

REASONABLENESS IN THE CONCEPT OF REASONABLE ACCOMMODATION¹

RAFAEL DE ASÍS ROIG²

Abstract: Reasonable accommodation is one of the pillars upon which the recognition of the rights of people with disabilities rests. It acquires its full meaning when understood in connection with the concept of universal design, since both concepts fall within the framework of universal accessibility. An accurate understanding of reasonable accommodation requires, on the one hand, clarifying its connection with universal design and accessibility, and on the other, unraveling what “reasonable” means. The reasonableness in accommodation takes to three kinds of reflections. On the one hand the one concerning non-discrimination, which requires to assess, when examining whether the adjustment is justified or not, if it entails a violation of the principle of equality (since it differentiates or it does not, in an unjustified manner, thus harming a human right such as accessibility). In this justifying test there is an essential methodological tool at hand, which shall be regarded as the second great reflection on reasonableness in accommodation: the principle of proportionality. In virtue of this principle, the reasonableness test requires facing the adjustment’s adequacy and necessity and, in addition to that, the advantages or sacrifices that produces on rights. And since both of these reflections do not ensure a single answer, reasonableness requires a last reflection on the basis of acceptability. The adjustment’s justification, or the lack of it, shall be subject to the community’s acceptance or rejection.

Keywords: Accessibility, Reasonable Accommodation, Disability, Universal Design.

Summary: I. UNIVERSAL ACCESSIBILITY AND REASONABLE ACCOMMODATION; II. THE MEANING OF REASONABLENESS; II.1. Three dimensions in reasonableness; II.2. Reasonableness in accommodation; III. REASONABLENESS IN DISABILITY; III.1. Reasonableness and unreasonable costs; III.2. A comprehensive vision.

Reasonable accommodation is one of the pillars upon which the recognition of the rights of people with disabilities rests. It acquires its full meaning when understood in connection with the concept of universal design, since both concepts fall within the framework of universal accessibility (which, in general, but particularly so in the field of disability, is part of the right to have rights).³

¹ I would like to thank F. Javier Ansuátegui, M. C. Barranco, P. Cuenca, A. Palacios and M. L. Serra, for their comments and suggestions for this paper’s rough draft. There is a Spanish version of this paper in SALMON, E. and BREGAGLIO, R. (2014).

² Instituto de Derechos Humanos Bartolomé de las Casas, International, Ecclesiastical and Philosophy of Law Department, Universidad Carlos III de Madrid, Spain (rafael.asis@uc3m.es).

³ I would like to point out, just as a reminder, that the rights of the disabled unfold within generalization and specification. On the rights of people with disabilities see, for a general scope, CUENCA, P. (2012). Generalization expresses the need for people with disabilities to be entitled to the same rights as any other person; specification conveys the necessity of recognizing people with disabilities specific rights. Well then, taking into account the preceding statement and contrary to what I favored in DE ASÍS, R. (2013),

An accurate understanding of reasonable accommodation requires, on the one hand, clarifying its connection with universal design and accessibility, and on the other, unraveling what “reasonable” means. Admittedly, achieving a fully comprehensive notion of this idea seems almost impossible. In spite of that, in the forthcoming pages I will attempt to offer some reference points in order to provide the term with a meaningful content.

I. UNIVERSAL ACCESSIBILITY AND REASONABLE ACCOMMODATION

As has just been said, universal accessibility is one of the major principles (rights) when dealing with the issue of disability. It therefore comes as no surprise that it appears in the preamble of the Convention on the Rights of Persons with Disabilities (CRPD) being its importance highlighted “in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.”⁴ As to this international enactment, accessibility is also comprised in the general principles provided by Article 3 and there is even a provision as a whole (Article 9) devoted to this particular principle.

Hence, Article 9 CRPD is worded as follows: “To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure for 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”.

In most legal texts accessibility is enshrined as a principle. However, accessibility may be brought forward as: a) a requirement for action by the public authorities as well as a validity standard for any legal performance (legal principle of universal accessibility); b) a relevant claim tied to the defence of any fundamental right (universal accessibility falls within every fundamental right’s core content); c) a need for non-discrimination (the right to accessibility on an equal basis); d) a right itself, the right of access to goods, products and services not related to human rights, understood as a performance right (of a statutory or a fundamental nature) which correlatively brings along the “design for all” obligation ((DE ASÍS, AIELLO, BARIFFI, CAMPOY, and PALACIOS 2007: p. 104 ff).

Furthermore, universal accessibility is integrated and grounded in the CRPD by reference to three other major rights: the right to an independent living, to a full participation in society and equal opportunity.

both universal design and reasonable accommodation are part of generalization as long as they aim at extending the enjoyment of human rights to persons with disabilities.

⁴ In order to attain an accurate understanding of the Convention PALACIOS, A. (2008) is a must-read.

Independent living shall mean “the situation in which disabled people retain their full ability to make decisions about their very existence and actively take part in their community, in accordance with the right to the free development of personality”⁵. Article 19 of the Convention addresses the right to an independent living as follows: “States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, especially by ensuring that: a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement”.

Full participation in society is a right covered by the definition of disability which lays the foundations for many of the rights set forth in the CRPD⁶. Accordingly, Article 1 reads: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

There is no doubt, however, that equal opportunity rights provide the basis for accessibility thereby integrating the two previous rights. The referred equal opportunity rights, as N. Bobbio pointed out, “are aimed at placing every member of a given community on equal starting points with regards to participation conditions in the competition of life or in the conquest of the most significant milestones in a lifetime” (BOBBIO 1993: 78). It brings along “measures focused on removing those obstacles that prevent individuals from competing on equal terms” (BARRANCO 2011: 36). Nevertheless, as M.C. Barranco has stated, it may turn to be insufficient to ensure the recognition and enjoyment of rights on an equal basis. Actually, “it is easy to imagine situations in which two individuals have equal opportunities to compete but due to the given circumstances, individuals that belong to a certain group would win every single time” (BARRANCO 2011: 38). This happens because in many cases the reflection on equality is not only projected onto specific practices or situations but embedded in social structures. This is why it is important to use a broad concept of “opportunity” when speaking about equal opportunities. This concept must be so overarching as to comprise structural situations.

Along these lines, the demand for accessibility does not take place in the abstract or in relation to domains with an individual or a personal scope, but it is rather applied to goods, products and services linked to social life which some people (the majority) enjoy.

⁵ As defined by Article 2 of the Spanish General Law on the Rights of Persons with Disabilities of 2013.

⁶ Article 22 of the Spanish General Law on the Rights of Persons with Disabilities of 2013 begins by pointing out that “persons with disabilities are entitled to live independently and to a full and effective participation in every aspect of life.”

The bottom line is that although accessibility can be accomplished through different means, two of them are usually highlighted: universal design and reasonable accommodation.

Pursuant to Article 2 of the Spanish General Law on the Rights of Persons with Disabilities of 2013, universal design means “the activity aimed at planning and conceiving from the very beginning, where possible, environments, processes, goods, products, services, objects, instruments, programs, devices or tools to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.”

It is an obligation stemming from the right to universal accessibility in each of its dimensions, to be complied with, not only by public authorities, but rather by every individual who participates in the making of these goods and products, in the provision of a service, or in the enforcement of a given right. Therefore it shall be construed as an obligation that accounts for the importance of taking the validity of rights among subjects of private law in a serious manner when it comes to enforcing the rights of the disabled.

From a conceptual standpoint, what is troublesome about universal design lies on determining the meaning of the term ‘possible’, which, as it may have been appreciated, sets an internal boundary for the content of this principle. From a general point of view, a first sense of ‘possible,’ the most basic one, closely relates to the state of knowledge and research. Therefore, the design for all might be constrained by progress made in science and technology as well as by human diversity and our chances to learn about it. It is a boundary which, legally speaking, is amply illustrated by the old aphorism “ad impossibilia nemo tenetur.”

In addition, the design for all might find other bounds that have to do with the consequences tied to its enforcement and which complement the mentioned primary meaning of possible. As it has been previously stated, the design for all is aimed at accomplishing universal accessibility. Nonetheless, there may be occasions when measures brought along by universal design might lead to harmful outcomes which could be prejudicial for other rights at stake, thus weakening its legal foundation. Let’s imagine, for instance, that in order to meet universal design standards it is necessary to cause environmental damage or that a blatantly unreasonable cost which causes the non-enforcement of other rights at stake is required. In these situations, design for all shall be deemed unreasonable, thus turning the need for what is possible into the need for reasonableness.

Universal accessibility, as it happens with every right, is not an absolute right. This obviously implies that the universal design obligation is not an absolute right either. Therefore, when focusing on the consequences, the impact of universal design on rights and their cost must be taken into account. However, as it will be noted below, these are issues that shall not be addressed separately, being the latter determined by the first. Founding the boundaries of design on reasonableness only makes sense when such

design entails undermining the enjoyment of a given right in an unacceptable manner. On this point, reasonableness is normally assessed in terms of proportionality. I will take care of the matter later.

Reasonable accommodation measures (also referred to as reasonable adjustments) intend to shape the environment, goods and services to meet the particular needs of a given person. In accordance with the CRPD, reasonable accommodation means “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”⁷

It is a right meant to fulfill the legal interest protected by the right to accessibility, so it can also be considered as an expression of this principle or right. Hence, reasonable accommodation acquires its fullest dimensions when the underlying legal interest in accessibility cannot be fulfilled universally, thus becoming an actual right aimed at solving a given situation (PALACIOS 2004). The right to reasonable accommodation encompasses neither a preferential nor a privileged treatment. Moreover, it does not bear a time dimension and it shall not be understood as a mere measure either. Nevertheless, the adjustments are not aimed at replacing the duty to provide accessibility or let alone to limit it.

Admittedly, the lack of accessibility, i.e., the breach of the accessibility obligation, may or may not be justified, and that will depend on whether a design for all has been accomplished (either originally or by means of accessibility measures). If it has actually been accomplished, either because there is in fact universal accessibility or because its existence was either impossible or unreasonable, we cannot talk about a violation of the duty to provide accessibility. If it has not been accomplished, because there is no universal accessibility and its existence was possible or reasonable, we can in fact talk about non-compliance with the duty to provide accessibility. In this latter case we are dealing with a discrimination scenario that must be settled by remedying the unsatisfactory situation and accomplishing accessibility. As I have stated elsewhere, universal design might sometimes encounter constraints related to the progress made in technology and knowledge, which could entail the lack of accessibility with regards to certain goods, products and services. In these cases, the lack of accessibility does not amount to discrimination against anybody (because it is justified, i.e., “universal design was either impossible or unreasonable”) and can be remedied by means of reasonable

⁷ As the UN Committee on the Rights of Persons with Disabilities has pointed out, “The duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation (workplace, school, etc.) in order to enjoy her or his rights on an equal basis in a particular context. Here, accessibility standards can be an indicator, but may not be taken as prescriptive. Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account. Thus, a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard”. Section 26 of the General Comment on Article 9 of 11 April 2014 (General Comment No. 2).

accommodation (since the mentioned goods, products and services are linked to participation in society). However, if the breach of the duty to provide universal design and consequently the lack of accessibility are not justified (i.e., “if universal design was possible or reasonable”), these non-compliances would in fact amount to discrimination thus preventing reasonableness and reasonable accommodation from coming into play. Hence the importance of correctly interpreting the requirement that has been put forward, so it does not become an outlet for the duty to provide accessibility or universal design (DE ASÍS 2013: 80).

A comprehensive understanding of accessibility embodies: (i) universal design, which operates as a general principle from which specific obligations or duties stem; (ii) accessibility measures, which play a role when universal design is not achieved; (iii) reasonable accommodation, which arises when there is grounds for the non-universal nature of accessibility.

In other words, the requirement for universal accessibility is fulfilled through universal design. However, there may be situations in which universal design does not allow to comply with the accessibility obligation. These situations could be the result of: (i) universal design was either not possible (boundaries set forth by science, technology, knowledge or human diversity) or unreasonable (it is prejudicial for rights at stake or involves a disproportionate cost); (ii) universal design was indeed possible but actually not performed. In the first case, the lack of accessibility is justified and accommodation comes into play. In the second, there is no grounds for the lack of accessibility, amounting to a discrimination scenario that is not to be remedied by means of reasonable accommodation. In these situations, the lack of accessibility can only be solved by making the given good, service, or right universally accessible,⁸ and not by carrying out reasonable adjustments.

In short, the content of universal accessibility is constrained by three types of circumstances that could be considered as the bounds for what is necessary, possible and reasonable. The bounds of what is necessary refer to the kind of goods, products or services onto which accessibility is projected (and that must be tied to participation in society). The bounds of what is possible relate to the status of scientific knowledge and human diversity (there are indeed limitations in knowledge, and the greatness of human diversity makes it impossible to fully accomplish accessibility standards). The bounds of reasonableness address the absence of grounds for accessibility because rights at stake and goods are affected or because it brings along unreasonable costs (on which I will focus later).

⁸ In these cases, accessibility is accomplished by carrying out special general measures. This brings along a strengthened claim for universal design as opposed to these accessibility measures, since it is a principle more aligned with a less stigmatizing approach to disability, pointing out that these measures fall within a distinct approach which does not favor the inclusion of people with disabilities. It is actually stated that many of the policies aimed at fostering accessibility entail special measures for certain groups or individuals that perpetuate a picture of “abnormality” certainly incompatible with the disabilities social model’s philosophy. For instance, it shall be upheld that it is better to have just a ramp rather than having a staircase and a ramp.

In other words, discrimination on the grounds of the lack of accessibility takes place when providing a design for all is possible as well as reasonable yet it is not carried out. However, there might be another way of breaching the duty to provide accessibility and another form of discrimination stemming from a bad use of adjustments. The very conception of accessibility incorporates a dimension regarding accommodation and related to reasonableness at the same time. As it has been stated, the need for reasonableness in the adjustments is enshrined in the definition of reasonable accommodation. Thereupon, there might be a lack of accessibility, because it has not been possible to achieve a design for all, which cannot be remedied due to the unreasonableness of the possible adjustment to be made. In these cases there is no room to talk about a breach of the duty to provide accessibility. Nevertheless, if the adjustment shall be deemed reasonable, its non-performance amounts, once again, to discrimination. Hence, reasonableness comes up again as a boundary for accessibility, although now in its projection onto accommodation.

II. THE MEANING OF REASONABLENESS

As we have just examined, the terms possible and reasonable are central when studying accessibility. We have related the first to the state of knowledge (both scientific/technical and about human diversity) whereas the latter has been tied to legal reasoning and clashes with rights or other fundamental legal interests. In this section I am keen on analyzing the meaning of reasonableness within the context of accommodation.

For this purpose, I will start by unraveling the general meaning of this term and secondly I will outline its role in accommodation.

First of all I will clarify the power of the right to accommodation and the context where it shall be placed. As it has been stated before, we are dealing with an essential right within the framework of the rights of the persons with disabilities. Accommodation, as any other right, can have boundaries. Nevertheless, since it is a result of a restriction on accessibility, the legal grounds for these boundaries requires a greater argumentative effort. The adjustment's nature becomes really important at this point. Indeed, the requirement for reasonableness allows relating the adjustment in question to other parameters such as interests, principles, rights... Consequently, if the adjustment has a constitutional character, the parameters must be constitutional as well, whereas if it has a statutory nature the parameters must have this same essence; if accommodation shall be considered a human right, the parameters must be those of that legal context. Hence, as it happened when dealing with accessibility (maybe with greater justification in this case), the right to reasonable adjustments can (must) be construed as a human right.

II.1. Three dimensions in reasonableness

I will begin by underscoring that rational does not mean reasonable. Reasonableness refers to goals and values⁹; rationality basically brings forward logic and practical arguments, along with a domain in which there seem to be clear referents. Along these lines we might think that there is some sort of basic rationality affecting every domain of knowledge (a common compliance with deductive reasoning and the principles of practical rationality, such as consistency, efficiency, coherence, generalization...), and alongside there is another kind of rationality that connects to the first, which shall be understood within a particular domain and that is to be called sectoral. For instance, we could refer to a legal rationality based on rules. In this dimension, a rational behavior in Law is the one that can be labeled as lawful.¹⁰ Nonetheless we must recall that there are different rationality criteria, thus legal rationality could be found irrational from an economic outlook.

Something similar applies to reasonableness, since it can have a general dimension but it can also project itself onto a particular domain made up of a series of principles and values.

According to the foregoing, there is no reason for rationality and reasonableness to coincide. Therefore, there can be unreasonable rational measures, while we can also think of reasonable decisions which are also irrational. However, this last point calls for certain clarification.

As noted above, when dealing with rationality a difference must be made between basic rationality and sectoral rationality, and the same applies to reasonableness. Reasonable but irrational measures are implemented when combining different domains of knowledge. This is why something could be reasonable from an ethical standpoint yet irrational from a legal perspective.

The context of reasonableness is opposed to that of truth and certainty. Therefore, what is reasonable in the legal domain has nothing to do with the use of rules, despite the fact that these rules could be assessed in terms of reasonableness. Reasonableness relates to practical wisdom,¹¹ to arguments and principles. We shall not consider that applying reasonableness leads us to the only right answer there is. Contrarily, it is indeed useful in order to define a framework for admissible decisions, thus allowing us to identify the wrong ones.

⁹ According to L. Recaséns, reasonableness has to do with experience (RECASÉNS SICHES 1971: 49).

¹⁰ In the view of M. Atienza, a legal decision shall be deemed strictly rational if and only if: 1) Follows the rules of deductive reasoning; 2) Follows practical rationality principles, i.e., consistency, efficiency, coherence, generalization and honesty; 3) Is made without avoiding at least one or more binding sources of Law 4) It is not adopted on the basis of ethical or political criteria which are not specifically provided by the legal system (ATIENZA 1987: 193-194).

¹¹ See the interesting book by SCHWARTZ, B. y SHARPE, K., *Practical Wisdom*, Riverhead Books, New York 2010.

On the other hand, it must be highlighted that reasonableness has gained such salience in the legal domain as to be also used as a validity parameter (along with rationality). Reasonableness is central in the constitutional arena (MERCADER UGUINA 2008: 127 ff.) since this is where Law's evaluative dimension becomes more evident.¹² In this domain, reasonableness is mainly used for assessing the constitutional grounds for regulatory decisions. In Common Law, the notion of "principle of reasonableness" is normally used for referring to the substantive due process of law, a doctrine that obtained its utmost splendor in the early 20th century, and which was meant to assess the constitutionality of a rule on the basis of the reasonable relation between means and ends.

Reasonableness has been used when analyzing the safeguards of the right to an effective legal protection, putting together four control canons: a) congruence; b) line of reasoning; c) the absence of errors; and, d) the reasonableness of the court's judgment (ROCAS TRÍAS and AHUMADA RUIZ 2013).

Finally, the principle of reasonableness has projected itself onto equality protection, being used in this domain to distinguish between differentiation and discrimination (NINO 2005: 419; MARTINEZ TAPIA 2000: 99).

In all of these applications of the idea of reasonableness in Law, the latter has borne different referents, often tied to common sense and practical wisdom. But there are two referents that play an important role in this use of reasonableness. Although I briefly outline their respective meanings below, for now it is important to remark that whereas the first sets forth a series of steps and dimensions aimed at setting boundaries for what is reasonable, the latter focuses on assessing the outcomes of a given decision.

In brief, reasonableness in Law takes concrete form in the shape of non-discrimination, proportionality and acceptability.

II.2. Reasonableness in accommodation

As we have seen, the requirement for reasonableness in accessibility and accommodation has two dimensions. The first entails some sort of justification for the adjustment in question within the universal accessibility approach. Accommodation is justified on the grounds of the need for universal accessibility and its reasonableness stems from the latter. In these cases, the lack of accessibility has occurred because providing a universal design has been impossible or was deemed unreasonable. Nevertheless, the implementation of a particular measure such as accommodation can indeed be reasonable. In these situations universal design is not within reasonableness,

¹² In the view of the Spanish Constitutional Court, "reasonableness is not strictly synonymous with hermeneutic correction, but in addition to that, it is a requirement for compliance with the values enshrined in the Constitution". Constitutional Court Judgment 261/89 of 16 October, legal grounds 4.

but accommodation is certainly reasonable (in principle because the rights or interests are affected in a lesser degree).

The second dimension relates to the actual adjustment and its impact. This dimension calls for a reasonable adjustment so it can work as a boundary for the accessibility approach. Reasonableness, for this matter, involves leaving out certain measures that, although shall be deemed necessary to achieve accessibility, cease to be justified once another set of parameters starts to be taken into consideration (CAYO BUENO 2012: 159 ff.). In these cases, the accommodation in question has an excessive impact on some rights and legal interests, allowing the principle of proportionality to step in, through which it is assessed whether the adjustment entails an undue or unreasonable burden.

In a way, reasonableness works as a double test on accessibility. The first has to do with the grounds of a universal measure allowing for general access to a good or a service; the second relates to the single measure enabling a particular access to a good or service.

In all events, reasonableness shall not be an outlet for the universal design requirement nor shall become a strategy that enables to disguise actual cases of discrimination as for the enjoyment of rights or on the basis of disability. What I want to underscore with this is that the adjustment applies when the lack of accessibility is justified, but denying the adjustment might vary that justification and turn the mentioned absence into a case of discrimination.

As it has been stated, reasonableness in accommodation entails, on the one hand, the justification for the lack of universal accessibility, and on the other, the adjustment's justification. This call for reasonableness is expressed mainly in terms of proportionality. Notwithstanding, as it was pointed out above, the requirement for reasonableness has two other dimensions, which are non-discrimination and acceptability.

It is common to relate non-discrimination to the prohibition of prejudicial unjustified unequal treatment. However, non-discrimination also encompasses the prohibition of equal treatment without justification (i.e. the prohibition of discrimination on the basis of undifferentiation). This is because discrimination involves a violation of equal treatment, and equality plays a key role both when the unequal treatment is justified and also when there is justification for providing an equal treatment.¹³ Hence, when examining non-discrimination, we shall focus on how we assess a given treatment and its weight.

¹³ As a matter of fact, in the legal context we normally connect discrimination with unjustified unequal treatment from a "counterfactual" standpoint according to which all human beings are equal.

It is along these justification attempts where reasonableness turns into the requirement for proportionality.¹⁴ As it has been remarked, the principle of proportionality is the product of three major “sub-principles”: adequacy, necessity and proportionality (BERNAL PULIDO 1997: 100 ff.).

The adequacy principle expresses the demand for any right’s restriction to adequately match a legitimate constitutional purpose. Hence, when understood within the reasonable accommodation domain, the principle of adequacy states that a limitation in the adjustment could only be performed taking a constitutional aim as the reference and assuming that setting boundaries for the adjustment is an adequate means to achieve the mentioned constitutional ends.

Under this principle, the adjustment could only be denied when it hindered the attainment of another constitutional interest and denying the accommodation was deemed as an adequate means to preserve this interest. Nevertheless, one might also argue that the adjustment’s weight or importance is such that its performance is justified inasmuch as other measures enabling the satisfaction of the other interest can still be carried out.

Ultimately, the adequacy principle calls for a specification on whether the legal interest opposing the adjustment can be met through other means.

The principle of necessity declares that any adequate limitation on a right must be as benign as possible for the said right as compared to the remaining adequate limitations. With regards to accommodation, it sets forth that the limiting measure must be as harmless as possible (within the adequate measures), thus requiring clarifying whether or not there are better measures.

Strictly speaking, the principle of proportionality (also called weighing), provides that any adequate and necessary limitation on a given right must pass the advantages and sacrifices test. This test means that the limitation’s advantages shall overcome the sacrifices to be made (both for the right holders and citizens at large) within constitutional values. In short, it requires assessing and weighing the interests at stake.

Therefore, proportionality involves: (i) examining whether the interests ruled out as a result of the adjustment can be fulfilled with other measures or just denying the adjustment, (ii) assessing whether there are better measures (adjustments); (iii) comparing the advantages and sacrifices attached to one and the other.

Applying proportionality standards poses a series of issues and it can hardly be stated that its use ensures that the right decision will be made. Determining ends, advantages, sacrifices, adequacy, etc..., is subject to different possible judgments.

¹⁴ As many others have stated, we are living the era of proportionality. See, in this regard, BARAK (2012: 457).

Proportionality, as a criterion which legitimizes a possible limitation on a given right, involves a broad subjective margin of appraisal, and accordingly, what is relevant in its application are the underlying reasons. At this point, and within an argumentation grounded on rights, it is important to warn that not every reason is to be taken into consideration or weighed on an equal basis.¹⁵

The last dimension of reasonableness is acceptability (AARNIO 1991: 71 ff.).¹⁶ The importance of the latter increases as we are confronted with the impossibility of reaching the right answer, as it has been pointed out several times, just through proportionality. The requirement for acceptability calls for decisions allegedly acceptable to the community. It is thus related to the need for the community's reasonable expectations to be met. A reasonable decision shall be made within the expectations of the decision's addressees, and within this framework it shall be the one allegedly featuring the widest acceptance.

Certainly, the most complex cases, those that can only be solved on a one-by-one basis, are the ones in which the accommodation clashes with actual human rights. This is why it is essential to consider reasonable accommodation as a human right itself.

III. REASONABLENESS IN DISABILITY

As has been shown, the meaning of reasonableness has a central importance in the context of the persons with disabilities. In this section I will attempt to frame this idea within the mentioned context. Notwithstanding, prior to that we will examine an argument relating to the costs of the design or the adjustment which has been put aside until this very moment.

3.1. Reasonableness and unreasonable costs

As we have already seen, one of the limits set on universal accessibility, which can apply both to universal design and reasonable accommodation, relates to unreasonable costs. Indeed, when dealing with universal accessibility we saw how what is possible was integrated in its definition, thus allowing for an assessment of its economic costs in terms of reasonableness. We have also faced this assessment when tackling reasonable accommodation, since the latter can be limited, from a conceptual

¹⁵ In Spain, Article 66 (2) of the General Law on the Rights of Persons with Disabilities of 2013 states the following: "As for ascertaining if a given adjustment is reasonable... the costs, the discriminatory effects that could entail for the disabled not to adopt it, the structure and characteristics of the person, entity or organization that must implement it, and the possibility of obtaining official financing or any other sort of aid shall be taken into account."

¹⁶ I have addressed this principle in DE ASÍS, R. (2005).

standpoint, by the unreasonable costs of its performance.¹⁷ Therefore it seems appropriate to carefully examine this limit's scope with respect to accessibility, thus providing the full meaning of reasonableness in this domain.

Let me begin by recalling, as I have consistently done throughout this paper, that we are in the human rights domain, which undoubtedly restricts the referents that can be used as well as their scope. That said, it shall be noted that rights, as could not be otherwise, have always been limited by their economic feasibility, either by means of reflecting on scarcity or the so called "reservation of the possible".

Indeed, the focus on economy and on the costs of measures is by no means foreign to the context of rights. The traditional view has talked about material boundaries of rights when referring to constraints that preclude the satisfaction of the underlying interests and needs. And among the examples of these boundaries we can find references made to scarcity.

Nevertheless, the understanding of scarcity as a material boundary of rights shall aim for neutrality in its formulation, i.e., it must be an expression of natural scarcity.¹⁸ For instance, the claim that every individual in the world shall own a true Goya painting could not be considered as a fundamental right. Something similar, though not identical, applies to an alleged right to never getting sick. The material boundaries thus entail a limitation to certain demands which are unable to be met in a generalized manner due to natural scarcity.

However, facing this natural scarcity a built one can be found, i.e., the one stemming from human decisions, in judgment calls that award a higher value to some other interest deemed as more relevant (ANSUÁTEGUI 1991-92: 147 ff.).¹⁹ In these

¹⁷ However, the UN Committee on the Rights of Persons with Disabilities, in its comment on Article 9 of 11 April 2014 (General Comment No. 2) has noted that the economic costs shall not be put forward as a justification for not attaining accessibility (accomplishing universal design) but that it is indeed a valid argument as for grounding a non-performance of the adjustment. "State parties, in accordance with the Convention, are not allowed to use the austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities. Obligation to implement accessibility is unconditional, i.e. the obliged entity may not excuse the omission referring to the burdens of provision the access for persons with disabilities. Contrarily, the duty of reasonable accommodation only exists, if implementation constitutes no undue burden on the side of the entity" (Section 25). On universal design, see Section 15 of the comment.

¹⁸ It is important to distinguish between natural and real scarcity, i.e., between the one that naturally exists and the one we create. As Ferenc Fehér points out: "The most important indicator to support this claim is the Malthusian fiasco. Many times we exceed the Malthusian production level with respect to the population growth, and despite this we produce a number of edibles which is more than enough for the survival of humankind. If there is hunger in our world it is because it has been artificially provoked, and not caused by 'natural scarcity'" (FEHER (1993: 64).

¹⁹ In other occasions I have used this example to illustrate the argument. Let's imagine a planet in which 60% of the population were women and the remaining 40% were men. An alleged right to get married (providing that it was ethically justified) would not be troublesome and could even become widespread. However, it could indeed be troublesome to have this kind of right inasmuch as divorce, a second marriage and same sex marriage were to be banned. In view of this we can hardly claim that this difficulty is caused by scarcity or at least only by it. In better words, with what we are confronted here is a situation of scarce

situations, a right's boundary is set not because it is actually impossible to fulfill it, but because this right is ranked below some other interest. Hence, a weighing process is needed.

The focus on the economic costs as a limit for rights has taken place alongside with the so-called "reservation of the possible." This expression has its origins in Germany in the early 70s.²⁰ It was meant for underscoring the dependency of economic, social, and cultural rights on the State's economic capacity, and at the same time for disregarding any justification, on the grounds of unreasonableness, for the satisfaction of these rights when fulfilling them would entail unreasonable costs (ANSUATEGUI ROIG 2014: 24 ff.). Beyond the distinct ideological nature of this reservation, since it is only projected onto economic, social and cultural rights (when all rights involve costs for the State), the reservation of the possible is useful when it comes to highlighting the connection between rights and the economy.²¹

Both the reservation of the possible and the scarcity arguments take us again to the principle of proportionality, which as we have seen, involves studying the relation between rights and interests. Limiting a right on the basis of its excessive costs is an argument for which there is no room in the context of rights, unless it is proven that the mentioned cost is unbearably harmful for other rights. At this point what is really relevant is not the cost itself, but the impact on the right. Economy is a tool which, as such, shall be at the service of rights and not the other way around. The economic model seeks its justification on the basis of liberty, dignity, equality... And these values are obviously the ones that provide a justification for the State itself.²²

Hence, as I have pointed out somewhere else, the use of "an argument based on an unreasonable cost of the accommodation shall be examined with great care and it shall be even deemed as lacking proper justification when this cost does not entail a real and blatant non-fulfillment of the human rights of others. In other words, there is no room for an argument that takes into account the cost with no regard to the context of rights. Its use, as an admissible argument when it comes to rights, requires to be tied to these (in terms of expressing a limitation set on the rights of others). In addition, it shall assess the cost attached to the non-fulfillment of the interest in terms of segregation or lack of integration" (DE ASÍS 2013: 124).

resources caused by, among other factors, a series of principles that determine the alleged right. Actually, natural scarcity would exist in relation to an alleged right of women to get married to men who have never been married.

²⁰ In particular, the 1972 judgment is normally pointed out as the first one in which this clause is included and acknowledged as *numerus clausus*. The reservation of the possible argument has been in conflict with the existential minimum argument since then (GOMES CANOTILHO 1998: 439).

²¹ Recently, in Spain, as for rights of the persons with disabilities, the Judgment 1834/2012 from the Administrative Chamber of the Castilla León Superior Court of Justice, upheld by the Constitutional Court by means of the 10/2014 of 27 January judgment can be examined, where the right to an inclusive education is constrained on the basis of the unreasonable nature of the adjustment, on similar grounds as the ones provided by the reservation of the possible.

²² As Ferrajoli has recalled, the State "is not a profit-seeking corporation" (FERRAJOLI 2007: 68).

The claim for rights, which takes for granted the absence of absolute rights, requires that the rights' limitation is performed within the ethical framework to which the rights belong, and therefore using reasons and arguments grounded on rights and interests which are awarded the same value. When it comes to boundaries, it is important to preserve sensitivity for accomplishing a dignified human life and for the consideration that the rights' main purpose shall be, precisely, fighting against barriers and obstacles preventing highly valued interests from being fulfilled.

As I have remarked in some other places, the reflection on reasonableness in the context of rights shall be governed by: (i) the respect for freedom of choice (autonomy and physical and moral integrity) and the satisfaction of basic needs; (ii) the need for regarding and, where appropriate, equally empowering every individual in order to determine what can be deemed as correct; (iii) awarding a particular justifying weight to the decisions accepted by the majority of involved parties (DE ASIS 2000:149 ff.). These three referents projected onto the costs of rights domain, require full transparency and a great deal of knowledge about the allocation of resources and, in short, about public spending.

The claim for the rights of persons with disabilities individually considers the reasonableness test within the actual human rights context. Hence, for instance, when applying the principle of proportionality we must keep in mind that we are not dealing with welfare measures (which is partly true), but instead with instruments aimed at accomplishing a dignified human life, which intend to meet basic needs or demands, and which, accordingly shall prevail over others.²³ Furthermore, with regards to universal design and reasonable accommodation, it is important to be aware that a limitation set on the first (a justified one) leaves the way open for accommodation, whereas limiting the latter leaves the right lacking a definite fulfillment.

3.2. A comprehensive vision

As we have seen, reasonableness in accommodation takes us to three kinds of reflections. On the one hand the one concerning non-discrimination, which requires to assess, when examining whether the adjustment is justified or not, if it entails a violation of the principle of equality (since it differentiates or it does not, in an unjustified manner, thus harming a human right such as accessibility). In this justifying test there is an essential methodological tool at hand, which shall be regarded as the second great reflection on reasonableness in accommodation: the principle of proportionality. In virtue of this principle, the reasonableness test requires facing the adjustment's adequacy and necessity and, in addition to that, the advantages or sacrifices that produces on rights. And since both of these reflections do not ensure a single answer, reasonableness requires a last reflection on the basis of acceptability. The

²³ See Section 16 of the above mentioned Comment on Article 9 by the UN Committee on the Rights of Persons with Disabilities.

adjustment's justification, or the lack of it, shall be subject to the community's acceptance or rejection.

Obviously, these dimensions must act jointly in order to conclude that the requirement for reasonableness has been complied with.

In any event, as we have seen, the call for reasonableness is not projected only onto the adjustment but also onto universal design and, generally speaking, onto accessibility.

Hence, if we take as a reference the idea of accessibility, we can agree that it can be fulfilled through general measures (universal design) and through particular measures (reasonable accommodation). In both cases, these measures must be necessary (justified because they favor full participation in society), possible (matching scientific and technical knowledge along with a proper understanding of human diversity) and reasonable (non-discriminatory, proportional and acceptable).²⁴

Therefore, in accordance with the foregoing, it is possible to have a comprehensive vision about reasonableness in the disability domain. This demand makes it necessary to deem a measure as reasonable in the context of disabilities when:

- a) It is justified because it adequately provides for full participation in society.
- b) It shall be deemed as possible, taking into account the state of scientific, technical and human diversity knowledge.
- c) It shall be deemed as a non-discriminatory differentiation or undifferentiation which is not harmful for physical and moral integrity and at the same time does not prevent from meeting basic needs nor avoids participation in society on an equal basis.
- d) It shall be deemed as proportional and, therefore, entails more advantages than sacrifices within the context of human rights.
- e) It shall be deemed as acceptable by the community to which it is addressed.

²⁴ Certainly, when it comes to adjustments, what is possible falls within a scientific and technical knowledge framework, being human diversity one of the reasons for its existence.

REFERENCES:

- AARNIO, A. (1991) *Lo racional como razonable*. Madrid: Centro de Estudios Constitucionales.
- ALEXY, R. (1997) *Teoría de los derechos fundamentales*. Madrid: Centro de Estudios Constitucionales.
- ANSUATEGUI ROIG, F.J. (2014) *Rivendicando i diritti social*. Napoli: Edizioni Scientifiche Italiane.
- ANSUÁTEGUI, F.J., (1991-1992) "Algunas reflexiones sobre la visión integral de los derechos", *Estado & Direito*, n. 7-0.
- ATIENZA, M. (1987) "Para una razonable definición de lo razonable", *Doxa*, n. 4.
- BARAK, A. (2007) *Proportionality. Constitutional Rights and their Limitations*. New York: Cambridge University Press.
- BARRANCO, M.C. (2011) *Diversidad de situaciones y universalidad de los derechos*. Madrid: Dykinson.
- BERNAL PULIDO, C. (2007) *El principio de proporcionalidad y los derechos fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales.
- BOBBIO, N. (1993) *Igualdad y libertad*. Barcelona: Paidós.
- CAYO BUENO, L. (2012) "La configuración jurídica de los ajustes razonables", in AA.VV., *2003-2012: 10 años de legislación sobre no discriminación de personas con discapacidad en España*. Madrid: Cinca.
- CUENCA, P. (2012) *Los derechos fundamentales de las personas con discapacidad. Un análisis a la luz de la Convención de la ONU*. Alcalá: Universidad de Alcalá.
- DE ASIS, R. (2000) "La igualdad en el discurso de los derechos", in J. A. López García and J. Alberto del Real, *Los derechos: entre la ética, el poder y el derecho*, Madrid: Dykinson.
- DE ASÍS, R. (2005) *El juez y la motivación en el Derecho*. Madrid: Dykinson.
- DE ASÍS, R. (2013) *Sobre discapacidad y derechos*. Madrid: Dykinson.
- DE ASÍS, R., AIELLO, A.L., BARIFFI, F., CAMPOY, I., and PALACIOS, A. (2007) *Sobre la accesibilidad universal en el Derecho*. Madrid: Dykinson.
- FEHER, F. (1993) "El socialismo de la escasez", *Revista del Centro de Estudios Constitucionales*, n. 15.
- FERRAJOLI, L. (2007) *Principia iuris. Teoria del diritto e della democrazia, 2. Teoria della democrazia*. Bari: Laterza.
- GOMES CANOTILHO, J.J. (1998) *Direito constitucional e teoria das Constituições*, Coimbra: Almedina.
- <http://www.tribunalconstitucional.es/es/actividades/Documents/XV%20Trilateral/PONENCIA.pdf>. Looked up on March 10th 2014.

MARTINEZ TAPIA, R. (2000) *La igualdad y razonabilidad en la justicia constitucional española*. Almería: Universidad de Almería, Servicio de Publicaciones.

MERCADER UGUINA, J.R. (2008) “Tutela judicial efectiva, control de razonabilidad de las decisiones judiciales y «canon reforzado» de motivación en la doctrina del Tribunal Constitucional”, *Revista del Ministerio de Trabajo y Asuntos Sociales*, 73.

NINO, C.S. (2005) *Fundamentos de Derecho Constitucional*. Buenos Aires: Astrea.

PALACIOS, A. (2004) “El derecho a la igualdad de las personas con discapacidad y la obligación de realizar ajustes razonables”, in CAMPOY CERVERA, I. (Coord.), *Los derechos de las personas con discapacidad: Perspectivas sociales, jurídicas y filosóficas*. Madrid: Dykinson.

PALACIOS, A. (2008) *El modelo social de la discapacidad*. Madrid: CERMI.

RECASÉNS SICHES, L. (1971) *Experiencia jurídica, naturaleza de la cosa y Lógica «razonable»*. México: Fondo de Cultura Económica.

ROCAS TRÍAS, E. and AHUMADA RUIZ, M. (2013) “Los principios de razonabilidad y proporcionalidad en la jurisprudencia constitucional española”

SALMON, E. and BREGAGLIO, R. (eds.) (2014) *Diez conceptos claves para entender la Convención sobre los derechos de las personas con discapacidad*. Lima: IDEHPUCP.

SCHWARTZ, B. and SHARPE, K. (2010) *Practical Wisdom*. New York: Riverhead Books.