

XII. THE LEGAL APPROACH OF CYBERBULLYING IN GERMANY

NÓRA JAKAB

Introduction

The basis for regulating hate crime in Germany is EU Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the single market for digital services and amending Directive 2000/31/EC (Digital Services Act, DAS);¹ Grundgesetz für die Bundesrepublik Deutschland (GG)², Act on Improving Law Enforcement in Social Networks (NetzDG);³ Criminal Code (StGB);⁴ Code of Administrative Offences (OWiG);⁵ Code of Criminal Proce-

1 Official Journal of the European Union L 277/1, 27.10.2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065>

2 Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100- 1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 20. Dezember 2024 (BGBl. 2024 I Nr. 439) geändert worden ist; <https://www.gesetze-im-internet.de/gg/GG.pdf>

3 Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG): Netzwerkdurchsetzungsgesetz vom 1. September 2017 (BGBl. I S. 3352), das zuletzt durch Artikel 29 des Gesetzes vom 6. Mai 2024 (BGBl. 2024 I Nr. 149) geändert worden ist; <https://www.gesetze-im-internet.de/netzdg/NetzDG.pdf>

4 Strafgesetzbuch (StGB): Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 2 Absatz 2 des Gesetzes vom 7. November 2024 (BGBl. 2024 I Nr. 351) geändert worden ist; <https://www.gesetze-im-internet.de/stgb/StGB.pdf>

5 Gesetz über Ordnungswidrigkeiten (OWiG): Gesetz über Ordnungswidrigkeiten in der Fassung der Bekanntmachung vom 19. Februar 1987 (BGBl. I S. 602), das zuletzt durch Artikel 10 des Gesetzes vom 12. Juli 2024 (BGBl. 2024 I Nr. 234) geändert worden ist; https://www.gesetze-im-internet.de/owig_1968/OWiG.pdf

dure (StPO);⁶ Guidelines on the imposition of fines by public authorities under the NetzDG.

‘Human dignity is inviolable. Its respect and protection are the duty of all public authorities.’ (Article 1(1) GG).⁷ It is indivisible and applies to all persons equally, regardless of their status. Since human dignity includes the requirement of equality of fundamental rights, racial discrimination or similar degradingly unequal treatment is a violation of Article 1(1) GG. In the case of prejudicial attacks against groups of people, each individual concerned is protected by Article 1(1) GG. However, the protection of dignity alone is too vague to provide a tangible constitutional framework for the prosecution of hate crimes. To make it concrete, account must be taken of the fundamental individual rights which all public authorities are obliged to respect (Article 1(3) GG).⁸ It follows from Article 1(1) GG that the principle of reasonable and proportionate punishment, measured by the principle of guilt, governs the field of public punishment. Discrimination based on religious or political views and other reprehensible aspects may violate Article 3(3), first sentence, GG, and therefore criminal offences cannot be based on these aspects.⁹ According to this provision, no one

6 Strafprozeßordnung (StPO): Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319), die zuletzt durch Artikel 2 Absatz 1 des Gesetzes vom 7. November 2024 (BGBl. 2024 I Nr. 351) geändert worden ist; <https://www.gesetze-im-internet.de/stpo/StPO.pdf>

7 Art 1 (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt See also Zakariás, K. (2014). Human dignity does not only appear in the context of classical freedoms, but also in the context of the economic order or in other contexts. The constitutional recognition of human dignity in the Länder constitutions prior to the adoption of the Federal Constitution served as a building block for the human dignity article of the Grundgesetz. The early practice of the Bavarian Constitutional Court in relation to Article 100 of the Bavarian Constitution was particularly influential on the guarantee of human dignity in the Grundgesetz. The Bavarian Constitutional Court recognised that ‘[t]he human person is the bearer of the most precious spiritual and moral values and embodies a moral self-worth which cannot be lost and which is autonomous and untouchable against all political and legal interference by the state and society.’ The Parliamentary Council placed the requirement of respect for human dignity at the heart of the Grundgesetz ‘in order to express the spirit of the new state existence, in contrast to the state order that was destroyed in May 1945’. On this, see Zakariás, K. (2012).

8 Art 1 (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

9 Art 3 (1) Alle Menschen sind vor dem Gesetz gleich. (2) Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin. (3) Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.

may be discriminated against or given preferential treatment on grounds of sex, gender, race, language, nationality and origin, religion or political opinions. No one shall be discriminated against on the grounds of disability.¹⁰

The general right of personality guarantees that everyone has the right to the free expression of his or her personality, provided that it does not infringe the rights of others and does not violate constitutional order or moral rules¹¹, which also takes the form of recognition of the dignity of the person and protection of personal honour (Article 2(1)(1) of GG). This, in connection with the offence of insult (§ 185 StGB)¹², may conflict with the freedom of expression enshrined in Article 5(1) of the GG¹³, when it comes to damaging the public image of the person concerned by making defamatory statements. The internet and social media have significantly expanded the forms in which hate crimes can be committed. The freedom of personal development guaranteed by Article 2(1) of the GG is infringed if the statements may damage the individual's reputation, weaken his or her social relations and thereby undermine his or her self-esteem. However, the freedom of expression under Article 5(1) of the GG also permits offensive statements in the public debate. In criminal law, this is expressed in the justification of insult offences based on safeguarding legitimate interests under § 193 StGB. In each individual case, the freedom of expression

¹⁰ Kugelmann, 2015, p. 14.

¹¹ Art 2 (1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer erletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.

¹² The right to the free development of the personality, guaranteed by Article 2(1) of the GG, occupies a special place among fundamental rights, in view of its close link with human dignity. The reason for this close link is that the essence of the human person is his dignity. 'It is because of his dignity that he [man] must be guaranteed the fullest possible development of his personality.' Although human dignity as a 'supreme constitutional principle' permeates Article 2(1) of the GG, as well as its other provisions, this does not mean that it does not have an independent content. Zakariás, 2014, p. 104.

¹³ Art 5 (1) Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt. On the basis of the presentation of the normative content of human dignity and the general right of personality, we can conclude that individual honour – as a limitation of the freedom of opinion guaranteed by Article 5(1) of the GG, as referred to in Article 5(2) – may claim constitutional protection as a specific manifestation of the general right of personality, which is derived from the right to human dignity and the free development of personality. This is also supported by the literature. Accordingly, the right to individual honour – with the exception of the right to human dignity – may be restricted. Zakariás, 2014, p. 108.

of the person making the statement must be weighed against the person's claim to social esteem.¹⁴

In conclusion, the prosecution of hate crime is a matter of the state's duty to protect, rooted in fundamental rights. The focus is on the protection of human dignity¹⁵ (Article 1 GG) and the fight against discrimination (Article 3(3) GG). In view of the ultima ratio nature of state punishment, the need for a criminal law provision can only be confirmed in rare exceptional cases. The protection of bodily integrity or the right to social esteem, which is rooted in general rights of personality, is already adequately guaranteed by criminal law. Therefore, the legislator is under no constitutional obligation to extend protection against hate crime by law.¹⁶

1. Analysis of the Penal Code

A legal concept must be sufficiently defined. This applies even more so to criminal law, as every person must know whether a behaviour is punishable. According to Article 103(2) of the GG, a criminal offence is punishable only if criminal liability has been established by law before the offence was committed. The federal government's interpretation of the term is therefore based on this legislative understanding. It defines 'hate crimes' as crimes against a person because of 'political opinions, nationality, ethnicity, race, colour, religion, ideology, origin, sexual orientation, disability, physical appearance or social status'.¹⁷ Sec-

¹⁴ Kugelmann, 2015, p. 14.

¹⁵ Kinga Zakariás' position on the interpretation of Article 1 of the Grundgesetz is that the intention of the violator is irrelevant for the violation of human dignity, the conduct must be objectively capable of violating the human dignity of the individual. However, the link between the negative definition of human dignity (human beings must not be treated as objects) and the positive definition (human beings must be treated as subjects) is a way of clarifying the legal concept of dignity. The result of this link is that the violation of human dignity consists in calling into question the subject status of the human being and thereby reducing him or her to a mere object. Zakariás, 2014, p. 102.

¹⁶ Kugelmann, 2015, p. 14.

¹⁷ Kugelmann, 2015, p. 7. Verordnung (EU) 2022/2065 des Europäischen Parlaments und des Rates vom 19. Oktober 2022 über einen Binnenmarkt für digitale Dienste und zur Änderung der Richtlinie 2000/31/EG, (Gesetz über digitale Dienste, Digital Services Act, DAS); Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (NetzDG); Strafgesetzbuch (StGB); Ordnungswidrigkeitengesetz (OWiG); Strafprozessordnung (StPO); Leitlinien zur Festsetzung von Geldbußen im Bereich des Netzwerkdurchsetzungsgesetzes (NetzDG); Guidelines on setting regulatory fines within the scope of the Network Enforcement Act (Netzwerkdurchsetzungsgesetz – NetzDG)

tion 46 of the StGB regulates the principles of sentencing, according to which the court weighs the circumstances in favour of and against the offender when passing sentence. In particular, the following may be taken into account: the motives and aims of the offender, including in particular racist, xenophobic, anti-Semitic, gender-, sexual orientation- or other inhuman motives.¹⁸ The German government has highlighted the following criteria in the explanatory memorandum to the amendment of § 46 of the StGB: political opinion, nationality, ethnic origin, race, colour, religion, philosophical belief, origin, sexual orientation, disability, physical appearance or social status¹⁹. As the justification also guides the application of the law, the authorities and courts will use these criteria to interpret the criminalisation of racist, xenophobic or other inhuman motives and purposes.²⁰ An inhuman motive for a crime exists if the perpetrator has

18 StGB § 46 Grundsätze der Strafzumessung (2) Bei der Zumessung wägt das Gericht die Umstände, die für und gegen den Täter sprechen, gegeneinander ab. Dabei kommen namentlich in Betracht: die Beweggründe und die Ziele des Täters, besonders auch rassistische, fremdenfeindliche, antisemitische, geschlechtsspezifische, gegen die sexuelle Orientierung gerichtete oder sonstige menschenverachtende, ...

19 The final report of the German Bundestag's Committee of Inquiry into the NSU does not contain any specific recommendations for the judiciary to change substantive criminal law, but it does recommend that the police should thoroughly investigate any violent crime that may have a racial or other political motivation with regard to the victim's identity, and that this investigation should be documented in a clear and understandable way in the appropriate place. However, thorough examination and consideration of such motives should also be ensured in further proceedings, in particular in sentencing. In principle, the existing criminal law already meets this requirement, since § 46 of the German Criminal Code (StGB) requires the court to take into account not only the 'conduct resulting from the act' but also 'the motives and aims of the perpetrator' when sentencing, and it is generally recognised that this includes racist or xenophobic motives, but also other inhuman motives. However, the explicit inclusion of racist, xenophobic or other inhuman motives and aims in the catalogue of sentencing circumstances in § 46(2) sentence 2 of the StGB serves the purpose of emphasising the importance of these circumstances in sentencing. It is also intended to emphasise that the prosecution must also clarify and take account of these circumstances at an early stage of the investigation, since according to § 160(3) of the Code of Criminal Procedure (StPO) the prosecution's investigation must also cover circumstances relevant to the determination of the legal consequences of the offence. See on this: Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Umsetzung von Empfehlungen des NSU Untersuchungsausschusses des Deutschen Bundestage. RefE 2014-04-15 Umsetzung NSU-UA Empfehlungen (bundesgerichtshof.de) p. 6. 11-13.

20 Of course, the formulation as an illustrative list still allows the court to take into account motives and purposes other than those expressly mentioned when sentencing. Nor does it imply that racist, xenophobic or other inhuman motives and objectives are given one-sided weight in relation to the other punishment circumstances. It remains for the court to weigh the individual circumstances of punishment, if it is satisfied that they are relevant, in accordance with the recognised principles of sentencing, according to their importance and gravity in the particular individual case. The express mention of those

attacked the victim because of one of these criteria, a causal link must exist.²¹ In the context of § 46 of the StGB, a number of reprehensible characteristics can be included under the umbrella term of inhuman motive. The prohibition of discrimination in Article 3(3) of the GG may provide an approach to the definition of criminal offences.

As the term hate crime does not appear in the criminal law provisions, it should be understood as a generic term for certain manifestations of criminal offences. The fight against hate crime is part of the fight for human rights and fundamental freedoms²². In the Federal Republic of Germany, the concept of hate crime has the function of delimiting a type of crime which can be identified in criminal law and which, by its nature, requires special measures. This is due to the social relevance of hate crime, which is particularly harmful to peaceful coexistence and poses a specific criminal policy challenge. The measures concern prevention and repression. As regards criminal prosecution, a common understanding of the categorisation of hate crime by the police and the judiciary is needed to allow for a coherent assessment of offences, meaningful statistics and conclusive assessments.²³

In some cases, hate crime is understood to mean only violent crime. This may be related to the fact that statistical surveys or criminological studies often

motives in the second sentence of Paragraph 46(2) of the StGB does not therefore obscure the fact that the imposition of the sentence requires an overall view of the offence and the personality of the offender – as is not the case *de lege lata* with the mention of reparation and compensation for the victim – and does not diminish the importance of other sentencing circumstances, such as the culpable effects of the offence. The proposed addition also does not lead to an aggravating consideration of racist, xenophobic or other inhuman conduct as such. This would already contradict the clear wording of § 46 (2) sentence 2 of the StGB, which only allows for the consideration of attitudes expressed in the offence. Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Umsetzung von Empfehlungen des NSUUntersuchungsausschusses des Deutschen Bundestage. RefE 2014-04-15 Umsetzung NSU-UA Empfehlungen (bundesgerichtshof.de) p. 13.

21 See on this: Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Umsetzung von Empfehlungen des NSUUntersuchungsausschusses des Deutschen Bundestage. RefE 2014-04-15 Umsetzung NSU-UA Empfehlungen (bundesgerichtshof.de).

22 See about this: Hate crime | European Union Agency for Fundamental Rights (europa.eu) See also at international level the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in New York on 21 December 1965, or the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948.

23 Möglichkeiten effektiver Strafverfolgung bei Hasskriminalität Rechtsgutachten, p. 8. See also Glet, 2011.

focus on hate crimes motivated by right-wing extremism²⁴. However, the general social dimension of hate crime goes beyond violent acts based on right-wing extremist attitudes. Criminal law is essentially neutral and covers acts irrespective of the ideology of the perpetrator. The exception in § 130(4) StGB, which will be examined later, only reinforces this rule. Any motivation based on certain characteristics of the victim can lead to a classification as a hate crime. Not only persons holding extremist views can be considered as perpetrators, because such a narrow horizon may result in ‘ordinary’ manifestations of prejudice and attacks going unnoticed and therefore unaddressed. The perception of the victim is crucial in determining whether a crime is a hate crime.²⁵

§ 130 of the StGB deals with the offence of incitement of masses. According to (1), whoever, in a manner suited to causing a disturbance of the public peace, 1. incites hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or 2. violates human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population incurs a penalty of imprisonment for a term of between three months and five years.

According to (2), whoever 1. disseminates content (section 11 (3)) or makes it available to the public, or offers, supplies or makes available to a person under 18 years of age content (section 11 (3)) which a) incites hatred against one of the

24 After the ‘National Socialist Underground Union’ (NSU) came to light in November 2011, it became clear that this right-wing terrorist group had managed to commit some of the most serious crimes for nearly fourteen years without detection by federal and state security authorities. An examination of the possible failings of the authorities responsible for constitutional protection, threat prevention and prosecution in the subsequent period in the area of criminal prosecution revealed the fact that investigations into crimes committed in several federal states were not carried out centrally by the police or the judiciary until the NSU came to light in November 2011. This may also have contributed to the fact that the links between the crimes and the links with far-right extremism and right-wing terrorism were only recognised after the NSU became known and the federal prosecutor general only took over the investigation afterwards. On this, see Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Umsetzung von Empfehlungen des NSU Untersuchungsausschusses des Deutschen Bundestages RefE 2014-04-15 Umsetzung NSU-UA Empfehlungen (bundesgerichtshof.de) p. 5–6.

25 Kugelmann, 2015, p. 11. See more: Bannenberg, B. Coester, M. and Marks, E. eds, 2005; Bannenberg, B. Coester, M. and Marks, E., 2004; Schneider, H. J., 2001; Schneider, H. J., 2003.

groups referred to in subsection (1) no. 1, sections of the population or individuals on account of their belonging to one of the groups referred to in subsection (1) no. 1, or sections of the population, b) calls for violent or arbitrary measures against one of the persons or bodies of persons referred to in letter (a) or c) attacks the human dignity of one of the persons or bodies of persons referred to in letter (a) by insulting, maliciously maligning or defaming them, or 2. produces, purchases, supplies, stocks, offers, advertises or undertakes to import or export content (section 11 (3)) as referred to in no. 1 (a) to (c) in order to use it within the meaning of no. 1 or to facilitate such use by another incurs a penalty of imprisonment for a term not exceeding three years or a fine.

According to (3) whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of Crimes against International Law in a manner suited to causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years or a fine.

According to (4), Whoever publicly or in a meeting disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule incurs a penalty of imprisonment for a term not exceeding three years or a fine.

With regard to verbal hate crimes, insult offences under sections 185 et seq. of the StGB are considered to be criminal offences. A hate crime may be the subject of any offence under the Criminal Code if the offence is committed for a specific motive of the offender. With regard to offences that criminalise bias-based violence, in addition to classic violent crimes such as homicide, assault and sexual offences, any other offence that involves harming or threatening people, such as arson, coercion, robbery, extortion or hostage-taking, can also be considered.²⁶

2. Factual elements of certain hate crimes

The offences of insult are intended to protect personal honour and are governed in Germany by sections 185 et seq. of the StGB. The three basic offences are insult (StGB § 185), malicious gossip (StGB § 186, *üble Nachrede*) and defamation (StGB § 187).

²⁶ Kugelmann, 2015, p. 19.

According to § 185 of the StGB the penalty for insult is imprisonment for a term not exceeding one year or a fine and, if the insult is committed publicly, in a meeting, by disseminating content (section 11 (3)) or by means of an assault, imprisonment for a term not exceeding two years or a fine.²⁷

According to § 186 of the StGB, whoever asserts or disseminates a fact about another person which is suited to degrading that person or negatively affecting public opinion about that person, unless this fact can be proved to be true, incurs a penalty of imprisonment for a term not exceeding one year or a fine and, if the offence was committed publicly, in a meeting or by disseminating content (section 11 (3)), a penalty of imprisonment for a term not exceeding two years or a fine. Under § 187 StGB, whoever, despite knowing better, asserts or disseminates an untrue fact about another person which is suited to degrading that person or negatively affecting public opinion about that person or endangering said person's creditworthiness incurs a penalty of imprisonment for a term not exceeding two years or a fine, and, if the act was committed publicly, in a meeting or by disseminating content (section 11 (3)), a penalty of imprisonment for a term not exceeding five years or a fine.²⁸

According to § 188 if an offence of insult (section 185) is committed publicly, in a meeting or by disseminating content (section 11 (3)) against a person involved in the political life of the nation on account of the position that person holds in public life and if the offence is suited to making that person's public activities substantially more difficult, the penalty is imprisonment for a term

27 Insult is usually understood as an attack on another person's honour through a display of contempt or disrespect for the other person. Insult is generally characterised by the expression of a value judgment (i.e. opinion) against the person concerned or a third party which cannot be proven. This distinguishes it from the offences of malicious gossip (StGB § 186) and defamation (StGB § 187), which relate to statements of fact. The prevailing view, however, is that the statement of fact can be punished as an insult under Section 185 StGB, even if it is addressed to the victim himself ('you stole my watch!'). However, it must then be proved that the statement is untrue. A true statement of fact can only be punishable under § 192 StGB in exceptional cases if it is a so-called 'formal offence', i.e. if the alleged fact is true but the offensive character is due to the form of the statement. The insult must not have any negative consequences for the person concerned beyond defamation. See on this: Grundzüge der Beleidigungsdelikte (§§ 185 ff. StGB) aus straf- und zivilrechtlicher Sicht. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 052/22, p. 4.

28 A common feature of both offences is that criminal liability can be excluded if the alleged fact is proven (cf. StGB § 190). The person concerned must generally tolerate confrontation with the actual fact, unless it constitutes an official insult within the meaning of StGB § 192. Moreover, the defamatory fact must be capable of 'disparaging or degrading the person concerned in the eyes of the public' or, in the case of defamation, of endangering his or her credibility. Grundzüge der Beleidigungsdelikte (§§ 185 ff. StGB) aus straf- und zivilrechtlicher Sicht. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 052/22, p. 5.

not exceeding three years or a fine. The political life of the nation reaches down to the local level. According to (2) malicious gossip (section 186) under the same conditions incurs a penalty of imprisonment for a term of between three months and five years and defamation (section 187) under the same conditions incurs a penalty of imprisonment for a term of between six months and five years.

It is emphasised that according to § 11 (3) StGB for the purposes of those provisions which refer to this subsection, ‘content’ means that which is contained in writings, on audio or visual media, on data carriers, in images or other materialised content or which is also transmitted independently of any storage using information or communication technologies.

In the case of offences of insult, malicious gossip and defamation, the offence is qualified if it is committed in public, at a meeting or by disseminating content (Article 11(3)). The content may be transmitted by means of information or communication technology. The offences do not explicitly mention an infocommunication technology as a means of commission, there is no reference to online space as a place of commission, and the legislator has avoided formulating the result.

According to § 201 of the StGB, in the case of a violation of privacy of spoken word whoever, without being authorised to do so, 1. makes an audio recording of the privately spoken words of another or 2. uses or makes a recording thus produced available to a third party incurs a penalty of imprisonment for a term not exceeding three years or a fine.

According to § 201a of the StGB, in the case of violation of intimate privacy and of rights of personality by taking photographs or other images whoever

1. without being authorised to do so creates or transmits photographs or other images of another person in private premises or in a room which is specially protected from view, and thereby violates the intimate privacy of the person depicted;
2. without being authorised to do so produces a photograph or other image exhibiting the helplessness of another person or transmits such image, and thereby violates the intimate privacy of the person depicted;
3. without being authorised to do so creates or transmits a photograph or other image which in a grossly offensive manner exhibits a deceased person;
4. uses a photograph or other image produced by an offence under no. 1 to no. 3 or makes it available to a third party or
5. makes available to a third party, in the awareness of lacking authorisation to do so, a photograph or other image of the type set out in no. 1 to no. 3 which was produced with authorisation, and, in the cases under no. 1 and no. 2, thereby violates the intimate privacy of the person depicted,

incurs a penalty of imprisonment for a term not exceeding two years or a fine.

According to § 240 of the StGB, in the case of coercion (Nötigung) whoever unlawfully, by force or threat of serious harm, compels a person to do, acquiesce to or refrain from an act incurs a penalty of imprisonment for a term not exceeding three years or a fine.

According to § 241 of the StGB, in the case of threatening commission of serious criminal offence whoever threatens a person with the commission of an unlawful act against sexual self-determination, physical integrity, personal liberty against that person or a person close to him or her or against an object of significant value incurs a penalty of a term of imprisonment not exceeding one year or a fine. If the act is committed publicly, in a meeting or by disseminating content (section 11 (3)), the penalty in the cases under subsection (1) is a term of imprisonment not exceeding two years or a fine and in the cases under subsections (2) and (3) a term of imprisonment not exceeding three years or a fine.

The offences do not explicitly mention any infocommunication technology as a means of commission, there is no reference to the online space as a place of commission, and the legislator avoided formulating the result. However, these offences can also be committed in the online space.

2.1. Hate-mongering insult

Section 192a of StGB deals with hate-mongering insult, which was newly introduced into the German Criminal Code in September 2021. Its purpose is to close the gap that previously existed in criminal liability for sending hateful content to the persons concerned.

According to the statement of facts, whoever allows content (section 11 (3)) suited to violating the human dignity of others by insulting, maliciously maligning or defaming a group defined by its national, racial, religious or ethnic origin, ideology, disability or sexual orientation or individuals on account of their belonging to one of these groups to come to the attention of another person who belongs to one of the aforementioned groups without having been requested to do so by that person incurs a penalty of a term of imprisonment not exceeding two years or a fine.

The act must be capable of offending the human dignity of others. The fact that one of the groups protected by § 192a of StGB or a person must be insulted,

maliciously gossiped or defamed because of his/her membership of one of these groups is in accordance with § 130(1) StGB.²⁹

While the requirement of offence against human dignity in the context of hate speech is only intended to exclude simple defamation offences, § 192a StGB has an additional function. The legislator rightly assumes that an offence against human dignity can be committed by confronting a group with serious, non- or insufficiently individualised statements if the addressee is linked to the group by some identity-forming characteristic. The suitability clause is also aimed at this link and thus has a ‘double filtering function’ in terms of content. With regard to the element of association with a group, it may exceptionally exclude from the scope of the offence content which incites with sufficient intensity against one of the listed groups, but which is not capable of violating individual human dignity.³⁰

With regard to § 130 Section (1) no 2 of the StGB, Hörnle explains the choice of the term ‘insult’ by the additional limitation that ‘the insult must relate expressly and primarily to defamation.’ However, since the term ‘insult’ in § 192a StGB refers to the content and not to the person making the statement, there can be no limiting effect here anyway. According to Streng’s interpretation, § 130 Section (1) no. 2 of the StGB does not speak of an insult to human dignity because it is often only through the conduct of inciting third parties and not through the statement itself, but in the case of § 192a of StGB the insult is directly caused by confrontation with the content, there is no need for mediation through the violent acts of third parties.³¹

According to the reasoning, the quality of the punishable content is determined on the basis of § 130 Section (2) no. 1 (c) of the StGB, which implicitly refers to the group characteristics in § 130 Section (1) no. 1 of the StGB. It is striking that the offence of incitement to hatred also refers to national, racial, religious and ethnic group characteristics, but not to ideology, disability or sexual orientation. However, these groups can be included in the protected circle of § 130 Section (1) no. of the StGB, provided that the groups are sufficiently distinct and are quantitatively decisive. Incitement to hatred does not have this openness; the list of group characteristics is exhaustive and constitutive of criminal relevance. This difference can be explained by the different protection objectives of the offences: the prevailing view is that the offence of incitement to hatred is intended to protect public peace and human dignity in the abstract – both of which can in principle be threatened by incitement of masses of any group of the

²⁹ Nussbaum, 2021, p. 335.

³⁰ Nussbaum, 2021, p. 338.

³¹ Nussbaum, 2021, pp. 338–339.

population – whereas § 192a of the StGB focuses on the protection of individual human dignity. Although an offence against individual dignity can of course occur without reference to any of the characteristics listed in § 192a of the StGB, the basic idea behind the new criminal law provision is that an offence against the individual dignity of the recipient of the content is only possible if he or she is linked to the group by an identity-forming characteristic.³²

In the case of this offence, the offence does not explicitly include any information technology as a means of commission, there is no reference to online space as a place of commission, the legislator avoided formulating the result, while at the same time making available as a conduct may include content that is capable of violating human dignity, which is transmitted by means of information and communication technology. The offence of incitement of masses is the unsolicited making available, which is defined in the Explanatory Memorandum by the terms sending, offering and making available. In contrast to Section 185 of the German Criminal Code, the offence does not require the actual knowledge of the addressee, but the mere possibility is sufficient. It is clear from the legislative material that the offence also includes the act of ‘remotely communicating’. This wording raises questions, given that the act of ‘remotely verbal’ refers to content within the meaning of § 11(3) StGB. It is true that the concept of content, which has replaced the concept of writing, no longer necessarily requires content to be embodied, but also includes content that is transmitted independently of storage by means of information and communication technology, including words transmitted by telephone. It does not, however, include verbal expressions that do not require technical transmission, even if the human dignity of the members of the group present may be equally violated. The notion of ‘making available’ must be interpreted accordingly and is not limited to the transfer of the right to dispose of embodied content.³³

2.2. Stalking

Section 238 of the StGB regulates the offence of stalking. According to (1), whoever, without being authorised to do so, stalks another person in a manner suited to not insignificantly restricting that person’s lifestyle by repeatedly

1. seeking the other person’s physical proximity,
2. trying to establish contact with the other person by means of telecommunications or other means of communication or through third parties,

³² Nussbaum, 2021, p. 339.

³³ Nussbaum, 2021, p. 340.

3. improperly using the other person's personal data for the purpose of
 - a) ordering goods or services for that person or
 - b) inducing third parties to make contact with that person,
4. threatening the other person, one of his or her relatives, or someone close to him or her with causing injury to life or physical integrity, health or liberty,
5. committing an unauthorised access or preparation of an unauthorised access to data pursuant to § 202a, § 202b or § 202c to the detriment of that person, a relative or another person close to that person,
6. disseminating or making available to the public a depiction of that person, one of his or her relatives or another person close to him or her,
7. disseminating or making available to the public content (section 11 (3)) suited to disparaging or negatively affecting public opinion about that person by feigning that person's authorship or
8. committing an act comparable with nos. 1 to 7.

According to (2), in particularly serious cases under subsection (1) nos. 1 to 7, stalking incurs a penalty of imprisonment for a term of between three months and five years. An especially serious case typically occurs where the offender

1. by committing the offence causes damage to the health of the victim, a relative of or another person close to the victim,
2. places the victim, a relative of or another person close to the victim in danger of death or at risk of serious damage to health on account of the act,
3. stalks the victim by committing a large number of acts constituting an offence over a period of at least six months,
4. uses a computer program in the commission of an act constituting an offence under subsection (1) no. 5 whose purpose is to digitally spy on other persons,
5. uses a depiction obtained through one of the acts constituting an offence under subsection (1) no. 5 in the commission of an act constituting an offence under subsection (1) no. 6,
6. uses content (section 11 (3)) obtained through one of the acts constituting an offence under subsection (1) no. 5 in the commission of an act constituting an offence under subsection (1) no. 7 or
7. is over 21 years of age and the victim is under 16 years of age.

It can therefore be seen that so far only the offence of stalking (StGB § 238) explicitly mentions telecommunication – which includes digital forms of communication – as a possible means of committing the offence (StGB § 238 Section (1) no. 2).

In this way, there is an implicit reference to online space as a ‘place of offence’, but the wording of the offence does not imply that it is exclusively online, only that stalking can be committed online.

Stalking may also be committed by disseminating or making available to the public content (Section 11(3)) that is likely to defame or degrade the person in the eyes of the public. This does not explicitly include any infocommunication technology as a means of offence, there is no reference to online space as a place of offence, the legislator has avoided formulating the result, but making available as an offence may include content that is capable of offending human dignity and is transmitted by means of information and communication technology. In this respect, the offence of committing an offence in the online space may also be a qualified case.

2.3. *Cybercrime*

Germany was one of the first countries in the world to introduce criminal measures against cybercrime. This mainly concerns the crimes of data modification (StGB § 303a), computer sabotage (StGB § 303b) and data espionage (StGB § 202a). In addition, there is computer forgery (§§ 269, 270 StGB) and computer fraud (§ 263a StGB). Data security protection rules also exist in data protection law.³⁴

Certain crimes are increasingly committed using the internet and electronic forms of communication. In recent years, therefore, ‘cybercrime’ has increasingly become a focus of attention for security authorities and politicians. However, the focus should be on certain types of crime which experience has shown to be particularly affecting the human dignity of the victims of crime: insults, harassment, coercion, threats and extortion. However, these crimes do not specifically mention digital forms of crime.

Cybercrime can include the following criminal offences:

- StGB § 174-184 Criminal law offences relating to the protection of sexual autonomy
- StGB § 185 insult (§ 185)
- StGB § 186 malicious gossip
- StGB § 187 defamation
- StGB § 192a hate-mongering insult,

³⁴ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG) vom 1. September 2017 (BGBl. I S. 3352) <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html> 1. § (3). [https://www.bidt.digital/glossar/cyberkriminalitaet/#::~:~:text=Deutschland%20hat%20als%20eines%20der,Daten%20\(%C2%A7%20202a%20StGB\).](https://www.bidt.digital/glossar/cyberkriminalitaet/#::~:~:text=Deutschland%20hat%20als%20eines%20der,Daten%20(%C2%A7%20202a%20StGB).)

- StGB § 201 violation of privacy of spoken word
- StGB § 201a violation of intimate privacy and of rights of personality by taking photographs or other images StGB § 238 stalking
- StGB § 240 coercion
- StGB § 241 threatening commission of serious criminal offence
- Art Copyright Act (Kunsturheberrechtsgesetz) § 33 Criminal offences against the copyright in works of art and photography³⁵

Thus, only the offence of stalking (StGB § 238) explicitly mentions telecommunication – which includes digital forms of communication – as a possible means of committing the offence (StGB § 238 Section (1) no. 2.). A person who, without authorisation, stalks another person in a manner likely to seriously disrupt the life of that person by persistently using a means of telecommunication or other means of communication or by attempting to contact that person through a third party is punishable by a term of imprisonment not exceeding three years or a fine (...). Digital content that constitutes an offence of insult (StGB § 185) or threat (StGB § 241) is subject to the Act on the Improvement of Law Enforcement in Social Networks (NetzDG).³⁶ It is aimed at telemedia service providers and imposes reporting and monitoring obligations with fines for relevant offences.

2.4. Action against online hate crime, service provider responsibility

The online debate culture is often aggressive, abusive and hateful. Hate crimes can affect anyone based on their opinion, colour, origin, religion, gender or sexual orientation. The fight against punishable hate speech on social networks has also become a high priority in Germany. Law enforcement on social networks must therefore be improved to ensure that objectively punishable content such as hate speech, insults and defamation is removed immediately. The growing incidence of hate crime, particularly on social networks such as Facebook, YouTube and Twitter, prompted the Federal Ministry of Justice and Consumer Protection to set up a working group of network operators and civil society representatives back in 2015. The companies represented in the task force committed to improve

35 Handlungsansatz zur Prävention und Intervention von Cybermobbing. Vom Mobbing zum Cybermobbing. <https://www.klicksafe.de/cybermobbing/handlungsansatz-zurpraevention-und-intervention-von-cybermobbing>; p. 45. 46. https://www.klicksafe.de/fileadmin/cms/download/Sonstiges/Themen/Cybermobbing/Kapitel2_Vom_Mobbing_zum_CyberMobbing.pdf

36 ‘Cyberkriminalität’ Strafrechtliche Regelungen in Deutschland und ausgewählten EU-Mitgliedstaaten, Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 039/19, p. 4-5.

the handling of hate crime reports on their sites, to establish user-friendly mechanisms for reporting critical posts, and to review the majority of reported posts within 24 hours by linguistically and legally trained teams and delete them if they are illegal. An audit of social network deletion practices carried out by jugendschutz.net in January/February 2017 showed that user complaints about hate crime are still not being processed promptly and adequately. YouTube now deletes criminal content 90% of the time. In contrast, Facebook deletes content only 39% of the time and Twitter only 1% of the time. Social network providers have a responsibility to fulfil. Given that existing tools and voluntary commitments promised by social networks are not effective enough and that there are significant problems with the enforcement of applicable law, compliance rules for social networks are needed to ensure that they can effectively and promptly tackle online hate crime.³⁷

On 1 September 2017, the law on improving law enforcement in social networks (Netzwerkdurchsetzungsgesetz, NetzDG) entered into force.³⁸ According to (1), the Act applies to telemedia service providers that operate for profit platforms on the Internet that are designed to allow users to share any content with other users or to make it available to the public (social networks). Platforms with journalistic/editorial content for which the service provider itself is responsible are not considered social networks. The same applies to platforms for individual communication or for the distribution of specific content. According to (3), unlawful content is content that is in breach of § 86 (dissemination of propaganda material of unconstitutional and terrorist organisations), § 86a (use of symbols of unconstitutional and terrorist organisations), § 89a (preparation of serious violent offence endangering the state), § 91 (instructions for committing serious violent offence endangering state), § 100a (treasonous forgery), § 111 (Public incitement to commit offences), § 126 (Disturbing public peace by threatening to commit offences), § 129-129b (Forming criminal or terrorist organisations), § 130 (incitement of masses), § 131 (depictions of violence), § 140 (rewarding and approval of offences), § 166 (Revilement of religious faiths and religious and ideological communities), § 184b (Dissemination, procurement and possession of child pornographic content), § 185-187. (insult, malicious gossip, defamation), § 189 (defiling memory of dead), § 201a (violation of intimate privacy and of rights

³⁷ Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken, https://netzpolitik.org/wp-upload/2017/03/1703014_NetzwerkDurchsetzungsG.pdf

³⁸ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG) vom 1. September 2017 (BGBl. I S. 3352) <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html>

of personality by taking photographs or other images), § 241 (coercion) or § 269 (forgery of data of probative value) and cannot be justified.

A complaint about unlawful content under subsection (4) is any objection to content that requests the removal of the content or the blocking of access to the content, unless the complaint does not clearly allege that the content is unlawful.

According to § 1 (2), the provider of a community network is exempted from the obligations laid down in the Act if the community network has fewer than two million registered users in Germany.

According to § 2 (1), social network service providers that receive more than 100 complaints about illegal content in a calendar year are obliged to produce a report in German³⁹ every six months on the handling of complaints about illegal content and to publish it in the Federal Gazette and on their website no later than one month after the end of the six-month period. The report published on their website must be easily recognisable, directly accessible and permanently available. The report shall include, *inter alia*, information on whether and to what extent academics and researchers have been given access to the provider's data during the reporting period in order to carry out an anonymised assessment, the nature, main features and scope of the procedures used to automatically detect content to be removed or blocked. These are the procedures for the control of content.

According to § 3, the social network service provider must provide an effective and transparent, easily identifiable, directly accessible, easy to use and

39 Paragraph (2) summarises in 17 points what aspects, at least, the report must cover. For example:

1. General information on the efforts made by the social network provider to prevent crime on the platforms.
2. The nature, main features and scope of the procedures used to automatically detect content to be removed or blocked.
3. A description of the mechanisms for submitting complaints about illegal content, the criteria for deciding whether to remove or block illegal content, and the review procedure, including the order of review in which the review will be conducted in relation to the existence of illegal content or a breach of the contractual provisions between the provider and the user.
4. The number of complaints received during the reporting period about illegal content, broken down by complaints bodies and users, and the reason for the complaint.
5. The organisation, staffing, technical and linguistic competence of the complaints handling units, and the training and support of the persons responsible for complaints handling.
6. Membership in industry associations, indicating whether there is a complaints office in these industry associations.
7. Number of complaints for which an external body was consulted to prepare the decision.

permanently available procedure for the submission of complaints about illegal content. According to Article 3b, the social network service provider must provide an effective and transparent procedure for both the complainant and the user on whose computer the illegal content has been stored to initiate a review of the decision to remove or block access to the content (the original decision) taken in response to a complaint about illegal content. The procedure ensures that the social network provider

1. immediately takes note of the complaint and checks whether the content reported in the complaint is illegal and whether it should be removed or access to it should be denied;
2. removes or blocks access to the manifestly illegal content within 24 hours of receiving the complaint; this does not apply if the social network has agreed with the competent law enforcement authority to remove or block the manifestly illegal content for a longer period;
3. removes or disables access to the illegal content without undue delay, normally within seven days of receipt of the complaint; the seven-day time limit may be exceeded if
 - (a) the decision on the illegality of the content depends on the falsity of a factual statement or on other cognizable factual circumstances; in such cases, the social network may give the user the opportunity to comment on the complaint before taking a decision;
 - (b) within seven days of receipt of the complaint, the community network provider shall refer the decision of illegality to a self-regulatory body and submit to its decision.

According to § 3a, the provider of the social network is obliged to forward such content to the Federal Office of Criminal Investigation as the central office for the purpose of enabling the prosecution of criminal offences,

1. which has been reported to the service provider as illegal content;
2. which has been removed or access to which has been blocked by the service provider, and
3. for which there are concrete indications that at least one of the offences is being committed
 - a) offences as defined in §§ 86, 86a, 89a, 91, 126, 129-129b, 130, 131 or 140 of the StGB;
 - b) § 184b of the StGB, or
 - c) violation of § 241 of the StGB in the form of a threat to commit a crime against life, sexual self-determination, bodily integrity or personal liberty, and cannot be justified.

According to § 3c, the supervisory body may recognise private law bodies as conciliation bodies for the out-of-court settlement of disputes between complainants or users who store infringing content and social network service providers.

According to § 4, a deliberate or negligent breach of the obligations laid down in the Act is punishable by administrative penalties and fines of up to EUR 500 000 or EUR 5 000 000 million. According to § 4, the administrative authority within the meaning of § 36 Section (1) no. 1. of the Administrative Offences Act is the Federal Office of Justice. The Federal Ministry of Justice and Consumer Protection shall, in agreement with the Federal Ministry of the Interior, Building and Community Affairs, the Federal Ministry of Economic Affairs and Energy and the Federal Ministry of Transport and Digital Infrastructure, issue general administrative principles on the exercise of discretion by the administrative authority when initiating the fine proceedings and when imposing the fine.⁴⁰

§ 4a provides for the supervisory body. The Federal Office of Justice is the administrative authority responsible for monitoring compliance with the provisions of the Act. If it finds that a provider of a social network has violated or is violating the provisions of the Act, it shall take the necessary measures against the provider. In particular, it may order the provider to cease the infringement.

According to § 5, social network providers are obliged to designate a domestic delivery agent and to draw attention to it on their platform in an easily recognisable and directly accessible way. Service of process is important in fines and surveillance proceedings and in court proceedings before German courts for dissemination of illegal content or for unfounded allegations of such dissemination, in particular in cases where the restoration of removed or blocked content is requested, service may be made on him or her. This also applies to service of documents instituting such proceedings, service of final judicial decisions and service in enforcement or execution proceedings.

The law was amended on 3 April 2021 for reporting obligations and on 28 June 2021 for video-sharing platforms.

40 For more on platform responsibility, see also: <https://www.eff.org/de/deeplinks/2022/05/platform-liability-trends-around-globe-recent-noteworthy-developments>

3. Protection of minors

The criminal protection of minors against sexual violence on the internet is based on the criminal law provisions on the protection of sexual self-determination (StGB §§ 174-184), while cyberbullying, as mentioned, can be based on several criminal law provisions, such as insult (StGB § 185) or criminal infringement of the rights to effigy (§ 33 of the Copyright Act on Visual Art and Photographic Works).⁴¹

Sexual violence against minors on the internet is punishable, in particular the offering of children for sexual abuse, sexual abuse of children without physical contact and the preparation of sexual abuse of children. Any person under the age of fourteen is considered a child (StGB § 176 Section (1) no. 1).⁴²

According to § 176 (1) whoever 1. performs sexual acts on a person under 14 years of age (child) or has the child perform sexual acts on them, 2. causes a child to perform sexual acts on a third person or to have a third person perform sexual acts on them, 3. offers or promises to supply a child for an offence under no. 1 or no. 2 incurs a penalty of imprisonment for a term of at least one year.

According to Section (2) in the cases under subsection (1) no. 1, the court may dispense with imposing a penalty in accordance with this provision if the sexual act between the offender and the child was consensual and the difference both in age and level of development and maturity is small, unless the offender is exploiting the child's lack of capacity for sexual self-determination.

§ 176a StGB criminalises sexual abuse of children without physical contact. Accordingly, whoever performs a sexual act in front of a child or causes a third person to perform a sexual act in front of a child is punishable by imprisonment for a term of between six months and ten years (StGB § 176 (1) no. 1., point 1.). StGB § 184h stipulates that sexual acts require a significant violation of a protected legal interest (StGB § 184h. § no. 1. point 1.) and that the sexual acts performed in front of a person must be actually perceived by another person (StGB § 184h no. 2 point 2). It is sufficient if the sexual acts are transmitted to the

41 Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie in der im Bundesgesetzblatt Teil III, Gliederungsnummer 440-3, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 3 § 31 des Gesetzes vom 16. Februar 2001 (BGBl. I S. 266) geändert worden ist. Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 4.

42 Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 4.

victims via the Internet and it is possible to follow the acts on a screen. However, it is necessary that the perpetrator has an explicit interest in the victim's perception.⁴³

In addition, § 176a (1) no. 3 point 3 of StGB punishes anyone who influences a child with pornographic content or inappropriate speech. Content is pornographic if it depicts sexual events in a crude form and without any connection to other manifestations of life. The offence of influence requires a deeper psychological influence on the victim, for example by arousing age-inappropriate sexual interest. Nor is physical proximity between the offender and the victim necessary in this respect.⁴⁴

According to § 176b Section 1 no. 1 of the StGB, a person who influences a child with the content of § 11(3) StGB in order to induce the child to perform a sexual act with or in front of the perpetrator or a third person is punishable by imprisonment of between three months and five years. The offence is intended to criminalise the initiation of sexual acts and includes, for example, influencing children in internet chat rooms with the intention of future sexual acts. Targeting minors in this way to initiate sexual contact on the internet is known as 'cybergrooming'. Similarly, influencing a child with content in order to produce or obtain child pornography content or to obtain possession of such content is punishable (StGB § 176b Section 1 no. 2).⁴⁵

According to § 176e (1) of the StGB, anyone who distributes or makes available to the public content which is capable of serving as an instruction to commit an unlawful act as defined in §§ 176-176d StGB and which is intended to incite others to commit such an act or to create a disposition to commit such an act is also punishable by imprisonment of up to three years or a fine. The offence is therefore the dissemination and making available to the public of content which is capable of serving as an incitement to commit the offences of abuse referred to in § 176 to 176d of the StGB. Finally, under § 176e Section 3 of the StGB, a person who obtains, possesses, makes available to another person or obtains for another person such instructions is punishable by imprisonment for up to two years or a fine. In addition, § 184b Section 1 sentence 1, nos 1 to 4 of the StGB

43 Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 5.

44 Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 5.

45 Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 6.

punishes the distribution, making available, inducing to possess, producing, possessing, obtaining and supplying child pornography content with a prison sentence of up to one to ten years⁴⁶.

If a person's effigy is published or displayed without consent (§ 22 of the Copyright of Works of Art and Photographic Works Act, KUG) or other justification (§ 23 of the Copyright Act, KUG) as a result of cyberbullying, *criminal liability* may be incurred under § 33 Section 1 of the Copyright Act, which provides for imprisonment for up to one year or a fine. A portrait of a person is a portrait if the appearance of a person is reproduced in such a way that the person has reasonable grounds to believe that he or she is recognised in the circle of acquaintances. If, unlike cyberbullying, the perpetrator seeks to contact the person concerned by stalking the victim without permission and on a sustained basis by means of communication ('cyberstalking'), this may ultimately be punishable under § 238 Section 1 no. 2 of StGB.⁴⁷

The offences do not explicitly mention any infocommunication technology as a means of commission, there is no reference to the online space as a place of commission, and the legislator avoided formulating the result. However, these offences can also be committed in the online space.

In addition to the criminal law provisions, the German Youth Protection Act (JuSchG)⁴⁸, the Interstate Treaty on the Protection of Minors in the Media (JMStV)⁴⁹ and the Act on Improving Law Enforcement in Social Networks (NetzDG) contain provisions on the protection of minors on the internet.

According to § 1 of the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and Telemedia (JMStV)⁵⁰, the purpose of the interstate treaty is to provide uniform protection for children and young people against content in electronic information and communication media that is harmful to their development or education, and against content

46 Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 7.

47 Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 8–9.

48 Jugendschutzgesetz vom 23.07.2002 (BGBl. I S. 2730), das zuletzt durch Artikel 1 des Gesetzes vom 09.04.2021 (BGBl. I S. 742) geändert worden ist.

49 Staatsvertrag über den Schutz der Menschenwürde und den Jugendschutz in Rundfunk und Telemedien (Jugendmedienschutz-Staatsvertrag – JMStV) vom 13.09.2002, zuletzt geändert durch Artikel 2 des Zweiten Medienänderungsstaatsvertrages vom 14./27.12.2021 als Anlage des Gesetzes vom 31.03.2022).

50 <https://www.gesetze-bayern.de/Content/Document/JMStV>

in electronic information and communication media that is harmful to human dignity or other legal interests protected by the Criminal Code.

According to § 24a of the JuSchG, service providers who store or provide third-party information for profit must take precautionary measures to ensure that the media protection objectives for children and young people (JuSchG § 10a) are met. Precautionary measures include the provision of reporting and redress procedures (JuSchG § 24a (2) no.s 1, 2), easy-to-find links to independent advice, assistance and reporting facilities (JuSchG § 24a (2) no. 5.) and to establish basic settings limiting the risks of use for children and young people (JuSchG § 24a (2) no. 7). These requirements also apply to providers of social networking and messaging services, whether or not they are established in Germany (JuSchG § 24a (4), 1st sentence). However, service providers whose services can be shown to be used by fewer than one million users in Germany are exempted from the obligations (JuSchG § 24a (3)). JuSchG § 16 sentence 2 further provides that the specific requirements on telemedia content are to be taken over from the JMStV. The term telemedia generally refers to all information and communication services, unless they are subject to specific requirements as telecommunications services, telecommunications protected services or broadcasting services (Telemedia Act⁵¹). The JMStV defines, for example, content which is unacceptable regardless of the criminal law consequences; this includes, for example, content in which children or young people are depicted in unnaturally sexualised postures (JMStV § 4 (1) no. 9. On the other hand, providers of content harmful to children and young people must ensure that children and young people are generally unable to perceive the content (JMStV § 5 (1) no. 1). Intentional or negligent distribution of illegal content and intentional or negligent violation of the age rating are punishable as administrative offences by a fine of up to EUR 500 000. The NetzDG, on the other hand, explicitly targets operators of social networks. As mentioned above, the offences to be reported include the distribution, acquisition and possession of child pornography (StGB § 184b) and threats to life, sexual autonomy, physical integrity or personal liberty (StGB § 241).⁵²

51 Telemediengesetz vom 26.02.2007 (BGBl. I S. 179, 251; 2021 I S. 1380), das zuletzt durch Artikel 3 des Gesetzes vom 12.08.2021 (BGBl. I S. 3544) geändert worden ist.

52 Schutz Minderjähriger im Internet durch das Strafrecht Untertitel: Einzelfragen zur Rechtslage Schutz Minderjähriger im Internet durch das Strafrecht Einzelfragen zur Rechtslage. Wissenschaftliche Dienste Sachstand WD 7 – 3000 – 023/23. p. 10–11.

4. Prevention

There are many ways to take preventive measures against cyberbullying within the family or in the school environment. Through role-playing, projects and active media work, children and young people can be sensitised to the problem. Important topics such as data security and the data economy, copyright and privacy rights of oneself and others, rules of online behaviour (netiquette), privacy and the health, social and legal consequences of cyberbullying can and should be discussed. On the one hand, the aim is to develop the confidence to use online media responsibly and competently. On the other hand, to communicate clear boundaries of digital communication.⁵³ To achieve this goal, there are several initiatives in Germany.

As part of the JIM Study 2022, young people were also asked if they had ever been contacted by strangers about cybergrooming on the internet. The term ‘grooming’ refers to the approach and preparation of sexual harassment online with the aim of sexual abuse. A quarter of young people say they have been confronted with cybergrooming, girls more often than boys (girls: 28%, boys: 21%). High school students are more likely to say they have been contacted by strangers. However, nine per cent of young people chose ‘don’t know’, so the number of unreported cases may be much higher.⁵⁴

JUUUPORT is a national online counselling platform for young people who have problems online. JUUUPORT members are volunteer teenagers and young adults from all over Germany who help their peers confidentially with online problems such as cyberbullying, media addiction, sexual harassment, data theft and many more. The advice is privacy-appropriate and free of charge. In addition to counselling, JUUUPORT also carries out active awareness-raising and prevention work. The website provides comprehensive guides and news on current online issues and threats. JUUUPORT’s workers appear in the press and at events and organise awareness-raising campaigns on social media (in particular Instagram, TikTok and YouTube), sensitising their peers to problematic content and interaction risks on the internet, and providing concrete tips for confident, reflective and critical use of digital media. The volunteers are supported by a permanent team of media educators, psychologists, editors, press officers and

53 <https://www.lmz-bw.de/medienbildung/themen-von-a-bis-f/cybermobbing/praevention-und-intervention#:~:text=Rollplaying%2C%20Workshops%20and%20active%20media%20work,f%3%BCr%20to%20raise%20awareness%20of%20the%20problems>

54 Medienpädagogischer Forschungsverbund Südwest JIM-Studie 2022. p. 56–57. https://www.mpfs.de/fileadmin/files/Studien/JIM/2022/JIM_2022_Web_final.pdf

administrative staff.⁵⁵ In addition, JUUUPORT is organising a national online counselling platform action day, on which it is making it its mission to raise awareness of the problem of cyberbullying.⁵⁶

The Klicksafe is the European Union's awareness-raising centre in Germany, coordinated by the Media Authority of Rhineland-Palatinate and implemented in cooperation with the Media Authority of North Rhine-Westphalia. The Klicksafe has also been coordinating the Safer Internet Centre DE since 2008, which includes the internet hotlines, eco, FSM and jugendschutz.net, as well as the helpline Nummer gegen Kummer. Klicksafe is funded by the European Union's Digital Europe Programme (DIGITAL). The independent information portal www.klicksafe.de provides users with a wealth of up-to-date information, practical tips and useful material on digital services and issues. Its activities also include the implementation of comprehensive campaigns and the development of national certification schemes for teachers and professionals. They also support training for children, young people, parents, teachers and professionals on the opportunities and risks of the Internet. The Klicksafe also networks initiatives and stakeholders in Germany and across Europe to promote media literacy on the Internet.⁵⁷

jugendschutz.net was founded in 1997. They currently operate as a joint federal and state competence centre for the protection of children and young people online. They analyse the Internet in terms of the dangers for children and young people. They focus on issues such as self-harm, political extremism, sexual violence, harassment and cyberbullying. They also investigate services that contain cost traps, present inappropriate advertising or violate the privacy rights of minors. When they receive reports through their online reporting form, they will also examine and assess the content and review the precautions taken by online gaming services and services such as Instagram, YouTube and TikTok to protect against risks and harm. This includes, for example, settings that prevent strangers from contacting unsolicited. Reporting systems are also tested. These should not only be easy to find and simple to use but should also lead to the rapid deletion of breaches. If a website is found to be in breach of the Interstate Treaty on the protection of personal data (JMStV), the service provider or a voluntary self-regulatory organisation is contacted and a request is made to have the infringement stopped. If this does not happen, the matter is

55 See: <https://www.juuuport.de/ueber-uns>

56 See: <https://www.juuuport.de/aktionstag-gegen-cybermobbing>. Materials available at: <https://www.klicksafe.de/cybermobbing/handlungsansatz-zur-praevention-und-intervention-von-cybermobbing>

57 See: <https://www.klicksafe.de/die-initiative>

usually referred to the Commission for the Protection of Minors in the Media (Kommission für Jugendmedienschutz, KJM). If there is a risk to life or depictions of sexual violence against children, the police authorities, such as the Federal Criminal Police Office (Bundeskriminalamt), are immediately involved. The Federal Centre for the Protection of Children and Young People (Bundeszentrale für Kinder- und Jugendmedienschutz, BzKJ) is informed. Their reports and briefings provide in-depth insights into specific problems and highlight the need for action. They also present their findings at conferences and workshops and contribute to the debate on contemporary youth media protection.⁵⁸

The Landesmedienzentrum Baden-Württemberg, together with the #RespektBW project and the 'Bitte Was?! Kontern gegen Fake und Hass' (Countering Fake and Hate) information campaign, it sends a clear signal against online fake and hate. The aim of the campaign is to motivate children and young people to behave respectfully online and thus stand up for good social coexistence. Such projects could result in an informative classroom bulletin board, a self-made film, a code of conduct or even a play on cyberbullying. In this context, 'experts' such as student media mentors, mediators and anti-bullying officers can also be trained. They can provide competent support in acute cases of bullying. In addition, teachers should receive regular training in mediation and conflict resolution.⁵⁹

Examples of mediation as a process of constructive conflict resolution, in which impartial third parties act as mediators to assist in mobbing and cyberbullying cases, can be found in the state of Hessen.⁶⁰

One site, [klicksafe.de](https://www.klicksafe.de), offers manuals on the subject, and one of them describes the decision levels. The school management is responsible for running of the school, intervenes in conflicts in a regulatory way, decides on the convening and composition of the Systemic Conflict Management (SKM) team, leads it, hears parents, victims, perpetrators and their families, decides on educational and disciplinary measures in an administrative act, in a regulatory role, advises victims, offenders and their families. The class teacher is responsible for class management, informs parents of all events affecting them, decides on educational measures outside the administrative act, makes contact offers, in a regulatory role, advises victims, offenders and their families. They

58 See: <https://www.jugendschutz.net/ueber-uns/was-wir-tun>

59 See: <https://www.lmz-bw.de/medienbildung/themen-von-a-bis-f/cybermobbing/praevention-und-intervention#:~:text=Rollplaying%2C%20Workshops%20and%20active%20media%20work,f%C3%BCr%20to%20raise%20awareness%20of%20the%20problems>

60 See: <http://www.schulmediation-hessen.de/index.html>

are the decision-makers. The systemic conflict management professional prepares team meetings and decisions, makes conflict diagnoses, proposes conflict assessments, proposes action strategies, advises team members, evaluates the process, gives feedback if agreements and procedural standards are not respected, takes over documentation. Conflict support professionals conduct interviews with conflict support seekers or confrontation interviews with the accused for social training and harassment intervention or mediation, social training and systemic harassment and brief interventions, advice on mediation of values in the classroom, coaching victims, perpetrators and their parents, triangle meetings, mediation in front of the classes if necessary. Counselling and training professionals (e.g. media education specialists) advise the team and its members on all professional issues.⁶¹

Summary

In conclusion, the prosecution of hate crime is a matter of the state's duty to protect, rooted in fundamental rights. The focus is on the protection of human dignity (Article 1 GG) and the fight against discrimination (Article 3(3) GG). In view of the ultima ratio nature of state punishment, the need for a criminal law provision can only be confirmed in rare exceptional cases. The protection of bodily integrity or the right to social esteem, which is rooted in general rights of personality, is already adequately guaranteed by criminal law. Therefore, the legislator is under no constitutional obligation to extend protection against hate crime by law.

In some cases, hate crime is understood to mean only violent crime. This may be related to the fact that the main focus of statistical surveys or criminological studies is often on hate crimes motivated by right-wing extremism. However, the general social dimension of hate crime goes beyond violent acts motivated by right-wing extremist attitudes. Criminal law is essentially neutral and covers acts irrespective of the ideology of the perpetrator. Any motivation based on certain characteristics of the victim can lead to classification as a hate crime. It is not only people who hold extremist views who can be considered as perpetrators, because such a narrow perspective can result in 'ordinary' manifestations of prejudice and attacks going unnoticed and therefore unaddressed. The perception of the victim is crucial in determining whether a crime is a hate crime.

61 Chapter5_Systemic_Conflict_Management.pdf (klicksafe.de)

A hate crime can be the subject of any offence under the Criminal Code if the offence is committed because of the specific motivation of the perpetrator. With regard to offences criminalising bias-based violence, in addition to classic violent crimes such as homicide, assault and sexual offences, any other offence involving harming or threatening people, such as arson, coercion, robbery, extortion or hostage-taking, may be covered.

Section 192a of the StGB deals with hate-mongering insult, which was newly introduced into the German Criminal Code in September 2021. Its purpose is to close the gap that previously existed in criminal liability for sending hateful content to the persons concerned.

Only the offence of stalking (StGB § 238) explicitly mentions telecommunication – which includes digital forms of communication – as a possible means of committing the offence (StGB § 238 (1) no. 2). Thus, there is an indirect reference to online space as a ‘place of commission’, but it does not follow from the wording of the offence that it is committed exclusively online, only that harassment can be committed online.

An audit of social network deletion practices carried out by jugendschutz.net in January/February 2017 showed that user complaints about hate crime are still not being processed promptly and adequately. YouTube now deletes criminal content 90% of the time. In contrast, Facebook deletes content only 39% of the time and Twitter only 1% of the time. Social network providers have a responsibility to fulfil. Given that existing tools and voluntary commitments promised by social networks are not effective enough and that there are significant problems with the enforcement of applicable law, compliance rules for social networks are needed to effectively and promptly tackle online hate crime.

The criminal law protection of minors against sexual violence on the internet follows from the criminal law provisions on the protection of sexual self-determination (StGB §§ 174-184), whereas in the case of cyberbullying, as mentioned, several criminal law provisions can be applied, such as insult (StGB § 185). In addition to the criminal law provisions, the German Youth Protection Act (JuSchG), the Interstate Treaty on the Protection of Minors in the Media (JMStV) and the Act on the Improvement of Law Enforcement in Social Networks (NetzDG) contain provisions on the protection of minors on the Internet.

There are many ways to take preventive measures against cyberbullying within the family or in the school environment. One is to develop the confidence to use online media responsibly and competently. On the other hand, clear boundaries of digital communication need to be communicated. To achieve this goal, there are several initiatives in Germany.

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