"DEVOLUTION" AND BASIC RIGHTS BETWEEN UNITY, EQUALITY AND DIVERSITY: THE ITALIAN CASE *

Carlo Casonato **

1. Introduction

My paper aims at introducing the reader to the Italian approach to a constitutional oxymoron: unity and equality, on the one hand, diversity, on the other hand.

Any federalizing process tries to combine unity and diversity. As decentralization touches welfare as well, different regional governments could, and eventually will, provide for different levels of social right safeguard. As a result, inhabitants of different regions might enjoy different standards in their quality of life. One of the results of welfare devolution would be the differentiation in the quantity and quality of citizens' social benefits in the different regions. However, welfare devolution would be unconstitutional if it didn't guarantee a basic level of social rights[1].

Italian lawmakers working on constitutional amendments have made a clear distinction between the need to keep unchanged the First Part of the Constitution (which deals with constitutional rights) and the need to reform the Second Part of the Constitution (which deals with the regions and how powers are distributed). Such a clear distinction may, however, prove to be wishful thinking, as it is based on political and constitutional rhetoric.

From the citizens' point of view, their rights to basic equality of health care (commonly shared all over Italy) and the different levels of benefits (which will vary according to the different regions) all come under the umbrella of the general rules established under the unity (of the Italian state per se) and the diversity (of the regional powers).

Political devolution must be careful not to create excessive inequality among citizens, and one of the criteria that is of paramount importance when dealing with welfare is that the whole population should have access to equal basic health facilities. The concern is that regional governments could set up *vastly* different basic health standards, thus affecting the level of the essential services that their citizens enjoy.

While it is almost inevitable that welfare devolution will create differences in the citizens' access to some health facilities, the need to establish a basic level of care that can be improved - but not reduced - was recognised by all concerned. An unfair welfare devolution would be unconstitutional and thus open to legal challenges. For instance, Constitutional Court's rulings have safeguarded the interests of the citizens through the provision of special powers that have been left with the central government to intervene in regional areas of authority to mitigate the impact that welfare devolution may have on certain regions (Tosi, 2003).

Although one may be tempted to perceive this impact as exclusively negative for citizens, some positive elements could also derive from it.

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** Associate professor of Comparative Constitutional Law, University of Trento, Italy.

[1] For an overview of the problem see Diez Picazo 1999. Compare R. Bifulco 2003.

One of the potential aspects of devolution is the setting in motion of a virtuous circle of political responsibility. It is hoped that politicians will become more accurate in their analysis of citizens' needs, which in turn would result in a better-targeted response, improved planning, and greater efficiency. However, historically, Italian governments have shown a limited amount of political responsibility or effectiveness and, sadly, legal changes do not necessarily guarantee changes in political attitudes.
If properly thought out and implemented, political devolution could successfully result in savings for the taxpayers, as wasteful practices would be tackled. Italy is overburdened by a very time-consuming and money-wasting bureaucracy, which renders decision-making processes very cumbersome. Any reductions in red-tape are bound to be good for the state coffers and have positive fall out on the quality of life of the citizenry. A better utilisation of financial resources in health care and welfare services will be perceived by citizens as good housekeeping. Adapting the fiscal levy to different needs could be another advantage of devolution.
Although today's citizens are becoming better educated than their parents and grandparents, and have come to expect that elected politicians take a responsible approach to the administration of public finances, some politicians still have a casual approach. A tax increase might be perceived as yet another unfair burden on the citizens, even when such an increase could be justified by the need to offer better health and welfare services.
The government constitutional reform of 2001 in welfare devolution, which transfers more powers to Italian regions, provinces and municipalities, is a brave attempt to streamline procedures and remove red tape. Only time will tell if it has been successful.
In my paper I will try to offer an analysis, as unbiased as possible, of the main features, problems, and potential results of the devolution amendments, and the effects that they might have on citizens. I will also analyse the possibility to ensure that basic rights and standards of life are enjoyed equally all over Italy, and also potential additional local benefits, especially in the health field.

2. Historical background

Article 117 of the Italian Constitution listed basic guidelines on health services among the state legislation subjects . Whatever was not perceived to fall within the category of fundamental principles was given to the regions, with the proviso that regional legislation had to comply with the fundamental principles laid down in State legislation, and also be mindful of national and other regions' interests (*concurrent legislation*).
Until 2000, a general policy law clearly indicating the basic foundations of welfare at regional level was missing. This, though, did not prevent the Italian regions from legislating, basing their regional laws on existing national laws (Rossi 2004)[2].
The 1978 health reform (Act no. 833) attempted an overall reorganisation of health care. One of the major concerns of the reformers was to guarantee equal access to health care to all citizens, as provided for by Articles 3 and 32 of the Italian Constitution[3]. A total

[2] This referred to the 1975 Act no. 382 and the 1977 decree no. 616, which provided for the transfer of legislative powers regarding charities and health care and subsequent implementation.
[3] Art. 32:
'The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent'.

health care program included hospitals to treat diseases, as well as specialised centres for prevention and rehabilitation, all run by Local Health Units (*Unità Sanitarie Locali*). The reform gave municipalities administrative control over health services. The municipalities were in turn accountable to the regions, which were also responsible for regional health planning. The state retained the right to issue guidelines on national health policies (Bottari 2001, Balduzzi 2003)[4].

This new system was soon found to be impossible to manage effectively. Two main reasons were at the root of the failings of the new system: the improper utilisation of the new power allocations, on one hand, and the citizens' increased expectations, on the other. The outcome was the inability to reduce the existing health care differences found in the Italian regions, which, in turn, caused the national health care budget to soar.

An attempt to reduce health expenditure led to a second health reform in 1992-1993. This second reform reduced the municipalities' level of responsibility over health expenditures in favour of the regions, which also took on administrative responsibilities. The Local Health Units were replaced by Local Health Agencies (*Aziende Sanitarie Locali*), which were managed with business-like rules of efficiency and good housekeeping standards by professional administrators. The regional governments were in charge of defining regional health guidelines and planning, which were then implemented through the Local Health Agencies and their managing teams.

The basic right of citizens to the same standards of health care was laid down by a legislative decree in 1992 (no. 502), which bore in mind both the principles of equality of health treatments and cost-effectiveness. The legislative intent was that the government would guarantee common levels of health care through financial legislation[5]. The possibility to offer higher levels of health care at regional level was introduced, on condition that regions could independently budget for it either through savings in other budget areas, or through additional taxation (Bottari 2001). The legislative decree (no. 502) stipulated that the National Health Plan (establishing uniform levels of health care) had to be set up in agreement with the Regions and the Autonomous Provinces, through a special body, the *Conferenza permanente stato-regioni-province autonome*[6]. A Presidential decree dated December 24, 1992 that had established uniform levels of health care without previously reconciling them with the *Conferenza* was annulled by the

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Art. 3:

'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions.

It is the duty of the Republic to remove those obstacles of an economic and social nature which, really limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country'.

[4] See Act 23 December 1978, no. 833, Article 4, which provided that state laws set rules aimed at ensuring that the health conditions and guarantees are the same all over Italy; and Article 53, para. 4, lett. c) which speaks of a 'distribution of the national health fund among the regions, in order to create a fair organisation of services in the country'.

[5] Article 1 of the legislative decree dated 30 December 1992, no. 502, modified in 2001, which states that the National Health Service must ensure 'essential and uniform health care levels as defined in the national health plan in keeping with the principles of human dignity, health needs, equal access to health services, quality of treatment and their appropriateness to specific health requirements, as well as cost-effective utilisation of resources ': Mariani Castelli 2000.

[6] Article 1 adds that 'Whenever an agreement with *Conferenza* is not reached within 30 days from the date of presentation of the bill, the national executive decides independently'.

Constitutional Court in 1994 (sentence no. 116). Through this leading case, the Court stated that the definition of such levels of health care represents the national interest as it sets up common levels of basic care all over the state, but that, at the same time, it interferes with the regional authority over health care (including hospital care) that had been given to the regions before 2001. Such contradictions between national and regional authority required solution, and the *Conferenza* was the right body to do it. A unilateral national government decision would have been justified only if exceptional and well-motivated reasons had existed. The inability to reach an agreement at the *Conferenza* level was not considered enough to warrant such a decision. (Andronio 2003)[7].

The Bassanini reform of public administration of the late 1990s, which aimed to decentralise state powers as much as possible while keeping the Italian Constitution unchanged, strengthened the position of the regions towards local institutions and some ministerial powers. The reform granted to the regions all the powers that had not been specifically reserved to the state, and was also instrumental in promoting co-operation with private parties.

A 1999 decree by the then Health Minister, Ms Bindi was never fully implemented.

As we have seen, the concept of regional jurisdiction over health matters had been addressed well before the 2001 health reform. Although there had been instances where coherence had been somewhat overlooked, the overall trend was to recognise a growing regional role in administrative and legislative decisions whilst ensuring the uniformity of health treatment to the citizens (Pizzetti 2003). The potential conflict between the national interest to standardised levels of health care and the regional jurisdiction over health issues was solved with the help of co-operation through an agreed procedure the purpose of which was to ensure that the decisions were taken together in the respect of constitutional areas of competence and mutual interests.

3. The 2001 constitutional reform: equality and diversity

The Italian Constitution tries to satisfy citizens' need of equality and, at the same time, diversity. Basic welfare rights are listed in Article 117, third paragraph, which grants concurrent legislative powers to the regions 'except for the determination of the fundamental principles, which are laid down in State legislation'. On the other hand, the 'determination of the Essential Levels of Benefits [ELBs] relating to civil and social entitlements to be guaranteed throughout the national territory' – whatever this means – constitutes a matter left to the exclusive state legislative power (Article 117, second paragraph, m)[8].

It may be worth noting that Article 119 states that 'State legislation shall provide for an equalisation fund - with no allocation constraints - for the territories having lower per-capita taxable capacity' and that 'the State shall allocate supplementary resources and adopt special measures in favour of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of

[7] I'll come back to this. Please see Mazziotti di Celso 2003 about national interest.

[8] Regarding the uncertainty of the legal positions to be included within the civil and social rights, please refer to Principato 2002, among others.

their functions'[9]. Article 120 grants substitute powers to the state if 'the regions, metropolitan cities, provinces and municipalities fail to comply with international rules and treaties or EU legislation, or in the case of grave danger to public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities'. This substitute power has to be exercised 'in compliance with the principles of subsidiarity and of loyal cooperation' between the substituted entity and the government[10].

The constitutional philosophy underlying these provisions tries to combine standardised levels of protection of essential health care services with the possibility that the regions have of offering additional facilities to their citizens. Other than guaranteeing access to an essential level of health care (which is mandatory for the regions and is backed up by the state), the regions have the power to offer supplementary health services to their citizens.

4. A critical analysis of the constitutional reform

Based on this general, and therefore vague, constitutional framework, I will now analyse the meaning and the outcomes of the 2001 reform in more detail. I will briefly deal with the issue of the constitutionality of the constitutional reform. I will then focus on the concepts of health and the ELBs as entrenched in the Constitution and constructed by the doctrine and the Constitutional Court rulings.

I think I should start by saying that some critics have expressed serious doubts about the 2001 constitutional reform. Let me explain this better.

If I might go back for a minute to my introductory comments regarding the often forgotten relationship between the First and the Second Parts of the Italian Constitution (dealing respectively with constitutional rights; and with the regions and how powers are distributed), critics would say that the fundamental principles of the Constitution were the basis upon which a thorough reform was built in order to change some aspects of the Italian society.

The Constitution's recognition of inviolable human rights (Article 2), of the principles of formal and substantial equality, leading to the full development of every person (Article 3), and the list of rights and duties of the citizens all were the basis upon which the state was to build its 'long-awaited-for revolution'. The Constitution applies to every citizen, and hence a provision for different entitlements to rights and privileges based on areas of residence would have been perceived as profoundly unfair by the citizens. As it often happens, though, apparently contradictory statements are made. Article 5 of the Constitution declares that the Italian Republic is 'one and indivisible', but at the same time recognizes and promotes local autonomies (Pizzetti 2003; Mazziotti di Celso 2003). If we take into account that both the principle of citizen equality and Article 5 are listed in the fundamental principles of the Italian Constitution, then the 2001 constitutional reform might be deemed unconstitutional. Moreover, because of the 1988 decision of the Constitutional Court (which extended its own judicial review powers to the assessment of the validity of the law altering the Constitution) the possibility of a decision of unconstitutionality of some parts of the 2001 constitutional reform could not be abstractly excluded.

[9] See Bartole, Bin, Falcon, Tosi, 2003; Pizzetti 2003.
[10] See Bartole, Bin, Falcon, Tosi, 2003.

A critical conflict may exist in the relationship between the different scope of citizens' rights in different regions and the principle of citizens' equality. If not downright unconstitutional, the 2001 reform might be deemed inconsistent. Different standards in the protection of health, for instance, could generate problems regarding Article 32 (protection of health) as systematically interpreted in connection with Article 3 of the Constitution (equality).

5. The constitutional protection of health

Article 32 of the Italian Constitution states: 'The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigents'. Despite its literal meaning, this article certainly does not – and unfortunately could not – give a "right" to health to every Italian citizen. Health is not something we can be "given" by anyone, and we cannot sue anybody when we get the flu. It is interesting to notice that Article 32 does not speak of "health" with the same meaning that is used by the World Health Organisation (WHO), which defines health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'. If I had such a constitutional right to health, this paper would probably have never been written.

The best approach to the interpretation of article 32 is an analysis of Constitutional Court's rulings.

The "right to health" is a multi-faceted concept. The first right is undoubtedly that of not being harmed. In fact, the right of the citizens to be protected against physical and mental assault is an *erga omnes* right, directly guaranteed by the Italian Constitution and immediately enforceable (Constitutional Court ruling no. 445, 1990). The 'right to health', however, contains an element of potential personal freedom of choice as well, such as the right to refuse or accept medical treatment, or the choice of a physician that the citizen considers competent to cure him or her. Moreover, Article 32 speaks of the inalienable right of access to health services and the medical care and treatments they provide. It goes without saying that, in today's world, unconditional access to health services has to be juggled with other constraints, primarily of a financial nature.

Several Constitutional Court rulings (no. 445, 1990; no. 218, 1994; no. 304, 1994; no. 416, 1995; no. 267, 1998; no. 509,2000) have reinforced the concept that citizens' right of access to health services depends on the legislators, who have to bear in mind other constitutional interests, such as organizational priorities and limited financial resources, among others (Luciani, 2003; Morana 2002; Principato 2002; Molaschi FA 2003; D. Bifulco 2003; Pezzini 2003: Chieffi 2003). While allowing potentially ample Parliamentary discretion, the Court awarded itself the task of checking the soundness of Parliament's decisions. And in the very combination of health and equality the Constitutional Court occasionally adopted a severe approach.

6. An equal protection of the 'right to health'?

In the 1970s, an Italian physician, Dr. Di Bella, started testing his very own cancer cure (which consisted of melatonin, bromocriptine, somatostatin, and other drugs) on his patients. As always happens when there are strong emotions and hopes at play, public opinion and the media had mixed reactions, and even the two political sides took opposing views. After years of wrangling, the Italian Ministry of Health authorised

clinical trials. Finally, in 1998, the Ministry of Health issued a statement declaring that no evidence had been found to support Dr Di Bella's claim that his therapy could cure cancer.
During this time, an increasing number of patients asked to try Dr Di Bella's therapy, and volunteered to participate in trials because they were free. As the number of people accepted to participate in trials had to be kept to manageable levels, those who were excluded from the trials felt that they had been discriminated against and complained. The Italian Constitutional Court agreed with this, ruling that, by limiting the number of patients who could get the treatment free of charge, the government was enforcing economic discrimination and violating the principle of equality (decision 185/1998). The result of this meant that the Italian National Health Service has been offering this treatment free of charge to whomever has asked for it, and will have to do so for as long as the trials continue.
Whenever the right to health is at stake, the law cannot allow discrimination among the citizens based on their financial status: 'in extreme cases of tumour, with pressing therapeutic needs, and no alternative left, people can have expectations that are included in the minimal content of the right to health. The principle of equality means that the real possession of this fundamental right depending on patients' different financial situations is prohibited' (ruling no. 185, 1998).
The rationale of this decision makes clear again that every citizen has to be fully entitled to the same 'minimal content' of the right to have access to health services, and that no personal condition can justify a difference in enjoying this basic right.
These were the bases upon which an authoritative doctrine has extended the principle of equality beyond its minimal contents. 'The reference to a "minimal content" in health care is not relevant if the issue is dealt with in the perspective of equality: whether it is a minimal content or not, it is obvious that a certain level of health care must be ensured equally for everyone, regardless of their social, personal or financial status' (Luciani 2003, 68). According to this doctrine (which, though, appears to be unsupported in ruling no. 185 and in the Constitution), whatever difference existing in the access to health care based on social or financial conditions would be a violation of the principle of equality. However, given that the possibility of offering additional health services may be due to a higher regional income (which in itself depends on economic parameters, albeit not individual ones)[11], such interpretation would impose a total uniformity of services in the whole of the country, thus contradicting the basic philosophy behind the 2001 reform. With respect to the equality principle, the 2001 constitutional reform tried to guarantee a basic right to health services to every citizen, whatever his or her residency, permitting, however, regional differences in additional services. However, by opposing the 'minimal content' concept, Article 117 of the new Constitution opted for Essential Levels of Benefits (ELBs).

7. The ELBs: a bias in favour of the state?

The Italian legal literature is divided on the meaning of ELBs. Some give the word 'essential' the meaning of 'minimal', maintaining that there is no difference between the two. The majority of scholars, however, see a difference between the two concepts. In

[11] I'll come back to this later.

their opinion, an essential level includes a minimal one, but might provide something additional (Dal Canto 2004; Tosi 2003; D'Atena 2002).
This is not just a semantic problem.
We must remember that the 2001 constitutional reform considered the protection of health as a concurrent legal issue. The first argument tells us that, as the 'determination of the essential level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory' is among the powers the state has retained, the clear meaning of the wording becomes crucial in understanding the balance of legislative power between the central government and the regional governments.
If *essential* were a synonym of *minimal*, the state would have to limit its own legislative powers to the lowest possible denominator in order not to encroach on regional powers.
National laws giving patients access to additional medical treatments would be unconstitutional as they would be in violation of the separation of powers between the state and the regions. If, on the other hand, *essential* was not limited to the very *minimal* level, the state could legitimately offer additional health services, without infringing the Constitution and the regions' powers.
The controversy over the meaning of the words stems from the fact that the state may impose *essential levels* of health care that are higher than those *minimal levels* envisaged by the regions, implying that 'essential' is not covered by 'minimal'. The regions, as a result, are obliged to consider as *minimal levels* what that they would consider, in earnest, *essential*. The citizens, thus, benefit from a level of services that is higher than a potentially minimal level. (Tosi 2003; Principato 2002).
A second argument deals with the available criteria for defining ELBs. Such criteria are based on different and clashing interests: economic interests on the one hand, and medical or ethical on the other. As I said earlier, the Constitutional Court has repeatedly held that the right to health care must be balanced with other interests, namely with organizational and financial resources. The question that we must ask ourselves is whether this criterion could also be used to identify ELBs.
Of course, financial sustainability is a must in any contemporary welfare state; and the Italian Constitution has a clear article on this point[12].
Moreover, the 1992 Legislative Decree no. 502 regulating the health reform states that 'the individualisation of essential and uniform levels of health care provided by the National Health Service … has to be done at the same time as the finding of the financial resources destined to the National Health Service, bearing in mind the overall financial requirements as indicated in the government's budget'[13]. One could argue that one thing is to say that the ELB is limited by financial resources, yet another thing to assume that the very concept of the level has to be built in economic terms. Again, the issue is not merely theoretical. As an example, the 2002-2004 Regional Health Program of Lombardy, a region in Northern Italy, seems to be conceived first in economical terms: 'the system has to be sustainable in cost terms'. It is interesting to compare this with the

[12] Art. 81: 'The houses approve budgets and expenditure accounts submitted by the government every year.
Provisional use of budget funds cannot be allowed unless specified by law and for periods not exceeding a total of four months. It is not possible to introduce new taxes and new expenditures through the law that approves the budget.
Every law that involves new or increased expenditures must specify the means for meeting them.'
[13] Third par., Article 1, legislative decree dated 30 December 1992, no. 502.

health program of Emilia Romagna, another region in Northern Italy. Its 1999-2001 Regional Health Program takes a different view. The definition of 'essential' contained in the program is 'nothing more and nothing less than what people need, based on clinical, ethical, and social criteria'. Effectiveness, appropriateness, efficiency and the meeting of basic health requirements were the focus of the latter approach, giving the financial impact a limiting role (Balboni, 2004).

Based on a flexible and extensible formula, and dealing with a number of criteria, the power to determine the ELBs to be guaranteed throughout the national territory seems to give the state a very broad, discretionary and exclusive legislative power to the detriment, in a zero-sum game, of regions' powers.

A third argument deals with the possibility to list the determination of the ELBs as a legislative matter, capable of cross-impacting a variety of subjects. The majority of the Italian legal literature agrees with this, claiming that the determination of the ELBs does affect a plurality of matters[14]. The Constitutional Court too has held this point. In its leading ruling (no. 282 of 2002) it stated that the ELBs do not constitute a legislative matter per se, but they affect a state legislative power that touches the matters in which a certain essential content of the civil and social entitlements has to be guaranteed[15]. Essentiality takes on an exclusively relational meaning that is used to distinguish the services that have to be uniformly guaranteed as constitutional rights from the services that should be considered as additional, albeit relevant, for the enjoyment of such rights (Falcon 2001; Tosi 2001; Bin 2002; Mangiameli 2002; Andronio 2003; Marini 2002; Stella Richter 2003).

It is accepted that, while the general listing of ELBs has to be determined through law, their scope could be determined by government regulations (Molaschi 2003; Principato 2002). Some authors point out, though, that – whenever matters that are the exclusive jurisdiction of the national government have an impact on regional matters (such as ELBs) – it is nevertheless necessary to involve all relevant government institutions in the procedures to determine any given issue. (Falcon 2003)[16].

Furthermore, Article 117 of the Italian Constitution (which deals with ELBs) can be interpreted as a means to identify the goal to be reached by the state more than to indicate legislative divisions of power (Ferioli 2004, Andronio 2003). The purpose of the Constitution is to indicate the broad powers given to the national government; while the Constitutional Court serves as the watchdog of Constitution.

A similar thing is found in Article 72 of the German Constitution, which states that the German Federation has the concurrent power to legislate**,** together with the other legislative powers, when 'the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of a Land, necessitates it' (Ferioli 2004; Marini 2002). Notwithstanding some differences between the two Constitutions – which deal with a different concept of concurrent legislative

[14] Against it, see Rovagnati 2003.

[15] The Court explicitly states that 'it is a power within the jurisdiction of the national parliament apt to touch on every aspect that needs to be regulated by the parliament to ensure that every citizen enjoys a guaranteed level of health care all over the country, without any limitation whatsoever from the regional governments' (ruling no. 282, 2002 - D'Atena 2002; Gallo 2002; Morana 2002).

[16] I'll come back to this later.

powers and state substitute power (Balboni 2004) – the underlying interest in combining territorial decentralization and basic common rights appears to be very similar.
A fourth issue concerns the more or less detailed character that the state legislation may take on. As the jurisdiction over ELBs touches different issues, the law allows the national government to intervene on an unlimited list of issues that include both the concurrent (Article 117, par. 3) and those allocated to the regions as a residuary power (Article 117, par. 4)[17]. If the power of the national government to take precedence over regional legislative powers on ELBs was not limited to basic principles but could be extended to detailed issues, this could be seen as a means to deprive the regions of their powers to legislate on civil and social rights. The regions would, therefore, be severely limited in their normative capacities, as they would have to legislate according to state rules, but would also be affected from an administrative point of view, as they would have to guarantee an essential level of service as defined by the state (Ferioli 2004).
The Italian doctrine appears to be divided, even though the prevailing trend seems to be that the state has the power to promulgate detailed laws if this would be in the interest of a nation-wide guarantee on ELBs. (D'Aloia, 2003, Rovagnati, 2003. D'Atena, 2003). The allocation of authority that is provided for in broad terms would collapse if a more open-ended national legislation was introduced, to which Article 117, on ELBs would give licence to intervene in virtue of an exclusive jurisdiction across power lines, capable of dealing with any matter that could be perceives as belonging to the domain of civil and social rights.
The state power to determine and impose ELBs would therefore represent a sort of passepartout, capable of further limiting regional authority, or a matter of state supremacy (Bartole, Bin, Falcon, Tosi 2003). In the relationship between equality and diversity, the former would have priority over the latter.
When dealing with the potential power vested in the national government, when devolution and basic rights are at stake, at least two more constitutional articles should be remembered. As I mentioned earlier, Article 120 provides for a governmental substitute power to guarantee the basic levels of benefits relating to civil and social entitlements throughout Italy. Article 119 provides for a central equalisation fund, supplementary resources, and special measures in favour of sub-national entities 'to promote economic development along with social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of the rights of the person'.
It is not difficult to see a potentially ample discretionary power that has been vested in the state at the expenses of the regions. The text and its most common interpretation may lead to a pro-unity and pro-equality depiction of the 2001 constitutional reform at the expenses of its potentially pro-diversity spirit (Pizzetti 2003).
Yet, other points can be argued in order to balance the state v. regions game.

[17] Art. 117, paragraph 3:
'Concurring legislation applies to the following subject matters:
…; scientific and technological research and innovation support for productive sectors; health protection; nutrition; … In the subject matters covered by concurring legislation legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation'.
Art. 117, paragraph 4: 'The Regions have legislative powers in all subject matters that are not expressly covered by State legislation'.

8. The ELBs: a more balanced approach

What we have seen so far appears to weaken the strength of the 2001 reform. In fact, the state could get back, through the ELB clause, the powers that it had passed on to the regions, indirectly perhaps, but incisively nonetheless. The obvious risk is that the regional legislative power may be reduced to mere supplementary and operational roles, which would thwart the 2001 reform spirit (Rossi 2004). However, as a measure to avoid that risk, a couple of precautions have been set in place: the *procedure* through which ELBs are determined, and the role that the *Constitutional Court* has in controlling the way the state exercises its powers.

The already-mentioned 1992 Legislative Decree (no. 502) provides that the identification of the contents of the ELBs is carried out by the state, the regions and the autonomous provinces of Trento and Bolzano by mutual agreement. (The provinces of Trento and Bolzano are to all intents and purposes on the same level as regions under special statutes)[18]. The already mentioned 1994 Constitutional Court ruling has confirmed the constitutional nature of the principle of preventive co-operation. After new Title V of the Constitution came into effect, the Prime Ministerial decree – which identified the broad aspects specifying the discipline in detail (d.P.C.M. 29 November 2001 adopted on the basis of the law dated 16 November 2001, no. 405)[19] – was the result of the agreement between the national government, the regions and the autonomous provinces reached by the *Conferenza* in November 2001. The 2003 budget confirmed that the decree cannot be modified unless another agreement is reached between the state, the regions and the autonomous provinces[20]. Moreover, the Constitutional Court has confirmed the constitutional principle of the agreement for each ELB modification, and went as far as to declare unconstitutional the state law on ELBs that had been passed without prior agreement (sentence 88/2003). As we saw earlier for legislation passed before 2001, this principle is even more relevant after the constitutional changes.

A 2003 Constitutional Court ruling on substance abuse (no. 88) has confirmed that the principle of co-operation is further confirmed after the 2001 modification of Title V of the Constitution. Although it refers to issues that go beyond the scope of the ELBs listed in the already-mentioned Prime Ministerial Decree (of November 21st, 2001), the Court ruled that the substance abuse act was unconstitutional as it had not been the result of an agreement between the national government, the regions and the autonomous provinces. (Andronio 2003). The ruling made clear that illegitimacy was not due to a state limitation of the powers of the regions or the autonomous provinces in the interests of national social and health concerns, but rather because the procedures to come to an agreement with the regions and the autonomous provinces had not been followed.

This is yet another example of how *procedures that involve several institutional bodies*, as the result of the devolution process, warrant a stricter constitutional protection than a more inflexible scheme that had powers compartmentalized, given that it has become

[18] See Article 1 of the legislative decree dated 30 December 1992, no. 502.

[19] 'The state has established the rules governing the health system almost entirely, planning the clear definition of essential levels of care, the creation of a monitoring system, the specification of the role of regional programming in the supply of agreed health services ' (Rovagnati 2003).

[20] See Article 54, law 27 December 2002, no. 289 which provides that for future modifications to the annexes of the already-mentioned Prime Ministerial Decree have to be 'defined with a Prime Ministerial Decree, in agreement with *Conferenza permanente per i rapporti tra lo Stato, le Regioni e le Province autonome di Trento e di Bolzano'*.

accepted, in Italy as well, that many issues overlap boundaries between the legislative matters and the different levels of government.

ìIt is no accident that the same approach based on multi-level agreements has been adopted by the Constitutional Court on issues pertaining to the environment (Andronio 2003). Here again, as for the ELBs, the key words are loyal cooperation or "state comity" between the institutions. A definition of loyalty or comity is not easy, and the concept is better explained through actual court cases. It is worth remembering that the unilateral exercise of a state power (ex Article 120 of the Constitution) would be considered legitimate only if it were adequately justified and carefully tailored on the basis of strict national interests (ruling no. 16, 1994). If the regions do not have unconditional veto powers, the state cannot be legitimated in its unilateral right to impose its law based on the lack of an agreement between the institutions. The general principle of an agreement between the state and the regions appears the only legitimate means to avoid a stalemate[21].

Another argument that aims to reassess the state powers on ELBs revolves around the role of the Constitutional Court as a guarantor. In a series of lawsuits against the regions, the state defended the legitimacy of its own intervention basing it on Article 117 (second par., letter m) of the Constitution. The state maintained that it had full legislative powers in this matter because of the need to ensure a uniform essential level of care, which is directly linked to the guarantee of civil and social rights[22]. It is interesting to notice that the Constitutional Court has consistently rejected these claims, adopting a restricted interpretation of the national authority over ELBs. The simple reference to the adoption of measures taken to safeguard civil and social rights is insufficient to give legitimacy to state authority.

In order to find legitimacy, national legislation must address the identification of ELBs and not, as in the above-mentioned cases, additional aspects of health care – even though they may be part of an effort to create, or safeguard, civil rights (e.g. health care, welfare, child education, compensation for expropriation, etc.) (Ferioli Reg. 2004). The Constitutional Court has thus avoided the issue that national authority on ELBs could be extended in such a way as to overwhelm regional authority in matters pertaining to civil and social rights.

At this stage it may be worth remembering another aspect that the Constitutional Court has identified as an essential element of some decisions in the health field: the skills and the honesty of the physician who must decide what constitutes an adequate health-care measures to be prescribed (D'Atena 2002; Gallo 2002). A very important statement of the already-mentioned ruling no. 282 (2002) refers to the legal incapacity of the state or the regions to decide unilaterally on the appropriateness of a given therapy. Such a decision, in fact, cannot be based on political criteria, but rather on medical criteria. In the words of the Court. an intervention in the appropriateness of therapeutic choices cannot be based on lawmakers discretionary political assessments. On the contrary, the national

[21] See Bartole, Bin, Falcon, Tosi, 2003; Mazziotti di Celso 2003; Dickmann 2002.

[22] See Court rulings no. 312 (2003), 371 (2003), 16 (2004), 73 (2004) regarding respectively the constitutional legitimacy of a Bolzano provincial norm on the composition of the provincial telecommunication committee, a financial law provision regarding kindergartens, a regional law passed in Emilia Romagna on expropriations, the creation of a national fund for urban amelioration. See Mazziotti di Celso 2003; Scaccia 2003; Ferioli Reg. 2004.

government must acquire experimental evidence supplied by national and international institutions and bodies that have proven scientific expertise[23].
It is therefore evident that national and regional lawmakers are prevented from using either the ELB clause or the health safeguard clause to force or prohibit therapies in the absence of precise medical guidelines. Evidence-based medicine and its application by physicians who are required to utilise at best their medical skills and their consciences in the respect of their patients' will constitute the basis upon which a decision on whether a certain therapy is appropriate is built.
I should also mention that the national government jurisdiction, albeit detailed, refers to ELBs, and that few people, if any, would support inequality of very basic treatment for the citizens based on different regions of residence. The prevalence of the principle of equality rather than the principle of diversity appears to be upheld (Rossi 2003; Bifulco 2003)[24], at least in the current phase of the Italian federalizing process. Doubts might concentrate on the possible state abuse in the exercise of its powers more than the clause per se.
Whenever a constitutional clause may be interpreted in different ways, the law allows the Constitutional Court to be the arbiter between the state and the regions. As we have already seen, the Court has played an important role in the implementation of the reform of Title V of the Constitution and ensuring its unbiased application (D'Atena 2002).

9. The non-essential levels of benefits: additional regional services

The 2001 reform, in the light of the above-mentioned considerations, has identified a national plan that guarantees citizens a level of safeguard of their civil and social rights that is essential but not minimal all over the country, after it reached an agreement with the other levels of government (*Conferenza*). Additional services may be possible at the discretion of the regions. The Constitution, then, allows possible regional differences in the safeguarding of civil and social rights affected by the regions' legislative powers (Balboni 2001).
A recent development, though, may complicate matters. A 2003 ruling by the Constitutional Court (n. 331) denies the existence of a 'general principle to derogate *in melius*… that would allow the regions to modify state-defined standards'. This ruling concerned an environmental issue, namely the unconstitutionality of a regional law passed by Lombardy that imposed an increased distance (compared with the one imposed by the 2001 state law no. 36) between telecommunication plants and some public buildings such as kindergartens, schools and hospitals, because of electromagnetic radiation. The Lombard government maintained the legitimacy of its law on the basis of its interest in a superior and additional safeguarding of its population compared with what the central government had provided. The Court, however, declared the Lombard law

[23] A Marche regional law had prohibited, albeit temporarily and while waiting for more detailed medical data, electroshock treatment, prefrontal and trans-orbital lobotomy, and other similar surgical interventions. Such a prohibition has been deemed unconstitutional because " it is not founded nor it claims to be founded on specific technical or scientific information that have been verified by the relevant bodies, but, rather, it is an autonomous legislative decision, plainly meant as a precautionary measure, while future investigation is carried out by the national health service': ruling 26 June 2002, no. 282.

[24] The Court had already pointed out the need to guarantee basic equality in national health care legislation (ruling no. 75,1992: Rossi 2003, 16).

unconstitutional because the national law was 'the *point of equilibrium* of many different interlinked needs, such as environmental protection, health protection, and governance of the land'. When the question is seen in these terms, 'the addition becomes an alteration, and as such a violation, of the equilibrium that has been reached through the principles stated in the state law'.

As I said, this Court ruling is not about ELBs but, ultimately, about the citizens' interest in being free of potentially harmful radiations. It could then be fair to say that an increased safeguard in a given region could break the overall equilibrium that constitutes the basis of national legal strategy. If we look at this from this point of view, though, every state measure vis-à-vis social rights could be considered the result of 'an equilibrium of multiple interlinked needs ' pertaining, for example, to financial equilibrium, public health, and – as we saw earlier – the potential conflict between equality and diversity.

A big doubt remains when we consider the principle of the 'non derogation *in melius'* generally applicable to a sector where, for example, the safeguarding of health is a matter that comes under concurrent legislative authority, and the exclusive state authority is limited to the individuation of ELBs. An overall point of equilibrium could limit regional powers only when dealing with ELBs. The general application of the principle contained in the 2003 ruling (no. 331) to ELBs would render the explicit provision of the second paragraph of Article 117 meaningless[25].

Having said that, the authority that the regions have to fix additional levels of medical care for citizens who live there, regardless of any kind of equilibrium that may have been reached (other than ELBs) by the national government, appears to coincide with the current Constitutional plan.

Things could develop in one of two directions. On one hand, the regions could include new rights in their statutes, not provided for by the Constitution and available only in the regions. Such rights could be added, but they could not – as they would be unconstitutional – encroach on the list of rights and duties included in the Constitution, nor affect the national interests that have to be equally guaranteed all over the country[26].

On the other hand, the regions could guarantee higher levels than the essential ones, experimenting with original solutions for higher level of guarantee of civil and social rights (D'Aloia 2003; Tosi 2003). It is interesting to notice that some regions (Veneto, Valle d'Aosta, Umbria, Toscana, Lazio) have already acted to guarantee their citizens additional health services. These services vary a lot, from sport fitness certificates to outpatient rehabilitation, to unconventional medicine such as acupuncture and homeopathy[27].

10. Additional regional services and tax federalism – an overview

[25] However, it may be that, in some specific cases, the equilibrium reached at state level may be considered untouchable in a given region (Ferioli 2004).

[26] See an analysis of the Tuscan statute by Groppi, Rossi, Tarchi, 2002. For an overview, see Bifulco 2003.

[27] Some treatments are offered free of charge to all citizens of the region, while others are reserved to people with special medical needs (such as those suffering from a chronic disease), or because they have reached a certain age or are disabled (Ferioli 2004).

The ability that a region has to offer its citizens additional services is dependent on its tax income[28]. This rather obvious statement has fuelled concern that the 2001 constitutional reform may worsen the historical divide that has existed in Italy for a long time, between richer and poorer regions, resulting in discrimination among the Italian citizens.

Prior to the 2001 reform, the need to keep public expenditure under control and also to ensure that essential services were equally available to all the citizens had created a state tax policy that was heavily centralised; a policy that was legitimised by a particularly restrictive interpretation of Article 199 of the Constitution.[29] The regional income that should have been made of 'regional and national taxes' was replaced by numerous restricted state transfers and by state funds the main characteristics of which were extreme uncertainty and randomness[30]. Such centralised policy, though, did not help cost control, which became seriously unbalanced, nor a uniform increase in service quality. Centralisation also contributed to regional financial irresponsibility (given that the national government intervened to settle regional debts in health care programmes) and profound differences in the level of health care and social services, so much so that the concept of different regional citizenry models was introduced (Fargion 1997; AA.VV. 1997; ISAE 2004).

The reforms of the 1990s and of 2001 give increased legislative and financial autonomy to the regions, and an increased administrative function to local authorities, waging on decentralisation that should strengthen the political and financial responsibility of the agencies, and also improve the quality of services (Ferioli Reg 2004). Such a wager should not disrupt ELBs, which, if they could not be ensured through regional taxes, would be financed through equalising national funds provided for in Article 119.

Two options are now open before us. The first option is that ELBs be established at a higher than minimal level. Some regions with lower tax income would be unable to afford them and would have to turn to the equalising national fund for help. This would, in turn, create overall financial problems. Moreover, it would clash with the constitutional requirement of the lack of constraints on funding (Article 119), which would be systematically tied to the ELB guarantee.

The second option would be that the national government establishes ELBs at the lowest level, so that every region would be capable of affording them with their own tax income. This solution, though, would reduce the level of guaranteed health rights to a minimum level all over Italy. However, the possibility that richer regions have of offering their citizens additional services would increase the gap between the richer and the poorer regions[31].

The Constitutional Court has been called upon to find a common ground between the need to differentiate and the need to unify. From what we can gather from the rulings

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[28] The income of the regions comes from regional taxation, a share of national taxation, and the equalising fund (Mazziotti di Celso 2003; Nicolazzi 2002; Antonini Fin. 2003).

[29] Article 119, prior to the reform, stated:

' Regions enjoy financial autonomy as indicated by national laws, which fix the levels of contributions that are to be paid by the state, the provinces and the towns. Regions are entitled to their own taxation revenue and a share of national tax revenue, according to the needs of the regions, in order to meet their financial obligations'.

[30] Regional financial autonomy was, thus, characterised by its being subsidised by state finance, in contrast with the constitution prior to the 2001 reform (Ferioli Reg. 2004; Antonini 2003).

[31] See Tosi 2003; Pizzetti 2003.

produced so far, a rather enlarged interpretation seems to appear, whereby the national authority in the co-ordination of public finances is increased, and is accompanied by the confirmation of the prohibition of earmarking the destination of financial transfers from the national government to the regions[32].
It is still too early for us to know whether such a restrictive interpretation of the federalization of fiscal principles will be limited by the slow beginning of the reform implementation, when the regions don't yet have the political and structural ability to exercise their powers, and if the Court will, in the fullness of time, impose a stricter interpretation of the new Constitution.

11. Non-concluding remarks

There are still numerous uncertainties linked to the unity and equality vision versus the difference vision in the welfare model that was adopted in the 2001 reform. A cautious approach based on the clarifications given may be utilised to define the national ELBs, used in my paper in paradigmatic terms, which should contribute putting together the devolution spirit of reform of Part Two of the Constitution with the guarantee of equal rights retained in Part One.
It would appear that, through the significant help of the Constitutional Court, the new Title V of the Constitution has reached an equilibrium between the arguments for unity and equality on what is considered essential and that can be shared, and the arguments for diversity on what goes beyond that[33].
It is obvious that much will depend on national political will, and the capacity of the regions to plan carefully their financial and organisational requirements based on the effective need to face new challenges (Pizzetti 2003; Principato 2002).
Even more important, the overall responsibility of citizens, mass media, institutions, etc. will be instrumental in the success or failure of the reform.
Due to the fact that a general policy law does not exist, the Constitutional Court rulings have been so far very strict in recognising the regions' authority in dealing with financial matters.
Things appear far from final, and a "reform of the reform" cleared the first round of voting in the Lower House and Senate[34]. Such a constitutional bill gives the national government sole authority for the determination of 'fundamental principles for safeguarding *healt*' and gives the regions sole authority on '*health care and organisation*'.
It seems to me that the function of the national government had already been made clear by the existing Constitution (Article 117, 3rd paragraph of the Constitution).
As for the function of the regions, the modification may be the harbinger of problems rather than the solution. The safeguard of health undoubtedly refers to health care as well. The basic principles that govern *health* must therefore include *health care and organisation*[35]. As one of them is an integral part of the other, it is difficult to understand

[32] See, among others, rulings no. 296 (2002), no. 297 (2002), no. 370 (2003) and no. 37 (2004): Ferioli Reg 2004.
[33] See Pizzetti 2003; Cilione 2004, who disagree with this assessment.
[34] See http://web.unife.it/progetti/forumcostituzionale/.
[35] How should we interpret devolution vis-à-vis health services such as health care and hospital care? ' Is it a departure from the rules, in the sense that the principles can only refer to those aspects of health other than medical care. In this case, would the national government remain in charge of the discipline

why authority over them has been split between the state and the regions. One cannot help noticing that the reform of the reform tries to split what was previously joined, albeit from the point of view of subsidiarity.

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only, still in terms of fundamental principles, of the aspects pertaining to the prevention and the fight of major calamities, leaving to the regional authority the exclusive organisation of interventions? How would, then, be possible to distinguish the boundaries between the two, in the prevention of diseases such as SARS or AIDS and, conversely, of the health care for those affected by these diseases?': Cilione 2004, 470. See also Menichetti 2004.

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