak Republic. Although the state anthem is governed by that law, there is no specific requirement for the dignity of its singing. This seems to be logical — compliance with such a duty could not be fairly demanded. After all, people cannot be prohibited from singing just because they are not good singers. However, it is necessary to recall the general provision of the first sentence of Section 1(2) of the SsA, according to which everyone is required to respect the state symbols of the Slovak Republic.

Thus, only the regulation of the use of the state seal remains to be mentioned. This is the only state symbol that cannot be used by natural and legal persons by nature, as its use is reserved only to the top state authorities for the most important public documents.

3.1.3. State symbols and copyright

Under the Section 5(d) of the Slovak Copyright Act (act no. 185/2015 coll. Copyright Act), the state symbols, symbols of municipalities, symbols of the self-governing regions are not considered to be subject to copyright; however, this does not apply in the case of a work which forms the basis for the creation of a symbol. Of course, at least some of the state symbols of the Slovak Republic had at some time the status of copyright protected work. For example, the text of the state anthem is an 1844 poem of the poet Janko Matúška. Thus, state symbols do not currently have the status of copyright works, but the works that were used to create them, do.

State symbols may be included in copyright protected works. For example, it is possible to create a painting involving the state flag. There is a general requirement here that the author must act with respect for the state symbol in such a way as to preserve its dignity.

¹⁹ The part of the sentence after the semicolon can already be seen as a negative regulation of the use of the coat of arms by natural persons and legal persons.

A sensitive issue are cases of caricatures of state symbols used in copyright protected works. Part 3.2.2. examines this topic closer.

3.1.4. Use of state symbols in business

The SsA does not explicitly prohibit the use of state symbols in business. However, it is necessary to recall again the initial provision of that law, namely Section 1(1) thereof, according to which the state symbols may be represented, produced and used only in the manner prescribed by that law. This means that private persons may, for example, include a state symbol in the design of their product as long as they fulfill the requirement of Section 3(4) of the SsA, i.e., that its use will be dignified and will respect its status as a state symbol. For example, if a publishing house publishes a photographic book about Slovakia, it may use the Slovak coat of arms on the cover, unless this creates the appearance, that it is an official public document. It is also possible to use the coat of arms for example on advertising items or, for example, on souvenirs. The law in no way precludes an entrepreneur from manufacturing and selling clothing or fan items with a state symbol. On the other hand, if someone was to produce and sell, for example, toilet paper with the print of the coat of arms or, for example, a doormat depicting a state flag, it would not be a dignified use and would therefore be a violation of the law.

Of course, any use of state symbols in business must also comply with the legal rules for doing business in general.

In relation to business which concerns state symbols, the question of the relationship between state symbols and intellectual property rights must be specifically mentioned. state symbols, as mentioned above, are not protected by copyright. However, copyright protected works in which the national symbols are included (*lege artis*) may be protected and such works may be commercially exploited.

It is not possible for someone to register a state symbol as a trade mark. Pursuant to Section 5(1)(j) and (k) of act no 506/2009 coll. on trade marks, a sign is not to be entered in the register of trade marks, if:

- it contains a sign of high symbolic value, in particular a religious symbol;
- it contains, without the consent of the competent authorities, signs, emblems, or coat of arms other than those protected under an international convention and which are of public interest.

On the other hand, it is possible to register a graphic sign as a trade mark, which is a stylized image of a state symbol. Such a case has already been mentioned in the chapter in relation to the logo of the Slovak Ice Hockey Union.

3.2. Negative protection of state symbols

The negative protection of state symbols in legislation may be understood as a set of rules, which prohibit or restrict certain ways of dealing with state symbols,

whether expressly or implicitly. This includes also laws penalizing certain forms of handling of state symbols, whether in terms of criminal liability or liability for administrative offenses.

3.2.1. Prohibited uses of state symbols

In relation to the Slovak coat of arms, the following uses are expressly excluded by law:

- it shall not be displayed on buildings in dilapidated conditions, although they fall within the scope of Paragraph 4(1) of the SsA;
- unless a specific law provides otherwise, private persons may not use the coat of arms to designate their buildings, documents, stamps and uniforms – as governed by Paragraph 3(4) of the SsA.

Some prohibited uses of the coat of arms derive implicitly from a statutory provision. However, these provisions must always be interpreted in the context of other provisions of the SsA.

For example, the SsA provides in the first sentence of Section 3(3), that the coat of arms shall be used for designation of natural and legal persons representing the Slovak Republic at official international events. However, a person, who represents the Slovak Republic at an unofficial sporting event, may also use the coat of arms for his or her designation, since such right is granted to such a person in Section 3(4) of the same act. Thus, the wording “at official international events” does not in fact imply an implicit restriction on the use of the coat of arms by natural persons at non-official international events. On the other hand, the second sentence of Section 3(3) of the SsA expressly provides that a sports representation of the Slovak Republic uses the Slovak coat of arms in a major competition, including the preparation for such competition, by displaying it in the manner provided for in this act on sports clothing. It follows implicitly from this provision, that the sporting representation of the Slovak Republic cannot use the coat of arms in a major competition, including the preparation for such competition, by displaying it in a manner different from the one provided for in the act (i.e., for example, stylized depiction). On the other hand, in case of other sporting events—for example, a “friendly” match — the national representation may also use a stylized emblem on sports clothing.

Furthermore, the use of the coat of arms implicitly limited by law includes i.a. use of the coat of arms by private primary schools or secondary schools other than as a watermark on school diplomas.

Regarding local self-government (municipalities, towns, municipal districts, self-governing regions), there is also an implicit restriction on the use of state symbols, which is very important in practice. The most important use of the coat of arms of the state by local and regional self-government authorities is the use in their official stamps. Local and regional self-governing authorities have two types of official stamps — official stamps with the Slovak coat of arms, and official stamps bearing

their own coat of arms. Under Section 5(3) of the SsA, local and regional self-government shall use the official stamp with the coat of arms of the Slovak Republic, the inscription “Slovak Republic” and the name of the municipality for decisions in matters in which they carry out state administration under specific legislation. These are therefore cases of so-called “transferred state administration”²⁰ carried out by a local authority. Thus, it follows implicitly from Paragraph 5(3), that the official stamp bearing the coat of arms of the state shall not be used by the self-government authority in the exercise of its own self-governing powers. In these cases, the local authorities are required to use official stamps with their own coat of arms. (This rule is also explicitly included in Section 1b(4) of the act no. 369/1990 coll. on Municipal Establishment.) the Act on self-governing regions does not expressly regulate official stamps of a self-governing region.

In the case of private persons, the use of the coat of arms is implicitly excluded by law if it is not dignified and does not correspond to its status as a state symbol (second sentence of Section 3(4) of the SsA).

The SsA regulates negative obligations, restrictions and prohibitions concerning the use of the state flag (and, as appropriate, state banner) as follows: No decorations, inscriptions, images, ribbons, etc. shall be placed on the national flag or on the pole.²¹ The state flag may not be used damaged or dirty and may not be bound into a rosette.²² The state flag shall be raised and lowered without interruption, slowly and with dignity; when lowered, it shall not touch the ground.²³

In the case of the state flag and the state banner, no specific negative regulation of the manner of use is provided in relation to private persons. Thus, the negative obligations and restrictions applicable to private persons are the same as those generally mentioned above.

In the case of both state anthem and state seal, the SsA contains only a positive regulation of their use, i.e., who can use them and how they can be used. This also implies, of course, *a contrario*, how the two national symbols may not be used. In the case of the state anthem, this limit is only given by the general requirement to respect the state anthem as a state symbol.²⁴

This is different in the case of the state seal. Since the range of ways in which it may be used under the law is very narrow, it implies an implicitly very broad restriction on its use. It cannot therefore be used other than on the original document of the Constitution and constitutional laws of the Slovak Republic, international treaties, credentials of diplomatic representatives and in other cases in which its use is usual. However, other use of the state seal is not possible by nature (except in cases

20 Vrabko et al., 2012, p. 151.

21 Section 8(9) of the SsA.

22 Section 8(11) of the SsA.

23 Section 8(12) of the SsA.

24 Section 1(2) of the SsA. One specific implicit restriction still follows from the provision contained in Paragraph 13a(1) and (2) of the state symbols act.

of obvious forgery), given that, under Section 12(3) of the SsA, the state seal is kept by the president of the Slovak Republic.

Of course, for all state symbols, the limits on their use also result from the regulation of criminal and administrative liability, as discussed in Section 3.2.2.

3.2.2. Legal consequences of breach of legal obligations relating to state symbols

Failure to comply with the obligations and restrictions laid down in relation to the use of state symbols may have various negative legal consequences (but also non-legal consequences). The negative legal consequences of such actions are the incurrance of tortious public liability, be it criminal liability or liability under administrative law (liability for infringements or administrative offenses).

If, however, there was a breach of the legal obligation relating to the use of state symbols by an official or employee of a public authority, disciplinary liability is also possible.

Although we will not address civil liability, we must say that damage to a thing (in terms of a certain material object), by which a symbol is portrayed, always results in a certain legal liability, be it public liability (according to the value of the object, it is either criminal or administrative liability — offense of damage to foreign property), or civil liability (liability for damage).

3.2.2.1. Criminal offenses

Among the criminal offenses contained in the Slovak Criminal Code, the criminal protection of state symbols is covered by the provision in Paragraph 364. It is the crime of disorderly conduct. That offense is committed, inter alia, by any person who commits, in words or physically, publicly or in a place accessible to the public, gross indecency or disorder by defamation of a state symbol (Section 364(1)(b) of the Criminal Code). For such conduct, the offender can be punished by imprisonment for up to three years (the lower limit of the rate is not provided for in the law in this case).

We will briefly explain how some of the terms used in the Section 364(1)(b) of the Criminal Code are to be interpreted:

- offense committed publicly — under Section 122(2) of the Criminal Code, a criminal offense is committed publicly when committed
 - a) by the content of a book or print media or by the distribution of the file, or by film, radio, television, using a computer network or other similarly effective means; or
 - b) in front of more than two persons present at the same time;
- a place accessible to the public may be, for example, a street, square, or other public space, a building accessible to the public, but also another place open to the public, even if the public is not present there;

- according to J. Ivor, a gross indecency is a serious breach of the rules of civil coexistence and the principle of civil morality, whereas disorder is an act which seriously undermines peace and public order, and, unlike gross indecency, it is usually an act of physical or psychological violence directed against persons or against property, or actions that raise concerns about the safety of people or property, or significantly reduce esteem of a larger number of people;²⁵
- a state symbol, according to the above-mentioned work, must²⁶ be understood not only as the state symbol of the Slovak Republic, but, and this is very important, it should be understood as meaning any state symbol.

The Section 364(1) of the Criminal Code governs the basic constituent elements of the offense and the corresponding penalty. However, the Criminal Code also regulates the qualified offense in Paragraph 364(2), with a higher penalty rate (six months to three years). The offender would be guilty of the qualified form of the offense if he or she had committed the offense referred to in paragraph 1:

- a) from a specific motif;
- b) by a more serious way of acting;
- c) in the presence of a group of persons below the age of eighteen;
- d) against the protected person; or
- e) although he or she has been convicted in the previous twenty-four months or punished in the previous twelve months for an alike or similar act.

A more serious way of acting in this context could be conduct that is committed in breach of an important obligation arising from employment, status or function of the perpetrator²⁷ — for example, if a state symbol would have been defamed by a public office-holder or a soldier or police officer. Among the specific motives provided for in Section 140 of the Criminal Code, in the event of an offense of disorderly conduct committed by defamation of a state symbol, it would be possible, in particular, to consider committing this crime because of hatred against a group of persons or an individual for their actual or alleged affiliation with a race, nation, nationality, ethnic group, for their actual or alleged origin, color, sex, sexual orientation, political opinion or religion.

In regards to this offense, we must at least briefly outline information concerning the basis of criminal liability in the Slovak Republic.

25 Ivor et al., 2021, p. 506. According to another work, gross indecency means conduct that grossly violates the principles of civil coexistence and the principles of civil morality. It must be a more serious indecency. The gross nature of indecency cannot be assessed only on the basis of the character of the perpetrator's personality, but also from his specific expression, even in relation to the environment where it occurred. Samaš and Stiffel and Toman, 2010, p. 773.

26 Ivor et al., 2021, p. 507.

27 Section 138(h) of the Criminal Code.

Generally, the perpetrator of all criminal offenses in the Slovak Republic may be a natural person. Legal persons within the meaning of act No 91/2016 coll. on the criminal liability of legal persons can only be the subject of exhaustively listed offenses. Those offenses do not include the offense of disorderly conduct, thus, criminal penalties for disorderly conduct are possible only in the case of a natural person.

Criminal offenses committed by natural persons must be committed intentionally, unless that law expressly provides that negligence is sufficient. Since in the case of the criminal offense of disorderly conduct, the law does not provide that negligence is sufficient, that offense may be committed only by deliberate action.

In terms of types of offenses, the Slovak Criminal Code divides offenses into two categories — misdemeanors or felonies (Section 9 of the Criminal Code). Under Section 10(1) of the Criminal Code a misdemeanor is:

- (a) an offense committed negligently; or
- (b) an intentional criminal offense for which this act provides, in its special part, for a maximum term of imprisonment not exceeding five years.

Thus, in the case of the offense of disorderly conduct, in the light of the scope of penalties laid down by law, the offense is a misdemeanor, which applies both to the offense in the primary form according to Paragraph 364(1) and to the more serious form according to Paragraph 364(2).

This is a very important piece of information in terms of finding a line between criminal and administrative liability for undesirable actions involving state symbols. Under Paragraph 10(2) of the Criminal Code, there is no misdemeanor where, having regard to the way the act was carried out and its consequences, the circumstances in which the act was committed, the degree of fault and the motivation of the offender, the seriousness of the offense is minor. It is the so-called “material remedy,” which “decriminalizes” offenses with a minimum degree of social hazard.

Finally, the questions of the personal scope and territorial scope of the Slovak Criminal Code need to be mentioned. This is important from the point of view of the fact that Slovak state symbols may also be defamed outside the territory of the Slovak Republic and perpetrators may also be non-nationals of the Slovak Republic.

Pursuant to Section 3 of the Slovak Criminal Code, the criminal liability for an act committed on the territory of the Slovak Republic is to be assessed under this act. The offense is considered to have been committed on the territory of the Slovak Republic, if the offender has:

- a) committed his/her conduct, at least in part, within the Slovak territory; or
- b) committed the act outside the territory of the Slovak Republic, if there was a breach or threat to an interest protected by the Slovak Criminal Code or if such a consequence should have occurred at least in part in the territory of the Slovak Republic.

This may be the case when someone defames Slovak state symbols online, for example, streaming a video from another country, but via a platform where the addressees are usually located in Slovakia.

Under the Slovak Criminal Code, the criminal liability for an act committed outside the territory of the Slovak Republic on board a ship flying the flag of the Slovak Republic or on board an aircraft entered in the Register of aircrafts of the Slovak Republic is also assessed.

As regards the scope *ratione personae*, under Section 4 of the Slovak Criminal Code, the criminality of an act committed outside the territory of the Slovak Republic by a citizen of the Slovak Republic or by a foreign national permanently resident in the Slovak Republic shall also be assessed.

Under Section 6 of the Criminal Code, the criminality of an act committed outside the territory of the Slovak Republic by a foreign national who does not have permanent residence in the Slovak Republic is to be assessed, if the offense is also punishable under the law in force in the territory where it was committed, the offender has been apprehended or arrested in the territory of the Slovak Republic and has not been extradited for criminal prosecution to a foreign state. However, such an offender shall not be liable to a more severe penalty than that provided for by the law of the state on whose territory the offense was committed.²⁸

In practice, sometimes in relation to the defamation of state symbols, the possibility of committing certain other criminal offenses is also discussed. These may include the offenses of “defamation of the nation, race and belief”²⁹ and “incitement to national, racial and ethnic hatred”.³⁰ In our opinion defamation of state symbols may, in some cases, also cover the constituent elements of these offenses, but this will not always be the case. What matters is if the signs of those criminal offenses are met in their entirety. The mere defamation of the symbols of a state does not always mean *eo ipso* also defamation of its constituent nation. For example, if someone defames the flag of a state that conducts war operations in violation of international law, this does not mean that he manifests hatred toward a nation that is ethnically dominant in that state.

In the following text, we will mention some cases, which, under the Criminal Code, could fulfill the merits of the abovementioned disorderly conduct offense.

In the Slovak Republic, use of a caricature of the coat of arms became widespread in 2011 and 2012 in response to the so-called “Gorilla Scandal”—a political corruption case, which began with the leak of a secret file bearing the cover name “Gorilla” from the Slovak Intelligence Service to the public in December 2011. It contained transcripts of audio recordings that showed corruption in Slovak politics. In

28 Apparently using this provision, the elite Slovak police unit *NAKA* tried to prosecute Hungarian fans for defaming the national flags of the Slovak Republic at the international football match Hungary — Slovakia in Budapest on September 9, 2019. However, it is also possible that the perpetrators were Slovak citizens of Hungarian nationality. In such a case, the assessment of the applicability of the Slovak Criminal Code would fall under Section 3. We note, that we do not know the course or outcome of this criminal proceeding. Available at: <https://hnonline.sk/slovensko/2005621-protislovenske-vypady-fanusikov-v-budapesti-riesi-uz-aj-naka>

29 Section 423 of the Criminal Code.

30 Section 424 of the Criminal Code.

the caricature, the trimount in the coat of arms was replaced by the head and arms of a massive gorilla, on the gorilla's head was a partly peeled banana shaped in the form of a double cross.

Igor Matovič, who is currently in the office of the Slovak minister of Finance (back then, he was a pro-government MP), also used this cartoon at the entrance gate of the Slovak parliament. He said that

there are politicians who have stolen from Slovakia for 23 years and citizens do not deserve to be led by such people. They hide behind the double cross, act as a state authority, and in fact they are thieves. This coat of arms will be much better represented by them.³¹

Igor Matovič's act sparked criticism of some politicians. The then president of the National Council of the Slovak Republic, Pavol Hrušovský, strongly criticised his then coalition partner. He found his actions unacceptable and said, that Matovič grossly disgraced a symbol of Slovak statehood.³² A criminal report was also filed against Matovič by at least one private person. It is not known from the media coverage, how this criminal report was dealt with, i.e., whether criminal proceedings were initiated at all, but it is known that Igor Matovič was not convicted.

In our opinion, Matovič's action could not be punishable as disorderly conduct for several reasons. Most important, the subjective aspect could not be fulfilled, since Matovič clearly did not intend to defame the state symbol, but merely wanted to express his criticism of the increase of corruption in Slovakia. He expressly stated that the symbol he placed on the gate of the parliament was meant as a symbol of corrupt politicians, who in his opinion were not worthy to use the actual coat of arms. It can therefore be said that he tried to symbolically strip those politicians of the right to be represented by the state symbols and gave them symbolically a new symbol — a caricature of the coat of arms. On the other hand, Igor Matovič has long been known for some provocative political “showing off” and it cannot therefore be excluded that he was not guided solely by this “noble” motive.

Even more sensitive was the case of a controversial artist and activist, Ľuboš Lorenz, known for damage, destruction, removal and defamation of various symbols in the public space (typically the memorials of the Soviet army and of representatives of the Communist regime). In 2016 and 2018, he repeatedly wore in public T-shirts depicting the double cross on a trimount in an undoubtedly defamating way. It was a diamond-shaped representation reminiscent of an obscene symbol of the female genital organ. In this case too, it was a criminal complaint filed against Lorenz, but it seems he was not convicted.

There were several differences between the Matovič and Lorenz cases. First, in the case of Igor Matovič, the depiction of the symbol was not in itself obscene.

³¹ <https://domov.sme.sk/c/6225012/matovic-zavesil-na-parlament-znak-gorily-s-bananom.html>

³² Ibid.

Images of gorillas and bananas are not perceived as vulgar, while images of the genitals are generally perceived as obscene. Furthermore, in Matovič's case, there was a clear semantic link between the case to which he responded, and the caricature, that made clear the critical message of his act. Matovič also explained his deed in an understandable way, which of course we do not evaluate in terms of truth or in terms of political positions. On the other hand, Lorenz's act was probably supposed to be a manifestation of general criticism of Slovak society, it was quite obscene and at the same time ambiguous.

A specific and quite frequent case in Slovakia is that anti-fascist protesters protest with the symbol of a double cross crossed out. Such manifestations are criticised by far-right nationalists as acts of defamation of the Slovak nation. However, such criticism is misleading. First, it is not known that anti-fascist demonstrators would ever display a crossed-out coat of arms or another official state symbol — it is always the isosceles double cross not placed on a trimount, and thus a symbol, that has not the attributes of the coat of arms. Secondly, this symbol, i.e., the isosceles double cross, is not a symbol of the Slovaks, it's a symbol of the totalitarian fascist ideology. It is not used (not crossed out) in a context other than to show sympathy to the Slovak WWII fascist regime, its ideology and the war-time Slovak state. His strikethrough is by no means a sign of a negative attitude toward Slovakia or Slovaks, but only a manifestation of opposition to the fascist ideology, politics and history of fascist totality during the Second World War.

Generally, the sanctioning — in particular by means of criminal law — of potentially defamatory acts toward state symbols must be viewed very sensitively, since these acts always are a form of exercise of freedom of speech. State symbols are, as their name implies, symbols of the state — thus, they are, of course, a possible “target” of symbolic expressions of criticism of the state and state authorities.

It goes without saying that — especially in a democracy — it is not right to place an “equals” sign between the current holders of state power and the state as such. The state is transcendent in relation to current holders of power, as such, of long-term social value, and for the cohesion of society it is necessary to ensure respect for the state, including through respect for its symbols. On the other hand, room for criticism in the exercise of freedom of speech must also be accepted. However, this criticism must not be defamatory in relation to state symbols.

The (unsuccessful) legislative initiative of the members of the far-right party *Kotleba — Ľudová strana Naše Slovensko* (“Kotleba — the People's Party Our Slovakia”) of 2018, who proposed to sanction such acts as part of the newly regulated criminal offense of “defamation of the state symbols of the Slovak Republic,” should also be mentioned. The aim was “to protect the state symbols of the Slovak Republic more consistently and strictly against defamation.” The explanatory report stated that “the national symbols of the Slovak Republic are an expression of state sovereignty and a permanent reminder of the importance of the independent Slovak Republic for the whole Slovak society. Their defamation is therefore a gross and dangerous manifestation of anti-Slovak extremism.” The proposers also referred to the cases of Matovič

and Lorenz, which were discussed above. They stated that “the Criminal Code, while penalizing public defamation of any state symbols, only in the context of the disorderly conduct offense, for which there is no minimum penalty. Thus, in practice, the offender can only receive a sentence of imprisonment of only a few days.”

However, this draft law was not approved.

3.2.2.2. Administrative offenses

In Slovak law, in addition to the criminal offenses prosecuted by the law enforcement authorities (police and prosecution) and sanctioned by the courts, there are also minor anti-social conducts, which are punished based on culpability through administrative proceedings by the administrative authorities. These are so-called infringements.

While a criminal offense and an infringement can only be committed by a natural person and must be based on fault, there is also a category of so-called hybrid administrative offenses, which are sanctioned regardless of fault, and whose entities may generally be legal persons and natural persons authorized to conduct a business.³³

Liability for infringements and hybrid administrative offenses may also be considered in the event of a breach of obligations in respect of state symbols — but also other symbols dealt with in this chapter.

Pursuant to Section 42(1)(a) of the Infringements act, a person who intentionally damages, abuses or derogates a state symbol or other symbol protected by a generally binding legal act commits an infringement in the field of general internal administration. Under paragraph 2 of the same article, a fine of up to EUR 99 may be imposed on the offender in respect of that offense.

In view of the construction of this infringement and its comparison with the criminal offense under Section 364(1)(b) of the Criminal Code (disorderly conduct), it is necessary to examine the dividing line between these public offenses. Under the *ne bis in idem* principle and the prohibition of double punishment, it is impossible for a person to commit this infringement and this crime in one act (with the exception, that we will mention below).

The dividing line between these two offenses concerns several aspects. First, a conduct, which is not committed publicly or in a place accessible to the public, cannot constitute the criminal offense of disorderly conduct. Furthermore, in the case of the criminal offense intentional defamation of a state symbol is required, whereas in relation to the infringement it is abuse, damage or derogation. “Defamation” (criminal offense) must be seen as a more serious act than “damage” or “derogation” (infringement). In the case of defamation, therefore, it will be a conduct associated with a higher rate of “reduction in the dignity” of the state symbol. Moreover, it should not be forgotten that, in order to constitute a criminal offense, the first part of Section 364(1) of the Criminal Code must also be fulfilled by the respective action

³³ Hamuláková and Horvat, 2019, p. 179; or Vrabko et al., 2012, p. 301.

in its entirety — that is to say, it must also be “gross indecency” or “disorder.” A mere disrespect for a state symbol (for example if someone depicts the coat of arms with a strikethrough) will usually not be so serious, that it is considered “gross indecency” or “disorder.”

Another difference is what the offender’s intention is directed toward. Both offenses require intentional fault, but the intent must relate to the entire object and conduct. Thus, in the case of the criminal offense, there must be an intention to defame the state symbol. Thus, if someone intends, for example, to damage the state flag, but does not want to defame it (i.e., if it is a simple vandalism, where the perpetrator does not intend specifically to manifest gross disrespect of the state symbol), it will not be the criminal offense of disorderly conduct, but it may be the criminal offense of damage to another’s property and at the same time the infringement under Section 42(1)(a) of the Infringements act.

For the same reason, an action cannot be regarded as an offense of disorderly conduct, when the offender’s intention is not to defame the state symbol, but, for example, to criticize the generally long-lasting circumstances in the state.

Finally, the distinction between the two offenses in question is generally determined by the substantive corrective (Paragraph 10(2) of the Criminal Code), according to which there is no misdemeanor if, having regard to the manner, in which the act was carried out and its consequences, the circumstances in which the act was committed, the degree of fault and the motivation of the offender, the seriousness of the conduct is negligible. Thus, if the circumstances of the case justify the use of this corrective, it will probably be only a infringement under Section 42(1)(a) of the Infringements act.

Finally, we will provide readers with some general information on liability for infringements in the Slovak Republic.

As mentioned above, only a natural person can be held responsible for an infringement. Liability for infringements is always based on fault. The infringement under Section 42(1)(a) of the Infringements act must be committed intentionally, since that provision expressly requires intent.

In view of the nature of the above-mentioned infringement, which is relevant to this publication, attention should be paid (as we did with the Criminal Code) to the personal and territorial scope of the Infringements act. These issues are regulated in Section 8 of the Infringements act as follows: an offense committed on the territory of the Slovak Republic is to be assessed under this act. Under this act, an offense committed abroad by a citizen of the Slovak Republic or by an alien permanently resident in the territory of the Slovak Republic shall also be assessed, if such person has breached an obligation under Slovak law outside the territory of the Slovak Republic, or if it results from an international treaty by which the Slovak Republic is bound.

As mentioned above, the entity that can be held responsible for the infringement can be only a natural person. However, the SsA (Section 14) also regulates another category of administrative offenses, which can only be committed by legal persons. Pursuant to Section 14, for breaking the Section 3(3) to (6), Section 5(3), Section

6, Section 11(2) and Section 13b(2), the District authority may impose a fine on a legal person of up to EUR 7 000. When imposing a fine and deciding on its amount, the gravity, manner of conduct and duration of the unlawful situation shall be considered.

3.3. Excursion into the use of foreign state symbols in the Slovak Republic

The SsA also regulates the use of foreign state symbols in the Slovak Republic.

Under Article 4(6) of that law, the coat of arms of another state may be used only to designate buildings of that state's representative offices.

In the case of foreign state flags, the SsA regulates them in the context of their use together with the state flag of the Slovak Republic. It provides in Section 8(6) and (7), that in the case of international events in Slovakia, in case of odd number of flags, the state flag is placed in the middle, in case of even numbers, on the left side from the front view in the middle pair. In the case of a major event of the Slovak Republic or a major event of a local nature, the national flag shall always be used; the national flag of another state is used only when an official delegation of another state is present. In this case, the Slovak flag is used in the place of honor (left side from the front view).

In relation to foreign state anthem, Section 13(2) is relevant, according to which the state anthem of another state shall be played, if its official delegation is present. However, the act further provides that the first sentence of Section 13(2) is without prejudice to the right of natural and legal persons to play or sing the state anthem of another state.

3.4. Excursion into the use of state symbols at sports events

Public sports events are a forum in which the use of state symbols, be they the state symbols of the Slovak Republic, or foreign state symbols, often takes place. They are also events where there is an increased risk of violence, manifestations of extremism, hate or defamatory speech and other unlawful or at least socially undesirable acts. The use of Slovak or foreign state symbols can also become a catalyst for such actions. In addition, sport is often associated with national pride and therefore the use of state symbols, whether Slovak or foreign, in public sports events, is very sensitive³⁴. For the reasons set out above, act No 1/2014 coll. on the organization of public sports events and amending certain acts, as amended (hereinafter also referred to as the “act on sports events”), has relevance regarding the regulation of the use of state symbols, including state symbols of states other than the Slovak Republic.

³⁴ In Slovakia, football matches are particularly sensitive from this point of view.

The act on sports events regulates different categories of public sports events. The regime for the use of state symbols — whether Slovak or foreign — in public sports events depends on the category of event.

An event is considered “public” if it is accessible to individually unspecified viewers. The provisions of this act shall not apply for an event, the organizer of which is a legal person or an entrepreneur and the participants in the event are natural persons who have a legal relationship with the organizer of the event, such as a member, student, employee, or a close person of such a person.

For the purposes of the act on sports events:

- an international event involves teams or athletes from different states; an event in which foreign athletes compete as members of Slovak sports clubs or an event designated as a domestic event by a national sports association shall not be considered to be an international event;
- a risk event is an event identified as risky by the organizer, sports federation, municipality or police force because of a threat to public order or to security, health, morality, property or the environment;
- a special regime event is:
 1. a football or ice hockey match in the two highest league competitions in the adult category or the last four rounds of football and ice hockey cup competitions in the adult category;
 2. an event involving 4,000 or more viewers, or
 3. an event that foresees more than 90% occupation of a sports facility with a capacity of 2 000 or more viewers.

First of all, we will mention the obligations of the organizer of a “normal” public sport event with regard to state symbols: The organizer is obliged, *inter alia*, to ensure at the beginning of the event the Slovak state anthem is played (only in the case of an international event in which a Slovak team or individual is competing, and the final event of the highest national competition), and is obliged to ensure that the symbols of foreign states or their predecessors are not used in domestic events in a derogatory manner or in any other way that may encourage the disruption of public order or endanger the proper conduct of the event.

The organizer of a risk event has the same obligations as the organizer of an “ordinary” public sports event, thus including those referred to above, but also has other obligations, including the obligation to ensure that participants in an event do not bear the national symbols of other states or their predecessors in domestic events.

Participants in any public sporting event shall be prohibited, *inter alia*:

- use the state symbols of foreign states or their predecessors in a derogatory manner or in any other way that is likely to create an incentive to disturb public order or endanger the proper conduct of a domestic event;
- introduce state symbols of foreign states or their predecessors to a domestic event where public order or safety, health or morals of the participants in the event may be compromised.

Pursuant to Section 30(2) of the act on sports events, the use of state symbols of the Slovak Republic at events under this act is governed by the SsA.

In conclusion—fans may bring to any public sports event those Slovak state symbols, for which their nature allows it (i.e., the flag may also be in the form of a banner), but their use at a public sports event must be dignified and correspond to their status as state symbols. Supporters can also sing the state anthem of the Slovak Republic. Foreign state symbols may be introduced to “ordinary” public sports events, but may not be used in a derogatory manner or in any other way that may incite to disturb public order or endanger the proper conduct of the event (i.e., they must not be used, for example, for provocation). This also applies to the national symbols of the predecessors of foreign states — in Slovak conditions, this applies specifically to the Kingdom of Hungary.

The situation is slightly different in the case of risk public sports events, where, on the one hand, it is the responsibility of the organizer to ensure that, in domestic events, participants do not bear the symbols of other states or their predecessors, and this corresponds to the obligation of participants in such events not to bear the symbols of foreign states or their predecessors, where public order or safety, health or morality of the participants may be disturbed. Thus, if, for example, a *DAC Dunajská Streda*³⁵ — *Slovan Bratislava* football match is assessed as being at risk (which is likely to be the case), the organizer should, for example, ensure that the *DAC Dunajská Streda* supporters do not bring to the stadium, for example, Hungarian state flags, and fans are obliged to refrain from doing so. However, here we see the shortcomings of this regulation — for example, the law does not prohibit the organizer of a risk event to set up foreign state symbols for supporters in the stadium, or objects from which the image of a foreign state symbol can be created. This is the case, for example, with posters which the organizers place on the seats and which, held by the fans, create a picture of a flag.

4. National symbols and their legal protection

In addition to the “official” state symbols of the Slovak Republic, which are expressly provided for by the Constitution of the Slovak Republic in Article 8 — and in conformity with it by the SsA in Section 1(1) — there are other symbols in the Slovak

³⁵ Dunajská Streda (Dunaszerdahely) is a town in southern Slovakia with Hungarians forming the majority of inhabitants. The football club DAC was vice-champion in the supreme football league in seasons 2018/19 and 2020/21. In those seasons, Slovan Bratislava won the championship.

Republic and in a Slovak society that symbolize the Slovak state and the Slovak nation.³⁶ These symbols are very diverse, as is their regulation.

In addition to the official state symbols, the SsA also regulates some other symbols which, while not being state symbols, can be seen as official and formally regulated national symbols.

Other symbols regulated in various laws can also be seen as formally regulated national symbols. They do not need to be explicitly called “national symbols”. It is essential that these are legally regulated symbols of high symbolic value, representing Slovak statehood, the history of Slovakia and Slovak people, and the Slovak nation. Among these symbols, the presidential standard, public holidays and orders, decorations, and medals of the Slovak Republic should be highlighted.

However, based on empirical experience, Slovaks often perceive also other symbols as symbols of the Slovak nation, although they are not formally regulated as symbols (e.g., geographical features, plants, towns, personalities, etc.), alternatively, their legal regulation exists, but it is focused primarily on aspects other than their symbolic value (e.g., the regulation of Bratislava as the capital of the Slovak Republic, the regulation of the city of Martin as the center of Slovak national culture). Finally, these may be partly legally regulated symbols, but they also have other than only symbolic dimensions, such as selected historical figures, who have their own law.

4.1. Emblem of the coat of arms

The emblem of the coat of arms is a legally regulated national symbol. It is regulated by the SsA in Section 6a. The emblem of the coat of arms shall consist of a double cross, erected on the central, elevated hill of three hills, extremities of the cross are amplified, and its ends are concaved: a graphically simplified representation of the coat of arms. Unlike the coat of arms, it does not need to be placed on an early gothic shield (or any shield). The dimensions, proportions and colors of the double cross or of the trimount in the emblem are not regulated.

The institute of the emblem of the coat of arms was inserted into the SsA with effect from 15 May 2019 by an amendment introduced by Act no. 126/2019 coll.

Under Article 6a(2) of the SsA, the use of the emblem is governed by Paragraph 3(4) of that law. Section 3(4) of the act governs the use of the coat of arms of the Slovak Republic by private persons, i.e., those, who are not entitled to use the coat of arms as representatives of the state and of Slovakia. Thus, it follows from Paragraph 6a(2), that the emblem of the coat of arms cannot be used, for example, by a state authority, since the state authority is not covered by Paragraph 3(4).

It is also follows from Paragraph 6a(2), which refers to Paragraph 3(4), that the emblem of the coat of arms may not be used by natural and legal persons to designate their buildings, documents, stamps and uniforms.

³⁶ The state symbols themselves also have their historical origin in national symbols. See Svák, Cibulka and Klíma, 2009, p. 294.

The emblem of the coat of arms may be used only in such a way, that its use is dignified and proportionate to its status. The requirement of the dignity of the use of the emblem also protects the coat of arms itself — it is now a violation of law for someone to display disgracefully, for example, a simplified representation of the coat of arms, which does not cover all the aspects of the coat of arms itself (as laid down by law). Prior to the amendment, a person who defamed the simplified representation of the coat of arms could have objected, that it was not the “official” coat of arms and, therefore, that such a conduct was neither unlawful nor in any way punishable.

4.2. National symbol

The national symbols laid down by law also include the eponymous national symbol in Section 13b of the SsA. Pursuant to Paragraph 13b(1), the national symbol shall consist of a double cross erected on the central of three hills. It is therefore the simplest graphical representation of the symbol of Slovakia and Slovaks, which can be drawn in one or two seconds. Just as the emblem of the coat of arms, the so-called national symbol was introduced into the SsA with effect from 15 May 2019 by the amendment implemented by act no. 126/2019 coll.

The national symbol may be used under Section 13b(2) of the SsA by both natural and legal persons; however, its use must be dignified. This requirement for the dignity of the use of the national symbol also protects the coat of arms itself—in the same way as we stated above for the emblem of the coat of arms.

De lege lata, if a natural person culpably violates an obligation under Section 13b(2) of the SsA, he/she may commit an infringement pursuant to Section 42(1)(a) of the Infringements act, for which a fine of up to EUR 99 may be imposed. In case of similar conduct of a legal person, it is an administrative offense under Section 14(1) of the SsA, for which the district authority may impose a fine of up to EUR 7,000.

The law does not provide for the use of the national symbol by public entities: it cannot therefore be used by the state authorities within the meaning of Article 2(2) of the Constitution of the Slovak Republic.

4.3. Other regulated and informal national symbols

The standard of the president of the Slovak Republic is one of the most prominent symbols of state authority in the Slovak Republic, but it is not a state symbol.³⁷ Unlike the state symbols, its form and use is not regulated by the Constitution, only by the “ordinary” act, which is act no. 51/1993 coll. on the standard of the president of the Slovak Republic. The standard of the president of the Slovak Republic shall be used by the president of the Slovak Republic as a symbol of his position. The standard takes the form of a red square, from the lower edge of which grows a blue trimount with a white double cross with proportions corresponding to the coat of arms of the

³⁷ Ibid., p. 250.

Slovak Republic. The square has a white-blue-red rim. The standard of the president of the Slovak Republic is a national symbol in the broader sense, as the president is the head of state and represents the Slovak Republic.

Formally in a law (act no. 241/1994 coll. on the City of Martin as the center of the national culture of Slovaks) as national symbol is designated the city of Martin located in the north of Slovakia, in the Turiec region. Cultural and national revival activities of Slovaks in the 19th century were concentrated here. Art. 4(1)(a) of that law expressly provides that the city of Martin acts, inter alia, as the center and national symbol of Slovaks at home and abroad. It can therefore be said that the city is a formally labelled national symbol of Slovaks. In Martin, there are the headquarters of the “*Matica Slovenská*” cultural and educational establishment, the seat of the Slovak National Library and the National Cemetery.

Legal concepts of symbolic value, which are not officially regulated as state symbols or national symbols, but which can be understood as such in a broad sense,³⁸ include, for example, public holidays and commemorative days provided for in act no. 241/1993 coll. on public holidays, non-working days and commemorative days, as amended. Orders, decorations, and medals of the Slovak Republic have a similar symbolic status.³⁹

Other national symbols are less formal and still have some symbolic value (such as geographical features, plants and animals, works of art, buildings and cities, and personalities).

Among geographical features perceived as informal symbols of Slovakia one of the most prominent is the *Kriváň* mountain in the High Tatra mountains, which is also depicted in some Slovak eurocent coins. *Kriváň* is also mentioned in the third stanza of “*Nad Tatrou sa blýska*” — but this stanza is not a part of the state anthem, since the anthem consists only of the first two stanzas. The High Tatra mountains as such also have a strong symbolic value. Other mountains, that can be considered as national symbols, are *Kráľova hoľa* in the Low Tatra, the *Sitno* mountain (legendary *Sitno* knights are told to be hidden here, who in the worst times will come out and will defend Slovaks) and the *Polana* mountain. Some rivers also have status of informal symbols. The Danube is of particular importance, despite being a border river for Slovaks, it has a prominent place in the folk songs and tales. However, the *Váh* river is perceived as a national river. The importance of these mountains and rivers is mainly due to their prominence in folk tales, folk songs, traditional fairy tales, and artistic literature.

Among the animals, eagles and falcons have a symbolic value for Slovaks. The linden tree and linden leaves are also Slovak symbols, they show the Slavic identity of the Slovak nation. As mentioned above, the linden leaf is also a part of the state seal of the Slovak Republic and as such is officially protected.

Geographical features, plants, and animals are not legally regulated and protected as symbols (with the above-mentioned exception of the linden leaf).

38 Ibid., p. 303.

39 Ibid., p. 308.

Of the Slovak cities, Martin has probably the strongest symbolic value (as already mentioned). The city of Nitra is also symbolic, although not formalized as a symbol, and is perceived as the historical center of Slovak statehood (“ancient glorious Nitra”). The *Devín* castle has a similar status, and like Nitra, it was also an important center of Great Moravia. Its symbolic importance is reinforced by its position on the confluence of the *Morava* and Danube rivers, where the castle acts as a guardian of the entrance to the Pannonian Basin. Nitra and *Devín*, unlike Martin, do not have their own laws.

Its own constitutional (Art. 10 of the Constitution of the Slovak Republic) and statutory provisions has the capital of the Slovak Republic, Bratislava, which can also be seen as an informal symbol of Slovak statehood. Its perception as a national symbol may be less prominent, because (similar to the city of Košice, which also has its own legislation) as a historically multi-ethnic town it was less associated with the Slovak nation. Bratislava’s location on the periphery of the national territory is also a specific feature.

In view of the important place of Roman Catholic faith in shaping the Slovak identity, pilgrimage sites, particularly those associated with Mother Mary, Our Lady of Sorrows, the patron saint of Slovakia, can also be attributed a symbolic value. This patronage can also be seen as an informal national symbol, although of course not all the Slovak population is identified with it.

Some historical figures are highly symbolic — perhaps the most important being the highwayman and folk hero Juraj Jánošík, to such an extent, that in Czech discourse, Slovaks are sometimes called “*Jánošíks*.”

Some historical personalities even have their own law, which provides that they have merits for Slovakia. As for historical figures, their evaluation is usually the more controversial, the less distant the time in which they lived. Without major reservations, personalities who were active until 1918 are generally accepted, when the Czechoslovak Republic was established and the Slovak political and culture elite paradoxically lost the strongest unifying ideological impulse — the emancipation of Slovaks from Hungary. Even personalities such as Alexander Dubček, the leader of the reform movement during the Prague Spring of 1968, are not clearly perceived as positive, especially by anti-communists. Probably the most common understanding of historical importance, and the associated symbolic status, applies to Ľudovít Štúr, a Slovak politician, a member of the Hungarian Parliament, a language scientist and poet of the 19th century, and the politician, scientist and soldier Milan Rastislav Štefánik, who was active before and during the First World War. They are both associated with the struggle for national revival and the emancipation of Slovaks. In the context of the abovementioned importance of the Roman Catholic Church, it is interesting, that both these personalities were protestants.

Personalities dating back to ancient times — the Great Moravian King Svätopluk and the missionaries — known as the “Apostles to the Slavs” — Saints Cyril and Methodius — also have symbolic value. Legal regulation is not associated with Svätopluk, but partly is with the Saints Cyril and Methodius, as there is a national holiday is dedicated to them. The status of an informal symbol of the Saints Cyril

and Methodius is also evident in connection with the social conflicts concerning the placement and damage of their sculpture in the town of *Komárno* (southern Slovakia). In the south of Slovakia, however, there was also cases of damage and theft of *Turul* bird statues, these statues have a symbolic value for the Hungarian minority.

The so-called hymn songs can also be seen as informal symbols of Slovakia and of Slovaks, especially “*Hej, Slováci*,” “*Aká si mi krásna*,” “*Kto za pravdu horí*,” “*Na Kráľovej holi*,” and “*Slovensko moje, otčina moja*.” These songs are not regulated by law.

5. Symbols of self-governing regions, towns and municipalities

Territorial self-government in the Slovak Republic consists of local authorities organized at two levels: at the regional level, the so-called “higher territorial units,” also referred to as “self-governing regions,” and at the basic level the municipalities.

There are eight self-governing regions in the Slovak Republic and 2,927 municipalities (including self-governing city districts of Bratislava and Košice).

There is a fundamental difference between municipalities (and towns) and self-governing regions concerning their historical tradition. Although there were centuries-old traditions of self-government in Slovakia at regional level (*stolice*, *župy*), during the 20th century, regional self-government was gradually reduced and disappeared in the 1930s. The re-establishment of regional self-government took place only in 2001, when today’s self-governing regions were created. However, these regions have borders corresponding to the regions (“*kraje*,” as created in 1996; regions are state administrative units). The self-governing regions in the Slovak Republic have practically no link to historical “*stolicas*” or “*župas*” — the “natural” regions in Slovakia. For example, the historical eastern Slovak regions of *Spiš*, *Šariš* and *Zemplín* are divided between the Prešov self-governing region and the Košice self-governing region, the territory of the former “*Nitrianska stolica*” is now part of three self-governing regions (*Trnavský*, *Nitriansky* and *Trenčiansky*), the historical “*Trenčianska stolica*” is in two self-governing regions (*Trenčiansky* and *Žilinský*), while the *Trnavský* self-governing region and *Žilinský* self-governing region are completely newly created units, because such “*stolicas*” have historically not existed. By contrast, municipalities in the Slovak Republic mostly have a history of many centuries.

It is essential to mention these historical aspects because they also have an impact on the symbolics of local and regional self-governing bodies. Indeed, it is true that while, at least for most cities, their symbols have quite long traditions (the coat of arms of Košice even is the first officially awarded coat of arms to an entity other than a natural person; it was already awarded in 1369⁴⁰), the symbols of self-

40 Mannová, 2003, p. 74.

governing regions are new heraldic creations created two decades ago — usually as a modern interpretation and combination of symbols of the historical regions, whose territories belong to today’s self-governing region.

Unlike the state symbols, the positive regulation of the symbols of self-governing regions and municipalities is not included in the Constitution of the Slovak Republic; it is only left to “normal” laws. In particular, these are:

Act no. 369/1990 coll. on Municipal Establishment;

- Act no. 302/2001 coll. on the self-government of higher territorial units (act on self-governing regions);
- Act no. 377/1990 coll. on the capital of the Slovak Republic, Bratislava; and
- Act no. 401/1990 coll. on the City of Košice.

The general regulation of the municipal symbols is contained in the provisions of Section 1b of the Municipal Establishment act. Under this regulation, a municipality has the right to its own symbols. A municipality with its own symbols is obliged to use them in the exercise of self-government. It follows, that in the exercise of delegated state administration, the municipality shall use state symbols.

According to the law, the symbols of a municipality are the coat of arms of the municipality, the flag of the municipality, the seal of the municipality and, possibly also the anthem of the municipality. Legal persons set up or established by the municipality, other legal persons and natural persons may use the symbols of the municipality only with the consent of the municipality. Parts of the municipality also have the right to own symbols. The provisions of this act on the use of municipal symbols apply equally to local districts of Bratislava and Košice.

The coat of arms of the municipality and the municipality’s flag are used to mark the building, where the seat of the municipality authorities is located (the municipal hall), the meeting room of the municipal council and the official room of the mayor of the municipality. The municipality uses the official stamp with the coat of arms and the municipality’s name for the decisions, authorizations and certification of facts issued in the exercise of self-government competences.

Towns are legally a sub-category of municipalities in the Slovak Republic, thus, they are also covered by the provisions on municipalities. There are some special provisions for the symbols of towns in in Section 24 of the Municipal Establishment act. Under those provisions, inter alia, the towns council establishes the town’s coat of arms, the towns’s flag, the seal of the town and, possibly also the towns’s anthem, and the mayor keeps and preserves the city’s flag and seal and uses its insignia.

Slovak law has a special regulation on symbols in act no. 377/1990 coll. on the capital of the Slovak Republic, Bratislava. According to the Section 20 of this act, the symbols of Bratislava are the coat of arms, the flag and the seal of Bratislava. Their design is also regulated by the same act. A detailed representation of the city symbols shall be attached to the Statute of the City of Bratislava, which shall also regulate their use.

The specificity of the two Slovak “statutory” cities (Bratislava and Košice) is, that they have a two-tier local self-government structure — in addition to the city itself, self-governing districts also operate within them, whose status is largely similar to that of municipalities. Therefore, Section 24a of the act no. 377/1990 coll. also regulates the symbols of these districts: the coat of arms, the flag and the seal. The rules on the use of city district symbols shall be governed by an ordinance of general application of the city district.

The special rules governing the symbols of the city of Košice and its districts are partly similar, but more succinct. According to Section 19 of act no. 401/1990 coll. on the City of Košice, the symbols of the city are the city’s coat of arms, the flag and the banner of the city, the seal of the city and the anthem of the city. The representation, description and use of city symbols are regulated by a city’s ordinance. The symbols of a city district are the coat of arms of the district, the flag and the banner of the district, the seal of the district and, possibly also the anthem of the district. The symbols of the city districts, their representation and description, are regulated by a city district’s ordinance.

The regulation of the symbols of self-governing regions in the Act on self-governing regions is very succinct — this is only the sixth subparagraph of Section 1, according to which a self-governing region has its symbols which it may use in the exercise of self-government; the symbols of the self-governing region are the coat of arms, the flag and the seal or, possibly also the anthem. An interesting difference can be noted here regarding the symbols of municipalities, since in the case of self-governing regions the law provides that the self-governing region “may” use them, whereas in the case of municipalities (if they have symbols) it is an obligation.

In the case of territorial self-government symbols, there is no detailed regulation of their positive and negative legal protection comparable to state symbols.

As far as negative protection is concerned, we already mentioned two specific offenses that may be committed by certain unlawful conduct in relation to state symbols (criminal offense of disorderly conduct and infringement under Section 42(1)(a) of the Infringements Act).

Symbols of territorial self-government are not defined as objects of the disorderly conduct criminal offense under Section 364(1)(b) of the Criminal Code. However, such an offense could nevertheless be committed by acts which would defame a symbol of territorial self-government, provided that those acts fulfill the general constituent elements of the offense of disorderly conduct — that is to say, acts by which someone commits, in words or physically, publicly or in a place accessible to the public, gross indecency or disorder, which is directed against the symbol of a town, municipality or self-governing region. On the other hand, the general constituent elements of the disorderly conduct criminal offense expressed in Paragraph 364(1) may be perceived as problematic from the point of view of the application — or perhaps violation — of the principle *nullum crimen sine lege certa*.

A different situation is in the case of an infringement under Section 42(1)(a) of the Infringements act. This infringement may be committed in such a way, that a

person intentionally damages, abuses or derogates a state symbol or other symbol protected by a generally binding legal act. A symbol of territorial self-government may also be seen as such “other protected symbol”.

In the case of state symbols, we have already referred to Section 5(d) of the Slovak Copyright Act, according to which a state symbol, a symbol of a municipality, a symbol of a self-governing region is not considered to be a subject of copyright; however, this does not apply in the case of a work which forms the basis for the creation of such a symbol. Thus, the symbols of territorial self-government do not have the status of copyright works, but works which form the basis for their creation, are copyright protected. Similarly, the symbols of territorial self-government may be included in works protected by copyright (such as works of art).

In the case of territorial self-government symbols, the conclusions on the possibility of including them in product designs we have referred to in relation to the state symbols apply *mutatis mutandis*; in this case, the options are even more liberal for entrepreneurs, since the regulation of use of the symbols of territorial self-government is very minimalist.

Even in the case of symbols of territorial self-government, it is not possible for anyone to register them as a trade mark (Section 5(1)(j) and (k) of Act no. 506/2009 Coll. on trade marks) — of course, except for the municipality, city or self-governing region to which they belong.

6. Community symbols in the Slovak Republic and their legal protection

Other public corporations in the Slovak Republic (in addition to the bodies of territorial self-government), which have their symbols specifically regulated by law, are universities. Pursuant to Section 2(9) of Act no. 131/2002 Coll. on higher education, higher education institutions have the exclusive right to award academic degrees, scientific and educational degrees and artistic – pedagogical degrees, to use academic insignia and to carry out academic ceremonies. The right to use academic insignia is among the academic freedoms and academic rights guaranteed by Section 4(1) of the Higher Education Act.

The Higher Education Act itself does not specify, what academic insignia a higher education institution has or may have, nor does it regulate the rules for their use. The Act leaves the regulation of these issues to the internal rules of higher education institutions, namely the Statute — Section 15(2)(j) of the Higher Education Act.⁴¹

⁴¹ Examples of such internal legislation include the provision contained in Art. 5 of the Statute of the Comenius University Bratislava, according to which the academic insignia are: an emblem and a seal with the emblem, the rectors ring, medals on rectors and deans chains, the scepters of the rector and of the deans.

Under Section 22(14), faculties also have the right to use their own academic insignia and to perform academic ceremonies in accordance with the internal regulations and traditions of the higher education institution.

In the Slovak Republic, there is no regulation on the use of community symbols in the sense, for example, of ethnic, national or linguistic groups, or, for example, sexual minorities. Of course, some of these communities have symbols — such as emblems, flags, etc. — in some cases these symbols are also national symbols of third countries. There is no specific regulation of symbols of national minorities and ethnic groups in Art. 34 of the Slovak Constitution. National, ethnic and other said communities are entitled to use their symbols, as they are acts covered by Art. 2(3) of the Slovak Constitution, under which everyone may do what is not prohibited by law and no one may be forced to do anything that is not prescribed by law. However, community symbols must be used in accordance with the law, for example if the symbol of an ethnic minority is a flag, which corresponds to the state flag of a foreign state, its use is covered by the SsA.

The protection of community symbols is indirectly provided by certain criminal offenses of the kind of so-called hate crimes. Under Section 423 of the Criminal Code, which governs the crime of defamation of nation, race and beliefs, when someone publicly defames

- a) any nation, language, race or ethnic group; or
- b) a group of persons or an individual because of their actual or presumed belonging to a race, nation, nationality, ethnic group, actual or presumed origin, color, religion or belief.

This can also be done in practice through the defamation of a symbol of a nation, race or ethnic group, but also a religious symbol.

Section 424 of the Criminal Code and the criminal offense of incitement to national, racial or ethnic hatred also comes into play as an indirect instrument for the legal protection of certain symbols. This offense is committed by a person who publicly incites violence or hatred directed against a group of persons or individuals because of their actual or presumed belonging to a race, nation, nationality, ethnic group, actual or presumed origin, color, sexual orientation, religion or belief, or publicly encourages the restriction of their rights and freedoms. Here too, it is conceivable that the offender's conduct includes defamatory manifestations in relation to the symbol of the relevant group of persons.

However, symbols of communities may also enjoy legal protection in other legal regimes — for example, if the community symbol is embodied in the form of a cultural monument, its damage is penalized in a similar way to other cultural monuments.

It can also be stated here, that damage to a thing (in terms of a certain material object), by which a symbol of a community is portrayed, always results in a certain legal liability, be it public liability or civil liability (liability for damage).

As regards national minorities in Slovakia, their language obviously also has symbolic value for them. The use of the language of national minorities is governed by act no. 184/1999 coll. on the use of national minority languages; for the purposes of this act, minority language means codified or standardised language traditionally used in the territory of the Slovak Republic by its citizens belonging to a national minority which is different from the state language; the minority language is Bulgarian, Czech, Croatian, Hungarian, German, Polish, Roma, Romanian and Ukrainian.

7. Conclusions

The chapter presented a brief outline of the historical development of the state symbols of the Slovak Republic. The historical, political, cultural and heraldic/vexilological features of the state symbols of the Slovak Republic can be summarized as follows:

- the state symbols and their historical genesis reflect the historical and cultural ties of Slovakia and Slovaks with historical Hungary, but also reflect the emancipation of the Slovak people in Hungary and the struggle for their own statehood;
- the national symbols of the Slovak Republic reflect the Slavic identity of Slovakia;
- the coat of arms, the flag and the state seal, also express the predominantly Christian identity of Slovakia (despite the fact that, according to the Constitution of the Slovak Republic, the state is not linked to any religion), since they include the depiction of a Christian symbol (the double cross);
- all the state symbols of the Slovak Republic represent in some form the basic geomorphological features of the Slovak lands, namely the mountainous parts of Slovakia;
- the state anthem of the Slovak Republic expresses its attachment to the Slovak folk culture, as its melody has its origins in a folk song.

The constitutional regulation of state symbols is relatively brief, but it provides a higher degree of esteem and protection for the state symbols and significantly complicates their change. However, the most important part of the normative regulation of state symbols is contained in the SsA.

The chapter discusses positive and negative legal regulation of the use of state symbols. “Positive protection of state symbols” consists of those elements of normative regulation that define state symbols and regulate, who has the right to use state symbols and how. The negative protection of state symbols restricts or prohibits the use of state symbols by certain persons and/or in a certain way. This includes the regulation of tortious liability. A part of legal protection of state symbols are rules,

which give them an exclusivity status in relation to other symbols, in particular in relation to foreign state symbols.

State symbols may be depicted, produced and used only in the manner regulated in the SsA. Everyone is required to respect them. Natural persons and legal persons in the Slovak Republic may, in principle, use the state symbols of the Slovak Republic, but this use must be dignified and correspond to their status as state symbols.

State symbols, symbols of municipalities, symbols of the self-governing regions are not considered to be subject to copyright; however, this does not apply in the case of a work which forms the basis for the creation of a symbol. These symbols may be included in copyright protected works. The SsA does not explicitly prohibit the use of state symbols in business, however, they may be represented, produced and used only in the manner prescribed by that law and the use must be dignified.

The negative protection of state symbols in legislation may be understood as a set of legal rules which prohibit or restrict certain ways of dealing with state symbols, whether expressly or implicitly. This includes also laws penalizing certain forms of handling of state symbols, whether in terms of criminal liability or liability for administrative offenses. An example of explicit negative regulation is — in relation to the coat of arms — the rule that it shall not be displayed on buildings in a dilapidated condition (Paragraph 4(3)). Other prohibited uses of the coat of arms derive implicitly from a statutory provision. However, these provisions must always be interpreted in the context of other provisions of the SsA.

The criminal protection of state symbols is covered by the provision in Section 364(1)(b) of the Criminal Code (crime of disorderly conduct). This offense is committed, inter alia, by any person who commits, in words or physically, publicly or in a place accessible to the public, gross indecency or disorder by defamation of a state symbol. The chapter also presents two case studies of cases of “caricature” of the national emblem by politician Igor Matovič and artist Luboš Lorenz. In neither case are we aware that they were ever punished for their actions.

Another type of public law offense, which can be committed in the context of violating the protection of state symbols, is the infringement pursuant to Section 42(1)(a) of the Infringements act. A person who intentionally damages, abuses or derogates a state symbol or other symbol protected by a generally binding legal act commits an infringement in the field of general internal administration. Under paragraph 2 of the same article, a fine of up to EUR 99 may be imposed on the offender in respect of that offense.

The dividing line between these two offenses concerns several aspects. First, the criminal offense of disorderly conduct has to be committed publicly or in a place accessible to the public. In the case of the criminal offense intentional defamation of a state symbol is required, whereas in relation to the infringement it is abuse, damage or derogation. “Defamation” (criminal offense) must be seen as a more serious act than “damage” or “derogation” (infringement). In order to commit a criminal offense, the first part of Section 364(1) of the Criminal Code must also be fulfilled by the respective action in its entirety — that is to say, it must also be “gross indecency”

or “disorder”. Another difference is what the offender’s intention is directed toward. In the case of the criminal offense, there must be an intention to defame the state symbol. The SsA itself (Section 14) also regulates another category of administrative offenses, which can only be committed by legal persons.

The chapter further deals with the use of foreign state symbols in the Slovak Republic, as well as the use of state symbols, whether Slovak or foreign, at sporting events.

In addition to the state symbols of the Slovak Republic, there are other symbols, that symbolize the Slovak state and the Slovak nation. They are very diverse, as is their regulation. In particular, the SsA also regulates some other symbols which, while not being state symbols, can be seen as official and formally regulated national symbols — the emblem of the coat of arms and the eponymous national symbol.

In addition, other symbols regulated in various laws can be seen as formally regulated national symbols, although they do not need to be explicitly called “national symbols.” Among them, the presidential standard, public holidays and orders, decorations, and medals of the Slovak Republic should be highlighted. However, the chapter also briefly deals with informal or even legally unregulated national symbols.

Finally, the chapter also discusses the symbols of municipalities (the coat of arms of the municipality, the flag of the municipality, the seal of the municipality and, possibly also the anthem of the municipality) and self-governing regions (the coat of arms, the flag and the seal or, possibly also the anthem) and community symbols in the Slovak Republic and their legal protection. In addition to the bodies of territorial self-government, the only public corporations, which have their symbols specifically regulated by law, are universities.

In the Slovak Republic, there is no public legal regulation on the use of community symbols in the sense, for example, of ethnic, national or linguistic groups, or, for example, sexual minorities. Of course, some of these communities have symbols — such as emblems, flags, etc. — in some cases these symbols are also national symbols of third countries. National, ethnic and other said communities are entitled to use their symbols, as they are acts covered by Article 2(3) of the Slovak Constitution, under which everyone may do what is not prohibited by law and no one may be forced to do anything that is not prescribed by law. However, community symbols must be used in accordance with the law, for example if the symbol of an ethnic minority is a flag, which corresponds to the state flag of a foreign state, its use is covered by the SsA.

The protection of community symbols is indirectly provided by certain criminal offenses of the kind of so-called hate crimes.

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CHAPTER VIII

LEGAL PROTECTION OF STATE, NATIONAL AND COMMUNITY SYMBOLS IN SLOVENIA



BENJAMIN FLANDER

1. Introduction

In a democratic society, state, national, and community symbols are controversial phenomena. On the one hand, these symbols are an expression of collective self-identification and a force for community building and preservation. As such, they may and should be considered as being of paramount importance for and intrinsically positive element of building states, nations and communities. However, there is also a less bright and potentially dangerous side of the presence and role of the state, national and other identity symbols in the today societies. Hummel, for example, points to the non-conscious impact of national symbols on individuals and society as a whole, suggesting that state and national symbols could actually encourage developments which could lead toward a less peaceful and more violent society.¹ He asserts that the modern-day nation-state has replaced other forms of identity as an increasingly important avenue of self-identification. The national narratives of these states inspire those that consider themselves members of that state. A genuine example of such narratives are state and national symbols. Representing group membership, these symbols may have a unique influence on both an individual's psychological and

¹ Hummel, 2017, p. 225.

Benjamin Flander (2022) Legal Protection of State, National and Community Symbols in Slovenia. In: Zoltán J. Tóth (ed.) *Constitutional and Legal Protection of State and National Symbols in Central Europe*, pp. 291–347. Miskolc–Budapest, Central European Academic Publishing.

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a society's social processes. The consequence of these processes may be, *inter alia*, a tighter conceptualization of insiders and outsiders. Since potential glorification of conflict by states through their symbols could be an important signal of ethos for the individuals who strongly identify with the nation and the state, such processes in any country shall be taken extremely seriously, otherwise they can lead to intolerance of others and in extreme cases even to violence.²

State, national and, to a lesser extent, community and other group identity symbols are a controversial phenomenon also in terms of their legal regulation and protection. More particularly, they are controversial in terms of issues that arise in relation to them in a democratic legal discourse. In modern societies, there are examples of public expression of political views and artistic messages, which criticize the state authorities by physically interfering with the integrity of the state symbols (for example, symbolic burning of the flag, writing slogans on the flag, etc.). Even though such actions would generally constitute legally unacceptable or even criminal desecration of symbols of states, nations, and communities (national, religious, etc.), in a constitutional democracy protection of physical integrity of these symbols shall not have an absolute and unconditional advantage over the exercise of the right to freedom of expression (as a means of criticism for abuse of power). Arguably, a democratic state with a well-developed constitutional discourse should be able to distinguish between the criminal dishonoring of state symbols on the one side, and the exercise of the right to free expression on the other. According to Teršek, in specific circumstances, tolerance of political or artistic criticism, expressed in the form of interference with the physical integrity of the flag and other national symbols, is the attribute of free and democratic society.³

This chapter focuses on the legal regulation and protection of state, national and community symbols, and the legal discourse surrounding the protection of these symbols in Slovenia. It refers to the historical formation, constitutional and statutory regulation and judicial protection of these symbols as identity-based constituent parts of the Slovenian state, nation and communities. The chapter addresses relevant constitutional provisions and provisions in administrative law, criminal law, minor offense law and civil law as well as crucial Constitutional Court's decisions and case law of the courts of general jurisdiction. The attention is also paid to the disagreements about and conflicting views on the current occurrence and legal regulation of state symbols, and to the few examples of public expression of political views by interfering with the physical integrity of these symbols that took place in "the country on the sunny side of the Alps" over the last two decades.

2 Hummel, 2017, pp. 225, 226. See also: Butz, 2009; Billig, 2009.

3 Teršek, 2018.

2. Legal protection of the state and national symbols in Slovenia

2.1. Presentation and brief description of the state and national symbols

According to the Constitution of the Republic of Slovenia,⁴ the official state symbols of the Republic of Slovenia are the coat of arms, flag, and national anthem. All three state symbols of the Republic of Slovenia are also its most important national symbols. Another symbol officially declared as a national symbol is the flag of the Slovenian nation, but according to the Constitution, it does not have the status of a state symbol. Slovenia also adopted the flag and anthem of the European Union when it became its member in 2004.

The coat of arms of the Republic of Slovenia is in the form of a shield. The center of the shield depicts Mount Triglav, as an emblem in white color on a blue background, with two wavy lines below it symbolizing the sea and rivers and three golden six-pointed stars arranged above it in the shape of a point-down triangle. The shield features a red border on two of its sides. The coat of arms is designed in accordance with a set standard of geometry and color.

The Flag of the Republic of Slovenia is the white–blue–red Slovenian national flag bearing the coat of arms of Slovenia. The ratio between the width and length of the flag is one to two. Each of the three colors occupies a horizontal band covering one-third of the flag. The coat of arms is positioned in the upper left canton of the flag such that it is positioned with one half in the white band and the other half in the blue band.

The National Anthem of the Republic of Slovenia is the seventh stanza of “Zdravljica” [A Toast], written by France Prešeren (1800–1849), officially declared the nation’s greatest poet. “Zdravljica” is set to a piece of music of the same name composed by Stanko Premrl (1880–1965). The lyrics of Slovenia’s national anthem in English translation by Janko Lavrin are:

*God’s blessing on all nations,
Who long and work for that bright day,
When o’er earth’s habitations
No war, no strife shall hold its sway;
Who long to see
That all men free
No more shall foes, but neighbours be.*⁵

4 The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*), Official Gazette of the Republic of Slovenia nos. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 47/13, 75/16, 92/21.

5 You can listen to “Zdravljica” composed by Stanko Premrl (1880–1965) at the following link: <https://www.youtube.com/watch?v=w-WuhiuEOQc>.

The flag of the Slovenian nation (also called the Slovenian national flag) consists of white, blue and red color. It originates from the period of the awakening of the Slovenian national consciousness in the 18th and 19th centuries. Its colors indicate its Slavic orientation (the color choice is the same as in most Slavic countries). The flag of the Slovenian nation is a national symbol that does not have the status of a state symbol.

2.2. An outline of the history of the state and national symbols

The predecessor of Slovenia's state and national symbols appeared in public when censorship was abolished after the fall of Metternich's absolutism. In 1848, the white-blue-red Slovenian national flag was the first to gain predominance. It was first hoisted by Lovro Toman on 7 April of the same year in Ljubljana. The Slovenian national flag consisted of Carniolan provincial colors, which were agreed upon as early as in 1836. Throughout the second half of the 19th century, under this flag demands for the recognition of the Slovenian nation were expressed at large people's assemblies. Since the struggle for the emancipation of the Slovenian nation continued until WW1, the Slovenian national flag gained an exceptional symbolic value for the Slovenian nation. In 1918, after the end of WW1, in the territory of today's Slovenia the state of Slovenes, Croats and Serbs was formed for a short time, which was then replaced by the Kingdom of Serbs, Croats, and Slovenes and its successor the Kingdom of Yugoslavia. Although the Slovenian national flag never became a state symbol, it was the flag which symbolized the growing demands for a united Slovenia.⁶

According to Klasinc, various flags fluttered on Slovenian soil even before the Roman Empire, as a common symbol of tribes or military formations. On some archeological monuments, preserved in Slovenia (for example in Ptuj), signs can be found that show flags called "vexillum." Nevertheless, there is no evidence of the coat of arms or flag for Carantania, the first predecessor of today's Slovenian state (first mentioned in 595) in the so-called pre-heraldic period, which lasted from the 6th to the 11th century. Klasinc claims that individual heraldic elements, such as depictions of the panther and the flag of the banner appear on many archeological artefacts and preserved seals on medieval documents from the period of Leopold III around 1205. The times of Charlemagne and the Crusades also left traces that testify to the use of various flags that only crossed Slovenian territory or remained for only a short time.⁷

Over the centuries, the historical Slovenian lands of Goriška (Gorizia), Kranjska (Carniola), Štajerska (Steyr) and Koroška (Carinthia) received their flags. While following their own development and artistic representations, these

6 Grdina, 2022.

7 Klasinc, 2006, pp. 56–61.

flags are preserved on seals, maps, and historical documents. The origin and development of the Slovenian national flag, under which all historical lands were united, is based in its basic heraldic elements on the coat of arms of the land of Carniola, which appeared in the 12th century. Almost four hundred years later (in 1836), Emperor Francis I revised and supplemented the coats of arms of some Slovenian historical lands and issued a decree restoring the old historical colors to the Carniolan region. These changes brought about the final formation of the true historical heraldic colors of the land of Carniola in the combination of white, blue, and red.⁸ As pointed out at the beginning of this section, this color combination was also retained by the first (unofficial) flag of the Slovenian nation, which was created within the Habsburg Monarchy at the European Spring of Nations in 1848.

However, the Slovenian national flag was only *de facto* in use, because in the Habsburg Monarchy and later in the Kingdom of Serbs, Croats, and Slovenes, it was never legally recognized as an official flag. Decree of Imperial-Royal Ministry of the Interior, no. 2778/114, adopted on September 23, 1848, confirming the previous Decree of the Court Office of Emperor Ferdinand I, no. 1836/2858, dated October 31, 1836, did not recognize the Slovenian national flag, but only the Slovenian colors and their sequence.⁹ The Slovenian national flag was legally recognized one and a half centuries later, just before the proclamation of the country's independence and sovereignty in 1991, as the basis for the creation and adoption of a new flag of the Republic of Slovenia (see below).

Grdina asserts that as a national symbol, the Slovenian national flag was banned after the creation of the Kingdom of Yugoslavia during the dictatorship of King Alexander because the monarchic regime at that time considered ethnic symbols tribal and persecuted them. During WW2, the Slovenian national flag was the basis for the design of the partisan flag and after the war's end for the flag of the People's Socialist Republic of Slovenia. While a red five-pointed star was added to both, it had a yellow (gold) border on the flag of the People's Socialist Republic of Slovenia. From 1943 until 1945, the Slovenian national flag was used by the Slovenian Home Guard (i.e., collaborators of the Nazi German occupier who opposed communism), with the Carniolan provincial coat of arms from the Habsburg monarchy in the middle.¹⁰

Efforts for designing the flag of the newly born democratic state began immediately after the independence referendum on December 23, 1990. A special 22-member subcommittee on state symbols was established within the Constitutional

8 Ibid. When the Slovenian national flag became prominent, archive documents, prose and poetry testified to overwhelmingly positive reactions. For instance, poets Simon Jenko and Simon Gregorčič both published poems praising the flag (i.e., "Forward, Flag of Glory" and "About the Flag") and in the second half of the 19th century, the former served for a short time as an unofficial Slovenian national anthem (see below).

9 Hartner, 2012.

10 Grdina, 2022.

Commission of the Assembly of the Republic of Slovenia. Public tender yielded as many as 87 proposals for the Slovenian flag and the coat of arms. After harmonizing some of the proposals and considering historical and heraldic principles, the Assembly of the Republic of Slovenia adopted on June 24, 1991, an amendment¹¹ to the 1974 Constitution of the Republic of Slovenia,¹² which determined the flag (and the coat of arms) of the Republic of Slovenia. It was created on a basis of the Slovenian national flag with the addition of the coat of arms in the upper left canton of the flag (one half of the coat of arms is positioned in the white band and the other half in the blue band).¹³ The amendment also stipulated that the use of the flag and the coat of arms shall be determined by the statutory law.¹⁴

Regarding the Slovenian coat of arms, Grdina states that it did not yet exist during the times of the Habsburg monarchy (coats of arms of provinces were in use). In the Kingdom of Serbs, Croats, and Slovenes and later in the Kingdom of Yugoslavia, the Slovenian part of the state was represented by the coat of arms which included some elements of the coat of arms of the Counts of Cilli (Celje), of the coat of arms of the Kingdom of Illyria and of some other historical coats of arms. The then coat of arms did not consist of motives from Slovenian provinces with the only exception of Carniolan eagle which was placed upon the royal banner. Golden or yellow ship from the Illyrian coat of arms was adapted into silver moon crescent in order to please the Muslim inhabitants on Slovenian territories. On the blue background of the shield stars were added as Slovenian element. They were first used by the Counts of Vovberg and later adopted by the Counts and Princes of Cilli. During the WW2, the silhouette of the national mountain Triglav initially gained popularity as a coat of arms of the partisans.¹⁵ When WW2 ended, it served as a central element in the coat of arms of the People's Socialist Republic of Slovenia and its successor the Socialist Republic of Slovenia, however it was surrounded with a typical socialist iconography: red star and wheat ears. Socialist ideology was apparent also in the shape of the coat of arms which was not in a shield form

11 The Constitutional Amendment C to the Constitution of the Republic of Slovenia (*Ustavni amandma C k Ustavi Republike Slovenije*), Official Gazette of the Socialist Republic of Slovenia no. 1/91–I.

12 The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*), Official Gazette of the Socialist Republic of Slovenia nos. 6/74, 32/89, 32/89, Official Gazette of the Republic of Slovenia nos. 24/90, 35/90, 37/90, 1/91–I, 4/91, 4/91, 7/91, 10/91, 20/91.

13 On August 22, 1991, the Russian Soviet Federal Socialist Republic adopted the resolution of its Supreme Soviet N 1627–1–1 which legally stipulated the Russian historical flag as the national flag of the future Russian Federation. According to Hartner, the Republic of Slovenia was most probably aware of Russian intentions even before the Slovenian declaration of sovereignty and independence in June 1991, therefore the historical Slovenian national flag, which is practically identical to the Russian historical/national flag, was used only as a basis to create the flag of the Republic of Slovenia (the national coat of arms was added in the upper left side of the flag). See Hartner, 2012.

14 Klasinc, 2006, p. 60. See also Grdina, 2022.

15 During the WW2, Slovene partisans were members of resistance movement and the armed wing of the Liberation Front of the Slovenian nation.

but in a circle. On June 24, 1991, a day before the proclamation of sovereign and independent Republic of Slovenia, the Assembly passed the aforementioned constitutional amendment C which fixed the national coat of arms with Triglav, stars of Celje and waving lines. According to Marko Pogačnik, the creator of the coat of arms, the coat of arms was developed as a cosmogram. Its design was inspired by Prešeren's epic poem "Baptism at Savica Waterfall" ["*Krst pri Savici*"] and by so-called Šverljug's sign, designed by architect Jože Plečnik for the parish church in Bled. According to Pogačnik, the Šverljug's sign is where a form of the Slovenian coat of arms appeared for the first time—on the robe of St. Mary with six-pointed star above the mountain Triglav.¹⁶

In the second half of the 19th century, the song "Forward, flag of glory" ["*Naprej, zastava slave*"] gained popularity as an unofficial Slovenian anthem. It was created in 1860 when composer Davorin Jenko put the poem of poet Simon Jenko to music. In the years before the WW1, another song, namely the song "I am Slovenian" ["*Slovenec sem*"] by Jakob Gomilšek, put to music by composer Jakob Ipavec, gained the status of unofficial Slovenian anthem. After the end of WW1 however, the song "Forward, flag of glory" regained popularity as its first part was adopted as the element of the national anthem of the Kingdom of Serbs, Croats, and Slovenes and later Kingdom of Yugoslavia. During the WW2, "Forward, flag of glory" was considered the anthem on the side of the partisans and on the side of the home guard as well. After the end of war, it remained an official anthem only for a very short time. When the song "Hey, Slavs" ["*Hej, Slovani*"] became the new anthem of the Socialist Federal Republic of Yugoslavia, this anthem was also performed officially in the People's Socialist Republic of Slovenia and then in the Socialist Republic of Slovenia, often together with "The Internationale" as the official song of the ruling communist party.¹⁷

Prešeren's "Zdravljica," put to music by composer Stanko Premrl, gained prominence in the last years before the dissolution of Yugoslavia. On September 27, 1989, the Amendment XII to the 1974 Constitution¹⁸ affirmed "Zdravljica" as the official anthem of the Socialist Republic of Slovenia. On that day, the anthem was first sung in the Slovenian parliament (i.e., in its socialist predecessor). On March 29, 1990, the Assembly of the Socialist Republic of Slovenia adopted the Slovenian Anthem Act.¹⁹ This act stipulated the seventh stanza of "Zdravljica" as the official anthem. The new anthem was adopted before the declaration of independence because its adoption was considered as one of many symbolic acts which lead the process of

16 Grdina, 2022.

17 Cigoj Krstulović, 2005, pp. 15, 16.

18 The Constitutional Amendments IX-XC to the Constitution of the Socialist Republic of Slovenia (1974) (*Ustavni amandma IX do XC k Ustavu Socialistične Republike Slovenije* (1974)), Official Gazette of the Socialist Republic of Slovenia no. 32/89.

19 The Slovenian Anthem act (*Zakon o himni Republike Slovenije*), Official Gazette of the Republic of Slovenia no. 14/90.

Slovenian independence.²⁰ “Zdravljica” kept its official role also after the declaration of the sovereign and independent Republic of Slovenia and with the adoption of the new Constitution and the law regulating state symbols. Simultaneously, the song “Forward, flag of glory” became the official anthem of Slovenian armed forces and the song “I am Slovenian” became the anthem of the Slovenian World Congress.

2.3. Constitutional, statutory, and sub-statutory regulation of the state and national symbols

In Slovenia, in the last three years before the declaration of independence, several other democratic reforms were introduced in addition to the declaration of the new national symbols. For example, with the 1990 constitutional amendments XCI–XCV,²¹ the Assembly of the Socialist Republic of Slovenia introduced, *inter alia*, multi-party political system (in the same year this was followed by the first democratic multi-party elections), declared that Slovenia is a country based on the sovereignty of the Slovenian nation and the people of Slovenia, and removed the word “socialist” from the official title of the republic. Slovenia became a sovereign and independent state on the June 25, 1991, when the Assembly adopted the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia.²² While this amendment changed the legal status of Slovenia, it did not change its existence and territorial integrity as the Slovenian national republic had already existed as a federal unit of the former Socialist Federal Republic of Yugoslavia.

Six months later, on December 23, 1991, the new Constitution was adopted which followed and replaced the former 1974 Constitution of the Republic of Slovenia as

20 Prešeren wrote his first version of “Zdravljica” in 1844. He was not allowed to include it in his collection of poems *Poezije* in 1847 because imperial censorship demanded the removal of the fourth stanza (“Let peace, glad conciliation...”). Slightly modified, “Zdravljica” was finally published (in its entirety) after the March Revolution of 1848 which abolished the censorship and brought to Habsburg monarchy the freedom of press. Through turbulent times, it became the symbol of Slovenian nation for its text was sending a message about national history, about the nation’s aspirations and struggles for freedom and independence. Slovenians identified with the poem during their most difficult times. Already after its first publication after the Springtime of Nations, “Zdravljica” issued an urgent call, coinciding with the political program “United Slovenia” [*Zedinjena Slovenija*] designed to unify all Slovenian lands within the Habsburg empire. A century after its creation, the poem’s eternal message touched the nation again during the struggle for national liberation against nazism and fascism. In 1944, partisan illegal press Tritof published a limited edition for collectors. In the 1980s which were a time of great political and social changes, “Zdravljica” was spontaneously sung at public events, rallies and other ceremonies of cultural, political or patriotic character. On March 31, 2020, the European Commission awarded “Zdravljica” with European Heritage Label. See Grdina, 2022. See also Cigoj Krstulović, 2005, pp. 11–28.

21 The Constitutional Amendments XCI–XCV to the Constitution of the Socialist Republic of Slovenia (1974) (*Ustavni amandma XCI do XCV k Ustavi Socialistične Republike Slovenije* (1974)), Official Gazette of the Socialist Republic of Slovenia no. 8/90.

22 The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (*Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije*), Official Gazette of the Republic of Slovenia, nos. 1/91–I and 19/91.

a federal unit of Yugoslavia. In the preamble of the Constitution, the following is written:

Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia and from fundamental human rights and freedoms and the fundamental and permanent right of the Slovenian nation to self-determination; and from the historical fact that in a centuries-long struggle for national liberation we Slovenians have established our national identity and asserted our statehood.

Art. 3 of the Constitution states that “Slovenia is a state of all its citizens and is founded on the permanent and inalienable right of the Slovenian nation to self-determination.” It is evident from the preamble and from Art. 3 that the bearer of Slovenian statehood is the Slovenian nation.²³

2.3.1 Constitutional regulation

The Slovenian state symbols, which simultaneously serve as the most important national symbols, are regulated in Section 1 Art. 6 of the Constitution. The Constitution contains the description of the Slovenian coat of arms and the flag and determines that the national anthem of Slovenia is “Zdravljica” (*A Toast*) (see Section 2.1). It also stipulates that the use of the coat of arms, the flag, and the national anthem shall be provided by law. In the Constitution, however, there is no reference to the Slovenian national flag. This national symbol, which does not have the status of a state symbol, is regulated by the statutory law (see Section 2.3.2).

As outlined in the previous section, the current state symbols were legally recognized when Slovenia was still a republic of the former Yugoslavia. New state symbols were determined by amendments to the 1974 Constitution which were adopted in 1989, 1990 and 1991, just before the declaration of sovereign and independent Slovenia. The new coat of arms kept some elements of the former one (the symbolism of the mountain Triglav, the rivers, the sea and the struggle for national liberation which led to independence during WW2), while elements, related to socialist past, were abandoned. The flag went through similar changes. The coat of arms was added to it, while the red five-pointed star, also a symbol of socialist past, was discarded. While Prešern’s poem “Zdravljica” was affirmed as the new national anthem by the 1989 constitutional amendments, the fact that only its seventh stanza will be performed as the official anthem was stipulated by the statutory law adopted six months later (see above, Section 2.2).

23 Šturm et al., 2010, p. 120; Avbelj et al., 2019b, pp. 56–64.

2.3.2. *Statutory and sub-statutory regulation*

The central piece of legislation related to the state and national symbols is the *Act Regulating the Coat of Arms, Flag, and Anthem of the Republic of Slovenia and the Flag of the Slovenian Nation*. This law regulates the form and manner of use of the state symbols and the form and manner of use of the Slovenian national flag. To certain extent, it also regulates the use of symbols of autochthonous national communities. The law regulates the instances and occasions when the coat of arms, flag and anthem shall be used, and the instances and occasions when they can be used. Legal provisions explicitly or indirectly relating to the state (and national) symbols are also contained in the Maritime Code. More specific legal provisions, explicitly related to the state symbols, are contained in the following sub-statutory acts: the Regulations on the Use of the European Union's Flag and Anthem in the Republic of Slovenia, the Regulations on Hosting the Flag of the Republic of Slovenia in Educational Institutions, the Rules on the Flying on the Flag of the Merchant Marine and the Signs on Ships of the Merchant Marine of the Republic of Slovenia, the Rules on the Registration and Marking of Vehicles, Aircraft and Vessels of Ministry of Defense, the Criminal Code, and the Protection of Public Order Act.

2.3.2.1. Relevant provisions in administrative law

Statutory provisions

The Act Regulating the Coat-of-Arms, Flag, and Anthem of the Republic of Slovenia and the Flag of the Slovenian Nation²⁴ (ARCFA) stipulates in its general provisions that the coat of arms, flag and anthem of the Republic of Slovenia signify affiliation with the Republic of Slovenia and may only be used in the form, content, and manner determined by the Constitution and ARCFA.²⁵ This act summarizes the description of the coat of arms, flag and anthem, originally contained in Art. 6 of the Constitution, and determines geometric, graphic and color rules regarding the form of the coat of arms and flag, and the text of the anthem and the notation of its melody.²⁶ Also regulated by ARCFA is the flag of the Slovenian nation, a national symbol that does not have the status of a state symbol and is not mentioned in the Constitution. According to ARCFA, the flag of the Slovenian nation shall signify affiliation with the Slovenian nation. While it is a white-blue-red flag, each color shall occupy one-third of the width of the flag.²⁷

24 Act Regulating the Coat-of-Arms, Flag, and Anthem of the Republic of Slovenia and the Flag of the Slovenian Nation (*Zakon o grbu, zastavi in himni Republike Slovenije ter o slovenski narodni zastavi* [ARCFA]), Official Gazette of the Republic of Slovenia, no. 67/94.

25 ARCFA, Art. 2.

26 ARCFA, Arts. 3–5.

27 ARCFA, Art. 3.

In its general provisions, ARCFA also stipulates that if on official occasions the coat of arms or flag of the Republic of Slovenia are placed, deposited, or displayed alongside the flag of the Slovenian nation, the flags of the Italian or Hungarian national communities, the flags of local communities, military or foreign flags or other symbols, they shall occupy the place of honor, unless otherwise determined by ARCFA. Furthermore, this act prohibits the use of the coat of arms, flag, or flag of the Slovenian nation if they are damaged or their appearance is unsuitable for use. Also prohibited is the use of the state symbols in contravention of public order or in such a manner that the reputation of the Republic of Slovenia is damaged. The coat of arms, flag, or constituent parts thereof, or the flag of the Slovenian nation and the text of the anthem and the notation of its melody may not be protected or used as a trademark, model or pattern, or to label goods or services. However, the later shall not apply to collective trademarks whose bearers are the ministries or government of the Republic of Slovenia.²⁸

The ARCFA determines, in a separate section, when the coat of arms shall and may be used and regulates the situations when the coat of arms is used alongside another coat of arms, alongside two other coats of arms or corresponding insignia and alongside several foreign and domestic coats of arms or the corresponding insignia of an international organization or other similar symbols. With some exceptions, the Slovenian coat of arms shall always be on the left, seen from the front.²⁹ In another separate section, ARCFA stipulates when the flag shall be permanently and occasionally displayed and when it may be displayed, albeit not mandatory. In most instances, where the flag shall or may be displayed, in addition to the flag of the Republic of Slovenia, the flag of the Slovenian nation may also be displayed. In the geographic areas where the Italian or Hungarian national community reside, the national community flag shall also be displayed.³⁰ Similar as in the case of the coat of arms, ARCFA regulates also the situations where the flag is displayed next to another flag, alongside two other flags, alongside two or more other flags on crossed masts, alongside several other flags, in a semicircle, in a column, in a row and in a group.³¹ Similar regime applies as in the case of the coat of arms.

Pursuant to Arts. 20 and 21 of ARCFA, the anthem shall be performed at official ceremonies on the state level (only exceptionally at the local level) and those present shall salute it in accordance with customs. It may be also performed at celebrations and other ceremonial occasions marking events of importance to the Republic of Slovenia.³² If the anthem is performed alongside the anthem of a foreign state or the solemn song of an international or other organization, such anthem or the solemn song shall be performed first, followed by the anthem of the Republic of Slovenia. It

28 ARCFA, Arts. 6–8.

29 ARCFA, Arts. 9–11.

30 ARCFA, Art. 13, para. 2.

31 ARCFA, Arts. 17–19.

32 ARCFA, Arts. 21, 22.

is forbidden, according to ARCFA, to perform the anthem for purposes of commercial advertising or the branding of services.³³

Another relevant statutory act is the Maritime Code (MC).³⁴ In its provisions on the sovereignty of the Republic of Slovenia in Section II, this code stipulates that a foreign ship shall fly its national flag when in the territorial sea of the Republic of Slovenia, and that in internal waters the flag of the Republic of Slovenia shall also be flown.³⁵ In the territorial sea of the Republic of Slovenia, foreign submarine, and other underwater vehicles are required to navigate on the surface and to show their national flag.³⁶

In the provisions concerning nationality, identification, and registration of ships, MC determines that a ship shall acquire Slovenian nationality, when entered in the Slovenian register of ships.³⁷ All merchant or public ships entered in the register of ships shall be issued with a certificate of registry. The certificate of registry serves as evidence of the ship's Slovenian nationality and gives the ship the right and duty to fly the flag of the merchant marine of the Republic of Slovenia (hereinafter the Slovenian marine flag) and share its purposes and limits of navigation.³⁸ According to MC, the Slovenian marine flag shall be the national flag of the Republic of Slovenia and that it shall be the symbol of the ship's Slovenian nationality.³⁹

Sub-statutory provisions

Based on ARCFA, more detailed regulations were issued by the government on the use of the European Union's flag and anthem and on hosting the flag of the Republic of Slovenia in educational institutions. Additionally, the minister responsible for defense introduced rules on the use of the coat of arms and flag in the armed forces, and the minister responsible for transport and communications issued rules on the use of the flag, signs on ships, and other vessels of the merchant marine.

According to the Regulations on the use of the European Union's flag and anthem in the Republic of Slovenia,⁴⁰ with the flag and anthem of the European Union, the Republic of Slovenia demonstrates its membership in the European Union. The flag of the European Union shall be hoisted exclusively together with the flag of the Republic of Slovenia, which shall be placed in a place of honor. The flag of the European Union may exceptionally be placed in a place of honor when the flags are

33 ARCFA, Art. 23.

34 The Maritime Code (*Pomorski zakonik* [MC]), Official Gazette of the Republic of Slovenia, nos. 62/16—officially consolidated text, 41/17, 21/18, 18/21, 21/21.

35 MC, Art. 16.

36 MC, Art. 19.

37 MC, Art. 201.

38 MC, Art. 118, paras. 1, 2.

39 MC, Art. 203.

40 The Regulations on the Use of the European Union's Flag and Anthem in the Republic of Slovenia (*Uredba o uporabi zastave in himne Evropske unije v Republiki Sloveniji*), Official Gazette of the Republic of Slovenia, no. 38/04.

hoisted during the official visit of the president of the European Commission or the president of the European Parliament to the Republic of Slovenia. The flag of the European Union may not be used contrary to public order or in such a way to spoil the reputation of the European Union, or if it is damaged or unappropriate for use by its exterior appearance.

The regulations further stipulate the occasions where the flag of the European Union (next to the flag of the Republic of Slovenia) shall be permanently or occasionally displayed and where it may be displayed (i.e., at official or working visits of foreign dignitaries and statesmen, at international meetings and events such as political, economic, sport, cultural, military etc.). The regulations also determine where it should be placed when only flags of the Republic of Slovenia and of the European Union are hoisted together, when three flags are hoisted and when four or more flags are hoisted in a line.

In the Republic of Slovenia, the anthem of the European Union shall be performed on receptions with military honors on the following occasions: an official visit of the president of the European Commission or the president of the European Parliament, official ceremonies, celebrating the Day of Europe holiday. It can also be performed on other important occasions, related to the European Union. The anthem of the European Union shall always be performed together with the Slovenian national anthem. The latter shall be performed first, i.e., in the place of honor. When the president of the European Commission or the president of the European Parliament are received with military honors, an exception is made (the Slovenian anthem's place of honor is yielded to the EU anthem which is performed first).

The Regulations on Hosting the Flag of the Republic of Slovenia in Educational Institutions⁴¹ stipulate that the flag of the Republic of Slovenia shall be permanently displayed in kindergartens, primary, secondary and music schools, colleges, student dormitories, institutions for the upbringing and education of children with special needs and other educational institutions. Hoisting and ordering of other flags in educational institutions is regulated by ARCEFA and the Regulations on the use of the European Union's flag and anthem in the Republic of Slovenia. Besides the flag of the Republic of Slovenia and the flag of national communities, the following flags can also be hoisted in educational institutions: the Slovenian national flag, the EU flag, flag of a local municipality and school flag. The flag of the Republic of Slovenia shall be hoisted in the place of honor, i.e., on the very left.

The Rules on the Registration and Marking of Vehicles, Aircraft and Vessels of Ministry of Defense⁴² determine in the third paragraph of Art. 21 that motor and combat military vehicles of the Slovenian Armed Forces used in the performance of

41 The Regulations on Hosting the Flag of the Republic of Slovenia in Educational Institutions (*Uredba o izobešanju zastave Republike Slovenije v vzgojno-izobraževalnih zavodih*), Official Gazette of the Republic of Slovenia, no. 47/08.

42 The Rules on the Registration and Marking of Vehicles, Aircraft and Vessels of Ministry of Defense (*Pravilnik o registraciji in označevanju vozil, zrakoplovov in vodnih plovil Ministrstva za obrambo*), Official Gazette of the Republic of Slovenia, nos. 116/07, 21/09, 111/09, 106/10, 42/16, 58/19.

international obligations in accordance with international treaties may be marked with the flag of the Republic of Slovenia or the flag of the United Nations, the size of which is adapted to the type and shape of the vehicle. The second paragraph of Art. 26 of the rules stipulates that motor vehicles of the Administration of the Republic of Slovenia for Civil Protection and Disaster relief may be marked with the flag of the Republic of Slovenia when they perform the tasks of protecting, rescuing and providing aid outside Slovenia. If such tasks are performed under the auspices of the United Nations or any other international organization, they may be marked with the UN flag or the flag of such international organization of an appropriate size.

According to the rules, air vessels of military air force of the Slovenian Armed Forces shall be marked by the Slovenian national flag.⁴³ In a separate section, the rules also stipulate the navy flags, military status flags and commanders' banners. Pursuant to Art. 46 of the rules, the naval flags of the Republic of Slovenia are of two categories: the flag of ships and the flag of boats of the Slovenian Armed Forces. The flag of ships and the flag of boats of the Slovenian Armed Forces is the flag of the Republic of Slovenia. It shall be hoisted in the berth from 8 am until sunset on the stern pole. Ships in voyage shall have a flag hoisted on the stern pole throughout the voyage. Ships and boats of the Slovenian Armed Forces shall display flags on their bows on Sundays and holidays and at military and other ceremonies. The flag on the bow shall be hoisted from 8 a.m. to sunset. If there is a person on the ship, entitled to a status flag, the ship shall have the appropriate status flag or pennant displayed. If there are several persons on board who are entitled to a status flag or a pennant, the highest status flag shall be displayed.⁴⁴

Status flags of the state dignitaries (i.e., the flag of the president, the prime minister, the Minister of Defense, the Chief of the General Staff of the Slovenian Armed Forces and the president of the National Assembly of the Republic of Slovenia) are determined by Arts. 47 and 48 of the rules.⁴⁵ The rules also stipulate that a foreign warship shall greet the Slovenian flag when visiting the Republic of Slovenia.

Issued based on MC, the rules on the flying of the flag of the merchant marine and the signs on ships of the merchant marine of the Republic of Slovenia⁴⁶ stipulate that the Slovenian marine flag (i.e., the flag of the Republic of Slovenia) shall be hoisted on all ships of the merchant marine of the Republic of Slovenia. These rules specify how the flag of the Slovenian merchant marine shall be hoisted on different types of ships (on ships with and without sails, on ships sailing with folded sails

43 The Rules on the Registration and Marking of Vehicles, Aircraft and Vessels of Ministry of Defense, Art. 31.

44 The Rules on the Registration and Marking of Vehicles, Aircraft and Vessels of Ministry of Defense, Art. 54.

45 The shapes of status flags of state dignitaries are determined on the drawings that are an integral part of the rules.

46 The Rules on the flying of the flag of the merchant marine and the signs on ships of the merchant marine of the Republic of Slovenia (*Pravilnik o izobešanju pomorke zastave in znamenj na ladjah trgovske mornarice Republike Slovenije*), Official Gazette of the Republic of Slovenia, no. 71/01.

etc.). Different flag sizes are also set, the general principle being that the size of the flag shall correspond to the size of the ship. Furthermore, the rules stipulate that the ship may always have the flag hoisted and determine the cases when it shall have it hoisted during the day (i.e., from sunrise to sunset). Foreign flag may be hoisted on Slovenian ship when a foreign dignitary is on board. If foreign dignitaries are transported to or from a ship by boat, the flag of the Merchant Marine of the Republic of Slovenia shall be hoisted on its stern, and the national flag of the country of such dignitary shall be hoisted on the bow. When a ship meets with a warship of the Armed Forces of the Republic of Slovenia, it shall greet it with a one-time slow lowering of the flag to one-third of the height of the pole or ax or mast or sail. During ceremonies determined by the rules, the flag of the Merchant Marine of the Republic of Slovenia shall be hoisted on the stern and on the front mast, while the Slovenian national flag shall be hoisted on the bow pole. The final provisions of the rules stipulate when a ship shall lower the flag of the Slovenian Merchant Marine at half staff or ax or mast or sail (on days of mourning, if someone dies on the ship and if the ship carries a corpse while the latter is being embarked or disembarked).

2.3.2.2. Relevant provisions in criminal law

The Criminal Code⁴⁷ (CC-1) contains several provisions which relate either explicitly or indirectly to the state and national symbols.

The provisions of CC-1 on the Insult to the Republic of Slovenia stipulate that whoever publicly commits any of the offenses under arts. 158 to 162 (i.e., the Assault, Slander, Defamation, Calumny and Malicious False Accusation of Crime) against the Republic of Slovenia or against the president of the Republic with respect to the exercising of his duties shall be punished by a fine or sentenced to imprisonment for not more than one year. The same punishment shall be imposed on anyone who has publicly desecrated the flag, coat of arms or national anthem of the Republic of Slovenia.⁴⁸

According to the latter provision, the state symbols are subject to penal legal protection only to the extent in which they basically define and symbolize the Republic of Slovenia. For example, a Slovenian national flag which is printed on the package of a commercial product (to convey its geographical origin), is not protected by this provision. This criminal offense can be committed either with a direct intent (*dolus directus*) or with an eventual intent (*dolus eventualis*). While the disposition of this provision does not explicitly describe such (physical or verbal) acts which could represent desecration, the commentary of CC-1 suggests that the offense can be committed by a publicly expressed insulting statement or insulting physical act (e.g., removal of a hoisted flag or destruction, damaging or painting of a flag).

47 The Criminal Code (*Kazenski zakonik* [CC-1]), Official Gazette of the Republic of Slovenia, nos. 50/12—officially consolidated text, 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21.

48 CC-1, Art. 163, para. 2.

Such acts should be directed toward the object which is being implied by the state symbols (i.e., the state itself or the state authority) in order to constitute desecration. In contrast to this, only physically destroying state symbols (coat of arms or flag) as tangible property shall be considered a minor offense against public order (see below). Self-defense against acts that constitute desecration of state symbols is not conceptually possible. It is also conceptually impossible to commit this offense while acting in self-defense. Cooperation of two or more offenders and other forms of participating in and abetting the crime are subject to the rules from the general part of CC-1. Under Art. 90 of CC-1, statute of limitation for prosecution is six years from the commission of the criminal offense.⁴⁹

It must be emphasized here that in constitutional democracy protection of physical integrity of state symbols cannot have an absolute and unconditional advantage over the exercise of the right to freedom of expression. Under certain conditions, a sharp political (or artistic) criticism expressed, for example, with the destruction of a flag (even if such an act is blatantly unjustified) cannot be regarded as a criminal offense of desecration of the state symbols. Such cases imply a conflict of constitutional values and when such a conflict arises, in a democratic society respect ought to be given to the special meaning of freedom of speech and other forms of expression for the preservation of the constitutional democracy and to protection of the possibility to criticize the state power if abused or exercised illegitimately.⁵⁰

The CC-1 does not incriminate only Insult to the Republic of Slovenia, but also Insult to Foreign Country or International Organization. In the definition of this crime, CC-1 stipulates, *inter alia*, that whoever publicly desecrates the flag, coat of arms, or national anthem of a foreign country or an international organization shall be punished by a fine or sentenced to imprisonment for not more than one year.⁵¹ These provisions guarantee penal legal protection to foreign states and international organizations, their leaders or diplomatic representatives in the Republic of Slovenia, and to symbols of foreign states and international organizations (flags, coats of arms and anthems).

Surprisingly, the Slovenian national flag, the paramount national symbol without the status of a state symbol, does not seem to be covered with the paragraph 2 of Art. 163, as this provision refers exclusively to the flag, coat of arms and anthem of the Republic of Slovenia (i.e., to the state symbols). The question arises whether the criminal law protection against the public desecration of the Slovenian national flag is provided by the general provision incriminating assault, slander, and defamation

49 Korošec, Filipčič and Zdolšek, 2018, pp. 890–893.

50 The official statistics for the period from 2012 to 2018 show that the Slovenian police investigated the suspicion of committing this crime several times, but later no charges or final convictions followed. See Korošec, Filipčič and Zdolšek, 2018, pp. 890–893.

51 CC-1, Art. 164. The same punishment shall be imposed on anyone who has committed a criminal offense against the insignia of an international organization recognized by the Republic of Slovenia (CC-1, Art. 164, para. 2).

against the Republic of Slovenia and against the Slovenian people?⁵² It seems that the answer to this question may depend on which method of interpretation and which interpretative arguments one uses. If we rely upon the principle of *lex certa* and the prohibition of analogy in criminal law, and if we refer to grammatical interpretation, the answer is no. However, if we consider that analogy *intra legem* is allowed despite the general prohibition of analogy in criminal law, and if we deploy systemic arguments, then, perhaps, the answer could be affirmative.

For the above offenses, committed verbally by public notice of these acts in newspapers and magazines, radio and television programs, electronic publications, on teletext or in other forms of daily or periodical publications, or on websites, the responsible editor or the person acting in his place shall also be punished. According to CC-1, the editor or the person acting in his place shall be punished within the limits of the penalty prescribed for the offense, under one of the following conditions:

- If the author remained unknown until the end of the main hearing before the court of first instance;
- If the information was published without the author's consent; and
- If, at the time the information was published, there were factual or legal obstacles to prosecuting the author that are still ongoing.⁵³

Equal conditions apply to punishing a publisher or a printer if the public dissemination of criminal offenses against the Republic of Slovenia and the Slovenian people was committed by a non-periodical printed publication. If a punishable dissemination was committed by CD, film, DVD, or by other visual media, sound media, and similar media, intended for wider consumption by a larger number of people, the producer of such material is criminally responsible as well. The responsible editor-in-chief or his/her deputy cannot be punished if an emission was broadcast live and he or she was unable to stop or prevent a punishable dissemination. The responsible editor-in-chief or his/her deputy also cannot be punished if the an offense was committed online on an internet site which allows the users to publish content in real time without preliminary approval and control.⁵⁴ If a guilty verdict is reached for a criminal offense, committed by press, radio, television or any other public media or by internet sites, the court may order the judgement, in its entirety or only a part of it, to be publicly disseminated in the same manner as the crime was committed. The costs of such publication shall be covered by the defendant.⁵⁵

Finally, relevant criminal law explicitly related to national (as well as ethnic or religious) symbols can be found in Art. 297 of CC-1 on Public Incitement to Hatred, Violence or Intolerance. According to the provisions of this article, anyone who

52 CC-1, Arts. 163, 165. Pursuant to CC-1, whoever publicly commits any of these offenses shall be punished by a fine or sentenced to imprisonment for not more than one year.

53 CC-1, Art. 166, para. 1.

54 CC-1, Art. 166, paras. 2, 3.

55 CC-1, Art. 169.

publicly provokes or stirs up hatred, violence or intolerance based on ethnicity, race, religion or ethnicity, sex, color, origin, wealth, education, social status, political or other beliefs, disability, sexual orientation or any other personal circumstances, and the act is committed in a manner that may endanger or disturb public order and peace, or by using threats or insults, shall be punished by imprisonment for up to two years. The same punishment applies to anyone who, in the aforementioned way, publicly spreads ideas about the superiority of one race over another or gives any help in racist activities or denies, diminishes, approves, justifies, ridicules, or defends genocide, holocaust, crimes against humanity, war crimes, aggression or other crimes against humanity. If these acts are committed, *inter alia*, by desecrating national, ethnic, or religious symbols, the perpetrator shall be punished by imprisonment for up to three years. When committed by desecrating national, ethnic or religious symbols, this criminal offense is the so-called *delictum proprium* compared to the basic version of the crime.

2.3.2.3. Relevant provisions in minor offense law

In the legal system of the Republic of Slovenia, most (but not all) minor offense penalty provisions related to protection of state and national symbols are contained in ARCFA. Legal persons, their responsible persons and private citizens shall be fined for the following minor offenses:

- a) Using the coat of arms, flag or the flag of the Slovenian nation in a form or with content in contravention of the Constitution or ARCFA;
- b) Using the coat of arms, flag or a constituent part thereof, the flag of the Slovenian nation, or the text of the anthem and the notation of its melody as a trademark, model or pattern or to label goods or services and
- c) Performing the anthem for purposes of market advertising or the labelling of services.⁵⁶

Legal persons, their responsible persons and individuals (i.e., private citizens) shall be also fined for using a coat of arms, flag or flag of the Slovenian nation which is damaged or whose appearance is unsuitable for use and using the coat of arms, flag or the flag of the Slovenian nation in contravention of public order or in such a manner that damages the reputation of the Republic of Slovenia.⁵⁷

Relevant provisions can also be found in the Protection of Public Order Act⁵⁸ (PPOA-1). According to Arts. 4 and 14 of this law (Hoisting a Foreign Flag), flags of foreign countries may be hoisted on publicly visible places (a) at official or working visits of state leaders and delegations and official representatives of legislative,

⁵⁶ ARCFA, Art. 26.

⁵⁷ ARCFA, Art. 27.

⁵⁸ The Protection of Public Order act (*Zakon o varstvu javnega reda in miru* [PPOA-1]), Official Gazette of the Republic of Slovenia, nos. 70/06, 139/20.

executive, or judiciary branches of foreign governments, (b) at international meetings, international sporting events, and other public events, (c) at public gatherings with international participation, and (d) in front of hotels and other buildings where a hoisted foreign flag indicates an appropriate purpose. Flags of foreign countries may be hoisted only if such displaying does not diminish the reputation of the Republic of Slovenia or of any other foreign country. They shall be hoisted on places and in the manner as stipulated by the law, regulating the hoisting of the Slovenian flag (i.e., ARCFA). Whoever hoists a flag contrary to these provisions or hoists a foreign flag which is damaged or in some other way inappropriate, commits a minor offense punishable by fine. Punishment by fine also applies to legal persons and entrepreneurs and individuals who independently engage in economic activity. Responsible persons of these entities shall be also punished by fine.

Art. 15 of PPOA-1 stipulates the minor offense of destroying state symbols. Whoever in a public place intentionally burns or in some other way damages or destroys the flag of the Republic of Slovenia or its coat of arms, or the flag of the European Union or a flag of a foreign country, is punished by fine. This provision of PPOA-1 seems deficient because it only explicitly protects the Slovenian state symbols (beside the flag of the EU and a flag of a foreign country), while it does not protect the Slovenian national flag, which is, as we have already explained, the central national symbol without a status of a state symbol.

Also relevant for the legal protection of state and national symbols is Art. 11a of PPOA-1. It refers to the use of camouflage clothes, uniforms and other clothes which are similar to uniforms. Whoever wears such clothes or clothes looking similar to uniforms of official or military personnel, and behaves, acts, moves, or stays in a certain public or private place or uses equipment or accessories in such a way that it makes the impression that he or she is performing the tasks of official or military persons, shall be punished by a fine, ranging from 500 to 1,000 euros. If such an offense is committed by a group of at least two people, every individual of such a group shall be punished by a fine, ranging from 1,000 to 2,000 euros.⁵⁹ Even higher fine (from 1,500 to 2,500 euros) is prescribed if such a group of at least two people wear camouflage clothes or uniforms or clothes, similar to uniforms of official or military personnel, and behaves, acts, moves or stays in a certain public or private place, and uses symbols, coats of arms or flags or makes the impression that the group is hierarchically organized, or uses vehicles with the aforementioned symbols or equipment or accessories which give an impression that they are the police or the military force that acts without the legal basis.⁶⁰ To put it simply, it follows from these provisions that the use of coats of arms, flags, and other symbols (including state and national symbols) by individuals and groups is prohibited and sanctioned if the latter makes the impression of belonging to a police or military force or performing official or military tasks.

⁵⁹ PPOA-1, Art. 11a, paras. 1, 2.

⁶⁰ PPOA-1, Art. 11a, para. 3.

The police have the power to control and enforce PPOA-1 and to decide upon potential minor offenses related to state (and national) symbols. The military police have the said power, if a minor offense is committed by a military person while performing military duties. According to PPOA-1, the military police has jurisdiction over control, confiscation of incriminating objects and to decide upon potential minor offense when the latter is committed in buildings or on territories considered especially important for defense, or on the territory of military camp.⁶¹

2.3.2.4. Relevant provisions in civil law

The Obligations Code⁶² (OC) stipulates that any person that inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without that person's culpability.⁶³ Damage comprises the diminution of property (ordinary damage), lost profits, the infliction of physical or mental distress or fear on another person (i.e., the violation of another person's personal rights), and encroachment upon the reputation of a legal person.⁶⁴

It follows from the above provisions of OC that a person who would commit a crime of Insult to the Republic of Slovenia by publicly desecrating the flag, coat of arms, or national anthem of the Republic of Slovenia, could cause ordinary damage and/or encroach upon the reputation of the Republic of Slovenia and would be obliged to reimburse material and/or immaterial damage caused, unless it is proved that the damage was incurred without his/her/its culpability. A civil lawsuit seeking compensatory damages could be filed by the Republic of Slovenia (i.e., by the state Attorney's Office). Under the conditions set by OC, a civil action could also be filed by the Republic of Slovenia if a person would commit the criminal offense of Public Incitement to Hatred, Violence or Intolerance by desecrating ethnic or national symbols (see above).

Regarding reimbursement of immaterial damage, the court may order, in addition to the monetary compensation, the publication of the judgement and/or an apology of the injurer or order that the injurer must retract the statement by which the infringement was committed or do anything else through which it is possible to achieve the purpose achieved via compensation.⁶⁵ According to OC, the court shall award a legal person (i.e., the Republic of Slovenia) just monetary compensation for the defamation (i.e., for the encroachment on its reputation) independent of the reimbursement of material damage, if it finds that the circumstances so justify, even if there is no material damage.⁶⁶

61 PPOA-1, Art. 27.

62 Obligations Code (*Obigacijski zakonik* [OC]), Official Gazette of the Republic of Slovenia, nos. 97/07—officially consolidated text, 64/16, 20/18.

63 OC, Art. 131.

64 OC, Art. 132.

65 OC, Art. 178.

66 OC, Art. 183.

Similarly, a person who would commit any of the abovementioned minor offenses would be obliged to reimburse material and immaterial damage caused, unless it is proved that the damage was incurred without his/her/its culpability.

2.4. Case law

Our research showed that in Slovenia there is relatively little case law regarding the legal protection of state and national symbols. We found, however, that the existing jurisprudence (particularly the Constitutional Court's jurisprudence) is of great importance for understanding the nature, scope and limits of constitutional and legal protection of state and national symbols.

In its Decision no. U-I-296/94,⁶⁷ the Constitutional Court of the Republic of Slovenia (hereinafter the Constitutional Court) reviewed at the request of the National Council and upon the petition of the Parliamentary Group of the Slovenian National Party⁶⁸ constitutionality of several provisions of ARCFA. The key question that the Constitutional Court had to answer was whether the Constitution allows the symbols of the Italian and Hungarian national communities to be identical to the symbols of foreign states. Deploying the grammatical method of interpretation of Art. 64 of the Constitution, the Constitutional Court ruled that national communities and their members have the right to use symbols formed in the history of the Italian and Hungarian nations, regardless of their possible identity with the official symbols of the Italian and Hungarian states. It further ruled that at official events where national communities act through their self-governing communities as legal entities under public law, these symbols may be used only together with the symbols of the Republic of Slovenia. The Constitutional Court ruled unanimously that the challenged provisions of ARCFA are not unconstitutional. This case will be presented in more detail in the section on the legal protection of symbols of national communities.

Another decision of the Slovenian Constitutional Court related to the legal protection of state and national symbols is Decision no. U-I-320/12.⁶⁹ In this case, the Constitutional Court reviewed the constitutionality of Art. 5 of ARCFA. The petitioner claimed that the provision of this article was in contradiction to Paragraph 3 of Art. 6 of the Constitution according to which the anthem of Slovenia is "Zdravljica." He claimed that he had a legitimate interest as a citizen of the Republic of

67 U-I-296/94, dated January 28, 1999.

68 The petitioner challenged the ARCFA provisions that prescribe that in certain cases together with the national flag also the flag of the Italian or Hungarian national communities may be displayed, and that together with the Slovenian national anthem, also the anthem of these national communities may be played. While the Constitutional Court joined the petition of the Parliamentary Group of the Slovenian National Party with the request of the National Council, it did not find in the procedure for examining the petition that the challenged provisions do interfere with their rights, legal interests and legal position. Finding that the Parliamentary Group of the Slovenian National Party did not demonstrate the legal interest, the Constitutional Court rejected its petition (U-I-296/94).

69 U-I-320/12, dated June 13, 2013.

Slovenia to listen the Slovenian anthem when performed to celebrate Slovenian international successes and on public holidays as stipulated by the Constitution, i.e., in its integrity, not the shortened version as stipulated by allegedly unconstitutional provision of ARCFA. He claimed that the anthem of Slovenia belonged to all—to every citizen, including himself. Therefore, the petitioner should have been recognized a legal interest to resist any censorship of the full text of “Zdravljica,” even if such censorship had been stipulated by the law. In the procedure for examining the petition, the Constitutional Court found that the challenged provision did not directly interfere with his rights, legal interests, or legal position and that he has not demonstrated legal interested. The Court established that the petitioner expressed his disagreement with the challenged legislation and that he, as a citizen of Slovenia, was arguing for a different regulation of the anthem in ARCFA, however he failed to demonstrate how the contested provision interfered with his rights and how his legal position would improve if a constitutional review was granted. The Constitutional Court rejected his petition by eight votes to one.⁷⁰

In connection with this case, we need to explain that certain legal experts and conservative politicians share the petitioner’s disagreement with ARCFA stipulating the seventh stanza of Prešeren’s poem “Zdravljica” as the official Slovenian anthem. These experts and politicians argue that ARCFA stipulated the exact stanza of “Zdravljica” to be used as a national anthem, although there is no such detailed provision in the Constitution (see more on this issue in the postscript).

In the case law of the courts of general jurisdiction, we were unable to find any court decisions directly related to the current Slovenian state and national symbols. The only decision found was Judgement no. I Ips 129/97⁷¹ issued by the Supreme Court of the Republic of Slovenia more than seventy years ago. Agreeing with the request for the protection of legality filed by a convict identified as “F.L.” against the final judgement issued by the appellate court, the Supreme Court overturned the challenged decision and acquitted the defendant. He was charged that on November 8, 1950, he mocked the Slovenian flag by carrying it to a road, dirtying it on the ground, and throwing it into a nearby brook. Due to his actions, the court of first instance sentenced him for committing a criminal offense against the public order. Apart from F.L., the Supreme Court also acquitted his co-defendant “A.V.,” who had not filed neither the request for the protection of legality nor any other extraordinary legal remedy. The Supreme Court agreed with F.L., who claimed that his acts did not constitute a criminal offense at the time when they were carried out, and that they could only be qualified as a minor offense.

70 U-I-320/12.

71 I Ips 129/97, dated March 23, 2000.

Postscript

Ever since the new state symbols have been legally determined in Slovenia, there have also been disapproving and critical comments about them. Concerns were mainly about the anthem. For example, Boris Pahor, an internationally renowned Slovenian writer, stated in newspaper interviews that the problem of Slovenian anthem laid in emphasizing internationalism and mentioning neither Slovenians nor the Slovene nation. Through the Slovenian Writers Association, Pahor proposed to the National Assembly to put into law a modified anthem that would be a composite of the second and seventh stanza of “Zdravljica”. The proposed modified anthem would have the following wording:

*God save our land and nation
And all Slovenes where e'er they live,
God's blessing on all nations,
Who long and work for that bright day,
When o'er earth's habitations
No war, no strife shall hold its sway*

Pahor, who passed away in 2022 at the age of 109, was of opinion that adopting only seventh stanza of “Zdravljica” as official Slovenian anthem reflects the nation’s communist past when internationalist sentiments prevailed over national consciousness. The latter is manifested, according to Pahor’s vision, as a natural and progressive force because it opposes individualism and promotes harmony, while nationalism as its opposite is an expression of an arrogant pride of its own grandeur which demeans others.⁷²

Jernej Letnar Črnič, an expert in constitutional law, agrees with the writer’s proposal, arguing that the anthem shall serve as a symbol which emphasizes belonging to Slovenian nation and the state in the same manner as the flag and the coat of arms.⁷³ In his analysis, he establishes that the legal foundation for Slovenian anthem can be found in Art. 6 of the Constitution which stipulates that the Slovenian anthem is “Zdravljica”. His opinion is that the Slovenian anthem consists of Prešeren’s poem in its entirety. Contrary to that, ARCFA stipulated only its seventh stanza as the national anthem. Letnar Črnič argues that ethical, moral, civilizational and state considerations demand either that the entire “Zdravljica” be performed at official events and state ceremonies or at least its second stanza which mentions Slovenians, Slovenian world and Slovenian nation.⁷⁴ He further argues that the law could only regulate the appropriate use of the anthem, however it should not have interfered with the contents of the anthem as these have been already

⁷² See Mamić, 2010.

⁷³ Letnar Črnič, 2010.

⁷⁴ The third and fifth stanza of “Zdravljica” also mention Slovenian men and women.

stipulated by the Constitution itself. “If Slovenians do not sing “Zdravljica” where it mentions the Slovenian nation, neither will anybody else.”⁷⁵ In contrast to Letnar Černič, Miro Cerar, another renowned Slovenian expert in constitutional law, argued that legal opinions opposing the constitutionally determined anthem of the Republic of Slovenia are wrong and harmful. In his opinion, all those who try to weaken the importance of state and national symbols of independent Slovenia through their relativization should be told that they are on the wrong path.⁷⁶

It is emphasized in Section 2.2 of this chapter that “Zdravljica” was determined as the text of the Slovenian national anthem more than two years before the adoption and promulgation of the new Constitution (on September 27, 1989, when the Assembly of the Socialist Republic of Slovenia adopted and promulgated the Amendment XII to the 1974 Constitution). This constitutional amendment, which began the constitutional process toward the Slovenian sovereignty and independence, stipulated in Art. 1: “The anthem of the Socialist Republic of Slovenia is “Zdravljica”. Six months later, on March 29, 1990, the Assembly of the Republic of Slovenia (in the meantime, the word “socialist” was removed from the official name of the state) adopted the Slovenian Anthem act.⁷⁷ This law stipulated in Art. 1: “This law stipulates the text and the music of the anthem of the Republic of Slovenia and its use.” Art. 4 of the statute continued: “The text of the anthem of the Republic of Slovenia is the seventh stanza of France Prešeren’s poem “Zdravljica”. The music is the choral composition of the same name by composer Stanko Premrl.” Contrary to what was written in the constitutional amendment, the statute did not stipulate the entire “Zdravljica” as Slovenian anthem but only its seventh stanza in which Prešeren does not mention Slovenians. As shown in Section 2.4, these events were repeated when Art. 6 of the Constitution of the sovereign and independent Slovenia stipulated “Zdravljica” as national anthem, however, the later adopted statutory law gave official value only to its seventh stanza. The new-old statutory regulation was challenged before the Constitutional Court, which rejected the petition for the review with the argument that the petitioner failed to demonstrate the legal interest (i.e., the Constitutional Court did not address the petition in terms of its content).

For a significant part of the population and academia at least, and obviously for the political right in Slovenia, it is disturbing that the seventh stanza of “Zdravljica” was determined as the national anthem by the former socialist authorities.⁷⁸ In 2015, the Slovenian Democratic Party (SDS), the leading right-wing political party in Slovenia, proposed the adoption of a new law, referring to the aforementioned critical views on the current statutory regulation of the national anthem.⁷⁹ The bill, however, did not receive support in the National Assembly. Interestingly, there are

75 Letnar Černič, 2010. See also: Božič, 2010.

76 Cerar, 2012.

77 Cigoj Krstulović, 2005, p. 24.

78 The seventh stanza was isolated from France Prešeren’s “Zdravljica” as a literary whole in the founding manifesto of the Communist Party of Slovenia in 1937. See Grdina, 2022.

79 Ius-Info, 2015.

also voices in Slovenia which claim the opposite—that from ethical, moral, civilizational and statehood point of view the fact that the seventh stanza of “Zdravljica” was determined as a national anthem should be seen as an advantage, not as a weakness.⁸⁰ According to them, the virtue of not praising the homeland and patriotic feelings, but peace, freedom, and brotherhood among different nations, especially among neighboring ones, make Slovenian anthem unique. Indeed, considering the current situation in the world, the message of the seventh stanza of Slovenian anthem “Zdravljica” could not sound more urgent. While it is true that the new anthem and other state symbols were formally adopted by the former socialist authorities, the Slovenian national identity and the symbols of the Slovenian state have been renegotiated by post-communist political elites after the collapse of communist ideology, the breakup of Yugoslavia, and the establishment of an independent and democratic Slovenian state.⁸¹ Nonetheless, the critics should be agreed with in their assertion that the members of parliament acted unconstitutionally by stipulating only the seventh stanza as a national anthem. It is also possible to agree with the criticism that anthems of many countries emphasize the nation and its self-determination and that the Slovenian anthem stands out as an exception in this regard.⁸² However, one could argue that the lawmakers would have acted in accordance with the Constitution if the statute would have followed the constitutional text by stipulating Prešeren’s “Zdravljica” in its entirety as the Slovenian anthem and then adding that when the anthem is performed in public, only its seventh stanza is used. After all, being an exception is not necessarily a bad thing, even when it comes to the national anthem.

80 In contrast to Letnar Černič, Cerar argued that legal opinions which relativize the constitutionally determined anthem of the Republic of Slovenia are wrong and harmful. In his opinion, all those who try to weaken the importance of state and national symbols of independent Slovenia through their relativization should be told that they are on the wrong path. See Cerar, 2012.

81 Bajt, 2017, pp. 29–31. Bajt asserted that although the process of the post-1991 reorganization of Slovenian state symbols was far from smooth, the firm embeddedness of Slovenian national identity prior to independence meant that the Slovenian authorities did not need to resort to a drastic reinvention of national memory.

82 See Cerulo, 1993.

3. Legal protection of community symbols

3.1. National communities

3.1.1. The legal status and protection of national communities

The Slovenian Constitution guarantees the protection to national, ethnic, religious, linguistic and other minority communities. Because such communities are numerous and diverse, this section focuses exclusively on the constitutional and legal protection of national minorities. Among those, the main emphasis is on Italian and Hungarian autochthonous national communities. According to Ribičič, the fact that the Slovenian population is ethnically diverse demonstrates that Slovenian nation succeeded in keeping its culture and identity on the rift between Slavic, Germanic, and Romanic worlds. A very important role was played also by the participation of Slovenia in various forms of Yugoslav multiethnic and multicultural states. The results of the Population Census 2002⁸³ show that the main ethnic groups in Slovenia are Slovenes with 83.06%, followed by Serbs with 1.98%, Croats with 1.81%, Bosnians with 1.1%, Muslims (as an ethnic group) with 0.53% and Macedonians with 0.2%. Autochthonous Hungarians take 0.32% of population and autochthonous Italians 0.11%, while 6.43% of the population is of unknown ethnicity. The Constitution guarantees the Italian and the Hungarian national minorities a special status of autochthonous national communities. Special constitutional protection is also guaranteed to Roma community.

The Slovenian Constitution introduces a special concept of protection of the Italian and Hungarian national communities. Both communities are constitutionally protected, firstly, as a whole and secondly, their individual members are also entitled to a special legal protection. Besides general constitutional rights, both national communities and their members are also entitled to special rights which belong only to them. Special rights of Italian and Hungarian national communities were guaranteed already by the 1974 Constitution.⁸⁴ The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (which on June 25, 1991, declared independent Slovenia) stipulated that the Republic of Slovenia guarantees to the Italian and Hungarian national communities all the rights from the 1974 Constitution and valid international treaties. While the new Constitution (adopted in December 1991) included this guarantee among its general provisions, rights of

83 SURS, 2022. In Slovenia, the Population Census 2002 was the last census carried out in a traditional way (with numerous enumerators collecting data with fieldwork), which also measured the population by ethnic affiliation. From 2011 onward, Slovenia resorted to register-based censuses, with the most recent one being completed in 2021. The results of this census show the population numbers according to the nationality, but not according to the ethnical affiliation.

84 Collective and individual protection of the Italian and Hungarian national communities in Slovenia was ensured even before democratization and the declaration of independence. See Ribičič, 2004.

national communities are stipulated in more detail in its chapter on human rights and fundamental freedoms. With the new Constitution, the previous level of legal protection and rights of both autochthonous national communities was preserved and upgraded.⁸⁵

In General Provisions, the Constitution stipulates that the state protects and guarantees the rights of autochthonous Italian and Hungarian national communities on their territories.⁸⁶ It also stipulates that, on the territories of municipalities where the Italian or Hungarian national community reside, Italian and Hungarian also serve as the official language.⁸⁷ In the chapter on Human Rights and Fundamental Freedoms, it is stated that the Constitution guarantees to everyone equal human rights and basic liberties, regardless of national origin, race, sex, religion, political or other conviction, material status and any other personal circumstances. In accordance with the laws, everybody is given the right to freely express his or her membership to a certain nation or national community, to nurture and express his or her culture and to use his or her language and script on the entire territory of the Republic of Slovenia.⁸⁸ The latter provisions apply to everybody: to citizens and to foreigners, to members of autochthonous and non-autochthonous nations and national communities in the Republic of Slovenia.

Art. 64 of the Constitution stipulates the special collective and individual rights of national communities and their members. These are the following:⁸⁹

- The right to freely use their national symbols;
- In order to preserve their national identity, the right to establish organizations, to develop economic, cultural, scientific and research activities, as well as activities in the field of public media and publishing;
- The right to education and schooling in their own languages, as well as the right to establish and develop such education and schooling (the law determines territories where bilingual schooling is mandatory);
- The right to foster relations with their nations of origin and their respective countries.

The term “special rights” from Art. 64 refers to the rights guaranteed to national communities and their members in addition to other (general) constitutional rights: the freedom of expression (Art. 39), the freedom of assembly and gathering (Art. 42), the freedom of management of public affairs (Art. 44), the freedom of education (Art. 57), the freedom of science and art (Art. 59), the right to use one’s own language and script (Art. 62) and the freedom of enterprise (i.e., the right to free economic initiative) (Art. 74).⁹⁰ In accordance with Art. 64, the state shall provide material

85 Kaučič and Grad, 2011, p. 153; Grad, Kaučič and Zagorc, 2018, pp. 822–826.

86 Constitution, Arts. 5, 11.

87 Constitution Art. 14, para. 1.

88 Constitution, Art. 61.

89 Constitution, Art. 64, para. 1.

90 Šturm et al., 2010, p. 622. See also: Avbelj et al., 2019a, pp. 533, 534.

and moral support to the national communities in the exercise of their special rights. The members of autochthonous national communities may establish special self-governing communities on the territories where they reside with the intention to realize their special rights. Upon their special request, the state may authorize them to perform certain administrative functions under national jurisdiction. The state also guarantees material resources for performing these functions.⁹¹ An important instrument to protect national communities and their rights can also be found in their right to participate in the management of public affairs. Both national communities are represented in the National Assembly (one representative for each is elected).⁹² They are also represented in representative bodies on municipal levels (i.e., in city councils).⁹³ Hence, both communities, regardless of their number, are guaranteed the possibility of participating in parliamentary decisions and in decisions of municipal councils. Finally, Art. 64 also stipulates that in the National Assembly statutes and other general acts, related to the realization of the constitutional rights and status of national communities, cannot be adopted without consent of their representatives.⁹⁴

The Act on Self-Governing National Communities⁹⁵ (ASGNC) prescribes the manner of implementing the rights, needs, and interests of the Italian and Hungarian national communities. This statute regulates in more detail the status and obligations of self-governing communities which, according to the Constitution, may be established by members of the Italian and Hungarian national communities. Self-governing communities are public legal persons. They can be established on two levels: on the level of ethnically mixed municipalities⁹⁶ and on the state level. ASGNC regulates the obligations of municipalities and of the state when they decide about the status of self-governing communities, about their financing and about guaranteeing material conditions for their functioning. National communities themselves can decide how their self-governing entities shall be internally organized and how they should function.⁹⁷

The Slovenian legislator also adopted the Act Regulating Special Rights of Members of the Italian and Hungarian National Communities in Education.⁹⁸ This

91 Constitution, Art. 64, para. 2.

92 Constitution, Art. 81, para. 3.

93 Constitution, Art. 64, para. 3.

94 Constitution, Art. 64, para. 4.

95 The Act on Self-Governing National Communities (*Zakon o samoupravnih narodnih skupnostih*), Official Gazette of the Republic of Slovenia, nos. 65/94, 71/17.

96 Members of the autochthonous national communities live in the following municipalities: Koper, Izola, Piran, Ankaran (the Italians) and Lendava, Dobrovnik, Šalovci, Moravske Toplice, Hodoš (the Hungarians). See the Government of the Republic of Slovenia, 2022.

97 Šturm et al., 2010, p. 629. See also: Avbelj et al., 2019a, pp. 536, 537.

98 The act Regulating Special Rights of Members of the Italian and Hungarian National Communities in the Field of Education (*Zakon o posebnih pravicah italijanske in madžarske narodne skupnosti na področju vzgoje in izobraževanja* [ARSRMHNCFE]), Official Gazette of the Republic of Slovenia, nos. 35/01, 102/07, 11/18.

law regulates the implementation of rights of the Italian and Hungarian national communities in pre-school education and on all levels of educational system. Contents and organization of pre-school, primary school and secondary school classes are regulated in such a manner that special characteristics and needs of national communities are considered. Similar important provisions can be also found in the Organization and Financing of Education Act⁹⁹ (OFEA). According to this law, kindergartens and schools with Italian language can be established on the territories where the Italian national community resides. On the territories where the Hungarian national community resides, bilingual kindergartens and schools shall be established.¹⁰⁰

The right of national communities to be directly represented in the National Assembly and in municipal councils is regulated in more detail by the National Assembly Election Act, Local Self-Government Act, the Local Elections Act and the Voting Rights Register Act. On both state and local level, the legislator has introduced the principle of a double right to vote. This principle means that at elections to the National Assembly and at local elections the members of national communities have one vote at the elections of their own representative and another vote at “general” elections.¹⁰¹ For the purpose of elections of deputies of the National

99 The Organization and Financing of Education act (*Zakon o organizaciji in financiranju vzgoje in izobraževanja* [OFEA]), Official Gazette of the Republic of Slovenia, nos. 16/07—officially consolidated text, 36/08, 58/09, 20/11, 40/12, 57/12, 47/15, 46/16, 25/17, 123/21, 172/21, 207/21).

100 Šturm et al., 2010, p. 629. The statutory provisions on compulsory bilingual education were challenged at the Constitutional Court by a group of parents of children of Slovenian nationality who had to attend classes in the Hungarian language. The petitioners claimed that the challenged regulation discriminated against their children in comparison with Slovenian children from other areas of Slovenia. They believed that in areas where members of the Hungarian national community live, education should be organized in the same way as in areas where members of the Italian national community live (i.e., the state should establish special kindergartens and schools with Hungarian as the language in which education is carried out). By decision no. U-I-94/96, dated 22 October 1998, the Constitutional Court ruled that the challenged provisions are not unconstitutional. It took the position that the introduction of the regulation proposed by the initiators would mean the de facto abolition of bilingual education in schools in areas where the Hungarian national community lives. According to the Constitutional Court, such regulation would be unconstitutional. See also: Avbelj et al., 2019a, pp. 534–535.

101 The provisions on the double right to vote of members of national minorities were subjected to review of their constitutionality. In decision no. U-I-283/94, dated February 12, 1998, the Constitutional Court ruled that the statute according to which members of national communities cast two votes in elections of deputies to the National Assembly and members of municipal councils does not violate the principle of equal suffrage and is not in conflict with the Constitution. According to the Constitutional Court, dual suffrage, which is unique and can not be found in the regulations of other countries, means the realization of the special rights of national communities and the confirmation that Slovenia is a democratic state. Such legislation is necessary, according to the Constitutional Court, for the exercise of the constitutional right to direct representation in representative bodies at the state and local levels. According to the Constitutional Court, if members of national communities had only one vote, they would be forced to choose between two constitutional principles, namely universal suffrage and the right to direct representation, but the Constitution does not stipulate such restrictions. See Šturm et al., 2010, p. 628.

Assembly, the voting districts correspond to the territories where the national communities reside. There are two such voting districts, one for Italian and one for Hungarian community. For the purpose of local elections, the voting district is the municipality where members of national community reside. According to the Constitution, each national community is represented by one special representative in the National Assembly. In municipal councils, the national communities are entitled to one tenth of the entire number of representatives, but at least one. Representatives of national communities in the National Assembly and in the municipal councils are elected according to the voting system of relative majority. If Slovenian population is a minority in each municipality, special rules apply. In this case, the Slovenian voters are guaranteed a certain number of their own representatives.¹⁰²

As mentioned before, the Constitution also stipulates that statutes and other legal acts which are related to the realization of the constitutional rights and legal protection of the status of national communities cannot be adopted without consent from the representatives of such communities. This provision is further developed by the Rules of Procedure of the National Assembly. When laws and other legal acts which relate to one or both national communities are being passed in the National Assembly, their representatives have the right of “minority veto” which has the effect of an absolute veto. These procedural rules guarantee that the representatives of the majority population (i.e., Slovenians) cannot over-vote the representatives of national minorities.¹⁰³

While a general provision on the use of national symbols by the national communities is in the Constitution, the administrative law provisions of ARCFA stipulate how the right of Italian and Hungarian national community to freely use their national symbols is realized in practice. This right of national communities is also regulated and protected by the relevant provisions of criminal law, law on minor offenses and civil law. In the following sub-sections, the constitutional and statutory protection of Italian and Hungarian national symbols will be presented in more detail.

3.1.2. Constitutional and statutory regulation and protection of the symbols of national communities

3.1.2.1. Relevant constitutional provisions

The first paragraph of Art. 64 of the Constitution stipulates that autochthonous Italian and Hungarian national communities have the right to preserve their national identity. In accordance with this, both communities have the right to use their national symbols freely. There are no other provisions in the Constitution directly related to the symbols of national communities. The rules on using the symbols and the manner of their use are more thoroughly stipulated by the statutory law.

102 Such regulation is in power in Hodoš and Dobrovnik. Šturm et al., 2010, p. 629.

103 Kaučič and Grad, 2011, p. 155. See also: Grad, Kaučič and Zagorc, 2018, pp. 822–826.

3.1.2.2. Relevant provisions in administrative law

The ARCFA stipulates how to use the flag and the anthem of both national communities. On official occasions, if the Slovenian coat of arms and flag are positioned or hoisted together with the flags of Italian and/or Hungarian national community (and with other flags and signs), the place of honor belongs to the Slovenian flag.¹⁰⁴ On the territories where the Italian and the Hungarian national community reside, their flags shall be hoisted in addition to the Slovenian flag on the following occasions: on official state holidays of the Republic of Slovenia, on official days of mourning when such days are declared by the government of Slovenia and in other instances stipulated by the law.¹⁰⁵ The flag of national community shall be also hoisted in addition to the Slovenian national flag on the following occasions: on holidays of local communities, on public manifestation which are considered to be important for the Republic of Slovenia and declared as such by the government, and in other instances if the use of the flag does not contravene the law.¹⁰⁶ On their ethnic territories, the anthem of the national community shall be performed at ceremonial events in addition to the Slovenian anthem.¹⁰⁷

Rules on hoisting the flags of national communities in educational institutions are stipulated by the Regulations on Hosting the Flag of the Republic of Slovenia in Educational Institutions. On territories inhabited by the Italian or Hungarian national community, the flag of national community shall be hoisted beside the flag of the Republic of Slovenia in the educational institutions where classes are held in Italian or Hungarian language and bilingual kindergartens. In other educational institutions located on such territories where the language in which classes are carried out is Slovenian the flag of the national community can be hoisted, but it is not mandatory. Hoisting and ordering other flags in educational institutions is regulated by ARCFA and the Regulations on the use of the European Union's flag and anthem in the Republic of Slovenia. Besides the flag of the Republic of Slovenia and the flags of national communities, the following flags can also be hoisted: the Slovenian national flag, the EU flag, flag of a local municipality and school flag. The flag of the Republic of Slovenia shall be hoisted in the place of honor, i.e., on the very left.

Although the Act on Self-Governing National Communities serves as the main piece of legislation regarding the realization of rights of Italian and Hungarian national communities, it does not contain any provisions on the use of national symbols.

104 ARCFA, Art. 6.

105 ARCFA, Art. 13, para. 2.

106 ARCFA, Art. 14, para. 3.

107 ARCFA, Art. 21, para. 2.

3.1.2.3. Relevant provisions in criminal law

Relevant provisions in criminal law indirectly referring to protection of symbols of national communities can be found in three articles of CC-1.

The provisions of Art. 164 on Insult to a Foreign Country or International Organization stipulate, *inter alia*, that whoever publicly desecrates the flag, coat of arms or national anthem of a foreign country shall be punished by a fine or sentenced to imprisonment for not more than one year.¹⁰⁸ Since in practice the symbols of the Italian and the Hungarian national community are actually the symbols of the Republic of Italy and the Republic of Hungary, the provisions of Art. 164 of CC-1 incriminating public desecration of symbols of foreign states in our view also guarantee protection to the symbols of national communities.¹⁰⁹ When there is a case of conflict between such legal protection and the right to free speech and to artistic expression, such a conflict should be resolved as discussed in Section 2.3.

The relevant criminal law provisions protecting—not explicitly their symbols but—the integrity of national communities in a general manner can be found in Art. 165 on Insult to the Slovenian People or National Communities. The provisions of this article stipulate that whoever publicly commits any of the offenses under Arts. 158 to 162 of the Criminal Code (i.e., the Assault, Slander, Defamation, Calumny and Malicious False Accusation of Crime) against the Slovenian people or against the Hungarian or Italian national communities living in the Republic of Slovenia shall be punished by a fine or sentenced to imprisonment for not more than one year. While this criminal offense can be committed in any form of insult, slander and slanderous accusation, an insult shall possess an objective capacity to diminish the reputation of national communities (for example by an act desecrating their flag or other symbols). A criminal offense occurs only if such acts are committed publicly. The offender can only commit this act intentionally. He or she must be aware of insulting the Italian or the Hungarian national community, however, a direct intent (*dolus directus*) is not required. For this criminal offense to be committed, an eventual intent (*dolus eventualis*) suffices.¹¹⁰

Desecrating symbols of national communities might also serve to publicly incite hatred, violence or intolerance on ethnic grounds. According to the provisions of Art. 297 of CC-1, anyone who publicly provokes or stirs up hatred, violence or intolerance based, *inter alia*, on ethnicity and the act is committed in a manner that may endanger or disturb public order and peace, or by using threats or insults, shall

108 CC-1, Art. 164. The same punishment shall be imposed on anyone who has committed a criminal offense against the insignia of an international organization recognized by the Republic of Slovenia (CC-1, Art. 164, para. 2).

109 Korošec, Filipčič and Zdolšek, 2018, p. 894.

110 *Ibid.*, p. 896. In practice, a crime could be committed by which the perpetrator would deliberately desecrate the state symbols of Italy or Hungary, which are also the symbols of one or another national community, in order to insult or disgrace the national community. In our opinion, in such case the perpetrator would have committed a criminal offense under Art. 165, not under Art. 164 of CC-1.

be punished by imprisonment for up to two years. The same punishment applies to anyone who, in the aforementioned way, publicly spreads ideas about the superiority of one race over another or gives any help in racist activities or denies, diminishes, approves, justifies, ridicules, or defends genocide, holocausts, crimes against humanity, war crimes, aggressions, or other crimes against humanity. If these acts are committed by desecrating ethnic, national, or religious symbols, the perpetrator is punishable by imprisonment for up to three years.

3.1.2.4. Relevant provisions in minor offense law

The relevant provisions in minor offense law protecting symbols of the Italian and Hungarian national communities can be found in PPOA-1. The provisions of Art. 15 of this statute punish the minor offense of destroying state symbols. Whoever intentionally burns or in any other way damages or destroys the flag or coat of arms of the Republic of Slovenia, the flag of the European Union or a flag of any other state in a public place, shall be punished by a fine. This minor offense can be committed only intentionally when one or more offenders in a public place burn, tear or in any other way destroy a flag of a foreign state.¹¹¹ Control and enforcement of the provisions of PPOA-1 which are related to state symbols (of the Republic of Slovenia and of other states), are within the jurisdiction of the police.

The provisions of this article have some obvious deficiencies. They do not explicitly protect the Slovenian anthem and the Slovenian nation flag. Furthermore, they do not protect the anthem of the European Union, the anthems and the coats of arms of other states, and it also does not protect the anthems and the coats of arms of the Italian and the Hungarian national communities. These shortages notwithstanding, their flag at least falls under the protection by these provisions since the national communities use the flags of the Republic of Italy and of the Republic of Hungary.

Also worthy of attention are Arts. 4 and 14 of PPOA-1 which refer to “Hoisting a foreign flag” (see above, Section 2.3.2). Surprisingly, the authors of the commentary to PPOA-1 argue that in the context of these provisions hoisting a flag of a national community cannot be considered as hoisting a foreign state flag. According to their opinion, it is obvious in the provisions of ARCFA that the symbols of national communities can only be used together with Slovenian national symbols while giving priority to the latter.¹¹² We believe that their opinion is controversial and problematic. If the interpretation by the authors of the commentary is accepted (i.e., if according to PPOA-1 flags of national communities would not be considered as flags of foreign states), then flags of national communities would be guaranteed no protection by the minor offense law. If such flags were hoisted damaged or in some other way

111 See Jarc and Nunič, 2007, p. 61.

112 Jarc and Nunič, 2007, pp. 60, 61. The authors of the commentary refer to the Constitutional Court's Decision no. U-I-296/94 (see section 3.1.3).

inappropriate, such an act could not be considered a minor offense and accordingly be punished because ARCFA does not contain any provisions which would define and punish such an act as a minor offense (ARCFA only punishes the minor offense of using a damaged or an inappropriate flag and the coat of arms of the Republic of Slovenia and of the Slovenian national flag).

3.1.2.5. Relevant provisions in civil law

As explained in Section 2.3, OC stipulates that any person that inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without that person's culpability.¹¹³ Damage comprises the diminution of property (ordinary damage), lost profits, the infliction of physical or mental distress or fear on another person (i.e., violation of another person's personal rights), and encroachment upon the reputation of a legal person.¹¹⁴

It follows from the above provisions of OC that a person who would commit a crime of Insult to Foreign Country or International Organization by publicly desecrating the flag, coat of arms or national anthem of a foreign country when and where these were used as symbols of the national community, could cause ordinary damage and/or encroach upon the reputation of the national community and would be obliged to reimburse material and/or immaterial damage caused, unless it is proved that the damage was incurred without his/her/its culpability. A civil lawsuit seeking compensatory damages could be filed by the self-governing communities (as legal persons) established by the members of national communities. Under the conditions set by OC, a civil action could also be filed by the self-governing communities or a member of a national community (or several members of a national community) which/who would be a victim of the criminal offense of Public Incitement to Hatred, Violence or Intolerance by desecrating ethnic or national symbols.

Regarding reimbursement of immaterial damage, the court may order, in addition to the monetary compensation, the publication of the judgement and/or an apology of the injurer, or order that the injurer must retract the statement by which the infringement was committed or do anything else through which it is possible to achieve the purpose achieved via compensation.¹¹⁵ According to OC, the court shall award a legal person (i.e., the self-governing community established by the Italian or the Hungarian national community) just monetary compensation for the defamation (i.e., for the encroachment on its reputation) independent of the reimbursement of material damage, if it finds that the circumstances so justify, even if there is no material damage.¹¹⁶

113 OC, Art. 131.

114 OC, Art. 132.

115 OC, Art. 178

116 OC, Art. 183.

Similarly, a person who would commit a minor offense by destroying or damaging state (and/or national) symbols of a foreign country when and where these were used as symbols of a national community, would be obliged to reimburse material and immaterial damage caused, unless it is proved that the damage was incurred without his/her/its culpability.

3.1.3. Case law

According to our findings, the abovementioned Constitutional Court's decision no. U-I-296/94¹¹⁷ is the only court decision directly related to the legal protection of symbols of national communities in Slovenia. The Constitutional Court reviewed at the request of the National Council and upon the petition of the Parliamentary Group of the Slovenian National Party¹¹⁸ constitutionality of several provisions of ARCFA.

The National Council asserted in its request that the challenged statutory regulation makes it possible that on the territory of the Republic of Slovenia, the flag and national anthem of another sovereign state (Italy or Hungary) are used. They claimed that using the symbols of another state on the territory of the Republic of Slovenia represents an encroachment on the sovereignty of the Republic of Slovenia. They found the challenged regulation unconstitutional because it allows the symbols of the autochthonous national communities (i.e., Italian and Hungarian) to be identical with the symbols of another sovereign state. According to the National Council, the symbols of national communities shall be distinguished from the symbols of another sovereign state and a statutory provision which prohibited the identity of these symbols with the symbols of another sovereign state would not conflict with the right of the autochthonous Italian and Hungarian national communities and their members to freely use their national symbols (Art. 64 of the Constitution). At the public hearing, the National Council also stated that they had proposed the enactment of a mandatory interpretation of the challenged statutory provisions, according to which the symbols of autochthonous national communities could not be understood to be the symbols of a foreign state. Since the National Assembly had not accepted their proposal, they filed a petition at the Constitutional Court to establish the unconstitutionality of the challenged provisions of ARCFA.¹¹⁹

117 U-I-296/94, dated January 28, 1999.

118 The petitioner challenged the ARCFA provisions which prescribe that in certain cases together with the national flag also the flag of the Italian or Hungarian national communities may be displayed, and that together with the Slovenian national anthem, also the anthem of these national communities may be played. The Constitutional Court joined the petition of the Parliamentary Group of the Slovenian National Party with the request of the National Council, but did not find in the procedure for examining the petition that the challenged provisions do interfere with their rights, legal interests and legal position. The Parliamentary Group of the Slovenian National Party were found not to have standing, and the Constitutional Court rejected their petition (U-I-296/94, items 2 and 7).

119 U-I-296/94, item 1.

In summary, the National Council requested the Constitutional Court to decide on whether, from a constitutional perspective, the symbols of the autochthonous Italian and Hungarian national communities may be identical with the symbols of another state.

The National Assembly (i.e., the legislature) opined that determining the form and contents of the symbols of the autochthonous Italian and Hungarian national communities in statute would have interfered with the right of national communities and their members to the free use of national symbols as guaranteed by Art. 64 of the Constitution. Moreover, such a determination and restriction would allegedly violate the internationally recognized and valid right of national communities to express their own culture and the right of an individual member of such a community to express their cultural identity. According to the National Assembly, the assertion explaining that displaying a foreign flag and playing a foreign national anthem on the territory of the Republic of Slovenia interfered with the sovereignty of the state was questionable, since the legal system did not allegedly forbid the use of the symbols of a foreign state (in Arts. 16 and 23, ARCFA determined the manner of displaying a foreign flag and playing a foreign national anthem). Hence, because national communities, pursuant to the Constitution, had the right to autonomously determine their national symbols, it was not necessary to distinguish between the flag of an autochthonous national community and the flag of a foreign state.¹²⁰ The Constitutional Court acknowledged that the nature and form of the symbols of the Italian and Hungarian national communities are not regulated by ARCFA or any other statutory law.¹²¹ Considering this, it stated that the Constitution protects the autochthonous Italian and Hungarian national communities and their members in two ways. First, in the paragraph 1 of Art. 14, it guarantees everyone equal human rights and fundamental freedoms irrespective of their ethnic origin. It also vests in individual members, and their national communities as such, certain special rights (Art. 64). This institutional framework is intended to preserve their identity and the equal participation of both autochthonous national communities and their members in social life. In this context the Constitution provides that both autochthonous national communities and their members are entitled to freely use their national symbols (Art. 64).¹²² The wording “their national symbols” already entails that this concerns the symbols of the nations whom the Italian and Hungarian national communities are part of, that is the symbols of the Italian and Hungarian nation. But the nature of the symbols of the Italian and Hungarian nations are extant and cannot be left to someone’s choice. These national symbols were, as such, formed during the history of the Italian and Hungarian nations. So, according to the Constitutional Court, the

120 U-I-296/94, items 3 and 4.

121 The petitioner, whose petition was rejected by the Constitutional Court, opines that the act should at least prohibit these symbols from being identical with the symbols of the Italian and Hungarian state.

122 U-I-296/94, items 8 and 9.

autochthonous Italian or Hungarian national communities and their members are entitled by the Constitution to use the Italian or Hungarian national symbols as their own symbols, irrespective of the fact that these may be identical with the symbols of the countries of Italy or Hungary. Only if the Constitution explicitly provided a condition not allowing national symbols to be equal to state symbols, could Art. 64 be understood differently.¹²³

Accordingly, in the opinion of the Constitutional Court, the view that the Constitution prohibits the autochthonous national communities and their members the right to use as their own national symbols the identical symbols of another sovereign state, is not well founded. From ARCFA it follows that the symbols that the autochthonous national communities and their members use as their own national symbols, may on official occasions only be used together with the symbols of the Republic of Slovenia, and in a manner such that the symbols of the Republic of Slovenia have priority. Thus, according to the Constitutional Court, the petitioner's assertion does not hold true that in the areas populated by the autochthonous national communities it could happen that the "Slovenian armed forces marches under the Italian or Hungarian flag, singing the Italian (or Hungarian) national anthem."¹²⁴

The Constitutional Court further that the coat of arms and the flag of the Republic of Slovenia shall, when hoisted together with other flags or with other symbols, have a place of honor, if ARCFA does not provide otherwise. Consequently, ARCFA can only be interpreted as prohibiting the independent use of other symbols on official occasions. According to the Constitutional Court, official occasions are also those occasions at which the autochthonous national communities participate or appear through their self-governing national communities as entities under public law.¹²⁵

Following the above arguments, the Constitutional Court ruled that the challenged provisions of ARCFA are consistent with the Constitution. The Constitutional Court reached the decision unanimously.

3.2. Religious communities

3.2.1. The legal status of religious communities and the right to freely profess religion and other beliefs in private and public life in the Republic of Slovenia

Pursuant to Art. 7 of the Constitution, the state and religious communities in the Republic of Slovenia are separate. Religious communities enjoy equal rights and pursue their activities freely. The constitutional principle of separation of state and religious communities provides a neutral approach of the state authorities toward all religions and other beliefs, including atheism, which has been a privileged and encouraged belief in Slovenian schools for almost half a century. In the Republic

123 U-I-296/94, item 10.

124 U-I-296/94, item 11.

125 U-I-296/94, items 12-14.

of Slovenia, religious communities perform their activities in accordance with the Slovenian Constitution and laws, and the state recognizes their right to organize internally according to their own rules and to carry out their mission independently and autonomously. Slovenia, as a democratic state, does not define religion as such in the Constitution or other legal acts, but ensures the right of citizens to free personal and collective expression of their religion or non-religious beliefs. Obligated to respect the freedom of everyone, it shall consider that citizens have different religious and non-religious beliefs.

Art. 7 of the Constitution guarantees religious communities the right to an equal position, which means that these communities shall be equal and that there shall be no discrimination between them. With the explicit prohibition of discrimination on the grounds of religion or belief (Art. 14), the Constitution imposes on the legislator equal regulation of the status and equal treatment of religious communities, but at the same time allows legal distinction where this is substantially justified. The constitutional principle of equality of religious communities also means that the state should ensure religious and worldview neutrality toward all such communities. Accordingly, the Slovenian Constitution does not distinguish between recognized and unrecognized religious communities. This means that it does not recognize a special position for any religious community and that it should not give preference to any religious community over others, nor should it neglect any religious community.

Stipulating the right to freedom of action, Art. 7 of the Constitution provides to the religious communities' autonomy and protection against state interference and at the same time imposes an obligation on the state to create conditions for realization of this provision. This provision guarantees, *inter alia*, the freedom to establish and organize religious communities and to perform religious ceremonies and other religious events.¹²⁶

Art. 41 of the Constitution guarantees everyone freedom of conscience. Everyone is guaranteed the right to freely profess religious and other beliefs in private and public life.¹²⁷ No one is obliged to declare his or her religious or other beliefs. Parents have the right to provide their children with religious and moral education in accordance with their beliefs. The religious and moral guidance given to children shall be appropriate to their age and maturity, and shall be consistent with their free conscience and religious and other beliefs.¹²⁸ In the Slovenian Constitution, this right has a status of an absolute right which means that—in contrast to most other

126 Kaučič and Grad, 2011, p. 85.

127 Contrary to the 1974 Constitution of the former Socialist Republic of Slovenia, the new Constitution no longer contains a provision stating that the practice of religion is a private matter.

128 The authors of the Commentary on the Constitution assert that freedom of conscience is a modern version of freedom of religion, which, as one of the most fundamental human rights, was an integral part of the first two modern human rights documents—The Virginia Declaration of Rights (1776) and the French Declaration of Rights of Man and Citizen (1789).

constitutional rights—it should not be suspended or restricted during war or in a state of emergency.¹²⁹

The object of legal protection under this constitutional right are theistic, atheistic and non-theistic beliefs. The right not to have a religious belief and the possibility not to unite in a religious community refer to the negative aspect of religious freedom. An individual is not obliged to have faith or to speak out about it. He or she shall not be punished or discriminated refusing to speak out about his or her religious belief. It is not permissible to force him or her to confess his or her religious belief. He or she has the right to refuse to take part in acts which constitute the exercise of religion. In contrast, the right to have a religious belief and the possibility to unite in a religious community refer to the positive aspect of religious freedom. The positive aspect of religious freedom includes outward perceptions that are significantly related to an individual's religious beliefs. An individual freely professes religion alone or together with others, publicly or privately, through instruction, performance of religious duties, worship, and the performance of religious ceremonies. This aspect ensures any (oral or written, private or public) expression of religion, including prayers and the dissemination of religious truths. Acts that signify the observance of religious rules (worship, ceremonies, rituals, processions and the use of religious clothing and symbols) are also legally protected.¹³⁰

In the Constitution, the freedom of action of religious communities and the right to freely profess religious and other beliefs in public and private life are linked to additional safeguards stemming from constitutional principles and provisions prohibiting religious and other hatred and intolerance (Art. 63), general freedom of conduct (including freedom of conduct of religious communities) (Art. 35), freedom of expression (Art. 39), freedom of education (Art. 57) and freedom of association (Art. 42). Also relevant are the provisions on the right to conscientious objection (Art. 46).¹³¹

At the statutory level, the status of religious communities was initially regulated by the Legal Status of Religious Communities in the Republic of Slovenia Act¹³² (LSRCA), which was adopted in 1976 in the then Socialist Republic of Slovenia. LSRCA did not define religious communities and did not set criteria for the establishment of religious communities. Amendments to this law, which were adopted after the independence of Slovenia (1991), enabled the establishment and operation of confessional private schools. Many shortcomings of this law were eliminated by the Religious Freedom Act¹³³ (RFA), which was adopted by the National Assembly in

129 Constitution, Art. 16, para. 2.

130 Šturm et al. 2010, pp. 447–448. See also: Republika Slovenija Vlada, 2022.

131 Kaučič and Grad, 2011, p. 85. See also: Grad, Kaučič and Zagorc, 2018, p. 148.

132 The Legal Status of Religious Communities in the Republic of Slovenia Act (*Zakon o prvem položaju verskih skupnosti* [LSRCA]), Official Gazette of the Republic of Slovenia, nos. 10/91., 22/91. The validity of this act expired when the Religious Freedom Act was passed.

133 The Religious Freedom Act (*Zakon o verski svobodi* [RFA]), Official Gazette of the Republic of Slovenia, nos. 14/07, 100/13.

2007. This law regulates the individual and collective exercise of religious freedom, the legal status of churches and other religious communities, the procedure for their registration, the rights of churches and other religious communities and their members, the rights of registered churches and other religious communities and their members, and powers and competencies of the state body responsible for religious communities.

According to RFA, churches and other religious communities are socially beneficial organizations. They are committed to spirituality and human dignity in private and public life. They strive to make meaningful living in the field of religious life and at the same time play an important role in public life by developing their cultural, educational, solidarity, charitable and other activities. By strengthening the welfare state and enriching national identity through their activities, they perform an important social task. The state has a duty to respect the identity of churches and other religious communities, to establish an open and lasting dialogue and to develop continuing cooperation with them.¹³⁴

Pursuant to Arts. 22–28 of RFA, the members of the Slovenian Armed Forces have the right to religious spiritual care during their military service in accordance with the law on military service and defense. This right is carried out by the Military Vicariate of the Slovenian Armed Forces, headed by the Military Vicar. Religious spiritual care is also provided for female and male police officers who wish to do so in circumstances where it is difficult for them to exercise their religious freedom. The organization of religious spiritual care and the way of exercising this right in the police are determined in more detail by the regulations of the Minister of the Interior.¹³⁵ According to the provisions of RFA, the right to regular individual and collective religious spiritual care is also provided in prisons, public hospitals and social welfare institutions. Churches and other religious communities have the right to build and maintain premises and buildings for worship and other religious ceremonies.

The Constitutional Court of the Republic of Slovenia issued several decisions which determine the content of the constitutional provisions on the division of the state and religious communities, on the free and equal functioning of religious communities¹³⁶, and on the right to freely profess religious and other beliefs in private and public life. In decision no. U-I-68/98¹³⁷, the Constitutional Court reviewed the constitutionality of the provisions of OFEA. In this decision, it interpreted Art. 7 of the Constitution and took a stand on the issue of confessional education in public schools. The constitutional judges clarified that the Constitution does not explicitly

134 RFA, Arts. 1, 5.

135 Religious spiritual care in the police is organized by the employees of the General Police Administration, who shall ensure the equality of different religions when exercising this right.

136 Even before the adoption of RFA, the Constitutional Court recognized to religious communities the status of socially beneficial organizations and the right to denationalization of the property confiscated from religious communities during communism.

137 U-I-68/98, dated 22 November 2001.

regulate confessional education in public and concessioned schools, which means that it neither prohibits nor commands it. They asserted that the principle of separation of state and religious communities and the state's commitment to neutrality and tolerance in the field of education means that confessional religious content cannot be part of lessons neither in public schools nor in schools to which the state has granted a concession. The legislator may interfere with the positive aspect of freedom of religion and the right of parents to provide their children with religious and moral education (third paragraph of Art. 41 of the Constitution) in order to protect the negative aspect of freedom of religion of other children and their parents (under this provision, no one is obliged to declare his or her religious or other beliefs). In the opinion of the constitutional judges, such a restriction of one constitutional right in favor of another serves to ensure the worldview neutrality of the state and to realize the principle of separation of state and religious communities. Both the goal (i.e., a complete prevention of identification of the state with any of the religions) and its realization in the field of public education are constitutionally permissible only in the case of public kindergartens and schools, but not in the case of confessional activities in kindergartens and schools with concessions outside the public program.¹³⁸ It follows from this position of the Constitutional Court that in Slovenia the inclusion of religious confessional content in public educational institutions is not permitted. Religious confessional content may be included in the educational process of private kindergartens and schools, but only in a segment that is conducted outside the public concession.

With decision no. U-I-92/07,¹³⁹ the Constitutional Court abrogated several provisions of RFA and LSRCA. It ruled that the regulation of the registration of religious communities, enabling them to obtain the status of "a registered religious community" on condition that it has at least one hundred adult members who shall be either citizens or permanent residents of Slovenia and that it has been active in Slovenia for at least ten years (or has been widely known for more than a hundred years) is inconsistent with the right of religious communities to free religious activity as determined by the first paragraph of Art. 41 of the Constitution, read in conjunction with the freedom of association referred to in Art. 42 of the Constitution. The requirement that a religious community shall be registered if it is to receive financial support from the state, however, was found reasonable and substantively justified. Therefore, according to the Constitutional Court, the provisions of the RFA which differentiate between registered and unregistered religious communities for the purpose of providing them with financial support is not inconsistent with the principle of the equality of religious communities (the second paragraph of Art. 7 of the Constitution).

In this controversial decision the Constitutional Court also ruled that the state may also provide religious communities with the necessary financial resources for

138 U-I-68/98, dated 22 November 2001.

139 U-I-92/07, dated 15 April 2010.

the performance of religious spiritual care in prisons and public hospitals, even if such state financing does not fall within the framework of the constitutional right to have a religious belief and the possibility to unite in a religious community. However, it is constitutionally inadmissible to provide the support in such a manner that priests would be employed by the state to perform their religious services. Being inconsistent with the principle of the separation of the state and religious communities, such regulation would undermine the autonomy of religious communities and their leaders on the one hand, while on the other hand it would lead to a symbolic identification of the state and religion, which is a negation of the principle of separation of the state and religious communities and the principle of neutrality.¹⁴⁰

In contrast to its decision regarding prisons and hospitals, the Constitutional Court ruled that the statutory regulation of religious spiritual care in the Slovenian Armed Forces under which members of the Slovenian Armed Forces have the right to religious spiritual care which is carried out by the Military Vicar as an employee of the state, is in accordance with the Constitution. Most constitutional judges asserted that although the armed forces as a body in the composition of the ministry are a symbol of the state, the negative religious freedom of a non-believer or other religious member of this body cannot be interfered with simply by being aware that other (religious) members of the military forces have the possibility of religious spiritual care by participating in a religious ceremony provided financially by the state.¹⁴¹

3.2.2. The legal protection of the symbols of religious communities

There are not many provisions in the legal system of the Republic of Slovenia that explicitly refer to religious symbols. The Constitution and the RFA determine the legal status of religious communities and the rights of their members, but do not explicitly regulate the use and legal protection of religious symbols. Legal norms that explicitly determine the legal protection of symbols of religious communities in the Republic of Slovenia can only be found in criminal law (i.e., in CC-1). Decisions of the Constitutional Court and judgments of the European Court of Human Rights (ECtHR) also explicitly refer to religious symbols and it seems that judicial practice is actually a key element of the legal regulation and protection of (the use of) religious symbols in Slovenia.

3.2.2.1. Relevant constitutional provisions

The legal protection of (the use of) religious symbols is implied in the constitutional provisions on the separation of state and religious communities, freedom and equality of religious communities (Art. 7) and the individual's right to freely profess

¹⁴⁰ U-I-92/07.

¹⁴¹ U-I-92/07. The Constitutional Court ruled on this issue by six votes to three.

religious and other beliefs in private and public life (Art. 41). In its case law, the Constitutional Court clarified that the positive aspect of religious freedom includes, *inter alia*, freedom of action in the form of the use of religious symbols. Arts. 7 and 41 of the Constitution, according to the Constitutional Court, protect the performance of activities of religious communities and practices that are significantly related to the individual's religious beliefs (worship, rituals, processions, use of religious clothing, symbols, etc.). In its decisions, the Constitutional Court also ruled on the question of whether these constitutional provisions enable the presence of crucifixes and other religious symbols in public educational institutions. Relevant constitutional case law will be presented in more detail in Section 3.2.3.

3.2.2.2. Relevant provisions in administrative law

RFA determines that religious freedom includes, *inter alia*, the freedom to express religious beliefs and the freedom for everyone, alone or in association with others, in private or in public, to express his or her faith in worship, instruction, religious practice, or otherwise.¹⁴² While religious freedom in private and public life is inviolable, the state ensures its smooth exercise.¹⁴³ RFA, however, does not explicitly stipulate that religious communities may use religious symbols in carrying out their activities and that every individual has the right to wear or use religious symbols in public.¹⁴⁴ The fact that the positive aspect of religious freedom includes, *inter alia*, freedom of action in the form of the use of religious symbols, was clarified by the Constitutional Court.

Albeit indirectly, the legal protection of religious symbols is also ensured by the provisions of Art. 3 of RFA. In these provisions, RFA stipulates that any incitement to religious discrimination and incitement to religious hatred and intolerance (by desecrating religious symbols for example) is prohibited. While RFA does not define violations of these provisions as minor offenses, the breach of these prohibitions, under certain conditions which are set down by CC-1, constitutes a criminal offense

3.2.2.3. Relevant provisions in criminal law

Art. 297 of CC-1 on Public Incitement to Hatred, Violence or Intolerance (see above, section 3.1.2) explicitly refers to religious symbols, however, the provisions of this article do not incriminate the sole act of desecrating religious symbols. Desecrating religious symbols is considered criminal act only if it is aimed at public provocation or stirring up hatred, violence or intolerance based on religion or religious

¹⁴² RFA, Art. 2, para. 2.

¹⁴³ RFA, Art. 2, paras. 1, 5.

¹⁴⁴ Provisions directly related to the use of crosses and certain other religious symbols are also contained in some municipal ordinances on cemetery and funeral activities and on the arrangement of cemeteries.

and other beliefs, and if religious symbols are desecrated in a manner that may endanger or disturb public order and peace, or by using threats or insults.

3.2.2.4. Relevant provisions in minor offense law

There are no provisions whatsoever in the Slovenian minor offense law that would explicitly refer to religious symbols. Relevant provisions protecting (although not explicitly stated) symbols of religious communities can be found in the article on *Vandalism* in PPOA-1. Art. 16 of this act stipulates that a fine is imposed on anyone who intentionally damages, overturns, removes or otherwise, contrary to the purpose of use, handles memorials and public infrastructure facilities, such as: municipal infrastructure, public lighting, road signs, preparations and appliances in recreational areas, playgrounds and similar public appliances. According to our understanding, religious symbols are also an object of protection under these provisions, although they are not explicitly referred to in the wording of the article. An offense under Art. 16 may be committed only with intent, when an offender or two or more offenders in a group in a public place damage, overturn, remove or otherwise act contrary to the purpose of use of religious symbols.¹⁴⁵ The police are responsible for supervising and deciding on vandalism-related offenses under PPOA-1.

Interestingly, Art. 15 of PPOA-1 explicitly sanctions the offense of destruction of state symbols, but not the offense of destruction of symbols of religious or other communities (see section 2.3).

3.2.2.5. Relevant provisions in civil law

As explained in Sections 2.3.2 and 3.1.2, OC stipulates that any person that inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without that person's culpability.¹⁴⁶ Damage comprises the diminution of property (ordinary damage), lost profits, the infliction of physical or mental distress or fear on another person (i.e., violation of personal rights), and encroachment upon the reputation of a legal person.¹⁴⁷ The court can award a legal person just monetary compensation for the defamation of reputation independent of the reimbursement of material damage, if it finds that the circumstances so justify.

In cases where criminal offense of Public Incitement to Hatred, Violence or Intolerance is committed by desecrating religious symbols and such an act causes pecuniary or non-pecuniary damage to the religious communities or their members, in accordance with the conditions determined by OC, the basis for civil liability of the perpetrator is provided. A civil lawsuit seeking compensatory damages could be filed

145 See Jarc and Nunič, 2007, p. 62.

146 OC, Art. 131.

147 OC, Art. 132.

by the affected religious community (as a legal entity), or by a member or several members of a religious community who would be a victim of this criminal offense.

According to OC, the court shall award a legal person (i.e., the religious community) just monetary compensation for the defamation of reputation independent of the reimbursement of material damage, if it finds that the circumstances so justify.¹⁴⁸ If immaterial damage would occur, the court may order, in addition to the monetary compensation, the publication of the judgement and/or an apology of the injurer, or order that the injurer must retract the statement by which the infringement was committed or do anything else through which it is possible to achieve the purpose achieved via compensation.¹⁴⁹

Similarly, a person who would commit a minor offense of vandalism by destroying or damaging religious symbols which belong to a particular religious community would be obliged to reimburse material and immaterial damage caused, unless it is proved that the damage was incurred without his/her/its culpability.

3.2.3. Case law

In the abovementioned decision no. U-I-92/07, the Constitutional Court stated, *inter alia*, that the positive aspect of freedom of religion determined in the first paragraph of Art. 41 of the Constitution ensures that the constitutionally guaranteed freedom of religion includes externally perceived actions that are significantly related to the individual's religious beliefs. An individual may freely profess his or her religion either alone or in community with others and in public or in private, by teaching, performing religious duties, in worship, and in observance. The positive aspect of religious freedom thus ensures any (oral or written, private or public) expression of religion or religious affiliation, including prayers and spreading religious dogma. The Constitutional Court added that actions which constitute observance of religious rules (worship, rites, rituals, processions, the use of religious symbols, etc.) are also protected. In the same decision, the Constitutional Court also ruled that the state shall guarantee the freedom of religion determined by the Constitution to individuals who are in closed and semi-closed institutions such as the army, prisons and hospitals. The latter requires that the state be restrained, i.e., it shall not preclude, prevent, obstruct, or hinder the freedom to manifest and to exercise religion. It shall enable individuals in such circumstances to perform individual acts of a religious nature (the state shall enable individual the use of religious symbols).

In decision no. U-I-68/98, the Constitutional Court took the position that based on freedom of religion an individual is also guaranteed the right not to profess his religion. This so-called negative freedom of religion prohibits the state from forcing believers into other religions or non-believers into a particular religion or, for example, in public educational institutions, it imposes on the state the duty to prevent

148 OC, Art. 183.

149 OC, Art. 178.

the domination of one religion over another at teaching. According to the Constitutional Court, the negative religious freedom prohibits indirectly effective actions that compel an individual to exercise freedom of (non)expression of religion or worldview (for example, placing billboards with the Ten Commandments or crosses and crucifixes in public school classrooms and performing prayers and blessings at graduation ceremonies in public schools). The Constitutional Court referred to the decision of the German Federal Constitutional Court, No. 1BvR 1087/91 in BVerfGE 93, dated 16 May 1995. The German Federal Constitutional Court ruled on a constitutional complaint concerning the installation of crosses and crucifixes in school premises. It took the position that the placement of crosses or crucifixes in the classrooms of a state mandatory school is contrary to the first paragraph of Art. 4 of the German Constitution (i.e., contrary to the provisions on freedom of conscience). The court found that, considering the general school obligation, crosses in classrooms lead to students being confronted with these symbols during lessons without being able to avoid them, and that they were forced by the state to “learn under the cross.”¹⁵⁰

Postscript

In Slovenia, the Constitution and other general legal acts do not give an explicit answer to the question of whether the fundamental right to freely profess religious and other beliefs in private and public life allows an individual to carry religious symbols in public and whether the state can prohibit him or her from carrying religious symbols in a public place or in the workplace. Similarly, general legal acts do not explicitly respond to the question of whether a confessional religious teaching can be performed in public educational institutions and whether crosses and other religious symbols can be displayed in public schools. In the Slovenian legal system, these questions were addressed by the Constitutional Court and while answering them, the court determined boundaries of the constitutional principle of the separation of state and religious communities and the legal nature of the state’s obligation to protect the freedom of religion.

It follows from the Constitutional Court’s ruling on these issues that in Slovenia the principle of separation of state and religious communities is exercised relatively strictly. The authors of the commentary on the Constitution remark that the Constitution merely prescribes the secularity of the state, while the doctrine in relation to this principle has not yet been developed in Slovenia. According to them, this principle is implemented relatively strictly also due to its specific understanding in the

150 U-I-68/98, item 13.

time of the former political system.¹⁵¹ While freely expressing religion or religious affiliation, either alone or in a community with others, in public or in private, one's actions which constitute observance of religious rules (including the use of religious symbols) are legally protected. The possibility of using religious symbols shall also be provided to individuals located in closed institutions such as the military, prisons and hospitals.

The Constitutional Court ruled, however, that in Slovenia the involvement of confessional religious teaching in public educational institutions is not allowed. It may be included in the learning processes in private kindergartens and schools in their divisions which are outside the public concession. In these institutions, the Constitutional Court banned indirectly effective practices, which represent compulsion for an individual on his or her right to freely profess religious and other beliefs (as an example of such practices, it cited the installation of crosses or other religious symbols in classrooms). Evidently, regarding the presence of religious symbols in public schools (and in other public institutions), the Constitutional Court has resorted to a restrictive interpretation of constitutional provisions on religious freedom and a stringent enforcement of the principle of separation of state and religious communities.

The presence of crucifixes in public schools and the legal regulation of this issue was a hot theme in most European countries a decade ago. The legal discourse on this issue reached its first peak in November 2009, when the Second Section of the ECtHR released its judgement in the *Case of Lautsi and Others v. Italy*¹⁵². It decided that crucifixes should not be present in the classrooms of (Italian) public schools. The presence of the crucifixes in Italian public schools, according to the judges, restricted both religious freedom (Art. 9) and the right to secular education (Art. 2 of the First Protocol to the European Convention on Human Rights) of those children who do not belong to the majority Christian religious community. The Second Section pointed out that students of all ages interpret the presence of a crucifix in classrooms as a religious symbol of a particular religious community. According to the ECtHR, the state party has an obligation to ensure religious neutrality in public education, if and where it is compulsory.¹⁵³ Neutrality and negative religious freedom include not only the absence of religious rites or religious education, but also the absence of symbols expressing a particular religion or belief.¹⁵⁴ The Court also held that religious symbols in Italian public schools do not safeguard pluralism in public education, which is essential for the preservation of a democratic society. The ruling, in

151 Šturm et al., 2010, p. 124. The main restriction on the excessive separation of the state and religious communities (i.e., of building too high "wall" between the state and religious communities) is determined by the second paragraph of Art. 7 of the Constitution, stipulating that religious communities pursue their activities freely.

152 *Case of Lautsi and Others v. Italy*, appl. no. 30814/06, dated 3 November 2009.

153 *Lautsi and Others v. Italy*, para. 56.

154 *Lautsi and Others v. Italy*, para. 55.

which the ECtHR took an almost identical position to the Slovenian Constitutional Court, caused great uproar in the Italian and wider European public.

The Italian Government appealed against the judgment of the Second Section. Its appeal was joined by several Catholic and Orthodox countries who disagreed with the court's decision. Following a public hearing, most of the judges of the ECtHR's Grand Chamber issued a new judgement disagreeing with the approach of the first instance judges and decided diametrically opposed.¹⁵⁵ It ruled that the Italian state enjoys a margin of appreciation in the provision of education and the protection of the right of parents to provide their children with religious and moral education in accordance with their beliefs. In the opinion of the Grand Chamber, the fact that there is no consensus in European societies about the (non)presence of religious symbols in public schools speaks in favor of such an approach. The judges also supported their decision with the fact that Italy does not prohibit the display or wearing of symbols of other religions in school classrooms and that religious education on the Christian religion is not mandatory, but optional. The ECtHR has also found no evidence that the Italian authorities are intolerant toward people of other faiths, such as Jewish and Islamic. The judges further noted that the appellant, Mrs. Lautsi, was able to continue to raise her children according to her own religious and philosophical beliefs. Therefore, the ECtHR did not find any violation of the European Convention.

The ECtHR's ruling in the *Lautsi* case had no legal or practical effects on the legal regime regarding the presence of religious symbols in the premises of public institutions in Slovenia. Religious symbols (i.e., crucifixes) were removed from the walls of Slovenian public schools and other public institutions (government offices, administrative units, police stations, etc.) during and after the end of the WW2. This remained the case even after the abandonment of communism and socialism and the proclamation of an independent democratic Slovenia in June 1991. This situation was legally consolidated by the decisions of the Constitutional Court which introduced the principle of moderate constitutional secularism in the Slovenian legal

155 The Case of Lautsi and Others v. Italy, appl. no. 30814/06, dated 18 March 2011. The arguments of the countries which joined Italy were presented by Joseph H. H. Weiler, a professor at New York University. He expressed the view that it is legally dishonest to defend a political position that divides our societies and at the same time to claim that such a position is neutral. He disputed the court's view that the absence of religious symbols from public school classrooms was the only possible and correct solution and that only that is what can establish neutrality and religious freedom. He wondered why, despite the diversity of public orders in European countries, we need to have only one right and possible solution in this matter, in the sense of Dworkin's thesis on the "one-right-answer." In Weiler's view, in this case, due to the diversity of Europe, there cannot be only one right solution for all countries, all classrooms and all situations. It is necessary to consider the social and political reality and the situation of each society, its demography, history, etc. Accordingly, the Convention should allow states the flexibility to regulate the important issue of the relationship between the state and religion as they wish. According to Weiler, Italy has the right to be a secular state, while Mrs Lautsi demanded that the European Court of Justice impose an obligation on Italy to be a secular state. See Letnar Čerňič, 2010. See also: Puppinc, 2012.

system.¹⁵⁶ While the current legal regime regarding the presence of religious symbols in public schools (and in the premises of other public institutions) seems to correspond to the original ECtHR ruling in the *Lautsi* case, it is, at least formally, also in line with the ruling of the ECtHR's Grand Chamber. According to its judgement, Slovenia enjoys the margin of appreciation and free discretion when it comes to the implementation of the positive and negative aspects of religious freedom and of education and protecting the right of parents to provide their children with religious and moral education in accordance with their beliefs.

4. Summary and conclusion

In Slovenia, the current state symbols were legally recognized when the country was a federal republic of socialist Yugoslavia. They were determined by amendments to the 1974 Constitution in the last three years before the declaration of Slovenian independence. At the end of 1991, these symbols (i.e., the coat of arms, flag, and anthem) were stipulated as state symbols also by the sovereign and independent Slovenia in the general provisions of its new Constitution. While the Constitution contains a short description of each of the three symbols, they are more thoroughly regulated by ARCFA. The state symbols (all three are also the main national symbols) are legally protected also by other statutes with the administrative law, criminal law, minor offenses law and civil law provisions. In the administrative law, the state symbols are also regulated by a larger number of provisions of sub-statutory acts.

¹⁵⁶ Some Slovenian specialists in constitutional law are critical of constitutional secularism and the position of the Slovenian Constitutional Court. Letnar Čerňič, for example, argues that the absence of religious symbols in public schools could perhaps be justified based on equality and equality of religion, not based on religious freedom. According to Letnar Čerňič, empty walls in public schools do not show the plurality and neutrality of a society, but only a lack of tolerance and intolerance toward the pillars of the historical and cultural development of such society. An empty wall in the classroom, in his opinion, is no more neutral than a crucifix or any other religious symbol that we hang above or next to the blackboard. According to him, we should ask ourselves whether the state has an obligation to ensure a value-neutral public sphere, or whether secularism is just one in a multitude of beliefs and religions. Secularism, he claims, cannot be neutral, neutrality can only be achieved if society follows and encourages the plurality of religions and worldviews. Therefore, according to Letnar Čerňič, who refers to Weiler, constitutional secularism is not the answer to solving the dilemma of the legal position of religion in the public sphere. Constitutional secularism represents a step beyond the principle of separation of state and religious communities, because it follows the French *laïcité*, which aims at complete exclusion of religion from public space. Such an attitude is utopian, because religion has always been an important part of public life. According to Letnar Čerňič, there is no standard model for the legal regulation of this issue that would suit all countries. See Letnar Čerňič, 2016, pp. 627–630. For a different view among the Slovenian legal experts see Novak, 2012.

As a central piece of legislation, ARCFA in its administrative law provisions determines the form and manner of use of the state symbols, as well as the form and manner of use of the Slovenian national flag, a national symbol which has not been formally recognized as a state symbol, and the use of symbols of the Italian and Hungarian national communities. The ARCFA stipulates in its general provisions that while the coat of arms, flag, and anthem of the Republic of Slovenia signify affiliation with the Republic of Slovenia, the flag of the Slovenian nation shall signify affiliation with the Slovenian nation. If on official occasions the coat of arms or flag are placed, deposited or displayed alongside other flags or symbols, they shall occupy the place of honor. ARCFA regulates in detail the cases and occasions in which the coat of arms, flag, and anthem shall be used, and the cases and occasions in which they may be used.

Important statutory provisions in administrative law related to the use of national symbols are also contained in MC. This law determines, *inter alia*, that the Slovenian marine flag shall be the flag of the Republic of Slovenia and that it shall be the symbol of the ship's Slovenian nationality. It regulates that a foreign ship shall fly its national flag when in the territorial sea of the Republic of Slovenia, and the flag of the Republic of Slovenia when in internal waters. This code also provides provisions concerning nationality, identification and registration of ships, determining that the certificate of registry serves as evidence of the ship's Slovenian nationality and gives it the right and duty to fly the Slovenian marine flag.

On a basis of the statutory law, the minister responsible for transport and communications issued more detailed provisions on the use of the flag and signs on ships and other vessels of the merchant marine, and the minister responsible for defense introduced rules on the use of the coat of arms and flag in the armed forces. Following the statutory law, more detailed regulations were also issued by the government on the use of the European Union's flag and anthem and on hosting the flag of the Republic of Slovenia in educational institutions.

According to the criminal law provisions, anyone who has publicly desecrated the flag, coat of arms or national anthem of the Republic of Slovenia (or the flag, coat of arms, or national anthem of a foreign country) shall be punished by a fine or sentenced to imprisonment for not more than one year. The Slovenian national flag, the core national symbol which has not attained the status of a state symbol, does not seem to be covered by the paragraph 2 of Art. 163 of CC-1, as this provision refers exclusively to the flag, coat of arms and anthem of the Republic of Slovenia (i.e., to the state symbols). Nevertheless, the criminal law protection against the public desecration of the Slovenian national flag seems to be provided by the provision incriminating Assault, Slander and Defamation against the Republic of Slovenia and against the Slovenian people. A fine or imprisonment for not more than one year apply to both criminal offenses.

Relevant criminal law related to state and national as well as ethnic and religious symbols can also be found in CC-1's provisions on Public Incitement to Hatred, Violence or Intolerance. In short, if acts of public provoking or stirring up hatred,

violence or intolerance based on ethnicity or any other personal circumstances, are committed by desecrating ethnic, national or religious symbols, and these acts are committed in a manner that may endanger or disturb public order and peace, or by using threats or insults, the perpetrator shall be punished by imprisonment for up to two years. Similarly, if acts of public spreading of the ideas about the superiority of one race over another or giving any help in racist activities or denying, diminishing, approving, justifying or defending genocide, holocaust, crimes against humanity, war crimes, aggression or other crimes against humanity are committed by desecrating ethnic, national or religious symbols, the perpetrator shall be punishable by imprisonment for up to three years.

According to the Slovenian law on minor offenses, legal persons, their responsible persons and private citizens shall be fined for using the coat of arms, flag or a constituent part thereof, the flag of the Slovenian nation and the anthem in contravention of the provisions of the Constitution or ARCFA (i.e., as a trademark, model or pattern or for labeling goods or services). They shall be also fined for performing the anthem for purposes of market advertising or the labelling of services and for using state and national symbols which are damaged or unsuitable for use and for using them in contravention of public order or in such a manner that damages the reputation of the Republic of Slovenia. Also sanctioned with the Slovenian minor offense law is destruction of national symbols. If somebody in a public place intentionally burns or in some other manner damages or destroys a flag or a coat of arms of the Republic of Slovenia, a flag of the European Union or a flag of foreign country, the prescribed penalty is a fine. In our understanding, the minor offense law provisions are incomplete because they only protect the flag, the coat of arms and the anthem of the Republic of Slovenia, but do not protect the Slovenian national flag, at least not explicitly.

Our research has shown that the Slovenian Constitutional Court issued several decisions while reviewing the constitutionality of administrative law provisions on state and national symbols, but there are no judgements of courts of general jurisdiction in publicly available case law that would have been issued in relation to the abovementioned crimes. The only judicial act issued by a court of general jurisdiction that we came across is the judgement of the Supreme Court of the Republic of Slovenia which refers to the annulment of a conviction for a crime against public order by desecrating the flag of the former Socialist Republic of Slovenia half a century ago. This is somewhat surprising because in the aftermath of 1991 Slovenia witnessed several cases involving desecrating a flag that received a great deal of public and media attention.

One of such cases happened when a citizen burned the flag of the Republic of Slovenia on the Square of the Republic near the parliament. He explained to the public that gathered there that with his act he intended to raise awareness about corruption in the Slovenian government. He tried to convince the people who were present that he loves his country very much and respects the national symbols. The media reported that he was arrested by the police for violating public order and

because he allegedly committed a criminal offense, as stipulated by the Art. 174 of the then Penal Code¹⁵⁷ (PC-OCT1) which prescribed the same sentence as CC-1 for a perpetrator who publicly desecrates the flag, coat of arms or the anthem of the Republic of Slovenia (i.e., a fine or imprisonment of not more than one year). In 2002, a similar event happened in Ljubljana when a young man attached to the exterior fence of the US Embassy the American flag painted with swastika. He invited the media to witness the event and explained that he wanted to express his opposition to the politics of so-called “Bushism” as the American foreign policy reminded him of the period before the WW2 and of military aggressiveness of Adolf Hitler’s regime. Slovenian police started to seek the perpetrator and questioned the eyewitnesses of the event and the journalist who were present. The media quoted the police explaining that they were seeking the perpetrator for committing a criminal offense stipulated by Art. 174 of PC-OCT1. In the end, the perpetrator was neither charged nor convicted in this case.

According to Teršek, pursuing criminal charges in the latter case would be doubly irrational and even absurd. Firstly, Slovenian authorities would prosecute a citizen of Slovenia for committing an act which in the USA is not considered a criminal offense. Secondly, when the said citizen publicly hoisted a foreign flag, painted with swastika, with this act he did not intend to call for an establishment of a Nazi political system or to praise Nazi ideology, even less so to deny or justify Nazi crimes before and during the WW2.¹⁵⁸ One can agree with Teršek that if the perpetrator had done all that, he would have committed a criminal offense without a doubt, however, his intentions, the manner of committing the said act and the circumstances of the act itself testify that he cannot be charged with any relation to Nazism at all. Quite the contrary, as the perpetrator explained to the members of the public who were present at the time, his intent was not to insult or shame the United States of America and/or their national flag. According to his own words, he wanted to voice his opposition against Nazism and against aggressive American foreign policy.

Paraphrasing Teršek, the attitude of the state power toward the symbolic way of expression in the form of interference with the physical integrity of a state symbol is a touchstone of a democracy and legitimacy of its political and legal regime. In a democracy, the expression of opinions, beliefs, views or value judgments accepted by the state and society or a certain part of it as bold, shocking, radical, and non-conformist shall enjoy an effective constitutional and legal protection. Although certain acts of an expressive nature cannot enjoy the constitutional protection of freedom of expression, in a democratic state the protection given by the legal system to state symbols cannot isolate the state from criticizing its actions and policies. It seems, however, very unlikely that the citizens of a democratic state would express their disagreement with the actions and decisions of the state authorities in such a way,

157 The Penal Code (*Kazenski zakonik* [PC-OCT1]), Official Gazette of the Republic of Slovenia, no. 95/04.

158 Teršek, 2003.

i.e., (i.e., by drawing a swastika on its symbols). It is unlikely that in a state which not only rhetorically but factually strives to become democratic and free, its flag will burn in the fire. Rather, it will flutter in the wind.

In Slovenia, the autochthonous Italian and Hungarian national communities are constitutionally protected firstly as a whole and secondly, their individual members are also entitled to special constitutional protection. Besides general constitutional rights, national communities and their members are also entitled to special rights which belong only to them. The Constitution stipulates that Italian and Hungarian national communities have the right to preserve their national identity. In accordance with this, both communities have the right to use their national symbols. However, there are no other provisions in the Constitution, directly related to the symbols of national communities.

On a statutory level, the administrative law provisions of ARCFA stipulates how to use the flag and the anthem of both national communities on official occasions, if the Slovenian coat of arms and flag are positioned, put or hoisted together with the flags of the Italian and/or Hungarian national community (and with other flags and signs). In any case, on such occasions the flags of the national communities can be hoisted only together with the flag of the Republic of Slovenia and the place of honor belongs to the latter. The ARCFA also determines when and how the flags of the Italian and Hungarian communities shall be hoisted on the territories where both communities reside. Hoisting the flag of national communities in educational institutions are stipulated by the special regulations adopted by the government.

Relevant provisions in criminal law indirectly referring to protection of symbols of national minorities can be found in the provisions of CC-1 on Insult to Foreign Country or International Organization. These provisions incriminate public desecration of symbols of foreign states. Because symbols used by national communities are actually symbols of the Republic of Italy and the Republic of Hungary, these provisions also guarantee protection to the former. Further relevant criminal law can be found in article on Insult to the Slovenian People or National Communities, albeit these provisions protect the integrity of national communities in a general manner and do not explicitly refer to their symbols. Finally, in Art. 297 on public incitement of hatred, violence or intolerance on ethnic grounds, CC-1 stipulates, *inter alia*, that this criminal offense can be committed by desecrating ethnic or national symbols and that the perpetrator is punishable by imprisonment for up to three years.

Relevant provisions in minor offense law protecting symbols of the Italian and Hungarian national communities can be found in the Protection of Public Order act (PPOA-1), however, these provisions have some obvious deficiencies. They implicitly protect only the flag of the national communities, but not their other symbols. Moreover, if the interpretation provided by the authors of the commentary to PPOA-1 that the flags of national communities shall not be considered as flags of foreign states is accepted, flags of national communities would be guaranteed no protection with the law on minor offenses if such a flag was hoisted damaged or in some other way inappropriate.

Finally, where a criminal offense which is committed by publicly desecrating the flag, coat of arms or national anthem of a foreign country (i.e., of a national minority) and where the abovementioned minor offenses cause pecuniary or non-pecuniary damage to the national communities, in accordance with the conditions determined by the Obligations Code (OC), the basis for civil liability of the perpetrator is provided. A civil lawsuit could be filed by self-governing communities as legal persons which can be established by the members of national communities. Under the conditions stipulated by OC, a civil lawsuit could also be filed by any member of the Italian or the Hungarian national community.

In the only court decision related to the legal protection of symbols of national communities, the Slovenian Constitutional Court reviewed the constitutionality of several provisions of ARCFA. The Constitutional Court answered the question whether the Constitution allows the symbols of national communities to be identical to the symbols of another state and whether national communities are allowed to use such symbols in the Republic of Slovenia. The constitutional judges ruled that national communities and their members have the right to use symbols formed in the history of the Italian and Hungarian nations, regardless of their possible identity with the official state symbols of the Italian and Hungarian state.

In the Slovenian legal system, the legal protection of (the use of) religious symbols derives from the constitutional provisions on the separation of state and religious communities, freedom and equality of religious communities, and the individual's right to freely profess religious and other beliefs in private and public life. On a statutory level, in administrative law, the use and legal protection of symbols of religious communities is covered by the provisions of RFA. While not explicitly stipulated in RFA, the fact that the positive aspect of religious freedom includes, *inter alia*, freedom of action in the form of using/wearing religious symbols in public was clarified by the Constitutional Court.

According to the Slovenian criminal law, desecrating religious symbols is considered criminal act only if it is aimed at public provocation or stirring up hatred, violence or intolerance based on religion and religious and other beliefs, and if the act is committed in a manner that may endanger or disturb public order and peace, or by using threats or insults.

Relevant provisions in minor offense law protecting symbols of religious communities can be found in the provisions on vandalism in PPOA-1. Interestingly, PPOA-1 explicitly sanctions the offense of destruction of state symbols, but not the offense of destruction of symbols of religious (and other) communities.

In civil law, provisions which are relevant for the protection of symbols of religious communities can be found in articles related to torts. If certain crimes or minor offenses are committed by desecrating religious symbols and such an act causes pecuniary or non-pecuniary damage to the religious communities or their members, in accordance with the conditions determined by OC, the basis for civil liability of the perpetrator is provided. A person who would commit a specific crime or minor offense by desecrating religious symbols, could also encroach upon the reputation

of the religious community and would be obliged to reimburse immaterial damage caused. A civil action could also be filed under the conditions set by OC by a member of a religious community (or several members of a religious community together) who would be a victim of such offense.

Finally, it is worth emphasizing that in Slovenia, the Constitution and other general legal acts do not give an explicit answer to the question of whether the fundamental right to freely profess religious and other beliefs in private and public life allows an individual to carry religious symbols in public and whether the state can prohibit him or her from carrying religious symbols in a public place or in the workplace. These questions were answered by the Constitutional Court. Also addressed by the Constitutional Court was the question of whether a confessional religious teaching can be performed in public educational institutions and whether crosses or other religious symbols can be displayed in public schools. In this regard, the Constitutional Court's case law shows that in Slovenia the principle of separation of state and religious communities is exercised relatively strictly.

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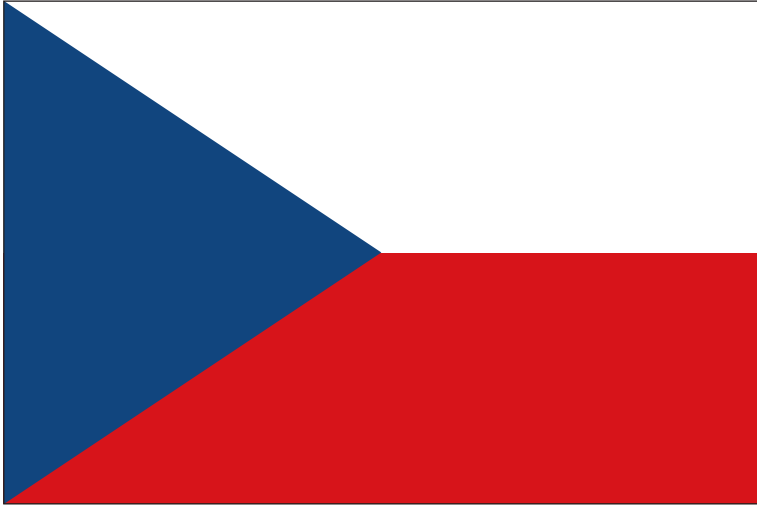
APPENDIX



Flag of the Republic of Croatia



Coat of arms of the Republic of Croatia



State flag of the Czech Republic



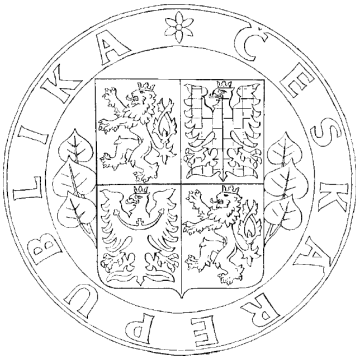
State colours of the Czech Republic



Large state coat of arms of the Czech Republic



Small state coat of arms of the Czech Republic



State seal of the Czech Republic



Flag of the President of the Czech Republic



Flag of Hungary



Coat of arms of Hungary



Flag of the Republic of Poland



Coat of arms of the Republic of Poland



State flag of the Republic of Serbia



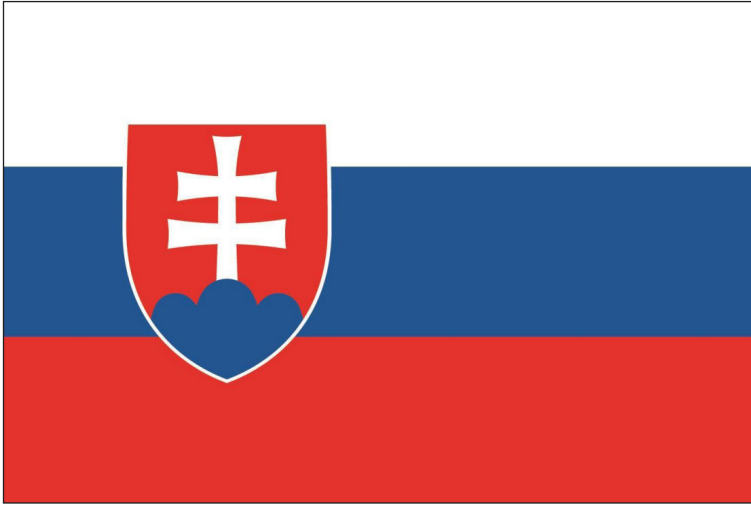
National flag of the Republic of Serbia



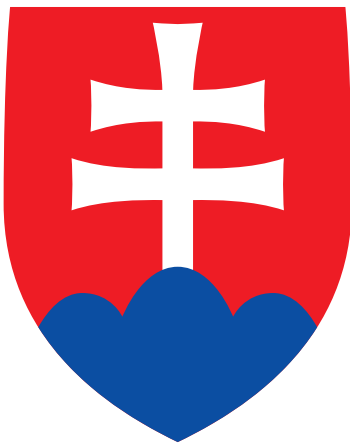
Large coat of arms of the Republic of Serbia



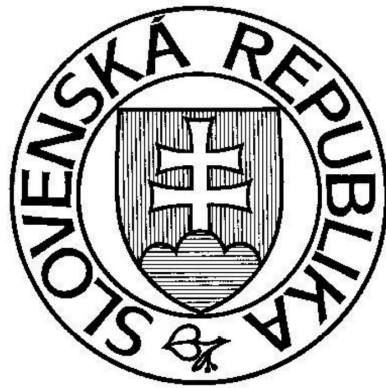
Small coat of arms of the Republic of Serbia



State flag of the Slovak Republic



Coat of arms of the Slovak Republic



State seal of the Slovak Republic



Flag of the Republic of Slovenia



Flag of the Slovenian Nation



Coat of Arms of the Republic of Slovenia

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