

Laws *in lieu* of measures (the so – called “*leggi provvedimento*”) and *jus singulare* (on the basis of labour law)

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Summary: 1. Introduction. - 2. Laws *in lieu* of measures and *ad personam* laws - 3. Laws *in lieu* of measures under employment law. - 4. Wage subsidies (when the exception strives to turn into the rule). - 5. Open competitions (when the rule prevails over the exception). - 6. The “one-off” spoil system. - 7. The *ILVA* case. - 8. The “*ALITALIA*” case. - 9. Final considerations.

1. Introduction

The subject matter of our seminar, relates to very complex questions that have always been the subject of debates under legal theory, such as those relating to the concept of law, the principle of equality, the principle of the separation of powers, the relationship between authority and freedom, and ultimately the dialectic dynamic between “law” and “justice”¹.

Each of these questions, however, can be explored from different perspectives, and particularly from the perspective of history, general theory, statute law, and comparative legal systems.

Basically, in order to draw up a report such as the one I have been entrusted with, it is necessary to choose a specific field of investigation, on the basis of purely conventional and subjective preferences. For this, therefore, please accept my apologies.

2. Laws *in lieu* of measures and *ad personam* laws

The first problematic issue, a brief reference to which can only be made, arises in terms of clarifying what the ‘laws *in lieu* of measures’ are which we aim to address in this seminar.

This notion, with ancient origins², refers to a seemingly legal hybrid concept, partly displaying the characteristics of a source of law, and partly those of an administrative measure. Many definitions have been put forward in this regard, various taxonomic classifications have been suggested, and

¹ This topic’s eternal key role is today evidenced by three contemporary works (each with a different approach and outcome) by illustrious authors (cf. Nicola LIPARI, *Elogio della giustizia*, Bologna, 2021; Paolo GROSSI, *Il diritto civile in Italia fra moderno e postmoderno (dal monismo legislativo al pluralismo giuridico)*, Milan, 2021 and Natalino IRTI *Viaggio tra gli obediendi*, Milan, 2021).

² The original source of this notion is commonly traced back to F. CAMMEO, *Delle manifestazioni di volontà dello Stato nel campo del diritto amministrativo*, in *Primo trattato completo di diritto amministrativo*, edited by V.E. ORLANDO, Milan, 1907, 92.

there is a wide range of opinions as to the compatibility and consistency against the set of powers laid down in the Italian Constitution.

For the purposes of our seminar, as a starting point, we will refer to the concept of a measure contained in a law, which lacks the typical features of generality and abstractness of regular laws and is rather intended for a single individual or a limited number of people in relation to specific circumstances³. In this sense, the notion of ‘laws *in lieu* of measures’ is comparable to that of *ad personam* laws (*leggi singolari*)⁴, the definition of which, in turn, is of controversial nature⁵.

As regards potential intra-category further classifications, authoritative and long-standing authors drew a distinction between innovative and executive laws *in lieu* of measures⁶. Under this distinction, the key feature of innovative type of laws *in lieu* of measures is they “innovate” the provisions of general laws with respect to the “regulation of individual relations”, and therefore, from this point of view, the assimilation of laws *in lieu* of measures to *ad personam* laws (*leggi singolari*) appears more evident; “executive” laws *in lieu* of measures, on the other hand, include an additional feature as, while they are equally addressed to specific individuals, they refer to cases which, under the applicable laws (or under the principles inferred from the legal system), should have been governed by an executive measure issued by the public administration instead (hence, the definition of “laws *in lieu* of measures”)⁷.

Again, as a very brief summary, legal scholars’ most critical misgivings about the constitutionality of laws *in lieu* of measures revolve around the principle of equality being potentially compromised⁸, as “such laws carry an inherent danger of arbitrariness, linked to the potential violation, to the detriment of certain parties, of the principle of equal treatment legally guaranteed to all citizens”⁹. The risk of the legislator “trespassing” into the

³ Under the case law of the Italian Constitutional Court, ‘laws *in lieu* of measures’ are defined as laws that “will affect a specific and limited number of people” (Judgment No 275/13; see also Judgments Nos. 154/2013, 137/2009 and 94/2009) and whose content is of “a specific and concrete nature” (Judgments Nos. 20/2012, 241/2008 e 267/2007).

⁴ They are also sometimes categorised as “exceptional laws”. But we should keep in mind that, as derogations from the ordinary rules may often be found, “exceptional laws” may also be of a general and abstract nature (cf. P. RESCIGNO, *Forme e contenuto di regolamento*, GC, 1993, 1434). As an example, reference can be made to the recent Covid-19 emergency laws, such as the one on the “freeze” on redundancy provisions.

⁵ As to the problematic nature of this matter, all I will refer to is the observations made by F. MODUGNO, *Norme singolari, speciali, eccezionali*, in Enc. dir., XXVIII, Milano, 1978, 506, et seq.

⁶ Cf. C. MORTATI, *Le leggi provvedimento*, Milan, 1968, VI. We should also note the distinction between laws *in lieu* of measures that operate to the “advantage” of their recipients’ legal positions, with those that operate to the “detriment” of their recipients’ legal positions (see RESCIGNO, *Leggi provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime*, in *Dir. Pubbl.*, 2007, 326-328).

⁷ Cf. R. DICKMANN, *La legge in luogo di provvedimento*, RTDP, 1999, 917 et seq.

⁸ Cf. MORTATI, *Le leggi provvedimento*, cit., 47

⁹ Thus, the Italian Constitutional Court judgment No 168/2020.

field of action specifically reserved to the public administration, thereby breaching the principle of the separation of powers, is particularly relevant for laws “*in lieu* of measures”.¹⁰ Finally, regardless of any “intra-category” sub-classifications, the question arises for all laws *in lieu* of measures as to what judicial protection is afforded to the subjective situations that are negatively affected by such laws.

3. Laws *in lieu* of measures under employment law

Two preliminary clarifications are necessary to analyse the matter at hand from the perspective of employment law.

First, I would like to clarify that laws *in lieu* of measures of an “executive” nature (i.e., *ad personam* laws ruling on matters falling within the remit of the public administration) do not typically apply in the employment law field.

The reason for this is simple: both employment and social security rules mainly relate to subjective rights, the recognition of which, by virtue of the mandatory nature of the underlying constitutional precepts, does not normally require any administrative act of a discretionary nature.

Laws *in lieu* of a measure can, therefore, “reside” only in those limited circumstances in which administrative action is allowed under employment law, such as those relating to the exercise of powers of authorisation, supervision, sanctions, and distribution of public resources with funds within the “ceiling” provided for by the law itself (as, for example, certain instances of contribution facilities).

As a theoretical example, a legal provision directly granting authorisation to a single company to install a “plant” to carry out remote monitoring of work activity may make up an executive law *in lieu* of a measure, thereby “bypassing” the administrative measure (as well as the trade union agreement) required under Article 4(1) of Law No. 300 of 1970.

On the other hand, a concrete and particularly important case of laws *in lieu* of measures is that of the Wages Guarantee Fund (*Cassa integrazione guadagni*), where several statutes have been enacted over time to grant wage subsidies to the staff of individual companies, as an exception to the applicable rules, thereby in the absence of the administrative authorisation measure provided for therein (and thus replacing such administrative measure).

However - and this is the second clarification to be made - the fact that laws *in lieu* of measure in the strict sense have a limited scope of application

¹⁰ See, in particular, V. CRISAFULLI, *Fonti del diritto*, in *Enc. Dir.*, Milano, 1968, 950 et seq. More recently, F. SORRENTINO, *Le fonti del diritto italiano*, Padova 2009, 116 et seq.; G.U. RESCIGNO, *Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime*, above, 319, et seq.

compared to other areas of intervention on the part of the public administration (for instance, regularisation acts, confiscations, or seizures) does not mean that employment law may not be affected by issues caused by the “*ad personam*” nature of the relevant measures, potentially leading to arbitrary effects.

Such a conclusion could be drawn if one were to only focus on the mandatory nature of employment law, which is linked to the idea of equality of treatment, the latter being required and justified, in turn, by the requirement to regulate competition between companies and between workers. However, along with this consideration, albeit accurate, one should take into account an additional feature of the development of employment law, which suggests the opposite conclusion: I refer here to the deluge of legislation¹¹, which gave rise to a thorough and detailed set of rules and treatments, on the basis of the most disparate and heterogeneous criteria¹².

The detailed and articulated rules provided for undefined categories of relationships described in general and abstract terms, on the basis of objective and transparent criteria, are not of significance in respect to the subject matter at hand. In any case, for those relationships, the intervention of the Italian Constitutional Court was warranted on several occasions for a review of the constitutionality thereof against the principle of equality¹³.

On the other hand, there are a great many cases of rules providing for special and derogatory treatments in relation to individual parties that are of significance for the matter in question (where, for the reasons already mentioned, the theoretical taxonomic qualification as laws *in lieu* of measures, or *ad personam* laws (*leggi singolari*), is irrelevant for our purposes).

Such cases, as mentioned, are numerous, similarly to their ‘parent’ cases, i.e., laws that, while identifying their respective recipients in formally general and abstract terms, are in reality driven by a specific party’s particular requirements (or a few specific parties’) and are ‘tailored’ accordingly to address those particular requirements.

At this point and taking into account the uncertainties around the definitions pointed out above, it may be useful to move on by analysing an

¹¹ See G. GIUGNI, *Il diritto del lavoro negli anni ‘80*, in *DLRI*, 1982, 373-409.

¹² As is well known, detailed and articulated rules are a constant feature of the social security system as well, in relation to which reference to the concepts of ‘pluralism’ or ‘particularism’ of the law has been made (especially in the field of pensions, but also for sickness protection and, for a long time, for unemployment protection). Such feature, moreover, cannot be said to have been completely overcome even by more recent policies aimed at homogenising the rules on pension protection (on the one hand), and setting universal rules on income protection in the event employment contracts are suspended or jobs are lost (on the other one).

¹³ In the voluminous line of relevant case law, reference may be made to the several cases concerning the constitutionality of Article 18 of law no. 300 of 1970, due to the application of the protections laid down therein being excluded for certain workers by virtue of the workers’ role, the size of the undertaking, and the special nature of the relevant employment relationship.

illustrative series of cases that I have selected. I selected these cases either by virtue of their intrinsic significance for the matter in question, or as they may provide suggestions for further reflection, with a view to the considerations that we will endeavour to draw in closing.

4. Wage subsidies (when the exception strives to turn into the rule)

The development of rules on the wages guarantee fund, already mentioned as an emblematic case, unfolded along a fluctuating path, which, by taking a close look, appears to be the result of an endless dynamic between the adoption of measures intended to address exceptional situations (or deemed to be such) and attempts at streamlining the relevant provisions (while there has always been some pressure to extend the scope of wage subsidies).¹⁴

For our purposes, suffice it to say that the very origins of the wages guarantee fund as a legal construct are rooted in the unquestionably exceptional historical situation brought about by the Second World War, and the legislator's decision to encourage the post-war reconstruction and development efforts (also) by means of wage subsidies as a new mechanism operating to the benefit of workers in certain industrial fields whose activity were suspended (or reduced) due to events "not attributable" to firm owners nor workers¹⁵.

While in the following decades the scope of wage subsidies was progressively extended (by providing for new grounds for the granting of wage subsidies and gradually widening the categories of employers and workers entitled to them), it was again an exceptional situation, the economic crisis of the 1970s, which triggered a twist in the use of the wages guarantee fund, bending it towards purely welfare purposes¹⁶. A twist that can still be observed today, despite subsequent (and repeated) attempts at simplifying and re-ordering the relevant rules¹⁷.

Thus, the time of redundancies defined as "impossible" followed, which were conditional on the implementation of prior inter-company mobility procedures that, in fact, were unfeasible¹⁸. Fictitious employment relationships that had in fact ceased to exist were kept alive, with the sole aim of guaranteeing the payment of wage subsidies in the event companies would cease their business activity¹⁹. More generally, especially in the case of large

¹⁴ In this regard, R. PESSI, G. SIGILLO' MASSARA, *Ammortizzatori sociali e politiche attive per il lavoro*, Turin, 2017; E. BALLETTI, D. GAROFALO, *La riforma della cassa integrazione guadagni nel jobs act 2*, Cacucci, Bari, 2016; M. BARBIERI, *Jobs Act e integrazione salariale*, *Ec. Pol.*, 2015.

¹⁵ See Legislative Decree 9 November 1945, No 788.

¹⁶ U. CARABELLI, *La gestione delle eccedenze di lavoro in Italia: una analisi giuridica*, in *Economia e lav.*, 1996, 153 et seq.

¹⁷ In particular, through Law No 223 of 1991, Law No 92 of 2012 and Legislative Decree No 148 of 2015.

¹⁸ See Article 25 of Law No 675 of 1977.

¹⁹ Article 2 of Law No 301 of 1979.

companies undergoing a financial crisis, legislative measures were regularly enacted to have the granting of funds extended for periods longer than those provided for by the ordinary rules, even in the absence of any prospect of the relevant companies resuming their business activity. This continued to be the case even in the period following each of the legislative measures meant to streamline the rules on wages guarantee funds, which, as mentioned above, endeavoured to provide for stricter rules as to both the grounds for funds and the maximum timeframe for which they could be granted.

Once again, it was events of an exceptional nature, this time linked to the 2008 economic and financial crisis, that led to the introduction of rules for the wages guarantee fund that were structurally designed to operate 'as an exception' to the ordinary rules, in order to ensure that all workers could benefit from wage subsidies²⁰. Likewise, the legislator recently referred to the approach whereby a wide extension of the scope of wage subsidies shall apply in order to cope with the emergency pandemic crisis we are still going through²¹, and, in this context, such approach was once again combined with a temporary ban on dismissals similar to that adopted in the post-war time (and, only in part, the *de facto* freeze deriving from Article 25 of Law no. 675 of 1977).

Evidently, the case of the wage subsidies outlined above, whose development from a legal perspective included several exceptions and derogations “as a continuous stream”, provides suggestions for further reflection for the purposes of our work.

The case of the wages guarantee fund shows, first of all, that laws *in lieu* of measures were used which were both of an innovative and executive nature. These laws were partly of an executive nature, to the extent they were enacted in place of the administrative measures required under the applicable rules (at the time) in order for the benefit of wage subsidies to be granted in concrete terms. Equally, such laws were of an innovative nature, in that they derogated from the ordinary applicable rules with respect to individual cases, rather than implementing such rules.

Further, these laws show that the key requirement (sometimes actually existing, others uncertain, others non-existent), explicitly or implicitly, of laws *in lieu* of measures is a situation of exceptional nature. Indeed, it is no coincidence that the main legal mechanism used to enact laws *in lieu* of measures is decree-laws, which are reserved, pursuant to constitutional law, to

²⁰ See Decree-Law No 185/2008, converted into Law No 2/2009; Decree-Law No 5/2009, converted into Law No 33/2009; Decree-Law No 78/2009, converted into Law No 102/2009.

²¹ See Article 22 Decree-Law No 18 of 2020; Article 70 Decree-Law No 34 of 2020; Article 1 Decree-Law No 104 of 2020; Article 3 Decree-Law No 125 of 2020; Article 8 Decree-Law No 41 of 2021.

“extraordinary circumstances of necessity and urgency” (Article 77, paragraph 2, of the Italian Constitution).

The case of wage subsidies further shows that each instance of (deemed) exceptional nature is described in the relevant laws *in lieu* of measures on the basis of evaluations that are certainly of a political nature, regarding the seriousness of the specific company crises considered from time to time; however, at the same time, these evaluations are just as clearly linked to the degree of pressure that each company, together with its workers, may exercise depending on its strength, thus leading to participatory practices involving politics and the most influential groups of society, as well as macroscopic discriminatory differences in treatment, to the detriment of all parties not involved with the company in question (and, in particular, the weakest parties).

Finally, the case of wage subsidies shows that the practice of passing laws by means of 'exceptional' and 'derogatory' measures can also lead to the 'general rule' being eroded. A path by which the exception tends to turn into the rule is natural, and sometimes such an outcome may be foreseen (or predictable) in advance. Any exception, as such, will be challenged by the parties who are excluded from the benefit provided for by the exception itself; from a legal point of view, the excluded parties' request to be granted the benefits under the exception by invoking the violation of the principle of equality may be rejected on reasonable grounds, since, as the Italian Constitutional Court held, restoration of equality should be achieved not by extending to all the “privilege” of a few, but rather by outright removing such privilege.

But by widening and extending the scope of any favourable rule, in ever greater cases and for ever more parties, the claim of the excluded parties to be also granted the favourable treatment will progressively get stronger. And at the end of such process, it may happen that a legal construct such as the guarantee fund, which was created for very specific reasons and purposes, is legitimately subject to pressure for its uniform application, as shown in several recent reform proposals²². It may be argued that this way, a virtuous process leading to the equality of citizens is implemented (as indicated by Article 3, paragraph 2, of the Italian Constitution). However, this approach is flawed. In relation to the wage guarantee fund, such approach does not seem to be the most appropriate for the purposes of setting up a rational reform of the rules on income support for workers who are in difficulty. This reform

²² See *Linee di indirizzo e proposte di intervento per la Riforma universalistica degli Ammortizzatori Sociali*, drawn up by the “Tavolo tecnico di studio sulle tematiche concernenti le forme e gli strumenti di sostegno al reddito, con il compito di definire linee di indirizzo ed interventi per una riforma delle normative in materia di ammortizzatori sociali”, set up by Decree-laws nos. 82 of 8 July 2020 and 83 of 13 July 2020.

should take into account the issues that were raised at European level on the extent to which wage guarantee funds are compatible with state aid rules (on the one hand), and the constitutional principles on social security that give priority to the protection of 'unemployment' (on the other hand), and finally the need for a fair distribution of available resources among the different forms of public intervention in favour of those in need (on the other hand).

5. Open competitions (when the rule has prevailed over the exception)

A similar dialectic between rule and exception may be found in another area concerning access to public administrations, in relation to which several laws provide for exceptions to the general principle of open competition as the main mechanism for access (Article 97, paragraph 2, of the Italian Constitution).

In this area, however, the abovementioned dialectic takes shape in different terms, leading to equally different outcomes. First of all, on the facts, the push towards having the derogation from the general rule extended exercised by those who could benefit from it (i.e. workers already employed within the public administration, who aspire to career progression, or workers who have, or have had, flexible or temporary relationships with the public administration, who seek to have those relationships stabilised) is directly opposed, including in the context of political decision-making, by another push in the opposite direction exercised by other parties 'in the flesh', i.e. all those who have an interest in taking part in open competitions, on equal terms. Thus, when the push for a “derogation” succeeds in having the favourable law applied beyond its original scope, this automatically leads to all parties holding opposite interests wanting to challenge the competition notice issued on the basis of the derogating rule.

As to the law, it should be noted that, unlike in the case of wage guarantee funds, the “rule” (i.e., open competitions), against which pressure is exercised to have an exception applied, is laid down in the Italian Constitution - just as the provision whereby limits (i.e., derogations) may be set for any “rule” as per the “cases established by law”. It follows that the Italian Constitutional Court, in the numerous cases in which it is asked to review the constitutionality of laws setting up exceptions to the principle of open competitions²³, is not only faced with a “live” representation of the interests of those negatively affected by the privilege afforded to a few of people (for the reasons outlined above); most importantly, it is responsible for issuing a decision on the basis of Article 97 of the Italian Constitution (and, therefore, the interpretation thereof), thus taking into account the principles of

²³ Moreover, in relation to regional laws, direct access to the Italian Constitutional Court’s jurisdiction may be possible through the Presidency of the Council of Ministers.

“impartiality” and “sound administration”, principles which are enshrined in the same provision, second paragraph.

These are the reasons why I believe that, on this matter, the control exercised by the Italian Constitutional Court ensured, albeit to some extent only, that the principle of open competition was maintained, and was able to do so on the grounds of interpretative criteria as properly drawn from the same constitutional provision (i.e., Article 97 of the Italian Constitution).

The Italian Constitutional Court's case-law, drawing on the duty to “set strict limits to any room for exceptions to open competitions”²⁴, has consistently held that exceptions may be legitimate “only when [exceptions] serve the purposes of sound administration and where specific and extraordinary public interest requirements may justify them”²⁵. For the avoidance of doubt, in order to prevent potential workarounds being introduced as a way to provide for additional derogations, the Italian Constitutional Court further clarified that the “need to merely have insecure employment relationships within the public administration stabilised” may not qualify as a necessary “extraordinary” requirement (thus denying relevance to the protection of workers’ expectation about the continuity of their employment relationship per se)²⁶. The Court added that, in any case, any derogations must provide for “adequate measures” to ensure “that any personnel hired meet the standards of professionalism required to carry out their tasks”²⁷.

Finally, the Court added that the same limits to derogations apply in relation to: (i) any arrangements aimed at introducing third-party workers into posts within the public administration (including in-house companies and economic public bodies)²⁸, and (ii) any career progression procedures entailing transfers to other departments or secondments for workers already employed with the public administration, such that, as a result of the latter, job posts would only be provided 'within specific percentage limits', and without prejudice to the workers necessary taking part in the relevant open competitions.²⁹

6. *The 'one-off' spoil system.*

The case of the “one-off” spoil system deserves consideration because, unlike the cases analysed above, relates to laws *in lieu* of measures that put their recipients “at a disadvantage”. This will also provide an

²⁴ Thus, judgments no. 133/2020 and 7/2015.

²⁵ See judgments nos. 40/2018, 110/2017, 7/2015, 134/2014.

²⁶ See judgments nos. 110/2017, 251/2006, 81/2006.

²⁷ Thus, judgment No 225/2010.

²⁸ See judgments nos. 40/2018; 7/2015, 134/2014, 227/2013, 62/2012, 310 e 299/2011.

²⁹ See judgments nos. 167/2013, 194/2002, 1/1999, 234/1994.

opportunity to reflect on the consequences arising, in this case, from these laws *in lieu* of measures having been found unconstitutional.

The laws to which I am referring are those that provided for executive positions [within the public administration] that were held on the date in which the relevant laws took effect to be automatically terminated³⁰. As is well known, these laws were declared unconstitutional on the grounds that they breached the constitutional principles of 'sound administration' and impartiality', thus causing a distortion to the 'clear separation of functions between political-administrative and managerial tasks'³¹.

The most critical aspect to be pointed out here - in respect to which the Italian Constitutional Court's findings of unconstitutionality appear entirely sound - relates to the "one-off" nature of the spoil system provided for by the laws in question, insofar as such system was intended to only affect a very limited (and well-determined) number of recipients (i.e., the holders of existing executive positions); without even attempting to "disguise" this purpose in the framework of an overall reform that would tackle the relationship between political leadership and management.

A "one-off" spoil system introduced by a decree-law³² is particularly serious as an act directly adopted by the Government, including as the wording of the decree-law suggested that its purpose was not only to terminate the executive appointments' employment contracts (thus failing to comply with the ordinary rules for the revocation of the appointments in question), but also to "disingenuously" conceal the intention to only terminate non-popular executives³³.

In fact, what this meant is the Government effectively circumvented the substantive and procedural limits which individual Ministers within the

³⁰ See, inter alia, Article 3(1) (b) and Article 7 of Law No 145 of 15 July 2002; Article 2(159) and (161), of Legislative Decree No 262 of 3 October 2006, converted with amendments into Law No 286 of 24 November 2006.

³¹ Thus, in identical terms, judgments Nos. 103/2007, No. 161/2008 and No 81/2010. See also judgments No. 52/2017, No. 15/2017, No. 20/2016, No. 228/2011, No. 124/2011, No. 224/2010. As to case law relating to the spoil system being held constitutional only where it applies to individuals holding top management positions, or appointed on the basis of mutual trust (*intuitu personae*), see judgments of the Italian Constitutional Court No. 23/2019, No. 269/2010, No. 246/2011, No. 81/2010, No. 161/2008.

³² See Article 2, paragraph 161, Decree-Law No 662/2006 and Article 2, paragraph 20, Decree-Law No 95 2012.

³³ Article 2, paragraph 161, of Decree-Law no. 662 of 2006 provided that the appointments in question "shall cease, **unless confirmed**, within sixty days from the date in which this decree shall take effect...". Thus, the "one-off" spoil system referred to above left it to the heads of each relevant Ministry to decide whether or not they would let terminations to take effect automatically, by choosing, at their full discretion, the posts that should be confirmed and the posts that should be terminated. On this point, relevant case law failed to see how the "mischievous" system implemented by the decree-law above concealed, in fact, the most "brutal" aspect that any arbitrary exercise of public functions can assume.

Government itself (as the political heads of individual central State administrations) would be faced with in order to provide for executive appointments to be terminated under the law.

The following question arises: was the harm thus caused to the principle of legality really 'remedied' through the judgment that found the one-off spoil system to be unconstitutional?

The answer, in my view, is absolutely in the negative - first of all as rulings of unconstitutionality may not provide for legitimate grounds for the executives involved to request to "return" to the posts that they lost within the public administration. Moreover, any proceedings challenging the posts termination (including initiating a judicial review) would take so long that any positive outcome would be achieved at a time when the original time limit for the appointments will have expired.

There remains, theoretically, the option of compensation. However, the case law of the Italian Supreme Court - having attributed a 'sovereign' role to Parliament such that the latter would not be subject to constitutional principles - provides that, other than in the specific event of failure to implement EU law³⁴, by no means shall the State be liable for any "unlawful acts". Therefore, "given the principle whereby the Parliament shall exercise its functions entirely independently and freely (see Article 68 of the Italian Constitution, paragraph 1; Article 122 of the Italian Constitution, paragraph 4), no unlawful act may be found that could give rise to damages, and therefore, the right to compensation"³⁵.

In fact, the analysis of the case law of the Italian Constitutional Court suggests that the Court did not rule out the possibility of compensation for the damage suffered by the executives whose contracts had been terminated. Indeed, judgment no. 351 of 2008 acknowledges that the claim from which the judicial review itself derived concerned precisely the extent to which damages could be recognised; while it is true that the Court said nothing about the admissibility of such a claim, it is also true that, had the Court believed that there were no grounds for damages to be recognised in the first place, it would have had to find such judicial review as inadmissible for lack of jurisdiction (i.e., since it would not be necessary for a decision to be issued on the claim for damages to begin with, the case would not be "of relevance" under Italian Constitutional law).

There is, however, an alternative way of explaining the way in which the Italian Constitutional Court implicitly deemed the claim to be "of

³⁴ As required by the Court of Justice of the EU since the well-known "*Francovich* judgment" (Court of Justice of the European Union 19 November 1991, C-6/90, and C-9/90).

³⁵ See Italian Supreme Court 22 November 2016, no. 23730, and Italian Supreme Court 24 November 2019, No 34465. As to the case-law on the merits, see Court of Appeal of Ancona, 27 May 2021.

relevance”. The Court may have held that, in the case at hand, damages could be recognised as deriving from the conduct of the public administration that implemented the contested law, and not directly the law itself.

But even if this were the case, a recognition of a claim for damages would remain little more than “virtual” and largely ineffective. Indeed, pursuant to rulings of the Italian Supreme Court, the retroactive effect of judgments finding laws to be unconstitutional “does not mean that the conduct carried out - prior to the review of constitutionality - in accordance with the rule that was subsequently declared unconstitutional, was unlawful”. Hence the “slap in the face” for the executives involved in the situation described above, as, up until the date on which the Italian Constitutional Court ruled that the law that caused their employment contracts to be terminated was unconstitutional, no “intent” or “negligence” on the part of the public administration involved could be found according to the Italian Supreme Court, which would be necessarily required for liability to be recognised³⁶.

From the perspective of justice (or, rather, lack thereof), the sad ending of the case referred to above was that the individual Ministers, who, collectively, had approved the decree-law ordering the automatic termination of any existing executive positions in their own Ministry, remained exempt from liability (both in their personal capacity, and as legal representatives of their Ministry) as regards the effects of the “measure” they adopted, thanks to the latter having been taken in the form of a decree-law, the subsequent judgment of unconstitutionality being of no consequence.

7. The ILVA case

The long-standing case of the ILVA plant in Taranto³⁷ is the subject of the best-known case of laws *in lieu* of measures that had an impact on employment law.

The ILVA case, involving several constitutional rights, related to employment law from the point of view of workers' safety, and unfolded through a long series of legislative, administrative, and judicial measure. In light of the significant interest it sparked, the ILVA case has been examined and commented on from all possible angles³⁸. For the purposes of our analysis,

³⁶ See Italian Supreme Court judgments Nos. 3092/2018, 13869/2016, 3210/2016, 355/2013, 15879/2002, 6744/1996.

³⁷ This matter was also dealt with by the European Court of Human Rights (judgments of 24 January 2019 and 16 April 2015) and the Court of Justice of the European Union (judgment of 31 March 2011). The Italian Council of State’s judgment of 23 June 2021 marks the latest development of the legal proceedings concerning this case.

³⁸ See, in this regard, P. PASCUCCI, *La salvaguardia dell’occupazione,*; above, R. ROMBOLI, *In tema di leggi provvedimento: in particolare la prosecuzione dell’attività produttiva dello stabilimento siderurgico Ilva*, Comment to Italian Constitutional Court judgment 9 May 2013, No 85, in *FI* 2014, pt. 1, pp. 461-463; R. BIN, *Giurisdizione o amministrazione, chi deve prevenire i reati ambientali?* in

I will have to limit the scope of my review to the principles deriving from the well-known judgment of the Italian Constitutional Court no. 85/2013³⁹, which addresses both the topic of the balancing of constitutional rights and that of the laws *in lieu* of measures.

With respect to the latter, the Italian Constitutional Court did not deviate from its own well-settled case law, confirming that laws *in lieu* of measures are not unconstitutional (insofar as such a way of legislating is not “incompatible, in and of itself, with the set of powers set forth in the Constitution”, and “no constitutional provision [...] provides that acts with a specific and concrete content are restricted to the authority of administrative or “executive” bodies); the Italian Constitutional Court reaffirmed the requirement that such laws be subject “to rigorous reviews of constitutionality” (given “the danger of unequal treatment inherent in any provisions of a specific and derogatory nature”).

The Italian Constitutional Court’s application of the statements of principle outlined above in relation to the rules under review is particularly of interest - more so than the statements per se, which merely concur with the Court’s own case law. The Italian Constitutional Court acknowledges that the content of the provision (Article 3 of Decree-Law no. 207 of 2012) by which the legislator, replacing the administrative measure required under the law, had identified the Taranto plant as an “establishment of strategic national interest” was that of a measure. In the Court’s view, such a “peculiar” derogation of the applicable rules on responsibilities [among public bodies] was justified by a “serious and exceptional situation”, “which led the legislator to forego, for reasons of urgency, going through the procedure for the adoption of a decree of the President of the Council of Ministers” (to whom the analysis of the Taranto plant was entrusted under the applicable rules). In other words, the rationale of the legislative intervention, in the Court’s view, is to be found “in the peculiar circumstances of emergency situations”, since “the legislator considered that it had to avert a very serious employment crisis, which is even more serious in the current phase of national and international economic recession, without however underestimating the serious damage to the environment, and therefore the health of the peoples in the surrounding areas”.

In this case, therefore, the constitutional grounds of the law *in lieu* of a measure was described in the same terms as the requirements and conditions of admissibility for the use of decree laws, i.e., the existence of an “extraordinary situation of necessity and urgency” (Article 77, paragraph 2, of

Giur. cost., 2013, pp. 1505-1511; M. MAZZOTTA, *Il “caso Ilva” al vaglio della Corte costituzionale*, in *La Nuova giurisprudenza civile commentata*, 2013, issue 10, pt. 1, pp. 877-884.

³⁹ The subsequent judgment (no. 58/2018) is worth mentioning. By contrast, the Italian Constitutional Court decided not to rule on the third review of constitutionality that it was seized of, as the Court ordered for the case be remitted back to the referring Judge in order for them to assess the impact, if any, of the new rules (*jus superveniens*) (see Order 230/2019).

the Italian Constitution). This also explains why, as will be noted, most of the acts having the effect of a law which were adopted as a replacement of an administrative measures are contained in emergency decrees.

In relation to the question of the balancing of constitutional rights, the Italian Constitutional Court considered that a balance between the rights to the environment, health and employment would be reasonable (as recognised by Article 1 of Decree Law No. 207 of 2012).

In particular, the parts of the judgment in which the Court states that “the fundamental rights protected by the Italian Constitution should be understood as each completing one another, and it is therefore not possible to identify one of them as having absolute precedence over the others” are very well known and quoted in other works. This means, according to the Court, that “the Italian Constitution, just like other contemporary democratic and pluralist constitutions, requires a continuous and mutual balancing of fundamental principles and rights, with none of them claiming any absolute nature over the others”. The Court further draws the conclusion that “the balance between rights, precisely because it is dynamic and not set *a priori*, must be assessed - both by the legislator in laying down the rules and the courts in their review of the rules - according to criteria of proportionality and reasonableness, such as not to allow for their essential core to be undermined⁴⁰.

I will not dwell on the widely debated issue of whether or not there is a 'hierarchy' between constitutional principles⁴¹. For our purposes, I would like to focus on the question on the relationship between the law and the public administration, which pushes towards the definition of clear boundaries between political choices and technical evaluations. Many of the critiques levelled at the Italian Constitutional Court's judgment are based on the notion that, in a matter such as health protection, where rules are (also) of a technical nature and intended to evolve over time (in line with changes in the relevant factual situation and scientific progress), the legislator ought not carry out the balancing of constitutional rights in a static manner and through purely political choices.

⁴⁰ Even the European Court of Human Rights, in the aforementioned judgment of 24 January 2019, while holding Italy liable for having failed to protect the right to private and family life (Article 8 of the European Convention on Human Rights), recognised that, in principle, the State has a certain margin of appreciation in defining the “fair balance between the competing interests of the individual and society as a whole”.

⁴¹ On this subject, see, A. BALDASSARRE, *Costituzione e teoria dei valori*, in *Politica del diritto*, 1991, p. 639; A. BARBERA, Art. 2, in G. BRANCA (ed.), *Commentario della Costituzione*, Bologna, 1975, pp. 50 et seq.; R. BIN, *Diritti e argomenti, Il bilanciamento degli interessi nella giurisprudenza costituzionale*, Milan, 1992, pp. 1 et seq; F. RIMOLI, *Pluralismo e valori costituzionali. I paradossi dell'integrazione democratica*, Turin, 1999, i, G. ZAGREBELSKY, *Il diritto mite*, Turin, 1992, pp. 16 et seq.

This approach ought to be fully embraced since, as we shall see, only through an administrative procedure can the necessary weighing up of all relevant elements (including the facts) be carry out properly, and can thorough investigations, the involvement of various technical and scientific professionals, and the representation of all the interests involved be guaranteed. However, it is not true that the approach outlined above regarding the operational separation between the law and administrative measures was “denied” by the judgment referred to above.

The Italian Constitutional Court, despite not referring to the principle of “due process”, implicitly recognises that the law in question did, in fact, comply with due process. This is because the balance between rights deemed “reasonable” by the Court did not refer to the “static” framework of the law under review, but rather the provisions of the law itself in conjunction with the prescriptions contained in the “authorisation measure” (the “AIA” - “re-examined” Environmental Impact Authorisation) issued by the appropriate public administrations⁴².

In other words, it is “the procedure culminating in the issuance of the AIA (Environmental Impact Authorisation), through which public participation and transparency are ensured”, “the mechanism through which, under the applicable rules, a balance is reached with regard to the extent to which the risks deriving from the activity the subject matter of the authorisation may be acceptable and managed”.

On this basis, the Court ruled out that the judicial function and of the rights of defence would allegedly be undermined, since the authorisation measure - to which the law refers - “may be challenged before a court that has jurisdiction by any private citizens alleging that the authorisation was unlawful in that it violated their rights or legitimate interests”.⁴³ It follows that “the provision under review would not make any act lawful *ex post* which was previously unlawful - and continues to do so for the purposes of any criminal proceedings instituted prior to the authorisation issued for the continuation of a production activity; nor does it mean that the company’s future conduct may not be challenged (“sterilised”) before a court (even temporarily) with respect

⁴² In that regard, the Court pointed out that that measure “is the result of the combination of several technical and administrative contributions into a single procedure, in which, in accordance with EU Directive 2008/1/EC, the principles of prevention, precaution, intervention at source, information and public participation in decision making, as key features of the entire system of environmental legislation, must be applied simultaneously”.

⁴³ However, the authorisation “may not be challenged as regards the substantive content of the competent authorities’ choices underlying the authorisation itself, authorities which may not be replaced by third parties in their discretionary assessment of the appropriate measures to be taken to protect the environment and prevent future pollution, provided that the exercise of such discretion does not result in a defect that may be challenged before the appropriate courts with jurisdiction”.

to violations of the rules on the protection of the environment and public health”⁴⁴.

Finally, the Court ruled out any violation of the principle of “reserved jurisdiction [for judicial authorities as opposed to administrative bodies]” in relation to the provisions contained in Article 3 of Decree-Law no. 207 of 2012. The Court noted that “the provisions that have been challenged did not remove any offence nor do they mitigate the relevant penalties, nor do they contain interpretative and/or retroactive provisions capable of influencing in any way the outcome of the ongoing criminal proceedings, as instead occurred in most cases, addressed by the Italian Constitutional Court and the Strasbourg Court through numerous rulings, which related to questions of constitutionality of laws having effects on the settlement of ongoing trials”.

Therefore, in conclusion, it does not seem to me that a “reversal of this position” can be identified in the transition between judgment no. 85 of 2013 and the different conclusions reached by the Italian Constitutional Court a few years later, in judgment no. 58/2018, when it was seized with the review of the new provisions contained in Article 3 of legislative decree no. 92 of 2015 and in Article 1, paragraph 2, and 21-*octies*, of law no. 132 of 2015.

There is, in fact, no inconsistency in the benchmark that the Court adopted, and the reasoning followed. What changed, and by no small measure, is only the content of the new rules that were subject to judicial review. Under the rules at issue in the 2018 proceedings, unlike those reviewed in 2015, the continuation of the Taranto plant’s business activities “is conditional exclusively upon the unilateral presentation of a “plan” by the very same private party whose property has been seized by the judicial authorities, without any form of participation by other public or private parties or bodies”.

In particular, the Court pointed out that the new rules being challenged did not specify the 'additional measures and activities' that should be contained in the plan, nor did they provide for 'any form of participation' by private parties and public authorities in the preparation of the plan itself.

Therefore, the conclusion to be drawn is, unlike in the case previously reviewed, the new rules under scrutiny did not comply with “the requirement to strike a reasonable and proportionate balance between all relevant constitutional interests, and thereby acted unconstitutionally in not taking due account of the requirements to protect the health, safety and bodily integrity of workers, when confronted with circumstances that exposed them to a risk of death”.

⁴⁴ “Rather, the same provision provides for an environmental rehabilitation project driven by the balance between the protection of the goods specified and that of employment, that is, between goods all corresponding to constitutionally protected rights.”

8. The '*ALITALIA*' case.

In the never-ending story about the former national airline company's crisis, a long series of legislative acts were adopted whose basis could hardly be identified, for each and every of them, in the existence of exceptional circumstances (unless one considers the process of liberalisation of air transport activities which began in the mid-1980s as such⁴⁵).

A significant component of the such legislative acts related to economic-financial support measures aimed at saving the company, or preserving ownership of the assets in Italian hands, thus highlighting the public interest in defending a company which operates in a field that is considered strategic, but also a partly disguised protectionist push (which, moreover, could also be found in the legislation of other European partners). In this respect, the legislator has had to deal with both national and European competition law and has found the latter to be more restrictive and controlling than the domestic one. Reference can be made, in this regard, to the case in which the Italian Constitutional Court, in the context of reviewing the constitutionality of one of the State's favourable measures [for Alitalia] on the grounds of the alleged violation of Articles 3 and 41 of the Italian Constitution, despite recognising in the preamble that a "strict scrutiny" was required, ultimately held that the rules under review were not unreasonable⁴⁶. On the other hand, the European set of rules on State aid (which also includes specific rules concerning the air transport sector), while structured in such a way as to allow for various possibilities for derogations and exceptions (which Member States can use to avoid the constraints provided for by the main rules), is based on principles, such as (i) the European Commission's necessary prior authorisation to any State aid measures, and (ii) the duty to recover any aid unlawfully granted⁴⁷, which domestic legislators may not circumvent, and mark therefore an insuperable limit to the introduction of any favourable measures. So much so that even the law that, most recently, authorised the incorporation of a new company for air transport activity, provides for the

⁴⁵ See Court of Justice of the European Union, 30 April 1986, C. 209-213/84.

⁴⁶ See, in relation to Article 4, paragraph 4-*quinquies* of legislative decree no. 347 of 2003 (introduced by Article 1, paragraph 10 of legislative decree no. 134 of 2008), Italian Constitutional Court No 270 of 22 July 2020, which referred to the requirement to deal with the 'very serious crisis of an undertaking ... which provided an essential public service whose continuity had to be ensured ... moreover in a particular sector, which is clearly of strategic importance for the national economy, worthy of specific consideration, whose urgency required to avoid distortions and interruptions which were likely to cause wider systemic repercussions in other sectors'. Hence, in the Italian Constitutional Court's view, the legislator "intended to carry out an intervention aimed at guaranteeing the company continuity and allowing the preservation of the company significant value (consisting in several assets and relationships of various kinds), in order to avert, in this way, also any serious employment crisis".

⁴⁷ See the Commission's decision of 12 November 2008, which found the so-called 'bridge loan' provided for by Italian Decree Law No 20/2008 to be unlawful on the grounds that it had not been notified to the Commission, as well as incompatible with the common market, which entailed the State's obligation to recover such aid as improperly granted.

commencement of the exercise of the activity itself to be conditional “to the European Commission’s evaluations” (see Article 79, paragraph 3, of Decree-law no. 18 of 2020).

There are numerous examples of legislations in the field of employment law, along with economic and financial legislations. Among these, the favourable treatments introduced for wages guarantee funds⁴⁸ are the most important. The scope of such funds did not originally include the air transport sector and was subsequently extended to it⁴⁹ precisely in order to set up procedures for the non-traumatic management of workers redundancies of a clearly definitive and irreversible nature (“*strutturali*”).

There are several other relevant provisions, of heterogeneous nature.

On the one hand, I refer to the provisions which, in order to enable the then extraordinary administration of Alitalia to carry out a transfer of business (or part of the business), *ad hoc* amendments were made to Decree-law no. 347 of 2003 (see Article 1, paragraph 13, of Decree-law no. 134 of 2008 and Article 14 of Decree-law no. 185 of 2008) of controversial compatibility with the EU rules on business transfers⁵⁰; on the other hand, I refer to the provision set forth in Article 203 of Decree-law no. 34 of 2020 which - in order to limit competition from foreign carriers without service bases in Italy and for which Italian jurisdiction may not be exercised - introduced a social clause (having as its object the respect of the sector-specific National collective employment agreement) relying on an EU regulation (Regulation 965/2012) which, however, does not relate to employment relationships⁵¹.

Finally, it is worth mentioning an instance of a strict *ad personam* law (*norma di stretto diritto singolare*) which is contained in the aforementioned Article 79 of Decree-Law No 18 of 2020. The legislator, despite providing that the new company operating in the air transport sector shall be “put entirely under the control of the Ministry of Economy and Finance or of a semi-public company with a majority public holding, including indirectly” (paragraph 3), decided to make the new company exempt from the application of the ordinary rules set forth for all “semi-public companies” in the Consolidated Act

⁴⁸ See E. BALLETTI, *Rilevanza e funzionalità degli ammortizzatori sociali nella realizzazione dell’operazione di salvataggio di Alitalia*, DML, 189 et seq.

⁴⁹ Through Article 1-*bis* of Decree-Law No 249 of 2004, introduced by Conversion Law No 291 of 2004.

⁵⁰ See S. NAPPI, *Il sistema delle tutele dei lavoratori nella vicenda traslativa dell’azienda Alitalia*, DML, 2009, 60 et seq.

⁵¹ This provision is clearly driven by specific requirements of our national airline company [Alitalia], given that, in the air transport field, national collective negotiation procedures are now, as a matter of fact, carried out as a single-company negotiation procedure, as is usually the case where companies operate under a de facto monopoly or quasi-monopoly.

approved by Legislative Decree no. 175 of 2016⁵², thus making the new company further exempt from the provisions set forth in the Consolidated Act in relation to employment relationships⁵³.

I referred to Article 79 above as this provision shows that a law specifically applying to individual parties and/or cases (*singolarità della legge*) may, in fact, be fully justified and reasonable. In fact, I do not think there can be any doubt on the consideration that ordinary rules provided for semi-public companies would not be suitable for the purposes of regulating the activity of an airline company operating in a sector which not only, as mentioned, is subject to specific regulations under European law, but, most importantly, is particularly exposed to international competition. Suffice it to say, with respect to employment relationships, that the constraints provided for in Articles 19 and 25 of Legislative Decree No 175 of 2016 would have been utterly inadequate regarding recruitment and personnel management (including the management of redundant workers).

9. Final considerations.

The last observation I made as a *trait d'union* to move to my final considerations, along with the research carried out, shows that the admissibility under our legal system of laws *in lieu* of measures is not an issue per se, but, rather, any misuses of these laws are. The measure provided for by laws applying specifically to individual parties and/or cases (*singolarità della misura*) does not, in itself, make for grounds for critiques of “irrationality”, or even “patronage”, on the part of the legislator. Most of the cases examined above show that concrete requirements lie behind the issues addressed by laws *in lieu* of measures, such as those relating to setting an economic direction and ensuring employment protection. And it is not, in my opinion, the job of jurists to make an appraisal on the merits of the political solutions adopted by the legislator. Put simply, in my view, we should acknowledge that, in relation to both laws *in lieu* of measures and *ad personam* laws (*leggi singolari*), the key issue relates to ensuring that an effective scrutiny is performed over Parliament’s discretion against the limits set on it by the Italian Constitution and supranational law.

On a theoretical level, it should be noted that the very 'classic' concept of laws as having a general and abstract content, which developed under the

⁵² See, paragraph 5 of Article 79 of Decree-Law No. 18 of 2020, which also excludes the application of Article 23-bis of Decree-Law No. 201 of 2011. It is interesting to note, moreover, that the Consolidated Act itself already provided, in advance, that any rules specifically applying to individual parties and/or cases (*norme “di diritto singolare”*) which had taken effect prior or subsequent to the Act’s entry into force would continue to apply (see Article 1, paragraph 4, letter a), and Article 5, paragraph 2, of Legislative Decree No. 175 of 2016). In other words, the Italian legislator, in setting certain rules, made efforts, at the same time, to have them interpreted in relative terms, without prejudice to any past and future exceptions.

⁵³ See, in particular, Articles 19 and 25 of Legislative Decree No 175 of 2016.

French Revolution, appears to have been overcome by the ever-growing complexity of interests and relationships brought about by society evolution and the development of welfare States together with the responsibilities that go along with them⁵⁴, making it harder to maintain a clear separation line between the 'setting rules' and 'addressing specific issues'⁵⁵.

From the perspective of positive laws, pursuant to well-settled case law of the Italian Constitutional Court, the Italian Constitution does not require that legislative acts be of a general and abstract nature as essential requirements⁵⁶. And laws *in lieu* of measures, just like *ad personam* laws (*di diritto singolare*), are part of the broader notion of “public administration tasks carried out through laws” (“*amministrazione per legge*”)⁵⁷.

Further, the Italian Constitution itself grants the Government the power to issue a decree having force of law defined as “provisional measures” where there are “extraordinary circumstances of necessity and urgency”, subject to such measures being submitted to Parliament on the same day for transposition into law (Article 77, paragraph 1, of the Italian Constitution). It is therefore no coincidence that most of the acts falling in the category of laws *in lieu* of measures were enacted in the form of decree-laws⁵⁸. In fact, the point was made that the most “appropriate” use of decree-laws, which are intended to address “extraordinary” situations, would precisely be the introduction of measures having a specific, derogatory content to the ordinary set of rules⁵⁹, as decree-laws are deployed “on the assumption that there are no legal means available in the legal system for the purpose” of dealing with extraordinary situations⁶⁰.

Having noted that the deployment of laws *in lieu* of measures is not per se an issue, but rather potential misuses of these laws and of laws *ad personam* (*jus singularis*) are, it should be added that such misuses could be identified, and lead to detrimental consequences, on different levels.

First, merely in terms of the scale of this phenomenon. Evidently, laws have increasingly become the outcome of a process of redistribution of

⁵⁴ See G. ZAGREBELSKY, *Il diritto mite*, Turin, 1992, 43; F. MODUGNO-D. NOCILLA, *Crisi della legge e sistema delle fonti*, *Dir. soc.*, 1989, 413; E. FORSTHOFF, *Le leggi-provvedimento*, in ID., *Stato di diritto in trasformazione*, Milan, 1973, 150.

⁵⁵ According to the well-known distinction provided by Vezio Crisafulli (ID., *Atto normativo*, *Enc. Dir.*, IV, Milan, 1959, 255).

⁵⁶ See judgments nos. 181/2019, 85/2013, 225/1999. As to legal theory, A. M. SANDULLI, *Legge (diritto costituzionale) in riferimento all'art. 79 della Costituzione*, *Noviss. Dig. It.*, IX, 1963, 630 et seq.; G. ZAGREBELSKY, *Il diritto mite*, above, 44.

⁵⁷ As a thorough analysis, S. SPUNTARELLI, *L'amministrazione per legge*, Milano, 2007.

⁵⁸ See M. CAMMELLI, *Premesse allo studio delle leggi provvedimento regionali*, *Riv. trim. dir. pubbl.*, 1971, 1343.

⁵⁹ See, most recently, M. LOSANA, *Il contenuto dei decreti-legge: norme oppure provvedimenti? Oss. Cost.*, 2021, issue no. 2.

⁶⁰ See A. MORRONE, *Fonti normative*, *Mulino*, 2018, 155.

resources (and opportunities) established by several social and political forces, according to the balance of power applicable from time to time, leading to results that will be constantly subject to changes according to any change that may affect that balance of power. Therein lies the danger of occasional and irrational legislation.

However, setting aside, for the moment, the grounds of their content, “specific laws” [such as laws *in lieu* of measures and *ad personam*] (*leggi e “leggine” particolari*), as a matter of fact, will trigger a “chase” on the part of the parties excluded from the laws’ scope for an extension of the “privileges” therein recognised to individuals or restricted groups (or, in any case, for compensation to be granted), leading to an overwhelming, relentless deluge (“*iperproflia*”) of legislation and derogatory treatments in respect to general rules which, in turn, will increasingly lose their uniformity in application. The “legal system erosion” (in the somewhat nostalgic sense adopted by so many jurists) is not the only consequence of this process. What is particularly of concern is a potential development of the legal system in “fits and starts”, on the basis of contingent reasons, and which, in the absence of any “great ideas” that would be necessary for the legal reforms required by a country that is currently “at a standstill” (or, for the less optimistic, “in decline”), risks losing sight of the very directions of travel set out in the Italian Constitution. Equally worrying consequences can be identified, as is well known to employment lawyers and practitioners alike, in relation to an excessive legislation production - especially if disorganised - in terms of uncertainty in legal relationships, litigation increase and a consequent overloading (and malfunctioning) of the justice “machinery”.

Secondly, misuses of laws *in lieu* of measures and *ad personam* laws can be identified - alongside the scale issue referred to above - in relation to the judicial remedies that may be exercised against each individual statutory measure. In this respect, the analysis carried out emphasised the issues arising from the plethora of laws granting privileges or advantages, in respect of which reviews of constitutionality by the Italian Constitutional Court are often precluded due to the lack of parties who may have a legal and *de facto* interest in initiating legal proceedings in which a question of constitutionality may possibly be raised. There is, therefore, a wide field in which acts having the force of law can operate in a completely arbitrary and unchecked manner. This “drift” may be partly limited - fortunately, I would add - by the scrutiny exercised by European institutions, which can also be initiated *ex officio*, in circumstances where the relevant privileges or advantages affect the principles of free competition or other supranational principles. If the review of constitutionality is admissible, the effectiveness and adequacy of the judicial protection afforded to the parties who incurred damages or were disadvantaged by the challenged provision are to be assessed.

The latter aspect intersects with the third level in which consequences can be identified in connection with any legislation that “addresses specific issues” (without “setting generic rules”), and can be examined in this context: that is, it is now a question of considering the effects that this way of legislating produces on the balances between the powers of the State (legislative, executive and judicial) which are the basis of modern constitutionalism, and, ultimately, the balances between authority and freedom.

With regard to such “third level”, a tendency can be identified towards a significant shift in the balance of power in favour of the Government, which directly carries out its own political action⁶¹ - including through a systematic recourse to emergency decrees (as a constant vehicle of political choices ratified *ex post* by Parliament).

This shift in balance is clearly linked to a distortion of our parliamentary system towards a majority system⁶², within which the perception of the law as the expression of a “partisan power, effective in that it is imposed by concrete forces (fractions of society) that have gained the upper hand” is reinforced⁶³.

Another risk worth noting is that the administrative function may be weakened. While in the Italian Constitutional Court’s view the authority to exercise the administrative-executive function shall not be restricted to the public administration (“*riserva di amministrazione*”)⁶⁴, the critical issue is that any “specific” and “concrete” measure provided for by laws *in lieu* of measures or laws *ad personam*, to prevent potential random or arbitrary effects, should be based, at least in most cases, on technical evaluations and the balancing of different interests. It seems reasonable to argue that these evaluations and balancing acts can only be ensured (or at least more effectively) through the deployment of administrative measures, by virtue of the procedure underlying such measures, including the rules on preparatory stages, public participation, and legitimate grounds⁶⁵.

Moreover, in the cases in which the Italian Constitutional Court held that laws *in lieu* of measures were unconstitutional, the Court constantly referred to the importance of the principles of “due process” as the “natural

⁶¹ The same applies to the deployment of legislative decrees, to implement enabling laws (from Parliament) that set out very broad or even generic and undefined principles and guidelines.

⁶² See M. CARTABIA, *Il Governo ‘signore delle fonti?’*, in M. CARTABIA, E. LAMARQUE, P. TANZARELLA (eds.), *Gli atti normativi del Governo tra Corte costituzionale e giudici*, Turin, 2011, IX et seq.

⁶³ See M. DOGLIANI, *Indirizzo politico (voce)*, *Enc. Dir.*, XXI, 139 et seq.

⁶⁴ Supported by prevailing legal theory (see M. DOGLIANI, *Riserva di amministrazione*, *Dir. pubbl.*, 2000, 68 ff.) but not without dissenting views (see, among others, G.U. RESCIGNO, *Leggi provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime*, in *Dir. Pub.*, 2007, pp. 321 et seq.

⁶⁵ See F. SORRENTINO, *Principio di legalità*, *Dir. pubbl.*, 2016, n. 3; G. MORBIDELLI, *La riserva di atto amministrativo nella disciplina delle modifiche di destinazione d’uso senza opere*, *Giur. cost.*, 1991, 2453.

venue for the settlement of interests”⁶⁶. However, on these occasions too, the Italian Constitutional Court's judgments were based on a finding of violation of specific constitutional precepts, as opposed to holding that the authority to exercise the administrative-executive function shall be restricted to the public administration as a principle (*principio di “riserva di amministrazione”*), (which the Court consistently rejected⁶⁷).

Equally, the effectiveness of judicial protection of rights is also weakened, which is particularly of concern if one considers that the purpose of resorting to laws *in lieu* of measures is often precisely to prevent or “neutralise” courts’ interventions, and thus to give greater stability to the specific and concrete measure that the legislator deems appropriate ⁶⁸.

In this regard, unlike the concept that the authority to exercise the administrative-executive function shall be restricted to the public administration (*principio di “riserva di amministrazione”*), the right to full and effective judicial protection has firm and secure foundations in the Italian Constitution (in particular, in Articles 24, 103 and 113), as well as in fundamental principles of international and European law⁶⁹. In fact, according

⁶⁶ See judgment no. 116/2020, according to which “it is at the procedural stage [...] that the synchronic evaluation of the public interests involved and worthy of protection can and must take place, against both the private economic operator’s interests and also (and not least) further interests held by individual citizens and communities, which are recognised and protected by constitutional principles”. *The structure of the administrative procedure makes it possible for such interests to be identified, adequately explained, and for an evaluation thereof to be made public and transparent, in accordance with the principles laid down in Article 1 of Law No 241 of 7 August 1990 [...]: effectiveness, impartiality, publicity and transparency. In this way, first of all, impartiality of any decision-making procedure is guaranteed, in accordance with Article 97 of the Italian Constitution; and the pursuit, in the most appropriate and effective manner, of the relevant primary interest is equally guaranteed, in implementation of the principle of sound administration, referred to in the same Article 97 of the Italian Constitution”.*

⁶⁷ See also judgments nos. 258/2019, 69/2018. Hence, on the one hand, some legal scholars argued that it would be necessary, at least, to consolidate the tendency to have similar procedures apply to the legislative function (*procedimentalizzazione*) in order to reclaim democratic guarantees of due process (see A CARDONE, *Riserva di amministrazione in materia di piani regionali e divieto di amministrare per legge: le ragioni costituzionali del “giusto procedimento” di pianificazione*, in *Forum Cost*, 10 October 2018) and, on the other hand, the suggestion was made that there should be an implicit rule whereby laws *in lieu* of measures may only be adopted on the basis of due process (*riserva di giusto procedimento*) (P. SCARLATTI, *Aggiornamenti in tema di limiti alle leggi provvedimento regionali: luci e ombre della sentenza n. 28 del 2019 della Corte costituzionale*, in *Giur. cost.*, 2019, I, 360).

⁶⁸ According to the Italian Constitutional Court’s case-law, the legislator may in such cases also enact laws affecting ongoing disputes, with the exception of judgments having the force of *res judicata* (see judgments nos. 352/2006 e 374/2000).

⁶⁹ See Article 6 of the ECHR (“everyone” is “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”, which “shall be responsible to rule on disputes concerning their civil rights and obligations or the merits of any criminal charge against them”), and Article 13 of the ECHR (“Everyone whose rights and freedoms as set forth in this Convention have been violated has the right to an effective remedy before a national tribunal, even when the violation has been committed by persons acting in an official capacity”); Article 47 of the Nice Charter (everyone “whose rights and freedoms guaranteed by Union law have been infringed shall have the right to an effective remedy before a court or tribunal”); Article 19 of the TFEU (“The

to many, precisely the effectiveness of this guarantee makes up the deepest identity of a constitutional State, as a shield against any irrational or absurd laws and arbitrary exercise of authority⁷⁰.

On this point, the Court's position - according to which, in relation to specific and concrete measures adopted by the legislator, the right of defence would be ensured by means of a "transfer" of venue - from ordinary judges to the Italian Constitutional Court⁷¹ - is formally impeccable but leads to overlooking the substantive distinction of the rules governing the procedure and the powers of the judges involved, i.e., ordinary judges v. the Italian Constitutional Court.

From a procedural perspective, reference can be made, on the one hand, to the limits set for citizens' access to the Italian Constitutional Court, and, on the other hand, the wider precautionary powers that can be exercised by both civil and administrative judges, which are fundamental, according to the Italian Constitutional Court itself, for the protection of subjective legal positions⁷².

As regards the type of review exercised by the Italian Constitutional Court, the principle of "strict scrutiny" of constitutionality⁷³ does not seem sufficient to meet the requirements of judicial protection (*domanda di giustizia*) understood in the sense of the possibility of predicting the outcome of litigations and the effects that may follow.

The observation was made that the reference to "strict scrutiny" appears to be a mere verbal concept, which would be "evanescent" when applied in practice⁷⁴. In essence, the complaint is that no clear criteria were set out on the basis of which such "strict scrutiny" should be conducted, in order

Court of Justice of the European Union shall, in accordance with the Treaties, rule on: (a) actions brought by a Member State, an institution or a natural or legal person"); and Article 263 TFEU ("Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against acts addressed to that person or which are of direct and individual concern to him or her, and against regulatory acts which are of direct concern to him or her and do not entail implementing measures").

⁷⁰ See M. DOGLIANI, *Riserva di amministrazione?*, *Dir. pubbl.*, 2000, 678 (see, additionally, ID., *I diritti fondamentali*, in M. FIORAVANTI, *Il valore della costituzione*, Bari, 2009, 41, et seq.)

⁷¹ See judgments nos. 2/2018, 231/2014, 65/2013, 289/2010, 241/2008.

⁷² On the "virtual nature" of precautionary decisions that may be issued in proceedings before the Italian Constitutional Court, A. PACE, *Sulla sospensione cautelare dell'esecuzione delle leggi autoapplicative impugnate per incostituzionalità*, *Riv. trim. dir. pubbl.*, 1968, 54.

⁷³ Strict scrutiny which, again as a matter of principle, must be "all the more rigorous" the stronger the nature of a measure of the legislative act subject to scrutiny: see Judgment 137/2009 and Judgments Nos. 289/2010, 20/2012, 85/2013, 182/2017, 181/2019.

⁷⁴ D. BELVEDERE, *Lo scrutinio di costituzionalità delle leggi provvedimento: variabilità della soluzione ed "evanescenza" dei relativi criteri utilizzati dalla giurisprudenza costituzionale*, in www.Associazionedeicostituzionalisti.it, n. 1/2011.

to distinguish it from the examination of the reasonableness of laws that is applied in ordinary constitutionality reviews⁷⁵.

In addition, the absence of any obligation on the part of the legislator to provide reasons [for any laws in lieu of measures or *ad personam* laws] further complicates the Italian Constitutional Court's task of assessing the consistency of the provisions under review with the conditions that would legitimately justify their 'specific and individual content' (*singolarità*), given that such an assessment implies (and requires) that the criteria inspiring the choices adopted and the interests pursued may be identifiable⁷⁶.

It should be added that, in any case, the Italian Constitutional Court's review “may not be stretched as far as to examining the actual nature of the factual elements underlying legislative choices”⁷⁷, nor can it avail itself of the established techniques developed by administrative judges to review potential misuses of power, a typical defect of administrative measures⁷⁸ (as, instead, suggested by some legal scholars⁷⁹).

Finally, a further, serious and separate issue can be noted in relation to laws providing for measures that are “disadvantageous” for their recipients, where no effective protection is provided for under the domestic legal system, - since, as we have seen, according to the Italian Supreme Court, no justiciability is recognised to claims for damages brought on the grounds of the unconstitutionality of laws following a (definitive) finding of the Italian Constitutional Court to that effect.

The approach taken in the case law of the Italian Supreme Court, in my view, shows an undue “reverence” to the legislative power - a legacy of the ancient concept whereby rulers were not subject to the laws (*princeps*

⁷⁵ See A. CERRI, *Sindacato più o meno rigoroso con riguardo a leggi provvedimento di sanatoria ed alla garanzia dei principi di eguaglianza, imparzialità e buon andamento*, *Giur. Cost.*, 1999, 1137; C. PINELLI, *Cronaca di uno scrutinio stretto annunciato*, *ivi*, 2010, 3739; L. CARLASSARE, *Garanzia dei diritti e leggi-provvedimento*, *ivi*, 1986, 1493.

⁷⁶ See, most recently, judgment no. 49/2021 (with extensive references to concurring precedents), according to which, since the constitutionality of laws in lieu of measures must be examined “in relation to their specific content”, “the criteria that inspired the choices underlying such laws, as well as the relevant implementation methods, must be clearly identifiable”, “through the identification of the interests to be protected and the rationale of the rule that can be inferred from the same, also by way of interpretation, on the basis of the ordinary hermeneutical tools”. On the matter regarding whether or not a duty to provide reasons may be appropriate, C. MORTATI, *Osservazioni sul sindacato di costituzionalità delle leggi provvedimento*, in *Studi in memoria di Tullio Ascarelli*, III, Milano 1969; V. CRISAFULLI, *Sulla motivazione degli atti legislativi*, in *Riv. dir. pubbl.*, I, 1937, pp. 415-444. N. LUPO, *Spunti sulla motivazione della legge, dal punto di un legislatore sempre più vincolato*, in F. FERRARO, L. ZORZETTO (eds.), *La motivazione delle leggi*, Giappichelli, 2018, 50; M. PICCHI, *L'obbligo di motivazione delle leggi*, Milano, 2011, 21 ss.

⁷⁷ Thus Italian Constitutional Court No 66/92.

⁷⁸ See Italian Constitutional Court No 168/2020.

⁷⁹ See, among others, A. PIZZORUSSO, *Il controllo della Corte costituzionale sull'uso della discrezionalità legislativa*, *Riv. trim. proc. civ.*, 1986, 798 et seq. As seen above, “on abuses of power on the part of the legislator”, C. MORTATI, *Le leggi provvedimento*, above.

legibus solutus) and the outdated principle whereby States shall not be held accountable deriving from Kelsen's thinking. This approach fails to consider the new principles (and relevant changes in the balance between State powers and individual freedoms) enshrined in the Italian Constitution, nor those deriving from the process of European integration, which are pushing for the incorporation of common legal models in each and every domestic system⁸⁰, suggesting that the rule of law shall be binding not only on the executive and judicial powers, but also the legislative one.

Thus, it is precisely the necessary balancing act between different powers, as well as *vis-à-vis* citizens, that makes the notion whereby States would effectively benefit from immunity against any infringements of rights deriving from "harmful laws" - the illegitimacy of which was declared by the competent constitutional body (i.e., the Italian Constitutional Court)⁸¹ - questionable, not to say "odious".

In conclusion, in the light of the considerations set out above, while not subscribing to the strongest critiques⁸², the concerns expressed by legal scholars with regard to the dangers that may derive from an unsupervised recourse to laws *in lieu* of measures and *ad personam* laws (*leggi individuali*) seem valid.

In particular, in my view, there are two key problematic questions in the legal system.

Firstly, while, as stated above, the admissibility of laws *in lieu* of measures cannot be denied as a matter of principle even in matters typically falling within the remit of the public administration, when it comes to decision-making, laws, as such, will not provide the same guarantees underpinning the procedure followed by the public administration in its decision-making. Secondly, the current system of judicial protections, in my view, does not adequately outweigh risks of arbitrariness, which - as the Italian Constitutional Court itself recognised - are inherent in any law containing a measure. This is because an effective intervention against potential arbitrary exercises of power would require for the relevant judicial protections to be adjusted to the specific features of the phenomenon in question, which needs careful "monitoring".

⁸⁰ In particular, on the subject of judicial cross-fertilisation, E. AUTORINO, *Diritti fondamentali e "cross fertilization": il ruolo delle Corti supreme*, *Dir. pubbl. comp. eur.*, 2014, IV, p. 2057 et seq.

⁸¹ In relation to legal scholars' misgivings around the notion of such immunity, see V. ROPPO, *Appunti in tema di "illecito comunitario" e "illecito costituzionale" del legislatore*, *Danno resp.* 1998, 961; A. PIZZORUSSO, *La responsabilità dello Stato per atti legislativi in Italia*, *Foro it.*, V, 2003, 176 et seq. A. PACE, *Problematica delle libertà costituzionali. Parte generale*, Padova, 2003, 283; G. TESAURO, *Sovranità degli stati e integrazione europea*, Napoli, 2006, 27; F. GALGANO, *I fatti illeciti*, Padova, 2009, 56.

⁸² Often, in my opinion, these critiques are based on a preconceived anti-parliamentary polemic or, on the other hand, an exasperated anti-formalism approach (in particular, to the extent they fail to account for the fact that the possibility of measures contained in acts having the force of law as such is recognised in the Italian Constitution itself).

This is also with a view to ensuring that our domestic legal system is fully in line with the requirements of full jurisdiction under EU law⁸³, and ensuring compliance with (and, why not, anticipate) the developments of the case law of the European Courts⁸⁴.

Moreover, drawing on the experience of other legal systems, legal scholars have been putting forward various proposals, such as, for example, (i) introducing specific procedures governing the process by which laws are drafted; (ii) imposing a duty, for the legislator, to provide reasons (for any laws *in lieu* of measures or *ad personam* laws); (iii) revised mechanisms regulating access to the Italian Constitutional Court; and (iv) ensuring compensation as a necessary protection of the rights directly damaged by any law that was found unconstitutional.

Any corrective amendments in this area would obviously raise complex questions, given the delicate nature of the balances to be affected and the “wheels” to be turned. But the “stakes” are too high to let go of this debate, as it is a matter of keeping alive the eternal goal of settling the dynamic between “law” and “justice”, after all.

⁸³ Under the principle of full jurisdiction, domestic legal systems are under a duty to provide full protection of individual rights that are affected by acts of public authorities, irrespective of whether such acts take the form of legislative or administrative measures (cf. CJEU, Grand Chamber, 18 October 2011, cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus and others*, and CJEU sect. IV, 16 February 2012, case C-182/2010, *Solvay and others*). In particular, the Court of Justice of the EU already expressed some concerns as to the use of legislative acts *in lieu* of administrative measures, as potential attempts to circumvent the substantive and procedural rules applying to administrative measures as a way to afford protection to any private parties affected by administrative acts having a specific and concrete content (see CJEU, 30 April 2009, c.75/08, Mellor). Another “warning” from European case law can be noted, where it specified, by way of reminder, that any laws interfering with the administration of justice, “with a view to influencing the judicial settlement of a dispute”, are prohibited unless “compelling reasons of public interest” exist (see ECHR, Sect. II, 14 December 2012, *Arras v. Italy*).

⁸⁴ In other words, to avoid the risk that, as so many times happened on the subject of free competition, interventions of the European Court are required in order to identify and draw attention on specific breaches of the law on the part of domestic systems.