

## CHAPTER VIII

# LEGAL PROTECTION OF STATE, NATIONAL AND COMMUNITY SYMBOLS IN SLOVENIA



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### 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.<sup>1</sup> 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.

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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.<sup>2</sup>

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.<sup>3</sup>

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,<sup>4</sup> 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.*<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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 amendment<sup>11</sup> to the 1974 Constitution of the Republic of Slovenia,<sup>12</sup> 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).<sup>13</sup> The amendment also stipulated that the use of the flag and the coat of arms shall be determined by the statutory law.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup>

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 Constitution<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> “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,<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

### *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 Nation<sup>24</sup> (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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

Another relevant statutory act is the Maritime Code (MC).<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

#### *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,<sup>40</sup> 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 Institutions<sup>41</sup> 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 Defense<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> 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 Slovenia<sup>46</sup> 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 Code<sup>47</sup> (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.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup> 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?<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup>

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.<sup>57</sup>

Relevant provisions can also be found in the Protection of Public Order Act<sup>58</sup> (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,

<sup>56</sup> ARCFA, Art. 26.

<sup>57</sup> ARCFA, Art. 27.

<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.

<sup>59</sup> PPOA-1, Art. 11a, paras. 1, 2.

<sup>60</sup> 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.<sup>61</sup>

#### 2.3.2.4. Relevant provisions in civil law

The Obligations Code<sup>62</sup> (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.<sup>63</sup> 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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup>

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,<sup>67</sup> 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 Party<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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 129/97<sup>71</sup> 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.<sup>72</sup>

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.<sup>73</sup> 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.<sup>74</sup> 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

<sup>72</sup> See Mamić, 2010.

<sup>73</sup> Letnar Črnič, 2010.

<sup>74</sup> 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.”<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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 2002<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

In General Provisions, the Constitution stipulates that the state protects and guarantees the rights of autochthonous Italian and Hungarian national communities on their territories.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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:<sup>89</sup>

- 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).<sup>90</sup> 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.<sup>91</sup> 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).<sup>92</sup> They are also represented in representative bodies on municipal levels (i.e., in city councils).<sup>93</sup> 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.<sup>94</sup>

The Act on Self-Governing National Communities<sup>95</sup> (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 municipalities<sup>96</sup> 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.<sup>97</sup>

The Slovenian legislator also adopted the Act Regulating Special Rights of Members of the Italian and Hungarian National Communities in Education.<sup>98</sup> 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 Act<sup>99</sup> (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.<sup>100</sup>

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.<sup>101</sup> 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.<sup>102</sup>

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.<sup>103</sup>

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.

<sup>102</sup> Such regulation is in power in Hodoš and Dobrovnik. Šturm et al., 2010, p. 629.

<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> On their ethnic territories, the anthem of the national community shall be performed at ceremonial events in addition to the Slovenian anthem.<sup>107</sup>

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.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup> 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

<sup>111</sup> See Jarc and Nunič, 2007, p. 61.

<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup> 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.<sup>116</sup>

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-296/94<sup>117</sup> 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 Party<sup>118</sup> 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.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup> 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).<sup>122</sup> 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.<sup>123</sup>

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."<sup>124</sup>

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.<sup>125</sup>

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.<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup>

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).<sup>131</sup>

At the statutory level, the status of religious communities was initially regulated by the Legal Status of Religious Communities in the Republic of Slovenia Act<sup>132</sup> (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 Act<sup>133</sup> (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.<sup>134</sup>

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.<sup>135</sup> 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 communities<sup>136</sup>, and on the right to freely profess religious and other beliefs in private and public life. In decision no. U-I-68/98<sup>137</sup>, 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.<sup>138</sup> 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,<sup>139</sup> 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.<sup>140</sup>

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.<sup>141</sup>

### *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

<sup>140</sup> U-I-92/07.

<sup>141</sup> 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.<sup>142</sup> While religious freedom in private and public life is inviolable, the state ensures its smooth exercise.<sup>143</sup> 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.<sup>144</sup> 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

<sup>142</sup> RFA, Art. 2, para. 2.

<sup>143</sup> RFA, Art. 2, paras. 1, 5.

<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup>

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.”<sup>150</sup>

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### *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.<sup>151</sup> 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*<sup>152</sup>. 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.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup> 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.

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## 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.

<sup>156</sup> 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 ARCA (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 Code<sup>157</sup> (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.<sup>158</sup> 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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