

# Is Continuity Enough to Safeguard Equality? A Critique of the New Italian Age-based System of Long-term Care

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**SUMMARY:** 1. Introduction. – 2. Long-term Care as a Social Problem. – 3. Long-term Care as a Legal Problem. – 4. The First National Legal Reform of LTC in Italy. – 5. A Three-steps Critique of the New Italian Age-based LTC System. – 6. The Constitutionalization of Healthcare Universalism. – 7. The Construction of Old Age as a Legal Criterion to Access Welfare Provisions. – 8. The Constitutional Shortfalls of the Age-based Dualization of the Italian LTC System. – 9. Conclusions.

**ABSTRACT:** After having conceptualized Long-term Care (LTC) as a social and legal problem, the specificities of the Italian public action in this rising welfare area are highlighted. The paper offers a critique of the new age-based nature of the Italian LTC system. At its core, the analysis critically examines the principle of continuity as legal principle of the new Italian age-based system of LTC (Law 33/2023; D. 29/2024). By discussing the dualization of the legal reforms on disability and LTC for older people, the legal construction of old age as a legal criterion to access public welfare provision is interrogated through constitutional lenses. The paper argues that the legislative design of the principle of continuity is inconsistent with the constitutional principle of equality, as its protective function reveals to be nominalistic, and it discloses the risk of structural discrimination of people with disability who age prematurely.

## 1. Introduction

After many years of institutional inertia, the Italian legislator has planned and approved the first national legal framework on Long-term Care during the Covid-19 pandemic emergency. Long-term Care (LTC) can be generally understood as a set of integrated health and social care services and measures oriented to meet the numerous and complex needs of people who cannot perform autonomously activities of daily living (ADLs), such as personal care, eating and bathing, due to disabilities or old age-based impairments<sup>1</sup>. Traditionally, the family has played a major role in providing care, as the welfare states has implicitly overlooked the long-term care needs of fragile family members satisfied informally by female

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<sup>1</sup> B. Greve *Long-term Care. What is it about?*, in B. Greve (ed), *Long-term Care for the Elderly in Europe. Developments and Prospects*, Routledge, London, 2017, 1-7.

caregiving<sup>2</sup>. However, due to the ageing population and the transformations in family structures, the response to rising and complex long-term care needs is now a growing as a political concern all over Europe, and LTC is the most rapidly developing policy area in the EU<sup>3</sup>.

The institutional changes of LTC systems across European countries have been traditionally studied and compared by social scientists through the lenses of social policy analysis<sup>4</sup>. Particularly, feminist scholars have problematized the gender assumptions underlying mainstream policy categories, while illuminating how the welfare state relies on informal and unpaid reproductive labour that is legally constructed through care obligations within the family<sup>5</sup>. However, the constitutional and legal implications of policy shifts have only recently begun to be examined by legal scholars<sup>6</sup>. As of today, the juridical analysis of the legal issues arising from the recognition of LTC as a new social risk is yet anchored to doctrinal legal analysis<sup>7</sup>. Critical approaches to the evolving legal condition of older people with long-term care needs are only slightly cultivated under the umbrella of Elder Law or Ageing and the Law in several European scientific venues<sup>8</sup>. However, despite a growing interest is being registered, today a dedicated research environment is still missing in the Italian legal scholarship<sup>9</sup>.

As the objective of the ELVIS Project is to investigate the interplay between the law and the vulnerabilities of older people in society, this research paper is to be framed in a wider exploration of the new Italian legal reform of LTC that I carry in my doctoral research study. First, LTC is preliminary understood as a rising social change in contemporary Europe (p. 2). Secondly, the satisfaction of long-term care needs is conceptualised as a legal problem (p. 3). I then outline the specific traits of the Italian system of LTC in the European scenario (p. 4). At its core, the analysis discusses the following research question: does the principle of continuity

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<sup>2</sup> C. Saraceno, *Sociologia della famiglia*, Il Mulino, Bologna, 2022, 28-51.

<sup>3</sup> F. Maino, M. Betti, *Ageing and Long-Term Care problems During the Covid-19 Pandemic*, in C. Aspalter (ed), *Covid-19 Pandemic: Problems Arising in Health and Social Policy*, Springer, London, 2023, 73-95.

<sup>4</sup> For an overview of policy issues and changes in the field: E. Pavolini, H. Theobald, *Long-Term Care Policies*, in E. Kuhlmann, R. H. Blank, I. L. Bourgeault, C. Wendtpp, *The Palgrave International Handbook of Healthcare Policy and Governance*, Palgrave Macmillan, London, 2015, 462-478.

<sup>5</sup> J. Lewis, *Gender and the Development of Welfare Regimes*, in *Journal of European Social Policy*, 2 (3), 1992, 159-173.

<sup>6</sup> See K. Scheiwe, *Caring, law, and solidarity – on the need for reorientation*, in *International Journal of Law, Policy and The Family*, 2024, 38, 1-18.

<sup>7</sup> U. Becker, H. Reinhard (eds), *Long-Term Care in Europe. A Juridical Approach*, Springer, London, 2018.

<sup>8</sup> A. Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives*, Edward Elgar, Cheltenham, 2017.

<sup>9</sup> See V. Cappellato, B. Gardella Tedeschi, E. Mercuri, *Anziani. Diritti, bisogni e prospettive. Un'indagine sociologica e giuridica*, Il Mulino, Bologna, 2021, 187-190.

safeguard equal treatment in accessing the new LTC system among people in need of Long-term Care to perform activities of daily living due to disabilities or age-related limitations of autonomy? To answer this question, the paper discusses the principle of continuity through a three-step critique of old age categorization in welfare laws (pp. 5-8). Finally, the supported arguments and my provisional answer are collected in the conclusions.

## 2. Long-term Care as a Social Problem

As the European population is rapidly ageing, the number of people in need of LTC due to age-based limitations is rising<sup>10</sup>. Due to the spread of neurodegenerative diseases, longevity often does not come with good quality of life. Despite geographical differences, the dependency ratio in older people is fastly growing in all European countries<sup>11</sup>. However, care needs are not only rising in quantity but also in complexity: therefore, the response to meet them is supposed to be not only durable in time but also structurally integrated, as the combination of clinical frailty and social vulnerability mutually affect the health status of people with disabilities and older people with impairments<sup>12</sup>. Therefore, LTC services are to operate at the intersection of health and social care ones, as they are specifically oriented to maintain their functional abilities and to support their quality of life over time, rather than being oriented to cure diseases through medical treatments<sup>13</sup>.

In this context, the re-organization of the household around the care needs of fragile relatives is being reduced due to family transformations<sup>14</sup>. Indeed, European countries are vastly experiencing the nuclearization of the traditional family and the pluralization of family forms: being their legal recognition fragmented, non-conjugal family care practices are spreading in Europe<sup>15</sup>. A significant example is that of the unipersonal families, mostly common among older people, that are usually associated with non-parental affective relations. These social

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<sup>10</sup> G. Neyer, A.H. Kull, L. Bernardi, C. Buhler, *The Demography of Europe*, Springer, London, 2013.

<sup>11</sup> See EUROSTAT, *Old-age dependency ratio*, 2025.

<sup>12</sup> S. Asant, G. Karikari, *Social Relationships and the Health of Older Adults: An Examination of Social Connectedness and Perceived Social Support*, in *Journal of Ageing and Longevity*, 2(1), 2022, 49-62.

<sup>13</sup> H. Nies, K. Leichsenring, S. Mak, *The Emerging Identity of Long-Term Care Systems in Europe*, in K. Leichsenring, J. Billings (eds) *Long-Term Care in Europe*, Palgrave Macmillan, London, 2013, 19-41.

<sup>14</sup> C. Ranci, *Social Vulnerability in Europe*, in C. Ranci (ed), *Social Vulnerability in Europe. The new configuration of social risks*, Palgrave Macmillan, New York, 2010, 3-24.

<sup>15</sup> N. Palazzo, *Legal Recognition of Non-Conjugal Families: New Frontiers in Family Law in the US, Canada and Europe*, Hart Publishing, Oxford, 2021.

transformations are also driven by the changing gender roles in caring responsibilities<sup>16</sup> due to the progressive, but still largely unequal, entry of women into the waged labour market<sup>17</sup>. In this moving scenario, everywhere in Europe, public action in LTC is urgently called into question.

### 3. Long-term Care as a Legal Problem

Since the Covid-19 pandemic outbreak, the role of public action in addressing the rising and complex long-term care needs of people who cannot perform autonomously activities of daily living is emerging as a burning political concern, as it structurally implies gender power relationships<sup>18</sup>. A common trend is detectable: while the role of public action in the field is intensifying, new institutional changes are reshaping LTC as a new social risk across European welfare systems<sup>19</sup>. The role of the State is evolving at least towards two directions: on the one hand, the accessibility to the LTC services and measures by the person in need is being reconfigured and, on the other, the role of family carers is being formalized within the welfare system. Therefore, the evolution of the legal condition of the person in need of care, and that of the family carer, are being newly structured by the law.

Following the context-specific trajectories of welfare models, in the last three decades legal reforms across European countries have been approved to reconfigure existing or introduce new legal entitlement to access LTC measures and services. Aside from Nordic countries, where LTC was traditionally conceptualized as a public responsibility, legal developments have also occurred in countries traditionally marked by a considerable degree of familization of care. This is the case of Spain that, since 2006, has adopted new public policy oriented to the realization of a social right to receive care for all dependent people<sup>20</sup>. Differently, other Mediterranean countries have rather focused on the configuration of new legal entitlements to provide care: as a way of example, Portugal has introduced a

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<sup>16</sup> J.W. Dwyer, R.T. Coward, *Gender, Family and Long-Term Care of the Elderly*, in J.W. Dwyer, R.T. Coward (eds), *Gender, Families and Elder Care*, Sage, London, 1992, 3-17.

<sup>17</sup> C. Mussida, R. Patimo, *Women's Family Care Responsibilities, Employment and Health*, in *Journal of Family Economics*, Issue 42, 2021, 489-507.

<sup>18</sup> A. Dohotariu, *Care for older people through politicising and gendering processes: An introduction*, in A. Dohotariu, A.P. Gil, L. Volanska (eds), *Politicising and Gendering Care for Older People*, Bristol University Press, Bristol, 2024, 8-14.

<sup>19</sup> C. Ranci, E. Pavolini (eds), *Reforms in long-term care policies in Europe: Investigating institutional changes and social impacts*, New York, Springer, 2015 and C. Gori, J. Fernandez, R. Wittenberg (eds), *Long-term Care Reforms in OECD Countries*, Policy Press, Bristol, 2016.

<sup>20</sup> J. Costa-Font, S. Jimenez-Martin, P. Vilaplana, C. Prieto, A. Viola, *Universalizing the Access to Long-Term Care: Evidence from Spain*, in J. Gruber, K. MacGarry, *Long-Term Care around the World*, University of Chicago Press, Chicago, 2025, 323-352.

restricted set of legal entitlements of the family carer under the Caregiver Statute in 2019<sup>21</sup>. As the pandemic has unveiled the extreme health and social vulnerabilities of people in need of LTC and that of their families, legal developments of this kind are currently debated in Italy, too.

#### 4. The First National Legal Reform of LTC in Italy

Whit its long-lasting history of familization, Italy marks a solitary exception in the European scenario. Comparatively, the Italian welfare regime is familistic, as public intervention was initially blind on the role of the family in providing care, has then configured legal obligations to provide care within the family, while contextually promoting the satisfaction of individual care needs in the market<sup>22</sup>. However, the construction of family as the main provider of care on the intergenerational and gender axis is not an exclusive feature of the Italian experience<sup>23</sup>. What makes it remarkably unique is rather the institutional inertia that occurred during the Nineties when, due to demographic transformations, a wave of national LTC reforms has emerged in Europe<sup>24</sup>. In that span of time, despite the urgency for public action being acknowledged, any comprehensive legal reform of LTC has conversely occurred in Italy.

Since the Seventies until our days, the Italian LTC system relies on the prevalence of family care, as public financial support to the individual demand of care is limited and the accessibility to public or publicly regulated LTC services is weak<sup>25</sup>. An incremental growth of public expense for the only national cash-for-care scheme (*indennità di accompagnamento*) is consequently registered: indeed, such measure was introduced in 1980 as a monetary transfer and, ever since, it is the only enforceable individual legal entitlement of all people who cannot perform autonomously the activities of daily living guaranteed under national law<sup>26</sup>. In the

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<sup>21</sup> A.P. Gil, *Itineraries and contradictions of a family policy: The Informal Caregiver Statute in Portugal*, in *International Journal of Care and Caring*, 2023, 653-674, p. 659.

<sup>22</sup> C. Saraceno, *Constructing Families, Shaping Women's Lives: The Making of Italian Families between Market Economy and State Interventions*, in J. Gillis, L. Tilly, D. Levine, (eds), *The European Experience of Declining Fertility: 1850-1970*, Blackwell, Cambridge, 1992, 251-289.

<sup>23</sup> M. Naldini, *The Family in Mediterranean Welfare States*, Frank Cass, London, 2004.

<sup>24</sup> P. Taylor-Gooby, *New Risks and Social Change*, in P. Taylor-Gooby (ed) *New Risks, New Welfare. The Transformation of the European Welfare State*, Oxford University Press, Oxford, 2004, 1-27.

<sup>25</sup> G. Costa, *Long-Term Care Italian Policies: A Case of Inertial Institutional Change*, in C. Ranci, E. Pavolini, *Reforms in Long-Term Care in Europe. Investigating Institutional Change and Social Impacts*, Springer, New York, 2013, 221-241.

<sup>26</sup> M. Arlotti, A. Parma, C. Ranci, *Riformare diritti sociali iniqui con uno sguardo all'Europa? La sfida dell'indennità di accompagnamento*, in *Journal of Social Policy*, 3/2017, 63-77.

context of its constant undervaluation in the political arena, this welfare area has further evolved fragmentally across Italian Regions: indeed, despite the absence of a national legislation, regional actions have evolved across time, and experimental innovations in health and social service integration have widely occurred<sup>27</sup>.

Contextually, the contrast between such public policy crisis and the social *ethos* of the Italian Constitution is striking. As the role of public action to promote personal realization by protecting positive rights towards the State is a pillar of post-WWII social constitutionalism, fundamental constitutional principles of personalism, solidarity and substantive equality demand the public intervention when equality is *de facto* compromised, standing against the legal invisibility of vulnerable subjects. This is the very case of people in need of LTC and their family carers whose vulnerability is obscured by the law and neglected by public action. The shortfalls of the Italian legislator towards the protection of the legal subjectivity of the person in need and that of family carers have been recently tackled by the CRPD Monitoring Committee<sup>28</sup>. Indeed, international disability law standards play a major role in challenging the limits of the Italian LTC systems, while the introduction of an *hoc* international legal instrument to protect and promote the rights of older people is still debated<sup>29</sup>.

After three decades of institutional inertia, the Italian national legal framework of LTC has finally evolved during the pandemic. Thanks to the active role played by civil society organizations in claiming new and principled public interventions, two legal reforms were finally planned by the national legislator within the National Recovery and Resilience Plan (NRRP): while the first concerns the rights of people with disability in multiple life-settings under the impulse of the UNCRP (Law 227/2021)<sup>30</sup>, the second specifically addresses Long-term Care for dependent older people (Law 33/2023)<sup>31</sup>. A new set of norms (Decreets 62/2024 and 29/2024) have further implemented this dual evolution<sup>32</sup>. Currently, the Italian LTC system is moving towards at least two major legal trends: as old age ( $\Rightarrow$ 70 years-old) becomes a legal condition to access the new LTC system, the legal definition of

<sup>27</sup> C. Gori, *Le riforme regionali per i non autosufficienti. Gli interventi realizzati e i rapporti con lo Stato*, Carocci, Roma, 2008.

<sup>28</sup> The reference is to the *Bellini case* addressed by CRPD Committee in the views adopted on the 3rd of October 2022 (CRPD/CJ27/D/51/2018).

<sup>29</sup> B. Lewis, K. Purser, K. Mackie, *The Human Rights of Older Persons. A Human Rights-Based Approach to Elder Law*, Springer, London, 2020, 52-54 and 60-62.

<sup>30</sup> See E. Vivaldi (a cura di), *Il progetto di vita della persona con disabilità. Dal PNRR al decreto legislativo n. 62/2024*, Pisa University Press, Pisa, 2025.

<sup>31</sup> C. Gori, *La riforma dell'assistenza agli anziani non autosufficienti*, in *Social Policies*, 3/2023, 511-516 and T. Andreani, *L'assistenza continuativa e integrata alle persone anziane non autosufficienti: prime considerazioni d'insieme intorno alla legge delega 33 del 2023*, in *Corti supreme e salute*, fascicolo 1, 2024, 130.

<sup>32</sup> T. Andreani, E. Vivaldi, *Una lettura unitaria delle riforme della disabilità e della non autosufficienza: verso un sistema di assistenza fondato sull'età anagrafica*, in corso di pubblicazione.

dependency is predominantly based on age-related health conditions. Against this backdrop, the protection of the rights of people with disabilities explicitly relies on a new foundational legal principle introduced by the ongoing legal reform of LTC: the principle of continuity.

## 5. A Three-steps Critique of the New Italian Age-based LTC System

Enucleated as a founding legal principle of the reform of LTC for older people (Law 33/23, art. 2, p. 2, letter h), the principle of continuity is designed as a legal clause to protect people with disabilities who are ageing. Within the ongoing dualistic evolution, according to the law this principle serves a unifying function between the two ongoing legal reforms. Indeed, article 33 of the Decree 29/2024 explicitly configures a right of people with disabilities who meet the age threshold to:

- (1) enjoying already accessed services and benefits provided by disability laws;
- (2) accessing old-age specific set of Long-term Care services and benefits.

Due to its centrality in the legislative design of the ongoing reforms, the structure, scope and functioning of this principle can be investigated through constitutional lenses. Particularly, the following question is crucial: does the principle of continuity safeguard equal treatment in accessing the new LTC system among people in need of long-term care to perform activities of daily living due to disabilities or age-related limitations of autonomy? As my research is still unfinished, I try to offer a provisional answer by building a three-steps critique of the new age-based nature of the Italian LTC system that combines different methods and arguments:

1. historic argument = firstly, I discuss that the universalistic transformation of the Italian welfare State in healthcare (Law 883/1978) was achieved through legal mobilization of the constitutional principle of substantive equality to show that the professional categorization of people in need of healthcare, that marked the insurance-based system, was replaced through the principle of health universalism that rather adopts a needs-based paradigm;

2. critical legal argument = secondly, I discuss the construction of old age through critical legal approaches to show that, despite ageing being a complex and dynamic concept, the law can ambivalently express a protective function of older people or an excluding one with regards to people with disabilities who age prematurely;

3. constitutional assessment = thirdly, I discuss the interplay between the constitutional principles of personalism and substantive equality (articles 2 and 3) and the legal construction of old age as a legal criterion to access welfare provisions; I try to show that, when balancing its political discretion, the legislator should be rather oriented to a needs-based paradigm, as it can effectively safeguard

the equal access to LTC measures and services for all people with care needs regardless of their age.

## 6. The Constitutionalization of Healthcare Universalism

Approved in the aftermath of World War II, the Italian Constitution is both rigid in its democratic structure and open to the emergence of new solidarity instances<sup>33</sup>. Possessing an inherent forward-looking nature, the Constitution embodies the social conflict within the constitutional project through constitutional principles, particularly that of substantive equality (art. 3, co. 2)<sup>34</sup>. Indeed, the Constituent Mothers and Fathers have enshrined a more equal and just society, that is to be achieved by functionalizing public action towards the transformations of social reality. Precisely, public action is constitutionally oriented to tackle *de facto* existing inequalities in society<sup>35</sup>, thus promoting the development for each person. This idea of the substantive dimension of equality is intertwined with the principles of solidarity, that is enucleated in conjunction with the very idea of the relational person as subject of duties and rights between the individual and towards the State (art. 2), and social dignity, that rather qualifies the significance of equality itself<sup>36</sup>.

Despite such constitutional normativity, the institutional continuity with the liberal and fascist eras, that also operated through the continuity with the previous legal culture and administrative structure, hampered several legal proposals to reform the Italian welfare regime<sup>37</sup>. For the three initial decades of the constitutional experience, the health and social care system remained highly fragmented and primarily oriented to the inter-categorical protection of formal workers, thus ensuring structural discrimination of peoples labelled as unproductive, such a women providing care within the family, people with disabilities and older people. The political trajectory of welfare universalism only begun to be discussed during the Sixties and the Seventies when social movements claimed the realization of constitutional social rights<sup>38</sup>. In this span of time, the constitutionalization of welfare policies towards the transformation of social reality

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<sup>33</sup> L. Paladin, *Per una storia costituzionale dell'Italia repubblicana*, Il Mulino, Bologna, 2004, 240-258.

<sup>34</sup> U. Romagnoli, *Il principio di uguaglianza sostanziale*, in G. Branca (a cura di), *Commentario della Costituzione. Principi fondamentali*, Zanichelli, Bologna, 1975, 162-198.

<sup>35</sup> V. Crisafulli, *La Costituzione e le sue disposizioni di principio*, Giuffrè, Milano, 1952.

<sup>36</sup> G. Ferrara, *La pari dignità sociale (appunti per una ricostruzione)*, in *Studi in onore di Giuseppe Chiarelli*, Vol. I, Giuffrè, Milano, 1974, 1090-1105.

<sup>37</sup> M. Ferrera, *Modelli di solidarietà. Politica e riforme sociali nelle democrazie*, Il Mulino, Bologna, 1993, 201-272.

<sup>38</sup> C. Giorgi, *Salute per tutti. Storia della sanità italiana dal dopoguerra a oggi*, Laterza, Roma, 2024, 25-40.

occurred through national legislation (*disgelo costituzionale*)<sup>39</sup>.

A leading example of the constitutionalization of welfare universalism is that of universal healthcare (Law n. 883/1978). The legal principle of healthcare universalism, that implies the global response to health needs and implied equal access to healthcare services, was grounded on a progressive and expansive interpretation of article 32 of the Constitution, that literally states health as a fundamental individual right and public interest, through the lenses of the substantive equality principle<sup>40</sup>. Through the institution of the National Health Service (NHS), the legislator has fundamentally restructured the legal relationship between the person and the State as a personal right to access public or publicly regulated healthcare services on the sole ground of health needs<sup>41</sup>. Previously, the individual could only access existing healthcare facilities on the ground of professional categorization: indeed, this was the general legal rule underpinning the insurance-based model, with the only exception of residual public assistance provided by municipalities to low-income residents<sup>42</sup>. Despite health being constitutionally protected as a fundamental right of each individual, the professional status was legally constructed as the condition to access healthcare services: consequently, wide inter-professional inequalities in access to service of quality were legally legitimized.

## 7. The Construction of Old Age as a Legal Criterion to Access Welfare Provisions

In the context of the growing tension between ageing population and welfare sustainability<sup>43</sup>, the construction of old age as a legal criterion that structures individual accessibility to welfare provisions is detectable as a legal trend at the comparative level: aside from new Italian laws on disability and elder care, the Swedish legal system, mostly renown for having inspired welfare service universalism, has yet adopted old age as an organizing principle in social welfare laws with the aim to draw a line between the legal measures pertaining to disability laws and that of elder care<sup>44</sup>. Similarly, the French legal system structures old age

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<sup>39</sup> S. Rodotà, *Diritti e libertà nella storia d'Italia*, Donzelli, Roma, 2011, 85-122.

<sup>40</sup> D. Morana, *La salute come diritto costituzionale*, Giappichelli, Torino, 2021, 96-97.

<sup>41</sup> L. Busatta, *La salute sostenibile. La complessa determinazione del diritto ad accedere alle prestazioni sanitarie*, Giappichelli, Torino, 2019.

<sup>42</sup> See C. Giorgi, I. Pavan, *Storia dello Stato Sociale in Italia*, Il Mulino, Bologna, 2021, 223-224.

<sup>43</sup> V. Galasso, P. Profeta, *Population ageing and the size of the welfare state*, in S. Harper, K. Hamblin (eds.), *International Handbook on Ageing and Public Policy*, Elgar Publishing, Cheltenham, 2014, 74-83.

<sup>44</sup> T. Mattsson, *Age, vulnerability and disability*, in I. Doron, N. Georgantzi (eds), *Ageing, Ageism and the Law. European Perspectives on the Rights of Older Persons*, Edward Elgar Publishing,

to differentiate the legal protection of people with disabilities and that of older people with age-based impairments<sup>45</sup>.

Generally, the construction of age through the law is not a new trend across European legal traditions. Indeed, age already works as a legal fiction in multiple legal domains to classify rights and duties, such as legal capacity for minors in civil and criminal law. In this case, the protection of minor is the interest underpinning an extensive, specific and tailored protection in multiple legal spheres<sup>46</sup>. Differently, old age has vastly deployed as a discrimination factor in labour law, particularly with regards to mandatory retirement<sup>47</sup>, thus problematically working in favour of other public interests, rather than protecting older workers<sup>48</sup>. Today, ageing is challenging the role of law in recognizing and protecting specific and complex needs that older people experience<sup>49</sup>: this is occurring in the health and social welfare sphere, too. While this perspective can justify the adoption of old-age specific legal principles and rules, the legal construction of old age itself possesses an ambivalent nature.

As the feminist and disability critical legal theories have stressed<sup>50</sup>, the nature of law is artificial, as it is a product of prevailing social norms<sup>51</sup>. Indeed, the law can be deconstructed as a social tool that reflects and perpetuates inequalities<sup>52</sup>. Ageing is rather a continuous, dynamic and relational process that affects each person: like disability<sup>53</sup>, it can significantly differ according to social factors. By structuring old age as a legal criterion to access welfare provisions, the law structures the collective identity of older people, thus ambivalently expressing a protective or excluding function<sup>54</sup>. The legal condition of the people with disabilities who age prematurely in welfare laws is particularly illustrative of this ambivalence. On the one hand,

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Cheltenham, 2018, 86-112.

<sup>45</sup> P. Martin, *New social risks and new social rights in the French welfare system*, in T. Kotkas, K. Veitch (eds), *Social Rights in the Welfare State*, Routledge, New York, 2017, 99-116.

<sup>46</sup> J. Barnett, *Children's Rights and the Law. An Introduction*, Routledge, London, 2021.

<sup>47</sup> A. Numhauser-Henning, M. Ronnmar (eds), *Age Discrimination and Labour Law*, Kluwer, London, 2015.

<sup>48</sup> A. Blackham, *Reforming Age Discrimination Law*, Oxford University Press, Oxford, 2022.

<sup>49</sup> O. Ben-Shahar, *Personalized Elder Law*, in *The Elder Law Journal*, Vol. 28, 2020, 282-312.

<sup>50</sup> See for all M.A. Fineman, N.S. Thomadsen (eds), *At the Boundaries of Law. Feminism and Legal Theory*, Routledge, New York, 1991 and A. Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law*, Cavendish, London, 1996.

<sup>51</sup> M.G. Bernardini, *Il soggetto tra cura e diritti*, in T. Casadei (a cura di), *Donne, diritto, diritti. Prospettive di Giusfemminismo*, Giappichelli, Torino, 2015, 193-212.

<sup>52</sup> D. Barak-Erez, *Her-meneutics. Feminism and Interpretation*, in B. Baines, D. Barak-Erez, T. Kahana (eds), *Feminist Constitutionalism. Global Perspectives*, Cambridge University Press, New York, 2012, 85-97.

<sup>53</sup> A. Leahy, *Ageing and Disability*, Bristol University Press, Bristol, 2021.

<sup>54</sup> D. Bedford, *Embracing Vulnerability in Ageing*, in B. Clough, J. Herring (eds.), *Ageing, Gender and Family Law*, London, Routledge, 2018, 15-33.

when the legal construction of old age serves the scope of limiting older people's access to care services, as occurs in the Swedish legal system, they are better protected; on the other, when it serves the enlargement of public support for older people in the care sector, the law excludes them on the sole ground of age.

## 8. The Constitutional Shortfalls of the Age-based Dualization of the Italian LTC System

As the new Italian national legal framework for LTC stands, the declared scope of the continuity principle to protect people with disabilities that turn older is hampered by a structural old age categorization and segmentation. Indeed, although the Law 33/2023 had prescribed the adoption of a legal definition of older people that was supposed to include multidimensional factors along with chronological age, the Decree 29/2024 has conversely structured old age as a rigid threshold to access new LTC measures and services. A significant example of this problematic legal trend relates to the new monetary benefit (art. 34) that considerably extends the financial support provided to all people with long-term care need: indeed, the access to such welfare provision is restricted only to => 85 years-old people who possess the highest care needs and the lowest family income<sup>55</sup>.

In the Italian constitutional order, the principle of substantive equality ensures that people are treated differently by the law according to different factual conditions<sup>56</sup>. In this sense, the substantive dimension of equality is further complemented by the constitutional principle of personalism (art. 2) that promotes the idea of a relational person who is to be recognised, protected and empowered by the law. When applied to Long-term Care, the constitutional *ethos* supports the centrality of the person towards the State, namely in the field of health and social care services that are to support vital needs<sup>57</sup>. This is the constitutional reasoning that underpins a needs-based paradigm that was adopted by the law with regards to healthcare universalism. As the law is to express an equalizing constitutional function<sup>58</sup>, when balancing political discretion, the legislator should ensure the equal condition before public welfare provisions for all people with the same care needs, as old age cannot operate as a rigid legal fiction to limit the access to LTC

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<sup>55</sup> For a critical account see F. Cembrani, T. Vecchiato, D. De Leo, M. Trabucchi, *Si restringe ulteriormente la coorte degli anziani non autosufficienti che potranno accedere alla prestazione universale*, in *Corti supreme e salute*, 2024, fascicolo 2, 929-940.

<sup>56</sup> A. D'Aloia, *Eguaglianza sostanziale e diritto disuguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, Cedam, Padova, 2002.

<sup>57</sup> P. Stanzione, *L'età dell'uomo e la tutela della persona: gli anziani*, in P. Stanzione (a cura di), *Anziani e tutele giuridiche*, Editoriale Scientifica, Napoli, 1991, 27-46.

<sup>58</sup> P. Perlinger, *Diritti della persona anziana, diritto civile e stato sociale*, in P. Stanzione (a cura di), *Anziani e tutele giuridiche*, Editoriale Scientifica, Napoli, 1991, 91-110.

without breaching the constitutional principle of equality<sup>59</sup>.

## 9. Conclusions

Building on an historical argument, a critical approach and a constitutional assessment, I finally argue that, as the legal reform of the Italian LTC system has shifted from the person-centered paradigm (Law 33 of 2023) to a rigid old age categorization and segmentation (Decree 29 of 2024), the legislative design of the principle of continuity does not sufficiently mitigate the risk of discrimination of people with disabilities who are ageing. Despite possessing the same long-term care needs of older people, they are legally excluded from accessing the new LTC system when they do not meet the age threshold, thus potentially breaching the constitutional principle of equality. Precisely, as the Italian welfare is systemically moving to an old age-based evolution in Long-term Care, I have tried to support the following reasoning: as it stands, the current legislative design of the principle of continuity provides only a nominalistic protection because it does not effectively counterbalance the rigidity of the systemic old age categorization and segmentation. Despite possessing the very same needs, people with disabilities, who are generally to age prematurely, cannot access the new and wider legal protection reserved for older people (=> 70 years-old) only.

In my view, this principle offers a weak legal protection clause, as it is rather crafted to support the legal division of two welfare areas and to limit the respective welfare expenditures. In this sense, Italy is following other legal systems that, driven by economic rationales, have already introduced old age as a legal criterion to access different set of welfare provisions. However, differently to other constitutional orders, the function of law is constitutionally oriented to safeguard substantive equality among people in the Italian legal system. In my critique, a principle-oriented constitutional assessment shows that old age categorization is potentially in breach of the principle of equality, as it works as a legal factor of structural exclusion of younger people with disability despite them having the very same long-term care needs. As of today, constitutional litigation over the access to the new LTC systems is still missing, and this hypothesis is yet to be confirmed. Contextually, age categorization is spreading in other LTC-related welfare area, such as the one concerning the legal condition of family carers of people with disabilities and older people. In this moving scenario, the constitutional legitimacy of the legal construction of old age as a criterion to access welfare provisions, that implies old age categorization and segmentation in welfare laws, is likely to stay as a burning constitutional question in Italy.

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<sup>59</sup> G. Lisella, *La rilevanza della condizione di anziano nell'ordinamento giuridico*, in P. Stanzone (a cura di), *Anziani e tutele giuridiche*, Editoriale Scientifica, Napoli, 1991, 29-30.