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FACEBOOK: "POST" AND "LIKE", WHEN ARE THEY OFFENSIVE AND PUNISHABLE?

Are we really sure that what we write on Facebook is always legal and not illegal? Together, we can find when this is the case.

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There is a widespread belief that what we write or "post" to social networks cannot be judged and we can be exempted from any kind of responsibility. Therefore, you can frequently find offensive contents, "posted" and thrown to the web, where viral spread is of course inevitable. It is worth remembering that last September* the Italian Court of Cassation, in a case of harassment of people via social network (art. 660 of the Italian penal code), has denounced the nature itself of **virtual place open to access to anyone using the web**, a social network or community like **Facebook**.

In view of these new cases, which lie outside of the traditional notion of social community, we can talk about "**immaterial square**", where interactions between users are potentially infinite (just like potential illegal behaviour). Such viewpoint of the Court, which strengthens the comparison between "virtual" and physical places, reflects the idea that the illegal use of social networks since their advent could have been detrimental to constitutionally assisted rights and values like **reputation, honour**⁽¹⁾ and **personal decorum** through a massive and uncontrolled spread of contents.

The latter represent the right of moral integrity, which belongs to the category of personality rights, inviolable and protected by virtue of the provision of art. 2 of the Italian Constitutional Charter.

Another fundamental right of the individual, authorized by **art. 21** of the Italian Constitution, i.e. the right to express freely one's ideas, acts as a counterbalance to this category. The **discrimen** between lawful exercise of this right and unlawful damage to someone's reputation emphasises the distinction between **personal opinions or criticism and a type of behaviour based on defamation and slander**.

According to the law, it is undisputed that personal opinions are legal expressions of one's thought and/or the right of criticism, if not uttered with defamation and insinuation and, in any case, if they are free from any offensive intention.

The exercise of freedom of expression has its limits when it is defamatory, offensive and injurious. In that case, it cannot be protected by the system but it must be sanctioned, in spite of occurring in "immaterial squares" like social networks.

Facebook users - to mention the social network par excellence - who may exaggerate and convey any kind of insult become (sometimes unconsciously) **responsible for criminal offences** like defamation and slander, prosecutable both in criminal court (after an experiment of action) and in civil court (to order the author to compensate for damages).

When can a social network user's behaviour complement the crime of slander?

To answer this question it is necessary to illustrate the structure of such crime which, regulated by **art. 594** of the Italian **penal code**, sanctions the conduct of anyone who offends the honour or decorum of a person (with detention up to six months or a fine of 516 euros), also "through communication on the telegraph or telephone, or through writings or drawings addressed to the offended person", predicting an aggravating factor when "the offence is committed in the presence of more people".

As for the prerequisite to **the presence of the offended**, not only is **the relation of spatial contiguity between the responsible and the offended** considered to be necessary, **but also the direct perception of the offence by the offended**.

Recent case law shows that the commission of crimes against honour, telematically or informatically, has risen sharply. Therefore, an ex-fiancé who, via Facebook, sends offensive emails, private messages or chats against the honour or reputation of his ex, commits slander⁽²⁾.

When are the contents we "post" defamatory instead?

In this case too it is necessary to illustrate the structure of the crime of defamation. Its system is similar to that of the crime of slander, but art. **595** of the Italian **penal code** further requires that the offence of someone's reputation is committed **in absence of the offended and through communication** addressed to **more people** (predicting the penalty of detention up to one year or a fine up to 1,032 euros).

The fact that the offended person is not "present" implies that they cannot respond to the offence and, for this reason, such crime is sanctioned even more than slander. Moreover, **defamation increases** if "the offence is committed via the press or any other kind of public media" and, for this reason, it is evident that the use of the Internet proves such hypothesis, because of "*the particular tendency to use the medium to spread the defamatory message*".

Recent case law is varied.

The following kinds of behaviour on Facebook have been considered defamatory:

- Publish **defamatory** and ignominious **contents**, insults and "**dirty jokes**", **confidential news** whose spread is detrimental to the offended person [for this reason, the Italian Cassation⁽³⁾ has recently clarified that "for a crime to be committed it is sufficient that the offended person can be easily recognized by a limited number of people, regardless of their name"];

- Publish the victim's **photos**, whose divulgation may have potentially negative consequences for their reputation;
- Like offensive contents. Substantially, **one "like"** to a defamatory post **can complement the crime by involving the author** in their content. The same can be said about the act of **sharing insults** [recently there have been various cases of commitment for trial because of the involvement of magistrates in increased defamation who have denounced the importance of the offence with respect to the victim's reputation: it increases in proportion to the number of users who like defamatory posts].

In conclusion, it is necessary to have a responsible conduct and be aware that even on social networks...**scripta manent!**

* n. 37596/ 2014.

1) *"The right of honour is a personality right that is believed to include both subjective dignity, which is typical of every human being, and objective respect derived from the social environment. (...) The offended person receives both inhibitory protection (intended to stop detrimental behaviour of third parties) and compensatory protection (intended to relieve the offended person from detrimental consequences)" [Encyclopaedia Treccani].*

2) *The abovementioned case ended with ordering the author of such offence to compensate for damages. The sentence de qua, n. 770 of 2010, pronounced by the Court of Monza, has been the first in Italy to deal with crimes against the honour committed via Facebook.*

3) Italian Court of Cassation, sentence n. 13604/2014.