

debates and issues

The right to care: a proposal from feminist perspectives for a constitutional reform in Spain

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The COVID-19 crisis has demonstrated the extreme vulnerability of the human being and the importance of care within the framework of a social state. This crisis has also brought pre-existing inequalities to light, showing that it is mainly women who continue to take up the tasks of care as they have always done. Indeed, care work has always been carried out by women and this dedication has contributed to diminishing the exercise of other rights, so it is essential to take on the tasks of care by the family and the State in a co-responsible manner. This problem has been taken into consideration by the studies on constitutional reform in Spain in order to prepare a text that includes the right to care, and the rights of caregivers as well. The purpose of this work is to highlight this need and to make proposals to improve the Spanish constitutional framework.

Key words right to care • feminist economics • Spanish Constitution • constitutional reform

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Introduction: the value of care, with particular focus on the COVID-19 crisis

We are living in a time without precedent in the known and lived experience of current generations: a health crisis that has highlighted the fragility of health services, social services, the education system and, especially, the economy but that, above all, has altered value systems and priorities. Even more importantly, it has led institutions to address the problem and the outstanding debt that they (and we all) have in the areas of caring and other activities of social reproduction regarding the value currently attributed to them and that which they are truly due.

The COVID-19 crisis has vividly demonstrated the extreme vulnerability of human beings, the value of life and everything that helps sustain it. Thus, caring for people must be revalued within the framework of a social state of law. We are vulnerable and interdependent, and in fragile circumstances, we need each other. Further, ‘although the crisis has made visible the “essential” nature of this care work, the work is systematically undervalued and invisible’ (Kabeer et al, 2021: 3), this is also the case for caregivers – those who provide care to others.

It is evident that care work is not well paid, and for many caregivers, it is not paid at all, especially in (non-professional) care, carried out mostly by women. Overall, caring is highly gendered. In the health and social sector, 70 per cent of workers are women, both in professional contexts and in private life, where in the family, carers of children, older people and people with illnesses and long-term care needs are also mainly women ([Cátedra de Economía feminista ante la Covid19, 2020](#); [UN, no date](#)). Historically, they have assumed the caring role and continue to do so, as the COVID-19 pandemic demonstrated. Providing care, which is essential to the sustainability of life, has placed them in a position of discrimination and has negatively affected them in exercising their rights, particularly as regards equality, employment and political participation ([Marrades Puig, 2019: 23](#)). To achieve equality between women and men, two strategies are needed: first, the revaluation of care; and, second, men's involvement in care in the family, society and state institutions in a co-responsible manner.

Caring, whether paid or unpaid, must be revalued in society and count towards the economy ([Moltó Carbonell and Uriel, 2008: 228](#)), not least because the survival of society depends on caring. This requires a cultural shift that reassesses what is truly important: the health of citizens in a sustainable environment, without pollution and with essential conditions guaranteed. To achieve this, societies will need to invest in care and health, and to educate their populations on the values of solidarity, diversity, equality and co-responsibility.

Education, new values and changes in cultural and economic paradigms are all ideals that are being reaffirmed at this time of crisis. These arguments have gained significant ground in Spain since 2016 and with even greater vigour since the start of the pandemic. Research on options for constitutional reform has been ongoing for some years. Most studies from a feminist perspective aim to introduce care as a core value and as a right in a reform of the Constitution, and it is therefore vitally important to establish a framework in which the right to care can be developed.

Discussion: towards a constitutional feminist economic model that includes the right to care¹

Unlike conventional ways of understanding the economy, feminist economics proposes a different model that aspires to achieve a fair economic order, assuring a dignified quality of life for all people, and to keep in mind what is vital: the revaluation of social reproduction activities. In *Gender, Development and Globalisation*, Lourdes Benería, [Günseli Berik and María Floro \(2018\)](#) summarise two possible approaches to this: a 'rights' approach and a 'capabilities' approach. In this sense, one of the main axes of feminist economics – care – would also be central to this new economic order because it ensures vital minimums that are also constant in the models of capabilities and human rights.

The capability approach offers a powerful counter to the neoliberal approach. Postulated by Amartya Sen and Martha Nussbaum, it is founded on policies aimed at eliminating the obstacles people encounter in their lives, so that they can live in freedom in the best way possible: 'Capabilities represent the multi-dimensional potential of individuals. A capability is the ability to be and to do what an individual wants to be and do' ([Benería et al, 2018: 65](#)). This concept can be identified with the free development of the personality recognised by the Spanish Constitution in Section 10 as the foundation of political order and social peace.

Martha Nussbaum developed the capability approach, applying it to a theory of justice and to the universal empowerment of the abilities of women. She created an irreducible list of capabilities, which indispensably includes living a dignified life with health and freedom of action, free of gender-based violence. This essential summary list of the ten capabilities has as its premise, as the authors explain, the idea that 'being human implies being a physical entity with a body, being cared for and being able to care for other people' (Benería et al, 2018: 66). Nussbaum (2003; 2004) places the focus on care once more and, at the same time, demands that these capabilities be made universal, that is, constitutionally guaranteed all over the world. The call for the inclusion of capabilities in constitutional texts raises a second question: can safeguarding of these capabilities be reconciled with the economic model of (in our case) Spain's Constitution? If Section 10 of the Spanish Constitution ('Human dignity as a central axis and the free development of the personality as a possibility') is combined with a guarantee of social rights, and if their elements are added (for example, if certain social rights or guiding principles are amended so as to be considered fundamental rights), the answer could be affirmative.

This last point connects to another economic approach: the human rights-based approach developed by Balakrishnan and Elson (2011). This may have more potential for modifying neoliberal policies, as a human rights approach involves certain minimum and essential economic and social rights that must be preserved in all economic processes (Benería et al, 2018: 72).

Both approaches complement each other and have important objectives in common, for example, the fulfilment of human needs for a dignified life. These concepts are also central to feminist studies, which is why constitutionalists are working for a constitution with a gender perspective that takes into account the different contexts of women and men because women's dedication to addressing the needs of others has always been a factor of discrimination. Thus, we may consider that the Spanish Constitution may be interpreted in terms of feminism and true equality in relation to the economic model, with dignity as a central axis of rights and the free development of the personality as the foundation of political order (Section 10 of the Spanish Constitution), along with the promotion of effective equality (Section 9.2 of the Spanish Constitution). This implies the need to amend rights in three ways: broadening the scope of 'fundamental' rights to include some rights not yet considered fundamental; the effective use of the hermeneutical clause (Section 10.2 of the Spanish Constitution) to expand the content of some rights; and the inclusion of new rights, including the right to care, which refers both to those who receive care and to those who provide it.

This new conception of 'economy' would need to be included in Spain's constitutional reform proposals, especially in relation to the economic model and the catalogue of rights. Specific policies will need to be developed in several areas in order to guarantee a universal right to care linked to a reorganisation of the care services system and to a reformulation and expansion of the provision and professionalisation of informal care (unpaid carers). Essential policies for guiding the orientation of the new model will need to focus on a regulatory framework based on the 'Ley de cuidados y sostenibilidad de la vida' (Care and Sustainability of Life Act) and the 'Ley de tiempos' (Time Act). The main objective of the former would be identifying essential services and activities for the sustainability of life; a second objective would set criteria to break down gender-based divisions of labour and regulate the distribution and uses

of time (that is, essential work, childcare, caring and civic). This proposed regulatory framework would establish the foundation for a transition to an economic model designed to sustain life. The counterpoint for sustaining the economy will be an individual and collective responsibility to assume the functions and responsibilities of the people with whom we relate, and, in the final instance, the responsibility of the state. The [Spanish Government \(2021\)](#) has also been working on this, including several measures in its 'Recovery, transformation and resilience plan' (especially in Part VIII: 'The new care economy and employment policies' [Lever Policy VIII]). In June 2023, the [Equality Ministry \(2023\)](#) published a 'basic document' establishing a foundation for the creation and development of the right to care and the public policies to be implemented.

Proposals for a constitutional amendment: the right to care

The universalisation of rights, especially fundamental social rights, is one of the most effective strategies to ensure that care and attention to people are guaranteed. Protecting these rights guarantees that caring for people's health and for the environment they inhabit is prioritised in line with the rights-based approach of [Balakrishnan and Elson \(2011\)](#), which sets out minimum, essential, economic and social rights that should be upheld in all economic processes ([Benería et al, 2018: 72](#)) in line with the United Nations Sustainable Development Goals (SDGs).

The review of social rights – a recurring issue in Spanish constitutional doctrine ([Castro et al, 2012](#)) – implies their recognition as fundamental rights, something that has been an outstanding challenge for citizens for some time. La Red Feminista de Derecho Constitucional (The Feminist Network of Constitutional Law) has also proposed giving all rights the status of fundamental rights ([RFDC, 2017](#)) in line with most political parties and non-governmental organisations ([Marrades Puig, 2016: 222](#)), either by means of interpretation or via constitutional reform.

The recognition of the right to care has long been pursued ([Marrades Puig, 2016; 2018: 105; 2019: 21](#)) and is already included in other constitutions, for example, in Mexico, and is needed now more than ever in the emergency and crisis caused by COVID-19. The Cuidados y covid19 (Care and COVID-19) working group, appearing before the Comisión para la Reconstrucción Social y Económica (Commission for Social and Economic Reconstruction), proposed a budget for a state care act linked to the right to care. The purpose of the proposed law and of the recognition of the right to care is to obtain political commitment to prioritising care and attention to people in equal conditions above other economic interests. It is a project that allows for the transition of the economic model through a process that may be radical but is nonetheless necessary to eradicate inequalities ([Marrades, 2021: 32](#)).

A proposal to create and develop the right to care, with the ultimate goal of including it in the text of the Constitution, is in progress in Spain. In September 2021, the Equality Ministry called on the first session of experts to participate in creating this new right. This is vital in a country with a written constitution. Other countries have legislation regulating care systems (for instance, the Care Act 2014 in England and Ontario's Long-term Care Act), but for a country with a written constitution, such as Spain, and considering its importance and scope (in terms of efficacy), guarantees of fulfilment need to be offered. Spain has several acts regulating aspects of care – co-responsibility, dependency and personal autonomy, palliative care

(and others) – but regulating care by bringing different fields under the same law is necessary, and this challenge is drawing closer.

Spain, once a ‘latecomer’, has become a ‘pioneer’ in gender-equality policies (Lombardo, 2009) but still faces necessary changes, many of which have been taking place in recent legislatures. An important tool is the new equality legislation, approved in 2019, including the decree facilitating co-responsibility by extending parental leave.² It is also absolutely necessary, however, to monitor the interpretation of the legislation, applying a gender perspective in argumentation and judicial decisions. Here, the Spanish Constitutional Court’s work in promoting equality by incorporating a gender perspective in its jurisprudence is relevant, and it is important to note the dissenting opinions of Magistrate Luisa Balaguer (for example, in the 111/2018 and 117/2018 judgments of the Constitutional Court).

The new equality legislation³ will have an important role in the process of adapting to a new social reality in which a gender and intersectional approach is required to deal with gender-based discrimination. The new legislation for effective equality for women and men will need guarantees for the complete fulfilment of rights, not mere programmatic declarations or intentions of a better quality of life. They need to start from the vital premise of conferring value to reproductive work as an underpinning of productive work and a condition that makes it possible. At the same time, all aspects that favour sustainability of life should be included, prioritising reproductive values and promoting social, institutional and family co-responsibility across education, culture and media. Only then will it be possible to achieve the much-awaited cultural and economic paradigm shift.

The moment of political change that Spain is currently facing is crucial to continue the work done in order to constitutionalise the right to care and approve a care law that allows integrating real equality through co-responsibility. We are therefore eager to see the new government’s development of the actions proposed in the ‘Recovery, transformation and resilience plan’ on ‘The new care economy and employment policies’.

Notes

¹ Considering the right to care implies two standpoints: the right to receive care and the right to provide care without limiting the exercise of other rights.

² Real Decreto-Ley 6/2019, de 1 de marzo, on urgent measures for equality (see: www.boe.es/boe/dias/2019/03/07/pdfs/BOE-A-2019-3244.pdf).

³ See, for example: Autonomic Equality Acts in Spain (Ley 2/2019, de 7 de marzo, para la igualdad entre hombres y mujeres de Cantabria, o la Ley Foral 17/2019 de 4 de abril de igualdad entre mujeres y hombres de Navarra), as well as other provisions (Real Decreto 901/2020, de 13 de octubre, and Real Decreto 902/2020 [BOE 14 de octubre]; and Real Decreto-ley 28/2020, de 22 de septiembre, of teleworking [BOE 23 de septiembre de 2020]).

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Conflict of interest

The author declares that there is no conflict of interest.

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