# On the Brink of Joining Poland and Hungary: The Night of Surprises in the Slovak Parliament

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The relatively short political history of the Slovak parliament witnessed several dramatic sessions going well into late hours. Beginning with the 'night of long knives' in 1994 that enhanced the control of Vladimír Me#iar over the legislative body, the latest drama unfolded during the night of 23 October. The parliamentary session was scheduled to discuss the amendment of the Constitution and the new Act on the Constitutional Court taking its final vote five minutes after midnight. It was not clear whether the government-sponsored amendment of the Constitution required for the change of the appointment model of constitutional judges would pass. Still, virtually no one could have expected the surprises that were about to put Slovakia on a direct path to follow Hungary and Poland and the twist that followed them.

## How the Night Came About

The process leading up to this night started during the previous electoral term, when the single-party government of *Smer-SD* ('Direction' led by then PM Robert Fico) elected a set of candidates for the country's most authoritative judicial bench. Most of the candidates had a dubious (if any) previous track record in the legal profession and the President (opposing *Smer-SD*) refused to choose three out of the six candidates. The Constitutional Court stepped in and obliged the President to select the required number of candidates from the nominees. Illustrating the legitimacy deficit of the existing selection model, which basically allows a simple majority of present deputies to select all candidates in the first round, this case sparked a broad political and academic debate on changing the model.

After the parliamentary elections of 2016, one of the coalition parties (the Slovak-Hungarian party *Most-Híd*, 'The Bridge') which received the seat of the minister of justice managed to get one of its programmatic priorities into the government manifesto (p. 61). Aside from building a 'barrier against extremism' (represented in the parliament by the far-right People's Party Our Slovakia), the prevention of the 'capture of the Constitutional Court' by a particular political party was a core reason for Bridge to enter into coalition. After all, this policy agenda was represented by the then Minister of Justice and one of the party's MPs, both recognized and credible legal experts.

In the subsequent two years a public, mostly expert-based deliberation ensued on how to improve the appointment process but it was clear from the beginning that for changing the appointment model, a constitutional amendment will have to pass. As argued elsewhere at that time (p. 355), there seems to be an inverse relationship

between the political feasibility of various appointment models, and their legitimacy, the latter measured by their capacity to generate judges with both expertise and high moral standing as well as the equal representation of the whole parliamentary opposition in the appointment process. A model such as the consensual one applied in Hungary after the transition, that would constitute the most legitimate one according to this approach, was not even considered in the core discussions for the Slovak case. However, the 'second-best options', i.e. the 'German' model of appointing the judges through a parliamentary constitutional majority, and the 'split model', dispersing this competence among multiple constitutional bodies, were, as well as many nuances and refinements.

As 2019, the year when nine of the thirteen judges are to be replaced by their successors, was fast approaching, the proposal backed by the coalition was submitted to the parliament in August 2018. The (new) Minister of Justice proposed changing the quorum from the current simple majority of *all present* deputies (which with a 150-member parliament theoretically allows for an option of a candidate to be chosen with 39 votes) to a majority of *all* deputies (i.e. 76 votes at the minimum). While the proposal contained many other changes (such as the formulation of stricter standards for the professional as well as moral qualifications of the candidate), the modest increase of the quorum signaled no change of the appointment *model* itself since the president's involvement would have been unchanged.

A large part of the expert community as well as the parliamentary opposition objected against the proposal, *inter alia*, because any coalition with more than 75 guaranteed votes would have been able to make the candidate selection in this constellation, and because of the introduction of an increased minimum age of 45 years for the candidates for no apparent reason. Yet, the amendment was considered as a step forward compared to the model in place. In addition, the 'window of opportunity' by this situation was used to propose an entirely new Act on the Constitutional Court as well which was to replace the Act from 1993.

In the period from the submission of the written draft leading up to the October night session, it had become clear that a consensus needed for a constitutional amendment is difficult, maybe even impossible, to reach. This may partially have been caused by one of the coalition parties (*Smer-SD*) proposing a modification that would have changed the collaborative model to a 'German-type' parliamentary consensual model with a constitutional majority needed for the appointment of the judges but with no choice for the head of state. While this proposal is at first sight an improvement because of the opposition's involvement, concerns arose that in case the coalition makes an alliance with the extreme right or if any future coalition reaches a constitutional majority (Hungary is a clear example), the doors would be wide open for unrestrained majoritarianism.

# Last-Minute Surprises Changing the Scene

It was not until the decision day agreed upon by the coalition that the real cat came out of the bag and it took the form of a 'surprise proposal' by one of the deputies of *Smer-SD* with the backing of the coalition. The proposal, on the one

hand, introduced the earlier rumored constitutional majority appointment without presidential involvement. On the other hand, it allowed for a reduction of the quorum in case the required number of constitutional judges is not elected by a supermajority. In this latter case, the quorum was to be lowered to the majority of all deputies while *two candidates* were to be selected for each vacant seat and from these two candidates the president would have been obliged to appoint one as a judge. The devil is in the details here, namely, in the prescription of nominating 'twins' of candidates for a vacant seat if a constitutional majority is not reached. This is a substantial difference from the current model where a set of candidates is nominated together in one round and the president shall select half of them (while it remains an open question whether refusing more than half of the candidates is constitutionally permissible).

The difference from the current model is that, combined with the obligation of the president to choose from a precisely determined 'twin', the coalition could easily put its preferred candidates on the bench by selecting entirely unacceptable candidates for the 'twin's counterpart' which is more difficult to achieve with the current model in the current political constellations. A second, equally suspicious and sudden change proposed by the *Smer-SD* deputy would have transferred the competence to appoint the Court's President and Vice-President from the head of state to the Court's plenum (presumably packed with justices loyal to *Smer-SD* by that time).

The proposal was not approved and so for the moment it seems Slovakia can celebrate not taking the track of Hungary and Poland, at least until the selection of the constitutional judges according to the current appointment model takes place. Moreover, the heated debate could approve the continued significance of parliamentarism in Slovakia (at any rate, when a constitutional majority needs to be reached). The manner leading to the rejection of this 'surprise amendment' gives fewer reasons for optimism though.

## Whose Victory?

As the voting results show, the final proposal for a constitutional amendment was not approved by a wide margin – only 55 MPs gave their vote. However, the core vote was the preceding one on the 'surprise amendment' of the *Smer-SD* deputy. And the deputies who did not vote for it, contrary to the expectations, were the members of the far-right party of Marian Kotleba. While the political context of this process cannot be covered here in detail, hints were made that Kotleba promised to provide the necessary support for a constitutional change in the absence of such support from most other opposition deputies. However, in the very last minute, Kotleba and all his deputies abstained from the vote which created a moment of disorganization the original constitutional amendment fell a victim to. In other words, the future of the Constitutional Court and thereby of the constitutional order was for a few moments in the hands of fourteen out of the 150 deputies belonging to a far-right party seeking to undermine that very constitutional order.

There are two possible explanations for the choice of Kotleba's party. Firstly, they made a simple mistake (most of them are hardly legal experts). Secondly,

they did it on purpose (and, unsurprisingly, Kotleba claimed just that in his first reactions after the vote). The first option is concerning as it indicates the fragility and often accidental nature of decision-making on constitutional matters, but hardly groundbreaking news. However, the second option (the one the far right can now use for campaigning against the 'system') goes beyond that. It would not only prove that the 'barrier against extremism' in Slovakia got leaked again but that the far right might well have politically gained the most on what may become the most important vote in Slovakia's current electoral term, when the chances to put respected constitutional figures with strong moral standards on the bench of its Constitutional Court were severely limited. The reward for Kotleba's party is nothing less than public attention and greater acceptance of the far right as a 'standard' part of the Slovak parliamentary spectrum, one that can directly influence major questions of constitutional significance. In sum, whether by accident combined with the incapacity of the coalition parties or by a well-orchestrated strategy, this amounts to a victory of the far right – one that may cost democracy in Slovakia even more than the missed chance to reform the appointment model.

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