

The legal nature of the virtual space on social media- public or private space

By

Amine El-Khantouri

PhD researcher at the University of Sidi Mohammed bin Abd-Allah, Morocco

Email: amine.elkhantouri@usmba.ac.ma

College of Legal, Economic and Social Sciences of Fez

Lab: Law, Philosophy, and Society

Abstract

Social media have created a virtual environment of a special nature, which has created an important doctrinal and judicial debate about the existential or spatial nature of this virtual environment, because of its important legal repercussions and effects, so that the legal adaptation of the nature of the virtual space of social media is an important and influential matter in the nature and limits of Legal responsibilities resulting in the event of its misuse. Determining the legal nature of the virtual space provided by social media enables us to solve a set of legal puzzles on these sites, especially those related to the limits of the powers of administrative control of these sites by public authorities, as well as determining the nature, scope and various manifestations of the legal responsibility of their users. This legal nature of the virtual space of social media is often determined in light of the fact of the technical privacy on which these sites are based, and this is what we will learn about by discussing the various jurisprudential opinions and judicial positions related to determining the spatial nature of these sites in whether they constitute a public or private space.

Keywords: virtual space, social media, public space, private space.

Introduction

The Internet has become an open means for the free flow of information and freedom of opinion and expression Ahmed Abul-Majd Mohammad (2017), especially with the emergence of the second-generation technology for the Web “web:02” or what is known as the Social Web, which enabled the normal user of this network to become more interactive with informational content.

In view of the margin of freedom that the user of social media enjoy, an abundance of expression, a space of boldness and speed of access, these sites have become a tool for revealing the privacy of others, or defaming them, or attacking and distorting their images and posting them on these sites with the aim of offending them, or the attack happens by posting their protected intellectual works, and the matter does not stop at these images, as forms of the violation of rights through social media evolve and multiply with the development and multiplicity of these sites and their technical specificities, which makes it impossible to leave people without legal protection to confront posting through those sites Kadhim Hamdan (2017).

Therefore, the accelerated transition to the use of social media, and the accompanying forms of illegal uses of these sites, was a major motive for resolving man-made legislation in order to adopt legal texts capable of keeping pace with this development, which would control the behavior of users of these sites, by drawing the limits of legal responsibility for its various users. However, the legislative shortcomings in the regulation of social media represent a stumbling block

to achieving this aspiration.

Thus, the issue of determining the legal nature of the virtual space on social media has become of importance, including in drawing the limits of legal responsibility on these sites, especially with regard to crimes and attacks that require the availability of the element of publicity to achieve them, so visions differed about whether these sites are considered a public virtual space or private.

In this regard, the definitions of public space differed according to the different angles from which it is viewed. The founder of the idea of public space, the German philosopher and sociologist Jurgen Habermas, considered it "every area in our social life in which access is guaranteed to all citizens and allows for the formation of something close to public opinion" jurgen (2019). While some contemporary researchers considered it as "the place where citizens gather for discussion and debate and to crystallize a common public opinion among themselves, affecting decision and social action, and formulating their attitudes towards various issues" May (2020). The one who linked it to the virtual field defined it as "a virtual communicative space for discussion and debate, and a virtual space for representing social and political life, representing its issues, and publicizing its events and personalities" Abdel Rahim (2017/2018).

Hence, if we define the public space as the common space in which people practice their activities related to life within society, then the private space is the remaining space, which is that area of human life in which he must be left to live in a secret and quiet intimacy far from the eyes and interference of others or Their control is within the limits of legality Safiya (2012). Thus, the private virtual space on social media represents that space in which others are not allowed to enter or break into it except with the will of its owner. However, distinguishing between the public space and the private space on social media is not that easy to imagine in light of the complexity of the technical construction of these websites and the ignorance of various users of the technical aspects on these sites.

Based on this, we have the right to ask about the legal description that can characterize the virtual space of social media?

In order to answer this problem, it is necessary to study two main indicators on social media, namely, technical privacy and the element of publicity through the following division:

First- The role of technical privacy in determining the nature of the virtual space on social media
Second- The role of the publicity component in determining the nature of the virtual space on social media

First- The role of technical privacy in determining the nature of the virtual space on social media: It is not surprising to say that social media have become, as a public asset, virtual public spaces for building identity and for self-presentation in the public sphere through which people learn about the subjective worlds of others. Individuals, groups and institutions are now required to re-locate them Hamza (2015), but what matters in this study is knowing the technical limits of the public virtual space on these sites, and to reach this end it is necessary to review the most important jurisprudential opinions and jurisprudence on the subject (Agrawal & Singh, 2020).

In this regard, a jurisprudential trend sees social media as a public virtual space, either on the basis of the wide access of the public to these sites Anthony (2012), or on the basis of what these sites provide as spaces for discussion and deliberation in public affairs Belkheir Mohammed (2018/2019). However, it is noticeable that these jurisprudential opinions were not built on technical foundations and did not take into account the technical specificity of social media, which

may make it a private space in various situations (Aguirre & Gómez, 2020).

This is what another jurisprudential approach came to his attention, which considered that adjusting the privacy settings for personal accounts on these sites, which would make the account holder's interaction limited to his virtual environment that he chooses himself and free from the knowledge of others, makes it in this situation as a private space Belkheir Mohammed (2018/2019), which includes it Legal protection for private communications and correspondence.

While the judicial work was more accurate in drawing the technical boundaries separating the public and private space on social media. A French judicial approach focused on the open nature of a Facebook page to convict the accused, as it stated in the decision that "the declared goal of Facebook is to create a network of relationships that grows steadily among its members through the application of the principle of 'my friends' relationships become my relationships". This is to allow them to share various types of information. Since this participation is freely carried out on the personal page of each member, which can be accessed by anyone if the owner does not impose a restriction on it, and therefore, this network must be considered, given its purpose and organization, as a public space" Belkheir Mohammad (2018/2019), the French Court of Appeal of Rennes, Ch. Correctionnelle, 10 Octobre 2010, N° 1283/2010. has also considered, that the open page on social media is a public space and condemned the perpetrator of the crime of defamation against the gendarmerie on the basis of that. It was stated in the rationale of the decision, "And since by mentioning derogatory expressions against the gendarmerie on the Facebook page, which is open to all, he has been severely affected. With dignity and respect for this institution" Belkheir Mohammad (2018/2019).

On the other hand, the French Court of Cassation, the "Civil Chamber" française, Ch. civile 10 avril 2013, N° 11/19530, considered that the account or page on social media is a private space as long as access to it is restricted. The reasoning of the decision stated the following: "The statements in question were posted on accounts opened by Mrs. Y, whether on Facebook or MSN, which were only accessible to authorized persons from the concerned party, and in a very limited number. and that the Court of Appeal has held, on a certain principle, that it constitutes a private group, and that the statements mentioned in it do not constitute a public insult." Belkheir Mohammad (2018/2019).

As for the Moroccan and Arab judicial work, it has not yet crystallized to the border a general and comprehensive idea about the technical boundaries separating the public and private space on social media. In resolving calamities, it depends on the element of publicity, between those who consider it to be an assumption on these sites, based on the fact that social media are considered media outlets, Such as what was considered by the Court of First Instance in Agadir in a ruling issued on November 27, 2018, that "the percentage of facts related to slander and insult was through the Internet, which is the means of communication open to the public, and therefore these statements were made public.", This is the same approach taken by the Egyptian Court of Cassation Criminal Chamber. 07/05/2016, No. 10345, for the year 85, in the case of posting matters affecting public order on social media. The reasoning of the decision stated that "the Public Prosecution accused the appellant (...) of deliberately posting, in one of the public ways, statements that would disturb public security and harm the public interest by posting on his social media pages...", and between those who restrict this publicity according to the conditions and situations in which the user's account exists. We will return to detail on that on the occasion of talking about the element of publicity in the second section of this chapter (Ajah, Ajah, & Obasi, 2020).

Second: The role of the publicity element in defining the nature of the virtual space on social media: All violations of rights on social media, publicity is the link between all of them, but

its status may differ from one crime to another between considering it as one of the necessary conditions for the crime to be established, as What is the matter in the crimes of insult and slander, and it may sometimes be a means of tightening the punishment only, this is what leads us to wonder about the limits of this publicity on social media? This question can also be answered only by drawing the boundaries between the public and private space in this virtual space.

The Moroccan legislator did not specify the means by which publicity is achieved, as some comparative legislation did, but rather left it to the discretion of the judiciary. In this regard, the Moroccan judiciary has tried to give a new concept of publicity on social media. As stated in a ruling issued by the Court of First Instance in Tiznit on 06/08/2018 in a file related to the crime of defamation and insult on social networks. A person, through his personal account, directed many slanderous and insulting statements against the complainant, such as (he is a symbol of corruption, that he is an unbalanced person, that he is a tyrant of corruption...). The court considered that these ugly phrases and words were seen by many people who followed the complainant's Facebook page and liked them and many of them commented on them. Thus, the publicity stipulated in Article 83 and the following of the Press and Publication Law No. 88:13. was achieved. While the Court of First Instance of Agadir, in a ruling issued on November 27, 2018, considered that the percentage of crimes related to slander and insult was through the Internet, which is an open communication means to the public and thus these statements have been made publicly.

It is noticed from this sample of national judicial rulings that the Moroccan judiciary does not enter into discussing the boundaries of public and private space on social media. The Court of First Instance in Tiznit was limited to considering the publicity as verified once some of the followers viewed and liked the publication and commented on it without entering into a discussion of the number of these people as well as the technical characteristics of the account that posted the slander. As for the Court of First Instance in Agadir, it considered that publicity is assumed, given that social media are open communication networks in the public, and therefore any publication that occurs through them is characterized by publicity, and this is a matter of consideration as we will see.

In explanation of this, some believe that social media are available to everyone, but the publications that members post among themselves are not available to everyone - in the case of identifying the viewer of the publications - and they are determined on the basis of friendship, work, or other social ties, and this is what It makes it fall into the public domain by chance. The messages - or all other forms - that the member posts on his personal page will not be public unless more than one member of the page has viewed it. Therefore, the member who owns an account on one of the websites and has only one friend and has limited viewing what is posted with friends only through the claims of the account, so publicity is never achieved here. If the account or the page allows public viewing, then the publicity is always verified, as long as the users of these sites or third parties are able to view the publication at any time. The same applies to comments on the publication. What applies to the publication applies to the comment in accordance with the controls referred to.

The French Court of First Instance confirmed that what counts as the availability of the publicity component or not is the state of the privacy settings that the user has chosen for his page. Therefore, the special nature of this page is negated, and therefore it becomes public, whenever these allegations allow anyone to access it Ashraf (2015).

The French Court of Cassation went to confirm this as it overturned a ruling issued by the Court of Appeal in which the court went to consider the Facebook wall as a private place, in a case the merits of which were an employee who posted insults on his Facebook account against his boss.

The Court of Cassation considered that the Facebook account cannot be a private place unless two conditions are met, the first, that everyone who visits the personal wall obtains the approval of the owner of the wall, and the second, that the number of people added by the owner of the wall is limited Al-Aesh Mohammad (2013). This specific number of friends should be chosen by the user and have a certain social relationship with them. There was a difference of opinion about this number among those who believed that when the number became in the hundreds, the publication would become public, but some criticized it Wassim Shafiq (2017).

On the other hand, some see that the criteria for distinguishing between the private and public space on social media are related to two issues. The private space is those (communication that takes place between the user and people he knows (such as personal, postal or telephone conversations). When this communication becomes public, we move from the private to the public space as is the case when commenting on a publicly available post on these sites.

If this is proven, it should be noted that studying the limits of publicity on social media requires a distinction between the working mechanisms of these different sites. Twitter, for example, allows all Internet users, whether they are members of the site or non-members, to view the tweets of its members, which is different from the site "Facebook", which only allows non-members to view certain information about its members, which can be said that Tweets on Twitter" are always of a general nature Ali Sayed Hussein (2017). In this regard, the Kuwaiti Court of Cassation considered in several rulings that the application of "Twitter" is a form of public places Moad Suleiman (2021). Thus, publicity is always assumed on the site. On the other hand, the same court considered the "WhatsApp" application as one of the applications with which the public nature is not achieved." In other words, it is considered one of the closed applications, and therefore it is under the rule of private correspondence Moad Suleiman (2021).

It is also worth noting that understanding the meaning of publicity is a legal issue that, in its determination, is subject to the oversight of the Court of Cassation in order to verify the correctness of the application of the law. In order for the Court of Cassation to exercise its aforementioned authority, the court must indicate the objective elements from which it was deduced from the availability of publicity, otherwise its judgment will be deficient.

Finally, it should be noted that publicity on social media may be one of the conditions for criminalizing the act (the crime of defamation, for example), and it may be criminalized in an indirect way, as did some Arab legislation related to information crime, when criminalizing the creation of a website to carry out certain crimes..., and publicity may be an aggravating circumstance, as it was stated in the verdict of the Discriminatory Commission of the Iraqi Court of Appeal that, misdemeanors of posting and media issues, publication number / misdemeanors / 2014, dated 10/29/2014, case publication number / c/ misdemeanors / 2014 and posting on social media (Facebook) is considered a form of media because it is available to everyone and reaches everyone and provides the element of publicity in action and in accordance with The provision of Article (3/19 of penalties), and accordingly, the penalty is not appropriate for the act, and it was necessary to tighten it and impose it to the extent that achieves the element of reform and general deterrence. Therefore, it decided to overturn the decision of the penalty ruling and return the file to its court to intensify the penalty".

Thus, the Moroccan legislator must take into account the element of publicity on social media in the policy of criminalization and punishment of various violations of rights on these sites. This is in view of its seriousness, because it achieves a widespread in a short time, and its damage is severe, which is often difficult to redress.

Conclusion

In conclusion and to conclude from the foregoing, social media are a digital environment parallel to the physical environment. Thus, it bears the two spaces together - public and private -. The user is the one who can determine the nature of his presence on these sites. If he chooses to make his account and interaction available to the public, he is in the public space and should be able to take responsibility for his actions and behaviors during that. But if he chooses to control his privacy on these sites, by limiting his friends to his social environment, and preventing others from knowing his interactions, then he is in his private space. It is also worth noting that there are some places on social media that are always and supposedly a private space, such as conversations and chat rooms.

References

- Abdullah, M, 2020. The labyrinth of social communication in the public space: A theory of communication philosophy in a changing world. Arab Renaissance House, Beirut, 2020.
- Abu Diab, A.S.H, 2017, Lights on the authenticity of messages in proof on social media. *Journal of the Faculty of Sharia and Law in Tanta*, Volume 32, Issue 3.
- Agrawal, M., & Singh, R. (2020). Factors Associated with Police Depression: A Systematic Review. *International Journal of Criminal Justice Sciences*, 15(1), 34-50.
<https://ijcjs.com/menu-script/index.php/ijcjs/article/view/253/191>
- Aguirre, J., & Gómez, M. (2020). Competitive Strategies in Contexts of Organized Crime: The Case of the Avocado Industry in Mexico. *International Journal of Criminal Justice Sciences*, 15(1), 114-126. <https://ijcjs.com/menu-script/index.php/ijcjs/article/view/290/229>
- Ait Ouida B.M, 2018/2019, Administrative control of electronic social networks. PhD thesis in Law, University of Batna 1, Faculty of Law and Political Science.
- Al-Hajjar, W.S, 2017, The legal system of social media: a comparative legal study on privacy, personal freedom, responsibility and jurisdiction. First Edition, Arab Center for Legal and Judicial Research, League of Arab States, Beirut - Lebanon.
- Al-Salihin, A.M, 2015, Commentary on the judgment of the European Court of Justice of 13 May 2014, regarding the right to hold certain facts in limbo. *Dubai Judicial Institute Journal*, Volume 3, Number 5.
- Al-Sayyid Afifi, A.A..M, 2017, Tort liability for private practices and misuse of the Internet in light of private international electronic law. New University House, Alexandria, 2017.
- Anthony Astaix, A 2012, Qualification des propos tenus sur Facebook: le flou prédomine, *Dalloz actualité* 04 December 2012, p. 1-2 [en ligne] <http://www.dallozactualite.fr/printpdf/essentiel/qualification-des-propos-tenus-sur-facebook-flou-predomine>.
- Ajah, B. O., Ajah, I. A., & Obasi, C. O. (2020). Application of virtual reality (VR) and augmented reality (AR) in the investigation and trial of Herdsmen terrorism in Nigeria. *International Journal of Criminal Justice Sciences*, 15(1), 1-20.
<https://ijcjs.com/menu-script/index.php/ijcjs/article/view/249/188>
- Bashatin, S, 2012, Legal protection of private life: a comparative study. Doctoral thesis, Faculty of Law and Political Science, Mouloud Mammeri University - Tizi Ouzou.
- Ben Bouziane A.R. 2017/2018, The impact of social networks on the formation of the Algerian public space. PhD thesis in Mass Communication, University of Algiers 3, Faculty of Media and Communication Sciences.

- habermas, J, 1974, the public sphere: an encyclopedia article (1964), new German Critique.
- Hawari, H, 2015, electronic social media and the problem of the application of public space, Journal of Political and Social Sciences, Issue 20.
- Jaber, A, 2015. Legal Aspects of social media: Privacy, Freedom of Expression, Intellectual Property and Evidence Issues (with a focus on Facebook and Twitter). First Edition, Publication and Translation Center, Majmaah University.
- Mulla, M.S, 2021, Information technology crimes and the Corona virus pandemic between reality and hope: an original study. Journal of the Kuwaiti International Law College, the ninth year, issue 2.
- Sadkhan Al-Bazzouni, K.H, 2017, Civil responsibility for posting on social media. Master's thesis in private law, Al-Nahrain University, College of Law, Iraq.