

VII. HATE SPEECH AND CYBERBULLYING IN CZECH LAW

DÁVID HOJNYÁK

1. Hate speech in Czech law

If we look for the constitutional basis of hate speech in the Czech legal order, we find that the constitutional legislation¹ does not contain *expressis verbis* provisions on this subject, while the *Charter of Fundamental Rights and Freedoms* (hereinafter: Charter) provides that freedom of expression and the right of access to and dissemination of may be restricted by law where this is necessary in a democratic society in order to protect the rights and freedoms of others, the security of the State, public security and public health, and public morals.² We see, therefore, that the Charter lays down a kind of limitation clause which allows for the restriction of these fundamental constitutional rights in certain circumstances, while taking into account the criteria of legality, necessity and proportionality.³ With regard to the constitutional basis of the legislation on this subject, it is also worth noting the Charter's provisions on human dignity⁴, the protection of privacy⁵, and the protection of personal data.⁶

Provisions on hate speech can be found in Czech legislation in the context of criminal law, although it should be noted that the term hate speech is not

1 It is important to note that the Czech constitutional order consists of the Constitution, the Charter of Fundamental Rights and Freedoms and a set of so-called constitutional laws (also known as constitutional laws or constitutional enactments).

2 Article 17 para. (4) of the Charter

3 For more information on the characteristics of these fundamental constitutional rights and the detailed rules for their limitation, see Bartoň and Hejč, 2021, and Herczeg, 2004, pp. 85-86.

4 Articles 1 and 10 para. (1) of the Charter.

5 Articles 7 and 10 para. (2) of the Charter.

6 Article 10 para. (3) of the Charter.

recognised in Czech law. The Czech Criminal Code (Act No 40/2009, hereinafter referred to as ‘the Criminal Code’)⁷ lists the relevant offences in Chapter 10, which contains offences against public order (including offences against human coexistence), and in Chapter 13, which contains offences against humanity and peace and war crimes (including offences against humanity). The Criminal Code therefore contains several elements that correspond to the category of hate speech or have a close connection with it, which are briefly analysed below.

1.1. Defamation of a national, racial, ethnic or other group of persons

The first provision of the Criminal Code relevant to the topic under consideration is Article 355, which is entitled “Defamation of *national, racial, ethnic or other groups of persons*.”⁸ According to this provision, if a person publicly defames a nation and its language, a race, an ethnic group or a group of persons on the grounds of their actual or perceived race, ethnic group, nationality, political opinion, religion or actual or perceived atheism, he commits the offence.⁹ The qualified case of this offence is also relevant to the subject under consideration, whereby the offender is punished more severely if he commits the offence through the media, films, radio, television, publicly accessible computer networks or other similar means.¹⁰

1.2. Incitement to hatred against a group of persons or incitement to restrict their rights and freedoms

Another form of hate speech is defined in the Article 356 of the Criminal Code, which is called “Incitement to hatred or to restriction of the rights and freedoms of a group of persons”.¹¹ According to the definition of the Penal Code, whoever publicly incites hatred against a national, racial or ethnic group, religious community, social class or other group of persons, or incites the restriction of the rights and freedoms of members of such communities, commits the offence.¹² The law also provides for the punishment of anyone who attempts or conspires to commit such an act.¹³ The Penal Code defines as a qualified case, similar

7 The Criminal Code is available at the following link: <https://www.zakonyprolidi.cz/cs/2009-40>

8 In Czech: “*Hanobení národa, rasy, etnické nebo jiné skupiny osob*”.

9 Criminal Code 355 § para. (1)

10 Criminal Code 355 § para. (2)

11 In Czech: “*Podněcování k nenávisti vůči skupině osob nebo k omezování jejich práv a svobod*”.

12 Criminal Code 356 § para. (1)

13 Criminal Code 356 § para. (2)

to the one discussed above, when the offender commits the offence through a press product, film, radio, television, a publicly accessible computer network or other similar means, and when the offender actively participates in the activities of a group, organisation or association that promotes discrimination, violence or incites hatred against a race, ethnicity, social class, religious group or other group of persons.¹⁴

1.3. Violence against a group of people and an individual

Another provision of the Criminal Code should be mentioned in connection with the category of hate speech, namely the provision in Article 352, which is called “*Violence against a group of people and an individual*”.¹⁵ According to the basic case, if a person threatens a group of residents with death, bodily harm or substantial damage, he or she has committed the offence covered by the Act. The Criminal Code defines as a qualifying case in comparison with the basic case the offender who uses violence against a group of the population or a person, or threatens that group of persons with death, bodily harm or substantial damage because of his or her actual or perceived race, ethnicity, nationality, political opinion, religion or even his or her actual or perceived atheism.¹⁶ In the case of this offence, we see that the basic offence is not explicitly linked to the category of hate speech, but the aggravated offence is, since the offence is committed by threatening death, bodily harm or substantial damage- against a specific group of persons. Under the Criminal Code, the commission of such an offence by means of a press product, film, radio, television, a publicly accessible computer network or other similar means, as well as the attempt or conspiracy to commit such an act, is a qualified case in comparison with the basic case.¹⁷

1.4. Other offences

It is also necessary to mention the criminal offences of the Criminal Code concerning the creation, support and promotion of a movement for the suppression of human rights and freedoms or the promotion of hatred against racial, ethnic, national, religious or class hatred or against any other group of persons

14 Criminal Code 356 § para. (3)

15 In Czech: „*Násilí proti skupině obyvatelů a proti jednotlivci*”.

16 Criminal Code 352 § para. (1)

17 Criminal Code 352 § para. (2)-(3)

(403 §),¹⁸ the dissemination of a work promoting such a movement (403a §),¹⁹ and the public expression of sympathy for such a movement (404 §).²⁰

Closely related to hate speech is the offence of approving the commission of a crime (365 §)²¹ on the one hand, and the offence of publicly denying, questioning, approving or justifying genocide (405 §)²² on the other. The former offence is committed by anyone who publicly approves of a crime committed or publicly praises the perpetrator of the crime for having committed it. This offence may be of particular interest in the context of the shooting at Charles University in Prague in December 2023,²³ where comments under internet articles reporting the massacre, identifying with the event and the perpetrator, and praising the act and the perpetrator itself, constituted the offence as defined by the law. As regards the latter offence, it is worth mentioning at this point the official statement by the Prosecutor General on the Russian-Ukrainian conflict. The Prosecutor General's statement of 26 February 2022, entitled "*Information on the possible criminal limitations of freedom of expression in relation to the situation in Ukraine*", states that, although Czech constitutional rules declare freedom of expression, it has its limits. This means, in the context of the Russia-Ukraine war, according to the Prosecutor General's statement, that if a person expresses publicly (including at demonstrations, on the Internet or other social networks) his or her approval of (i.e. acceptance or support for) Russia's aggression against Ukraine, or in this context expresses support or praise for the leaders of the Russian state, he or she may, under certain conditions, be held criminally liable under the Criminal Code 365 § (i.e. approval of the crime) and 405 § (i.e. public denial, questioning, approval or justification of genocide is a criminal offence) of the Russian Federation.²⁴

It is also interesting to note that the Penal Code lists in a taxative manner the circumstances that the court must take into account as aggravating circumstances in sentencing for each offence. On this basis, the Code classifies as an aggravating circumstance, among others, the fact that the offender commits

18 In Czech: „Založení, podpora a propagace hnutí směřujícího k potlačení práv a svobod člověka”.

19 In Czech: „Šíření díla k propagaci hnutí směřujícího k potlačení práv a svobod člověka”.

20 In Czech: „Projev sympatií k hnutí směřujícímu k potlačení práv a svobod člověka”.

21 In Czech: „Schvalování trestného činu”.

22 In Czech: „Popírání, zpochybňování, schvalování a ospravedlňování genocidia”.

23 On 21 December 2023, a 24-year-old student at Charles University in Prague opened fire in the main building of the Faculty of Arts in the city centre. He planned the shooting in advance. During the massacre, he killed fourteen people and eventually killed himself.

24 The Attorney General's statement is available via the following link: <https://verejnazaloba.cz/nsz/informace-k-moznym-trestnepravnim-limitum-svobody-projevu-ve-vztahu-k-situaci-na-ukrajine/>

VII. HATE SPEECH AND CYBERBULLYING IN CZECH LAW

the offence (e.g. murder) because of hatred against a national, racial, ethnic, religious or social class.²⁵

In summary, Czech national law criminalises and punishes certain forms of hate speech in the form of the above²⁶ offences, although it does not recognise the term hate speech itself.²⁷ The table below provides a clear overview of the groups at risk and the types of conduct that can be committed in relation to each of the legal offences of hate speech.

Name of the offence	Criminal Code provision	Vulnerable group	Compliance behaviour
Violence against a group of people and an individual	352. § para. (2)-(3)	a group that can be separated on the basis of national, racial, ethnic, religious or political opinion	threat
Defamation of a national, racial, ethnic or other group of persons	355. §	a group that can be separated on the basis of national, racial, ethnic, religious or political opinion	public defamation
Incitement to hatred against a group of persons or incitement to restrict their rights and freedoms	356. §	a national, racial, ethnic, religious, social class or other group of persons	publicly inciting hatred, incitement
To create, support and promote a movement to suppress human rights and freedoms	403. §	any group of persons (at the same time, the Criminal Code names the racial, ethnic, national, religious and social class against which the activity of such a movement may be directed)	creating, supporting and promoting a hate movement

²⁵ Criminal Code 42 § point (b)

²⁶ For a more detailed analysis of the facts analysed, see Nováková, 2010, pp. 7-11, pp. 16-21, and Strakoš, 2021, pp. 9-13.

²⁷ At this point, it is worth mentioning that the most comprehensive European treaty protecting the rights of persons belonging to national minorities, the *Framework Convention for the Protection of National Minorities*, under the control of the Committee of Ministers of the Council of Europe, highlighted in its latest report on the Czech Republic in 2021, that, although the Czech Republic has recently made some progress in the fight against discrimination, the report also called on the Czech authorities to step up their efforts to combat stereotypes and prejudice against minority groups most vulnerable to hate speech, among other things by effectively prosecuting cases of criminal relevance (Report, 6. The report is available via the following link: <https://rm.coe.int/5th-op-czech-republic-en-restricted/1680a2b3d6>).

Name of the offence	Criminal Code provision	Vulnerable group	Compliance behaviour
Distribution of works promoting the movement to suppress human rights and freedoms	403a §	see the provisions of 403 §	producing, importing, exporting, transporting, offering, making available to the public, transmitting, marketing, selling, selling or otherwise transferring such works (in particular emblems, flags, logos, etc.) in large quantities, or creating such works for others
Expressing sympathy for the movement to suppress human rights and freedoms	404. §	see the provisions of 403. §	public expression of sympathy
Public denial, questioning, approval or justification of genocide	405. §	not relevant	public denial, questioning, approval, confirmation

Table 1: Legal elements constituting hate speech in the Czech Criminal Code

The table shows that the common feature of the offences analysed is that the groups at risk are broadly the same, i.e. such offences are specifically directed against a national, racial, ethnic, religious group or a group that can be distinguished on the basis of political opinion. The range of offences takes four main forms: defamation, incitement to hatred (and certain forms of conduct linked to a movement carrying out such activities), incitement and threats. After analysing the constituent elements, it can also be concluded that hate speech conduct can be committed both offline and online, and that the constituent elements (with the exception of those in Articles 404 and 405) consider as a qualifying case when the offender commits an offence through a press product, film, radio, television, a publicly accessible computer network or other similar means.

At the same time, the question arises as to where the boundaries of freedom of expression can be drawn in practice, in the application of the law by the judiciary, i.e. how broadly or narrowly the above-mentioned definitions of hate speech can be interpreted. A relatively recent decision of the Czech Constitutional Court from December 2021, which deals in part with this question, may help us to answer this question. The decision was based on the following case: a picture of first-graders at a primary school in Teplice in north-western Bohemia, in which a significant number of the children are of Arab and Roma origin. The picture was posted on Facebook, with *Vítězslav Kroupa* commenting: “*It’s a good thing they go to the Plynárenská [Gas Factory] Street Primary School. The solution is obvious.*” The

criminal proceedings against the commentator were opened on the basis of two offences: firstly, the criminal offence under the Article 356 of the Criminal Code, which, as analysed above, is known as “*Incitement to hatred or restriction of the rights and freedoms of a group of persons*”, and on the other hand, the offence of “*incitement to hatred or restriction of the rights and freedoms of a group of persons*”. Article 404,²⁸ which makes it a punishable offence to express sympathy for a movement or idea that aims to suppress human rights and freedoms – in this case, this idea is obviously Nazism. Before the case was brought before the Constitutional Court, it went through several judicial forums. At this point, we will only highlight some details from the decision of the Supreme Court.²⁹ According to the Supreme Court, Kroupa’s comment was clearly a reference to the extermination of ‘*undesirable ethnicities*’ in gas chambers, i.e. that children of Arab and Roma origin in the picture should be treated in the same way as the Nazis systematically murdered people of Jewish origin and others during the Second World War. “*In a state governed by the rule of law, based on respect for constitutionally guaranteed civil and human rights, such remarks are unacceptable and must be responded to by the means of criminal law*” – says the Supreme Court decision.³⁰ The defence, however, argued that Kroupa’s comment was merely black humour and an opinion that was within the bounds of freedom of expression, but the argument was not found credible by the Supreme Court, which rejected it. In its decision, the Court also stated that “*the expression of certain values or opinions is not and cannot be a criminal offence. On the other hand, public incitement to hatred or expressing sympathy for hate movements is punishable under the conditions laid down in the Criminal Code.*”³¹ It should be noted that Kroupa has previously been convicted of posting a picture of an imperial eagle holding a Nazi swastika, as well as a portrait of convicted Nazi war criminal Hermann Göring and Adolf Hitler on social media, so it was obvious to the court at the time of the case that the commentator was sympathetic to Nazi ideas. The case was subsequently brought to the Constitutional Court by Kroupa through a constitutional complaint. In its decision³², the Constitutional Court in fact confirmed the decision and reasoning of the Supreme Court and the lower courts that had previously ruled that Kroupa’s commentary could not be considered black humour and was

²⁸ In Czech: „*Projev sympatií k hnutí směřujícímu k potlačení práv a svobod člověka*“.

²⁹ The Supreme Court’s decision 564/2021 [3 Tdo 564/2021 Usnesení NS ze dne 24.06.2021, hereinafter: SC decision] is available via the following link: <https://www.zakonyprolidi.cz/judikat/nscr/3-tdo-564-2021>

³⁰ SC Decision, Reasoning, point 70.

³¹ SC Decision, Reasoning, point 74.

³² The decision of the Constitutional Court [III.ÚS 2696/21 ze dne 7. 12. 2021, hereinafter: CC decision] is available via the following link: https://nalus.usoud.cz/Search/GetText.aspx?sz=3-2696-21_1

not protected by the fundamental constitutional right of freedom of expression, and therefore should be considered as hate speech – on the internet- as a form of hate speech, which in a democratic society must be combated by criminal law.³³ The Constitutional Court therefore dismissed the constitutional complaint and sentenced Vítězslav Kroupa to 16 months' imprisonment, suspended for three years.³⁴ In conclusion, in the Czech Republic, judicial practice already classifies as hate speech the expression of an opinion or value judgement that incites hatred against a specific group or group of persons by means of a comment on a post on a social media platform, in this case Facebook. We can therefore see that, on the basis of Czech case-law, the fundamental constitutional right to freedom of expression is not absolute.

2. Regulation of (cyber)bullying in Czech law

Czech law does not recognise the categories of *bullying* and *cyberbullying*, so they are not defined as separate facts in the Criminal Code or other legislation.³⁵ However, the Czech Penal Code contains a number of provisions which contain elements of one or other of these categories. Accordingly, the following is a brief description of those elements of the Criminal Code which, in terms of content, correspond most closely to the instrumental acts or a manifestation of the categories of bullying and cyberbullying.

However, before proceeding to the analysis outlined above, it is necessary to briefly refer to the public law, or more precisely the constitutional law, basis of the issue of cyberbullying. As we shall see, some forms of cyberbullying always involve a negative intrusion into the privacy and daily life of the victim. Accordingly, it is necessary to refer to Article 10 para. (2) of the Charter as the constitutional basis for the Czech legislation, which declares that everyone has the right to be protected against unlawful interference with private and family life.³⁶

2.1. Concepts of cyberbullying in Czech criminal law

The Czech Criminal Code contains five elements that can be linked and applied to acts of cyberbullying. These are analysed below, together with a brief

³³ CC Decision, Reasoning, point 11

³⁴ CC Decision, Reasoning, point 12

³⁵ Cf. Parti, 2016, 117, and Vištalová, 2021, p. 1 and p. 24.

³⁶ Vištalová, 2021, pp. 14-16.

reference to those elements of the case law which are of great relevance to the topic.

2.1.1. Breach of confidentiality of forwarded messages

The first relevant offence in Chapter 2 of the Penal Code is the violation of the confidentiality of transmitted messages (*porušení tajemství dopravovaných zpráv*, hereinafter referred to as ‘breach of secrecy’), which is a violation of the rights of personality, privacy and confidentiality of correspondence. This offence is in fact a violation of the right to privacy by obtaining and/or disclosing personal data without authorisation.³⁷ In the context of cyberbullying, the first two paragraphs of the offence are relevant. On the one hand, according to the Criminal Code, anyone who intentionally:

- a) the secrecy of any data, text, voice or image message sent over an electronic communications network and addressed to an identified participant or user receiving the message; or
- b) breaches the confidentiality of non-public transmissions of computer data to, from or within a computer system commits this offence.³⁸

On the other hand, the Penal Code also specifies the scope of cases where a person discloses or uses a secret which he or she has learned through correspondence, telegrams, telephone calls or transmission via electronic communications networks, with the intention of causing damage to another person or of obtaining unlawful gain for himself or herself or for another person.³⁹

Comparing these facts with the traditional conceptual elements of cyberbullying, we can say that there is a weak correspondence between the two categories, since although the perpetrator commits the breach of confidentiality intentionally, there is no continuity, regularity or subordination between the parties. A further important difference between the two categories is that in the case of a breach of secrecy, the fear of intimidation is not the aim of the perpetrator’s actions, but only a potential result.

37 If we have already mentioned the constitutional foundations of this issue above, in the context of this offence, we can mention, in addition to Article 20(2) of the Charter, the provisions of Article 20(3) of the Charter, which states that everyone has the right to be protected against the unlawful collection, disclosure or other misuse of personal data concerning him or her.

38 Criminal Code 182 § para. (1) points (b)-(c)

39 Criminal Code 182 § para. (2)

2.1.2. Defamation

The Criminal Code also provides for the next relevant offence, defamation (*pomluva*), in the area of violation of the rights of personality, privacy and confidentiality of correspondence. of the Czech Penal Code, a person who makes an untrue statement about another person which is likely to seriously damage the reputation of that person in the eyes of others (in particular if it causes damage to his employment, or interferes with his family relations, or causes him other serious harm) commits the offence of defamation.⁴⁰ It can be seen that this statutory element can only be linked to bullying in a very indirect way, since it lacks a relationship of subordination between the parties, a repetitive character (i.e. regularity and continuity) and, thirdly, it is seen that bullying can take the form of a result of defamation and not an explicit objective. The link of defamation to cyberbullying may be based on the qualified case of this offence. According to this provision, where the offender commits defamation in the press, on film, radio, television, via a publicly accessible computer network or by other similar means, the offence is punishable more severely than in the main case.⁴¹ This leads to the conclusion that there is also a weak correlation between defamation and cyberbullying, in other words, that defamation is on the borderline of cyberbullying.

2.1.3. Blackmail with sexual intent

Perhaps the most interesting element of the Czech legislation in this respect is the sexual blackmail (*sexuální nátlak*), which is a special type of bullying and is defined as a separate offence in the Criminal Code. In the context of the historical development of this offence, it should be noted that this specific form of blackmail is a new offence in the current Criminal Code, which the legislator has included in the category of sexual offences against human dignity. It is only partly new because, although it takes over certain provisions of the previous Criminal Code, other elements of the offence are completely new.⁴² The primary reason for including the new provisions and twists in the Penal Code was to respond to a regulatory loophole, since the previous legislation did not allow

40 Criminal Code 184 § para. (1). Article 20 para. (1) of the Charter declares that everyone has the right to respect for human dignity, honour, reputation and the protection of his or her name.

41 Criminal Code 184 § para. (2)

42 An example of this is the element of the legislation that previously applied only to persons under the age of 18, as opposed to the current legislation, which now applies to all persons regardless of age. It is a different matter that the current Penal Code provides for more severe penalties in cases where the offence is committed against a minor.

for the criminalisation of certain acts, which were, however, relatively often committed in practice.⁴³ It should also be noted that this form of extortion is a subsidiary offence, since it can only be established if the offence of rape referred to in Article 185 of the Criminal Code is not committed.

Compared to the classic case of extortion, this is a special case because the perpetrator forces the victim to perform a sexual act (in most cases this means masturbation and stimulation of the genitals or other erogenous zones with hands, erotic aids or other objects)⁴⁴, to take nude or poorly dressed photographs or to perform other similar acts, while the perpetrator blackmails the victim by publishing a sexually explicit recording (picture or video) in his possession.⁴⁵ The offence is defined in the Criminal Code as follows: whoever coerces another person to perform a sexual act, to take nude or poorly clothed photographs or other similar acts, or who coerces another person to perform such acts by exploiting his vulnerability, by using violence, threats of violence or other serious harm, commits the offence of extortion for the purpose of sexual exploitation.⁴⁶ The phrase '*coerces another to commit a similar act*' requires some explanation, as the interpretation of this phrase is problematic for jurisprudence and case-law. It covers any behaviour that may be similarly humiliating for the victim, such as sexual self-disclosure or exposure. Therefore, for example, the offence may take the form of coercion to use sexual gestures or vocal expressions intended to arouse the sexual arousal of the offender or to increase it.⁴⁷ As can be seen, although the facts of the case do not presuppose a relationship of subordination between the parties, it may nevertheless be a qualifying circumstance. It should be noted that, in addition to a relationship of subordination, the Czech Criminal Code considers as a qualifying circumstance the offender's use of the victim's dependency (addiction); his use of a child; his use of weapons or a group of persons to injure several persons; and his causing serious bodily injury or death to the victim.⁴⁸ The Criminal Code also criminalises preparation.⁴⁹ It can also be seen that bullying can be a result of the offence, not a condition of it, and that repeated or continuous bullying is not mentioned in the offence, i.e. the conceptual elements of bullying cannot be fully identified with those in the offence.

⁴³ Holas, 2012, p. 24.

⁴⁴ Fremr, 2015, pp. 1017-1018.

⁴⁵ Cf.: Party, 2016, pp. 126-127.

⁴⁶ Criminal Code 186 § para. (1).

⁴⁷ Ščerba, 2009, pp. 546-549.

⁴⁸ Criminal Code 186 § para. (2)-(6).

⁴⁹ Criminal Code 186 § para. (7).

Despite the differences, we would like to highlight the link between sexual harassment and cyberbullying by briefly presenting a case. In the case, a middle-aged man, *Patrik Krajíček*, contacted 19 underage girls (some of the victims were under 15 at the time of the offence) between 2017 and 2020 via Facebook under a pseudonym and with a pseudo-profile in order to extort sexual photos and videos from them. In the majority of cases, the perpetrator was successful, promising money or gifts in exchange for the photos and videos. However, after a while, when the victims tried to stop communicating with the man or refused to respond to his requests, the perpetrator would threaten them, most often by making public the intimate photos and videos they had already sent, and in rare cases by threatening them with violence. The perpetrator said that he did not intentionally contact minors, nor did he intend to meet the victims in person. On this basis, the offender was prosecuted for *sexual harassment*. The court finally imposed a sentence of three years' imprisonment (suspended for five years) and a fine, and ordered him to refrain from communicating electronically or in writing with anyone under the age of 18 for the duration of the sentence.⁵⁰ This case shows that the Czech case-law applies the concept of sexual harassment to certain cases of online abuse. This raises the possibility that the same concept could be applied in the future to specific cases of cyberbullying between peers, including sexual blackmail.

2.1.4. *Dangerous threat*

The Czech Penal Code's definition of dangerous threat (*nebezpečné vyhrožování*, hereinafter 'threat') also has some similarities with the category of bullying. The Penal Code mentions threats in Chapter 10, which covers offences against public order, including offences that disturb human coexistence. According to this definition, a person who threatens another person with death, grievous bodily harm or other serious harm in a way that is likely to cause fear in the other person, is deemed to have committed the offence covered by the Act.⁵¹ In this case, we can see that the primary aim and intention of the perpetrator is to create fear, and in this form it is similar to bullying, but in the case of threats there is no shift in the balance of power compared to bullying, nor is there any element of repetition or continuity in the facts under examination. The relevant literature states that the offence does not require the personal presence of the person to whom the threat is addressed, i.e. it is sufficient for the offence to be committed if the

⁵⁰ The case summary is based on the following article: <https://www.ceskenoviny.cz/zpravy/za-sexualni-natlak-vuci-nezletilym-ulozil-soud-muzi-z-luhacovic-podminku/2232595>

⁵¹ Criminal Code 353 § para. (1).

addressee becomes aware of it, for example by telephone or electronic means of communication.⁵² This latter finding confirms that the threat can be linked to the category of cyberbullying.

2.1.5. *Dangerous harassment*

The legal definition of dangerous harassment (*nebezpečné pronásledování*, hereinafter: harassment) also shows some similarity with the category of intimidation, which, like threats, is also included in the Criminal Code in the category of offences that disturb human coexistence. With regard to cyberbullying, the two aspects of the offence should be highlighted, namely that harassment may be committed by means of persistent contact with the victim by electronic means, in writing or by other means, or by misusing the victim's personal data for the purpose of personal or other contact, and that such conduct is likely to cause the victim to fear for his or her life or health or that of persons close to him or her.⁵³ In the context of harassment, the intimidation as an intent or the act itself is of a long duration (continuous, persistent or repeated). The latter raises the question of how we should interpret the notion of persistence of harassing conduct over a long period of time. A 2011 decision of the Supreme Court⁵⁴ helps us to answer this question. In its decision, the Supreme Court stated that, for this offence, a long duration of harassment means repeated violent contact or attempts by the perpetrator with the victim (i.e. an isolated or random act does not meet this requirement), which must also be capable of creating real fear in the victim. Accordingly, the consistent, persistent, persistent and systematic actions of the perpetrator may constitute conduct which gives rise to the offence. However, the relevant literature goes further by stating that repetition occurs when the offender makes more than 10 attempts to contact the victim and these attempts take place over a period of at least 4 weeks.⁵⁵ The Decision also underlines that in the case of this offence, the offender's behaviour typically deviates from normal norms of behaviour and may therefore in some

⁵² Šamal, 2012, p. 3000.

⁵³ Criminal Code 354 § para. (1) points (c) and (e).

⁵⁴ Decision 1082/2011 of the Supreme Court of Justice [8 Tdo 1082/2011 Usnesení NS ze dne 08.09.2011]. The decision is available via the following link: <http://kraken.slv.cz/8Tdo1082/2011>

⁵⁵ Šamal, 2012, p. 3295. It should be noted that the case law has accepted and adopted this interpretation of the legal literature, as it has referred to this interpretation in several decisions. See, for example, the reasoning of Supreme Court decisions 1625/2016 and 777/2018.

cases be dangerous for the victim. However, in a 2013 decision⁵⁶, the Supreme Court also addressed the question of what constitutes an act of harassment that results in harassment by electronic means. In particular, the case-law considers that this includes the regular sending of unsolicited e-mails (often with vulgar or aggressive content), so-called telephone harassment (i.e. where the victim is harassed anonymously and regularly by the victim, often with obscene and threatening telephone calls at any time of the day), but also, more generally, unsolicited e-mails, spam and telephone calls, where repetition can be established.

Because of these characteristics, it can be concluded that this situation has a strong similarity with (cyber)bullying, but the lack of a subordinate-subordinate relationship is a significant difference between the two categories. If we look at the twist of this offence, where the perpetrator contacts the victim by electronic, written or other means on a permanent basis and thereby carries out the harassment, we see that it has a high degree of similarity with the category of *cyberstalking* (a subtype of cyberbullying), but the conceptual elements of this offence can by no means be considered as a sufficient definition of cyberstalking. Accordingly, it must be seen that it is rather difficult to distinguish between this form of harassment and the classic case of cyberstalking, but experience from case law shows that in the Czech Republic this form of harassment [354 § para. (1) point (c)] is usually applied to cases involving cyberstalking.⁵⁷

At the end of our analysis, the following table provides an overview of the correlation between the analysed elements of the Criminal Code and the classic conceptual elements of the category of (cyber)bullying:

Name of the offence	Criminal Code provision	Level of match with (cyber)bullying category ⁵⁸
Breach of confidentiality of forwarded messages	182 § para. (1) points (b)-(c) and para. (2) (b)-(c).	<i>Poor match</i> regularity and continuity is not an element no element of subordination intimidation is not an end, it can only be a result

56 Decision 1333/2013 of the Supreme Court of Justice, Explanatory Memorandum, point 2 [4 Tdo 1333/2013-45 Usnesení NS ze dne 17.12.2013]. The decision is available via the following link: <https://next.codexis.cz/judikatura/JD196188#L1>

57 Vištalová, 2021, p. 24 and p. 27.

58 In this column of the table, we have captured the elements of each of the facts that differ from the classic conceptual elements of the cyberbullying category.

Name of the offence	Criminal Code provision	Level of match with (cyber)bullying category ⁵⁸
Defamation	184. §	<i>Poor match</i> regularity and continuity is not an element no element of subordination intimidation is not an end, it can only be a result
Harassment with sexual intent	186. §	<i>Medium match</i> regularity and continuity is not an element subordination is only a qualifying circumstance
Dangerous threat	353. § para. (1)	<i>Medium match</i> regularity and continuity is not an element no element of subordination
Dangerous harassment	354. § para. (1) points (c) and (e)	<i>Strong match</i> subordination is not a condition

Table 2. Legal elements in the Criminal Code that are similar in content to the category of (cyber)bullying

In conclusion, the Czech criminal legislation contains five legal elements that to a greater or lesser extent correspond to the category of (cyber)bullying. Of the analysed offences, the strongest similarity can be found in the area of harassment, but the offence of harassment with sexual intent, which can be considered a specific type of bullying, should also be highlighted. However, the other three offences analysed (breach of confidentiality of transmitted messages; defamation; threats) show only indirect, weak similarities with the traditional form of (cyber)bullying.

3. Prevention legislation and practice

In terms of prevention, we can report on programmes and procedures in the Czech Republic that are relevant to the topic, especially in relation to bullying in the school environment.

In this respect, it is necessary to briefly refer to the methodological guidance issued by the Ministry of Education, Youth and Sport in 2016 (hereinafter: the Guidance), which deals specifically with the prevention and management

of bullying in educational institutions.⁵⁹ The aim of the Guide is to help educational institutions to understand the phenomenon of bullying, the risks of bullying and how they can prevent and effectively deal with it. The Guidance sets out that educational institutions have a legal obligation to create and maintain a safe environment for pupils, to protect pupils' health and to prevent risky phenomena such as bullying.⁶⁰ In addition, educational institutions should develop *an anti-bullying programme with the primary aim of prevention and the establishment of procedural mechanisms to deal with bullying*. The school management should designate at least one person from among the members of the teaching staff to deal with specific issues of prevention and management of bullying within the educational institution. The designated persons should receive regular training and have the authority to investigate and deal with cases of bullying. As set out in the Guidelines, in order to deal effectively with harassment, the educational institutions concerned should first assess the seriousness of the situation and whether to deal with it internally at the level of the institution or to seek external help (e.g. At the same time, parents always have the right to ask the educational institution or a particular teacher for help in dealing with bullying, and the educational institution has a duty to investigate all suspicions and allegations of bullying. The legal representatives of the parties involved (aggressors, victims and witnesses) should be involved in the investigation and resolution of the problem. If the problem is not satisfactorily resolved by the teachers, the matter should be referred to the head of the school, who has a key role and primary responsibility for preventing and effectively dealing with bullying within the institution. If the school's response is inadequate, it is possible to contact the school's founder or the Czech School Inspectorate (ČŠI).

As far as the so-called *hotlines* (i.e. online counselling and legal aid services) are concerned, it is necessary to highlight the programmes and activities of seven central (public) platforms and NGOs in the fight against harassment:

- a) The 'Minimise harassment' programme (*Minimalizace šikany*)⁶¹
- b) Society against harassment (*Společenství proti šikaně*)⁶²
- c) Internet Counselling Centre (*Internet poradna*)⁶³
- d) Safety line (*Linka bezpečí*)⁶⁴

⁵⁹ The methodology guide is available via the link below: <https://www.msm.cz/file/38988/>

⁶⁰ This obligation is laid down in Article 29 of the Education Act (Act 561/2004).

⁶¹ Available at: <http://www.minimalizacesikany.cz/>

⁶² In this column of the table, we have captured the elements of each of the facts that differ from the classic conceptual elements of the cyberbullying category.

⁶³ Available at: <https://iporadna.cz/>

⁶⁴ Available at: <https://www.linkabezpeci.cz/>

- e) National Internet Safety Centre (*Národní centrum bezpečnějšího internetu*)⁶⁵
- f) E-safety portal (*E-Bezpečí*)⁶⁶
- g) E-Safety portal for teachers (*E-Nebezpečí pro učitele*).⁶⁷

On this topic, it is worth turning our attention for a moment beyond jurisprudence to the work of psychotherapist and therapeutic pedagogue *Michal Kolář*, who has been conducting sociological-based surveys on (cyber)bullying in the Czech Republic for decades. Kolář is also credited with the development of an internationally renowned theory and research model that specifically specialises in the field of school bullying (including cyberbullying). Kolář's theory was the basis for the internationally very positive results of the preventive *anti-bullying programme*⁶⁸, which has been implemented nationwide in the Czech Republic with the support and control of the Ministry of Education. In terms of its effectiveness, Kolář's programme is internationally comparable only with the *Olweus Bullying Prevention Program* (OBPP), which bears the name of *Dan Olweus* from Norway.⁶⁹

4. The issue of service provider liability for offences committed in the online space

It should be noted at the outset that in the Czech Republic there is no specific legislation on social platforms, and thus the Czech legal system does not recognise a public liability regime for the control of content on social media in relation to alleged or actual censorship. At the level of constitutional rules, all forms of censorship, including censorship on the Internet, are prohibited in the Czech Republic, with the proviso that the content and the way in which the information is communicated does not contravene the law.⁷⁰

⁶⁵ Available at: <https://www.ncbi.cz/>

⁶⁶ Available at: <https://www.e-bezpeci.cz/>

⁶⁷ Available at: <http://www.e-nebezpeci.cz/>

⁶⁸ Here is a statistic about the effectiveness of the project: in the pilot schools selected for the programme, the incidence of bullying was reduced by 42.5% in 4 months, while a team of specially trained teachers managed to reduce the number of bullying victims by 50-75%. Later, after the programme was implemented on a larger scale in 50 schools, its effectiveness was confirmed.

⁶⁹ For more on the methodology and experience of Kolář's antibullying programme, see the interview with Kolář: <http://beyondbullies.org/2012/02/program-deals-with-epidemic-in-schools/>

⁷⁰ Cf. Article 17 para. (3) of the Charter.

Currently, social media are not specifically regulated in the Czech legal order, i.e. there is no specific sectoral legislation or other provision concerning social media. At the time of writing, there is no known legislative intention to regulate social media or freedom of expression in this area. Czech law regulates freedom of expression in relation to the Internet and social media only in a tangential manner – This subject is regulated by the *Act on Information Society* (Act No. 480/2004, hereinafter referred to as the ‘Information Law Act’). In view of the year in which this Act was adopted (2004) and its purpose, which was to transpose the rules of the *European Directive on Electronic Commerce*⁷¹ (hereinafter the Directive) into the legislation of the Member States, this Act was not specifically designed to regulate expression and social media on the Internet, but in accordance with the provisions of the Directive, the Czech Act transposes, among others, the rules laid down therein concerning the general liability of hosting providers.

The scope of the Info Act covers the so-called information society services (*služby informační společnosti*). According to the legislation, such services are any information society service which is generally provided for *remuneration*, *at a distance* (i.e. without the simultaneous presence of the parties), *by electronic means* (i.e. the service is sent from its point of origin and received at its destination by means of electronic equipment for processing and storing data, and is sent, transmitted and received entirely by wire, radio, optical or other electromagnetic means) and *at the individual request of the recipient* (i.e. the service is provided by the transmission of data at the individual request).⁷² The Czech case law adds that, in assessing these services, it must be taken into account that:

- a) the service is provided to another person, i.e. it is not for the provider’s own benefit (i.e. services provided, for example, by an employer to its employees for the purpose of their work are excluded); or
- b) that the essence of the service is based on the information transmitted electronically (which excludes, for example, online shops from this scope, because the online interface is merely an intermediary and not the object of the service), and that
- c) it is an individual service for a specific user (which is not the case for example for a radio broadcast).⁷³

71 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. <https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=celex%3A32000L0031>

72 Zichová, 2019, pp. 21-23.

73 Polčák, 2012, pp. 142-143.

For the reasons set out above, the regulation of this Act approaches the issue under consideration primarily from the perspective of the provision of services on a business basis, rather than from the perspective of the expression of opinion, despite the fact that in certain cases there is an overlap between the two areas.

After an overview of the general rules, let's look at the detailed rules on liability. According to the Information Law Act, the provider⁷⁴ is responsible for the content displayed:

- a) if it was aware, having regard to the subject matter of its activities and the circumstances and nature of the case, that the content of the information stored or the conduct of the user was unlawful; or
- b) if it can be shown that it has knowledge of the unlawful nature of the content of the information stored or of unlawful conduct by the user and has not taken all necessary steps to remove or disable access to such information immediately.⁷⁵

In addition, the service provider is always responsible for the content of the information stored if it directly or indirectly exercises decisive influence over the user's activities.⁷⁶ With these provisions, the legislator transposes the relevant article of the Directive⁷⁷ into Czech law with practically no substantive changes.⁷⁸

In summary, the provider can be held liable for the content it '*transmits*' if the following conditions are met:

- a) the provider's knowledge or knowledge of the infringement; and
- b) the service provider has not removed the infringing content.

As a general rule, the service provider can therefore be held liable if it has not acted after becoming aware of the problem. A special rule, different from this

⁷⁴ It should be noted that the regulation does not distinguish between different types of service providers (e.g. social networking site operator, hosting provider, video-sharing provider). According to the regulation [2 § para. (1) point (a)], a service provider is any person who provides any information society service by electronic means at the individual request of the user, normally against payment. A service is provided by electronic means if it is sent over an electronic communications network and the user accesses it from an electronic storage device.

⁷⁵ Information Law Act 5 § para. (1)

⁷⁶ Information Law Act 5 § para. (2)

⁷⁷ Cf. Czech legislation with Article 14 of the Directive.

⁷⁸ With regard to the legal liability of social media, it should be noted that in addition to the provisions of the Info Law, the provisions of the Civil Code on liability can in principle also be applied.

general rule, is that the provider is liable in all cases where the content is produced directly by him or over which he has a significant influence. This is the case for news portals and online newspapers/magazines, where as publishers they are responsible for the content of the news they publish. This legislation is also in line with the legislation of the Czech Press Law and thus extends its scope to the online space.

Another important provision of the Information Law Act regarding the liability of service providers is that service providers are not obliged to:

- a) monitor the content of the information they transmit or store; and
- b) actively seek out facts and circumstances that suggest illegal content in information.⁷⁹

This means that the service provider has no active content search/content tracking obligations. In this respect, the Czech legislation contains a clear provision which therefore guarantees that active content tracking cannot be imposed on service providers, except in the case of online news portals/newspapers.

The Information Law Act does not contain a public law penalty for failure to remove content that violates the law, so it is a provision without a penalty. Accordingly, in this respect, Czech legislation does not provide for enforcement rules. The concept of infringing content is not defined in detail in the law. Accordingly, it is a broad category covering a wide range of infringements in different branches of law, for which the possible legal consequence or legal disadvantage may take different forms.

It is also necessary to briefly mention that, in addition to the above-mentioned legislation, the possible measures of the service provider in relation to the expression of opinions and the possibilities of taking action against the user are also reflected in the general terms and conditions of each service provider (hereinafter: GTC). These are bilateral private agreements between the service provider and the user. The general approach of such GTCs is that service providers reserve the right to remove content that is in breach of the law.

In conclusion, two trends have emerged in the Czech Republic in recent years with regard to the obligation for Community platforms to intervene. The first advocates accountability and responsibility of social media, arguing that service providers are able to control the source of the threat, while at the same time being able to easily avert the threat of infringement to the extent of their

⁷⁹ Information Law Act 6 §.

capabilities.⁸⁰ The other approach is that service providers cannot be obliged to actively monitor content under the regime of the Information Law Act.⁸¹

Following the overview of liability issues, it is important to briefly point out that Czech law does not recognise the criminal measure of making electronic data inaccessible in Hungarian terminology, and at the same time Czech law does not recognise a category of criminal offences equivalent in content to the making of electronic data inaccessible in Hungarian terminology, so that such criminal measures cannot be applied to offences committed in online space, including cyberbullying.⁸² The penalties for the offences described above are, as a general rule, imprisonment and, in some cases, disqualification from practising. It should also be noted that Czech law does not contain any specific provisions for the effective prosecution of hate speech and cyberbullying offences committed online (e.g. the possibility to obtain legal assistance and to request the authorities).

Summary

Although Czech legislation does not recognise the category of hate speech, the criminal legislation does contain a number of elements that correspond to this category or have a close substantive connection with it. The Criminal Code accordingly criminalises and punishes certain forms of hate speech. After analysing the relevant criminal law provisions, it can also be concluded that hate speech offences can be committed both offline and online, and that the offender committing an offence online is considered a qualified offence. In this context, it is also important to underline that Czech case-law already classifies as hate speech the expression of an opinion or value judgement that incites hatred against a specific group of persons in the form of a comment on a post on a social media platform.

Similar to the category of hate speech, Czech law does not recognise the categories of *bullying* and *cyberbullying*, so neither the Criminal Code nor any other legislation establishes them as separate elements of crime, while the Criminal Code does, however, include several elements that contain elements of the conceptual elements of these categories. The Penal Code sets out five legal elements

⁸⁰ Telec, 2015, p. 20.

⁸¹ For more on this, see Maisner, 2015.

⁸² For more information on the sanction system of the Czech Penal Code, see the Penal Code 36-104 §.

which are identical to the category of (cyber)bullying. After analysing these elements, it is concluded that the strongest similarity with cyberbullying can be found in the case of *harassment*. In addition to this offence, the offence of *harassment with sexual intent*, which can be considered as a specific type of bullying, should also be highlighted. However, the other three offences analysed (breach of confidentiality of transmitted messages; defamation; threats) show only an indirect, weak correspondence with the category of (cyber)bullying.

As regards the issue of prevention, there are programmes, procedures and professional documents, particularly in relation to bullying in the school environment, which are both preventive and effective in dealing with bullying situations.

In the Czech legal order, there is no specific legislation on social platforms, and therefore no legislation on content control in social media. With regard to the issue of service provider liability, Czech law generally provides that a service provider can be held liable for the content it transmits if it knew or became aware of the infringement and did not remove the infringing content. In short, the service provider can therefore be held liable if it failed to act after becoming aware of the infringement. However, the service provider is liable in all cases where it directly produced the content or had a significant influence on the content itself. A further important rule is that service providers are not under an active obligation to search for and monitor the content of the information they store and transmit.

Bibliography

- Bartoň, M., Hejč, D. (2021) 'Čl. 17 [Svoboda projevu a právo na informace]' in Husseini, F., Bartoň, M., Kokeš, M., Kopa, M. (eds.) *Listina základních práv a svobod*. 1st edition, Praha: C.H. Beck.
- Fremr, R. (2015) 'Trestné činy proti lidské důstojnosti v sexuální oblasti' in Drašík, A. et al. (eds.) *Trestní zákoník: komentář*. 1st edition, Praha: Wolters Kluwer.
- Herczeg, J. (2004) *Meze svobody projevu*. Praha: Orac.
- Holas, J. (2012) *Trestné činy proti lidské důstojnosti v sexuální oblasti*. Olomouc: Univerzita Palackého v Olomouci.
- Maisner, M. (2015) 'Snaha o zakázané těžení ze zdánlivé absence výslovné legislativní úpravy a nebezpečná situace pro poskytovatele služeb informační společnosti', *Bulletin advokacie* [online] <http://www.bulletin-advokacie.cz/snaha-o-zakazane-tezeni-ze-zdanlive-absence-vyslovne-legislativni-upravy>
- Nováková, H. (2010) *Trestné činy narušující soužití lidí z hlediska nové právní úpravy*. Brno: Právnická fakulta Masarykovy univerzity, Katedra trestního práva.
- Parti, K. (2016) 'A megfélemlítés (bullying) szabályozása Magyarországon és külföldön', *In Medias Res*, 5(1), pp. 114-146.
- Polčák, R. (2012) *Internet a proměny práva*. Praha: Auditorium s.r.o.
- Šámal, P. (2012) *Trestní zákoník: komentář*. 2nd edition, Praha: C.H. Beck.
- Ščerba, F. (2009) 'Trestné činy proti důstojnosti v sexuální oblasti' in Jelínek, J. (ed.) *Trestní právo hmotné*. 1st edition, Praha: Leges.
- Strakoš, J. (2021) 'Šíření nenávisti na internetu a jeho trestní postihy (poznatky k limitům českého přestupkového práva a úvahy nad nimi)', *Správní právo*, 54(1) [online] <https://www.mvcr.cz/clanek/spravni-pravo-cislo-1-2021.aspx>
- Telec, I. (2015) 'Zakázané těžení a nebezpečná situace na elektronických úložištích dat', *Bulletin advokacie*, 2015/1-2, pp. 19-29. [online] http://www.bulletin-advokacie.cz/assets/zdroje/casopis/2015/BA_1-2_2015_web.pdf
- Vištalová, A. (2021) *Trestněprávní aspekty kyberšikany*. Praha: Právnická fakulta Univerzita Karlova, Katedra trestního práva.
- Zichová, T. (2019) *Odpovědnost poskytovatelů služeb informační společnosti za cizí obsah*. Brno: Právnická fakulta Masarykovy univerzity.