

The so-called “leggi provvedimento”
and labour law.

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1. *The relevance/materiality of leggi provvedimento for market regulation.*

The frequent deployment of leggi provvedimento (laws having highly specific content) on labour matters, concerning an individual case or a few cases, and always bespoke for a specific industry is such a key feature of the present practices that it prompts verification of whether it is an Italian only phenomenon or rather cross-border, with the associated wounds inflicted to equality or to the overall harmonized regulation are typical of various systems, especially in evolved capitalist Countries, and with common difficulties in reaching any stable balance between business promotion, especially of the most important companies, on the one hand and the defence of workers’ interests and pay levels. In its own right, the blatant renunciation of general application and abstractness of the rules is so frequent and well-established as it still is the cause of misalignment in the system, which is often eluded through strategies addressing isolated matters that are managed differently and with specific solutions. The discomfort of the interpreters of the law combines with the awareness of the importance of this phenomenon in modern society, in which any traditionalist interpretation of the law would be outdated and even cloying.

Not only must the reasons of *jus singulare* be verified and the purposes of Parliaments and Governments be investigated, also as regards the promotion of economic freedoms pursued by the European Union, but any limits of these

specifically targeted laws departing from general applicability must be identified and the extent of any admissibility of said temptations in constitutional terms and from an EU perspective must be assessed. Ultimately, due to the unavoidable link between social protection and competition development, labour law craves harmonized setting, to protect competition; apparently at least, those needs are even more pronounced in the public scope, for the necessary impartiality of the public administration and to the enhancement of its good operation. Likewise, the condition of workers cannot be much different, especially in this period of crisis, seeking the best possible job, often to the detriment or at least conflicting with the opportunities of others.

Labour law and *leggi provvedimento* cannot be easily reconciled, although the latter have ... undeserved success in the Italian experience and meet the political system's desire to be the leading actor, affected by emotional approaches and impression-making choices, such as the one regarding the old Spa Alitalia and all the structures resulting therefrom, constantly failing to succeed. A similar consideration can be made about the public employment relationship, at least for the heedless experimentations on recruitment¹, which have not always been objected to with sufficient energy², especially when denying the centrality of

¹ See the recent Italian Constitutional Court ruling no. 275 of 21 December 2020, in *Variar temi dir. lav., website*, 2020, with a heedless decision in favour of a typical *legge provvedimento* and maintaining the principle that “there are no grounds for the matter of unconstitutionality of Article 1, paragraph 605 of Italian Law no. 205 of 2017, which, as regards a competitive procedure for the recruitment of executives in charge of general and administrative services in the school sector, admits the participation of administrative assistants with no specialist university degree, as the law may well provide for conditions for participation intended to give value to past experience gained in the administration itself.

² See the Italian Constitutional Court ruling no. 106 of 2 May 2019, in *Variar. temi dir. lav., website*, 2019, which reads “there are no grounds for the matter of unconstitutionality of Article 1, paragraph 88, letter b), of Italian Law no. 107 of 2015, which, in laying down the criteria for admission to the competitive procedure for recruitment of school managers, gives the possibility to some categories of candidates to participate in intensive training schemes, for eligibility to be tenured”.

competitive procedures³ and devising alternative solutions, sometimes of a patronage nature⁴.

The sometimes less than assertive criticism expressed by the Constitutional Court case law about *leggi provvedimento* is not the objective of this seminar, at least because any polemic intent would be rather predictable; it is no news that our system is poorly able to respond to the legislator temptations of making targeted choices in order to steer the fate of small groups of workers or of firms that are deemed strategic, which, for this reason only, are deemed deserving a different treatment. Albeit important in terms of values and necessary from a natural law perspective, defence of equality does not require any comparative law analysis and the only obstacle it has to overcome is poor consistency with the material constitution. If anything, the link between labour law and competition (between enterprises but also between workers or job seekers) prompts us to wonder what institutional and organizational impact may be generated by justice injuries, with *jus singulare* special law measures intended to favour sectoral interests.

It would be quite too much asking evolved capitalist Countries to abstain from heavily stepping in with regulatory measures aimed at specific instances and the European Union itself has not always proved eager to handle the matter, with uneven practices in terms of State aids, which sometimes have been poorly effective in the case of Spa Alitalia and its successors. At least, it must be understood whether *leggi provvedimento* are a factor of structural disturbance in allocating opportunities or a marginal and occasional factor within a rational legislative and regulatory framework pursuing equality between firms and workers. Both on the internal constitutional front and on the on the European one, renouncing the general application and abstractedness of rules is an unavoidable consequence of this society resting on the negotiation between collective and

³ See the Italian Constitutional Court ruling no. 199 of 2 September 2020, in *Variaz. temi dir. lav., website*, 2020, which reads “Article 14 of law no. 1 issued by the Sicily Regional government in 2019 is unconstitutional because a public competitive procedure must be held, under Article 97, paragraph 4 of the Italian Constitution, if a temporary employment contract is converted into a permanent employment contract, having specific regard to forestry personnel”.

⁴ See the Italian Constitutional Court ruling no. 36 of 27 February 2020, in *Variaz. temi dir. lav., website*, 2020.

public expectations, with a delicate and far from unbiased mediation by institutions that are conditioned by organized and active groups.

Nonetheless, besides sorting *jus singulare* assumptions, it would be useful to understand what their impact is and whether competition constraining is marginal or a structural consequence of sectoral measures with pre-determined addressees interacting with the related and planned sacrifice of justice and system balance. At least for those who still treasure a somewhat outdated view of abstractness, seeing it being out of the advantage of the specific case is always a wound inflicted to the rational manner of setting the exercise of the public power to regulate and to define what is lawful. In this regard, the unscrupulous approach of many Italian measures is the expression of realism, however without giving up the ideal model rules creation should be inspired by. Assessing how much of this is left in today's society deserves some thought able to leave behind illusions but not ideals.

2. Leggi provvedimento, "impossible" layoffs and regulation of large company crisis departing from general applicability.

To a large extent, "leggi provvedimento" have been the subject of historical review in our debate, at least because of that lucky title, which has almost become a symbol of the legislator's intervention in corporate crises. The reasons for the delay in Italy, typical of the 70s and 80s, in converting "impossible" collective "layoffs" into redundancies regulated by generally applicable legislation may be discussed. However, the lack thereof had caused that vacancy to be filled by unavoidable players, such as the courts, triggered theoretical considerations, trade union agreements, especially inter-confederations ones; on the other hand, all these contributions were dominated by rule-imposing measures, seeking, for years and years, occasional solutions, mostly through various wage protection schemes, to preserve doomed employment. Now, in addressing such a rough topic, to a larger extent than even by the Constitution or by EU Directives, the 1991 legislator was influenced by the need to intervene on a composite regulation set comprising several layers of leggi provvedimento; the

immediate goals was to overcome the upcoming and worrying economic crisis in the early 90s.

While Italian law no 223 of 1991 was intended to regulate redundancies that were “impossible” before, the related clarification took place with an internal alteration to the system. Specifically, the option for corporative governance of company crises was not questioned, one could say for micro-scale concerted actions. The 1991 legislator strengthened the instruments for alleged “proceduralization” of the company power and laid the foundations for dialogue with the trade unions, within the EU model and with a reasonable, albeit precarious, purpose, which was very soon belied by an endless series of decree-laws, which followed one another in the 90s, as one of the most successful seasons for *leggi provvedimento*, and therefore one of the most unfortunate ones, for those that seek a system relying of general applicability of regulations.

If serious difficulty is found by the relevant trade unions in governing workers’ behaviours, the overall scheme appeared to be, immediately after 1991, little productive and the “micro-scale concerted actions” system caused significant tensions. The frequent uncomfortable position of the trade unions in sizing down individuals’ disagreement brought to the surface the partial inconsistency of Italian Law no. 223 of 1991 with the economic and social scenario of the time and that can frustrate the achievement of the objectives pursued in 1991. The previous concept of “impossible” layoffs and the trust in *leggi provvedimento* have remained in the imagination of companies and trade unions that wished to move mediation out of the natural negotiation model towards political balances with the related damage to public resources and with the intervention of Parliament, seeking some ephemeral popularity, to the detriment of its institutional role.

Any efficient control on general interest lacked back then and is still lacking today, in the procedures for collective lay-off of many workers, in which the synthesis of private rights occurs to the detriment of public finances, using welfare schemes outside their stable conditions. If serious difficulty is found by the relevant trade unions in governing workers’ behaviours, the system is little productive and the “micro-scale concerted actions” system shows significant tensions, seeking a solution given by a specific regulation and, therefore, very

often, by leggi provvedimento outside general parameters and rather aimed at financial acrobatics.

Those tendencies firmly established after 1991, with wider and wider departure the generally applicable rules, often born of strategies aimed at reaching an agreement no matter what, even an unlawful one, and pursuing the planned difference in treatment, continuing with the logics of “impossible” lay-offs and using wage supplementing schemes devoid of any selective criteria. The weakness of our system has always been the lack of a public entity able to oppose the consociationalist drift in negotiation, which was keener on making instrumental use of wage supplementing schemes, blatantly violating the rules and, at times, exceeding the limits of criminal unlawfulness. The problem goes beyond the assessment of Article 41 of the Constitution; for those that do not find the foundations of enterprise “functionalization” in it, Italian Law no. 223 of 1991 is consistent with the protection of economic initiative freedom.

However, first of all leggi provvedimento constantly disown the spirit of Italian Law no. 223 of 1991 and of the EU legislation, moving mediation away from consensual “micro-basis concerted actions” towards rule-giving measures departing from the generally applicable legislation, with experimentation of ways to preserve employment against any realistic objective of promoting credible productive initiative. The public administration is supposed to guarantee and supervise actual pursuance by the wage supplementing schemes of the objectives set by the law; nonetheless, it is the law itself that subverts the system imposing case-specific and occasional rules.

Bending law instruments to new needs by loosening the eligibility requirements for welfare benefits and widening the number of those to be protected has multiplied differences. Departure from and defence of the (somewhat imaginary) centrality of the industrial sector have meant maintaining the status quo, refusing to see the need spreading to workers at commercial businesses, at the many public establishments exposed to contraction in consumption, at cooperatives companies that are used to participating in procurement procedures that are less and less attractive because of the lower solvency of customers. If the bankruptcy law has fostered habitual use of

questionable forms of agreements with creditors, aimed at protecting large companies to the detriment of those that, after providing them with services or supplying them with goods, made the only mistake of ... choosing the wrong debtor, the departure proposed by *leggi provvedimento* was the emblem of the refusal to see the crisis that started in 2008 in its objective features, as a radical transformation of the productive system, with many large-sized companies losing reliability and often allowed to have their creditors bear the consequences of their improvidence.

All the more so, after 2008 and the epidemic, any crisis should be an opportunity to for the selection of enterprises, based on their merit rather than promising impunity. It has been chosen not to see the dramatic situation of small enterprises, not all of which have a proclivity for unlawful practices and which are those most in need for help in their reorganization. The defence of small enterprises and their employees should have been the priority commitment of any Government that aimed at protecting consumption and the granular structure of the productive system. The intention of maintaining the status quo and poor understanding of equal treatment have led to an often confused regime, in which the traditional beneficiaries of social security (i.e. the employees of large manufacturing companies) have continued to receive the most considerable resources. The principle of equality has remained voiceless, to which departure from general applicability is hostile in its own right, and said departure has been the constant result of regulations intended for specific cases, with no general rearrangement of social security opportunities.

The use of departure from the generally applicable law was not imposed by the latest crisis, but started shortly after the entry into force of Italian Law no. 223 of 1991, so much so that “distinctions and separation between the various shock absorbers and strict time terms lasted (...) only a moment or maybe not even a moment, because, at the expiry of the single measures, maintaining that unforeseeable events had occurred, the combination and replacement of shock absorbers was immediately allowed and the terms were extended. I can be said that Italian Law no. 223 of 1991 has never been actually implemented”⁵. The

⁵ See: Miscione 2007, 710 *et seq.*

story of the evolution in the legislation is the story of an anti-system, if constant improvisation may be so called⁶.

3. *The old “flag carrier” and rescue attempts.*

Recently and in labour law, paradigmatic examples of the concept of *leggi provvedimento* are the specific laws about the old “flag carrier”, or what is left of it, after its unstoppable disorganization. Not coincidentally, the problem should attract the attention of several Italian scholars at this seminar, not only for the importance of the legal paradigm, but also because the questionable measures implemented potentially collide with the Italian Constitution and EU law principles. Besides the doubtful compatibility of many initiatives with the EU standards for State aid, a disputed matter is also the stated will to grant a preferential treatment, because of an alleged public need for continuation of air transportation. As that need cannot be identified in the need for air transportation stability, which could well be ensured by other players, also as regards the so-called territorial continuity regime, we are back to the traditional matter of “impossible layoffs”, because of the pressure exercised on the public opinion by workers (with some overstatement in this case). It must be wondered why they obtained resources and protection that are not given to all those having employment troubles, who, for the most part, do not have the same demerit in terms of efficiency and diligence. As they - somewhat instrumentally - invoke the universality of income protection measures, the many *leggi provvedimento* sound like a confession of guilty indulgence towards populist strategies. Ultimately, need is irrespective of the latest job position and the traditional setting of our law whereby the number of people experiencing difficulties should be grounds for a different and more favourable treatment is irrational in itself and contrary to substantial justice.

To the contrary, income protection measures should aim at the utmost simplicity, in order to pursue a decent level of efficiency. Indeed, social security measures touch very sensitive areas, bordering material household needs, when

⁶ See: Miscione 2012, 5 *et seq.*

not poverty, and should ensure linearity and speed, in order for workers' needs to be met in a short time. In terms of redistributive justice, the condition of workers must be seen on a par with equality, the natural reference point in financial aid. For example, without small enterprises and if small enterprises are not assisted to reach any acceptable legitimacy, our Country has not much hope. Indeed, especially in the last few years, we have been witnessing a sort of rupture in the enterprise system, with a drastic divide between those excluded from the possibility to compete and those able to face competition, with reasonable probability of success and with acceptable legitimacy. Our law must be selective in addressing the fate of economic agents, ensuring survival based on merit and this is impossible if *leggi provvedimento* remain.

These guidelines have been forgotten in the following measures about the old flag carrier and the well-known defence argument, namely that the reason would lie in the alleged strategic importance of this company, is utterly groundless, considering continuous failure despite the many transactions, arranged by targeted provisions, with preferential sectoral treatments, often having questionable consistency with the EU law and with the conflicting outcomes of the case law⁷, especially on the concept of business unit transfer and on the consistency with the EU law of Italian decree-law no. 185 of 2008, which was converted, with amendments, by Italian law no. 2 of 2009. The problem is general and it is the institutional justification for repeated preferential treatments granted to an enterprise and, consequently, to its employees, in a situation of overall and crosswise difficulties in the labour market as a whole, with considerable conditions of need. This instance may occur again in these weeks (March 2021), with yet another *legge provvedimento* coming up, while there is a very realistic expectation of hundreds of thousands of layoffs affecting people that are treated differently and threatened by the epidemic in any and all productive sectors.

⁷ See Law Courts of Civitavecchia, judgment of 13 September 2018, in *Variar. temi dir. lav., website*, 2018, which reads “Italian decree-law no. 185 of 2008, converted, with amendments by Italian law no. 2 of 2009, is not compliant with the EU Law in the part where it establishes that the transfers of assets, and specifically airplanes, made by a well-known Italian company experiencing a crisis, are not transfers of business units, under Article 2112 of the Italian Civil Code, as the provision complies with paragraph 5 of Directive 2001/23 /EC”. The aforementioned judgement is to the opposite effect versus those issued by the Law Courts of Civitavecchia on 11 January 2008, on 1 February 2018 and on 15 February 2018, in *Variar. temi dir. lav., website*, 2018. .

Following the same political orientation of very varied parliamentary majorities, “impossible” “layoffs” and “bankruptcies” are accepted for the old “flag carrier”, conflicting with objective economic indicators and with the never-ending and far from consistent series of proposed solutions, due only to fear of unpopularity, certainly not to the belief (in itself indefensible) that the remains of the old flag carrier may be material for our economy. Rather, the use of the term “enterprise” is surprising, considering its degraded structure, bound, as far as memory goes, to make unavoidable, if not planned, losses, with consequent non-applicability of Article 2082 of the Italian Civil Code, because of the lack of any economic character. With crosswise accountability lying with the entire structure of the State-as-a-person and with insane choices made over and over again and mostly in full awareness, *leggi provvedimento* have proved the structural difference between people in a situation of need. The constant asymmetric protection of some people going on for decades has highlighted the much more limited resources of *ius commune* and, therefore, of those that must be satisfied with said resources, when facing occupational issues. Quite the symbol of the degeneration in our institutional system, the handling of this matter is deplorable, first of all because of the method used, and then for its outcomes.

4. A specific regulation on some airlines and a precisely targeted social clause

Albeit somewhat stretching the concept of *legge provvedimento*, as several parties apparently undetermined, although quite precisely identifiable, are involved, the recent law regulating remuneration for airline employees can be mentioned, at least due to the evident and direct punitive goal against some companies, for example those that are used to apply ... the Irish law to employment relationships. However, the regulation departing from general applicability concerns several firms rather than a single case, albeit with an obvious sectoral target and with just as obvious purposes of forced rebalance of business opportunities.

With no clear link to the epidemic⁸ and, therefore, raising may doubts about the reasons for urgency justifying the use of a decree-law, Article 203 of Decree-Law no. 34 of 2020, converted with amendments by Law no. 77 of 2020, introduced a so-called social clause on air transportation, providing for the obligation lying with air companies having their “home base in Italy” to pay “remuneration treatments in any case not lower than the minimum ones laid down by the Italian national collective bargaining agreement for the sector signed by the employers’ associations and the trade unions that are the comparatively most representative ones nationwide”, with a well-known expression about a selective parameter typical of the recent legislation. As a result of the trade union and judicial opposition on the behaviours of some foreign players operating in Italy⁹ and as a sign of the regulation on air carrier employees moving even farther away from the speciality¹⁰ of the Code of Navigation, Article 203 of the aforementioned decree-law borrows the structure of the most traditional so-called “social clauses”, starting from its reference to “remuneration treatments”, without following the model of Italian Legislative Decrees no. 50 of 2016, no. 112 of 2017 and no. 117 of 2017.

In terms of the parties the legislative act applies to, Article 203 of Italian Decree Law no. 34 of 2020 is somewhat puzzling, because of its deliberate intent to elude, first of all, the regulation on jurisdiction, which makes the relevance of Article 36, paragraph 1 of the Italian Constitution conditional, irrespective of the national law governing the employment relationship, for example under an express clause and the aircraft nationality criterion. If the problem concerns in general foreign companies operating in Italy, it becomes even more relevant as regards air traffic, not only because of the weakness affecting our players, but also because of the complexity generated precisely by the aircraft nationality.

In order for our legal system to be able to pursue realistic objectives of protection of weaker parties to the contract, the competent jurisdiction must be

⁸ If anything, that connection results from link set between Article 203 and Article 198 of Decree Law no. 34 of 2020. Article 198 concerns the so-called compensation fund for damage suffered by the airline industry because of the epidemic.

⁹ See App. Brescia 24 July 2019, in *Variuz. temi dir. lav., website*, 2019; Law Courts of Bergamo 30 March 2018, *ibid.*, 2018.

¹⁰ Moreover, Article 203 applies “to air carrier” that “operate and employ personnel in the Italian territory” and to their employees with “home base” in Italy.

Italian, as otherwise the necessary application rules would have no relevance and their purposes could not be achieved. Not coincidentally, Article 203 tries to find a workaround to the jurisdiction problem linking its application to administrative proceedings. Even before that, despite the very uncertain indications given by the case law¹¹, it establishes the existence of a “home base in Italy” as the condition for operation of the new social clause. Therefore, all the airline companies meeting that condition shall comply with the remuneration treatment provided for by the Italian collective bargaining agreement for every employee whose activity is linked to said “home base”. Indeed, despite the quite confusing use of terminology in Article 203, paragraph 1, its binding force is linked to that concept, under which the relevant item is “personnel deployed in the Italian territory”. Otherwise, the problem of aircraft being foreign territory would arise again in another form.

Regardless of the clear objective of helping a company that was concomitantly supported with public funds (i.e. the old “flag carrier”), Article 203 is not puzzling mainly for its laying down a “social clause”, as its purpose is merely to completed the approach underlying Article 36, paragraph 1, of the Italian Constitution, but rather for the tool chosen to ensure the provision effectiveness, with a workaround of the jurisdiction problem. Indeed, the application of Article 203 should be supervised by the competent administrative authorities, as provided for in paragraph 3¹², fully departing from the nature and objectives of the related proceedings, which have no connection whatsoever with employment relationships; not coincidentally, in an arbitrary manner, Article 203, paragraph 1, makes reference to Regulation (EU) no. 965 of 2012, which is in no way relevant to the labour scope¹³, as confirmed by Article 1, which identifies the Regulation subject-matter as “inspections of aircraft of operators under the safety

¹¹ See: Court of Justice, Second Chamber, 14 December 2017, C. - no. 168 of 2016 and C. – no. 169 of 2016, *Mr. Nogueira and Others vs. Ryanair designated activity company and Others*.

¹² Article 203, paragraph 3 reads that “within ninety days of the entry into force of this provision, the parties set out in paragraph 1, under penalty of revocation of the concessions, authorizations and certifications issued to them by the Italian administrative authority, shall inform the Italian Civil Aviation Authority (ENAC) that they are compliant with the obligations” laid down by Article 203 itself.

¹³ Regulation (EU) no. 965 of 5 October 2012, n. 965 lays down “technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council”.

oversight of another State”. As it would be unrealistic to make any link between safety (as considered by Regulation (EU) 965 of 2012) and determination of remuneration and, in particular, remuneration not lower than the one provided for by an Italian collective bargaining agreement, there is no reason to believe that failure to comply with Article 203 should prevent “the issue of the concessions, authorizations and certifications”¹⁴ required by the “EASA regulations or by the national legislation”, with the imposition of administrative penalties for violation of Article 203 with an activity carried out under “concessions, authorizations and certification not issued by the Italian administrative authority”¹⁵.

Its transformation into the supervisor of compliance with the “social clause” has nothing to do with the residual speciality of the air personnel relationship, which nearly disappeared many years ago. If anything, the intention is to elude the problem of identifying which court has competent jurisdiction on the relationship of those that leave from our airports; if the regulation effectiveness topic is shifted to the administrative side and the very possibility to operate in Italy is conditional to compliance with Article 203 and, that is to say, the very possibility to obtain the necessary authorization measures, or if administrative penalties are imposed in case of operations under “concessions, authorizations and certifications not issued by the (...) Italian authority”, jurisdiction is monopolized for our courts (administrative in the former case and ordinary in the latter case), which are unavoidably called to decide on disputes. Indeed, they are bound to concern the legitimacy of the measures adopted based on Article 203, paragraph 4, and of the penalties imposed under paragraph 5. For the Italian Courts, Article 203 is an overriding mandatory provision.

5. A famous steel plant.

¹⁴ This is what can be made out of Article 203, paragraph 4, which reads “the applications for concessions, authorizations or certifications” as in paragraph 1 shall be accompanied, under penalty of ineligibility for processing, by the communication to the Italian Civil Aviation Authority (ENAC) of the commitment to given personnel” overall remuneration that is not lower than the minimum one provided for by the” aforementioned collective bargaining agreement.

¹⁵ See Article 203, paragraph 5 of Italian Decree Law no. 34 of 2020.

Speaking of a typical *legge provvedimento*, on the work environment and on the protection of the health and safety of workers and of the inhabitants of a whole city, in the case of a serious situation and of a manufacturing plant accused of causing direct and immediate damage to health¹⁶, a recent decision of the Italian Constitutional Court made reference to the concept of striking a balance¹⁷, as “it cannot (...) be deemed that the legislator is abstractly precluded from taking action to safeguard production continuity in sectors that are strategic for the national economy and to ensure the associated levels of employment, establishing that any preventive seizures ordered by judicial authorities within criminal trials shall not prevent continuation of the business activity; nonetheless, that can be done only through a reasonable and proportionate balance of the constitutional values at stake”¹⁸. From a legal standpoint, the principle is acceptable and perhaps unavoidable; in case of conflict between constitutional canons, the debate synthesis is the responsibility of the law, which must operate in accordance with rational criteria precisely to ensure weighted abidance by all the factors relevant for public decision.

“Striking a balance” refers to rationality and requires equitable application of the full range of material constitutional provisions, in accordance with prudential views that cannot be defined beforehand, if not through a regulation that aims at finding some reconciliation, with the review performed by the Constitutional Court itself. Regardless any solutions, the possible conflict between constitutional provisions refers to the rationality of the ordinary legislator, and indeed there is hardly any other way. Furthermore, in the case examined, “the legislator ended up giving excessive weight to the interest to productive activity continuation, utterly neglecting the needs of inviolable constitutional rights to the protection of health and life itself (...), to which the right to work in a safe and hazard-free environment must be deemed indissolubly linked”¹⁹.

¹⁶ On the same episode, see the earlier ruling no. 85 of 9 May 2013 of the Italian Constitutional Court, in *Giorn. dir. amm.*, 2013, 750.

¹⁷ See the Italian Constitutional Court ruling no. 58 of 23 March 2018, in *Variuz. temi dir. lav., website*, 2018.

¹⁸ See Italian Constitutional Court ruling no. 58 of 23 March 2018, *cited*.

¹⁹ See Italian Constitutional Court ruling no. 58 of 23 March 2018, *cited*.

Moreover, although the matter was wrongly neglected in the aforementioned ruling²⁰, it is to be wondered whether it is possible to conceive any *legge provvedimento* departing from general applicability and concerning the protection of the environment, of an entire geographical area and of work environment, or whether the necessary reference to the principle of precaution may be a structural limit to similar unscrupulous legislative interventions, which may be intended to promote employment but are certainly not based on any rational comparison of interests. Primary interests, to protection of life itself, should be governed by general provisions, as their regulation cannot refer to single economic situations, due to the necessary grading of expectations giving the right value to fundamental ones.

Recently, an essential ... return to general principles occurred with an important and complex decision made by an administrative court²¹, which laid the basis for considerations starting from the Constitutional Court rulings exactly on the “sticking a balance” category, placing the reasoning core outside measures targeting specific cases and towards overall criteria of the legal system, giving the right value to the centrality physical safety protection. Not coincidentally, based on this thesis, the problem was seen in terms of a general institution, namely the legitimate exercise by the mayor of the power to issue a necessary and urgent order, protecting safety and with an assessment of the actual danger to be performed taking all due and careful account of scientific evidence. Needless to say, there the legal analysis stops and allows room for other branches of knowledge²².

Having withstood only the first review of the court of second instance²³, the decision deserves appreciation for its construction, although its conclusions rely on complex scientific matters. Most of all, if the decision does not take any

²⁰ See Italian Constitutional Court ruling no. 58 of 23 March 2018, *cited*.

²¹ See Regional Administrative Court of Puglia, Lecce, first chamber, ruling no. 249 of 13 February 2021, in *Variatz. temi dir. lav., website*, 2021.

²² See Regional Administrative Court of Puglia, Lecce, first chamber, ruling no. 249 of 13 February 2021, *cited*.

²³ See the Italian Council of State, fourth chamber, ruling no. 817 of 19 February 2021, in *Variatz. temi dir. lav., website*, 2021, which reads “the judgement issued about a well-known steel plant, the addressee of *leggi provvedimento*, does not deserve suspension by decree”. However, on interim suspension, see the Italian Council of State, fourth chamber, order no. 1275 of 12 March 2021, n. 1275, in *Variatz. temi dir. lav., website*, 2021.

direct stance on the traditional adoption of *leggi provvedimento* and, quite to contrary, proposes a line of reasoning that is carefully set to elude any contrasts with them²⁴, it brings attention back to administrative law provisions, and not only traditional ones, that have always been intended to consider public interest in its original conception, as it is for the mayor's power to adopt necessary and urgent orders²⁵. The trial debate is far from reaching any conclusion. Nonetheless, albeit destined to be further assessed, this precedent is appreciable as it does not limit the considerations on the steel company episode to *jus singulare*, as not only does it lift its gaze to the rights of the local community as a whole, but it also takes the invoked "striking balance" principle back to *ius commune* traditional measures.

Ultimately, putting aside the different indications given by the constitutional case law²⁶, the cultural problem posed by the steel company cannot be solved if its perspective or its employees' perspective only is considered, without seeing the matter as a dramatic intermingling of all points of view; one may wonder whether, in the experience of our law, that is possible with a *legge provvedimento*, forced to face and not able to overcome the strong assertion of some interests, to the detriment of other ones, specifically the interests to a healthy environment to live in; as hinted at by the decision of the administrative court of first instance²⁷, the more delicate the comparison the more necessary it is to entrust it to administrative proceedings, within which all points of view are allowed room, a result essentially prevented by *leggi provvedimento* and their unavoidable unilateral approach, as stated by the constitutional case law itself, albeit on less dramatic matters²⁸, invoking "strict scrutiny".

²⁴ See Regional Administrative Court of Puglia, Lecce, first chamber, ruling no. 249 of 13 February 2021, *cited*.

²⁵ Indeed, "the mayor's power to issue necessary and urgent orders is of a residual nature. The exercise of said power requires the necessity to handle, on an urgent basis and with *extra ordinem* instruments, exceptional and unforeseeable situations of present and imminent danger to public safety, which cannot be managed with the ordinary instruments provided for by the legal system. Those measures are connoted as provisional and temporary in terms of their effects, and as proportional to the danger that must be prevented" (see Italian Council of State, fifth chamber, ruling no. 5239 of 14 November 2017).

²⁶ See Italian Constitutional Court ruling no. 58 of 23 March 2018, *cited*; Italian Constitutional Court ruling no. 85 of 9 May 2013, *cited*.

²⁷ See Regional Administrative Court of Puglia, Lecce, first chamber, ruling no. 249 of 13 February 2021, *cited*.

²⁸ As said about local cultural and social initiatives, the "*legge provvedimento*, because it affects a limited number of parties and has a specific and practical content, requires strict scrutiny of its

6. *Civil servants, “leggi provvedimento” and the Constitutional Court case law.*

Occasionally only, the Constitutional Court case law has opposed the frequent *leggi provvedimento* regarding civil servants, due also to a questionable restrictive selection of this category: for example on the fate of *vicedirenti* (deputy managers in the Italian public service) it has been said that “the general and abstract extent of the disputed provision rules out its nature of *legge provvedimento*”, thus with no need for “any related constitutionality review concerning the assessment of abidance by limits, not only specific ones, such as that of compliance with the jurisdictional function, for decision on the disputes underway, but also general ones, and that is to say of the (...) reasonableness and non-arbitrariness”²⁹.

If sometimes the asserted existence of a *legge provvedimento* has indeed been upheld, as in the case of the “secretary-general of the Molise Regional Council”, it has also been added, astonishingly to say the least, that the impossibility of obtaining protection from the ordinary courts does not entail any violation of the right to judicial protection, but rather only the transfer of said protection into the scope of the constitutional court and that rules out that the transfer itself may be discriminatory or fit to alter equality of arms”³⁰. Better than many others, the ruling shows the unreliability of the constitutionality judgement itself, not only due to the impossibility for private citizens to directly challenge it and the utmost discretionality of the decision, but also due to the frequent absolving approach of the court rulings towards the political system, as confirmed by the aforementioned precedent. One may wonder who would be willing to

constitutionality, in terms of its being non-arbitrary. From this perspective, the legislative action violates Article 3 of the Italian Constitution, because the reason justifying the actual case does not emerge from its text or from the works for its preparation and it does not seem that the regional Council followed any objective and transparent criteria in choosing the beneficiaries of the grants in question. The legislative intervention ends up providing a privileged way to distribute money grants, with the interests of some collective parties prevailing over those, just as much deserving protection, of other entities that are excluded, and to the detriment of general interest” (see the Italian Constitutional Court ruling no. 137 of 8 May 2009, in *Giur. it. rep.*, 2009).

²⁹ See the Italian Constitutional Court ruling no. 214 of 3 October 2016, in *Giur. it. rep.*, 2016.

³⁰ See the Italian Constitutional Court, ruling no. 231 of 10 October 2014, in *Giur. it. rep.*, 2014.

forego the right to fair trial, which is laid down by a constitutional principle, which said precedent neglects.

Therefore, if it is not an exception, the assertion that “on the matter of unstable employment relationships with the public administration settled under the law, the discretionality scope of the legislator, both state and regional, albeit wide, is however subject to constitutional review, in the light of the principle of good administration and of impartiality, in terms of choice reasonableness (especially in case of *leggi provvedimento*)”³¹. Rather, the decision emphasizes that the constitutionality review should be more thorough for *leggi provvedimento* and, if this is not frequent in the case law, their adoption can be seen as a presumptive indicator of unconstitutionality, exactly because the administrative intervention is exempt from court review, which is the most frequent objective of the specific legislative intervention.

Not coincidentally it has been considered that “reserving all the jobs to be assigned with a competitive procedure to employees already on staff (...) is contrary to the open feature of the selection, which is an essential feature of public competitive procedures and its lacking violates Articles 3 and 97 of the Italian Constitution”, as the “*legge provvedimento* impacts on the effects of court judgments and interferes with exercise of the jurisdictional function”³², with a precise, albeit occasional, representation of the problem and of the consequences, in themselves disturbing, of the use of a measure having the force of law, to settle one specific conflict. For example, the provisions “aimed at overturning” jurisdictional final rulings obtained against newly set up and not insolvent entities (the Umberto I hospital firm) were deemed unconstitutional, with creditors forced to join the insolvency procedure started against the wound-up Firm”, violating “the constitutional responsibilities and powers of the judicial authority, which is in charge of protecting rights (...), as the issue of measures that can acquire the status of final judgement is one on the main tools to carry out the aforementioned

³¹ See the Italian Constitutional Court, ruling no. 153 of 29 May 1997, in *Giur. it. rep.*, 1997.

³² See the Italian Constitutional Court ruling no. 354 of 15 December 2010, in *Giur. it.*, 2011, 2260.

task”. Furthermore, “the results of the deployed defence were frustrated, whose final status creditors could reasonably rely on”³³.

Not only does the use of *leggi provvedimento* alter the equal treatment of workers, but it also affects the exercise of the jurisdictional function, preventing full review of deeds, as recently seen³⁴, in a quite blatant case, in the recruitment of school personnel. The order deserves to be considered for the overall assessment of the requirements that a *legge provvedimento* must be in order to be legitimate, so much so that it has been remarked that “it must be ensured (...) that benefits be not extended arbitrarily in favour of those that are not eligible for said benefits and violating the principle of meritocracy, but rather inequality must be made reasonable (...), because, as it is a matter of admission to a recruitment competitive procedure for civil service, the announcement of the procedure and the underlying provision (...) are (...) in violation of Article 3 of the Italian Constitution”. The above remark has general relevance, all the more so when interests are strong, as in the case of recruitment in the civil service, with appreciable sensitivities, hostile to the smallest unjustified preference, although there are many. Although not all of them can be attributed to *leggi provvedimento*, as they often stem from provisions concerning a wider group of people, they nonetheless impair fair competition between the unemployed, which is laid down by Articles 4 and 97 of the Italian Constitution. That guarantee is impossible for provisions regarding such limited and specific cases that their addressees can be identified³⁵.

7. The principles and the specific case, in the dialectic between jus dare and jus dicere.

³³ See the Italian Constitutional Court ruling no. 364 of 7 November 2007, in *Giur. it. rep.*, 2007.

³⁴ See Italian Council of State, sixth chamber, order no. 604 of 9 February 2021, in *Variar. temi dir. Lav., website*, 2021, which reads “ the matter of constitutionality of Article 1, paragraph 18-ter, of Italian decree law no. 126 of 2019, converted with amendments by Italian law no. 159 of 2019, is relevant and is not blatantly groundless, because, as it regulates a competitive procedure for teaching tenure putting the subsequent call for the competitive procedure under condition, it adopts irrational decisions, making reference to the fact that the qualification training required for participation ended before a fixed date, without considering all the rights of possible candidates”.

³⁵ See Italian Council of State, sixth chamber, no. 604 of 9 February 2021, ord., *cited*.

Although it may be unpleasant to admit, labour law largely governs competition, between enterprises to succeed on the market and between workers to achieve employment stability and a treatment that meets their expectations, with elements that are more and more frequent in today's society, in which nothing is given indefinitely and easily, both to enterprises and individuals with their personal expectations, with constant tension. Discussing about competition between employees or those seeking to become employees may seem odd, but it is quite the correct term when speaking of recruitment in the civil service, which has always been much sought after, all the more so because of the crises in the past decade or so. Evidence is given by the quoted rulings of the Constitutional Court, which have not always taken the trouble to prevent the legislator from altering, with targeted solutions, the allotment of the best opportunities, also to the detriment of the civil service and its good administration.

Catching the impact of the regulation of work conditions on enterprises' prospects is more frequent, especially in productive areas featuring high labour intensity and in which different solutions to the crises or for the prevention of occupational diseases cause direct fallouts on the economy. Rather, the matter of equality and its rational and foreseeable nature covers scopes far away from one another, albeit always interfering with financial prospects, which are certainly not the only considerations taken into account by the labour law but which are all the same present, even when combined with basic personal needs, such as health protection. Nevertheless, especially the former, in the mutual fight for professional success in a hostile setting, hint at the centrality of equality meant as contrary to *jus singulare*, which is the expression of a regime departing from general applicability, all the more so if reserved to one party only or to few identifiable ones.

No cloying idea of the general and abstract feature of the law is asserted, which opposes the many examples made, with many others than could be proposed; rather, the intention is to wonder whether any provision reserved for one enterprise or one or few workers is indeed tolerable considering the concept of labour law as the arbitrator of an economic conflict, often quite intense and not bound to become any less so in the future. This structural function calls for

enhanced consideration of equal treatment, as reasserted by the EU indications on State grants, not coincidentally hardly consistent with the interventions in favour of the old flag carrier or what is left of it. The EU approach of incentivizing freedoms emphasizes this dimension of equality, also as a guarantee of free competition, without any blatant and planned alterations. Ultimately, at various levels of danger and in different scopes, *leggi provvedimento* make specific aspect prevail on even rules, departing from general applicability to a maximum extent, i.e. all the way up to involving individual cases or, at least, known and recognizable groups

Without having to look at the EU constitutional system, also in the Italian one it may be wondered whether these practices and the shy responses to them can be acceptable, and whether, for example, the reiterated invocation of “rescues” (often extemporary) in the name of protection from occupational threats indeed causes irreparable damage to the very expectations for social fairness that focus on consistent principles being in force and supervised by judicial review, in its turn impacted by *leggi provvedimento*. Likewise, it cannot be deemed that the Constitutional Court rulings are sufficient when the natural competent court is not given the chance to decide on the matter. The assessment of the single case made by the legislator with the force of law sacrifices or rules out any court adversarial debate and, once again, it indirectly injures equality, which is prejudiced also in terms of review of the choices made. Lastly and not coincidentally, albeit regarding a provision that has nothing to do with labour law, the absolute lack of jurisdiction of the administrative courts has been recognized, as these matters are referred to said courts only to lay the required foundations to file a petition for a constitutionality ruling about a *legge provvedimento*³⁶.

Opposing *leggi provvedimento* is first of all a rejection of grounds of national interest, even when it is not patronage but aims at either more forceful expression of the political power, as in the case of well-identified replacements of top managers, or the solution of crises felt in the public awareness, with measures

³⁶ See the Italian Council of State, fourth chamber, order no 2409 of 22 March 2021, according to which, in order to have grounds to file a petition for a constitutionality ruling, an administrative deed to be challenged shall be identified. It is of no importance that, in the specific case, it was possible and even easy.

that are more favourable than those reserved to anyone in a state of need. National interest must be objected to by anyone supporting the natural law, as it requires reasoning by principles rather than by single specific cases. The criterion for dispute settlement in case of any climax in the problems of civil society must lie in the set principles, with the protection they provide for balanced development of civil interaction. The related regulation is in no way conflicting with contemporary needs, which invoke it in the name of equality. The possibility of deciding in the name of its authority is not in tune with the political system's crave for being at the center of the stage.

If the fight against *leggi provvedimento* is also a fight against the intrusiveness of the State-as-a-person, unavoidable defeat may well be expected and, ultimately, that is the case, if we are still discussing yet another targeted intervention to the benefit of the old flag carrier. Nevertheless, the defence of *jus dicere* is never meaningless and it must be seen as including each and every expression of critical analysis, not only of the case law, but even more importantly of the doctrine, as it pursues rational research on overall regulatory criteria, conflicting with any regulation triggered by pressure from the public opinion or the often deviating interests of constitutional Bodies. Ultimately, the discretionality temptations underlying *jus dare* are as frequent as dating long back in time, and only the concept of law as science can provide a credible alternative, in cultural terms, if not in phenomenological ones. Not coincidentally, even in this complex phase, the problem affects various and fundamental decisions, precisely inclined to emphasize overall parameters in regulatory choices³⁷.

The defence of jurisdiction and together of the law is denying their being subject to national interest, which is often confused with the occasional belief or immediate expediency, in order for provisions to be linked to thorough consideration and able to be part of a system. To the contrary, *jus singulare* is the most brutal expression of *jus dare* and especially shows the intensity of power, so much so that it not only departs from general criteria but does that for single specific cases or at least for cases that are precisely identifiable. Opposing similar practices is defending civilization of law and, consequently, of equality and,

³⁷ See Italian Council of State, sixth chamber, no. 604 of 9 February 2021, ord., *cited*.

ultimately, of the democratic nature of the State, against the contraposition between rulers (and their clients) and subjects. Unfortunately, similar points of view have not always had success in Italy, due to a widespread conception of the relationship with the public system as a claim, asking the public system for help (quite wrongly), rather than for justice.

Leggi provvedimenti are close to old conceptions of the State, going almost back to the financial one, or at least to *privilegium* as direct expression of political power and, thus, of the possible decision, with its discretionary components, whereas the law is and must be a rational synthesis, which may be questioned, but general, as it results from the assessment of a problem rather than of the person involved in the problem. This is an unrealistic view and one of the objectives of this meeting is to prove it. Nonetheless, as unrealistic (exactly) as our ideals may be, what would our poor human experience be without them?