

# IS SEXUAL ASSISTANCE A RIGHT?

RAFAEL DE ASÍS ROIG<sup>1</sup>

**Abstract:** In this paper I will reflect on sexual assistance, and I will discuss the possibility of shaping sexual assistance as a right. The question of whether sexual assistance is a right can have different answers depending on the framework we are in. We could fall within a purely legal framework, an ethical framework, or a combined framework such as the human rights context. From this point onwards, the question of whether sexual assistance is a right shall depend on the answer to the question regarding the nature of sexual assistance. Sexual assistance for persons that cannot perform sexual activities on their own body can be ethically justified by the theory of needs or by the notion of Instrumental Activities of Daily Living. It can also fall within sexual rights or within the right to choose a way of life.

**Keywords:** disability, sexual rights, assistance, supports.

**Summary:** I. THE TRUE MEANING OF THE QUESTION; II. WHAT IS SEXUAL ASSISTANCE?; III. SEXUAL ASSISTANCE AS A RIGHT; IV. SOME CONCLUSIONS.

## INTRODUCTION

In the context of the rights of persons with disabilities, the reflection on the meaning and scope of sexual assistance has gained ground in the last few years. This has been due to various factors: firstly, we have acknowledged the need to apply a human rights approach when discussing disabilities; secondly, several workshops have been held and numerous scholarly works have been performed on this subject; thirdly, certain organizations providing these services have appeared.

This is definitely a complex matter, since it addresses issues which are yet to be solved from a theoretical standpoint. Furthermore, there are opposing views in this regard, as well as many stereotypes, particularly affecting persons with disabilities.

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<sup>1</sup> Instituto de Derechos Humanos Bartolomé de las Casas, Universidad Carlos III de Madrid, Spain (rafael.asis@uc3m.es).

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Self-evidently, the reflection on sexual activity and sexual rights in the context of disability has been conditioned by certain aspects that must be tackled from the outset. In a recent work, I mentioned a three-step approach to the rights of persons with disabilities. One of these steps was normalcy.

Normalcy entails fighting against the prevailing stereotypes in this domain, which often depart from the consideration of disabled persons as asexual beings or otherwise sexually dependent. Some other times, the said stereotypes are based on the premise that disabled people shall only interact with other persons with disabilities, or on the idea that persons with intellectual disabilities “show an excessive sex drive or fail to adequately control their sexual behavior.”<sup>2</sup>

In this paper I will reflect on sexual assistance, and I will discuss the possibility of shaping sexual assistance as a right. I will do this within the framework of the human rights theory,<sup>3</sup> whilst adopting (as it could not be otherwise) a human rights based approach to disability.<sup>4</sup>

## I. THE TRUE MEANING OF THE QUESTION

The question of whether sexual assistance is a right can have different answers depending on the framework we are in. We could fall within a purely legal framework, an ethical framework, or a combined framework such as the human rights context.

If we adopt a legal standpoint, we must clarify what must be deemed as a right and when we are facing a right. There is no single answer for these two issues, since they depend on schools of thought and scholarly doctrines.

Indeed, throughout the history of Law there have been very different responses to the question of what must be considered to be a right. In this regard, there has been a clash between two main theories advocated by two scholars of great renown, i.e. Ihering’s theory of interest and Savigny’s voluntary submission theory. However, there have also been other views, and some of them have even reject the actual existence of rights.

For the purposes of this work, we could think of rights in terms of willingness or choice, or in terms of interest (whether individual or objective). Nevertheless, we could also understand a right as a given situation. This is actually the point of a famous German legal scholar when discussing individual rights: W.N. Hohfeld.

Hohfeld studied the use of the term “right” in the legal domain and pointed to four possible meanings.<sup>5</sup> According to this scholar, the notion of right was used as a claim, as

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<sup>2</sup> See Arnau Ripollés, S., “La asistencia sexual a debate,” in *Dilemata*, no. 15, 2014, p. 9.

<sup>3</sup> See Barranco, M.C., *Condición humana y derechos humanos: algunas claves filosóficas para un modelo de derechos humanos*, Dykinson, Madrid, 2016.

<sup>4</sup> See Palacios, A., *El modelo social de la discapacidad*, Colección CERMI, Madrid, 2008, p. 103 *et seq.*

<sup>5</sup> See Hohfeld, W.N., *Conceptos jurídicos fundamentales*, translated by G. R. Carrió, Centro Editor de América Latina S.A., Buenos Aires, 1968.

a freedom, as a prerogative or as room for immunity. In order to fully understand its meaning, Hohfeld established a list of opposite situations (the opposite of holding a right for an individual) as well as a list of complementary situations (the situation of the other person when his or her counterpart actually holds a right).

Accordingly, the opposite of a claim is the absence of a right, and a duty complements a right; the opposite of freedom is a duty imposed on the individual, whereas the absence of a right complements freedom; the opposite of a prerogative is the lack of power or competence, whereas the complementary situation to a prerogative is subjection; finally, the opposite of immunity is subjection, whereas the lack of power or competence complements immunity.

Regarding the foregoing, it is worth noting that there is always some sort of willingness or interest underlying a right, which can appear as a claim, a freedom, a given prerogative or certain room for immunity, and which entails that a given individual is in a situation that can be identified in obligational terms.

Nevertheless, the previous conclusion does not suffice, provided that the existence of a right also requires legal acknowledgment, i.e. the situation underlying a right must be legally acknowledged; additionally, the interest or willingness must also have some sort of legal acknowledgment.

Furthermore, we must wonder how this legal acknowledgment is attained, since it is mainly achieved through a given rule where the right is enshrined or which empowers or enables individuals to establish legal relationships based on which rights and obligations are shaped. In both cases, the existence of the rule or the validity of the legal relationship will be determined by its conformity with the remaining rules, and ultimately by the compliance with the legal criteria represented by human rights in constitutional systems.

From this point onwards, the question of whether sexual assistance is a right shall depend on the answer to the question regarding the nature of sexual assistance.

If we ask ourselves the question from an ethical standpoint we would be thinking of sexual assistance as a moral right.<sup>6</sup> But, what is a moral right and when are we actually confronted with a moral right?

As it happened in the legal domain, there is no single answer to this question. Moral rights have been construed as powers, prerogatives, freedoms, claims, interests, expressions of willingness, immunities, capacities, possibilities, needs... As can be seen, at this point there is little difference between the legal and ethical construction.

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<sup>6</sup> The notion of moral rights is very controversial in Philosophy of Law. See, in this regard, Nino, C.S., "Sobre los derechos morales," in *Doxa*, no.7, 1990, p. 311 *et seq.*

Moreover, the most important aspect of moral rights' construction is the ethical acknowledgment of the relevant claim, as it happened in the legal domain. Such acknowledgment appears as grounds, i.e. a moral right is held when there are moral grounds that justify the said moral right. Along these lines, the existence of a moral right shall be determined by how solid these justifying grounds are.

From this point, the question of whether sexual assistance is a moral right shall depend on how we define sexual assistance.

Finally, we can ask ourselves this question from a human rights perspective: is sexual assistance a human right? As in the two previous cases, in order to answer this question we must know what a human right is. Similarly, there is no single answer to this question. However, it is worth noting that, as opposed to the two previous cases, there is a list of human rights enshrined in international declarations as well as in domestic constitutions. Thus, in order to adequately answer the question, we could look for the acknowledgment of sexual assistance as a human right in any of these texts.

If we examine human rights laid down in declarations, conventions and constitutions, we will not find a right to sexual assistance. Conversely, we may be able to argue about its existence based on other rights or on core elements of the human rights discourse. However, this path forces us to question ourselves about the actual essence of human rights.

Although there are different approaches to human rights,<sup>7</sup> some distinct features can be found in almost any approach thereto, which are consistent with the legal and ethical notions of rights.<sup>8</sup> Therefore, human rights amount to requirements, needs, claims, etc. that can appear in any of the situations described by Hohfeld, generally supported by legal provisions as well as by ethical reasons for the enforcement thereof. Human rights are distinct because there is always going to be another side of the coin: a duty is always going to be complemented, among others, by the Government (either as a guarantor of rights or as a promoter thereof), and the ethical arguments that justify such rights is tied to the development of a dignified human life.

Yet again, it is essential to clarify the meaning of sexual assistance in order to verify if it is connected with a dignified human life.

Although we still have to clarify the meaning of sexual assistance, the question of whether it amounts to a right depends, from a legal perspective, on the existence of a valid legal provision. From an ethical standpoint, it depends on the existence of moral grounds, and from a human rights perspective it depends on a legal provision, but particularly on the existence of an obligation incumbent upon the Government as well as on grounds tied to a dignified human life.

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<sup>7</sup> See Rodríguez Toubes, J., *La razón de los derechos*, Tecnos, Madrid, 1995, p. 20 *et seq.*

<sup>8</sup> See De Asís, R., *Sobre el concepto y el fundamento de los derechos: una aproximación dualista*, Dykinson, 2001, p. 6 *et seq.*

## II. WHAT IS SEXUAL ASSISTANCE?

As it happened with the notion of right, there is no single perspective on sexual assistance. The primary meaning of sexual assistance relates to the help or support provided for the performance of sexual activities. In this connection, sexual assistance would involve a third party.<sup>9</sup> This aspect constrains and ultimately defines the approach to sexual activity. Accordingly, we can mainly differentiate between three kinds of sexual activity. First, the activity performed by oneself; second, sexual intercourse between two people; finally, a sexual relationship between two people with no physical contact.

In the context of disability, the term “assistance” is often referred to personal assistance, which involves the help provided by one person to another so the latter can carry out different activities or even the first may actually perform such activities for the latter.

As is well known, the issue of sexual assistance falls within the rights of persons with disabilities discourse. Indeed, it is a core element of what in other papers I have designated as “accessibility axis,” made up of universal design (a general principle that gives rise to specific obligations), accessibility measures (general measures appearing when universal design is not fulfilled in a justified manner), and reasonable accommodation (individual measures applicable when accessibility requirements are not met in a justified manner through universal design or accessibility measures).

Article 9 of the Convention on the Rights of Persons with Disabilities addresses universal accessibility in the following terms: “To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.”

Hence, one could speak of a narrow and a broad meaning of accessibility. The narrow meaning of accessibility applicable to “products, environments, programmes and services,” entails “persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.” Accessibility in a broader sense brings along the access of persons with disabilities to all legal interests and rights, and it revolves around an independent living and their participation as equal

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<sup>9</sup> This work will focus on sexual assistance provided by a person. However, such assistance could even be provided by machines. Some scholars consider that this would almost settle the debate, which leads to consider that one of the main issues regarding sexual assistance has to do with the assistant’s rights and overall situation. Furthermore, the possibility of using machines in this kind of activity can also pose certain problems. I have tackled this matter in *Una mirada a la robótica desde los derechos humanos*, Dykinson, Madrid, 2015.

members of society. It is closely connected with the notion of ability or capacity, and it underscores its dimension as a possibility or, better said, as a right to hold rights.

Support and assistance are key tools within the rights of persons with disabilities discourse. Although they have different meanings and implications, support is often connected with the exercise of rights, and assistance is usually tied to an independent living as well as to instrumental activities of daily living.

Therefore, we can highlight two broad meanings of support. On the one hand, a meaning related to the exercise of rights; in this vein, we can refer to educational support (Article 73 *et seq.* of Organic Act 2/2006, of 3 May, on Education -*Ley Orgánica 2/2006, de 3 de mayo, de Educación*-) or to supported employment (Article 2(1) of Royal Decree 870/2007 of 2 July -*Real Decreto 870/2007 de 2 de julio*-). On the other hand, support may be connected with the exercise of abilities or capacities, and particularly with decision-making (Article 12 CRPD).

Likewise, we can address two broad meanings of assistance. First, the one projected onto the exercise of rights in connection with independent living, thus tied to the first meaning of support. Second, the meaning that connects assistance with what has traditionally been designated as instrumental (or basic) activities of daily living (Article 2 of Act 39/2006 on the promotion of personal autonomy and care of dependent persons -*Ley 39/2006 de promoción de la autonomía personal y atención a las personas en situación de dependencia*-).

Accordingly, support and assistance can be jointly examined, with three main projections attached thereto: a) exercise of rights; b) decision-making; and, c) instrumental (or basic) activities of daily living.

These three projections or meanings of support and assistance can be found in the “accessibility axis” and in its three core elements. Therefore, they can be implemented as universal design (general measures for all enabling everyone), accessibility measures (general measures enabling persons with disabilities) or as accommodation (individual measures).

For instance, considering the right to access to justice, universal design requires buildings to be accessible; accessibility measures require solving -on a universal basis- a justified lack of accessibility (for instance, because the building is old); and reasonable accommodation requires specifically remedying a justified lack of accessibility (for instance, to condition a given room). We can apply this outline to support. Such support measures can be part of universal design or they may belong to accessibility measures (existence of specialized personnel to assist persons with intellectual disabilities in court), but they can also fall within reasonable accommodation (personal assistant or support person for decision-making).

Along these lines, both support and assistance can be part of the “accessibility axis,” and therefore they can be involved in the various legal constructs provided in other

works on accessibility. They can belong to the core content of rights, and the lack thereof can thus entail a violation of the relevant right. However, they can also operate as actual rights. Thus, in *Sobre discapacidad y derechos* (Dykinson, Madrid 2013), I have considered the possibility of shaping a right to decision-making support, or a right to assistance for the instrumental activities of daily living.

Notwithstanding the foregoing, as I have stated in previous works, the universal “accessibility axis” can be limited by three kinds of circumstances, i.e. the boundaries of necessity, of possibility and reasonableness. The boundaries of necessity relate to the kind of legal interests, products, services or rights on which accessibility can be projected; the boundaries of possibility are mainly related to the situation of scientific knowledge and human diversity; the boundaries of reasonableness are tied to the lack of justification for accessibility, since it affects other rights and legal interests or since it entails an unreasonable cost.

This general construct regarding the boundaries of the “accessibility axis” acquires certain distinct connotations when applied to support and assistance. This is mainly due to two reasons. First, because sometimes in these situations a third party’s rights (those of the person providing the assistance or support) can be at stake. Second, because some other times the point is to support a person’s will, and at this point we could put forward certain justified requirements in favor of the assistant or the person supporting himself/herself.

Indeed, despite our emphasis on integrating the notions of support and assistance within the individual exercise of a right, as well as within an extension of the person itself, the truth is that whenever such support and assistance are provided by a person, such person’s rights are actually at stake. Along these lines, we must weigh the various legal interests involved. Moreover, when this support or assistance is tied to the individual’s decision-making, particularly when touching on core individual aspects, some might argue in favor of protecting the person itself. Self-evidently, in both cases this construct becomes even more complex.

In the context of personal assistance we can find activities such as personal hygiene, activities related to the house, accompanying activities or driving, but sexual activities are not included therein.<sup>10</sup>

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<sup>10</sup> According to Soledad Arnau, personal assistance is an instrumental need, whereas sexual assistance is a secondary need. In her view, “Personal Assistance somehow contributes to enhance one’s sexuality, at least in an indirect manner. In other words, certain persons with functional diversities would be unable to access their current resources (going out, entering into clubs, sex-shops, preparing for sexual relations...) without their Personal Assistants.” She claims that sexual assistance is an optional or enabling resource, “a direct resource allowing a person with functional diversities to live his or her sexuality, but it shall never be construed as the only possible alternative.” Arnau Ripollés, M<sup>a</sup>. S., “Asistencia Sexual. Otro medio, no un fin, para alcanzar el Derecho Humano a una Vida Independiente en materia de Sexualidad,” Universidad Abierta Iberoamericana Manuel Lobato (UAI Manuel Lobato-IPADEVI), Madrid 2013. Available online at: <http://www.slideshare.net/solearnau/asistencia-sexual-sept-2013>.

In this connection, within the context of disability, sexual assistance is a special form of assistance encompassing the three dimensions of sexual activity mentioned above along with the preparation to sexual relationships.

It is central to lay down certain criteria that may allow us to individualize sexual assistance in the disability domain, thereby drawing a distinction between sexual assistance and other sex-related services. Out of the four activities mentioned above, there are two activities that acquire their own dimension, and which can be differentiated from other sex services that go beyond disability. They both require a distinct justification when the person willing to perform the relevant activity is materially unable to do so, i.e.: preparation for sex and sexual activity performed on oneself.

However, the first one can be considered to be personal assistance, whereas the latter would be sexual assistance in a strict sense. According to Antonio Centeno, “sexual assistance for persons with functional diversities is a common ground for personal sexual assistance (which fulfils the right to access one’s own body) and sex-related services (wherein sexual pleasure is obtained in exchange for money).”<sup>11</sup> This scholar contends that sexual assistance is connected with self-sexuality. Nevertheless, according to him, when sexual assistance involves a sexual relationship we are actually confronted with prostitution.

### III. SEXUAL ASSISTANCE AS A RIGHT

Once we have determined the meaning of sexual assistance, we can re-examine the possibility of shaping sexual assistance as an individual right.

As stated above, one path entailed considering sexual assistance as the result of a legal relationship, according to which an individual would be a right holder and his/her counterparty would be subject to an obligation. As is well-known, Article 1089 of the Spanish Civil Code sets out that obligations arise from legal provisions, from legal agreements or contracts, and from quasi-contracts. Accordingly, this would equal to consider sexual assistance as a service to be provided.

In order to further examine this path the validity requirement must be met, i.e. we must take into account Article 1255 of the Spanish Civil Code: “The contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the law, to morality or to public order.”

Is sexual assistance contrary to the Spanish legal system? As is well known, Spanish law is somewhat cautious when dealing with sexual work. One could assert that there is no explicit prohibition of a free provision of sex-related services.<sup>12</sup> On that basis, personal assistance would not be forbidden.

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<sup>11</sup> Centeno, A., “Asistencia sexual para personas con diversidad funcional,” 2014, Available online at: <http://derechoshumanosya.org/asistencia-sexual-para-personas-con-diversidad-funcional/>

<sup>12</sup> In Spain, this conclusion is often supported by the famous case of the Senior Judge Gloria Poyatos. She registered with the Spanish IRS and she registered in the Social Security System as a prostitute. Article 187



As has been highlighted throughout this work, considering sex services to be legal depends on whether such services are freely provided, and this is the most troublesome issue in this regard, in addition to other considerations such as the exploitation of women or the commodification of persons. However, these claims become less solid having regard to the shaping of personal assistance performed herein, which with such meaning and scope can become the subject of an agreement providing certain rights and obligations.

If, according to our interpretation, sexual assistance can be the subject of a service provision agreement, why would it be interesting to shape it as a moral right or a human right? In my view, there are two reasons for this. The first one has to do with its strength and cost; considering sexual assistance as a right with solid ethical foundations, or even as a human right, provides good reasons to get the Government involved in the fulfilment thereof. The second reason has to do with displaying sexual assistance as a demand in line with the struggle against discrimination and the protection of the rights of persons with disabilities.

As has been examined above, we need legal grounds (mainly a legal provision in the broader sense), as well as an ethical justification, to deem sexual assistance as a right.

The legal grounds can arise from the connection between sexual activity and sexual rights, or rather from the ties between sexual activity and other human rights.

In the context of human rights, sexual rights were defined for the first time in the Fourth World Conference on Women: “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.”<sup>13</sup>

We shall construe the notion of sexual rights as a set of claims mainly aimed at ensuring the autonomous and responsible control over all issues regarding sexuality. Conversely, the purpose of reproductive rights is to protect any decisions concerning women’s reproductive behavior.

These rights are grounded on human rights.<sup>14</sup> In this regard, they are based on the values that govern the human rights discourse (dignity, freedom and equality). In

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of the Spanish Criminal Code proscribes forced prostitution, which under Article 188 is a more serious crime if it involves children or persons with disabilities in need of special protection. Furthermore, the Act on Public Safety (*Ley de Seguridad Ciudadana*) provides for penalties on prostitution when carried out in certain public areas. In addition, several local rules and regulations address prostitution.

<sup>13</sup> Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 and A/CONF.177/20/Add.1.

<sup>14</sup> Declaration of Sexual Rights of the World Association for Sexual Health, available at <http://www.diamundialsaludsexual.org/declaracion-de-los-derechos-sexuales>, accessed on 29 December 2016.

addition, they are also closely tied to numerous legal interests underlying the human rights discourse (health, for instance).

In any event, the meaning and scope of these rights remain unclear. There are different dimensions within sexual rights. Accordingly, within sexual rights we can talk about sexual freedom (i.e. free decision-making regarding sexuality), privacy, non-discrimination, education, information and sexual health. Furthermore, reproductive rights comprise reproductive freedom (free decision-making concerning a woman's reproductive behavior) and reproductive health. Thus, they are rights that not only require protection, but they must also be provided and enforced.

Sexual rights have been fostered within the framework of women's rights claims and their struggle for non-discrimination.<sup>15</sup>

The inclusion of disabilities in the human rights discourse requires extending sexual and reproductive rights to persons with disabilities. This is certainly not a new issue. In 1981 the Charter of Sexual Rights in favor of Persons with Disabilities was adopted in Havana, following the efforts of the Cuban grassroots movement (*movimiento asociativo cubano*). Such Charter enshrined the following rights: (i) the right to sexual expression; (ii) the right to privacy; (iii) the right to information; (iv) the right to access the necessary services, such as contraception advice, medical attention and genetic and sexuality advice; (v) the right to choose the most suitable marital status for persons with disabilities; (vi) the right to offspring; (vii) the right to make decisions affecting one's own life; (viii) the right to try to fulfil the individual's full potential.

Nevertheless, this issue has not been tackled from an individual rights approach. This is due to the prevailing social view of disability and to the problems attached to dealing with sex-related issues.

We also face these constraints if we advocate for the inclusion of sexual activities within the content of other rights, such as freedom or health, or within other legal interests. Although I will go back to this point, it is worth noting that this inclusion is not unanimously accepted. Additionally, from a legal perspective, the acknowledgment of implicit rights (often designated as implied or underlying rights) is troublesome in certain contexts.

As is well known, the notion of implicit rights refers both to rights which have not been expressly enshrined in a given Constitution and, as a legal principle, to those rights the content of which can be inferred from the actually listed rights.<sup>16</sup> The Spanish Constitution fails to address implicit rights (as opposed to the Argentinian Constitution, which mentions implicit rights in Article 33). However, we can often find lines of

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<sup>15</sup>See, for instance, Londoño, M.L., *Derechos sexuales y reproductivos*, ISEDER, Colombia, 1996.

<sup>16</sup> On this matter, see Gros Espiell, H., "Los derechos humanos no enunciados o no enumerados en el Constitucionalismo Americano y en el artículo 29.C de la Convención Americana sobre Derechos Humanos," in *Anuario Iberoamericano de Justicia Constitucional*, 4, 2000, p. 146.

reasoning arguing that certain rights and claims can be inferred from the constitutional framework even if they are not expressly contained in the constitutional provisions.<sup>17</sup>

In any event, the success of the abovementioned lines of reasoning is closely tied to sound ethical arguments. In this regard, when it comes to justifying sexual activities from an ethical standpoint, there are two possible paths to be taken: a line of reasoning based on needs, or rather the construction sexual activities as an essential legal interest or activity.

In the contemporary rights discourse, basic needs are often put forward as justifying grounds.<sup>18</sup> This also happens in the majority of moral philosophy scholarly works, where the fulfilment of basic needs is an ethical imperative.<sup>19</sup> Nevertheless, it is worth noting that not every right is aimed at fulfilling a basic need, and thus considering sexual activities as a basic need would not necessarily solve the problem. However, it would further advance the construction of sexual assistance as a right.

The underlying issue in the basic needs discourse is the lack of consensus on the meaning of such basic needs as well as regarding the difference between them and satisfiers, wishes or preferences.<sup>20</sup> Neither there is consensus on whether sexual activities can be deemed as a need. For those who understand basic needs as those which in lack thereof will lead to death, sexual activity is not a basic need, although it is included in certain classifications of needs.<sup>21</sup>

Conversely, within the occupational therapy discourse, with significant implications in the personal assistance domain, the notion of “Instrumental Activities of Daily Living” is often applied to those activities oriented towards taking care of one’s own body as well as to any essential activity required for an effective participation in society.<sup>22</sup> In the most commonly used list of these activities, that of the American Occupational Therapy Association, sexual activity is acknowledged as an Instrumental Activity of Daily Living.<sup>23</sup>

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<sup>17</sup> A common example in Spain is Constitutional Court Ruling no. 31/1981 (*Sentencia 31/1981 del Tribunal Constitucional*), which infers the *in dubio pro reo* principle from the presumption of innocence laid down in Article 24 of the Spanish Constitution. This inference has been challenged by scholars.

<sup>18</sup> See Añón Roig, M.J., *Necesidades y derechos: un ensayo de fundamentación*, Centro de Estudios Constitucionales, Madrid, 1994.

<sup>19</sup> See Ribotta, S., “Necesidades, igualdad y justicia. Construyendo una propuesta igualitaria de necesidades básicas,” in *Derechos y Libertades*, no. 24, 2011, p. 259 *et seq.*

<sup>20</sup> See Ribotta, S., “Necesidades y derechos: un debate no zanjado sobre fundamentación de derechos,” in *Jurídicas*, 5 (1), Universidad de Caldas, 2008, p. 29 *et seq.*

<sup>21</sup> See Braybrooke, D., *Meeting Needs*, Princeton University Press, Princeton-New Jersey, 1987, p. 60 *et seq.*

<sup>22</sup> See Rogers, J. C. and Holm, M. B., “Assessment of self-care,” in Bonder, B.R. and Wagner, M.B. (eds.), *Functional performance in older adults*, F.A. Davis, Philadelphia 2009, p. 181–202; see also, Christiansen, C. H. and Hammecker, C. L., “Self care,” in Bonder, B.R. and Wagner, M.B. (eds.), *Functional performance in older adults*, cit., p. 155–175.

<sup>23</sup> American Occupational Therapy Association. “Occupational therapy practice framework: Domain and process” (3rd ed.), *American Journal of Occupational Therapy*, 68, 2014. Available at <http://dx.doi.org/10.5014/ajot.2014.682006>

Therefore, sexual assistance for persons that cannot perform sexual activities on their own body can be ethically justified by the theory of needs or by the notion of Instrumental Activities of Daily Living.<sup>24</sup> It can also fall within sexual rights or within the right to choose a way of life (given the connection between the Instrumental Activities of Daily Living and this right).<sup>25</sup>

Accordingly, we could refer to sexual assistance as a right. Indeed, based on how we have construed the notions of support and assistance, we could even deem sexual assistance as a core element of rights (such as the right to sexual freedom or the right to choose a way of life).

Notwithstanding the foregoing, there are significant limits to the construction of sexual assistance as a right and as an ethically relevant legal interest. These boundaries have to do with the other side of the coin, i.e. the obligation attached to the right and thus with the Government's role and the rights of the person providing the relevant assistance.

Could it be asserted that the Government has to help me in this domain provided that I am entitled (or, put differently, I hold the right) to sexual assistance? When I addressed the "accessibility axis" I pointed out that one of the limits came hand in hand with reasonableness, and that the latter often became an economic issue. If we place sexual assistance within the human rights domain, this claim is pushed right into the background. As I have stated in other works: "Limiting a right based on its excessive cost is simply unacceptable in the human rights discourse, unless there is evidence that such cost is causing insurmountable damage to other rights. At this point, the key is not the cost but the impact on the other right. Economics must be at the service of rights and not the other way around."<sup>26</sup> Hence, "there is no room for the cost as an argument independent from the enjoyment of rights. In order for it to be an admissible argument, the cost must be tied to the actual rights (i.e. it must limit other individuals' rights). Additionally, it will have to assess the cost attached to the non-fulfilment of the relevant legal interest in terms of lack of integration or segregation."<sup>27</sup>

Hence, it could be argued that the Government must be required to provide this right, although this provision would have to be weighed against the impact on other fundamental rights and legal interests (as it often happens in the rights discourse).

The same applies to the other side of the coin, i.e. the obligation attached to this possible right: the obligation incumbent upon the assistant. In this connection, this right's construction requires to clearly determine the scope of the assistance and the assistant's

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<sup>24</sup> In support of this argument we could find the possibility of banning any sexual activity performed on one's own body. Regardless of any ethical and religious grounds (or even claims disguised as medical criteria) advocating for this possibility, it does not look like the Law would be able to enforce it.

<sup>25</sup> See de Asís, R., *Sobre discapacidad y derechos*, Dykinson, Madrid, 2013, p. 91 *et seq.*

<sup>26</sup> De Asís, R., "El eje de la accesibilidad y sus límites," in *Anales de Derecho y Discapacidad*, no. 1, 2016, p. 65.

<sup>27</sup> De Asís, R., *Sobre discapacidad y derechos*, cit., p.124.

rights and obligations. This issue cannot be tackled in this paper, but it is rather complex. We should not forget that the rights and obligations attached to personal assistance are still to be defined in legal provisions.

In this paper I can neither focus on the implications of this possible right regarding persons with intellectual and psychosocial disabilities. In these cases there is a twofold support or assistance. On the one hand, sexual assistance as has been examined herein; on the other, the assistance related to the decision of performing, or not, a sexual activity. The latter entails providing support to decision-making, as it happens in other situations.<sup>28</sup> However, such support cannot be provided by the sexual assistant insofar as there is some sort of economic compensation for this service.

#### IV. SOME CONCLUSIONS

Sexual assistance in the field of disability is a type of special assistance that incorporates four dimensions: the activity of a person in his own body, the activity that consists of a physical sexual relationship between two people, the activity that consists of a relationship sex between two people No physical contact and preparation for sexual activity.

Sexual assistance can be constructed as the object of a service. However, there are two arguments that favor its consideration as a right. The first has to do with its strength and its cost. The consideration of sexual assistance as a right with a strong ethical justification or as a human right, provides reasons to implicate the State in its satisfaction. The second one has to do with presenting it as a demand consistent with the movement that fights against discrimination and for the rights of people with disabilities.

The consideration of sexual assistance as a right depends, in a legal sense, on the existence of a valid legal norm; in its ethical sense, the existence of a moral reason; in a sense of the human right of a norm, but above all, of the existence of an obligation of the State and of a reason linked to the dignified human life.

The legal reason may come from the connection between sexual activity and sexual rights or from the connection between sexual activity and other human rights. But we also need a convincing ethical argument. To justify sexual activity as an ethical reason, we can follow two paths: that of needs or that of understanding it as a fundamental good or activity.

But sexual assistance understood in this way has limitations in its own construction, which have to do with the correlative situation of obligation and, therefore, with the role of the State and with the rights of the person performing the assistance. In relation to the role of the State, there are arguments to defend a performance benefit that

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<sup>28</sup> See Cuenca, P., "El sistema de apoyo en la toma de decisiones desde la Convención Internacional sobre los Derechos de las Personas con Discapacidad: principios generales, aspectos centrales e implementación en la legislación española," in *REDUR 10*, December 2012, p. 61 *et seq.* See also, Bariffi, F.J., *El régimen jurídico internacional de la capacidad jurídica de las personas con discapacidad*, Cinca, Madrid 2014.

must be weighed against its effect on other rights and fundamental goods (as is usual in the discourse of rights). On the other hand, the construction of this right requires clearly establishing the scope of assistance and the rights and obligations of the assistant.

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