

Radosław Zych¹

The scope of standardization of the protection of national colors in the Polish law, the Italian law and the Community legislation

Keywords: history, national colors, Polish law, Italian law, European law

Słowa kluczowe: historia, barwy narodowe, prawo polskie, prawo włoskie, prawo europejskie

Summary

In the face of the European integration, the legal protection of national symbols enjoys momentous significance. The present turbulent times and numerous conflicts, the etiology of which is – e.g. social or political in nature – require an attempt to make a scientific overview of the situation. In this article I will examine the scope of standardization of the protection of national colors in the Polish law, the Italian law and the Community legislation. The study takes into account the historical and contemporary judicial decisions. I will try to answer the question whether the scope of protection of the Community colors in the Polish law is sufficient?

The analysis of the examined normative acts has led me to the conclusion that the Polish legislator, after the restoration of independent statehood, attached a great importance to the normative grounds ensuring protection of colors of the national symbols. The Italian constitutional adjustment, compared to the Polish one in the scope of the national colors, is very sparse. Aside from the Community rules, each member state – as a result of historical development – has developed its own model of protection. The colors of the European Union are not expressly protected under the Polish normative regulations.

¹ The Author is a PhD of Law in the Department of Roman Law, the History of Law and Political and Legal Doctrines of the Faculty of Law and Administration of the University of Szczecin. E-mail: radzy84@o2.pl.

However, *de lege ferenda*, I reckon that for the interests of legal certainty, the legal status in this field should be amended and relevant norms should be laid down.

Streszczenie

Zakres standaryzacji ochrony barw narodowych w prawie polskim, prawie włoskim i prawodawstwie wspólnotowym

W obliczu integracji europejskiej, doniosłego znaczenia nabiera prawna ochrona symboli narodowych. Współczesne czasy nie są spokojne. Liczne konflikty, których etiologia ma charakter społeczny, polityczny, nakazują próbę dokonania scjentystycznego oglądu sytuacji. W niniejszym artykule zbadam zakres normowania ochrony barw narodowych w prawie polskim i włoskim oraz wspólnotowym. W badaniach uwzględnię historyczne i współczesne orzecznictwo sądowe. Spróbuję udzielić odpowiedzi na pytanie o to, czy na gruncie prawa polskiego zakres ochrony barw wspólnotowych jest wystarczający?

Analiza zbadanych aktów normatywnych doprowadziła mnie do wniosku o tym, że polski prawodawca po odzyskaniu niepodległego bytu państwowego przywiązywał dużą wagę do normatywnych podstaw mających zapewnić ochronę barwom jako symbolom narodowym. Włoska regulacja konstytucyjna, w porównaniu do polskiej, w zakresie barw narodowych jest bardzo skąpa. Pomimo regulacji wspólnotowej, każde z państw członkowskich – na skutek rozwoju historycznego – wykształciło własny model tej ochrony. Barwy Unii Europejskiej nie są *expressis verbis* chronione na gruncie polskich regulacji normatywnych. Moim zdaniem, *de lege ferenda*, dla pewności obrotu prawnego, należałoby stan prawny w tym zakresie zmienić i stosowne normy subrogować.

✱

I. Introduction

In the face of the European integration, the legal protection of national symbols enjoys momentous significance. The present turbulent times and numerous conflicts, the etiology of which is – e.g. social or political in nature – require an attempt to make a scientific overview of the situation. In this article I will examine the scope of standardization of the protection of national colors in the Polish law, the Italian law and the Community legislation. The study takes into account the historical and contemporary judicial decisions. I will

try to answer the question whether the scope of protection of the Community colors in the Polish law is sufficient?

II. Law of Poland

A characteristic feature of the history of law is that it is trying to discover the correctness of the development of legal regulations over time².

The emergence of the nation state in the contemporary meaning of the word has resulted in the creation of new legal disciplines as for example the constitutional law, which are closed by the borders³. The issue of the legal regulation in question constituted the subject of a number of recently published articles⁴.

During the occupation, efforts were undertaken to restore the Polish statehood. In maintaining the national identity an invaluable merit is attributed to science and culture⁵. Colors represent historical expression of nationality. In

² „The past of each nation remains in close connection with the present moment. It is the master who leads me wisely”. W.A. Maciejowski, *Historia prawodawstw*, p. III. See: J. Kordębski, *Wacław Aleksander Maciejewski jako romanista*, „Czasopismo Prawno-Historyczne” 1974, XXVI, vol. 1, p. 222, note no. 160.

³ H. Kupiszewski, *Prawo rzymskie a współczesność*, Warszawa 1988, p. 15.

⁴ For example, see: A.M. Kosińska, *Ochrona prawna hymnu narodowego jako elementu dziedzictwa narodowego – jej charakter i funkcje*, „Przegląd Prawa Konstytucyjnego” 2014, no. 5, p. 109 and the following. In this article, the author focuses on examining one of the symbols – the anthem. Conscious use of state symbols shapes the collective memory of the society. That feature was put forward by M.M. Wiszowaty, who emphasizes that: „the national symbols perform functions related to the identity of the State”. See: M.M. Wiszowaty, *Symbole państwowe III Rzeczypospolitej*, „Państwo i Prawo” 2011, vol. 7–8, p. 31. In another article, the author focused on the examination of local heraldry, not national colors. See: *Idem*, *Na straży heraldycznej poprawności. Organy władzy i organy doradczo-opiniotwórcze właściwe w sprawach heraldyki samorządowej w Polsce na tle innych krajów europejskich*, [in:] *Prawo naszych sąsiadów. T. I: Konstytucyjne podstawy budowania i rozwoju społeczeństwa obywatelskiego w Polsce i na Ukrainie – dobre praktyki*, ed. W. Skrzydło, W. Szapował, K. Erkhardt, P. Steciuk, Przemysł-Rzeszów 2013, p. 325 n. According to R. Grabowski: „the colors are treated as both state and national symbols”. The author made historical findings, but on a limited basis, without reference to judicial decisions. See: R. Grabowski, *Polskie symbole narodowe i państwowe. Geneza, ewolucja, stan prawny*, „Przegląd Prawa i Administracji” 2011, LXXXVII, p. 41 n.

⁵ A. Szczerba, *Nie tylko szabłą... Rola archeologii w utrzymaniu tożsamości narodowej Polaków w okresie zaborów*, [in:] *W walce o wolność i niepodległość Polski*, ed. D. Litwin-Lewandowska and K. Bałękowski, Lublin 2016, p. 22.

the years 1010–1921 the threat of being a newly formed independent Polish state became evident⁶. Therefore, it does not surprise that one of the first regulatory periods was concerned with the issue of national colors⁷. A normative adjustment related to colors was developed (Article 1 (3)). The Act sanctioned conduct that was against the reverence for using national colors. Pursuant to Article 2: „The use, by non-state institutions and individuals, without a specific authorization from the Ministry of Internal Affairs, of emblems, flags and a flag in the form prescribed by this Act, as well as a seal with an eagle and any use of state emblems and colors in a manner disrespecting the dignity of the Republic of Poland, is prohibited and is subject to judicial monetary penalty from 10 to 10 000 marks, or arrest for the period from three days to six months, or to cumulative penalties, unless other laws provide for heavier penalties”.

The March Constitution⁸ did not regulate the issue of the national colors; however, under Article 44 (6) (which provided that: „the Act may authorize the President of the Republic to issue regulations with the force of the Act, at the time and to the extent specified by this Act, with the exception of changing the Constitution”) and The Act⁹ of 1926, a Regulation was issued in 1927¹⁰. It repealed the Act of 1 August 1919 on the emblems and colors of the Republic of Poland. The Regulation of 1927 contained one criminal law standard, namely under Article 16: „who unlawfully uses the national emblem, badges of state authority, local government or public law corporation;

⁶ J. Kodrębski, *Wizja państwa w myśli politycznej ludowców lat międzywojennych*, [in:] *Chłopi a państwo. Materiały z konferencji naukowej (12–13 czerwiec 1995 r.)*, ed. J. Janc, Łódź 1996, p. 49.

⁷ The Act of 1 August 1919 on the emblems and colors of The Republic of Poland (J.L. of 1919 No. 69, item 416).

⁸ The Act of 17 March 1921- The Constitution of The Republic of Poland (J.L. of 1921 No. 44, item 267).

⁹ The Act of 2 August 1926 on authorizing the President to issue regulations with the force of law (J.L. of 1926 No. 78, item 443). Pursuant to Article 1: „President of the Republic of Poland shall be authorized to issue regulations with the force of law within the scope of laws which are in force with the Constitution and the enforcement of its provisions, providing for the adoption of separate laws, reorganization and simplification of the State administration, and ordering legal status of the State”.

¹⁰ Regulation of the President of The Republic of Poland of 13 December 1927 on the Regulation of the President of The Republic of Poland of 13 December 1927 on the emblems and colors of the State and the badges and seals (Uniform text: J.L. of 1939 No. 2, item 8).

a flag of a commercial marine vessel, the Polish postage stamp and a flag of state non-military vessels, is subject to an administrative penalty of detention for three months and a fine of PLN 3 000,00, or one of these penalties”.

Despite the existence of one criminal law standard stipulated by the regulations of 1927, the Criminal Code¹¹ of 1932, in its Article 153, stated as follows: „whoever insults an emblem, a banner, a flag or any other badge or symbol of the Polish state, or a symbol exposed to the public – by damaging or removing, is subject to penalty of 2-year imprisonment or detention for the period of up to 2 years”¹².

¹¹ Regulation of the President of The Republic of Poland of 11 July 1932 – the Penal Code (J.L. of 1932 No. 60, item 571).

¹² On the basis of this standard, The Supreme Court, in its judgment of 6 March 1934, case file no. II K 115/34, ruled that: „paper flags, used to decorate the premises or used in marches organized for various purposes do not fall under the category of the emblems of the Republic of Poland within the meaning of Article 153 c.c., but under the category of symbols that could make an impression of flags listed in Article 22 of the Regulation of the President of The Republic of Poland dated 13 December 1927.” In contrast, The Supreme Court of 20 December 1934 r, case file no. III K 1573/34, stated that: „banner is one of the national symbols provided in Article 22 of the Regulation of the President of The Republic of Poland of 13 December 1927 – J.L. item. 980 (in the wording of the Regulation of the President of The Republic of Poland of 24 November 1930, item 629 and The Act of 14 March 1933, item 246) and in Article 153 c.c. The question of using the flag not by the authority but by a private person is neutral in application of Article 153 c.c.” The Court held that the offense of Article 153 c.c., which provides for imprisonment of up to 2 years or detention for up to 2 years, is threatened with heavier punishment than the offense under Article 22 of the Regulation of the President of The Republic of Poland of 13 December 1927 item 980, which provides for imprisonment from 1 month to 2 years or arrest for 6 weeks. However, bearing in mind that in the contested judgment the court applied an incorrect classification of the offense, but inflicted punishment which the court could inflict on the basis of the relevant Act, there is no need to repeal the judgment under appeal but to improve the incorrect classification of the offense. (Article 518 c.c.: „if, in the judgment under appeal, the court applied an incorrect classification of the offense, but ordered the punishment the court could inflict on the basis of the relevant Act, the Supreme Court shall either repeal the contested judgment in whole or in part, or only change the incorrect classification of the offense”. The Regulation of the President of The Republic of Poland of 19 March 1928 – the Code of Criminal Procedure (uniform text: J.L. of 1932 No. 83, item 725). The question of using the flag not by the authority but by a private person is neutral in the application of Article 153 c.c., which, unlike Article 19 of The Law on Misdemeanors („who intentionally damages or removes an announcement issued by the public authority, government agency or local government, or otherwise prevents familiarization with this announcement, is subject to arrest for a month or a fine of PLN 1.500.” The Regulation of the President of The Republic of Poland of 11 July 1932 – Law on Misdemeanors (J.L. of

The Constitutional Act¹³ of 1935 did not regulate the issue pertaining to national colors.

The original text of the Constitution of the Polish People's Republic¹⁴ with respect to the colors contained a modest adjustment introduced into one article. Pursuant to Article 89 (1), „the emblem of the Polish People's Republic is a white eagle on a red background”. Pursuant to § 2: „the colors of the Polish People's Republic are white and red”¹⁵. On the other hand, § 3 stated that „the details shall be laid down by the Act”.

In the changed – legal and political – conditions, normative basis pertaining to the issue of colors was included solely in the State Council's Decree¹⁶ of 1955. It repealed The Act of 13 December 1927 on the emblems, colors, badges and seals of the state. The decree expired under Article 18 of The Act¹⁷ of

1932 No. 60, item 372)), which provides for the issuance of public notices by the authorities and offices, does not specify by whom the banner is to be publicly exposed to be interpreted as crime under Article 153 c.c.” In its judgment of 26 June 1937, case file no. II K 511/37, The Supreme Court ruled that: „Article 153 c.c. refers to criminal activities the subject of which are Polish state symbols. The findings of fact made by the Court prove that the public insult referred to the eagle of the national emblem and the colors of the Polish flag which were publicly used by the municipality of Gostyń. It makes almost no difference whether the length and width of the banner and image of an eagle of the State fully and strictly corresponded with the provisions of the Regulation of the President of The Republic of Poland of 13 December 1927 (item 980) in the wording of the Regulation of the President of The Republic of Poland of 24 November 1930 (item 629 – Regulation of the President of The Republic of Poland of 24 November 1930 amending the Regulation of the President of The Republic of Poland of 13 December 1927 on the emblems and colors of the State and the symbols and seals (J.L. of 1930 No. 80, item 629) which amended Article 5 of The Act of 1927, clarifying it and stating that: „The authorities, offices and institutions abroad use a state flag with the state's coat of arms in the middle of a white band. The height of the state's coat of arms with regard to the width of the flag is 2:5”) and the Act of 14 March 1933 (The Act of 14 March 1933 amending The Regulation of the President of The Republic of Poland of 13 December 1927 on the emblems and colors of the State and the symbols and seals (J.L. of 1933 No. 29, item 246).

¹³ The Constitutional Act of 23 April 1935 (J.L. of 1935 No. 30, item 227).

¹⁴ The Constitution of The Republic of Poland of 22 July 1952 (J.L. of 1952 No. 33, item 232).

¹⁵ See: J. Wiszewski, *Zarys encyklopedii prawa*, Warszawa 1962, p. 277.

¹⁶ Decree of the State Council of 7 December 1955 on the emblem and colors of the Polish People's Republic and State seals (J.L. of 1955 No. 47, item 314).

¹⁷ The Act of 31 January 1980 on the emblem, colors and the anthem of The Polish People's Republic (J.L. of 1980 No. 7, item. 18).

1980. In its original version, the Act contained the following introduction: „shaped and preserved for generations – the symbols of the Nation and of the Polish State – a white eagle, white-red colors (...) have always expressed the Poles’ love for their homeland and the desire for national unity, independence and integrity of the State, care for the welfare and development of Poland, and the desire to provide the Nation with a worthy place among other nations and states. The emblem, the colors and the national anthem used to unite and unite all Poles at home and abroad. These are permanent indications of identity, honor, pride and dignity of the Nation. In the Polish People’s Republic, those symbols were given utmost reverence and respect, and constituted an embodiment of the continuation of the history of the Polish socialist system and the readiness of the Polish People’s homeland to serve and sacrifice all of its forces”. However, in the operative part of Act, extensive regulations referring to the colors were introduced.

An example of a special legal protection of the communist symbols of Article 1(3) of the Decree of 1955 was the Criminal Code¹⁸ of 1969. Pursuant to Article 284 (1), „whoever insults, damages or removes a publicly displayed emblem, banner, flag or another badge of the state or of an allied state or the symbol of the international workers’ movement, is subject to a penalty of imprisonment of up to 3 years”. The Party to the crime was rich because a banner and a flag are synonyms and refer to particular military formations, representing a set of colors in a particular individual configuration. The difficulty of enumerative listing resulted in reference therein to the internal statutory analogy (“another symbol”¹⁹). It should be emphasized that under the Criminal Code of 1969²⁰ an insult, damage or removal of banners, flags or a flag of a foreign state, exposed publicly by its representative or upon the order of the Polish state body were penalized. However, the constituent element of that crime was not the banner²¹. The conclusion that should be drawn is that solely the national standard was covered with legal and criminal protection under

¹⁸ The Act of 19 April 1969 – The Penal Code (J.L. No. 13, item 94 as amended).

¹⁹ J. Śliwowski, *Prawo karne*, Warszawa 1975, p. 567.

²⁰ Article 285 c.c. of 1969.

²¹ J. Śliwowski, *op.cit.*, p. 568.

Article 284 of the Criminal Code. These crimes have been grouped in the section protecting the legal order. Their category was wide and, therefore, the view that „legal order did not precisely specify the generic object of legal protection”²² was expressed.

²² A. Gubiński, *Zasady prawa karnego*, Warszawa 1974, p. 212. The Supreme Court, in its judgment of 26 November 1985, case file no. Rw 1060/85, ruled that: „the act of removing the flag (Article 284 (1) c.c.) may in certain cases also constitute a ‘crime of destruction or willful damage to property or rendering it unusable’ (Article 212 (1) c.c.: „Who destroys, damages or renders unusable social possessions or property of others, is subject to punishment of imprisonment of up to 5 years”), as stated in Article 59a (2) c.c. („The Court may order interest in the amount of PLN from 25 to 2,500 to the victim or to the Polish Red Cross or for any other social purpose specified by the court – in the event of conviction for an intentional criminal offence referred to in paragraph 1, or an intentional crime of destruction or damage to property or rendering it unsuitable for use”). The Court further concluded that the hooligan (pursuant to Article 59 (1) c.c., „a hooligan character of misdemeanor is considered by the court as a factor affecting the tightening of the penalty”) nature of the act of the accused was related to the issue of compensatory damages, which, for some unknown reasons, the court of the first instance ruled pursuant to Article 59a (2) c.c. instead of Article 59 (3) c.c. It is clear that the act of removing a flag (Article 284 (1) c.c.) may in certain cases also constitute a „crime of destruction or willful damage to property or rendering it unusable” (Article 212 (1) c.c.), under Article 59a (2) c.c. However, if the court does not determine it straight away and does not establish the legal classification of the act (Article 10 (2) c.c.: „if the act has features specified in two or more provisions of penal law, the court sentenced for one offense on the basis of all concurrent provisions”) it may not rule compensatory damages. However, pursuant to Article 59a (2) c.c., in this specific case, the court of the first instance did not acknowledge that the act of the accused relying on taking the flag off the pole, tearing the material, abandoning it on the sidewalk and taking the flagpole, constitutes a deliberate crime of destruction or damage to property or rendering the property unfit for use, and did not qualify the act of Article 212 (1) c.c. And rightly so, as there existed no grounds for assuming that the damage exceeded PLN 5000 (compare Article 124 (1) of The Act of 20 May 1971 – The Code of Petty Offenses (Uniform text: J.L. of 2015, item 1094). In accordance with legal standard: „Who destroys, damages or renders unusable another person’s property and the damage does not exceed ¼ of the minimum wage, is subject to arrest, restriction of liberty or a fine”. It was an offense which arose from the reclassification of certain minor offenses. See: A. Marek, *Prawo wykroczeń w zarysie*, Warszawa 1975, p. 83) in connection with Article 6 (3) of The Act of 10 May 1985 amending certain provisions of criminal law and the law on offences (J.L. No 23, item 100). Ordering the compensatory damages pursuant to Article 59a (2) c.c. must be viewed as misunderstanding. The compensatory damages should have been ordered under Article 59 (3) c.c. due to the rowdy nature of the act. And therefore, in connection with the revision of the error of the court of first instance – subject to appropriate change”.

The Preamble²³ to the Constitution of The Republic of Poland of 2 April 1997²⁴ provides that: „grateful (as a nation we are – annotation R.Z.) to our

²³ Plato in „The Rights” wrote about the preambles that provide necessary explanation and justification of rights. Therefore, the leading role of the preamble is persuasion and the indication of reasons for which the act being preceded by a preamble is important and must be observed. It is not only instruction for the subjects of power how to interpret and apply the constitution, but also – and perhaps primarily – a sentence reflecting the sense of political and social norms, indicating their purpose and source, in order not only to enforce the subordination of the constitution, but also the need for conviction of its rightness and virtue, which is constituted by an internal relationship, a sense of responsibility and the common good made by the subordination of these laws. See: A. Młynarska-Sobaczewska, *Normatywizacja pamięci zbiorowej w preambułach do konstytucji państw postkomunistycznych*, „Przegląd Prawa Konstytucyjnego” 2014, no. 2, pp. 241–242. The preamble indicates the historical and cultural context of its creation, the objectives of the rules and constitutional principles that are foundation and source of interpretation of the Constitution. See: L. Garlicki, *Komentarz do preambuły*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. V, ed. L. Garlicki, Warszawa 2007, p. 9. In constitutional law two opposing stances towards the normativity of introduction to the Constitution are distinguished. One disavows preamble *in extensor*, denying it any legal significance as it is not articulated. While the other is in favor of a total jurisdiction of the introduction. There is also an indirect view – the legal significance of particular entry must settle its analysis of various statements. See: J. Galster, *Propedeutyka wiedzy o konstytucji*, [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2013, p. 60. It is worth nothing that the preamble is sometimes referred to as „arenga”. The word (*arenga, arengae*) comes from Latin and means a first part of the document containing the general maxims of a moral nature, in connection with the content of the document. See: J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2001, p. 77. The introductions form the basis for the formulation of functional interpretation of directives, which indirectly affect the content of the reconstituted standard laws articulated in the parts of a legislative act. See: A. Choduń, M. Zieliński, *Interpretacyjna rola wstępów aktów prawnych*, [in:] *Wokół konstytucji i zdrowego rozsądku. Prace dedykowane Profesorowi Tadeuszowi Smolińskiemu*, eds. J. Ciapała, A. Rost, Szczecin 2011, pp. 17–18. The Constitutional Tribunal dealt with the issue of the role of introduction to the normative act aiming at determine the values of the legal system. See: J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000, p. 19. According to Hanna Suchocka, „although the values included in the text of the preamble may give the impression of an eclectic set, they increase in value with time”. See: H. Suchocka, *Jaka konstytucja dla rozszerzającej się Europy*, [in:] *Konstytucja dla rozszerzającej się Europy*, ed. E. Popławska, Warszawa 2000, p. 28. According to Andrzej Bałaban, „the legal nature of the introduction to the Constitution should not raise legal objections”. See: A. Bałaban, *Prawny charakter wstępu do polskiej Konstytucji z 2 kwietnia 1997 roku*, [in:] *W kręgu zagadnień konstytucyjnych. Profesorowi Eugeniuszowi Zwierzchowskiemu w darze*, ed. M. Kudej, Katowice 1999, p. 118. There are also critical voices formulated in the present wording of the preamble. According to P. Winczorek, „the preamble corresponds to the proper text of legal act, which is axiologically chaotic and heterogeneous; it is not subordinated to any clear system of values”. See: P. Winczorek, *Dyskusje konstytucyjne*, Warszawa 1996, p. 78; P. Bała, *Invocatio Dei w Konstytucji RP z 2 kwietnia 1997 r. w perspektywie porównawczej i historycznej*, „Studia Erasmiiana Wratislaviensia” 2011, vol. 5, p. 331.

²⁴ J.L. of 1997 No. 78, item 483 as amended.

ancestors for their labor, and their struggle for independence achieved at great sacrifice”.

Pursuant to Article 28 (2) of the Constitution, the colors of the Republic of Poland are red and white²⁵. Probably, red can be considered as a reference to the “struggle for independence achieved at great sacrifice”²⁶.

A reference to the red color also occurs in the description of the emblem of the state. The Constitution stipulates that the emblem of the Republic of Poland is an image of a crowned white eagle on a red background²⁷. The legislator pays particular attention to national colors. The emblem, colors and the national anthem are subject to legal protection²⁸. Details concerning the emblem, colors and the anthem are determined by the Act²⁹.

Clarification of legal protection is reflected in the normative Act on the emblem, colors and the anthem of the Republic of Poland³⁰. It indicates *expressis verbis* that: “white eagle, red and white colors are the symbols of the Republic of Poland”³¹, “the colors of the Republic of Poland are white and red, arranged in two parallel horizontal stripes of the same width, the upper of which is white and the lower is red”³², “when placing the colors of the Republic of Polish in a vertical layout, the white color is placed on the left side of the plane

²⁵ In December 1994, during the works of the Constitutional Commission, a preliminary catalog of the rules was supplemented by further elements – not included in other parts of the proposed constitution – on the capital city and state symbols. See: P. Winczorek, *Dyskusja nad podstawowymi zasadami ustroju RP w Komisji Konstytucyjnej Zgromadzenia Narodowego (Dziesięć pierwszych artykułów projektu Konstytucji RP)*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1995, vol. 2, p. 14.

The proposals contained in the preliminary catalogue of the rules aroused interest in diverse discussions. Some of them (on the capital city of the state and its symbols) turned out to be essentially undisputed. At most, in the course of a short statement exchange, it clarified the wording of relevant provisions. *Ibidem*, p. 16.

²⁶ See: K. Działocha, L. Garlicki, P. Sarnecki, W. Sokolewicz, J. Trzciński, *Komentarz do art. 28, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. IV, ed. L. Garlicki, Warszawa 2003, p. 2.

²⁷ Article 28 (1) of the Constitution.

²⁸ Article 28 (4) of the Constitution.

²⁹ Article 28 (5) of the Constitution.

³⁰ The Act of 31 January 1980 on the coat of arms, colors and the anthem of The Republic of Poland (Uniform text: J.L. of 2016, item 625).

³¹ Article 1 (1).

³² Article 4 (1).

viewed from the front”³³, “the pattern of the colors of the Republic of Poland is specified in the appendix no. 2”³⁴, “the colors of the Republic of Poland are the components of the Polish national flag”³⁵, “everyone has the right to use the colors of the Republic of Poland, in particular to emphasize the importance of celebrations, holidays or other events, including Article 1 (2)”³⁶, “the national flag of the Republic of Poland is a rectangular piece of fabric with the colors of the Republic of Poland, placed on a mast”³⁷, „the emblem and colors of the Republic of Poland are placed, and the Polish national anthem is performed or played in a way that ensures their due honor and respect”³⁸, “it is allowed to place, on the objects intended for trade, an emblem or colors of the Republic of Poland in a stylized form or artistically processed”³⁹.

Showing reverence and respect for national symbols is the right and duty of every citizen of the Republic of Poland and all the state bodies, institutions and organizations⁴⁰.

The protection of national colors finds its normative expression in The Act of 6 June 1997 – the Criminal Code⁴¹. Article 137 (1) and (2) of the Criminal Code classifies the crime of public insult, destruction, damage or removal of the emblem, banner, flags or other symbols of the state, either Polish or of other countries. The perpetrator is subject to a fine, the penalty of restriction of liberty or imprisonment for a year. Insult should be understood as a deliberate action, aimed at expressing a slight on symbols of the Polish state (e.g. tearing off and trampling, verbal ridicule, and express contempt), while the destruction or damage is a violation of the substance of these symbols (tearing off, tearing⁴²).

³³ Article 4 (2).

³⁴ Article 4 (3).

³⁵ Article 5 (1).

³⁶ Article 5 (2).

³⁷ Article 6 (1).

³⁸ Article 15.

³⁹ Article 16 (2). See: Judgment of The Provincial Administrative Court in Warsaw of 6 March 2009, case file no. VI SA/Wa 2376/08.

⁴⁰ Pursuant to Article 1 (2) of The Act of the coat of arms, colors and the anthem of The Republic of Poland.

⁴¹ Uniform text: J.L. of 2016, item 1137.

⁴² *Ratio legis* of regulation resulting from these standards is a penalization of conduct expressing a negative value of the perpetrators with respect to state symbols. See: A. Marek, *Kodeks karny. Komentarz*, Warszawa 2007, p. 299.

The requirement of a public nature of the impact of a researched offense was confirmed in the judgment of the Court of Appeal in Cracow dated 30 September 2008, in which the court held that the removal by the perpetrator – in the middle of the night – of a national flag hung out on a building at the market square, so in a public place, and placing it on a tree limb constituted a crime under Article 137 (1) of the Criminal Code. The Court expressed the view that the lack of a flag in the right place on national holidays could be – during the event, as well as in the later period -noticed by an unlimited number of people⁴³.

It is essential that also Article 49 (2) of the Act dated 20 May 1971- The Code of Petty Offences⁴⁴ penalizes an infringement on the emblem, colors and the anthem of the Republic of Poland. A legal norm states as follows: „who violates provisions applicable to the emblem, colors and the anthem of the Republic of Poland is subject to detention or a fine”. So, *prima facie*, the requirement of the “public” nature of the infringement of the act is missing in the act. This issue may raise doubts in interpretation as the name of the Chapter VIII of the Code of Petty Offences states that the chapter groups offenses against public order and peace. Therefore, it may raise objections whether the party punished for an offense under Article 49 (2) of the Code of Petty Offenses is the person who committed it in a public place or not.

According to A. Kilińska-Pękacz, an offense (Article 49 (2)) may be understood as exposing a flag throughout a year in front of a private house as the Act on the emblem, colors and the anthem “allows her displaying it only for several days a year”⁴⁵.

This opinion was subject to polemics by A. Lizak. According to this second researcher, the basis for such an interpretation is not provided in Article 5(2)⁴⁶, which contains only the suggestion that the flag should be used to emphasize the importance of celebrations, holidays or other events; how-

⁴³ Judgment of the Court of Appeal in Katowice of 30 September 2008, case file no. II Aka 282/08, LEX no. 477637.

⁴⁴ Uniform text: J.L. of 2015, item 1094.

⁴⁵ A. Kilińska-Pękacz, *Prawnokarna ochrona symboli państwowych*, „Wojskowy Przegląd Prawniczy” 2015, no. 4, p. 12.

⁴⁶ According to Article 1 (2) of The Act on the coat of arms, colors and the anthem of The Republic of Poland: Everyone has the right to use the colors of the Republic of Poland, in particular to emphasize the importance of celebrations, holidays or other events.

ever, through the use of the term “in particular” it absolutely “does not allow to limit (temporal – annotation R.Z.) the right to use of any of the symbols”⁴⁷.

In conclusion, it is clear that Article 137 (1) and (2) of the Criminal Code protects the national symbols of Poland and of other states against abuse, destruction, damage and removal, only if those countries provide reciprocity⁴⁸. Whereas Article 49 (2) of the Code Petty Offenses provides such protection only to Polish symbols in the case of violations other than insult, destruction, damage or removal.

It is worth noting that under the Act⁴⁹ of 2 May 2004 the “Polish Flag Day” was decreed. The justification of a parliamentary draft⁵⁰ stated that the establishment of a day dedicated to the national flag was motivated by „the extension of knowledge and dissemination of information about national symbols in the patriotic spirit”. The promoters assured that this day „would be celebrated without pathos, but in the spirit of patriotism”, “happily, on the picnics and festivals” and the choice of the date was justified by “the moment in which the Poles were accompanied by reflections on the noble history of Poland”.

In “The Flag Day of 2017” a flag appeared on the clock tower of the Royal Castle in Warsaw escorted by soldiers. However, the attention was not drawn by the Polish white and red colors but by the façade of the well-known historical building as thick layers of plaster were peeling off its walls. The President of the Republic of Poland, authorities of the Ministry of National Defense and military commanders took part in the celebrations. It was televised, which further caused dissonance that one could not fail to notice. In the opinion of one of the deputies, flying flags in such conditions was a violation of the Act on the national emblem and colors⁵¹. Probably, it referred to the lack

⁴⁷ A. Lizak, *Prawo a patriotyzm. Wybrane uwagi w kontekście regulacji dotyczących symboli narodowych*, [in:] *Prawo jako narzędzie kształtowania społeczeństwa*, ed. I. Barwicka-Tylek, P. Eckhardt., J. Ptak, M. Wróbel, Kraków 2016, p. 44.

⁴⁸ See: Article 138 (1) c.c.

⁴⁹ Pursuant to Article 1 (3) of The Act of 20 February 2004 amending the law on the emblem, colors and the anthem of The Republic of Poland (J.L. of 2004 No. 49, item 467), „it establishes the day of May the 2nd as a the „Polish Flag Day”.

⁵⁰ Print no. 2149/Sejm RP IV term of 15 October 2003. See: [http://orka.sejm.gov.pl/Druki4ka.nsf/\(\\$vAllByUnid\)/ED493151D44326C6C1256DD0002E8EB0/\\$file/2149.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/($vAllByUnid)/ED493151D44326C6C1256DD0002E8EB0/$file/2149.pdf) (22.04.2017).

⁵¹ See: <http://www.o2.pl/galeria/wciagneli-flage-na-zamek-krolewski-to-rozpetaloburze-6118296054536321g/4> (2.05.2017).

of respect (specified in Article 1 (2) and Article 15 of the Act) for the national symbol, i.e. the white and red flag.

III. National colors in the Italian law

The origins of the Italian flag date back to 7 January 1797 when the Parliament of the Cispadana Republic, the capital of which was the city of Reggio Emilia, granting the request of the deputy – Giuseppe Compagnioni, decided that „the common colors of the coat of arms and the flag of Cispadana shall be three colors: green, white and red and these ones were supposed to be used for a bow, which should be worn by all”. Then for the first time the flag was blessed – and henceforth called *tricolore*⁵². These colors symbolize the values that gave rise to the Italian Republic⁵³. The choice of these three colors was justified by the fact that the State-Republic arising in the eighteenth and nineteenth centuries began to form the essential elements of its new identity, the symbols of which were the flags. Its colors are derived from military formation standards. Lombard legion standard consisted of red and white entrenched in the iconography of Lombardy and the green color. White and red colors formed the oldest city crest of Milan⁵⁴. While the green had been the color of the uniforms of Milan Civil Guard since 1782⁵⁵. After the Congress of Vienna of 1815, after the defeat of Napoleon, the three-co-

⁵² See: A. Gaca, Z. Witkowski, *Podstawy ustroju konstytucyjnego Republiki Włoskiej*, Toruń 2012, p. 29; J.A. Gierkowski, *Historia Włoch*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985, p. 358.

⁵³ *60 anni di Liberta 1946–2006. La costituzione della Repubblica Italiana. Le radici, il cammino*, p. 2. See: <http://www.gramscibergamo.it/PUBBLICAZIONI/20060000.pdf> (25.05.2017). For example, green was supposed to symbolize patriots hoping for better future. Ibidem, p. 4. The white color, in turn, symbolizes the mountain snow, while red – the blood of the fallen. See: <https://www.ana.it/dotAsset/c89379a3-6a18-44bc-970d-838c5f205a81.pdf> (26.05.2017). On 4 November 2001 The President of the Republic, Carlo Azeglio Ciampi, said that the banner of freedom won and the people are united around the principles of brotherhood, equality, and justice. In them they find the source of their identity. This is the value of history and civilization. See: http://www.comune.ranica.bg.gov.it/upload/ranica_ecm8/gestionedocumentale/STORIA%20DELLA%20BANDIERA%20ITALIANA_784_3227.pdf (26.05.2017).

⁵⁴ *60 anni di Liberta 1946–2006*, op.cit., p. 5.

⁵⁵ See: A. Gaca, Z. Witkowski, op.cit., p. 30. It should be emphasized that the Italian legislation in the field of agriculture (e.g. the Act of 2.06.1961 and 27.10.1966) is called „*piano verde*” (green plan). See: J. Zakrzewska, *Państwo i regiony we Włoszech*, „Państwo i Prawo”, vol. 8–9/1972, p. 175.

lor banner was rejected in Italy⁵⁶, but it reappeared in 1831 – and a white, red and green expressed the common hope for the unification of Italy⁵⁷. Giuseppe Mazzini restored *tricolore* as a symbol⁵⁸. After the establishment of the Republic in Italy, the Presidential Legislative Decree of 19 June 1946 determined the temporary shape of the new flag⁵⁹. It was not until the work on the Republican constitution in the Constitutional Assembly, at its meeting on 24 March 1947, when the decision was finally given a normative character in the form of Article 12 of the Constitution's draft, and was finally passed on 22 December⁶⁰ 1947 – the Constitution⁶¹.

⁵⁶ *60 anni di Liberta 1946–2006*, op.cit., p. 7.

⁵⁷ See: A. Gaca, Z. Witkowski, op.cit., p. 31. In 1831 strong provincial or municipal autonomy remained, and the sense of unity between Italy was relatively weak. Time-wise, the need to overcome regionalism began to shape. The appeal of tradition facilitated the justification of national movements. The most representative figures of the Italian culture in the first half of the nineteenth century were Alessandro Manzoni and Giacomo Leopardi. The former was a supporter of the idea of unification. The latter was named the “poet of alienation” because of the impossibility to adapt to the conditions in which he lived. Literature was a factor uniting divided Italy. Among scientists there existed a strong sense of unity of the whole country. The congresses of intellectuals held since 1839 constituted the manifestation of the idea. See: J.A. Gierkowski, op.cit., pp. 408–409, 411–413, 415.

⁵⁸ Probably, Mazzini was inspired by Dante, who described, in the “Paradise”, Beatrice clad with a white curtain, a green coat and a red robe. See: http://www.corriere.it/unita-italia-150/11_giugno_03/nese-bandiera-d-italia-fatta-a-pezzi_5c495ada-8dc4-11e0-b332-ace-1587d6ad6.shtml?refresh_ce-cp (26.05.2017).

⁵⁹ *60 anni di Liberta 1946–2006*, op.cit., p. 9.

⁶⁰ On December 22, 1947 The Constitutional Assembly passed the Constitution of the Republic by 453 votes in favor, and 62 against. See: *ibidem*, p. 320. On December 27, 1947 the text was promulgated by the acting head of state. The Constitution came into force on 1 January 1948. See: Z. Witkowski, *System konstytucyjny Włoch*, Warszawa 2000, p. 15. The Republic was born in Italy on the ruins of war damage. During the meeting of the Constituent Assembly its members sought to adopt compromise, satisfying representatives of two main political forces of the then contemporary Italy: center-right gathered around Christian Democrats and left acting under the leadership of the Communists. See: G. Mammarella, *La prima Repubblica dalla fondazione al declino*, Bari 1992, pp. 33–61. It was necessary to overcome the gap which was the result of deep historical divisions of various parts of the state. See: A. Saitta, *La Costituzione e la Repubblica*, Bologna 1987, p. 118; J. Wawrzyniak, *Transformacja ustrojowa we Włoszech*, [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, ed. J. Trzcziński, A. Jankiewicz, Warszawa 1996, pp. 501–504.

⁶¹ For the emotional course of the session during the meeting of the Constituent Assembly see: *ibidem*, pp. 32–33. There are mutations of the Italian flag designated for merchant

In accordance with Article 12 of The Constitution of the Italian Republic⁶²: “La bandiera della Repubblica e’ il tricolore italiano: verde, bianco e rosso, a tre bande verticali di eguali dimensioni”. This means that “the flag of the Republic is the Italian tricolor: green, white and red, with three vertical stripes of equal dimensions”⁶³.

This Article belongs to a group of the so called “fundamental principles”, which form an integral part of the Constitution⁶⁴. The technique of the Constitution indicates a clear desire to emphasize the strictly legal, and not just program-related nature of those provisions⁶⁵.

Legal protection of the national colors recalls *mens legislatoris* resulting from the documents of the 30’s of the 20th century. The Criminal Code of the Kingdom of Italy⁶⁶ provided for the offense of contempt for the Italian Nation (Article 291). According to the Committee, it should not be punished by less severe penalties. Those facts could cause adverse effects for the state,

and naval purposes. In addition, the President of the Republic, being the Supreme Superior of the Italian Armed Forces, possesses his own banner. *Ibidem*, p. 33.

⁶² *Costituzione della Repubblica Italiana, Gazzetta Ufficiale della Repubblica Italiana*, no. 298 del 27-12-1947.

⁶³ The Constitution of the Italian Republic of 27 December 1947. Despite the fact that “the Constitution was enacted on December 22, 1947, it is dated December 27,” in accordance with the date of the promulgation of the Acting President of the Republic. On the same day it was announced in an official Italian publication medium, and entered into force on 1 January 1948. See: *Konstytucja Republiki Włoskiej*. Transl. Z. Witkowski, Warszawa 2004, p. 60; J.A. Gierowski, *Historia Włoch*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1985, p. 636. See: https://www.senato.it/1025?sezione=118&articolo_numero_articolo=12 (27.05.2017).

⁶⁴ See: J. Zakrzewska, *Ustrój polityczny Republiki Włoskiej*, Warszawa 1986, p. 31.

⁶⁵ See: *Konstytucja Republiki Włoskiej*, *op.cit.*, p. 13. The last amendment on the appropriate shades of color took place in 2006. According to the amendment, green must be similar to that of ferns, white – flashy, and red – scarlet. *L’ultima modifica alla tonalità giusta dei colori è avvenuta nel 2006. In base ad essa il verde dev’essere simile a quello delle felci, il bianco smagliante e il rosso scarlatto.*

⁶⁶ This is the so called „Rocco Code” of 1930, which entered into force on 1 July 1931 and its main trend is valid until today. In the postwar period Rocco Code has undergone specific process of „de-fascism” and then in 60’s and 70’s through numerous amendments of liberal nature. So still nominally, Rocco Code being in force in Italy, is subject to numerous modifications. See: M. Filar, *Włochy*, [in:] *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej. Wybrane zagadnienia*, ed. A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyń, Toruń 2007, pp. 171–172.

even if only indirectly, and therefore it was justified to punish them in proportion to the degree of harmfulness⁶⁷.

In addition, it established an offense committed by acting in violation of the flag or an emblem of another foreign state (Article 200). Without an application (which is the subject of criminal liability) neither arrest nor issuance of an arrest warrant were allowed⁶⁸.

The contemporary Italian penal code, in its Article 292, provides for an offense of insult to national and state symbols⁶⁹. Pursuant to the article: „Who despises the national flag or other symbols of the state, shall be punished by imprisonment from one to three years. For the purposes of criminal law, „national flag” is the official state flag and any other flag having national colors. The provisions of the Article shall also apply to those who despise the national colors presented on something other than the flag”⁷⁰.

⁶⁷ *Il vilipendio alla Naztone italiana (Article 291), a giudizio della Commissione parlamentare, non e meno grave di quello alle istituzioni costituzional, e però non dovrebbe essere punito con sanzione meno grave. Questi fatti possono benst produrre effetti dannosi anche per la personalità dello Stato, ma soltanto indirettamente e in grado minore che il vilipendio delle istituzioni costituzionali, e però è giusto che siano puniti con pena proporzionata alla loro capacità lesiva. Zob. nr 134 Approvazione del testo definitivo del Codice Penale, Gazzetta Ufficiale Del Regno D'Italia 26 ottobre 1930, no. 251, p. 4485. See: <http://augusto.agid.gov.it/#giorno=26&mese=10&anno=1930> (27.04.2017).*

⁶⁸ *Contro la bandiera o altro emblema di Stato estero (art. 200). Si offende più che altro un'idea, come nell'offesa alla bandiera si offende un simbolo (ed è perciò che questi due vilipendi sono equiparati rispetto alla pena). La ragione di questa limitazione consiste in ciò: che senza la richiesta (la qual'è a una condizione di punibilità) non sono ammessi né l'arresto in flagranza né l'emissione del mandato di cattura, che sono invece possibili nei casi in cui occorre l'autorizzazione. Zob. nr 137 Approvazione del testo definitivo del Codice Penale, Gazzetta Ufficiale Del Regno D'Italia 26 ottobre 130, no 251, s. 4485. Retrieved from: <http://augusto.agid.gov.it/#giorno=26&mese=10&anno=1930> (27.04.2017).*

⁶⁹ *Article 292: Vilipendio alla bandiera o ad altro emblema dello Stato – Chiunque vilipende la bandiera nazionale o un altro emblema dello Stato è punito con la reclusione da uno a tre anni. Agli effetti della legge penale, per “bandiera nazionale” s'intende la bandiera ufficiale dello Stato e ogni altra bandiera portante i colori nazionali. Le disposizioni di questo articolo si applicano anche a chi vilipende i colori nazionali raffigurati su cosa diversa da una bandiera. See: http://www.difesa.it/SMD_/CASD/IM/ISSMI/Corsi/Corso_Consigliere_Giuridico/Documents/15324_codicepenale.pdf (28.04.2017).*

⁷⁰ In one of its judgments, the Constitutional Court of the Italian Republic decided about the case of the accused, pursuant to Article 292 C.P., of public slander of the Italian flag during the session of the Province of Bolzano on 18 June 1986. In this case, the Court, by examining the facts, interpreted Article 3 of the Constitution of Italy. In the opinion of the court, all

Article 292 bis was introduced in The Act of 23 March 1956 no. 167. It regulates the aggravating circumstance („*circostanza aggravante*”). According to the Act, the penalty specified in the circumstances defined by Article 292 (defamation of the flags or other national symbols) is increased if the act has been committed by the military on leave⁷¹. It is believed that the military on leave, that is not on duty, do no longer belong to the armed forces of the State⁷².

Article 299 defines an attack on the flag or an emblem of another state (“*offesa alla bandiera o ad altro emblema di uno Stato Estero*”). Pursuant to the Article, „anyone in the country who degrades – in public places, places open to the public or intended for the public – the official flag or other symbol of a foreign official flag or other symbol of a foreign state, used in accordance with the national law of the Italian State, is subject to the punishment of imprisonment from six months to three years”⁷³.

Pursuant to Article 300 (“*condizione di reciprocità*”), “provisions of Article 299 shall be applicable only under the condition that they provide mutual protection by the criminal law of the foreign country with regard to the head of the Italian State or the Italian flag”⁷⁴.

citizens have equal social dignity and they are equal in the eyes of the law. The court held that this principle is violated when making a restrictive interpretation of the contested provision because it is a privilege and applies only in relation to the functions performed by Provincial Councilors in the exercise of legislative powers entrusted to the Autonomous Province. See: Corte Costituzionale Sentenza 1146, 1988. The Constitutional Court declared inadmissible rule on the constitutionality. (La Corte Costituzionale dichiara inammissibile la questione di legittimità costituzionale degli art. 28 e 49 del d.P.R. 31 agosto 1972, n. 670 (Statuto speciale della Regione Trentino-Alto Adige), sollevata, in riferimento all’art. 3 della Costituzione). See: <http://juriswiki.it/provvedimenti/sentenza-corte-costituzionale-1146-1988-it> (27.05.2017).

⁷¹ The Constitutional Court of the Italian Republic drew attention to that aspect. Corte Costituzionale Sentenza 531, 2000. See: <http://juriswiki.it/provvedimenti/sentenza-corte-costituzionale-531-2000-it> (27.05.2017).

⁷² *La pena prevista nei casi indicati dagli articoli (...) 292 (vilipendio della bandiera o di altro emblema dello Stato) è aumentata, se il fatto è commesso dal militare in congedo. Si considera militare in congedo chi, non essendo in servizio alle armi, non ha cessato di appartenere alle Forze armate dello Stato, ai sensi degli articoli 8 e 9 del codice penale militare di pace.* See: *ibidem*.

⁷³ *Chiunque nel territorio dello Stato, vilipende, in luogo pubblico o aperto o esposto al pubblico, la bandiera ufficiale o un altro emblema di uno Stato estero, usati in conformità del diritto interno dello Stato italiano, è punito con la reclusione da sei mesi a tre anni.* Podaję za: *ibidem*.

⁷⁴ *Le disposizioni degli articoli (...) 299 si applicano solo in quanto la legge straniera garantisce, reciprocamente, al Capo dello Stato italiano o alla bandiera italiana parità di tutela penale.*

In 1997, on the occasion of the bicentenary of the three colors (*tricolore*), 7 January was declared “The National Flag Day”⁷⁵.

IV. Protection of colors in the Community legislation/European law

Today the EU creates an economic and political union of twenty eight democratic European countries, which is the result of a long process of political, economic and social integration. On 8 December 1955 the official flag was adopted – “12 stars placed in hour positions of a clock on a cornflower background”⁷⁶. A starry circle is a symbol of unity, which brings together the people

⁷⁵ See: Article 1 (1) of The Act of 31 December 1996, no. 671 (*Celebrazione nazionale del bicentenario della prima bandiera nazionale*). *60 anni di Liberta 1946–2006*, op.cit., p. 11.

⁷⁶ It is a symbol not only of the European Union, but also – in a broader sense – a symbol of unity and identity of Europe. The circle of gold stars represents solidarity and harmony between the people of Europe. The Council of Europe – since its establishment in 1949 – was aware of the need for Europe to create a symbol which the citizens could identify with. On 25 October 1955 the Parliamentary Assembly chose unanimously a blue symbol representing a circle of twelve golden stars. On 8 December 1955 the Committee of Ministers adopted it as the European flag. The Parliamentary Assembly of the Council of Europe has repeatedly expressed the wish for the European symbol to be adopted by other European organizations – thus strengthening solidarity and unity of democratic Europe. The European Parliament took the initiative to adopt the flag of the European Community as the first. Therefore, in 1979 – just after the first direct elections to the Parliament – it presented a corresponding draft resolution. In April 1983 the Parliament spoke out in favor of the same flags as adopted in 1955 by the Council of Europe. In June 1984 in Fontainebleau, the European Council stressed the need to promote the identity and image of Europe among its citizens all over the world. Then in June 1985 The European Council in Milan granted the request of the Committee of Nations of Europe (Adonino Committee) on the adoption by the Community of its own flag. The Council of Europe agreed to the use of the flag of the European Community defined in 1955. Community institutions have been using it since the beginning of 1986. In this way, the European flag and a symbol of Europe refer both to the Council of Europe and the European Union. It is also an expression of a united Europe and European identity. The Council of Europe and European Union institutions expressed satisfaction with the growing interest in the flag expressed by the Europeans. The European Commission and the Council of Europe are responsible for ensuring that it is used as a symbol of respect for its dignity, and take appropriate measures to prevent its misuse. Heraldic description: on azure field a circle of twelve golden mullets, their arms not touching each other. Geometric description: The symbol is in the form of a blue rectangular flag which is equal to 1.5 times the length of its height. The twelve golden

of Europe. Since 1986 this flag has also been the official emblem of the European Union⁷⁷. During the Milan summit of EU leaders in 1985 it was decided to celebrate May 9th as the “Europe Day”⁷⁸. A year later, on May 9, 1986 in Brussels, the European flag was flown for the first time⁷⁹.

The European Union uses symbols that were adopted during the EU summit in Brussels on 18 June 2004, and entered into the Constitutional Treaty⁸⁰. Finally, not to suggest that the EU is a super state – they were abandoned in the Reform Treaty⁸¹; still, the provisions on the EU symbols remain valid for the Member States.

A manifestation of this “validity” is that the use of the EU flag is governed by an administrative agreement with the Council of Europe pertaining to the use of the European emblem by third parties⁸² (2012/C 271/04). Under its provisions, the general principle is that any natural or legal person (“user”)

stars situated at equal intervals form a set of an invisible circle whose center is located at the intersection of diagonals of the rectangle. The radius of the circle is equal to one third of the flag. Each star has five points, the ends of which form an invisible circle whose radius is equal to one eighteenth of the height of the flag. All the stars are in an upright position – it means that one arm is directed vertically upwards, and two lie on the horizontal line perpendicular to the flag post. The stars are laid out like the hours on a clock face. Their number is invariable”. See: <http://publications.europa.eu/code/pl/pl-5000100.htm> (5.05.2017).

⁷⁷ S. v. *flaga* w oprac. E. Górnicz, [in:] J. Ruskowski, E. Górnicz, M. Żurek, *Leksykon integracji europejskiej*, Warszawa 1998, p. 201.

⁷⁸ See: http://web.archive.org/web/20090129084024/http://europa.eu/abc/symbols/9-may/euday_pl.htm (17.05.2017).

⁷⁹ J. Ruskowski, E. Górnicz, M. Żurek, op.cit., p. 255.

⁸⁰ During the work on the Treaty establishing a Constitution for Europe (European Community) at the last plenary session on 10 July 2003. The Convention participants received the text of Parts III and IV of the constitution’s draft as an attachment. „Part IV: General and final provisions”. The flag of the Union shall be a circle of twelve golden stars on a blue background. See: <https://web.archive.org/web/20131002194713/http://european-convention.eu.int/docs/Treaty/cv00848.en03.pdf>. (5.05.2017). The treaty establishing the Constitution for Europe (European Community) (ECT, Constitution for Europe) signed by Member States of the European Union on 29 October 2004 in Rome. In Not being ratified by all parties, the Treaty has not entered into force.

⁸¹ The Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community was signed on 13 December 2007 in Lisbon. It has been in force in the Polish legal system since the promulgation, which took place on December 2, 2009 (J.L. of 2009 No. 203, item 1569).

⁸² Official Journal of the European Union C 271 of 8 September 2012, p. 5.

may use the European emblem or any of its components subject to compliance with the principles set out below.

It is permitted to use the European emblem or any of its components, both for commercial and non-commercial purposes as long as: a) the use does not create a false impression or leads to erroneous assumption that the user is associated with any of the institutions, bodies, offices, agencies or units of the European Union or the Council of Europe; b) the use does not create, in citizens, a wrong conviction that the user has received support, funding, permission or consent of any of the institutions, bodies, offices, agencies or units of the European Union or the Council of Europe; c) the use is related to the purpose or activity incompatible with the objectives and principles of the European Union or the Council of Europe, or is otherwise illegal⁸³.

The use of the European emblem in accordance with the principles set out above does not imply consent to register the emblem or its imitation as a trade mark or under any other intellectual property rights. The European Commission and the Council of Europe will continue to monitor the applications for registration of the European emblem or its components on the basis of (partial) intellectual property rights, in accordance with applicable laws⁸⁴.

The user of the European emblem or its elements assumes some form of liability. Users shall be held accountable for any misuse and any resulting damage in accordance with applicable provisions of the Member States or third countries⁸⁵.

According to the Agreement, the Commission reserves the right to prosecute, upon its own initiative or at the request of the Council of Europe: all cases of use that fail to comply with the principles set out above, or any cases of use which constitute, according to the Commission or the Council of Europe, abuse before the courts of the Member States or third countries⁸⁶.

⁸³ See: An administrative agreement with the Council of Europe on the use of the European emblem by third parties.

⁸⁴ *Ibidem*.

⁸⁵ *Ibidem*.

⁸⁶ *Ibidem*.

V. Summary

The establishment of the Banner of the Polish Republic in 1919 was associated with its dual legal status. Firstly, it was a symbol of an independent Poland. Secondly, it was a personal banner of the Head of State and, since 1921 – the Polish President embodying the majesty of the Republic⁸⁷.

The analysis of the examined normative acts has led me to the conclusion that the Polish legislator, after the restoration of independent statehood, attached a great importance to the normative grounds ensuring protection of colors of the national symbols. Legal protection in this area was shaped differently at different time intervals. Probably, its range was affected by historical experience and it intensified after the war.

In my opinion, the national symbols, including colors, should enjoy special legal protection. *De lege lata*, the Polish contemporary legislator attaches special attention to them. Undoubtedly, it is proven by the fact that the provisions in question have been placed in the operative part of the constitution. Moreover, detailed and extensive regulations have been incorporated into numerous laws.

The Italian constitutional adjustment, compared to the Polish one in the scope of the national colors, is very sparse. The lawmaker dedicated solely Article 12 to the issue in question. Italy has always actively participated in all crucial moments in the history of the European Community and in the development of documents determining the progress of the European integration⁸⁸.

The common characteristic feature of Poland and Italian colors are red (symbolizing the blood of those killed in action) and white.

⁸⁷ Compare R. Grabowski, *Zapomniany symbol. Zmiany statusu prawnego Chorągwi Rzeczypospolitej*, „Przeгляд Prawa Konstytucyjnego” 2012, no. 3, pp. 70–71.

⁸⁸ In 1951 Italy joined the initiative of the French Coal and Steel Community, which became the nucleus of the Common Market. See: J.A. Gierowski, *Historia Włoch*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1985, p. 644. Italy was the host of the most important conferences in the process of the European integration, including conferences founding treaties on establishing the European Economic Community (25.03.1957) and the European Atomic Energy Community (1/01/1958), known as the Treaties of Rome, and has always granted respect for supporting the idea – first the Communities, then the Union. See: *Konstytucja Republiki Włoskiej*, transl. Z. Witkowski, Warszawa 2004, pp. 41, 45.

Nowadays, white symbolizes renewal, rebirth and purity⁸⁹. Aside from the Community rules, each member state – as a result of historical development – has developed its own model of protection⁹⁰.

Each of the flags, being the carrier of Polish, Italian and Community colors, have been assigned, under the law, with the calendar day commemorating them. Probably, this should be a factor integrating all the citizens who enjoy equal rights and obligations towards the common good. The flag belongs to *weksylium*, one of the distinguishing marks of the state – proving its legal personality and sovereignty⁹¹.

The colors of the European Union are not expressly protected under the Polish normative regulations. In my opinion, this is not necessary because the standard of protection of transnational flag is the same due to the fact of the implementation of the Community law (*acquis communautaire*⁹²). However, I reckon that for the interests of legal certainty, the legal status in this field should be amended and relevant norms should be laid down.

⁸⁹ *Dr Janusz Sibora o znaczeniu kolorów w dyplomacji*. See: <http://www.rp.pl/Polityka/303269922-Dr-Janusz-Sibora-o-znaczeniu-kolorow-w-dyplomacji.html#ap-1> (10.05.2017).

⁹⁰ So it could be said that the thesis of the historical and legal school stating that each legal system is a product of the spirit of the Nation (*Volkgeist*) and that it is expressed in the law has been confirmed. „For this reason, Roman law could not be treated in German as a national law”. See: J. Kodrębski, *Wacław Aleksander...*, p. 203.

⁹¹ *Leksykon prawa i protokołu dyplomatycznego. 100 podstawowych pojęć*, ed. S. Sykun i J. Zajadło, Warszawa 2011, p. 83.

⁹² The idea of *acquis communautaire* is defined differently. According to P. Schmitter, „it is the sum of commitments that have been collected since the creation of the European Coal and Steel Community and shall be included in the treaties and protocols”. See: P. Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts*, [in:] G. Marks, F.W. Scharpf, P.C. Schmitter, W. Streeck, et al, *Governance in the European Union*, London 1996, p. 162. While according to Roger J. Goebel: *acquis communautaire* should refer to the „institutional structure, scope, policies and principles of the Community (now Union)”. Therefore, they should be treated as “specified” (*acquis*), which should not be questioned or substantially modified by the new state at the time of their accession”. See: R.J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, *Fordham International Law Journal* 18 1995, pp. 1141–1143. See: J. Ciapała, *Harmonizacja prawa polskiego z prawem innych państw Unii Europejskiej – kilka uwag podstawowych*, [in:] *Modele integracji międzynarodowej. Uniwersalny, kontynentalny, sektorowy a państwo, prawo, idee. Zbiór studiów*, ed. T. Smoliński, Szczecin 2006, p. 231.

Literature

- Bała P., *Invocatio Dei w Konstytucji RP z 2 kwietnia 1997 r. w perspektywie porównawczej i historycznej*, „Studia Erasmiانا Wratislaviensia” 2011, vol. 5
- Bałaaban A., *Prawny charakter wstępu do polskiej Konstytucji z 2 kwietnia 1997 roku*, [in:] *W kręgu zagadnień konstytucyjnych. Profesorowi Eugeniuszowi Zwierzchowskiemu w darze*, ed. M. Kudej, Katowice 1999.
- Burda A., *U podstaw świadomości państwowej*, Lublin 1982.
- Choduń A., Zieliński M., *Interpretacyjna rola wstępów aktów prawnych*, [in:] *Wokół konstytucji i zdrowego rozsądku. Prace dedykowane Profesorowi Tadeuszowi Smolińskiemu*, eds. J. Ciapała, A. Rost, Szczecin 2011.
- Ciapała J., *Harmonizacja prawa polskiego z prawem innych państw Unii Europejskiej – kilka uwag podstawowych*, [in:] *Modele integracji międzynarodowej. Uniwersalny, kontynentalny, sektorowy a państwo, prawo, idee. Zbiór studiów*, ed. T. Smoliński, Szczecin 2006.
- Działocha K., Garlicki L., Sarnecki P., Sokolewicz W., Trzeciński J., *Komentarz do art. 28*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. IV, ed. L. Garlicki, Warszawa 2003.
- Filar M., *Włochy*, [in:] *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej. Wybrane zagadnienia*, ed. A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Gir-dwoyń, Toruń 2007.
- Gaca A., Witkowski Z., *Podstawy ustroju konstytucyjnego Republiki Włoskiej*, Toruń 2012.
- Galster J., *Propedeutyka wiedzy o konstytucji*, [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2013.
- Garlicki L., *Komentarz do preambuły*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V, ed. L. Garlicki, Warszawa 2007.
- Gierkowski J.A., *Historia Włoch*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź- 1985.
- Goebel R.J., *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, *Fordham International Law Journal* 18 1995.
- Górnicz E., [in:] J. Ruszkowski, E. Górnicz, M. Żurek, *Leksykon integracji europejskiej*, Warszawa 1998.
- Grabowski R., *Polskie symbole narodowe i państwowe. Geneza, ewolucja, stan prawny*, „Przegląd Prawa i Administracji” 2011, t. LXXXVII.
- Grabowski R., *Zapomniany symbol. Zmiany statusu prawnego Chorągwi Rzeczypospolitej*, „Przegląd Prawa Konstytucyjnego” 2012, vol. 3.
- Gubiński A., *Zasady prawa karnego*, Warszawa 1974.
- Juchniewicz J., Pałka P., *Ewolucja kryminalizacji zachowań przeciwko wyborom*, „Prze-gład Prawa Konstytucyjnego” 2011, vol. 3
- Kilińska-Pękacz A., *Prawnokarna ochrona symboli państwowych*, „Wojskowy Przegląd Prawniczy” 2015, no. 4.

- Kodrębski J., *Wacław Aleksander Maciejewski jako romanista*, „Czasopismo Prawno-Historyczne” 1974, XXVI, vol. 1.
- Kodrębski J., *Wizja państwa w myśli politycznej ludowców lat międzywojennych*, [in:] *Chłopi a państwo. Materiały z konferencji naukowej (12–13 czerwiec 1995 r.)*, ed. J. Janc, Łódź 1996.
- Kosińska A.M., *Ochrona prawna hymnu narodowego jako elementu dziedzictwa narodowego – jej charakter i funkcje*, „Przegląd Prawa Konstytucyjnego” 2014, no. 5.
- Kupiszewski H., *Prawo rzymskie a współczesność*, Warszawa 1988.
- Lizak A., *Prawo a patriotyzm. Wybrane uwagi w kontekście regulacji dotyczących symboli narodowych*, [in:] *Prawo jako narzędzie kształtowania społeczeństwa*, ed. I. Barwicka-Tylek, P. Eckhardt., J. Ptak, M. Wróbel, Kraków 2016.
- Mammarella G., *La prima Repubblica dalla fondazione al declino*, Bari 1992.
- Marek A., *Prawo wykroczeń w zarysie*, Warszawa 1975.
- Marek A., *Kodeks karny. Komentarz*, Warszawa 2007.
- Młynarska-Sobaczewska A., *Normatywizacja pamięci zbiorowej w preambułach do konstytucji państw postkomunistycznych*, „Przegląd Prawa Konstytucyjnego” 2014, no. 2.
- Oniszczyk J., *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000.
- Saitta A., *La Costituzione e la Repubblica*, Bologna 1987.
- Schmitter P., *Imagining the Future of the Euro-Polity with the Help of New Concepts*, [in:] G. Marks, F.W. Scharpf, P.C. Schmitter, W. Streeck, et al, *Governance in the European Union*, London 1996.
- Sondel J., *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2001.
- Suchocka H., *Jaka konstytucja dla rozszerzającej się Europy*, [in:] *Konstytucja dla rozszerzającej się Europy*, ed. E. Popławska, Warszawa 2000.
- Sykun S., Zajadło J. (ed.), *Leksykon prawa i protokołu dyplomatycznego. 100 podstawowych pojęć*, Warszawa 2011.
- Szczerba A., *Nie tylko szabłą... Rola archeologii w utrzymaniu tożsamości narodowej Polaków w okresie zaborów*, [in:] *W walce o wolność i niepodległość Polski*, ed. D. Litwin-Lewandowska i K. Bałękowski, Lublin 2016.
- Śliwowski J., *Prawo karne*, Warszawa 1975.
- Wawrzyniak J., *Transformacja ustrojowa we Włoszech*, [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, ed. J. Trzeciński, A. Jankiewicz, Warszawa 1996.
- Winczorek P., *Dyskusja nad podstawowymi zasadami ustroju RP w Komisji Konstytucyjnej Zgromadzenia Narodowego (Dziesięć pierwszych artykułów projektu Konstytucji RP)*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1995, LVII, vol. 2.
- Winczorek P., *Dyskusje konstytucyjne*, Warszawa 1996.
- Wiszewski J., *Zarys encyklopedii prawa*, Warszawa 1962.

- Wiszowaty M.M., *Symbole państwowe III Rzeczypospolitej*, „Państwo i Prawo” 2011, vol. 7–8.
- Wiszowaty M.M., *Na straży heraldycznej poprawności. Organy władzy i organy doradczo-opiniotawcze właściwe w sprawach heraldyki samorządowej w Polsce na tle innych krajów europejskich*, [in:] *Prawo naszych sąsiadów. T. I: Konstytucyjne podstawy budowania i rozwoju społeczeństwa obywatelskiego w Polsce i na Ukrainie – dobre praktyki*, ed. W. Skrzydło, W. Szapował, K. Erkhardt, P. Steciuk, Przemyśl–Rzeszów 2013.
- Witkowski Z., *System konstytucyjny Włoch*, Warszawa 2000.
- Witkowski Z., *Konstytucja Republiki Włoskiej. Transl.* Warszawa 2004.
- Zakrzewska J., *Państwo i regiony we Włoszech*, „Państwo i Prawo” 1972, vol. 8–9.
- Zakrzewska J., *Ustrój polityczny Republiki Włoskiej*, Warszawa 1986.