BERGEN KEYNOTE SPEECH

Introduction

Professor Thorolf Rafto was involved into supporting democratic movement in Poland. He was a few times in Poland. He met Lech Wałęsa, Adam Michnik and Karol Wojtyła. He was also in the Czechoslovakia. His activity was subject of monitoring of the Polish secret service. His award was established in order to continue his work, to support his legacy. Therefore, I feel particularly honored and privileged to be this year’s laureate. It means like coming back to a very essence of Mr. Rafto’s award. But at the same time I am sad and I am depressed that my country is in this specific situation, that anybody from Poland is considered at all as a human rights’ award recipient.

Situation in Poland

Poland underwent political and legal transformation in 1989. It was an example for the former Soviet Bloc countries – how to get rid of the communist system without a drop of blood, in a peaceful and democratic way. Since 1989 it was mostly a success story. Poland reformed its legal system and economy, joined Council of Europe, NATO and the European Union. It became one of the leading EU member states, using its 38-million people capacity.

However, the transformation was not of the same value for everybody. After 25 years of transformation we observed disparity in protection of rights and in welfare status in big cities and smaller cities and villages. Some social groups were left behind. We had massive immigration to Western Europe after Poland joined the EU. Finally, protection of some rights was neglected, like lack of social housing or abusive practices in the labour market.

After more than years of successful membership in the EU, Poland was
missing a vision of development. *Should we be another Norway, with Norwegian model of governance, national identity and egalitarian society? Or maybe another Ireland or the Netherlands? What is the new map in Europe and where is Poland’s place between East and West, between North and South?*

In view of this void, the ideology based on traditional values and national pride was a reliable answer. It gave a feeling of strength and unity. 2015 was a special year due to migration crisis. Those factors, including use of fear against migrants, contributed to “Law and Justice” party victory in elections. Since then we observe, quite similar as in Hungary, attack on independent institutions and on values of liberal democracy.

As a first step, independence of the Constitutional Court was restricted. The ruling party managed to subordinate the operation of the prosecutor’s office, secret services, civil service and public media. The Constitutional Court, being paralyzed due to its own crisis, could not have time to make a proper evaluation of passed legislation.

The Polish Constitution has been *de facto* changed by adoption of legislative acts with a simple majority. At the same time, the government invested a lot of time and money into more egalitarian vision of the society, by creation of new social programs and taking advantage of economic prosperity. Lack of deep understanding of constitutional principles, low level of civic awareness and problems with courts’ daily operations paved the way for popular support to institutional reforms.

In 2017 the so-called reform of the judiciary started. It consisted of a package of three legislative acts restricting independence of common courts, the National Council of Judiciary and the Supreme Court. With respect to the latter - retirement age for judges of the Supreme Court (including the First President of the Supreme Court) was decreased from 70 to 65, thus leading to compulsory early retirement. New chambers were created in the Court – the Disciplinary Chamber and the Extraordinary Appeals Chamber.

The story of passing of those laws is a long one. To those, who are not interested in daily politics, it may look like a soap opera. But in fact it is a
story of protests, international reaction and oversight, emergence of new social movements, and judicial resistance. At this moment I would like to say only about two issues.

First, massive demonstrations in July 2017 – as a result of the sudden adoption of the Act on the Supreme Court (in its first, radical version), Polish people demonstrated in more than 200 Polish cities, keeping candles in their hands and creating so-called “chain of light”. “It is our Court” – it was a slogan displayed with the use of projector at the building of the Polish Supreme Court during mass protests in July 2017. Citizens protested against legislative acts threatening judicial independence. They defended the Supreme Court, although they were not fully satisfied with courts’ efficiency and quality of work.

Second, judicial independence became a topic of special oversight by international organizations, with a special interest of the EU. The EU is based on principles of democracy, rule of law and human rights. It has special procedures to check “rule of law” compliance. However, those procedures were never before used in practice.

Legislative reforms concerning judiciary have been to great extent implemented in practice. In most important courts the Minister of Justice exchanged court presidents. The new National Council of Judiciary was appointed, in a highly dubious and non-transparent way. New chambers in the Supreme Court were created, with appointees made by the new NCJ. Finally, the First President of the Supreme Court and more than 20 judges over 65 were pushed for retirement, on the basis of new provisions.

Nevertheless, despite legislative measures – judges as well as civil society protested. On 4 July 2018, the First President of the Supreme Court Małgorzata Gersdorf – who should officially be retired – appeared in the Court, saying that no legislative provision may shorten her constitutional term. And she was greeted by thousands of people in front of the Supreme Court. Judges over 65+ declared that although they cannot adjudicate, they still consider themselves as the Supreme Court judges. Authorities did not have a courage to order her compulsory removal from the Court.
And here the European Union law came strongly into play. The interaction between Polish law and the EU law is a long and complex process. So let me make just a brief sketch of pending proceedings. First, in *Celmer* case the EU Court of Justice undermined the operation of the European Arrest Warrant procedure, claiming that Polish judiciary may not be independent any longer. Second, there are a few preliminary questions referred by Polish courts to the CJEU concerning certain aspects of judicial independence. Third, in September 2018, the European Commission made an infringement case against Poland to the CJEU, and challenged retirement provisions of the Supreme Court judges.

This last case is the most important one. The CJEU in that kind of cases may order adoption of interim measures, thus stopping operation of certain kind of provisions. On 19 October 2018, the CJEU issued interim measure and ordered the Republic of Poland to restore the situation of judges as regards their retirement age, as it was before adoption of the Supreme Court Act, it means 3 April 2018. Just next day, relying on this interim measure, the First President of the Supreme Court asked all the “retired” judges to come back to work. And they did it, without any hesitation. *Commission v. Poland* case is not yet finally decided, but as of now the adoption and implementation of interim measure gives a certain hope that the process of changes in judiciary may not be stopped.

Please note, however, that institutional guarantees of judicial independence do not apply only to the Supreme Court judges. This court is in the spotlight. But the pressure on judges of lower courts is still present, due to operation of disciplinary procedures and different administrative measures and possibilities, which are in the hands of the executive power. What could be the end effect? The situation where judges perfectly know and understand where is the “thin red line” they should not cross, especially when making decisions in cases with some political element. If they cross, they risk professional consequences.

**Resistance of civil society**
The latest decision by the CJEU would not be possible without involvement of numerous actors: pressure by civil society, heroic “Solidarity” leaders, international intellectuals and scholars, business community, judicial associations, other international organizations. Polish society showed (and is still showing) its best traditions of anti-authoritarian resistance, dating back to times when Poland was not on the map, when Polish society was fighting with Nazi occupation and then with Stalinist oppression. Finally, when the tradition of “Solidarity” movement appeared and changed the history of this part of Europe.

In times of new technologies, development of social media and new methods of controlling societies, the defense of the rule of law in Poland is a huge challenge for civil society, political opposition, independent institutions and international organizations – despite historical anti-authoritarian traditions.

The space for an open public discourse is shrinking. The role of the Parliament as a forum for debate is marginalized. You cannot even use the Norwegian saying about the Polish Parliament as being a synonym for chaos and disorder, as politically strategic laws are adopted in an extremely quickly manner, without proper consultation and time for reflection. Also, the paralysis of the Constitutional Court excluded any real possibility of judicial review of legislative acts adopted by the Parliament.

In this situation, civil society is in the continuous process of “learning and protesting”. Between 1989 and 2015 it did not established structures and strategies to operate in such a political environment. People were not trained how to make “civil disobedience” actions. They did not practice how to organize demonstrations or how to deal with international organizations and complain on your own country. Before 2015 lawyers were doing their ordinary work, like in a typical democracy. They were also not in a position of personal risk, where their actions may cause some professional damage.

These days Thorolf Rafto would most probably go to Poland, speak to leaders, make connection in embassies and would think how to support the freedom, as much as he can. Maybe he would be one of those
lobbying for specific actions of the EU Commission. Or maybe he would build bridges between Polish and Norwegian judges, to give them the feeling of solidarity.

There is one thing which connects those who protest and cannot agree on such changes. It is the Constitution. Our deep belief that Poland deserves to be a fully democratic country, with a strong and effective membership in the European Union, a country which fully respects its own Constitution. The Constitution became a symbol unifying all those who share similar beliefs.

In July 2017, when massive protests were taking place in Poland, a young artist Luka Rayski created a poster “Konstytucja”. In this poster, words “Ty” and “Ja”, which means “You” and “I” are underlined with red color. So, the Constitution is for you, and for me. It has to connect. It is the major symbol connecting us.

Having the support of famous “Solidarity” leaders, the civil society seems to have additional moral backing to fight for democratic principles. So called “street opposition” and tradition of civil disobedience is a direct reference to Polish tradition of “Solidarity” protests. Although we have different times, similar strategies as in communist times are adopted. The good example is the “Committee to Protect Justice”, a coalition of NGOs created on 4 June 2018 to protect judges, represent them in disciplinary proceedings and monitor trials. The idea of the Committee is a direct reference to 1976, when the Committee to Protect Workers was established. Solidarity with workers means know solidarity with judges.

There are also interesting initiatives that show the absurd or comic character of some of the governmental actions. We have the tradition of “Orange Alternative” (Pomarańczowa Alternatywa), which was the opposition group in Wroclaw, that made different happenings with the use of absurd and nonsensical elements. Now people put T-shirts with the notion “Constitution” on monuments of public figures. And the police has a big question mark? Should it be prohibited or not? Should they intervene? Is the “Constitution” a prohibited word?

Vulnerable position of minorities and policy towards women’s rights
The political change in Poland is also the ideological shift. The right-wing parties build their support by referring to traditional values in the society, such as the protection of family, unity of the nation and strong connection with the Catholic Church, as well as sense of national pride, martyrdom and patriotism. Some of government’s actions aim toward building new state elite that would follow similar set of values. In this regard, Polish politics resembles the illiberal model of Victor Orban, Erdogan or even Donald Trump, although naturally methods and points of reference are different. Interesting aspect is an attempt to “rewrite Polish history”, by presenting mostly heroic actions and virtues of the Polish nation, while neglecting unclear or shameful aspects of the history. The promotion of this set of values in daily politics cannot be neutral to the governmental approach as regards values, which are usually affiliated with the concept of liberal democracy. It applies especially to women’s rights, LGBT rights and rights of migrants.

Obviously, restriction of the judicial independence might have an impact on rights of vulnerable groups. Therefore, it is important to note that protests against violation of judicial independence were supported by women’s rights organizations and groups.

Conclusions

After the interim measure adopted by the Court of Justice of the European Union and in view of upcoming European Parliament and national parliament elections, Poland is now at crossroads. Certainly, a number of important steps towards system of competitive authoritarianism, with elements of illiberalism, were made. On the other hand, this process has not been completed. There is still hope that the process of institutional changes could be stopped and that the civil society resistance against illiberalism may bring positive results. Result of recent local elections, especially in big cities, indicates that the process might be reverted.

In view of complex political, social and legal circumstances, Poland should not be regarded as just another example of the illiberal process. Poland could be considered as an interesting laboratory, where different
protest practices against populism are tested. The civil society adjusts its methods of operation to new challenges. The national human rights’ institution shows the importance of its role in a difficult political environment. Judges fight for judicial independence not only due to their professional sake, but they try to convince the society why independent courts are important to ordinary citizens. Finally, the Constitution – being one more book from the school library – becomes a symbol, a living instrument, a unifying force and the value in itself.

Sławomir Sierakowski recently wrote that after local elections Poland is a swing state. Depending on the outcome of next parliamentary election, pendulum will either swing into authoritarian direction or into European and pro-democratic direction. If the latter happens, it will mean that last three years was a new phase of transition from communism to democracy: learning of constitutional patriotism in an accelerated manner.

The first Polish Constitution was adopted in 1791. It was based on the same tradition of Rousseau, Montesquieu and Locke, like the Constitution of Norway of 1814. But then Poland disappeared from the map of Europe, to regain independence in 1918 and then to be one of major victims of the Second World War and totalitarian ideologies. We do hope that one day we will celebrate and respect our newly adopted 1997 Constitution in a similar way as Norway celebrates its Constitution of 17 May 1814, with its egalitarian society, strong institutions and judicial independence.