

Wystąpienie RPO w Sofii 17 listopada 2008 na konferencji:**“HUMAN RIGHTS – THE PROMISED LAND OF LAW,
BUT ALSO FAIRNESS”**

The invitation from Mr. Ganev, the Ombudsman of Bulgaria and Mr. Brenninkmeijer, the Dutch Ombudsman can be read as a very important call for reflection upon the universal character of the rights of men and women through the lenses of core values enshrined in our legal cultures. There is no doubt that we have landed in the promised land of human rights. But the question of whether we have found fairness there should remain open.

In the 20th century, to use a famous quote from a great English historian Sir Michael Howard, there were two revolutions: the one made by Bolsheviks, and another one that is still progressing, the human rights revolution. In fact the human rights revolution, symbolized by the Universal Declaration, of which the 60th anniversary we are celebrating this year, can be seen in the scope of human rights protection.

Protection of human rights is no longer conceived in traditional and formal way as an illicit intervention of a state into the domain of individual rights and liberties, and every ombudsperson can attest to it. The catalogues of human rights grow tremendously in both international and domestic law, and this growth is accompanied by development of new forms and instruments of their protection. In fact the number of activities performed for the sake of human rights enables us to speak about many different, mutually affecting and overlapping systems of human rights protection.

It is usually the domestic law, being closest to an individual, that is most often used when effective measures are sought. International law, however, has particular impact on domestic law, because of its capacity to build consent around minimal standards respected in large communities. There is a long way between proclaiming rights and making them effective, but it can be seen that international law has evolved towards creating protection mechanisms available to individuals.

René Cassin, one of the drafters of the Declaration, has once compared this document to a Greek temple. Its basis is made of principles of dignity, freedom, equality and brotherhood, then the stairs lead to an entrance supported by four columns, representing guarantees of life, freedom, personal rights and security, rights in civil society, rights in political community and economic, social and cultural rights.

Any review of international regulations clearly shows the tendency to put more and more rights into normative framework, and to grow into new generations, but it also shows the foundations.

It might be inspiring to see whether the European experience of the European Court of Human Rights may encourage the development of similar systems in other continents. Despite an apparent consent on the universal character of human rights, expressed in the Universal Declaration, the Covenants and other UN conventions, legal instruments of human rights seem to become more and more local, and centered on particular needs and experience.

Therefore the question of human rights universality and fairness remains present. The more complex and juridical human rights become, the more we need reference to fundamental concepts and values. And certainly ideals of fairness and reasonableness are to play an important role here.

It used to be very popular, especially among positivists, to advance value-free description and analysis of law. Nothing can be more false when it comes to human rights. The object of such rights is constituted by apparently neutral phenomena, such as human actions or states of affairs. But such actions and states of affairs can be fully understood only by understanding their point, their value and importance, as conceived by people who are engaged in them.

If human rights are to shape our conduct in societies and influence activities of governments, we cannot fail or refuse to see the value of fairness as an overarching principle for human rights. Seen in this way, fairness must be something more than

what minimalist liberals, such as John Rawls suggest. Fairness is not blindness! It is not an arbitrary choice of low standards, found behind a veil of ignorance, which would make us modestly satisfied with our condition in society. In fact it is exactly the opposite. Fairness provides us with guidance to see clearly the challenges of human rights, and their interplay in complexity of our globalized societies. It prevents us – so to say – from falling asleep, being a constant wake-up call for action and improvements. The need for such creativity based on fairness is particularly obvious in the context of financial crisis.

I am deeply convinced that human rights, as seen through their objectives or goods, need a constant concern about what is fair with respect to the allocation of these goods in a society. Therefore only a community whose individual members are rendered their due and treated fairly can be considered a society truly guided by the principles of human rights. This approach has been too often contrasted with procedural justice, while in fact such opposition is entirely false. Fairness supplements procedures, directing them towards just outcomes and consequences.

Important emphasis must be added here. If fairness could really help us to build the vision behind human rights, and complete our procedural justice, it must be focused on a common understanding of who we are as human beings.

Here I must quote the first article of the Universal Declaration of Human Rights, which in my view encapsulates this understanding in a now classical form:

“All human beings are born free and equal in dignity and rights. They are endowed with **reason** and **conscience** and should act towards one another in a spirit of brotherhood.”

The depth of this provision cannot be explored in my brief account, but I would like to point out to the fact that the Declaration’s explicit trust in every person’s reasonableness. Indeed we can only be fair in our approach to challenges of human rights if we accept this fundamental premise that men and women are reasonable, that is, able to pursue the objectives set by human rights standards in a reflective and diligent manner. Creativity which I had mentioned in this respect is not vague imagination, but ability to tackle problems here and now. This ideal of a reasonable

person is also so deeply rooted in our legal culture, that it enables us to interpret our law in a coherent and consistent manner, and in tune with human rights. The history of this ideal can be traced back to the ancient law – to *Digesta* for instance – and found in both continental and common law traditions.

As Sir Edward Coke once and famously put it: “Reason is the life of the law, the common law itself is nothing else but reason”, and an English proverb gives this idea a simple wording: “Law governs man, reason the law”.

We must not forget, however, that the rationale for the reasonable person standard is that the law will benefit the general public when a reasonable application of the law is sought, compatible with planning, working, or getting along with others. Such an application is only possible when the reasonable person is not only appropriately informed, capable, aware of the law, but also decent and fair-minded.

It is therefore obvious that one must include certain moral qualities within the standard of reasonable man, namely the quality of being decent, and that these qualities would hold true both when it comes to each individual, and to those who apply law. This is how I tend to read the Declaration’s provision that all human beings are endowed with reason and conscience. This is also, in my view, a common denominator of any law deserving that name.

By the way, in my language, where the word for law and for right is the same, the requirement for law, and for lawyers, to be righteous is expressed in the semantics.

Our faith in humanity as a background for our determination to promote human rights needs constant reaffirmation. It is through the reasonableness and decency that we are able to act towards one another in a spirit of brotherhood with respect for our dignity and rights. It is through the reason that we are able to justify our choices of policies and legislation. It is through the reason that we are able to act in fairness.

However, it is also through the reason that we may perform the most difficult task for human reason, which is to comprehend its own limitations. As a famous thinker (F.A. von Hayek) once said, “It is essential for the growth of reason that as individuals we should bow to forces and obey principles which we cannot hope fully

to understand, yet on which the advance and even the preservation of civilization depends. (...)

The rationalist whose reason is not sufficient to teach him those limitations of the powers of conscious reason, and who despises all the institutions and customs which have not been consciously designed, would thus become the destroyer of the civilization built upon them.”

I must say I am extremely happy to share these thoughts with you in the beautiful city of Sophia which – as we all well know – in Greek means “wisdom” which in my opinion means “reasonableness and fairness”