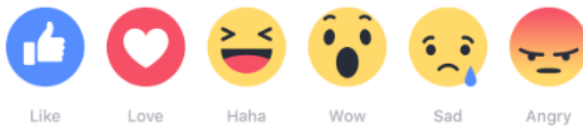


CRIMINAL LIABILITY OF FACEBOOK REACTION BUTTONS AS A FORM OF HATE SPEECH

The 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. It is enough to do just one “click” or display and the content is disseminated. According to the Criminal Code, there is possibility to prosecute the user just for one pressing Facebook reaction button, hence for one “click”.

The most known button is reaction button “Like”. Facebook introduced reaction buttons which are “Love”, “Ha-ha”, “Wow”, “Sad”, and “Angry” (next “Like” button, “Love” button, and so on). These buttons are form of speech (the US Court of Appeals for the Fourth Circuit in *Bland v. Roberts’s* case). Thus, 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. Although the European Court of Human Rights 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.

Figure 1: Facebook Reaction Buttons



Source: Facebook 2016.

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:

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

According to the Slovak Criminal Code, the user can commit by pressing Facebook reaction buttons several criminal offences: Condoning a Criminal Offence (Section 338); Suppression of Fundamental Rights and Freedoms (Section 421 paragraph 2), Dissemination of Extremist Materials (Section 422b paragraph 2), and Defamation of Nation, Race, and Belief (Section 423). Committing criminal offence by using computer network is aggravating circumstance, or even qualified subject matter of a criminal offence, so the penalty would be harsher. For the committing of mentioned criminal offences is sufficient pressing Facebook reaction button just once.

Why could be pressing Facebook reaction buttons qualified legally as criminal offences? 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.

Subjective element

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.

The Constitutional 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. Facebook allows for a networking social contact, communication between users, mutual wide variety of multimedia content, organization of events, and presentation of users.

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.

Key terms of objective elements

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

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

Ad a) **Supporting** is any action which provides ideology and propagates the possibility to spread and to gain adherents. 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 a moral way of support. Definition of the reaction “Like” button directly contains “support for (someone or something). Definition of the “Love” button contains “like or enjoy very much” which directly refers to the definition of the “Like” button, hence it is more intensive “Like”.

Ad b) **Dissemination** means to make an extremist material generally known. By pressing all mentioned buttons the user can disseminate extremist materials because 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** are rude, offensive, and subjectively disparagement offensive assertions or offensive actions. Defamation can be realised verbally or non-verbally (by print, images, etc.). 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.

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.

There is still a question whether the user should be sanctioned by means of the criminal law.

Possibility to sanction pressing Facebook reaction button just once

The consideration is based on two arguments: on the seriousness of such a criminal offence and on the principle ultima ratio.

The seriousness of pressing Facebook reaction buttons needs to be considered, which 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 determinate 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 administrative delict which is of milder interference.

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 “witchhunt” 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.

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.

Is the user steadily presses Facebook reaction buttons 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. 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.

Lt. JUDr. Ivan Smieško, PhD.
Police Investigator
Criminal Police Department
Police District Directorate Trnava

Compiled by SCM (2019) from

Ivan Smieško, SOCIETAS ET IURISPRUDENTIA, 2016,
IV., 4, pp. 213-234
<http://sei.iuridica.truni.sk>