Social media and politics: the legal value of a tweet

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Summary

1. Introduction

In the hot summer of 2018, in the midst of the migrant crisis, a series of tweets from Italian government officials announced the closure of national ports to refugee rescue ships. This digital statement was repeated as a mantra in television news, on the radio, and in newspapers. Italian people had the impression that the executive had ordered the closure of Italian ports. Port authorities and the coast guard, despite frictions and mutual misunderstandings, seemed to eventually follow this orientation conveyed through a series of tweets. Short sequences of words interspersed with some hashtags and published on a private platform from the personal accounts of various government officials de facto acquired a legal value equal, if not greater, to that of any ministerial decree.

This paper does not intend to discuss the merits of the complex issue of managing migrants in Europe. Instead, it aims to analyse from a legal point of view the relationship between social media and politics, specifically illustrating how the use of social media as a communication tool by politicians can have a profound impact on the exercise of our fundamental rights. In particular, the central question on which I would like to focus in this brief paper is: what is the legal value of a message, for example a tweet, published on social media by a person holding a political-institutional role?

2. Italian case-law: The *Bray* case

Italian case-law has rarely analysed issues related to social media, but there is one precedent specifically dealing with the question presented above. In 2015, the fourth chamber of the Council of State held that a minister's tweet cannot be considered an administrative act and that, therefore, cannot be a source of abuse of power.[1] A Ligurian municipality had approved an intervention to redevelop a part of the historic centre that was protected as a cultural asset. It requested and was granted authorization to start the works from the local cultural heritage office. However, some environmental

[1] Council of State, VI division, 12 February 2015, no. 769.

and citizens' associations began a protest as the redevelopments would have involved the demolition of some characteristic trees.
The media hype raised by the dispute came to the attention of national news to the point of arousing the personal interest of the then Minister for Cultural Heritage, Massimo Bray. The minister, tweeting from his personal Twitter account, asked the municipality to suspend the works. The local cultural heritage office decided to follow the advice expressed through the minister's tweet, and invited the municipality to suspend the part of the redevelopment works which was subject to contestation. The municipality then decided to appeal the suspension order before the regional administrative court. One of the points of the appeal concerned precisely the tweet in question: according to the applicant, the Minister would have intervened in a matter removed from his competence, giving rise to a situation of abuse of power.
The regional administrative court held that, although the Minister's tweets cannot be regarded as an administrative act that can be invalidated due to incompetence, they nevertheless constitute an evidence of abuse of power.[2] At the appeal stage, the Council of State reaffirmed that administrative acts must satisfy specific formal criteria, especially in an era characterised by new technologies and methods to communicate.[3] Therefore, according to Italian administrative judges, communication through social media by representatives of public institutions, especially if it is carried out via their personal profile or account, does not constitute an administrative act and, therefore, it cannot legally affect citizens' legal status.

3. Comparative perspectives: The *Trump* cases

Very similar conclusions, although starting from diametrically opposite assumptions, seem to have been reached also overseas, in the context of a dispute arisen from three tweets posted by US President Donald Trump in 2017. As known, the current president of the United States of America is a prolific Twitter user. His predecessor Barack Obama was considered the first "social media president", having tweeted for the first time in 2007 and having established the official account of the president of the United States @POTUS in 2015.[4] Trump, however, despite having inherited the presidential account login credentials from Obama, has always continued to use his personal Twitter ID @RealDonaldTrump.
On 26th July 2017, President Trump tweeted: «After Consultation with My Generals and Military Experts, Please Be Advised That the United States Government Will Not Accept or Allow.....» «....Transgender Individuals to Serve in Any Capacity in the U.S. Military. Our Military Must Be Focused on Decisive and Overwhelming.....» «....Victory and Cannot Be Burdened with the Tremendous Medical Costs and Disruption That

[2] Regional Administrative Tribunal of Liguria, I division, 19 May 2014, no. 787.

[3] Council of State, decision no. 769/2015, cit.

[4] See A. Acker – A. Kriesberg, *Tweets May Be Archived: Civic Engagement, Digital Preservation and Obama White House Social Media Data*, in Proceedings of the Association for Information Science and Technology, 54(1), 2017, 1 ss.

Transgender in the Military Would Entail. Thank You».[5]

In 2015, the Obama administration had started a process of gradual revision of policies relating to the admission and service of transgender military personnel.[6] In 2016, then US defence secretary Ash Carter allowed transgender soldiers to serve in the army in an "open" way.[7] In June 2017, the recruitment procedures for transgender individuals in the army were to officially begin, an operation however first postponed, and then definitively suspended due to direct intervention by President Trump.

Following the publication of the three tweets quoted above, several transgender soldiers sued the President for violating the principle of non-discrimination enshrined in the Fifth Amendment to the American Constitution.[8] These tweets, therefore, although published by Trump from his personal account @RealDonaldTrump, were perceived as an official order of the President, having a legally binding value in particular vis-à-vis military hierarchies, subject in the US legal system to the direct guidance of the President, in his capacity of commander in chief of the armed forces.[9]

The first comments on the legal nature of the President's tweets that appeared in American newspapers underlined the differences between a formal order of the head of state and his externalisation on social media, concluding that the latter could not claim to assume any legally binding value.[10] An analysis subsequently published in the Harvard Law Review took a more nuanced approach.[11] In contrast to the Italian Council of State, assuming that the orders of the president of the United States are legally binding whatever form they take, the article explained how Trump's tweets satisfy both the publicity and competence requirements, which are the only criteria necessary to evaluate the validity of a presidential order. Little, if anything, would then be the difference between a tweet and a presidential memorandum at the content level, both being purely political communication tools. The article therefore concluded that the legal value of a tweet depends on the intrinsically dynamic "legal culture" of the executive in power. Secretary Mattis' decision not to immediately follow Trump's tweets shows that the informality of the current President is not yet recognized and fully subscribed to at the executive level, but that perhaps - the article does not seem to exclude it - it will be in future.

On the one hand, decreeing via Twitter allows the president to circumvent the minimal guarantees required in terms of preliminary consultation about the decision and does not offer the possibility of fully developing any motivations or of accompanying

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[5] D.J Trump (@realDonaldTrump) tweets posted on 26 July 2017, available here, here and here.

[6] See US Secretary of Defense, *Memorandum for Secretaries of the Military Departments - Subject: Transgender Service Members* (28 July 2015), accessed 28 May 2019.

[7] US Secretary of Defense, *Directive-Type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members* (30 June 2016), accessed 28 May 2019.

[8] *Doe v Trump, Civil Action No 2017-1597 (DDC 2018).*

[9] See D. Luban, *On the Commander-In-Chief Power*, in *Southern California Law Review,* 81, 2008, 477 ss.

[10] See J.S. Gersen, *Trump's Tweeted Transgender Ban Is Not a Law,* in *New Yorker,* 27 July 2017, accessed 28 May 2019.

[11] Recent Social Media Posts. Executive Power - Presidential Directives - In Tweets, President Purports to Ban Transgender Servicemembers. - Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 5:55–6:08 AM), in *Harvard Law Review*, 131, 2018, 934 ss.

the decision with further guidelines. However, on the other hand, this form of digital ordering eases the formalities linked to the publication of the decision and shortens the distance with the citizen by ultimately increasing the level of transparency of the executive. From a pragmatic point of view, therefore, especially when transparency and contact with the electorate are core objectives for the government, decreeing via Twitter would not be a solution to be discarded, provided that the executive in power is sufficiently open to recognise its political and legal value.

While not excluding this last option, the aforementioned article published in the Harvard Law Review refers in the conclusion to two fundamental problems that would emerge if the legal binding nature of the presidential tweets were recognized. Firstly, Twitter, unlike official publication channels, would allow the president to eliminate, at his discretion, the tweet-decree: hence the problem of order stability. Secondly, Twitter would allow the president to limit access to his tweets, by 'blocking' unwelcomed users: hence the question of publicity of decisions. These aspects are linked to the peculiar architecture of Twitter as a medium chosen to transmit the orders of the President and it is interesting to note that both profiles have been the subject of recent legislative and judicial initiatives concerning the use of Twitter by President Trump.

In 2017, Democratic Representative Mike Quigley introduced a bill to Congress to amend the Presidential Records Act 1978, the legislation regulating the archiving of documents relating to the activity of the President of the United States.[12] The proposal aimed to impose an obligation to archive all the tweets of the President, without excluding those published through his personal account, as dictated by the legislation in force. The bill was mockingly titled COVFEFE Act, a name that intentionally evokes one of the most famous typos tweeted by Trump, but that would actually be the acronym for Communications Over Various Feeds Electronically for Engagement Act. The amendment promoted by Quigley could pose remedy to two related problems. Firstly, it would ensure the stability of presidential tweets, which, once published, even if subsequently deleted by the president, would in any case be available in the state archives. Secondly, it would recognise the value of the tweets issued by the president through his personal account, abandoning a formalist approach and evaluating with pragmatism the actual use by the president of his social media channels. It should in fact be remembered that, in the specific case of President Trump, the official Twitter account @POTUS plays a secondary role. Through the @RealDonaldTrump profile, the President himself announces official news, including relevant government directives, often - as we have just seen - before the White House press office.

4. Digital exclusion and fundamental rights

In light of this observation, one can guess the basic question that gave rise to another court case involving President Trump.[13] The President has elevated a personal

[12] M. Quigley, *H.R.2884 - 115th Congress (2017-2018): COVFEFE Act of 2017*, 12 June 2017, accessed 8 April 2019.

[13] *Knight First Amendment Institute at Columbia University et al v Donald J Trump et al* [2018] US District

communication tool, managed by a private company, to the rank of official contact point with citizens. Trump, by preferring Twitter as a means of transmitting his official messages, effectively neutralizes a series of guarantees that instead characterize traditional political communication procedures. First of all, that of publicity. The privatization of political communication entails new rules of the game: for example, on Twitter, President Trump may, at his convenience, "block" unwanted followers, what elsewhere I have called 'digital exclusion', and which may even take on the character of an afflictive 'digital punishment'.

In 2017, seven individuals blocked by the President from his personal profile, along with Columbia University's Knight First Amendment Institute, sued Trump, his social media manager and the White House press office manager. The first seven applicants complained that, having been blocked, they had not had the opportunity to read and, above all, to interact - commenting, retweeting, linking - with the tweets published by Trump. The Knight Institute, instead, claimed to have been deprived of the potential comments that the seven co-applicants could have published had they not been blocked.

District judge Naomi Reice Buchwald, in her ruling of 23rd May 2018, confirmed on appeal on 9th July 2019, ordered the President to "unblock" the seven individuals. Citing the *Packingham* case,[14] the federal judge recalled how social networks today represent one of the most important spaces for the exchange of opinions. Although Twitter is a private platform, President Trump would have de facto designated it as a "public forum" to interact with the other citizens. By blocking a number of users based on their political orientation, President Trump violated the First Amendment to the American Constitution, which protects freedom of speech. Blocked users, in fact, even if they could continue to have access to Trump's tweets through some tricks, would not have in any way the possibility to interact directly with the presidential tweets, for example by commenting on them.

5. Conclusion

To conclude, one can observe that the progressive shift of the centre of gravity of political communication from traditional means to social media is accompanied by an ever-increasing level of interactivity. At the time of Twitter, even the ordinary citizen can directly comment on a message from the President of the United States. One-way communication channels are thus gradually replaced by a complex space of interaction involving a plurality of social actors: a public forum – as it would be said in the United States. Replying to a tweet written by the President of the United States does not only mean engaging in a conversation with a prominent political figure, but also implies taking part in a virtual debate involving a boundless audience of other citi-

Court, Southern District of New York 17 Civ. 5205; *Knight First Amendment Institute at Columbia University v. Trump* [2019] 2d Cir. No. 18-1691.

[14] *Packingham v North Carolina* [2017] US Supreme Court 582 U.S. ___; see E. Celeste, *Packingham v North Carolina: A Constitutional Right to Social Media?*, in *Cork Online Law Review,* 17, 2018, 116 ss.

zens, who can read and, in turn, comment on the tweets. All the more reason why, as Judge Buchwald pointed out, even the President of the United States, even if he uses his own personal Twitter account, cannot block other users. He can ignore them, for example 'muting' them. But if politics chooses to expose itself to the virtual arena, it must do so completely, without evading criticism and by respecting the fundamental rights of others.