

Criminal Liability of Facebook Reaction Buttons in Environment of the Slovak Republic as a Form of Hate Speech

Ivan Smieško

Abstract: *The presented paper is focused on analysing the issue of the Facebook reaction buttons as a form of hate speech. Pressing these buttons can spread hateful content through Facebook and disseminate extremist ideas. Currently, technologies are so much sophisticated that it is enough to do just one “click” on the computer mouse, touchpad, or display and the content is disseminated. According to the Criminal Code of the Slovak Republic, there it is possible to prosecute the user just for one pressing Facebook reaction button, hence for one “click” with what we disagree on and in the paper we state arguments which support our opinion.*

Key Words: *Facebook; “Like” Button; Hate Speech; European Convention of Human Rights; European Court of Human Rights; Ultima Ratio; Criminal Code; Criminal Liability; the Slovak Republic.*

Introduction

Nowadays almost two billion people use Facebook. People in the real world have to take responsibility for their actions. This should be applied also in the virtual world, including Facebook, which allows many possibilities for users to express themselves. Among these possibilities are also Facebook reaction buttons. The most known button is reaction button “Like”. Facebook recently came with new reaction buttons which are “Love”, “Ha-ha”, “Wow”, “Sad”, and “Angry” (next “Like” button, “Love” button, and so on) and has also announced that more reaction buttons could be added. Facebook can be abused to spread hateful and offensive content. Although the European Court of Human Rights (hereinafter referred to as the “Court”) dealt many times with the limitation of freedom of expression, especially in cases of hate speech, it has never had to deal with the problem questions of Facebook reaction buttons. In the paper we analyse the issue of the criminal liability for pressing Facebook reaction buttons which could be used as a form of spreading hate speech. The paper also includes analysis of possible breach with the Article 10 of the

European Convention of Human Rights. Following questions rose during the analysis of presented issue:

- 1) *What are Facebook reaction buttons?*
- 2) *Can pressing Facebook reaction buttons be qualified as a form of hate speech in the Slovak Republic?*
- 3) *Should be pressing Facebook reaction buttons sanctioned by means of the criminal law?*

Answering the above-mentioned questions in our paper is important because pressing Facebook reaction buttons is the first step on the path which leads to the violation of rights and freedoms in the real world.

What are Facebook reaction buttons?

Facebook reaction buttons allow users to express their support for particular statuses, images, etc.; respectively, they allow users to express their gratitude for the content without having to make a written statement. They are manners of behaviour on virtual reality; because people cannot see user's reactions or emotions, these buttons are some kinds of substitutes. These buttons are form of speech which was also confirmed by the United States Court of Appeals for the Fourth Circuit in *Bland v. Roberts's* case. This court stated that on the most basic level, clicking on the "Like" button literally causes to be published the statement that the user "likes" something, which is itself a substantive statement.¹ Reason for adding new reaction buttons was according to Facebook that there should be more ways to easily and quickly express how something the user sees or how something makes him/her feel. That is why Facebook launched reaction buttons, an extension of the "Like" button – to give users more ways to share their reactions to a post in a quick and easy way. Users can see new reaction buttons by either holding down the "Like" button or hovering over it. Facebook user can just tap the reaction he/she wants and the icon for it will appear beneath the post, just as the icon of the "Like" button does. Users have for a long time complained that the "Like" button doesn't feel appropriate in a lot of circumstances, such as when a friend's loved one has died or an acquaintance has posted a political screed that the user found interesting, but also troubling. The reason why Facebook has yet only six types of reactions is that it was found out

¹ See *Case of Bland v. Roberts* [2013-09-18] [online]. Opinion of the United States Court of Appeals, 2013, No. 12-1671 [cit. 2016-09-02]. Available at: <http://www.ca4.uscourts.gov/Opinions/Published/121671.P.pdf>.

that users are more likely to choose an alternative to the “Like” button if the range of alternatives is small enough to quickly grasp. The paradox of choice suggests that more options might simply overwhelm people (Figures 1 and 2).²

Figure 1 Facebook Reaction Buttons



Source: Facebook [online]. 2016 [cit. 2016-09-02]. Available at: <https://www.facebook.com/>.

Figure 2 Facebook Reaction Buttons on the Website



Source: Facebook [online]. 2016 [cit. 2016-09-02]. Available at: <https://www.facebook.com/>.

² See OREMUS, W. Facebook’s Five New Reaction Buttons: Data, Data, Data, Data, and Data. In: *Slate* [online]. 2016-02-24 [cit. 2016-09-02]. Available at: http://www.slate.com/blogs/future_tense/2016/02/24/facebook_s_5_new_reactions_buttons_are_all_about_data_data.html.

Important information for the aim of our paper is where these reactions are displayed in Facebook, ergo, where other users can see them.

- 1) *News Feed* – constantly updating list of stories in the middle of user’s homepage. It includes status updates, photos, videos, links, app activity and “likes” from people, pages, and groups that the user follows on Facebook (Figure 3);³
- 2) *Ticker* – shows the user things he/she can already see on Facebook, but in the real time. It also keeps up with the latest news as it happens; the user can also listen to the music with his/her friends and click or hover over a story to join in the conversation.⁴ For the aim of this paper it is important that the user can see activities and reactions of other users (Figure 3).

Figure 3 News Feed and Ticker



Source: Facebook [online]. 2016 [cit. 2016-09-02]. Available at: <https://www.facebook.com/>.

It needs to be differentiated between the “Like” button and other Facebook reaction buttons because pressing the “Like” button as Facebook reaction button has more effects that will be the subject of analysis from the view of the criminal liability:

³ See How News Feed Works. In: *Facebook Help Center* [online]. 2016 [cit. 2016-09-02]. Available at: <https://www.facebook.com/help/327131014036297/>.

⁴ See Ticker. In: *Facebook Help Center* [online]. 2016 [cit. 2016-09-02]. Available at: <https://www.facebook.com/help/255898821192992/>.

- 1) *Pressing the “Like” button on posts* (statuses, images, videos, links, etc.): the “Like” button is in this case one of the types of reactions, along with other reaction buttons;
- 2) *Pressing the “Like” button on Facebook websites*: the “Like” button in this context can be interpreted as following a certain Facebook website, so the user can be ensured that he/she will get the content posted by the website into his/her News Feed (Figure 4).

Figure 4 The “Like” Button as Following a Certain Facebook Website



Source: Facebook [online]. 2016 [cit. 2016-09-02]. Available at: <https://www.facebook.com/>.

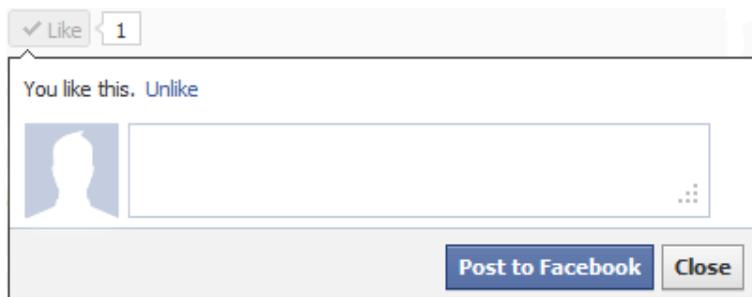
Other Facebook reaction buttons are available only for posts.

There are two types of the “Like” reaction button from the view of displaying:

- 1) *Common reaction button “Like”*: when user presses this button on some post directly on Facebook, it will only be displayed in the Ticker (where all activities of the users are displayed) and, maybe, on the Timeline;
- 2) *Reaction button “Like” with the possibility of making a comment*: it is typical for the non-Facebook websites where it is possible to press the “Like” button – for example on some websites of journals, under articles or blogs. When the user presses the “Like” button on some article, an empty field will be displayed where he/she can write some comment. It has replaced in many cases the original Share but-

ton. Other reaction buttons are not possible to use for the non-Facebook websites (Figure 5).

Figure 5 The Reaction Button “Like” with the Possibility of Making a Comment



Source: Facebook [online]. 2016 [cit. 2016-09-02]. Available at: <https://www.facebook.com/>.

The difference between the both above-mentioned types of the reaction button “Like” is that the user uses *the common “Like” button* only on Facebook itself, while *the “Like” button with the possibility of making a comment* is designed for the all non-Facebook websites. Anyone who has a website can add the “Like” button to his/her website, so more people will visit it. For the purpose of this paper only *the common “Like” button* is relevant because in the second case the “Like” button is de facto sharing, so the post on which the user pressed the “Like” button will be definitely displayed in the News Feed and by spreading some extremist article, image, etc. a criminal offence would be committed.

Can pressing Facebook reaction buttons be qualified as a form of hate speech in the Slovak Republic?

The Slovak *Criminal Code, Act No. 300/2005 Coll. as amended* (hereinafter referred to as the “Criminal Code”) is the only source of what the criminal offence is and of what sanctions can be imposed, according to the Section 8. The user can commit by pressing Facebook reaction buttons several criminal offences, concretely *Condoning a Criminal Offence* according to the Section 338,⁵ *Suppression of Fundamental Rights and Free-*

⁵ Section 338

(1) Any person who expresses *public* approval for a criminal offence or *publicly* praises the offender for the commission of an offence shall be liable to a term of imprisonment of up to one year.

(2) The same sentence as referred to in paragraph 1 shall be imposed on any person who,

doms according to the Section 421 paragraph 2,⁶ Dissemination of Extremist Materials according to the Section 422b paragraph 2,⁷ and Defamation of Nation, Race, and Belief according to the Section 423.⁸ The above-mentioned criminal offences are part of the hate speech criminal offences. Committing these criminal offences by pressing Facebook reaction buttons could be subsumed under the Section 122 paragraph 2,⁹ especially committing them by using computer network. Committing criminal offence by using computer network is aggravating circumstance, or even qualified subject matter of a criminal offence, so the penalty would

with the intention of expressing approval for a criminal offence,

- a) rewards or compensates the offender or his/her close person for the punishment, or
- b) raises funds for such reward or compensation.

⁶ Section 421

(1) Any person who supports or makes propaganda for a group of persons or movement which use violence, the threat of violence, or the threat of other serious harm, demonstrably aims at suppressing citizens' fundamental rights and freedoms shall be liable to a term of imprisonment of one to five years.

(2) The offender shall be liable to a term of imprisonment of four to eight years if he/she commits the offence referred to in paragraph 1

- a) *in public*,
- b) in the capacity of a member of an extremist group,
- c) acting in a more serious manner, or
- d) under a crisis situation.

⁷ Section 422b

(1) Any person who reproduces, transports, procures, makes accessible, puts into distribution, imports, exports, offers, sells, sends, or disseminates extremist materials shall be liable to a term of imprisonment of one to five years.

(2) The offender shall be liable to a term of imprisonment of three to eight years if he/she commits the offence referred to in paragraph 1

- a) acting in a more serious manner,
- b) *in public*, or
- c) in the capacity of a member of an extremist group.

⁸ Section 423

(1) Any person who *publicly* defames

- a) any nation, its language, any race, or ethnic group, or
 - b) any individual or a group of persons because of their affiliation to any race, nation, nationality, complexion, ethnic group, family origin, religion, or because they have no religion,
- shall be liable to a term of imprisonment of one to three years.

⁹ Section 122

(2) Criminal offence is committed *in public*:

- a) through the content of a printed matter or a disseminated written material, through a film, through the radio, television, *with the use of a computer network*, or using the means of similar effect, or
- b) in the presence of more than two persons.

be stricter. *It has to be emphasized that for the committing of mentioned criminal offences is sufficient pressing Facebook reaction button just once.*

Question which needs to be answered is why could be pressing Facebook reaction buttons qualified as mentioned criminal offences *from the formal way*. To answer this question, it is necessary to analyse:

- 1) *Subjective element, hence if the user has liability for that his/her activities on Facebook can be seen by other users;*
- 2) *Key terms of objective elements of mentioned subject matters and state if it is possible to subsume Facebook reaction buttons under these key terms.*

Ad 1) The Constitutional Court of the Czech Republic has defined Facebook as an extensive, multifunctional social network which serves primarily on the establishing and maintaining online relationships and the dissemination of information. Facebook allows for a networking social contact, communication between users, mutual wide variety of multimedia content, organization of events, and presentation of users.¹⁰ It follows that the nature of Facebook is providing information about users and their activities. It means that users know that their activities and information could be seen by other users and, therefore, it is fulfilled at least *dolus eventualis* which is sufficient for fulfilling the subjective element.

Ad 2) The key parts of objective elements of the mentioned subject matters are:

- a) Supporting;
- b) Dissemination;
- c) Defamation;
- d) Public approval.

Ad a) Supporting, which is part of the Section 421 of the Criminal Code, is any action which provides ideology and propagates the possibility to spread and to gain adherents. It can be realised by material way (financial gifts, technical resources, etc.), but also in moral way (affirming in the proper conduct, proselytizing, etc.).¹¹ Under the term “support” can be subsumed the “Like” and the “Love” buttons because it follows directly from definitions of the both reaction buttons. It could be accepted as

¹⁰ See *Nález Ústavního soudu České republiky sp. zn. III. ÚS 3844/13* [2014-10-30].

¹¹ See MAŠLANYOVÁ, D. et al. *Trestné právo hmotné*. 1. vyd. Plzeň: Aleš Čeněk, 2011, p. 461. ISBN 978-80-7380-338-4.

a moral way of support. Definition of the reaction “Like” button directly contains “support for (someone or something) by means of a particular icon or link”;¹² by icon or link the “Like” button could be understood in this case. Definition of the “Love” button contains “like or enjoy very much”¹³ which directly refers to the definition of the “Like” button, hence it is more intensive “Like”.

Ad b) Dissemination, which is part of the Section 422b of the Criminal Code, means to make an extremist material¹⁴ generally known.¹⁵ By pressing all mentioned buttons the user can disseminate extremist materials because, as we mentioned above, using these reaction buttons will be displayed in News Feed or in Ticker, so other users could see them and, therefore, extremist material would become generally known.

Ad c) Defamation, which is part of the Section 423 of the Criminal Code, are rude, offensive, and subjectively disparagement offensive assertions or offensive actions. Defamation can be realised verbally or non-verbally (by print, images, etc.). Petulance of the speech results from the content or the way, or the circumstances in which the speech was made. Defamation does not concern statement of the objectively existing fact. Offensive speech must direct to the disparagement of the nation, language, race, ethnical group, group of persons for their religion, or because they have no religion.¹⁶ Question is if pressing the reaction button “Ha-ha” as a form of humiliation could be subsumed under the term “nonverbally defamation”. To humiliate someone can be defined as *making (someone) feel ashamed and foolish by injuring his/her dignity and pride*.¹⁷ The aim of the defamation is to slander or to libel a reputation of someone which is a synonym to a part of definition of “injuring dignity”,

¹² Like. In: *Oxford Dictionaries* [online]. 2016 [cit. 2016-09-02]. Available at: <https://en.oxforddictionaries.com/definition/like>.

¹³ Love. In: *Oxford Dictionaries* [online]. 2016 [cit. 2016-09-02]. Available at: <https://en.oxforddictionaries.com/definition/love>.

¹⁴ Extremist’s material is legally defined in the Section 130 paragraphs 8 and 9 and it concerns materials which propagate, justify racial, ethnical, religious, national hatred, for example posters, articles, books, pamphlet, leaflet, videos, words, badges, flags, symbols, etc. *Act No. 300/2005 Coll. Criminal Code, as amended*.

¹⁵ See ČENTĚŠ, J. et al. *Trestný zákon: Velký komentár*. 1. vyd. Bratislava: Eurokódex. 2013, p. 831. ISBN 978-80-8155-020-1.

¹⁶ See MAŠLANYOVÁ, D. et al. *Trestné právo hmotné*. 1. vyd. Plzeň: Aleš Čeněk, 2011, p. 464. ISBN 978-80-7380-338-4.

¹⁷ See Humiliate. In: *Oxford Dictionaries* [online]. 2016 [cit. 2016-09-02]. Available at: <https://en.oxforddictionaries.com/definition/humiliate>.

so the subsumption of the term “humiliation” under the term “defamation” is theoretically possible.

Ad d) Public approval, which is part of the Section 338 of the Criminal Code, is an expression of the sympathy to the criminal offence or the public praise of the offender for any criminal offence. It can be committed before as well as after the criminal offence. It does not matter if the offender of the approved criminal offence proceeds. It also does not matter on the form of approval, but it must be public.¹⁸ According to the English Synonym Dictionary, the term “approve” is a synonym to the term “support”¹⁹ which is the part of the definitions of the “Like” and the “Love” buttons, so pressing these buttons could be a form of public approval.

There is also a possibility to a mutual combination of criminal offences which is not excluded in case of mentioned criminal offences. For example, by pressing the “Like” and the “Love” buttons Dissemination of Extremist Materials according to the Section 422b paragraph 2 and Supporting and Promoting Groups Aimed at Suppression of Fundamental Rights and Freedoms according to the Section 421 paragraph 2 can be committed. In case of pressing the “Ha-ha” button, it is possible to commit Dissemination of Extremist Materials according to the Section 422b paragraph 2 and Defamation of Nation, Race, and Belief according to the Section 423.

The Criminal Code of the Slovak Republic divides criminal offences to minor offences and crimes. In case of minor offences, *material corrective (also known as material way of criminal offence)* has to be taken into account.²⁰ Thanks to this material corrective element, an illegal act formally satisfying the characteristics of a contravention will not be deemed a contravention if its seriousness is negligible or, in case of juvenile offenders,

¹⁸ See MENCEROVÁ, I. § 338 Schvaľovanie trestného činu. In: E. BURDA, J. ČENTĚŠ, J. KOLEŠÁR, J. ZÁHORA, et al. *Trestný zákon: Osobitná časť: Komentár: II. diel* [online]. 1. vyd. Praha: C. H. Beck, 2011, pp. 1111-1112 [cit. 2016-09-02]. ISBN 978-80-7400-394-3. Available at: <http://www.epi.sk/beck-komentar/komentar-300-2005-p-338-schvalovanie-trestneho-cinu.htm>.

¹⁹ See Approve. In: *English Synonym Dictionary* [online]. 2016 [cit. 2016-09-02]. Available at: http://dico.isc.cnrs.fr/dico/en/calculc?r=17010814_1483882907_834976020&v=approve&send=View&o=0&s=E&l=E&p=3&c1=2&c2=2&v=approve.

²⁰ Section 10

(2) The act shall not be deemed as a minor offence if it is of lesser seriousness in view of the mode of its commission and consequences, the circumstances of its commission, the degree of culpability, and the motivation of the offender.

small.²¹ In case of crimes, material corrective is relevant only in imposing sanction, so if the offender fulfils all elements of criminal offence, he/she has to be prosecuted.

From the information mentioned above, the possibility to subsume Facebook reaction buttons as a form of hate speech under the concrete criminal offences according to which it could be possible to sanction the user follows. There is still a question whether the user should be sanctioned by means of the criminal law.

Should be pressing Facebook reaction buttons sanctioned by means of the criminal law?

Possibility to sanction pressing Facebook reaction button just once

The following part will analyse the possibility to sanction pressing Facebook reaction button just once. Our consideration is based on two arguments: on the seriousness of such a criminal offence and on the principle *ultima ratio*.

a) Seriousness of such a criminal offence

The seriousness of pressing Facebook reaction buttons needs to be considered, which in the Slovak Republic means application of the material corrective. In cases of Condoning a Criminal Offence according to the Section 338 and of Defamation of Nation, Race, and Belief according to the Section 423 it is no problem to consider their seriousness because they are minor offences. But Supporting and Promoting Groups Aimed at Suppression of Fundamental Rights and Freedoms according to the Section 421 paragraph 2 as well as Dissemination of Extremist Materials according to the Section 422b paragraph 2 are crimes where the material corrective element is irrelevant from the view of criminality. *To determine the seriousness of minor offence, it needs to be realised that material corrective is done by several criteria which must be considered as one unit, although in every single case could be different proportion of criteria and mutual relations between them could be different.* It is very important to correctly consider whether the act shall be qualified as minor offence or

²¹ See BALÁŽ, P. and M. VRÁBLOVÁ. *Introduction to Slovak Substantive Criminal Law*. 1st ed. Plzeň: Aleš Čeněk, 2011, p. 16. ISBN 978-80-7380-352-0.

administrative delict which is of gentler interference.²² Criteria which must be considered in case of minor offences are:

- 1) Commission;
- 2) Consequence;
- 3) Circumstances of the commission;
- 4) Degree of culpability of the offender;
- 5) Motivation of the offender.

Commission

Criminal offence is committed by just simple pressing Facebook reaction button. Problem is that if the user presses the “Like” button to a certain Facebook website, he/she can be ensured of getting the content posted by the website into his/her News Feed. In our opinion, it depends on the title of such a website. Criminal liability is permissible only if the title would fulfil all elements of criminal offence (for example website entitled with a slogan defaming race or nation), but the seriousness is, in our opinion, negligible because it follows from the fact that the motive of the user is to receive the content. Also, if a website posts some hateful content it doesn’t base liability of users who just follow the content of a website.

Consequence

In case of consequences, there could be considered whether it would be endangerment consequence or damaging consequence. Also, there could be considered the possibility to fix or to remove damages.²³ Hate speech has damaging consequence because it violates rights and interests protected by the Criminal Code. Possibility to remove damage is on the Internet quite simple; the user just deletes the hate speech comment, video, status, or whatever form the hate speech has, so, in our opinion, seriousness is still negligible and there is also a chance that it wouldn’t be even noticed by other users – this possibility will be analysed below.

²² See KOLESÁR, J. § 10 Prečin. In: E. BURDA, J. ČENTĚŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Všeobecná časť: Komentár: I. diel* [online]. 1. vyd. Praha: C. H. Beck, 2010, pp. 49-53 [cit. 2016-09-02]. ISBN 978-80-7400-324-0. Available at: <http://www.epi.sk/beck-komentar/komentar-300-2005-p-10-precin.htm>.

²³ See KOLESÁR, J. § 10 Prečin. In: E. BURDA, J. ČENTĚŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Všeobecná časť: Komentár: I. diel* [online]. 1. vyd. Praha: C. H. Beck, 2010, pp. 49-53 [cit. 2016-09-02]. ISBN 978-80-7400-324-0. Available at: <http://www.epi.sk/beck-komentar/komentar-300-2005-p-10-precin.htm>.

Circumstances of commission

Circumstances of commission of minor offence could be also the general mitigating and aggravating circumstances which are stipulated in the Sections 36 and 37 of the Criminal Code. For example, mitigating circumstances which are namely relevant for pressing Facebook buttons are committing the criminal offence because of the lack of knowledge or experience, or the offender had led a regular life before he/she committed the criminal offence. There is no aggravating circumstance which could be relevant for pressing Facebook reaction buttons. Because nowadays there is no information that the user could be penalised for pressing Facebook reaction buttons and most of people lead a regular life, the seriousness of such a minor offence is negligible.

Question is also if the seriousness of the first reaction (whether it could be the "Like", the "Love", or any from mentioned reactions) should be the same as, for example, of the twenty-fifth reaction or of the eight-hundredth reaction, hence, if there could be some influence of mass hysteria. Good example of mass hysteria on the Internet is hoax. A hoax is a deliberately fabricated falsehood made to masquerade as truth. A lot of hoaxes, especially those which have hate speech character are nowadays spread through the Internet. Seriousness of users who only use Facebook reaction buttons is negligible and, at the same time, lower than directly spreading hoaxes which could base criminal liability, so, therefore, it is not necessary to deal with analysing of the seriousness because it should not be qualified as criminal offence.

Degree of the culpability of the offender

Culpability is an internal psychical relationship of the offender to objective elements of the criminal offence.²⁴ Within the degree of culpability it could be examined to which extent commission of offence by the offender led to a consequence. There could be also realised evaluating of culpability in case of committing by more offenders.²⁵ In case of Facebook buttons, there is a possibility to evaluate the degree of culpability of abettors, hence organizer, instigator, hirer, and aider. Accomplice is not prac-

²⁴ See MAŠĽANYOVÁ, D. et al. *Trestné právo hmotné*. 1. vyd. Plzeň: Aleš Čeněk, 2011, p. 84. ISBN 978-80-7380-338-4.

²⁵ See KOLESÁR, J. § 10 Prečin. In: E. BURDA, J. ČENTĚŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Všeobecná část: Komentár: I. diel* [online]. 1. vyd. Praha: C. H. Beck, 2010, pp. 49-53 [cit. 2016-09-02]. ISBN 978-80-7400-324-0. Available at: <http://www.epi.sk/beck-komentar/komentar-300-2005-p-10-precin.htm>.

tically possible because in the absolute majority of cases only one person presses the button.

Motivation of the offender

Motive is what leads the offender to commit the criminal offence.²⁶ There should be considered whether the user really hates someone or some group because of their affiliation to race, ethnicity, religion, etc. and not only whether, for example, John has read some article about denying Holocaust and the article persuaded him that most of the world is wrong about Holocaust, so he pressed the “Like” button not because of his hate to Jews, but for “seeking the truth”.

Although the subjective parts of material corrective, which are namely degree of culpability and motive, can be serious, the objective parts of material corrective, which are commission, consequence, and circumstances, are more important in case of pressing Facebook reaction buttons.

Principle ultima ratio

According to the Criminal Code of the Slovak Republic, committing criminal offence via Facebook (via the Internet) and committing criminal offence by mass media or in front of at least two people are the same, although, in our opinion, there are still differences between them. This argument flows both from the objective part, which is overcrowding of News Feed and Ticker, and the subjective part, which is different perception.

a) Overcrowding of News Feed and Ticker

The user has at least dozens of friends, has “liked” many Facebook’s websites, so his/her News Feed is overcrowded by many different posts (including also advertising), so he/she may not ever see that someone reacted on some hateful article, image, status, etc.; it can just be lost in the amount of many posts while the user’s Timeline is overcrowded. The truth is that other users can see on what he/she has reacted in Ticker, but there are also all activities of friends displayed, so there is even bigger chance to become very soon lost in the amount of all activities of users. However, there is still a chance that other users will see it, but we

²⁶ See MAŠLANYOVÁ, D. et al. *Trestné právo hmotné*. 1. vyd. Plzeň: Aleš Čeněk, 2011, p. 58. ISBN 978-80-7380-338-4.

think that because of mentioned overcrowded News Feed of users the seriousness is negligible.

b) Different perception

For example, when some blogger writes a blog and publishes it on a website of some journal that hundreds of people read every day with the purpose of seeking information, it cannot be compared to one pressed Facebook reaction button displayed on News Feed because the primary aim was not to seek information, but to display activities of friends, favourite sites, advertising, etc. Also the Constitution Court of the Slovak Republic stated that Facebook is not mass media and also that public access to Facebook is bound to registration through the e-mail and the name and password, ergo, it is limited by certain way.²⁷ Although this case dealt with election campaign, there is a possibility to use *analogy in bonam partem* which is allowed in the criminal law. Firstly, the aim of the standard election campaign is to receive voters, respectively, to directly spread ideas among as many people (users in this case) as it is possible, but pressing Facebook reaction buttons has a different purpose. It is the reaction on some article, image, status, etc., so it means a sort of an answer or feedback to some post. The fact that other users can see it is just a side-effect; because of this side-effect the seriousness is lower. The above-mentioned also relates to the subjective element. Spreading ideas among users fulfils *dolus directus* because the user knows and also wants the post to be seen by as many people as it is possible, but pressing Facebook reaction button fulfils *dolus eventualis* which is a less serious form of intention because the user knows that it could be seen by other users, but he/she may not have the will to spread it and, therefore, the seriousness is totally lower than in case of *dolus directus*. Secondly, it is in favour of the offender because it decreases the seriousness of the criminal offence which is not considered in Supporting and Promoting Groups Aimed at Suppression of Fundamental Rights and Freedoms according to the Section 421 paragraph 2 and in Dissemination of Extremist Materials according to the Section 422b paragraph 2, although these are crimes, because, finally, pressing Facebook reaction buttons is not of the same level as publishing articles, images, statuses, etc. on Facebook and, definitely, because of limitation bound on registration that is also not of the same level of seriousness as in case of mass media.

²⁷ See *Uznesenie Ústavného súdu Slovenskej republiky sp. zn. PL. ÚS 42/2011-19* [2011-02-09].

Summary consideration about principle *ultima ratio*

Particular account should be taken of two features of the European Convention of Human Rights when a question of interpretation arises. The European Convention of Human Rights has to be interpreted objectively.²⁸ Firstly, the obligations undertaken by the High Contracting Parties in the European Convention of Human Rights are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.²⁹ Secondly, treaty obligations should be interpreted restrictively. The Court stated that it was necessary to seek the interpretation that is most appropriate in order to realise the aim and to achieve the object of treaty, not that, which would restrict to the greatest possible degree the obligations undertaken by the Parties.³⁰ According to these features, the further conclusion may be drawn as to the appropriate principles of interpretation: that the interpretation of the European Convention of Human Rights must be “dynamic” in sense that it must be interpreted in the light of developments in social and political attitudes.³¹ So the European Convention of Human Rights should be interpreted in favour of the freedom of expression rather than in favour of possibility to be prosecuted by the State. It is confirmation of the principle *ultima ratio* that the criminal law should be used as an utmost means.³² According to the Slovak criminal law theory, the principle *ultima ratio* consists in the obligation of legislator to prefer noncriminal legal norms before criminalisation and also in the duty of prosecuting authorities to prefer liability according to noncriminal legal norms before recourse of the offender by norms of the criminal law. Principle *ultima ratio* also fulfils subsidiary

²⁸ See OVEY, C. and R. C. A. WHITE. *Jacobs & White: The European Convention on Human Rights*. 4th ed. Oxford; New York: Oxford University Press, 2006, pp. 45-46. ISBN 0-19-928810-0.

²⁹ See *Case of Government of the Federal Republic of Austria v. Government of the Republic of Italy* [1961-01-11]. Decision of the European Commission of Human Rights, 1961, Application No. 788/60.

³⁰ See paragraph 8. *Case of Wemhoff v. Germany* [1968-06-27] [online]. Judgement of the European Court of Human Rights, 1968, Application No. 2122/64 [cit. 2016-09-02]. Available at: <http://hudoc.echr.coe.int/eng?i=001-57595>.

³¹ See OVEY, C. and R. C. A. WHITE. *Jacobs & White: The European Convention on Human Rights*. 4th ed. Oxford; New York: Oxford University Press, 2006, p. 46. ISBN 0-19-928810-0.

³² See MAŠLANYOVÁ, D. et al. *Trestné právo hmotné*. 1. vyd. Plzeň: Aleš Čeněk, 2011, p. 18. ISBN 978-80-7380-338-4.

function which consists in using criminal norms only if the application of other legal norms would be out of the question or clearly ineffective. Respectively, the legislator should criminalise only the most serious cases and enable the widest application of noncriminal reactions to the violation of law while duty of prosecuting authorities and courts is to react by applying the criminal repression only on cases which are socially harmful and where other sources of law are insufficient to protect rights. Prosecuting authorities and also courts should precisely examine what relevance has the criminal repression as a reaction on some act.³³

The idea of using means of the criminal law for sanctioning of pressing just one Facebook reaction button would have a lot of negative consequences, namely for example:

- 1) It would overextend prosecuting authorities and courts;
- 2) It would be contra-productive and would lead to some sort of “witch-hunt” from the view of the criminality;
- 3) It would mean a loss of confidence in democracy and rule of law because for the common people it would be a sign of autocracy, or even dictatorship that someone could be sent to imprisonment for pressing one button.

Seriousness of pressing Facebook reaction buttons as a form of hate speech should not be qualified as a criminal offence because this seriousness is negligible; maybe, there is a possibility to qualify it as an administrative delict, but it is not the aim of this paper to analyse the administrative consequences. In case of Supporting and Promoting Groups Aimed at Suppression of Fundamental Rights and Freedoms according to the Section 421 paragraph 2 and of Dissemination of Extremist Materials according to the Section 422b paragraph 2 which are both crimes and applying material corrective is not possible, sanctioning of pressing Facebook reaction buttons by means of the criminal law would be in breach of the Article 10 of the European Convention of Human Rights because it would failed in the second step of test of proportionality which is test of necessity in democratic society where the degree of interference is not proportionate to the aim pursued.³⁴

³³ See ŠAMKO, P. Princíp ultima ratio; významné interpretačné pravidlo alebo prehnaný súdny aktivizmus bez opory v zákone a judikatúre?. *Justičná revue*. 2013, roč. 65, č. 2, pp. 174-175. ISSN 1335-6461.

³⁴ *European Convention on Human Rights*.

Possibility to sanction steadily pressing Facebook reaction buttons

Question of criminal liability by pressing Facebook reaction buttons just once has been solved, but a new question has raised: *if the user steadily presses Facebook reaction buttons* (for example, the user steadily presses the “Like” button on articles concerning propagating Nazism ideology), *is seriousness higher than negligible, so should it be qualified as criminal offence?* Criteria of material corrective which will serve as the key to answer this question are commission and motivation of the offender, because other criteria are the same as in previous test. This is much more probable situation because users use Facebook reaction buttons quite often to express their emotions.

Steadily can be defined as pressing Facebook reaction buttons at least three times, so there would be no doubt that it has some regular manner.³⁵ It doesn't matter which button was pressed, but it must be the button that is connected to the relevant subject matter; for example the “Like” and the “Love” buttons are relevant for Supporting and Promoting Groups Aimed at Suppression of Fundamental Rights and Freedoms according to the Section 421 paragraph 2. It also doesn't matter whether the user who pressed some Facebook reaction button was the first, the fifth, or the thousandth. The time period between the individual presses of Facebook reaction buttons is important. It is not possible to define strict time period because it is very individual due to many factors which are on the side of the user (for example if he/she was not logged for some time because of serious injury).

The offender is in this case certainly motivated by seeking information about certain ideology and, therefore, there is present *dolus directus*. But it is hard to say where the red line is, respectively, when the offender becomes an extremist because it is a process which could have a different length, so it is very individual. Since it is impossible to determine when the user is still not affected by extremist ideology, when in the offender's mind the process of adopting an extremist ideology is realised, and when the offender becomes an extremist, it should be used principle *in dubio pro reo*, so the seriousness is still negligible.

³⁵ This element is also part of some criminal offences, for example:

Section 175

Serving Alcoholic Beverages to Juveniles

Any person who *steadily* or in a larger quantity serves alcoholic beverages to a person younger than eighteen years of age shall be liable to a term of imprisonment of up to three years.

From the view of commission, it is important to considerate the possibility of violation rights of others by steadily pressing Facebook reaction buttons. The argument that on whatever the user pressed Facebook reaction buttons would be lost in the amount of posts is weakened, but we do not think that it would reach the level that the seriousness could be considered as higher than negligible. Firstly, the previous consideration mentioned above could be applied in this case. Secondly, from the view of hate speech, more serious are violations in the real life than in virtual reality. In virtual reality should be also differentiated the types of violation of rights from the view of seriousness. Definitely, more serious are the directly and fully aware spread hate speech posts than pressing reaction buttons. The main reason of negligible seriousness follows from the nature of the Facebook reaction buttons themselves. Spreading some hateful posts has some message inside itself which is to provide extremist ideas, but this absents in case of Facebook reaction buttons.

From the above-mentioned follows that steadily pressing Facebook reaction buttons should not be qualified as criminal offence because the seriousness is negligible and from the view of the test of proportionality it would failed in the second step (the test of necessity in democratic society).

To avoid such a problem (or similar problems) in a future, there could be three possible de lege ferenda solutions applicable which would require following novelisation of the Slovak Criminal Code:

- 1) To differentiate committing criminal offence via mass media and via the Internet, with the possibility to apply material corrective in case of the Internet which would be very complicated and would need to novelise the whole Criminal Code;
- 2) To reduce the upper term of imprisonment, so mentioned crimes would become minor offences and material corrective could be applied;
- 3) To add another qualified subject matter of criminal offence of Condoning a Criminal Offence according to the Section 338 that would include element “steadily”, with the possibility to apply material corrective; this is an issue for a special paper.

The first solution seems to be, in our opinion, better because nowadays for example sending an e-mail to another person is also qualified as committing *in public* which is totally inappropriate. The second solution seems to be not so reasonable because it is understandable to sanction more strictly committing criminal offence in front of at least two people

or by using mass media. The third solution has to be more deeply analysed, but it still would be interfering into the freedom of expression by means of the criminal law.

Conclusion

The aim of the presented paper was to considerate the criminal liability of pressing Facebook reaction buttons. In the environment of the Slovak Republic, criminal liability in this area is possible and even in some cases it could be qualified as crimes. This result led to the question whether such legal form is appropriate or not. The appropriateness was considered by two arguments: *material corrective* and *principle ultima ratio*. From the consideration followed that the seriousness of pressing Facebook reaction buttons is negligible and, therefore, in case of crimes where material corrective is irrelevant, the legal form would be in breach of the European Convention of Human Rights because it would failed in the test of proportionality, specifically in the second step which means the test of necessity in the democratic society. However, this consideration raised the question, how to qualify steadily pressing of Facebook reaction buttons. Although steadily pressing Facebook buttons seems to be more serious than once pressing Facebook button, the difference is not so big; the seriousness would be higher than negligible because from the view of commission it would not reach the level to violate rights and freedoms of others and from the view of motivation it is not clear whether the user becomes extremist or not, so, all in all, there should be applied principle *in dubio pro reo*. Finally, we proposed three *de lege ferenda* solutions from which one is in favour of freedom of expression, one would have serious consequences in other areas of the criminal law, and the last one is in favour of interference, but it is an issue for another discussion.

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Mgr. Ivan Smieško

Faculty of Law
Trnava University in Trnava
Kollárova 10
917 01 Trnava
Slovak Republic
smieskoivan@gmail.com