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The Lisbon Treaty and the Czech Republic: past imperfect, future uncertain

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Introduction

The future evolution of the European integration process remains a deeply controversial issue. The failed Constitutional Treaty and the Lisbon Treaty are just two recent cases in point. The current problems are certainly not the first of their kind historically, but while in the past the need for treaty renegotiations constituted rare exceptions, in today's EU-27, this has become commonplace. This article explores the problems with the Lisbon Treaty (LT) ratification process in the Czech Republic (CR) and its repercussions for the EU. We will proceed in three steps. First, we will describe the general situation on the Czech domestic scene regarding the elites' attitudes towards the European Union. Second, we will present a more detailed analysis of the Czech debates about the LT. Finally, we will briefly point to some limitations of the existing theories of European integration which are related to their inability to reflect the profound changes in the integration process caused by the Eastern enlargement.

The background

First of all, we should shatter the myth that the resistance towards the LT in the Czech Republic can be explained as a consequence of a particularly Eurosceptic public opinion. According to the Eurobarometer polls, the Czech population belongs to the EU mainstream in almost every respect. For instance, when answering the question as to whether EU membership is considered a 'good thing', the Czech Republic is only slightly

below the EU average.¹ However, what is specific about the Czech Republic is the political elite? The Civic Democratic Party (ODS), as the main rightist party, is commonly described in the literature as being soft-Eurosceptic. Further, the Euroscepticism of the Czech Communist Party, the third strongest political force in the country, is of an even more radical persuasion.² Hence, there are strong parties on both right and left which stand in a permanent opposition to further political integration. This, in combination with the frequently expressed Euroscepticism of the country's president, contributes to a Eurosceptic image of the country³, which has manifested itself in the discussions on the LT.

The ODS coined the term 'Euro-realism' for their position on the EU already prior to the Czech membership, which, incidentally, they did not oppose (unlike the Czech Communists). The Euro-realism of the ODS can be described as a view of the EU as dominated by big powers striving for the fulfilment of their own interests, in which the small/middle-sized states gain the most if they protect their own sovereignty and reject further transfer of power to the EU level. The party is sceptical towards the increased influence of the EU institutions, since they are considered to be easily controlled by the big states.⁴

As a consequence of the position of the ODS, the Czech approach at the Convention on the Future of Europe, similarly to the CR's later approach regarding the ratification of the Constitutional Treaty and the LT, has been to some extent reluctant and divided. During the Convention on the Future of Europe, the Czech delegates held diverging views on most of the essential questions regarding the future treaty, such as those of the inclusion of the Charter of Fundamental Rights, the use of the term 'constitution', the increased powers of the European Parliament, etc.⁵ More fundamentally, the split was between the ODS, which rejected the Constitutional Treaty and called for a 'Europe of Democracies', and other parts of the elite, which held a more pro-integration view that was less based on intergovernmentalism.⁶

After the Convention and the Intergovernmental Conference of 2003, the ODS profiled itself as being strongly against the treaty.⁷ The party's resistance to the Constitutional Treaty (TCE) was principled, and, since many ODS members argue that the TCE and the LT are virtually the same, the same criticism is being applied to the LT. The resolution of the

¹ Eurobarometr 69. (2008). Národní Zpráva Česká Republika [National Report Czech Republic]. Available at: http://ec.europa.eu/public_opinion/archives/eb/eb69/eb69_cz_nat.pdf, accessed 17 July 2009.

² Hanley, S. (2008). "Embracing Europe, Opposing EU-rope? Party-based Euroscepticism in the Czech Republic", in A. Szczerbiak and P. Taggart (eds) *Case Studies and Country Surveys: Opposing Europe? The Comparative Party Politics of Euroscepticis..* Oxford: Oxford University Press, 243-262.

³ Only comparable in the EU to the UK (with the EU reluctant Conservatives) or Poland with its Eurosceptic President.

⁴ The ODS thus comes to the opposite conclusion on this compared to most academic literature focusing on small states. See, e.g., Thorhallsson, B. and Wivel, B. (2006). Small States in the European Union: What Do We Know and What Would We Like to Know? *Cambridge Review of International Affairs*, 19(4), 655.

⁵ Kratochvíl, P. and Königová, L. (2005). Jak utvářet Evropu: konvenčně nebo konventně? Konvent jako alternativní metoda přípravy základních smluv evropské integrace [How to shape Europe: Conventionally or by a Convention? The Convention as an alternative method of preparing funding treaties of European integration]. *Mezinárodní vztahy*, 2/2005, 24-41.

⁶ Kratochvíl, P. (2003). National Report on the Czech Republic, in *Positions of 10 Central and Eastern European Countries on EU Institutional Reforms: Analytical Survey in the framework of the CEEC-debate project*, edited by C. Franck, 25.

⁷ ODS. (2004). Stejně šance pro všechny: program pro volby do Evropského parlamentu [Equal Opportunities for All: A Manifesto for the Elections to the European Parliament]. Available at: <http://www.ods.cz/volby/programy/2004e.php>, accessed 7 July 2009.

party congress in 2006 is illustrative of the party's position. It prohibited politicians from the party from accepting any new transfer of powers to the EU or extending the qualified majority voting in the council to more issues.⁸

Yet, the Civic Democrats have not opposed the LT in the same way as the TCE, primarily due to two factors: first, between 2007 and 2009, the ODS was in a coalition government with two smaller pro-European parties (the Christian Democrats and the Greens). Thus, a rejection of the Treaty could have endangered the continuation of the cabinet. Second, it was believed that a non-ratification of the Treaty could have had negative consequences for the upcoming Czech EU presidency in 2009. Despite these two factors, the party leadership had a hard time convincing the majority of the party to accept the Treaty.

Assuming that political parties attempt to maximise their votes, the splits in the ODS on the LT are difficult to understand. The ODS voters are in fact more positive towards the treaty than the average Czech voter.⁹ Thus, an explanation for the party's reluctant approach to the treaty is to be found in the party's internal discourse. The latter has developed in a Eurosceptic direction that was largely influenced by current president Václav Klaus since the middle of the 1990s.

The debates on the Lisbon Treaty

The LT was ratified in both chambers of the Czech Parliament during spring 2009. Currently, only a very small part of the political elite, led by Mr. Klaus and a few senators loyal to him, have played a pivotal role in delaying the completion of the Czech ratification process. Therefore, in the following sections, we will take a more detailed look at their arguments against the treaty.

To understand the argumentation of the LT critics, it is helpful to look at the first request of the senators to the Constitutional Court on this matter dating back to Spring 2008. In this request, the senators posed six specific questions regarding the Treaty.¹⁰ These points are also the ones most frequently used by Klaus and his followers in their criticism of the Treaty. The first question referred to the division of competences, the second to the flexibility clause, the third to the passerelle, the fourth to the possibility of the EU being a subject of international agreements, the fifth to the increased competences of the EU within the former third pillar, and the sixth to the status of the Charter of Fundamental Rights.¹¹

President Klaus argued in the hearing on the LT at the Constitutional Court that the main problem of the compatibility between the LT and the Czech Constitution is the alleged fact that the Treaty would give the EU the 'competence-competence', the competence to acquire competences by itself through the flexibility clause and the so-called passerelle, which enables 'smaller revisions' of the Treaty without the normal process of treaty ratification. President Klaus argued that "there cannot be a possibility for EU institutions to interpret the range of transfer of competences by themselves, or even transfer

⁸ ODS (2006). 'Usnesení 17. kongresu ODS' [Resolution of the 17th ODS Congress], available at: <http://www.ods.cz/akce/kongresy/17.kongres/stranka.php?page=450>, accessed 1 October 2008.

⁹ STEM (2008). Informace z výzkumů STEM trendy 10/2008 [Information from the STEM surveys – trends]. Available at: <http://www.stem.cz/clanek/1635>, accessed 17 July 2009.

¹⁰ The court verdict stated that these points do not contradict the Czech Constitution.

¹¹ Senát (2008). Žádost o posouzení souladu Lisabonské smlouvy s ústavním pořádkem ČR Senát Parlamentu České republiky podává [Request of examination of the compatibility of the Lisbon Treaty and the Constitutional Order of the Czech Republic, required by the Senate of the Czech Republic].

competences from our country, whether we agree to this or not.”¹² Given the fact that the Czech Government is present in the Council, Klaus’ point only makes sense if the “we” in the above sentence is understood as meaning the Czech Parliament. The fact that the LT enables some changes to EU competences if the Council decides so unanimously means that the Czech Parliament has lost the ‘competence-competence’, which is unacceptable to Mr. Klaus. Therefore the President’s position should not be understood as being that of an intergovernmentalist; what he favours could be called an inter-parliamentary model of integration.

However, even if the criticisms sometimes target substantial points in the Treaty, the general overall argument is based on the assumption that the LT moves the EU one step further towards becoming a state. Therefore, it is very difficult to suggest any modifications to the Treaty that would satisfy this rather small group of the Czech political elite. Klaus, for instance, has repeatedly stated that European cooperation should be based on intergovernmental cooperation, where no states can be overruled by the others.¹³ Thus, he actually rejects any form of qualified majority voting (QMV) or simple majority voting in the Council. Since any new treaty revision that would replace the LT is likely to include the increased use of the co-decision procedure (ordinary legislative process), including QMV in the Council, it is hard to imagine what sort of a deal would ever satisfy this group of Czech LT critics.

Since the LT has been approved by both chambers of the Parliament, only two actors have recently influenced the LT ratification process in the Czech Republic: the Constitutional Court and the President. The hearing at the Constitutional Court and the negotiations about the additional requirements of the President – represented two, essentially independent processes which only rarely intersected. We will first discuss the Court’s ruling.

The verdict of the court was positive, as anticipated, regarding the compliance the Lisbon Treaty with the Czech Constitution. However, the verdict was surprisingly clear and straightforward. The group of senators who filed the complaint was criticised by the Court for using strategies aimed at delaying the ratification process; in the future, such requests to the Court regarding international treaties should be made without “unnecessary delay”.¹⁴ As already mentioned, the very same senators had already filed a complaint against the LT before. This time, the senators’ complaint was broader, attacking the LT as a whole. Yet, the thrust of the argument was essentially the same as before: the senators fear that the LT transforms the EU into a superstate, thus depriving the Czech Republic of substantial parts of its sovereignty. Interestingly, the senators expressed their doubts not only about the compatibility of the LT and the Constitution, but also about the Treaty of Rome and the Maastricht Treaty.¹⁵ The Court hearings were quite tense as the lawyer of

¹² Klaus, V. (2008) Vystoupení prezidenta republiky na jednání Ústavního soudu o Lisabonské smlouvě [The Speech of the President during the negotiations of the Constitutional Court on the Lisbon Treaty], available at: <http://www.klaus.cz/klaus2/asp/clanek.asp?id=KO4I54HvOCa4>, last accessed 4 November 2009.

¹³ Klaus, V. (2007) ‘Před debatou o euroústavě’ [On the upcoming debate on the Constitutional Treaty], *Hospodářské noviny* (13 June).

¹⁴ Rozhodnutí Ústavního soudu ČR (the Verdict of the Constitutional Court) The Constitutional Court of the Czech Republic, available at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=63966&pos=1&cnt=1&typ=result>, last accessed 4 November 2009.

¹⁵ Návrh skupiny senátorů (A proposal made by a group of senators), 28 September 2009, The Constitutional Court of the Czech Republic, available at: http://www.concourt.cz/assets/N_vrh_Lisabonsk_smlouva_29-9-2009.pdf, last accessed 4 November 2009.

the complaining senators accused the chairman of the Court, Pavel Rychetský of being biased, basing their argumentation on the judge's prior meeting with the German ambassador for a private discussion over the ratification process. However, this objection was rejected by the Court.¹⁶

While the senators' complaint was widely anticipated, no one expected that President Klaus would come up with additional requests. Therefore, it came as a complete surprise when on 8 October 2009 the Swedish Prime Minister Reinfeldt was informed by Klaus about this; i.e. the request that the Czech Republic needs an opt-out from the Charter of Fundamental Rights and Freedoms to ensure that the Sudeten Germans, expelled from the country after the Second World War on the basis of the decrees of the President of the republic (the so-called Beneš decrees), could not reclaim their land and damage the country.

It is obvious that the President took this step not because he fear the property claims raised by Sudeten Germans, but rather because this opt-out allowed him to sign the Treaty without losing face. There are at least two arguments which convincingly show that President Klaus used the Sudeten German card as a mere pretext. First, Klaus had never ever mentioned his concerns regarding the expelled Germans previously in the debates on the Charter of Fundamental Rights.¹⁷ Second, the vast majority of Czech lawyers are convinced that the Charter does not increase the chances for successful lawsuits arguing for the return of property to the expelled Germans, not least due to the fact that the Treaty cannot be used retroactively.

Nevertheless, the strategy of re-kindling the fear of Sudeten Germans is a favourite strategy of Czech populist politicians. It never fails to excite the public and gather support from those who are keen to protect Czech "national interests". As a result, knowing the popular attitudes, most Czech politicians from the ODS and the Social Democratic Party were rather uncertain how to react. The President still has a number of supporters in the ODS and the party's reaction was correspondingly muffled. Surprisingly, the Social Democrats supported the President's demand on a guarantee for the Beneš decrees, even though the Social Democrats supports the inclusion of the Charter in the LT. However, the reaction of the Czech Communists who unequivocally stood behind the President is not surprising, nor the reaction by the Greens and Christian Democrats who opposed his decision.

The disunity of the Czech political elites coupled with the weakness of the caretaker government resulted in the general acquiescence to the President's requirement. We should note that other options were available, but none of them were used by Czech politicians. One obvious way would have been to file a competence complaint to the Constitutional Court, which could have decided that the President's signature is not needed for the ratification process. Instead, Czech politicians – and subsequently the European Council – agreed to the opt-out from the Charter in order to finish the ratification process as soon as possible. The strategy of the Czech government, from this perspective, turned out to be a successful one. Very few had anticipated that the Czech ratification process would be completed already on the 3 November 2009. The protracted drama of the Czech ratification process took an abrupt end when Klaus in a rather emotional press conference declared that he respects the decision of the Constitutional

¹⁶ Czech US holds hearing on the Lisbon Treaty, MPs fail with objection. *České noviny*, 27 October 2009, available at: http://www.ceskenoviny.cz/tema/index_view.php?id=404780&id_seznam=2583, last accessed 4 November 2009.

¹⁷ This was confirmed by the former Foreign Minister Alexandr Vondra (Alexandr Vondra: Stalo se dnes, *Radiožurnál*, 8th October 2009, available at: <http://zpravy.ods.cz/prispevek.php?ID=11296>, last accessed 4 November 2009.

Court, even if disagreeing with the content of the decision, and that, accordingly, he had signed the treaty. It remains to be seen if there will be a Czech debate on the domestic legitimacy of this newly acquired opt-out.

A note of integration theory

After the recent enlargement rounds, the consequent increase of heterogeneity and the related problems with deeper integration in the Union have been frequently discussed in the academic literature. Some scholars even came up with new theoretical models that try to grasp Eastern enlargement specifically.¹⁸ However, most of these approaches simply rely on the gradual socialisation of new member states into the community structures, thus stressing the one-sided asymmetrical transfer of norms from the EU institutions (and the old member states) to the new member states.

The significant difficulties during the ratification process of the Lisbon Treaty leads us to the question as to whether the problems surrounding the Treaty are nothing new from a theoretical perspective and whether they can be compared to similar situations in the past (e.g. problems with the Maastricht Treaty ratification), or whether we should interpret the present process as a challenge to some of the existing theories of European integration. Given the limited space, we will focus merely on one theory, and a most influential one at that, which we believe is in need of substantial reformulation should it remain a useful analytical tool for the enlarged Union – liberal intergovernmentalism.¹⁹

Sure, Moravcsik and his followers could see the assertiveness of the new member states as the confirmation of their emphasis on the role of national governments. However, two concepts, on which liberal intergovernmentalism relies strongly, are challenged by the Lisbon Treaty ratification process. The first problem pertains to the concept of a two-level game,²⁰ which features prominently in the liberal intergovernmentalist account of the integration process.²¹ Moravcsik starts from the assumption that national governments seek the support of EU institutions, using them as a legitimising leverage in the domestic context. However, once a member state government feels (or at least pretends so) that its own citizens provide it with legitimacy in its opposition to further integration, the whole structure of the game, with the EU level overruling the domestic level, collapses.

The second problem is related to the way liberal intergovernmentalism describes international negotiations. Here, the concept of bargaining power looms large. The main assumptions underlying this concept are the willingness of the parties to reach an agreement and their preparedness for trade-offs. However, the experience with the Czech approach to ratification (as well as the Czech political elites' actions during the Czech EU

¹⁸ Among others, Friis, L. and Murphy, A. (1999) The European Union and Central and Eastern Europe: Governance and Boundaries. *Journal of Common Market Studies*, 37(2): 211-232; Fierke, K. M. and Wiener, A. (1999). Constructing institutional interests: EU and NATO enlargement. *Journal of European Public Policy*, 6:5: 721-742(22); Schimmelfennig, Frank (2001). The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union, *International Organization*, 55 (1): 47-80.

¹⁹ Moravcsik, A. (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. London: Routledge/UCL Press; Moravcsik, A. and Schimmelfennig, F. (2009) "Liberal Intergovernmentalism," in Antje Wiener and Thomas Diez, eds. *European Integration Theory*. Oxford: Oxford University Press.

²⁰ Putnam, R. (1988). Diplomacy and domestic politics: the logic of two level games. *International Organization* 42 (3): 427- 460.

²¹ See also Moravcsik, A. (1993) Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *JCMS: Journal of Common Market Studies*, 31 (4): 473 – 524.

Presidency) starkly contradicts these assumptions: Even though costs for non-compliance in terms of a quick ratification are high (the often-quoted danger of a lower number of commissioners, the decreased credibility of the country, etc.), and, although the EU partners of the country have been trying to make ratification more acceptable for the Czech Republic, none of these steps changed the unwillingness to ratify the Treaty in some corners. Substantial parts of Czech political elites underwent some Europeanisation during the Czech Presidency, but even this shift has not been sufficient to accelerate ratification. In other words, the high level of politicisation of the issues linked with an ideological motivation against the Treaty's ratification prevents the emergence of a compromise based on a trade-off with some other issues, and basic mechanisms of bargaining fail here. To sum up, the increased stress on the relevance of domestic politics coupled with the growing resistance to Europeanisation in some new member states challenges some basic tenets of liberal intergovernmentalism.

Conclusion

The LT ratification process faced a number of serious obstacles; however, it was successfully ratified in the end. There are at least two lessons learned from ratification: First, it is highly probable that no treaty revisions can be expected in near future. Even a small country can block something which other countries and their politicians invested substantial political capital – risking it becoming an unattractive option. Second, speaking about the situation in the Czech Republic, the willingness of a part of the political elite led by the Czech President to block any steps toward deeper integration is high and growing. The absence of Europeanisation (or even the existence of a process of “de-Europeanisation”) in the country (as well as in Poland and some other member states) will certainly create similar obstacles to further integration in the future as well. As a result, the gradual creation of a multi-speed Europe, in which Eurosceptic countries will be sidelined, is now more probable than ever.
