

## JCER Special Commentary Series

# Euthanasia, Gay Marriage and Sovereignty: The Polish Ratification of the Lisbon Treaty

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Observing the ratification process of the Lisbon Treaty in Poland must have been a peculiar experience, even for an attentive foreign observer. The government of Jaroslaw Kaczynski announced a Polish victory when the treaty negotiations were concluded in October 2007, only to block the ratification of the document in Parliament a few months later. Polish President Lech Kaczynski praised his brother's government for securing Poland's demands; yet, after Parliament finally passed ratification, the President decided not to sign it straight away. The sharpest disagreements concerned alleged 'new powers of the EU' in the area of euthanasia or gay marriage, supposedly brought about by the Charter of Fundamental Rights of the European Union. Yet, it is the Charter itself (together with the Declaration granting the Charter legal status) which makes it clear that such new powers do not exist. The aim of this commentary is to disentangle the baffling process of ratifying the Lisbon Treaty in Poland.

The outcome of the first Irish referendum on the Lisbon Treaty abruptly hampered the second attempt at reforming the EU, after the Constitutional Treaty was rejected in the respective referenda in France and the Netherlands in 2005. Some scholars and experts have attempted to explain which factors played a role in encouraging these states to reject reform of the EU (e.g. Carbone 2009) by pointing to domestic political factors. Other authors, despite ratification problems, have analysed how the Lisbon Treaty would affect different EU policies, such as foreign, security and defence policy (Whitman *et al.* 2009) or the Area of Freedom, Security and Justice (Kaunert 2010 forthcoming). Barrett (2008) considered three kinds of solutions after the Irish 'no': (1) Ireland eventually accepting the treaty; (2) the abandonment of the treaty by the EU; (3) other states moving forward without Ireland. Of these three options, the first, Ireland's secession from the EU, was politically difficult to envisage. Boudewijn *et al.* (2008) has argued that secession can only be voluntary; therefore, there was no point considering this possibility if the Irish government in Dublin wanted to stay in the EU.

However, in addition to Ireland, the situation in two other countries also threatened to further complicate the future of the Lisbon Treaty: the Czech Republic and Poland (see, Gros *et al.* 2008; Kaczynski 2008). Ireland joined the then European Economic Community (EEC) in 1973 and so is well established within the EU structures. Despite this, its

government still found itself under pressure and was expected to come up with a solution to the crisis. Poland, on the other hand, is a much younger EU Member State. In addition, it is also perceived to show a rather ambivalent attitude towards European integration. The Polish President Kaczynski and the opposition party, 'Law and Justice', are renowned for their strong Euroscepticism. Nonetheless, President Kaczynski did not gain anything domestically by delaying the signature of the Ratification Act until the second Irish referendum; nor did he strengthen Poland's position abroad in any way. Rather the contrary: he demonstrated that in the face of an institutional crisis in Europe, Poland was not the country to rely upon.

This is rather surprising; the Lisbon Treaty was negotiated on the Polish part by the government of Jaroslaw Kaczynski, the leader of the conservative Law and Justice Party and twin brother of the President. When the Inter-Governmental Conference concluded negotiations on the Treaty of Lisbon in October 2007, President Lech Kaczynski expressed his enthusiasm about the final outcome. He said that Poland got everything it wanted from the negotiations, underlining, for example, the abandonment of EU 'state symbols' in the new treaty (PAP 2007), which were included in the Constitutional Treaty. The then Parliamentary opposition, including the leader of the Civic Platform, current Polish Prime Minister Donald Tusk (TVN24.pl 2007a), was also enthusiastic about the outcomes of the negotiations. However, this enthusiastic stance was about to change significantly only a few months later, when the process ratifying the treaty was initiated in the Polish Parliament.

The first part of this commentary outlines the conflict among the main (Parliamentary and non-Parliamentary) political forces between December 2007, when the treaty was signed, and April 2008, when it was ratified by the Polish Parliament. It explains how it was possible for the Law and Justice government to conclude negotiations, call it a success, and later, after moving into opposition, to block ratification in Parliament. The second part looks in more detail at domestic political factors, shedding more light on some of the main arguments in this ratification conflict.

### **Between comedy and drama: the ratification process**

In order to understand the nature of the conflict over ratification, it is important to briefly explain what Polish negotiators actually secured in the negotiations. However, it is necessary to start with a brief overview over the constitutional ratification procedure in Poland. According to the Constitution of the Republic of Poland, as adopted in 1997, there are two options for how an international agreement can be ratified. As a first option, the Prime Minister merely informs the Sejm (the lower chamber of Parliament) that he intends to submit an international agreement to the President for ratification. As a second option, a special statute granting consent for ratification is necessary, which must be passed by the Sejm and the Senate with a 2/3 majority. The Sejm consists of 460 MPs and the Senate consists of 100 Senators. In February 2008, the Sejm decided that the agreement of both Houses of Parliament would be necessary for Poland to ratify the Lisbon Treaty, referring to Article 90 of the Constitution (Poland 2008a). After Parliament grants consent in the form of a Ratification Act, the President has 21 days to sign it, veto it, or refer it to the Constitutional Tribunal. It was therefore a legally ambiguous situation, which sparked controversy among some constitutionalists (Gazeta.pl 2008a), when President Kaczynski announced that he was not obliged to sign the Ratification Act (Gazeta.pl 2008b).

What did Polish negotiators actually secure during the negotiations? When the Lisbon Treaty was finally signed in December 2007, a number of Declarations and Protocols were attached. Two of these documents were crucial for the Polish negotiators. Firstly, EU Member States had agreed to include the so called 'Ioannina Compromise' (Conference of

the Representatives of the Government of the Member States 2007a). This provision applies to majority voting in the Council; it allows a number of states to freeze the legislative process when they do not represent enough Member States (13 out of 27) or enough of the EU population (more than 35 percent but four Member States minimum) to form the blocking minority. When this happens, the Council must then do “all in its power to reach, within a reasonable time (...) a satisfactory solution” (Conference of the Representatives of the Government of the Member States 2007a). The intention of the Polish negotiators was to allow medium and small Member States to maintain some control of the legislative process in the Council even when the big states reach a consensus. What Polish negotiators apparently did not take into account was the fact that states such as Germany can also use the provisions of the Ioannina Compromise for their purposes; they can do so even more easily, taking into account their population (Gazeta.pl 2007a).

The second, more controversial element which played a major role in the ratification of the treaty in Poland was the Charter of Fundamental Rights. It covers areas such as human dignity, freedoms, equality, solidarity, citizens’ rights and justice. The document was originally signed by the Presidents of the Council, the Commission and European Parliament in 2000 as a proclamation (European Parliament 2007). Since then, its legal status remains uncertain, with the European Court of Justice actually referring to the provisions of the Charter on a number of occasions (Menéndez 2007). The document was first incorporated as part of the Constitution for Europe; later, in 2007, the Declaration was included in the final outcome of the Lisbon Treaty negotiations, granting the Charter “a legally binding force” (Conference of the Representatives of the Government of the Member States 2007b). Poland, however, wanted an opt-out; thus, it signed the Final Act which included the so called British Protocol. The intention of this Protocol is to provide an opt-out for the UK, Poland and, (as of November 2009), the Czech Republic from the Charter’s legal applicability in national courts and on national legislation, as well as from the jurisdiction of the European Court of Justice (Conference of the Representatives of the Government of the Member States 2007c). Jaroslaw Kaczynski and his government expressed the concern that the Charter could indirectly introduce homosexual marriages or euthanasia to Poland (Gazeta.pl 2007b). Needless to say, these concerns were legally groundless. The Charter only applies to “the institutions and bodies of the Union” and to the Member States “only when they are implementing EU law” (The European Parliament, the Council and the Commission 2000). However, EU law does not regulate controversial moral issues; thus, the Charter cannot enforce them. Further, an additional safeguard was provided by the aforementioned Declaration which states that “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union” (Conference of the Representatives of the Government of the Member States 2007b).

Despite this, the fundamental factor explaining the conflict emerged in October 2007 when Jaroslaw Kaczynski and his Law and Justice Party lost the Polish parliamentary elections. A new majority was formed, consisting of the Civic Platform and the Polish People’s Party; Donald Tusk became the new Polish Prime Minister. The spark which ignited the clash was a Resolution adopted by the new Parliamentary majority on 20 December 2008 (Poland 2008b). In this document, Parliament expressed its satisfaction about the signing of the Lisbon Treaty seven days earlier. However, the Resolution also underlined the importance of the Charter of Fundamental Rights and signalled that Poland would be willing to withdraw from the British Protocol, fully accepting the Charter. The President, whose brother negotiated the treaty, referred to the Resolution as an infringement on the national agreement (Gazeta.pl 2008c).

Jaroslaw Kaczynski and Law and Justice, now the major opposition party, were unimpressed. Kaczynski announced that his party would support the ratification of the treaty in Parliament only if the opt-outs were safeguarded in the Ratification Act (Gazeta.pl 2008d). As already mentioned, a 2/3-majority (307 votes) in the Sejm was necessary to ratify the treaty. Without the support of the Law and Justice Party, some votes would be missing. Thus, Prime Minister Tusk had to seek a compromise with Kaczynski's party. A parliamentary debate on the ratification took place in March 2008. In order to support the treaty, Kaczynski demanded that the Ratification Act must be preceded by a preamble. In this preamble, the Law and Justice Party wanted to include various guarantees, such as legal primacy of Polish law over EU law. The party also wanted a reference to the British Protocol, as well as references to the Christian roots and the national sovereignty of Poland (Gazeta.pl 2008d).

The Civic Platform opposed these demands. Sejm Marshall, Bronislaw Komorowski, explained that such a preamble would be pointless, because the Ratification Act would expire the moment it is executed, i.e. the moment when the President signs ratification (Komorowski 2008). Instead, in order to obtain a compromise, Tusk agreed that the Sejm could adopt a non-binding resolution in which the concerns of the Law and Justice Party would be addressed. However, Kaczynski insisted on the safeguards becoming part of the Ratification Act. In the end, the Law and Justice Party agreed to support the parliamentary majority's version of the Ratification Act if one condition was fulfilled. In order to make it difficult for any political force to change the conditions secured by Kaczynski during the treaty negotiations, the party wanted to state into the Ratification Act that a consensus among the government, parliament and the president would be necessary to change these safeguards (Gazeta.pl 2008e). The parliamentary majority opposed the idea. At this point, President Lech Kaczynski proposed another compromise version of the Ratification Act (Gazeta.pl 2008f).

In the end, a compromise was achieved during a 5-hour meeting of the President and the Prime Minister. The conditions of the compromise were the following (Gazeta.pl 2008g):

- a) Lech Kaczynski would withdraw his proposal and support the government's version of the Ratification Act without any safeguards demanded by Law and Justice.
- b) Parliament would adopt a Resolution addressing all the concerns of Law and Justice.
- c) Parliament would begin to work on a law defining the roles of the various state organs in EU policy-making (the so called Competence Law).

Following this compromise, the Sejm and the Senate ratified the Lisbon Treaty at the beginning of April 2008. Even though the President was *de facto* representing the interests of the Law and Justice Party during his meeting with the Prime Minister, 56 MPs from this party still decided to vote against ratification (Gazeta.pl 2008h). The Senate ratified the treaty after the Sejm; thus, the first phase of the ratification process in Poland was over.

The only piece missing now was the signature of the President, who announced that he would ratify the treaty in June or July 2008 after Parliament had passed the Competence Law (Gazeta.pl 2008i). However, the Irish referendum in June 2008 changed everything. Following the rejection of the Lisbon Treaty by Irish voters, the President introduced the argument that ratification of the treaty on his part was pointless. Yet, he also assured that Poland would not become an obstacle if other countries ratified the document (Wirtualna Polska 2008a). This was the President's position from June 2008 up until 2 October 2009, the date of the second referendum in Ireland.

In the meantime, European leaders were trying to influence the President into signing ratification regardless of the Irish 'no'. French President Nicolas Sarkozy, holding the presidency of the EU in the second half of 2008, advised Lech Kaczynski not to hide behind Ireland's rejection. "Poland should take responsibility for itself" (Wirtualna Polska 2008b). Kaczynski's Office explained that the President was ready to sign the Ratification Act but Poland did not want to participate in putting international pressure on Ireland (Wirtualna Polska 2008a). However, the signs of impatience with the Polish President were coming not only from abroad. In January 2009, the Polish Parliament adopted a resolution in which it requested the President to sign the Ratification Act, as well as to support ratification of the Lisbon Treaty in other countries (Poland 2009c). The Law and Justice Party voted against this resolution, while the President suggested that Poland would not keep ratification on hold provided that other countries ratify the treaty. In the end, one week after the Irish 'yes' on 2 October 2009, the President signed the ratification.

The events outlined above constitute the major stages in the Polish ratification process between December 2007, when the treaty was signed, and October 2009, when Ireland voted in favour of the treaty. In order to better understand why the ratification has been such a painful procedure in Poland, some of the factors playing a role in Polish politics should be briefly examined.

### **The domestic politics explanation**

It is important to appreciate the significant role that religion and the Catholic Church play in domestic politics in order to explain the ratification problems of the Lisbon Treaty in Poland. The Church has had a prominent political influence in Poland since 966 when the process of Christianisation began. More recently, two factors strengthened the position of the Catholic Church in Poland especially. Firstly, the role of the Church as a central anti-Communist force from 1945 until 1989 strengthened its political role. Secondly, the election of Karol Wojtyła to become Pope John Paul II in 1978 also increased its political appeal. Furthermore, roughly 90 percent of Poles declares themselves to be Catholics; although, only half of them claim to follow the Catholic Church's teaching (Willma 2009). The Law and Justice Party and President Kaczynski can rely heavily on religious voters, thus providing the Church with some political influence, or even power. This fact strongly affected the ratification process of the Lisbon Treaty in Poland.

The Charter of Fundamental Rights was portrayed in Poland as a threat to 'Christian values' such as the traditional family unit and human life. This was used by both Lech and Jarosław Kaczyński, who portrayed themselves as the guardians of such traditional Christian values. The President made it clear when taking part in a 2008 Easter mass: "The role of the Catholic faith must be secured in the treaty as much as possible in secular law. (...) In Poland, Catholic tradition is interwoven with national tradition". When referring to the role of the Charter, the President noted that "most of the Charter's elements are entirely legitimate". However, he suggested that other points could "lead later to allowing marriages which are not marriages between a man and a woman" (Gazeta.pl 2008j).

For the purpose of this analysis, the role and position of the Catholic Church needs to be separated from the more radical voices from the city of Torun – the headquarter of Redemptorist Tadeusz Rydzyk's Radio Maryja. Rydzyk, sometimes referred to as Father Director, is a very controversial figure. He manages not only a radio station, but also a TV station, a newspaper and even the University of Social & Media Culture in Torun. His relations with the mainstream Catholic Church remain unclear. The Church itself is divided as to how to treat him. While Rydzyk has been accused of anti-Semitism and ultra-nationalism on many occasions, he still maintains a degree of popularity and influence, particularly among some of the older Catholics. All leading Law and Justice politicians,

including Jaroslaw Kaczynski, did not hesitate to frequently accept invitations to Radio Maryja, providing *de facto* legitimacy to Rydzyk's activities. Rydzyk himself has been very critical towards the Lisbon Treaty, accusing political elites of suppressing the "real debate" (Gazeta.pl 2008k) about the document in Poland. He voiced this concern particularly in March 2008, the time of the culmination of disagreements over ratification in the public debate.

Some nationalists tried to fan the fear of Germany; quite a traditional move in Polish debates on major European issues. Anna Fotyga, Minister for Foreign Affairs in the government of Jaroslaw Kaczynski, and later working for the President, suggested that the Charter of Fundamental Rights would allow German citizens expelled from Poland after the Second World War to claim back their properties (Money.pl 2007). This argument was strongly rejected the next day in the media; predominantly on two grounds. Firstly, it was emphasised that law cannot work backwards. Hence, courts cannot refer to the Charter when considering cases which precede the existence of the document. Secondly, EU law experts noted that the Union does not regulate property laws. Therefore, the Charter cannot constitute a legal basis for potential claims (TVN24.pl 2007b). However, just like in the cases of gay marriage and euthanasia, those who raised these issues were not really concerned with a good understanding of the Lisbon Treaty. Their goal instead was to win Rydzyk's approval and to present themselves as the only patriots defending the national interest.

Just as nationalists supported by Radio Maryja tried to pull the Law and Justice Party in one direction, some pro-European members of the party argued that Poland risked being embarrassed on the European scene. There were a number of well-known individuals, as well as a group of younger MPs, who were strongly determined to support ratification (Wronski *et al.* 2008). Kaczynski could not completely ignore these voices within the party if he did not want to expose his brother to the danger of impeachment in the future. In order for Parliament to potentially impeach a President, a two-third majority is necessary in the Sejm and the Senate (307 votes). In order to block impeachment, a minority of more than one-third of votes in the Sejm is necessary (153 votes). The Law and Justice Party had 159 votes in the Sejm in March 2008; therefore, if the party was deserted by at least seven MPs, the President would be vulnerable. On the other hand, if Kaczynski decided to support the more pro-European faction in the party, he would run the risk that those members who were close to Rydzyk would leave and create a new anti-European party under the auspices of Radio Maryja. The compromise arranged by the President and the Prime Minister, as explained previously, was a convenient solution to this problem.

## Conclusion

Polish ratification of the Lisbon Treaty occurred on 10 October 2009, when President Kaczynski ceremonially signed the ratification documents. For Eurosceptics, it was a meaningful 'incident' when the President's pen did not work and he had to borrow another one. One nationalist humorously concluded that this fact proved that objects could also be intelligent, sometimes even more intelligent than some people (Michalkiewicz 2009). On the other hand, he also lamented that the ratification of the treaty may eventually lead to the partition of Poland. These radical voices have been marginal in Poland since the October 2007 Parliamentary elections, when the fundamentalist, right-wing party 'League of Polish Families' was swept from political scene, obtaining a mere 1.3 percent of votes. However, this does not mean that nationalist populism has disappeared from public debate. As it was outlined in the first part of this commentary, the Law and Justice Party did not hesitate to use even the most nonsensical arguments to delay ratification of the Lisbon Treaty. The Office of the President constituted another centre of gravity for Eurosceptics. When looking at anti-European

populism coming from the outside of the political establishment, the group of religious fundamentalists concentrated around Tadeusz Rydzyk and Radio Maryja, certainly played some role in the battle over the ratification. The mainstream Church was much more restrained and diverse. While it was generally sceptical towards the Charter of Fundamental Rights at the beginning of 2008, it later became more sympathetic towards the document. One prominent representative of the Catholic Church admitted in December 2008 that there was nothing in the Charter that would challenge Christian values (Wiśniewska 2008). However, the successful conclusion of the ratification process in Poland does not mean that there are no more controversies sparked by the treaty, or that there will not be any more. In Poland, there are different shades of scepticism towards European integration; the Law and Justice Party and President Kaczynski are sometimes openly hostile towards the EU. However, there are other voices too. The current, officially very pro-European, government of Donald Tusk does not belong to the federalist camp either, but certainly is of a more pro-European conviction.

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