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The Development of Legal Institutions Related to Primary Elections in Hungary²

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Abstract

Primary elections are a new element in the ‘periodical table’ of Hungarian politics and were already used for the selection candidates in some instances in 2019. In preparation for the upcoming parliamentary elections in 2022, a cooperation scheme is taking shape among opposition parties, involving all currently decisive players on that political side. Entailing a scope broader than ever before, this cooperation also involves the organisation of primary elections for selecting the candidate for the Prime Minister and the candidates in single-member constituencies. The primaries are organised by the six opposition parties running together in the 2022 Hungarian parliamentary election. If held, it would be the first country-wide primary election in Hungary. This study looks beyond the specific solutions that may be applied in relation to the upcoming primaries. It provides a working definition of the term itself, briefly reviews the international and Hungarian antecedents of primaries, also outlining the reasons why this solution came to the fore in Hungary. Then the study sets out to predict the ‘evolutionary trajectory’ along which primary elections will become institutionalised here, spelling out the *potential* phases of development. In the latter context, this paper touches on the private law and public law implications of primaries and raises a scenario in which government parties also begin to apply this new political tool.

Keywords: opposition, primary, private law, public law, Hungary, 2022 Hungarian parliamentary election.

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Rozwój instytucji prawnych w związku z prawyborami na Węgrzech³

Streszczenie

Prawybory to swego rodzaju nowy „pierwiastek” w „tabeli okresowej” węgierskiej polityki. Były one organizowane na potrzeby wyborów kandydatów na różne stanowiska polityczne już w 2019 r. W ramach przygotowań do zbliżających się tegorocznych wyborów parlamentarnych, wśród partii opozycyjnych kształtuje się pewien model współpracy, który obejmuje wszystkich największych graczy po opozycyjnej stronie politycznego boiska. Współpraca ta, której zakres zapowiada się być najszerzy w historii, obejmuje również organizację prawyborów mających na celu wyłonienie kandydata na premiera oraz kandydatów w okręgach jednomandatowych. Prawybory są organizowane przez sześć partii opozycyjnych startujących wspólnie w wyborach parlamentarnych na Węgrzech w 2022 r. Jeśli rzeczywiście się odbędą, będą to pierwsze ogólnokrajowe prawybory na Węgrzech. Niniejsze opracowanie sięga nieco dalej niż konkretne rozwiązania, które można zastosować w związku ze zbliżającymi się prawyborami. Zawiera ono roboczą definicję samego pojęcia prawyborów, oferuje krótki przegląd historii tej instytucji zarówno w ujęciu międzynarodowym, jak i w kontekście węgierskim, a także nakreśla powody, dla których rozwiązanie to pojawiło się na Węgrzech. Następnie pojawiają się tu próby przewidzenia kierunku ewolucji instytucji prawyborów, którym towarzyszy pytanie o ewentualną instytucjonalizację tego rozwiązania, jak i o jego potencjalne fazy rozwoju. Ten ostatni kontekst stanowi tło, na którym artykuł porusza kwestię prywatnoprawnych i publicznoprawnych zastosowań prawyborów i analizuje scenariusz, w którym partie rządzące również zaczynają stosować to nowe narzędzie polityczne w praktyce.

Słowa kluczowe: pozycja, prawybory, prawo prywatne, prawo publiczne, Węgry, wybory parlamentarne na Węgrzech w 2022 r.

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A little less than a year before the 2022 parliamentary elections, it seems certain that Hungary's opposition parties, or at least those of them that have some weight in domestic politics as of today, will hold primary elections. Even the practical details and milestone dates have been published.⁴ In no way is this study intended to analyse the potential outcomes of the next elections, and it is even less intended to take sides for or against any of the parties, candidates or political alliances. Here and now, primaries are only of interest to me as a legal and political institution that constitutes a new social phenomenon in Hungary regarding its benefits and currently unfolding form, since as such, it is rightfully put to thorough analysis. Let us declare that *with the appearance of a primary election procedure that involves candidates from various political parties along with participation from the general public, a new element has been added to the 'periodical table' of Hungarian politics.*

This study encompasses five parts as follows:

1. First, it reviews the international history and background of the institution (group of phenomena) and renders a proprietary working term for it.
2. Another matter that calls for further analysis is whether there are any antecedents, i.e. former or recent examples of primary elections in Hungary.
3. What might be the potential reasons of the institutionalisation and currently growing popularity of primary elections in Hungary? What are the social needs that it responds to? What potential long-term roles might it have? There are so many questions here which are addressed in the third part of this study.
4. Assuming that primary elections as an institution will grow roots in Hungary's political life, legal implications are expected to emerge with increasing frequency. Also, the proliferation of legislative and law application 'products' with relevance for primary elections is predictable. In other words, a phenomenon that is merely a political institution today will *also* become an institution in statutory law and a law interpretation problem on its own right. Once that happens, it will follow its own development (evolutionary) trajectory that goes beyond the scope of legal considerations. Outlining the

⁴ Six opposition parties launched a common website; for more details, see: <https://elovalasztas2021.hu/>. The first round of the 2021 primaries took place between 18 and 26 September and the second round between 10 and 16 October 2021.

possible development phases and the related examples, this chapter is the academic novelty of this paper.

5. Lastly, the study reviews the considerations (arguments) that underscore the uncertain and fluid nature of the aspects outlined above and highlights the dangers that threaten this new institution and its uninterrupted development.

The Notion of Primary Elections

By definition, primary elections are a series of political events in which voters can express their opinion on aspiring candidates prior to regular parliamentary elections. The most frequent form is an *open primary election procedure* in which anyone complying with certain minimum conditions (e.g. presentation of proof of residential address) is entitled to participate.⁵ For nominating organisations, the main benefits include the opportunity to gather preliminary information on the popularity of candidates and to sustain voter attention for a longer period than in a traditional election process. For voters, the key benefit is the opportunity to obtain additional information on candidates and to enjoy the *sentiment* of actual involvement.

Nationwide primaries mostly take place in countries where elections are based on the majority principle and are held in a single round. The best known and best crystallised solution is the traditional primary election procedure of the Republican Party and the Democratic Party before the presidential elections in the USA. This method is less common in Europe, although there were examples for it in several countries in the past three decades, e.g. in Great Britain, France, Germany, Italy, Spain, Poland and Romania. These primaries were intended to select nominees for the positions of president, prime minister, mayor and members of parliament. In some cases, primaries were related to European Parliamentary elections.⁶ One obstacle to the wider adoption of primaries in Europe is that in several countries of the old continent a proportionate and two-round election system is in place which makes primaries partially or entirely unnecessary.

The form of primaries that seems to take shape in Hungary is a contest of potential candidates on one side of the binary political sphere, preceding related elections (mostly parliamentary, local government and European Parliamentary elections).

⁵ As opposed to the open version, closed primary elections usually refer to a survey or voting process within specific parties. In some instances, these closed primaries also entail the capturing of various secondary preferences.

⁶ *European Green Party Kicks Off 'Open Primary' for EU Elections*, 9.06.2013, <http://www.euractiv.com> (access: 12.11.2020).

Besides the participation of multiple political parties in it, one decisive element of the process is its public and involving nature and its reliance on the active participation of the general public. Thus, the process still involves the traditional internal selection procedure within the political parties concerned, i.e. nomination by a low-level party organisation, then approval by a higher party forum, etc. The primaries, however, are a voluntary additional element that precede the fulfilment of the statutory preconditions of official nomination⁷ and create a new stage of political competition (in addition to existing, traditional 'platforms' that are already in place for the candidates within individual parties or otherwise).

In addition to the already mentioned election forms, theoretically this institution can be applied with a narrower and a broader scope alike: if applied with a potential *narrower* scope, the primary election may not involve competition between different party candidates in single-member constituencies (or at least in some of them) for a parliamentary election, only between the candidates for Prime Minister. In a potential *broader scope* compared to what is taking shape today, the (opposition) parties would (also) apply a coordinated primary election procedure for the selection of any candidate for any position to which candidates must be nominated. Thus, all potential candidates should compete for the official nomination in public. E.g. with this scenario, one or more members of the nomination committee, as per Article 7 of Act 151 of 2011 on the Court of Constitution, could also rely on the results of a preliminary expression of a [public] opinion when developing their stand. Naturally, we are aware that this supposed scenario is a far cry from reality, i.e. the current quality of political discussions and practice. Yet, it is possible and necessary to pursue thinking in relation to this phenomenon on a broader horizon, regardless of current political practices. This approach is also justified by the fact that in the USA where by the early 20th century *primary elections* or *primaries* in their current form became a standard procedure in every state (becoming separated from the nominating conventions of parties, i.e. the *caucuses*), the same term (*primaries*) is used not only for the selection of presidential candidates but also for the voting procedure by which non-political candidates for city or state positions are selected (when the purpose of the primary is to reduce the number of contestants for the position concerned to two).⁸

Another potential and *far more realistic* possibility for expanding the scope of primary elections is to open participation to persons who wish to join the contest as independent candidates as per point b) in paragraph 1 of Article 5 in the Electoral

⁷ E.g. the collection of a sufficient number of recommendation slips as per Article 6 of Act 203 of 2011 on the Elections of Members of Parliament (hereinafter referred to as 'the Electoral Act').

⁸ V. Bogdanor (ed.), *Politikatudományi enciklopédia*, Budapest 2001, p. 349.

Act (e.g. on the condition that if they did not win, they would not run for the same office in the actual elections, that they would campaign for (or at least not against) the winner of the primary in their public statements, and that they would join a specific fraction if they get elected).⁹

The Launch of Primaries in Hungary

Although the institution of primary elections does have an international history and *similar* institutions and mechanisms can be cited from Hungary's history and political history as well, we must be very cautious with those. For the retrospective projection of current moral and political values onto past events 'may easily overshadow the proprietary truths of history'.¹⁰ In other words, it may be dangerous to 'recognise' the answer to today's expectations and needs in solutions that were applied in a different time and different historical and political constellation. Such an approach may easily lead to the justification of forced and unacademical points. Similarly, we must be cautious with primary elections, too. It is useless to draw far-reaching conclusions based on solutions from before the civic political transformation in 19th century Hungary, e.g. based on certain practices of the county assemblies and especially the partial assemblies (*particularis congregatio*) that elected envoys to the national assembly.

The first related procedure that was already regulated in law was that of nomination conventions in 1985, years before the change of the political system in Hungary. The intention was to apply multiple nominations in order to promote the objective of 'socialisation', i.e. the strengthening of direct democracy, simply by selecting the right candidate for MP nomination. 'In 1983, the Central Committee of the Hungarian Socialist Workers' Party (MSZMP KB) decided to take a "radical" step and passed a resolution on upgrading the election system. The political intention was converted into legal parlance in Act 3 of 1983. One of the most significant novelties of the act was that it required the nomination of two candidates in each constituency.'¹¹ Formally, the right of nomination was exercised by the nominating assemblies of citizens. Voting at the nominating assemblies was open, clinching

⁹ Candidates may declare their independence at the opposition primaries. However, as applicants are required to declare in advance which faction they would join and present a statement of admittance from the faction or party concerned along with a six-party declaration about themselves, their room for running as independents is highly limited in a legal sense.

¹⁰ G. Gyáni, *A történelem mint emlék(mű)*, Budapest 2016, p. 54.

¹¹ I. Kukorelli, *Adalékok az alkotmányos rendszerváltozásban közreműködő 1985/90-es Országgyűlés történetéhez*, „Acta Universitatis Szegediensis: Acta Juridica et Politica” 2015, 78, p. 160.

the nomination required one-third majority [at least in the first round of the two-round nomination process –Á.R.], everybody could vote for everybody.¹² The genuine novelty of the arrangement, an element that was indeed democratic, was that not only the official candidates of the Patriotic People's Front, but also independent candidates were allowed to run for parliamentary seats. Seeing the large number of 'spontaneous' candidates,¹³ the governing party 'tightened up' their lines (the sole political party in the one-party political system, MSZMP ordered and organised masses of party members to attend the second round of nominating conventions, in many cases without respecting area borders). Still, overcoming the varying amount of difficulties, a few independent candidates eventually won and made it to the national assembly.

What makes the referenced legal innovation notable and perhaps a distant predecessor of primary elections is that one of its declared (and, surprisingly, partially accomplished) objectives was to restore and increase confidence in democracy, to strengthen (the pretence of) democracy, and, what is more, to provide for some transparency or publicity on top of the mandatory (but hollow) slogan of developing 'democratic centralism'. In relation to the 1985 events, we must note that the aforementioned solution was one of the typical mistakes of the regime at the time: They thought that some degree of free expression of opinion and the launch of an embryonic form of plurality would function as a pressure valve for society, relieving the general discontent that became tangible by then, and would enable control over it. In reality, the exact opposite happened: the introduction of dual nomination proved to be a catalyst that accelerated the erosion and disintegration of the regime.

The term 'primary election' surfaced time to time in Hungarian politics and in public discussion in the two decades that followed the change of the political system in 1990; sometimes as a proposal of professors from the ELTE university and the University of Economics,¹⁴ sometimes in the description of the internal selection processes of a political party.¹⁵ As the primary elections in the US were and are watched closely by Hungarian media and academics, several analytic papers were issued about the topic in that period already.¹⁶

The concept of primary elections surfaced again in the early 2010s. This time, it was not an isolated thought but a meaningful discussion topic in the context of competition among opposition parties and their respective election campaigns.

¹² Ibidem, p. 159.

¹³ Ibidem, Table No. 2, p. 161.

¹⁴ Zs. Nagy, *Kaposvári „előválasztás”, „Magyar Nemzet”* 14.02.1994, p. 5.

¹⁵ A. Rádi, *Kiszagda nagygyűlés előtt: előválasztás, „HVG”* 2000, 17, pp. 99–101.

¹⁶ Á. Heller, *Előválasztás Amerikában, „Mozgó Világ”* 2004, 3, pp. 41–47.

The idea of a primary election that is based on an opinion poll came up at negotiations between Dialogue for Hungary and MSZP, followed by a proposal (!) to hold primary elections in each constituency.¹⁷ Regardless of their actual biases, all political analysts agreed that any suggestion of a primary election was to be interpreted in the context of political tactics and manoeuvring.¹⁸ At the time, political players were not yet ready for cooperation and were not perceiving any necessity for it: *the dual pressure of compelling external forces* (first, the high demand from opposition party voters for their favoured parties to join forces, and second, the change of electoral laws) *appeared to be survivable without said cooperation...* In other words: these two grips did not seem lethal yet.

Therefore, at the time of the second Orbán government, the parties and persons concerned considered the idea of primary elections merely a threat that was not seriously devised, a kind of a blackmailing tool. Or they regarded it as a way to demonstrate power to potential voters, sending them the message that ‘we are strong enough, so much so, that we are *even* ready to engage in a competition like that.’ As long as there was no real chance for primary elections, these views could be voiced without consequences.

The introduction of primaries in Hungary was already suggested in 2015 by the Republikon Institute, a thinktank with ties to more than one existing and former opposition parties. That suggestion came in the wake of the second FIDESZ-KDNP victory with two-third majority. Although no primaries took place before the 2018 parliamentary elections in Hungary (which ended with a victory for FIDESZ-KDNP giving them a two-third majority for the third time in a row), the year 2019 brought on the first actually implemented cooperation scheme (*for the main reasons of that, please see the arguments outlined in the next chapter*).¹⁹ The first time when primary elections were applied in a broader scope was in 2019, before the local government elections, with the participation of six opposition parties (five of which had parliamentary representation) and several non-governmental organisations and enjoying media support from well-known private individuals. Two primary elections were held for candidates for the position of mayor of Budapest and one for the mayor of

¹⁷ M. Sebők, „Győzelem” vagy győzelem? A pártközi koordináció kudarcai, [in:] B. Böcskei (ed.), *Padlóról padlóra – Magyar baloldal 2010–2014*, Budapest 2014, p. 26.

¹⁸ Cs. Tóth, G. Török, *Négy választás Magyarországon. A magyar politika az elmúlt 12 évben (2002–2014)*, Budapest 2015, p. 493.

¹⁹ The Republikon Institute elaborated several proposals for the 2022 parliamentary elections, now with the view of the lessons learnt at the two primaries held before the 2019 local government elections in Hungary. For details, please refer to these articles: https://hvg.hu/itthon/20200310_Elkuldte_az_ellenzeki_partoknak_a_Republikon_hogyan_kepzeli_az_elovalasztast; and <https://pestisracok.hu/republikon-etikai-kodexet-kell-elfogadnia-az-ellenzeki-partoknak-hogy-mukodjon-az-elovalasztas/> (access: 15.01.2021).

District IX. The organisation, implementation, vote counting and announcement of results regarding the primaries for the mayor of Budapest were coordinated by two non-governmental organisations (NGO's), the Civic Election Committee and aHang [theVoice]. Both of these primaries were entirely 'open', i.e. anyone entitled to vote at the 'official' elections could cast their votes at these primaries. The winner of the opposition primary, Gergely Karácsony was eventually elected as mayor of Budapest. His victory in itself strengthened confidence in primaries on the opposition side.

On 20 December 2020, six opposition parties, DK, Jobbik, LMP, Momentum, MSZP and Dialogue for Hungary made an agreement declaring that they would back a joint candidate in each of the 106 single-member constituencies, that they would have one joint candidate for prime minister and a single shared list for all participating parties. The agreement also laid out the fundamental principles of a joint program. The parties agreed that they would select the joint candidate for prime minister in a primary election and that they would also apply the same tool for selecting candidates for the joint list and the single-member constituencies. The participating parties specified the form primaries in the spring of 2021 along with the details of implementation.

One separate chapter in the history of Hungarian primaries is the primary elections held in ethnic Hungarian communities living outside the borders of Hungary. One of the greatest threats these communities face upon any parliamentary election is that none of the competing Hungarian parties would make it to the respective national assemblies. Therefore, cooperation is an *especially* compelling necessity there. Having said that, the dominant form of primaries in these communities is one where candidates within a specific party run for nomination vs. the one that involves multiple political parties: E.g. in April 2004, 185,000 people in 781 settlements participated in the primary elections organised by the Democratic Alliance of Hungarians in Romania. As a result, the Alliance finally participated in the election campaign with 612 candidates for mayor positions and with 6,135 candidates for local and county council member positions.

The Reasons Behind the Institutionalisation of Primaries in Hungary and the Long-Term Functions of the Institution

When discussing primary elections in the context of Hungary, it is worth separating the facts that helped the appearance of the institution from the arguments that support its consistent, long-term use. Approaching the matter from an academic viewpoint, we should also ask which factors are in the way of the full and lasting

adoption of primaries? What are the obstacles that may hinder it from becoming an integral element of political contests in Hungary? (*These topics are discussed below in Instead of a Summary – the final section of this study*).

Using a very simple approach, we assign the arguments for primary elections into two categories. The first one includes those that originate in the current political and legal constellations while the second category comprises general arguments.

The arguments originating in the current political and legal constellations

Introducing stricter rules than the former version of the law, the new Article 8 of the Electoral Act (based on Article 3 of Act 167 of 2020 on the amendment of certain election-related laws) declares that ‘Those parties are entitled to draw up a party list that have successfully nominated a candidate in at least 71 single-member constituencies (in at least 11 counties and in Budapest)’ [Article 8(1)].²⁰ This figure was 27 before the amendment while the number of single-member constituencies remained 106 all along the way. This rule, complete with that set out in paragraph 2 of Article 8 declaring that ‘Two or more parties may draw up a common party list based on the common candidates of the same parties in single-member constituencies’ *definitely pushes the key players of the fragmented opposition and the weakened parties in it towards creating a single ‘large common list’ or perhaps two common lists*. It must also be pointed out that the amendment in 2011 abolished two-round elections (that could help various second-round cooperation schemes, the revoking of candidates and other tactics etc. earlier)²¹ and also abolished combined lists that used to give an opportunity to voters to cast their votes on individual parties who otherwise would run on a single common list (enabling the clear measurement of support for individual parties. It is also important to note that ‘winner compensation’ was incorporated into electoral law,²² constituting another push for Hungarian parties towards cooperation in single-member constituencies (and, through that, towards primaries). Currently (2021–2022), this push is focused on Hungarian opposition parties.

²⁰ In effect since 21 January 2021.

²¹ Between 1990 and 2010, parliamentary elections in Hungary had two rounds. In a two-round system, the first round may function as a ‘live primary election’ in the sense that first-round results in the single-member constituencies serve as the basis for revoking candidates before the second round, with those candidates endorsing the surviving candidate and calling on their own supporters to vote for said candidate.

²² This means that the difference in votes gained by the first and the second candidate will be added to the national list. This arrangement boosts preference for ‘strong candidates’ owing to the higher number of votes that can be won through them.

Theoretically, the parties of the opposition may limit the scope of their coordinated actions to single-member constituencies, e.g. using the primaries only for selecting the single common candidate (of the cooperating parties) and not drawing up a single, common party list. Yet this approach may be ‘potentially lethal’ for an opposition side that consists of many small parties, as long as it can be assumed with certainty that more than one of these parties would fail to reach the required 5% threshold set out in paragraph 1 in Article 14 of the Electoral Act, suffering an ‘unnecessary’ loss of votes that would pose a serious threat to the ability of forming a government.

More general but equally important reasons

In relation to US-type primaries, the most frequently cited benefit is that it strengthens confidence in democracy and reinforces a sense of certainty that it is the ‘people (...) and not party leaders who select the persons they deem fit for holding a high office’.²³ In Hungary, where politics is traditionally unbalanced, parliament-centred and can be best described with adjectives like onerous and rough,²⁴ the personal nature of the process, citizen involvement and the experience of having a direct say in the turn of events in any form might be especially important.

Instead of a political approach that thinks in terms of ‘slow-moving’ cycles and puts the leaders (a small number of well-known politicians) to the fore, primaries bring aboard a different logic that *also* highlights the individual qualities of candidates and puts them up for public competition, using the tools, technologies and platforms offered by digital development. *In addition* to political and party preferences and the role of personal qualities, this may also increase the significance of party programmes(!). The latter may slightly ease what is perhaps the greatest weakness of Hungarian public life: a basic approach and mindset that strive to enforce political considerations in all spheres of life and thereby preserve division. The significance of the *opportunity* to understand, experience and strengthen the culture of cooperation can hardly be overestimated for a political elite that was socialised differently.²⁵ It should also be noted here that *ultimately* the primaries put participants in a better light inasmuch as it prevents the up-front fights and quarrels of the kind that opposition parties put on both in 2014 and 2018. An additional benefit may stem from the participation of popular and respected figures

²³ G. Péterfi, *Népi blog – Az elmúlt évek írásai (2014–2016)*, Budapest 2016, p. 194.

²⁴ Á. Rixer, *A magyar jogrendszer jellegzetességei 2010 után*, Budapest 2012, p. 22.

²⁵ Many codes of conduct are developed before each parliamentary election in Hungary. Formerly, it was extremely rare that a party would adopt the code of conduct of another party...

who are not committed to any political party which may also increase the reputation and legitimation of the entire process and its outcome.

The Evolution of Primary Elections in Hungary: In the Laws and Beyond

The starting point of this chapter is the assumption that primary elections form a complex (set of) social phenomena and will not emerge in a fully developed state. Instead, they will reach a stable form step by step. It is exactly this organic, gradual nature of development, along with the knowledge of domestic public policy trends and of the rules of traditional law, complete with lessons already learnt from the cautious but already existing experiments with primaries here that enable us to come up with predictions regarding the phases of this change and their potential sequence.

We assume that in case primaries become a lasting institution in Hungary, even in the form of a *civic* initiative, this fact will inevitably have implications in legal regulations, too. *In the most likely scenario, the process will unfold along the following development phases:*

- 1) In the first phase, civic-type self-regulation is expected with the dominance of *private law developments, both spontaneous and engineered*. Mostly private law cases are expected to unfold during this stage.
- 2) In the second phase, implications are expected to emerge in laws, mostly *in the form of rules relating to public law*.
- 3) Then the first two phases will evolve into a complex legal network, making primary elections a stand-alone legal institution on its own right, *even if the rules of executing primaries do not directly appear in laws (!)*.
- 4) The fourth phase will comprise the full evolution of the institution in Hungary beyond the scope of law. In fact, the fourth phase is the *opportunity* for any government in office to introduce primaries as a standard element of the election procedure. This may be the ultimate phase that provides full social and political acceptance of the institution, incorporating it organically into the system of domestic politics and legal culture, turning it into a widely used tool. What is more, the increased weight and role of the institution may make primaries an acceptable or even useful mechanism in the eye of current government parties (a strong bloc in Hungary) while it may forge a single political entity from the current opposition parties, ultimately resulting in a *de facto* two-party system.

- 5) As a potential consequence of the latter, in the fifth phase if you will, the regulatory thinking and social policy endeavours that serve as the foundation of the institution will 'export' the concept of primaries to other areas: e.g. its presence may become stronger in the private sphere in the form of a private administration tool, or perhaps in education (strengthening school democracy) and even in community decisions (both in personnel selection and for other subjects) that are to be made in the digital realm.

Naturally, the 'flow chart' outlined above assumes a linear trajectory and steady development, with no interruptions or setbacks. Let us examine in more detail three of the stages associated with the above ideal development trajectory.

First:

The current situation (July–October 2021) basically reflects the dominance of private law elements. It is an exciting question to see what new contract types (special private law contracts) will appear in the relationships between unique parties. What types of unilateral statements (e.g. subordination) may become common? Will those be any different from the statements and declarations of commitment that parties require their candidates to sign upon parliamentary elections anyway? Unilateral, bilateral and multilateral non-disclosure declarations will be more significant than ever before, along with the statements of support in which the parties commit to support the ultimate winner of primaries and set out the specific forms of said support.

Without doubt, the most compelling question is about the nature and content of agreements that will be made between the cooperating parties. *There are obvious and basic stipulations that ensure the fundamental rules for staging the primary elections:* general and preliminary minimum requirements that potential participants must comply with (age; clear criminal record and even integrity; potential additional requirements regarding education etc.). Furthermore, there are 'technical' requirements regarding both the candidates running at the primaries (e.g. they must collect a certain number of recommendation slips to become eligible for running, then they must receive more than 50% of valid votes cast in the first round, then achieve a relative majority in the second round to clinch joint nomination) and the duties of cooperating organisations that carry out the primaries (who, where, how and using what funds will carry out the in-person or online voting procedure, how will donations be used and accounted for during the term of cooperation etc.). Other topics that belong here include the regulation of the revoking of nominations, communication between the parties and the specification of dispute settlement

forums, definition of the platforms and eligible personnel regarding joint external communications etc. Additionally, it is obvious that in terms of scope, cooperation points beyond the settlement of matters associated with the primaries: it (may) also include elements that relate to the entire election cycle and the subsequent parliamentary cycle.

These unique bilateral or multilateral agreements may appear in the form of complex contracts that freely combine the elements of specific contract types. In the most obvious, traditional approach, the nature of contracts can be *dare* (giving); *non facere* (tolerating); *facere* (doing) and *praestare* (fulfilling one's commitment) depending on the actual service rendered by the obliged party. Furthermore, another category may be set up for contracts that cannot be assigned to any of the four categories mentioned above.²⁶ Any agreement to be created in relation to the primaries will almost certainly include all of these elements. Besides the obvious matters that must be regulated, there are some special ones: e.g. the limitation of competition may be stipulated, and also certain elements of 'non-aggression' agreements (!) (as known in Anglo-Saxon law) may be incorporated into the cooperation contracts. Beyond doubt, the Achilles heel of not only the legal framework of cooperation but of cooperation itself is the trust between the parties, and the parties' endurance in supporting each other. Inevitably, the parties must clarify in advance any avoidable conduct in respect of each other... In competition law, agreements that limit cooperation are usually prohibited.²⁷ On the 'market of political parties' and in the context of elections, however, there are forms of cooperation that are explicitly allowed by law, through which the number of contestants and their 'elbow room' may be reduced in order to boost the 'political market acquisition' of cooperating parties. While in competition law, any coordinated conduct (e.g. the exchange of sensitive information) that reduces the risks associated with competition is considered illegal, in politics and public law only those activities are forbidden that are aimed at 'acquiring or exercising power by force, and (...) exclusively possessing it' [Article C of the Fundamental Law of Hungary]. Naturally, any agreement between the cooperating parties would also address the basic requirements that are regulated in any contractual relation (e.g. data management and privacy matters which may have an important role in all phases of a primary election process).

In an agreement of this kind (concluded between political parties in relation to primary elections), special importance is assigned to stipulations that would

²⁶ Gy. Bíró, *Szerződéstípusok — a dare alaptípus az új Ptk-ban*, "Acta Universitatis Szegediensis: Acta Juridica et Politica" 2000, 1, p. 41.

²⁷ A. Tóth, *Versenykorlátozó megállapodások az energetikában*, "Infokommunikáció és Jog" 2008, 6, pp. 242–247.

normally be associated with *merchandising agreements*.²⁸ In this context, 'political merchandising' would principally refer to the secondary use of unique symbols (trade marks), statements, presentations, program elements, slogans etc. that the general public associates with specific political parties and their representatives: obviously, any use of these 'political products' by any cooperating party would only be allowed with the consent of the 'right holder(s)', as these items convey both financial value and political value, and *require legal protection*. The notion of political merchandising comprises all conducts that relate to the intended communication, promotion and ultimately the 'selling' of political products to external audiences, including any adapted versions of said products that are customised to specific target groups. The common objective of partners who cooperate but do not wish to give up or 'sacrifice' their respective political 'product' or 'innovations' is to successfully communicate to voters and to convince them about an election product (selection or 'development' of the right candidate, increase public awareness of said candidate. The ultimate objective is to expand 'political market share' and gain political benefits. In summary: political parties that cooperate (also) during primaries must clarify in a contract in what forms and under what limitations they will be allowed to use each other's 'popular figures', slogans or even activists.²⁹ Obviously, this is only necessary until the potential merger of the parties concerned, i.e. as long as the participating parties explicitly wish to sustain their independence and unique image.

The examples cited above clearly show how difficult it can be to settle in advance (through regulations) every important set of issues, considering the high number of players involved and the broad range of social standards that need to be amalgamated in the underlying web of legal and political relations. Therefore, it is assumed that contrary to most private law contracts, the parties will add several general guiding principles to the agreement discussed herein, aiming to shape the scope and content of cooperation. In other words, a broad reference to the cooperation obligation of participants will not be sufficient. One practical arrangement may

²⁸ The International Association for the Protection of Intellectual Property (AIPPI) provided a general definition of merchandising contracts at a conference in Montreal, Canada in 1995, outlining that '[Merchandising entails the use of] symbols, trademarks, copyrighted works, names or images of characters, real or fictional persons, events, groups and entities of the most varied kind, literary and artistic works, their titles and other distinctive elements, for the promotion or sale of products and services [exploiting the general popularity and appeal of said characters].'

²⁹ Apparently, this does not go smoothly in Hungary either. As of early 2021, the cooperating opposition parties carefully 'safeguard' their own ideas and prefer to use them alone as opposed to sharing and using them with the other participating parties. See e.g.: Z. Kroó, *Ellenzéki cica harc: Ujhelyi nekiment Fegyőrnek, szerinte a Momentum elnöke hazudik és pártja az ötleteit is lenyúlja*, Pestisracok.hu, 2.03.2021, <https://pestisracok.hu/ellenzeki-cicaharc-ujhelyi-nekiment-fegyornek-szerinte-a-momentum-elnoke-hazudik-es-partja-az-otleteit-is-lenyulja/> (access: 2.11.2021).

be as follows: one section of the agreement contains a reference to an underlying separate document titled e.g. Code of Conduct for the Primaries, requiring compliance with the rules outlined therein. As mentioned above, the agreements are also expected to specify dispute resolution procedures, forums and legal consequences in addition to laying out the general ethical principles.³⁰

Therefore, a complex agreement may emerge in the first step, one that can be separated clearly from other contract types.

Second:

Over time, the internal regulations that are more of a private law nature will inevitably be supplemented with rules emerging in the form of laws or regulatory acts pertaining to organisations that are more in the terrain of public law. A new and gradually stabilising phenomenon that may become increasingly decisive in Hungary's public life will inevitably have implications in statutory law: the public sector will interact with the set of phenomena associated with primaries, and this may require the regulation of certain aspects of these relations (e.g. bodies that apply the law may interpret specific electoral laws with an extended scope). Further, the political nature of the matter may increase the possibility and probability of illegal conduct which in turn triggers the need for new regulations and so forth...

Below we present several examples indicating that these issues are already relevant and that their reflection in statutory law is only a matter of time. This reflection is likely to appear in regulations of public law nature, relating to constitution law, public administration law, criminal law, infringement law, labour law (which is strongly becoming a part of public law today) and, in particular, public service law.

- The Criminal Code³¹ imposes penalties on crimes against the order of elections, referendums and European civic initiatives, assigning them under crimes against the order of public administration.³² In respect of these acts,

³⁰ In April 2021, six parties of the Hungarian opposition signed a code of conduct for the primary elections. The document declares that the allied parties are entitled to impose sanctions against those who violate the principles set out in the code.

³¹ Act C of 2012 on the Criminal Code.

³² Point 1 in Article 350 of the Criminal Code. 'Any person who, in the course of elections, referendum, popular initiative or European citizens' initiative held under the Act on Election Procedures:

- a) obtains nomination by violating the rules of nomination, by force or threat of force, deception or by offering financial benefits
- b) obtains signatures for holding a referendum, popular initiative or European citizens' initiative by force or threat of force, deception or by offering financial benefits
- c) votes without entitlement
- d) signs without entitlement, indicates false data

the law recognises several types of conduct (in particular when such conduct is carried out by force or threat) that may also compromise public interest severely in the context of primaries and may even call for the extension of the aforementioned laws to primary elections.

- ❑ Pursuant to subpoint 1) in point 11 of paragraph 1 in Article 459 of the Criminal Code, members of election committees also qualify as public officials. Although providing protection to them in that capacity would be difficult to substantiate, those who organise and carry out primary elections could also be qualified as persons performing public duties. Giving them enhanced protection under criminal law would be reasonable, especially that pursuant to point 12 in paragraph 1 of Article 459, civil guards also qualify as persons performing a public duty. Similarly, the organisers of primaries could be entitled to the same protection as they, too, are volunteers who work for community welfare.
- ❑ With a view to Act 55 of 2018 on the Right of Assembly [hereinafter referred to as 'the Assembly Act'] and to the Interior Minister's Order No. 26/2018 (27 September) on the detailed rules of the preliminary reporting of assemblies that are subject to the Assembly Act and on providing police protection at said assemblies, it is clear that in case a primary election is carried out with the physical presence of voters and organisers, it may be also subject to assembly regulations. Further, police presence at election events (typically, the participation of police commissioners who represent the police) has traditional limitations that are set out in standard sources of law, e.g. Directive No. 39/2013 (4 October) of the Commander in Chief of the Police already included provisions on the execution of police duties in relation to elections, in particular on the special conditions (additional conditions and guarantees) of police actions in voting rooms. It is almost certain that demand will emerge for similar restriction regarding primaries.
- ❑ The issue of incompatibility is another relevant matter. Pursuant to point b) in paragraph 4 of Article 85 in Act 199 of 2011 on Public Servants, government officials 'are not allowed to hold positions in political parties and to

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- e) obstructs any voter from participating in the election, referendum, popular initiative or European citizens' initiative by force, threat of force or deception, or makes any attempt to influence such person by offering financial benefits
 - f) infringes upon the confidentiality of the election or referendum
 - g) falsifies the result of the elections, referendum, popular initiative or European citizens' initiative
 - h) receives financial benefits in the nomination process for being nominated or for his signature in support of a referendum, popular initiative or European citizens' initiative
 - i) demands financial benefits for his vote, and receives financial benefits; therefore he is guilty of a felony punishable by imprisonment not exceeding three years.'

engage in any form of public role on behalf or in the interest of any political party, with the exception of running at parliamentary, European Parliamentary and local government elections in the capacity of a candidate'. Would participation in a primary election be subject to the same restrictions? There is no clear answer yet and lawmakers will soon have to answer similar questions, or bodies that apply the law will have to interpret existing laws in new ways to manage the underlying situations.

As a legal problem, primary elections are predicted to appear first in unique court decisions (perhaps in other court rulings). Its 'career' as a stand-alone legal institution will (may) start with that or after that.

Certain elements of the legal system may be shaped indirectly but substantially by primary elections (even without the actual use of the term itself) as certain practices and conditions that prove to be practical at the primaries may subsequently be incorporated into electoral law. Just one example: in case the age limit for voting at a primary election is set at 16 or 17 and if this practice proves to be successful, it may 'spill over' to all types of elections, potentially making lawmakers inclined to make changes.³³

Third:

The process phases and 'evolutionary trajectory' outlined above conveys the possibility of a shift towards a two-party political system. There are multiple reasons for that:

- 1) While primary elections will improve the stability of the entire opposition and increase the weight of their presence, *they will bring increased uncertainty for the individuals concerned*: if the candidates of a party fail to win the nomination in their respective constituencies, the party concerned may disappear from the political scene faster than before. Further, they will have fewer opportunities to compensate not winning candidates with offices and positions compared to a parliamentary elections campaign that is usually longer and, in many ways, less risky. *The demand for predictability coming from masses of individuals* may also push participants towards closer cooperation.
- 2) The need for continual harmonisation between the participating parties will lead to the creation of a 'central bureaucracy' that will be functioning

³³ The six-party agreement on the primary elections declares that those 17 old persons who will turn 18 by the time of the 2022 parliamentary elections will also be eligible to participate in the primaries.

on a regular basis and will involve (and perhaps actively shaped by) civic participants. In the beginning, this bureaucracy will only have executive and organising functions and may be operational from time to time only. Over time, however, it will inevitably have a word in important decisions and may evolve into a separate entity, a kind of a standing 'operational committee' of the opposition. As the members of this body will work together on a wide range of important 'technical matters', high-quality professional and personal connections will evolve in and around the team.

- 3) In addition to self-confidence, a great presence and the ability to argue logically, the integrity of individual candidates will become an increasingly important factor. The support from multiple parties enjoyed by the candidate that wins the nomination will enlarge any potential personal, family-related or political problems of the candidate along with his or her past actions: In fact, each of the parties and civic organisations supporting the nominee will become liable for these issues (even if this liability is merely political and has no legal consequences). In other words, the entities participating in a primary election actually issue a 'blank cheque' when they commit to support the candidates of other entities. This also entails the assumption of political risks potentially arising from the statements made by the candidate in the election period. *This is a cardinally important circumstance that may both raise the bar for candidates and standardise the requirements they must meet:* selection will become more thorough and potential candidates will be scrutinised for more and more criteria (in addition to the fact that the nominating party must be able to assume with some certainty of its candidate that he or she will be at least moderately acceptable for the supporters of other parties of the political side concerned, regardless of their actual participation in the primaries). Therefore, the primaries will incorporate *objective* moral standards (that require integrity on the part of candidates) and *additional considerations* embodied in *subjective* probabilities (that will correlate with acceptability for the voters of other competing candidates in the primaries). First, these standards and considerations may directly affect the quality of political culture. Second, they may *diminish the perceived image differences between political entities participating in the primary*, leading to the development of certain minimum values ('greatest common divisors'), i.e. programme elements that fit the political program of each participating entity. The latter set of developments (assuming that it will accelerate the erosion of differences between the cooperating parties) may also help the formation of a two-party system (or at least that of a new, dominant umbrella party or people's party).

Instead of a Summary: Uncertainties and Potential Pitfalls

Even a sketch-level review of the potential evolution of primaries in Hungary requires mentioning of specific uncertain elements that *may occasionally even* endanger the mere existence of the institution.

While the institutionalisation of the phenomenon and its increasing embeddedness into political practice may undeniably accelerate the polarisation of Hungarian politics, this institutionalisation, beyond a certain point, may also render political value to staying away from the primaries. Theoretically, it may also amplify a potential 'third way' endeavour (which is not yet visible in 2021), even if the current electoral rules leave little room for such endeavours to emerge. There is an inherent contradiction in the institutional evolution of primary elections: the more refined and adopted the institution becomes, the more valuable it *may become* politically to stay out of it. So, this is really far from being a one-way process. What is at stake in this game is the stabilisation of the subject matter of this study – yet this game is far from being over despite the developments that seem to take shape in relation to the 2022 parliamentary elections... When reviewing potential scenarios, let us not forget about this one: one or more of the political parties that agreed to cooperate in preparation for the 2022 elections may back out from the process along the way. A move like that would not only question the use (political benefit) of the primary itself, but it would also drag all participants of the cooperation into a credibility vacuum. What is more, even without the departure of certain participants, the primary election may 'lose steam' if the participating parties agree on the joint candidate in a significant number of single-member constituencies beforehand. Signs of this are already perceivable in the summer of 2021.

Another question is whether the current government parties would also adopt the primary elections approach, even partially (!). A move like that would not only increase media attention to their own candidates, but it would *partly* deprive the opposition parties (and every voter) of the 'magic' of the institution, all the excitement, thrill and intense attention that the first mention of the primary and its subsequent institutionalisation generated. Naturally, this context extends beyond primaries in the narrow sense (for which there is no realistic chance currently). It would entail e.g. the publication of more information by governing parties on their internal selection processes and their potential candidates, striving more than before to showcase their capabilities as debaters.

Another open question relates to the *potential impact of political scandals*, 'dark spots' in the past of candidates when those scandals get 'transmitted' and 'spread across' the entire opposition side (or at least across the dominant players thereof) and how it will

affect the popularity and credibility of certain political formations. *Formerly such scandals had a limited impact and only affected adversely the nominating party.* We will only get to know the answer to this question after the first serious scandals will gain traction in the media after a likely 'promotional boost' from the government parties...

In this context, it is also important to point out that *without the improvement of the overall quality of political culture, the only thing we will see is the rearrangement and duplication of conflicts:* without the wider adoption of mindsets and behaviours that consistently favour self-restraint, gallantry and keeping one's promises, the primary election may also become a series of own goals for the opposition side. Thus, primaries also convey significant risks for the parties that organise it as it may discredit an entire political side unless participants can demonstrate a much higher level of self-restraint and courtesy towards each other than what was experienced in Hungary in recent decades. The *opportunity to learn* is an aspect that must be underscored, along with the inevitability of 'mastering one's craft on the job' and the nature of the process that will certainly affect Hungary's political culture in one way or another.

The number of mandates that are up for grabs at each election may also have a significant impact on actual cooperation. E.g. if running together with alliance partners at a European Parliamentary election or local government election, a 'politically lightweight' participant *is more likely* to fail to clinch a mandate (parliamentary membership), he or she can only help the stronger ally to get a mandate. At a parliamentary election, however, the enhanced elbow room provided by the common list will make mandate clinching well predictable in any cooperation scheme, only the actual number of secured mandates might be questionable (i.e. cooperation *may* convey a lower risk in the latter case). Naturally, this conflict of interests may be resolved with compensation schemes which are not necessarily translated into representative seats (financial offsetting, access to advertising platforms etc.).

For certain parties, it may be a springboard if many of their candidates get involved in the primary election process, actively shaping and participating in the related *political road show*. For other parties, participation may be lethal politically, as primaries reveal more swiftly than any other solution if an entity or person has 'no real weight' (!). We can be sure that if primary elections indeed take place more or less successfully in 2021/22, they will *inevitably* have a significant impact on Hungary's political party structure.

The fact that there are hardly any restrictions in place for preventing the misuse of the primary process by voters and candidates alike represents another uncertainty factor. Actually, it can be regarded as a veritable weakness of open primaries. The appearance of rival party voters (i.e. supporters of opposition parties that are not part of the current cooperation scheme) and government party voters in the process, obviously with the ultimate aim of influencing the outcome of 'regular'

parliamentary elections, along with the running of ‘troll-type’ candidates are all real threats. An example for the latter was already seen in Hungary in 2019.³⁴ Naturally, there are methods for limiting these abuses at least partially, and these methods were applied successfully in other countries. For instance, voting at a primary could be linked to a symbolic donation or (as it seems to be the case in Hungary) organisers may require voters and contestants alike to sign a declaration of political values. Another limiting factor could be if those who run for nomination are required to name ahead of time the parliamentary faction that they would join in case they get elected (what is more, candidates need to present a statement of admittance from the would-be faction concerned).

Aqua regia (royal water), the mixture of nitric and hydrochloric acids used to be celebrated for its ability to dissolve gold. Primary elections may become the ‘aqua regia’ of Hungarian politics in the sense that they may dissolve seemingly unmovable (‘hard as gold’), longstanding political parties and political formations within in their political side in a flash... Using a hopefully not too far-fetched analogy, the ‘royal water’ of primaries may bring a watershed moment in Hungarian politics – perhaps in 2021 or 2022 already.

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³⁴ Zsolt Bede, an activist who supports the government parties participated in the 2019 primary election for mayor of Budapest nomination with the declared intention of ridiculing the opposition candidates and the primary itself. Rendkívüli: A Vadhajtások támogatásával Bede Zsolt is indul a főpolgármesterei jelölésért, Vadhajtások.hu, 6.08.2019, <http://www.vadhajtások.hu> (access: 1.02.2021).

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