Decision 13/2018 (IX. 4.) OF THE CONSTITUTIONAL COURT

On declaring that Section 1 and Section 4 of the Act on amending, with respect to water abstractions, the Act LVII of 1995 on Water Management.

In the prior review of compliance with the Fundamental Law of an Act of Parliament adopted but not yet promulgated, the plenary session of the Constitutional Court – with concurring reasonings by Justices *dr. Ágnes Czine*, *dr. Balázs Schanda* and *dr. István Stumpf* as well as with dissenting opinions by Justices *dr. Egon Dienes-Oehm*, *dr. Imre Juhász*, *dr. Béla Pokol*, *dr. Mária Szívós* and *dr. András Varga Zs.* – adopted the following

decision:

The Constitutional Court holds that Section 1 and Section 4 of the Act adopted on the extraordinary sitting of 20 July 2018 of the National Assembly on amending, with respect to water abstractions, the Act LVII of 1995 on Water Management is contrary to the Fundamental Law because of violating Article P) (1) and Article XXI (1) of the Fundamental Law.

The Constitutional Court orders the publication of its decision in the Hungarian Official Gazette.

Reasoning

I.

[1] 1. The President of the Republic asked – on the basis of Article 6 (4) of the Fundamental Law – the Constitutional Court to establish that Section 1 and Section 4 of the Act adopted on the extraordinary sitting of 20 July 2018 of the National Assembly on amending, with respect to water abstractions, the Act LVII of 1995 on Water Management (hereinafter: "Act") was contrary to the Fundamental Law because of violating Article B) (1), Article P) (1) and Article XXI (1) of the Fundamental Law.

[2] 1.1. As underlined by the President of the Republic in his petition, according to the reasoning attached to the Bill, it proposed "the elaboration of a regulation that does not require any permission or reporting procedure to be carried out, provided that

the depth of the well is not more than 80 meters. Accordingly, a water project development shallower than 80 meters to secure water abstraction not exceeding household water demand may be established without permission and reporting. Nevertheless, it shall be necessary to maintain the obligation of obtaining a permit in the case of *a)* interventions into cold and thermal karst stocks of water (water bodies) irrespectively to the depth of the intervention and the quantity of water, and *b)* water abstractions for economic purpose, irrespectively of the depth and the water quantity. The relevant detailed regulations shall be specified in the government decree on exercising the competence of the authority for water management." The presenter of the draft legislation has not attached any impact report to the amendment and he has not provided further professional reasoning. For the purpose of the legislative objective quoted above, the Act amends Section 28/A of the Act LVII of 1995 on Water Management (hereinafter: AWM) in a way allowing to "carry out on the basis of the law [even] without a permit" the water right activities that formerly required reporting or permission, including the performance of water-works, the establishment, transformation, putting into service, operation and termination of water projects and water usage. By virtue of the amendment incorporated in Section 4 of the Act, the Government shall be authorised to specify the scope of the activities that may be commenced and/or completed without water right permit and without reporting as well as other rules of procedure.

[3] 1.2. The President of the Republic also mentioned that the deputy commissioner for the rights of the future generations argued against adopting the Act in his general comment dated 24 May 2017. The ombudsman for future generations raised concerns about the State giving up the protection of the quality and the quantity of our common heritage, natural resource enshrined in Article P) of the Fundamental Law, by unleashing uncontrollable water abstractions that pose a threat of pollution. This is all done in an uncontrollable way, without exact definitions, only for the purpose identified in the reasoning attached to the draft legislation. According to the petition of the President of the Republic, the ombudsman for the future generations also raised objections against stepping back from the level of protection achieved in the field of nature conservation, which – in his opinion – becomes measurable in meters as well. The President of the Republic also referred to the joint declaration for the protection of sub-surface waters signed on 31 January 2018 by the representatives of eleven professional organisations to protest against ending responsible management of the stocks of water and the elimination of the protection of subsurface waters, also raising concerns about the risks resulting from unprofessional well-constructions and from illegal water abstractions.

[4] 1.3. The President of the Republic holds that the Section 1 of Act, which is not professionally founded and not verified by impact reports, allowing the establishment

of a water project – even as deep as 80 m – without permission and the use of waters without quality restrictions and without control, does not comply with the State's obligation resulting from Article P) (1) of the Fundamental Law, in particular with regard to the prohibition of step-back from the level of protection achieved and the requirements resulting from the precautionary principle. According to the petition, today in Hungary the depth limit of groundwater reserves is 50 m and groundwater wells of water abstraction for agricultural purposes may be established in a controlled way, provided that their total depth is not more than 50 m. 94% of the supply of drinking water comes from sub-surface waters, from the so called main drinking water aquifers. More than half of sub-surface water reserves are vulnerable, as they can be found in a natural-geological environment where pollution got under the surface may reach down to the water body that provides the water supply. The registration of these water reserves as well as the safeguarding and the special protection of their security is a particularly important obligation of the State. The legislator failed to provide, in the Act and in the reasoning, of a reason for derogating from the regulations in force, it failed to provide for guarantees to protect the drinking water reserves, to verify the forcing need to allow well-boring without permission and to provide for the maintenance of the state of the environment. Compared to the present situation of protecting drinking water reserves, it is clearly a step-back – and indeed an intolerable one – to let carry out water rights activities without permission (and reporting), as allowed by Section 1 of the Act. Interventions into the water layers without permission and registration, or even in an unprofessional way, bear a risk of contamination and thus the risk of decreasing the volume of drinking water reserves. Water abstractions without quantity control pose the same risk. All this together qualify as a clear step-back concerning the present state and protection of drinking water reserves, resulting in the violation of Article P) (1) and of the right to a healthy environment enshrined in Article XXI of the Fundamental Law. The President of the Republic also regarded as the violation of Article P) (1) and Article XXI (1) that Section 4 of the Act authorised a Government decree to be adopted in the future to regulate the scope of activities allowed to be commenced and carried out without permission and reporting as well as the elements of content of the reporting and the supervision by the authorities, but it failed to provide for its guarantees.

[5] 1.4. The President of the Republic also held that, in addition to the above, Section 4 of the Act was also contrary to the principle of legal certainty as a part of the State under the rule of law declared in Article B) (1) of the Fundamental Law. Section 5 (1) of the Act CXXX of 2010 on the Legislation (hereinafter: AL) refers to the requirement of a State under the rule of law when it provides that in an authorisation for the adoption of a law, the beneficiary as well as the subject and the limitations of the the authorisation shall be determined. In Section 4 of the Act, the legislator complied

with this requirement only to a limited extent, as it only specified the beneficiary and the subject of the authorisation without providing for the limitations and the guarantees. According to the petitioner, the legislator violated the requirement of the State under the rule of law enshrined in Article B) (1) of the Fundamental Law and of legal certainty deductible from it, by not complying with the provisions on fitting the law into the legal system, on preliminary impact assessment and on the obligation of having opinions obtained about the draft legislation as regulated in Chapter 4 of the AL, and by essentially providing the Government with a blank authorisation to regulate the issue.

[6] 2. Before deciding the case, on the basis of Section 36 (3) of the Rules of Procedure, the Constitutional Court requested the minister for the interior, the minister of justice, the deputy commissioner for fundamental rights in charge of protecting the interests of future generations (hereinafter: "deputy commissioner for the protection of the interests of future generations" or "deputy commissioner") as well as the president of the Hungarian Academy of Sciences (hereinafter: MTA).

II

[7] 1. The provisions of the Fundamental Law affected by the petition:

"Article B) (1) Hungary shall be an independent and democratic State governed by the rule of law."

"Article P) (1) Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

"Article XXI (1) Hungary shall recognise and endorse the right of everyone to a healthy environment."

[8] 2. The provisions of the Act affected by the petition are as follows:

"Section 1 Section 28/A (1) of the Act LVII of 1995 on Water Management (hereinafter: AWM) shall be replaced by the following provision:

»(1) With the exception of the activities that can be carried out without permission on the basis of the law and of the activities subject to reporting, water rights permission shall be required for

a) performing water works, constructing or transforming a water project (water rights implementation permit),

b) putting into service and for the operation of water projects, for water usage (water rights operation permit), and

c) termination of a water project (termination permit).«"

"Section 4 Section 45 (7) *s)* of AWM shall be replaced by the following provision:

(The Government shall be authorised to specify in a decree)

»*s)* the scope of activities that may be commenced and carried out without water rights permit and reporting, the elements of content of posterior reporting in these cases, and the rules of posterior control by the authority, as well as the scope of activities that can be commenced and carried out after reporting it to the water management authority and the elements of content of posterior reporting in these cases, and the rules of posterior control by the authority;«

III

[9] 1. First of all, the Constitutional Court established that the petition for posterior norm control received from an authorised person complies with the requirement of explicitness under Section 52 (1b) of the ACC. The application contains the provision of the Fundamental Law that establishes the competence of the Constitutional Court to decide upon the petition [Article 24 (2) *a)*] and the provision that provides the ground for the petitioning right of the President of the Republic [Article 6 (4) of the Fundamental Law]; the reasons for commencing the procedure; the statutory provision to be examined by the Constitutional Court (Section 1 and 4 of the Act); the violated provisions of the Fundamental Law [Article B) (1), Article P) (1), Aricle XXI (1)]; reasoning on why the challenged provision of the law is contrary to the relevant provisions of the Fundamental Law, and an explicit request addressed to the Constitutional Court to declare that the relevant sections of the Act are contrary to the Fundamental Law.

[10] 2. The Constitutional Court first examined the petition of the President of the Republic with regard to its elements claiming the violation of Article P) (1) and Article XXI (1) of the Fundamental Law. For this, the Constitutional Court first of all provided an overview and a summary of its relevant case law related to Article XXI (1) and Article P) (1).

[11] 2.1. According to Article XXI (1) of the Fundamental Law, "Hungary shall recognise and endorse the right of everyone to a healthy environment." The right to a healthy environment is necessarily also linked to the right to physical and mental health not referred to in the petition of the President of the Republic, as "Hungary shall promote the effective application" of this right "through agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision and by supporting sports and regular physical exercise as well as by ensuring the protection of the environment."

[12] 2.2. However, the Fundamental Law also developed further the environmental value structure and attitude of the Constitution and of the Constitutional Court {Decision 16/2015. (VI. 5.) AB, Reasoning [91]}. According to the National Avowal of the Fundamental Law, "we commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources." In this context, the National Avowal also lays down that the Fundamental Law "shall be an alliance among Hungarians of the past, present and future". Thus, it has already been pointed out in the National Avowal that the decisions made by the governments of the present influence the future generations, too, therefore, the present decisions of governance and legislation should take into account the interests of the future generations as well. It means that the provision of the National Avowal, as quoted above, lays down a framework of interpretation for the whole of the Fundamental Law, requiring, in general, the taking into account of the interests of future generations at the same time and with the same weight as the consideration of the needs of the present.

[13] According to Article P) (1) of the Fundamental Law, "natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations." The Fundamental Law, in terms of both the provisions of the National Avowal and Article P) (1), goes beyond the provision of the Constitution formerly in force, and it is clearly supported by the reasoning attached to the proposed normative text of the Fundamental Law: this provision "declares that Hungary shall protect and maintain a healthy environment. This way the Fundamental Law presents, as a new element, the requirement of sustainability setting a direction for the State and the economy for the responsible management of environmental values. It pays a particular attention to Hungarian environmental values and Hungarian cultural values, the safeguarding of which shall be an obligation of everyone for the purpose of preserving them for future

generations." It means that Article P) (1) of the Fundamental Law clearly identifies the conducts expected "from the State and from everyone" regarding the natural and cultural values that form part of the nation's common heritage {as for the latter: Decision 3104/2017. (V. 8.) AB, Reasoning [37]–[39]}: 1 protecting, 2 maintaining and 3 preserving for the future generations. In the context of preserving natural resources for future generations, the present generation is bound to preserve the possibility of choice, to preserve the possibility of quality and to preserve the possibility of access. The securing of the possibility of choice is based on the consideration that the life conditions of future generations can be secured the best, if the natural heritage they inherit is capable of providing them with the freedom of choice regarding their problems, rather than putting future generations to a track with no alternatives due to the decisions made in the present. According to the requirement of preserving quality, endeavours should be made to hand over the natural environment to the future generations at least in the same state as the one we received it from past generations. The requirement of access to natural resources means that present generations may freely access the resources available as long as they pay respect to the equitable interests of future generations {Decision 28/2017. (X. 25.) AB, Reasoning [33]}. These principles shall help the assessment of the interests of present and future generations on the basis of the same criteria, as well as the creation of a balance regarding the triple obligation laid down in Article P). The responsibility resulting from the Fundamental Law towards future generations requires the legislator to assess and weigh the expected effects of its measures on the basis of scientific knowledge and in accordance with the precautionary and preventive principles.

[14] Article P) (1) extended, on the one hand, the scope of the values to be protected, and on the other hand it mentions not only the obligation of the State, but of "everyone", including the civil society and each and every citizen. {Decision 16/2015. (VI. 5.) AB, Reasoning [92]}. However, while it is not expectable, in a general way and in an enforceable manner, from the natural and legal persons to align their conduct, in addition to the knowledge and the compliance with the provision of the law in force, with an abstract aim not regulated by the legislator in concrete terms, the State shall also be expected to clearly define all those legal obligations that both the State and the private parties must obey in the interest of, among others, the enforcement of the effective protection of the values specified in Article P) (1) of the Fundamental Law {Decision 28/2017. (X. 25.) AB, Reasoning [30]}, and in the interest of providing for, and enforcing as appropriate, compliance with these rules. In the context of the obligation of legislation related to the protection of the environment, the Constitutional Court pointed out that all those duties performed by the State elsewhere with the protection of subjective rights shall be implemented in this case by providing for statutory and organisational guarantees {most recently: Decision 3292/2017. (XI. 20.) AB, Reasoning [13]}. In this regard the Constitutional Court

pointed out that "a substantive standard of absolute character related to the state of the natural resources and thus to the conditions of the environment follows from Article P) of the Fundamental Law and it raises objective requirements concerning the State's activity at all times", and the legislator can only comply with this requirement "if, in the course of making decisions, it provides a long-term assessment arching over government cycles" {Decision 28/2017. (X. 25.) AB, Reasoning [32], [34]}. The fact that the Fundamental Law explicitly mentions in Article P) (1) the obligation of preserving for the future generations the common heritage of the nation, raises a general expectation regarding the legislation that in the course of adopting the laws, not only the individual and common needs of the present generations should be weighed, but also securing the living conditions for future generations should be taken into account, and the assessment of the expected effects of individual decisions should be based on the current state of science, in accordance with the precautionary and preventive principles. Accordingly, Article P) (1) can be seen as both the guarantee of the fundamental human right enshrined in Article XXI (1), and a *sui generis* obligation providing for the protection of the nation's common heritage, to be generally enforced beyond the scope of Article XXI (1).

[15] However, the protection of the interests of future generations is deductible not only from Article P) and the quoted provisions of the National Avowal: as laid down in Article 38 (1) of the Fundamental Law, "the property of the State and of local governments shall be national assets. The management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations." The Constitutional Court points out, in the context of the petition made by the President of the Republic, that according to Section 4 (1) d) of the Act CXCVI of 2011 on National Assets (hereinafter: ANA), subsurface waters shall be in the State's exclusive ownership. One of the aims of responsible management of the assets within the scope of the nation's common heritage, as specified in the Fundamental Law, namely defining the needs of future generations, is not a political question: it could and should be defined at all times on scientific basis, taking also into account the precautionary and preventive principles.

[16] 2.3. The Constitutional Court then provided an overview of the constitutional significance of the non-derogation principle.

[17] As stated by the Constitutional Court in the Decision 28/1994. (V. 20.) AB in the context of the right to the environment, "the right to environmental protection [...] is primarily an independent and self-contained protection of institutions – that is, a distinct fundamental right exceedingly dominated and determined by its objective aspect of institutional protection. The right to environmental protection raises the guarantees for the implementation of the state duties in the area of environmental protection to the level of a fundamental right, including the conditions under which

the degree of protection already achieved may be restricted. Due to the distinctive features of this right, what the State ensures by the protection of individual rights elsewhere it must ensure in this case by providing legal and organizational guarantees” (ABH 1994, 134, 138.). In this context, the Constitutional Court also underlined that "it follows from both the subject and the dogmatic peculiarities of the right to environmental protection that the State must not reduce the degree of protection of nature as guaranteed under law unless necessary to realise other constitutional rights or values. Even in the latter case, the degree of protection must not be reduced disproportionately to the desired objective” (ABH 1994, 134, 140.). The Court also stated that “prevention has precedence over all other means to guarantee the right to a healthy environment, for subsequent penalties for irreparable damages cannot ensure restoration of the original condition. [...] The enforcement of the right to a healthy environment by upholding the degree of protection also compels the State not to regress from preventive rules of protection to protection ensured by sanctions. Also any action by the State contrary to this requirement must be compelled by unavoidable necessity and it should be proportionate with this necessity” (ABH, 1994, 134, 140–141.). Thus the Decision 28/1994. (V. 20.) AB clearly deducted the principle of non-derogation from Article 18 of the Fundamental Law, and it also assessed the shift of the regulation from the principle of prevention to the principle of polluter pays (sanction) as a violation of non-derogation.

[18] As stated by the Constitutional Court in the Decision 3068/2013. (III. 14.) AB, “as with regard to the right to a healthy environment, the text of the Fundamental Law is the same as the text of the Constitution, the statements made in the earlier decisions of the Constitutional Court shall be considered to be of guiding nature in the interpretation of the right to a healthy environment” (Reasoning [46]). Based on the above, by taking into account the Decision 13/2013. (VI. 17.) AB (Reasoning [32]), the Constitutional Court may use the arguments, legal principles and constitutional relations elaborated in its earlier decisions {with respect to the right to a healthy environment, see: Decision 16/2015. (VI. 5.) AB, Reasoning [90]}. The Decision 3114/2016 (VI. 10.) AB summarised, also with account to the case law of the Constitutional Court before the entry into force of the Fundamental Law, the content of the right to a healthy environment as regulated in the Fundamental Law that “the State must ensure the right to a healthy environment in the scope of its objective obligation of protecting institutions, and a step-back from the level of environmental protection already achieved should be justified by the State with the enforcement of another fundamental right, with respect to necessity and proportionality” (Reasoning [45]).

[19] After the entry into force of the Fundamental Law, the Constitutional Court has referred to the importance of the principle of non-derogation in many of its

decisions, and it also held that this principle was applicable beyond the protection of the natural environment among others to the noise- and vibration load thresholds {Decision 3114/2016. (VI. 10.) AB, in particular Reasoning [45]}, the regulations related to the protection of the built environment {Decision 3068/2013. (III. 14.) AB, Reasoning [53]}, and, in a wider dimension, to the regulations of substantive and procedural law as well as to the organisational rules that apply to the protection of the environment and nature, regarding that only these together can guarantee the full enforcement of the principle as it follows from the Fundamental Law {Decision 3223/2017. (IX. 25.) AB, Reasoning [28]}. In addition to the above, the Decision 3223/2017 (IX. 25.) AB reinforced that the law-applying authorities proceeding with individual cases should also take into account the enforcement of the non-derogation principle in the course of applying the law. However, while the legislator may continuously form, by adopting new regulations, the rules applicable to the protection of the environment and the nature, the law-applying authorities should always enforce this principle within the limits of the existing laws (Reasoning [29]). The Decision 28/2017 (X. 25.) AB also reinforced that the principle of non-derogation as the State's additional obligation related to the environmental regulation was directly deductible from Article P) (Reasoning [28]).

[20] It means that in accordance with the case law of the Constitutional Court, the principle of non-derogation is now considered to originate directly from the Fundamental Law and it is connected equally to Article P) (1) and Article XXI (1) of the Fundamental Law. The Constitutional Court also points out in the context of non-derogation that in every case when the regulations on protecting the environment are modified, the precautionary principle and the principle of prevention should be taken into account by the legislator, "as the failure to protect the nature and the environment may induce irreversible processes" {most recently: Decision 3223/2017. (IX. 25.) AB, Reasoning [27]}. In accordance with the precautionary principle generally accepted in environmental law, the State must guarantee that the conditions of the environment are not derogated due to a particular measure {Decision 27/2017. (X. 25.) AB, Reasoning [49]}. Therefore, on the basis of the precautionary principle, when a regulation or measure may affect the state of the environment, the legislator should verify that the regulation is not a step-back and this way it does not cause any irreversible damage as the case may be, and it does not even provide any ground in principle for causing such damage. In the case of regulating cases not regulated before, the precautionary principle is enforced not only in the context of non-derogation, but also individually: with regard to those measures that do not formally implement a step-back, but they influence the condition of the environment, also the precautionary principle shall pose a restriction on the measure, and in this respect the legislator shall be constitutionally bound to weigh and to take into account in the decision-making the risks that may occur with a great probability of for sure. On the

other hand, the preventive principle means an obligation to act at the source of the potential pollution but even before the pollution takes place: it should guarantee the prevention of the occurrence of processes that may damage the environment.

[21] Finally, the Constitutional Court also points out that when the absence of step-back cannot be verified beyond doubt with respect to a regulation, the constitutionality of the step-back should be examined in accordance with Article I (3) of the Fundamental Law, and the State should justify stepping back from the level of environmental protection already achieved, also with account to the precautionary principle, by comparing it to the enforcement of another fundamental right, with respect to necessity and proportionality {Decision 3114/2016. (VI. 10.) AB, Reasoning [45]}.

[22] 3. The Constitutional Court – with account to partly the content of the petition made by the President of the Republic and partly the reasoning of the draft legislation No. T/384 – provided an overview of the regulations presently in force about water abstractions from subsurface waters as well as its historical precedents.

[23] As early as in the Section 14 of the Act No. XXIII of 1885, the establishment of new wells was restricted the following way: "a new well shall only be established in municipality territories and in inhabited areas outside municipalities at a distance of at least 3 meters from any existing wells, lakes, springs, water channels or houses, and at a distance of at least 15 meters from such constructions existing outside municipalities. In the case of a failure to comply with these distances, the new well shall be filled in upon the interested party's request. The regulation paid attention to the protection of both the quality and the quantity of subsurface waters by taking into attention the location of existing wells and water sources, and it also restricted the volume of water abstraction by requiring that only wells serving the "needs of ordinary life" (i.e. not for business purpose) shall be established.

[24] This Act was annulled as of 1 July 195 by the Act IV of 1964 on Water Management, and Section 27 (1) of it introduced the general rule – which was a significant development compared to the regulation of 1885 –, applicable up to this day, on requiring a water right permit for the establishment of wells. According to Section 62 of the Government Decree No. 32/1964. (XII. 13.) Korm., only those wells enjoyed an exemption, which were dug to a depth not exceeding the closing layer under the first aquifer, provided that they were placed at a minimum distance from constructions that pollute the environment as specified in the building regulations. Consequently, the regulation only allowed the digging of wells without a water rights implementation permit where not only the abstracted volume was limited, but it was also beyond doubt that the well did not injure the water closing layer, and there were also other guarantees applicable to the location of the well for the purpose of preventing any pollution. However, the establishing of bored wells has been an activity subject to permission since the 8th of August 1960, on the basis of Section 4 (1) of the OVF Director-General's Order No. 34/1960. (V. E. 17).

[25] The Government Decree No. 18/1992. (I. 28.) Korm. amended, as from 15 February 1992, the Government Decree No. 32/1964. (XII. 13.) Korm. by requiring the notary's permission for any well, even if they "only provide using of the groundwater". According to the new Section 62/A of the Government Decree, in force also as from 15 February 1992, in the procedures carried out by the notary, the competent environmental, nature conservation, public health and water management authorities shall contribute as specialised authorities. This has meant at the same time that as from 15 February 1992, the obligation to obtain permission for establishing wells has actually become complete: up to the present day, establishing any kind of well, either dug or bored, requires permission irrespectively to its depth, location as well as to the purpose of water usage and the expected volume.

[26] The AWM that entered into force on 1 January 1996 provided a comprehensive regulation of certain questions related to using, maintaining the possibilities of usage and the elimination of the damages done to surface and subsurface waters, and in Section 28 (1) it maintained the complete obligation of obtaining permission. In harmony with the earlier regulation, Section 24 (1) of the Government Decree No. 72/1996. (V. 22.) Korm. on exercising the competence of the authority for water management required the permit issued by the municipality local government's notary for the establishment of any well that served the purpose of meeting the water demand of a household, "functioning entirely by using the groundwater". According to Section 25 (3) of the Government Decree, in the procedures carried out by the notary, the water management authority and the environmental authority shall act as specialised authorities.

[27] As from 1 March 2010, the Act XIII of 2010 amended Section 28 (1) of the AWM, creating the category of "activities subject to reporting under the law" with the provision that – according to the reasoning of the Act – "on the basis of the amendment, the activity may be commenced after the lapse of a specific period of time upon reporting to the supervising authority. During this period, or at the time of commencing the activity, the supervising authority shall check compliance with the conditions under the law applicable to using the environment. If the user of the environment fails to meet these requirements, the supervising authority shall prohibit commencing the activity or continuing the activity commenced prematurely, and it may order the suspension of the activity. […] As in the case of these activities the environmental authority should – in the absence of a permission – supervise on a continuous basis the compliance with the statutory conditions, a yearly supervision fee was also specified in the amendment with respect to the activities subject to reporting." Nevertheless, the introduction of the institution of reporting obligation has not affected the status of the wells, as the requirement of obtaining a permit remained in force in unchanged form: the establishment of any well in Hungary is subject to obtaining a permit, irrespectively to the method of establishing the well, its

location, its planned depth, as well as the volume and the purpose of water abstraction. The above follows explicitly also from Section 29 (1) and (3) of the AWM, according to which a water right permit shall only be issued, if the water usage does not pose a risk on the interests related to protecting the stocks of water, and a new water right permit may only be issued if the water quantity specified in the permit can be granted for the licensees.

[28] Section 28 (1) of the AWM was subsequently amended by the Act CXX of 2015 on 16 July 2015 by indicating, as an independent category, the termination permit necessary for the termination of a water project. As from 1 January 2018, the Act L of 2017 formally re-regulated Chapter VIII of the AWM on water management authority competences, but the re-regulation has not affected the provision reviewed by the Constitutional Court, the former Section 28 (1) can be found with unchanged content in Section 28/A (1).

[29] In this context, Section 1 of the Act amended Section 28/A (1) of the AWM by introducing the category of the activities that can be carried out without permission on the basis of the law. Taking into account the reasoning of the Act provided by the presenter of the draft as well as the grammatical interpretation of Section 1 of the Act, which is completely in harmony with the presenter's reasoning, the Constitutional Court holds that the petition submitted by the President of the Republic indicated the legislator's real intention and the only possible interpretation of the law, when he alleged that the water right activities that had formerly been subject to reporting or permission have become ones that "can be carried out without permission on the basis of the law".

[30] In the course of providing an overview of the regulation, the Constitutional Court finally notes that the Decree 101/2007. (XII. 23.) KvVM regulates in details the professional requirements of interventions into the subsurface stocks of water and of well boring, and according to the Decree No. 41/2017. (XII. 29.) BM on the content of the documentation necessary for water right licensing procedure, the documentation necessary for the water right licensing procedure of establishing certain wells shall contain, among others, the technical specifications of the planned well, the way of disposing the waste water resulting from the operation, and – in the case of a bored well – the qualification of the contractor constructing the well. [Decree 41/2017. (XII. 29.) BM, Annex 2].

[31] Based on all the above, the Constitutional Court notes that in Hungary, since 1960, the establishment of bored wells has continuously been an activity subject to permission, and the regulations in force specify (among others), even in the cases that fall into the competence of the local government's notary, the qualification of the contractor constructing the well and the technical specifications of the well to be established. Requiring a permit for establishing a well guarantees the protection of the quantity of subsurface waters, as the authority is capable not only of continuously

monitoring the level of water usage that may be allowed without endangering the quantity of subsurface waters, but in justified cases it can also impose restrictions on the level of water usage concerning the wells that are granted a permit. The technical and professional requirements specified as the condition for issuing the permit serve the purpose of protecting the quality of subsurface waters by allowing only professionals to have appropriate professional qualification to establish wells by using appropriate materials and technologies.

[32] The Constitutional Court also points out that in accordance with Section 29 (4) of the AWM presently in force, water management fine may be imposed in the maximum amount of 80% of the construction's value, but not exceeding 300 thousand Forints in the case of natural persons. At the same time, according to Section 29 (7) of the AWM, the persons who established a well shall be exempted from the payment of the fine, if they established prior to 1 January 2018 a water project for water abstraction without permit or differently from the permit, provided that they apply for a maintenance permit, if the conditions for providing the permit are fulfilled. It means that the provisions of the Act presently in force provide an opportunity, even today, for the legalisation of the existing situation with regard to the wells established earlier without permission, and in the case of submitting, until 31 December 2018, an application for a maintenance permit, the applicant shall not even bear the risk of becoming subject to a water management fine. Consequently, the petition made by the President of the Republic does not substantially influence the living conditions and the activities of those who presently use subsurface waters with or without permission: the water projects possessing a permit may keep on operating in unchanged form, while in the case of wells established without permission, by neglecting the provisions of the laws that have been continuously in force – even under the laws currently applicable – the maintenance permit may be obtained until 31 December 2018 without the risk of being fined. Section 2 of the Act, not challenged by the President of the Republic, amends this deadline by 10 years to 31 December 2028.

[33] 4. The Constitutional Court then provided an overview of the importance and the present conditions of subsurface waters, with regard to the fact that from among the elements that form the nation's common heritage according to Article P) (1), this is the one directly affected by the Act, and therefore the prohibition of step-back should be examined concerning this element, together with the violation of Article P) (1) and Article XXI (1).

[34] 4.1. The existence and the state of waters, in particular of freshwaters is one of the most important factors of our life. (Drinking) water is an element of our existence that cannot be substituted by any other artificial substance, its renewability depends on the weather and the receiving geological medium, in particular the soil (its structure

and its pollution), and it is only available in limited quantity, that is why the existence of water reserves is a precondition of human existence and they are among the values that deserve the most protection. Due to the location of Hungary in a basin, only 4% of Hungary's stock of surface waters is generated within the borders of the country, while, at the same time, Hungary is located in an area significantly subject to the consequences of climate change, therefore the responsible management of sub-surface stocks of water is of primary importance. The correctness of this statement is also supported by the fact that surface waters are the most vulnerable ones to be affected by human polluting activities: according to the National Program for the Protection of the Environment 2015-2020 adopted by the Resolution of the Parliament No. 27/2015. (VI. 27.) OGY (hereinafter: "Program"), in Hungary, the proportion of surface water bodies of medium or worse water quality is 70-80%. In contrast with that, 68% of sub-surface water bodies is of good quality, due to their separation from direct polluting effects on the surface, and their primary importance is underlined by the fact that the vast majority – as much as 95% – of the drinking water supply of the domestic population is secured from this source. [See in particular the part 2.2. „Changes and effects of the state of the environment", and the part 5.2.3.2. „The conservation of strategic stocks of water (protection of water reserves, areas sensitive to nitrate)" of the Program]. The Program, as well as Hungary's reviewed river basin management plan for the year 2015 [Government Resolution No. 1155/2016. (III. 31.)] lay down the same way that more than a half of sub-surface water reserves can be found in a territory vulnerable in terms of pollution originating from the surface.

[35] As a special feature of using sub-surface stocks of water, the users of a given stock of water influence, through their wells, the quantity and the quality of the stock of water, and thus they influence, by their own use of water, the use and the quality of water in the whole area, even if they are not aware of that. This is, in itself, a good reason supporting the necessity of the unified management of the stocks of water – a duty that can only be fulfilled by the State. The purpose of managing the stocks of water is to secure the safe fulfilment of justified water demands in a manner not endangering the protection of the quantity and the quality of waters, as well as the sustainability of the ecosystems connected to sub-surface waters. Water resource fee, payable as taxes by the licensees of water rights, is one of the tools of regulating the management of the stocks of water. The primary aim of the contribution is to induce the sparing of water and to enforce the differentiation of the stocks of water according to their quantity and quality.

[36] As sub-surface stocks of water are finite in terms of their quantity and quality, and they are renewable only to a limited extent, the sustainability of the stocks of water would be endangered without the responsible management of the stocks of water. As emphasized in point 3.1.2 ("Drinking water, the key importance of the stocks of

water") of the National Rural Strategy in the context of the protection of sub-surface waters, "on the Great Plain, in certain areas, 75-100% of the sub-surface waters are utilised and it endangers the state of the affected ecosystems." The Constitutional Court points out the following: virtually all strategies on sub-surface waters in force today consider that it is of primary importance to provide for the protection of the quantity and the quality of these stocks of water, as well as maintaining and developing the existing level of protection.

[37] 4.2. The problems related to the state of sub-surface waters are assessed the same way by several strategic documents presently in force. The biggest problem affecting the quantity of sub-surface stocks of water is water abstractions not indicated in the water management registries. According to the Program's estimates, water abstraction without permission amounts to as much as 100 million m^3/year, which is 12% of the registered water abstraction. The illegal activity of this scale means not only a loss of water resource fee in billions of Forints, but it also makes the management of the stocks of water impossible and it is unjust with respect to those users of water who obey the law. The correctness of the latter statement is supported by the fact that if the volume of water abstraction without permission endangers the sustainability of the quantity of sub-surface waters, as natural resource with limited renewability, the authority can only restrict the water abstraction of those users of water who possess a permit, while the water users without a permit may even increase their water abstraction.

[38] This is why the reviewed river basin management plan of Hungary for the year 2015 clearly states that "regulatory methods are the best way to influence the quantitative status of sub-surface waters in Hungary. The regulations should be amended by maintaining, as the general rule, the institution of permission for all water abstractions irrespectively to their quantity and the depth of the water source, and by repressing water abstractions without permission. It is of key importance to keep the establishment of wells for water abstraction under the control of State water management." (8.3.5.2 "Measures to improve the quantitative status of sub-surface waters"). The Kvassay Jenő Plan (National Water Strategy) adopted in 2017 also identifies several problems related to the quantity of water abstractions that can only be remedied by clarifying the system of providing permits and registration and by reinforcing supervisory control (4.2.2.1 "Managing the stocks of water, water protection").

[39] At the same time, water abstractions from sub-surface waters without permission cause not only quantitative problems, but also pose a risk of pollution (Program 2.1.3 "Structural level – Water management"). As laid down explicitly in the reviewed river basin management plan for the year 2015, "any well constructed unprofessionally or without control as well as any defective well poses a risk on our sub-surface waters still of good quality, as polluted groundwater may directly reach the deeper layers

through such wells." The National Rural Strategy states the same way that "water abstractions without permission are problematic not only in terms of quantity, but also because of causing a risk of pollution for the water sources of medium depth. Water quality problems and the risks of such problems often result from polluting the stocks of water, in particular the environment of vulnerable drinking water reserves" (4.1.2 "Stocks of water, water quality").

[40] By summarising the above, the Constitutional Court states that all the relevant strategies and programs hold water abstractions without permission to be a significant problem of quantity and quality, and they consider the protection of the quantity and quality of sub-surface waters as a strategic duty. As individual strategies fall into the scope of public law regulatory instruments, they are binding upon the issuer, but at the same time they are also professional starting points for medium- and long-term planning and calculable legislation, and taking them into account with regard to the precautionary and the preventive principles is especially important in the case of the elements mentioned in Article P) (1) of the Fundamental Law, as ones that belong to the scope of the nation's common heritage. Consequently, the failure to take these professional strategies into account in the course of examining the conflict of an amendment of the law with the Fundamental Law shall be evaluated individually, if the regulatory subjects affect the nation's common heritage, as ones to be preserved for the future generations according to Article P) (1) of the Fundamental Law.

[41] 4.3. Before adopting the Act, several professional organisations warned about the same sources of risks as the ones mentioned in the strategies quoted above.

[42] The President of the Republic also made a reference in his petition to the joint declaration published on 31 January 2018 by eleven professional organisations, underlining, among others, that "the sub-surface waters of the Carpathian Basin – including Hungary – form a huge interrelated system in terms of quality and quantity. [...] The responsible water management of sub-surface waters – being part of the State's assets – in this interrelated system requires the continuous monitoring of the processes and the interventions. Knowing the volume of water abstraction is an integral part of the above, therefore, it should not be waived." These statements are fully applicable to the quality of water as well, moreover, in the case of contaminating sub-surface waters, "the complete rehabilitation of the quality of these waters is not possible and even the improvement of their condition would require large costs and many decades, while in most cases there are no immediately applicable alternative sources to meet water demands." In general, the deeper the contamination of sub-surface waters takes place, the more expenses are needed to eliminate the results of pollution. Based on the above, the affected professional organisations held that the Act "is capable of eliminating the responsible management of the stocks of water and of terminating the protection of waters secured earlier."

[43] The Association of Hungarian Water Utilities warns about a special aspect of protecting the quality of water reserves: wells established in an unprofessional way pose a great risk on the security of water supply. This is because due to the amendment "a significant segment of the protection of sub-surface water reserves would fall outside the scope of control of the authorities and specialised authorities. Even the operation of the water reserves would fundamentally increase the number and the severity of the risks."

[44] Both the Hungarian National Chapter of the International Association of Hydrogeologists (hereinafter: IAH HNC) and the Association of Hungarian Water Utilities underlined in their comment attached to the draft legislation No. T/15373 – of the same text as the Act – that the planned well-depth of 80 meters is unacceptable on professional basis as it already reaches down, and thus endangers, to the natural water bodies, which form the basis of the public drinking water network.

[45] The Hungarian Chamber of Engineers pointed out in its comments also attached to the draft legislation No. T/15373 that wells established improperly often provide a link between the contaminated groundwater and the protected aquifer, and in many cases the contamination has already reached the artesian water (the second aquifer) because of unprofessionally established wells and the draining of household wastewater into dug wells. According to the Chamber, the Act would result in "injuring the protection of artesian waters still of appropriate quality, and in contrast with the interests of long-term water management, selfish interest would be set free with the real danger of continuing the quality degradation of sub-surface waters."

[46] Several professional organisations also warn that the entry into force of the Act may result in serious risks concerning public health. In this context, it is important to note the position taken by the IAH HNC, according to which, "in the recent past (of 10-20 years), illegal wells were typically bored within municipality areas for the purpose of sparing high water fees, rather than in farmsteads without public utilities. […] Improperly constructed wells form a link between groundwater already contaminated and the protected aquifer. According to the experience gained by the National Public Health Institute, the water of private wells often fails to fully comply with the requirements applicable to drinking water, therefore, as waters from private wells may also reach the drinking water system, the quality of the drinking water network may also be put at risk, as potential contaminations may directly endanger human health. Similarly, the Association of Hungarian Water Utilities underlined in its position paper that "in many cases, the wells bored in the past without permission for the purpose of providing a household's water supply are connected (through the internal pipeline network of the house) with the public utility water supply system." However, while the licensing authority is obliged, in accordance with the Government Decree No. 147/2010. (IV. 29.) Korm., to supervise in every third year the drinking

water wells possessing a permission, the authorities do not have the opportunity to carry out such supervisions regarding the wells without permission and reporting, as they are not even officially aware of their existence.

[47] 5. In order to assess the potential effects of the provisions of the Act, different from the regulations currently in force, on the quantity and the quality of sub-surface waters – partly with regard to the statements made in the strategies quoted –, with account to the positions taken by certain professional organisations, the Constitutional Court turned to the Hungarian Academy of Sciences with a request.

[48] The Hungarian Academy of Sciences confirmed in its reply sent to the request that the adopted regulation is "a serious threat to the domestic stocks of sub-surface waters. The significant decrease of groundwater level is expected at several places, endangering the ecosystems that depend on sub-surface waters as well as the natural and agricultural plant cultures. It would render impossible to maintain the security of our sub-surface water reserves, and the safety of drinking water supply would be significantly reduced. [...] The adopted regulation poses serious and insupportable risks to the stocks of sub-surface waters in Hungary, in particular to the drinking water reserve, not only in terms of quantity, but of quality as well." As stressed by the Hungarian Academy of Sciences, in Europe 75% of the water supply comes from sub-surface waters, in Hungary this rate is more than 95%. According to the position taken by the Hungarian Academy of Sciences, "in addition to the known and registered water abstractions, in Hungary today there are unfortunately hundreds of thousands wells bored illegally that place a burden on the stocks of sub-surface waters. [...] Unfortunately the present situation raises very serious problems, as the volume of non-registered water abstraction by the illegal wells mentioned above may even reach the amount of 100 million m^3 per year. Even at present, this volume significantly endangers the sustainable utilisation and management of sub-surface waters." According to the Hungarian Academy of Sciences, these burdens of uncontrollable level may be manifested in serious falls (of as much as 0.5 or 1.0 meter) of the water level close to the surface that may lead to damaging the ecosystems depending on sub-surface waters. However, the nationwide fall of the groundwater level, expected to affect large areas, may influence not only the natural vegetation, as it may also increase the irrigation demand of arable crop cultures. To address this process, more and more uncontrolled wells would be established, resulting in a negative spiral continuing the deterioration of the quantitative status of sub-surface waters. In addition to the quantitative problems referred to above, the Hungarian Academy of Sciences also presumed the possibility of encountering serious problems related to quality as well: "The construction of wells without any obligation of obtaining permission or making a report as well as the operation of wells without supervision would pose a great risk of contaminating our aquifers presently considered to be clean and protected, or of creating unintentional links

between the contaminated and non-contaminated aquifers, which would continue to deteriorate the situation in many areas of Hungary. The greatest risk is the mass establishment of wells without any professional control. […] Improperly constructed cemented wells may almost serve as vertical gravitational downpipe wells draining contaminations of various types under the surface. Then, due to the sub-surface currents, the horizontal or vertical proliferation of the contamination dissolved in the water would be unstoppable." The removal of sub-surface contamination (provided that it is actually possible) may be a very expensive process that lasts for years.

[49] 6. As pointed out by the deputy of the commissioner for fundamental rights in his reply sent to the Constitutional Court's request, the elimination of permits and advance reporting poses a double risk: "the first one is overusing the water reserves, the wasting of waters of good quality, suitable for human consumption as well; the other risk is opening up for potential contamination the intact stocks of water that had been closed until now as well as the stocks of water safely utilised until today. According to the deputy commissioner, the Act failed to take into account the precautionary principle as it "has not explored whether or not the derogation of the conditions of the environment shall or could take place due to a particular measure." The Act also failed to fulfil the requirement of enforcing the preventive principle, as "by removing certain activities from the scope of preliminary control by the State, it would make the safeguarding and the supervision of protecting natural resources dependent only on voluntary law-abidance." As pointed out by the deputy commissioner: since the significant bodies of surface waters and the totality of sub-surface water resources are in exclusive State ownership, the obligation resulting from Article P) (1) clearly binds the State as the owner, too.

[50] The deputy commissioner holds that the elimination of permits and advance reporting excludes the possibility of the authority to determine the conduct of and the conditions of intervention by a person who intends to carry out an intervention into the waters, thus the legislator eliminates the basis of the prevention system and this amendment of the regulation may be assessed as a breach of non-derogation. This is in particular true, because the elimination of the permissions and the advance reporting of wells as an objective is only a tool from the point of view of restricting fundamental rights. It also means that the Act restricts the right to a healthy environment as a fundamental right not in the interest of enforcing another constitutional value or fundamental right, therefore, the restriction is necessarily contrary to the Fundamental Law.

[51] 7. As, in accordance with Section 40 (1) point 25 of the Government Decree 94/2018. (V. 22.) Korm., the minister of the interior is the member of the Government responsible for water management, the minister of the interior, who had presented

the draft legislation, replied to the Constitutional Court's request, providing information about his position related to the Act and the petition.

[52] The minister of the interior pointed out in his reply that "all governments and States make attempts to reduce bureaucracy and the redundant administrative burdens imposed upon the citizens in the cases of lesser weight. As a part of this endeavour, obligations of obtaining permits from the authorities are replaced by obligations of reporting, or – where it is possible without substantially decreasing the level of protection – by the elimination of permissions or reporting procedures together with improving supervisions." According to the minister of the interior, the Act "creates balance between reducing the administrative burdens of the citizens and the interest of the society related to the protection of the stocks of water by allowing to carry out certain activities – that cause negligible injury, in line with the above rules – without permission, but in parallel, it orders the improvement of the effectiveness of supervision." The minister holds that the enforcement of the preventive principle and of the rules of guarantee in the context of water abstractions shall remain secured in the future as well, and further provisions of the AWM specify the limitations of the authorisation provided for the Government, therefore, the possibility of adopting a decree may not be regarded as a blank empowerment. However, the exact scope of the activities that may be carried out without a water right permit shall be specified in the government decree, thus the reduction of the level of protection shall only be ready for examination with regard to the implementing regulation rather than the draft bill. Finally, the minister of the interior noted that the substantial content of the draft bill had been accessible by anyone for more than one year with the possibility of forming an opinion on it. The Parliament decided on adopting the draft legislation in the knowledge of these opinions by carefully considering the pro and con arguments.

[53] 8. By taking all these legal and professional aspects into account, the Constitutional Court evaluated the compliance of Section 1 and Section 4 of the Act with Article P) (1) and Article XXI (1) of the Fundamental Law as follows.

[54] 8.1. According to Section 4 (1) *d)* of the Act CXCVI of 2011 on National Assets, sub-surface waters shall be in the State's exclusive ownership. As laid down in Article 38 (1) of the Fundamental Law, "the property of the State and of local governments shall be national assets. The management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations." In line with the second sentence of Article XIII (1) of the Fundamental Law, "property shall entail social responsibility." It means that while Article XIII (1) of the Fundamental Law provides in general for the social responsibility that comes along with property, this social responsibility is concretely specified by the Fundamental Law itself in the case of the national assets under Article 38 of the Fundamental Law and the common

heritage of the nation under Article P) of the Fundamental Law. The Constitutional Court points out that the concepts of national assets and of the common heritage of the nation are not fully identical, but in case they overlap with regard to certain elements of the assets, then the owner's responsibility under Article XIII (1) should be determined with account to both Article 38 (1) and Article P) (1), by attuning them. This is indeed the case with regard to sub-surface waters in exclusive State-ownership mentioned in the petition of the President of the Republic and affected by the regulation in the Act: they are under protection both by Article 38 (1) and Article P) (1) at the same time. It means that the State as an exclusive owner may only manage sub-surface waters (including providing for the possibility of using the waters) by considering not only the common needs of the present generations, but the needs of the future generations as well, together with regarding the natural resources as regulatory subjects that represent intrinsic value worth protecting.

[55] 8.2. According to the provisions of the AWM currently in force, in particular its Section 28/A (1), in Hungary, since 1992 the establishment of any well suitable for water abstraction from sub-surface waters has been subject to obtaining a permit from the authority, irrespectively, among others, to the method of establishing it (dug well or bored well), the geographical location of establishing it, the planned depth of the well, as well as the expected volume and the purpose of water abstraction (household demands or water use for business purpose).

[56] Imposing an obligation of obtaining a permit is justified both by the qualitative and quantitative requirements connected to using the well, therefore, it shall not be regarded as an unnecessary additional requirement with respect to establishing wells.

[57] According to Section 15 (2) of the AWM, also with account to the quantitative and the qualitative protection of the usable stock of water, water demands should be supplied primarily from the stock of water not yet allocated for the purpose of water-use. As laid down in Section 29 (3) of the AWM, a new water right permit shall only be issued if the water quantity specified in the permit can be provided to the licensees. In order to allow the authority to decide about the application for a permit to issue a new water right permit by not endangering the quantitative renewing of sub-surface waters, i.e. not resulting in their overuse, the authority should be aware of the exact data related to water-use and the sources of these data are almost exclusively the water right permits issued in the past.

[58] The other function of the water rights permission system is to determine the technical and environmental characteristics of water projects – a function indispensable for the protection of the quality of the stock of water. As laid down in the information note issued by the Ministry of the Interior in February 2017 on "The rules of procedural law applicable to the wells within the scope of licensing by the municipality local government's notary", "wells constructed in an unprofessional way may contaminate the clear aquifers of Hungary that should be strategically preserved. Along the

pipeline structure of poorly constructed wells, contaminating substances leaking down from the surface may reach sub-surface waters relatively quickly and in high concentration. Due to an inappropriate construction of the well (the absence of cement casing), in the case of a deeper well supplying artesian water or karst water, the contaminated groundwater may be drained directly into the deeper layers with clear water" (Information note, page 3).

[59] 8.3. According to all strategic documents in force related to sub-surface waters and quoted in the Constitutional Court's decision, maintaining or – as the case may be – even the aggravation of the permission system is justified, regarding that the quantitative and qualitative protection of the stocks of sub-surface waters is considered as a duty of strategic level. As pointed out by the Constitutional Court, based on the precautionary and preventive principles, these strategies should be assessed with a particular weigh as regards the protection of the elements that belong to the nation's common heritage under Article P) (1) of the Fundamental Law. The position paper provided by the Hungarian Academy of Sciences regarding a scientific question necessary for deciding about a petition bears similar importance. Furthermore, the deputy of the commissioner for fundamental rights also argued with the same reasons as mentioned in the strategies and in the position paper of the Hungarian Academy of Sciences, just as some professional organisations engaged in activities related to sub-surface waters.

[60] In this context, the Constitutional Court should also take into account that the reasoning attached to Section 4 of the Act XLI of 2016 amending the AWM held (in full consonance with the quoted strategies) that, for the purpose of repressing black economy and facilitating sustainable water management, the regulation "shall support the authorisation without fine-payment, within a specific period of time (grace period), of maintaining (legalisation) the water projects for water abstraction presently operating without a water right permit. Wells and other water abstractions established and operated without permission are sources of risk, as they are not recorded in the asset management registries and in other registries of the authorities, which makes the management of the used stocks of water – often of very significant volume – impossible, and the evaluation of the state of our waters becomes insecure. The water abstractions presently operated without permission provide their operators with an unfair advantage in contrast with those who obey the law and operate their water projects in accordance with the rules. To solve the problem, those who at present operate their water abstracting projects without permission should be offered a chance to legalise it within a specific grace period without the payment of a fine.

[61] 8.4. The fact itself shall be considered as a step-back in the regulation that the activity of abstracting water from sub-surface waters fully and mandatorily subject to

permission under the current regulations might be carried out fully or partly without a permit and without reporting as from the entry into force of the Act, irrespectively to the exact scope of water abstractions allowed without permission and reporting, as regulated by the government decree to be adopted in the future. Therefore, in the context of the possibility of establishing the fact of step-back, the general objective of the 80 meters' well-depth mentioned in the reasoning of the Act – and not included in the text of the law – is insignificant.

[62] As it has been already pointed out by the Constitutional Court earlier, based on the precautionary principle, the State shall secure that the condition of the environment does not deteriorate due to a specific measure. {Decision 27/2017. (X. 25.) AB, Reasoning [49]}. Consequently, the legislator has to verify that a specific planned regulation does not qualify as a step-back, and thus does not cause any damage – an irreversible one, as the case may be –, and does not provide an opportunity in principle for such a damage.

[63] The Constitutional Court stated as early as in its Decision 28/1994. (V. 20.) AB that when the legal regulation shifts from the application of the preventive principle (advance permissions) towards the ex-post sanctioning of the potential damages done (ex-post supervision, application of the polluter pays principle), it shall, in itself, be regarded as a breach of non-derogation. Any regulation allowing the elimination of the procedure of advance permissions, even with regard to a limited scope of water abstractions, to be replaced by ex-post control by the authorities for the purpose of preserving the quantity and the quality of sub-surface waters shall be regarded as a step-back from the level of protection already achieved.

[64] The direction of the new regulation to be introduced by the Act is the opposite as that of both the water rights licensing obligation generally in force since 1992 and the amendment introduced by the Act XLI of 2016, and it allows, with general force, to declare that sub-surface water abstractions are not subject to permission or reporting, without providing any substantial reason for the alleged non-existence of the risks consonantly identified in the strategies quoted above, in the position papers of certain professional organisations, in the positions taken by the Hungarian Academy of Sciences and by the deputy commissioner for fundamental rights, as well as in the reasoning of the Act XLI of 2016.

[65] 8.5. According to Article I (3) of the Fundamental Law, "the rules relating to fundamental rights and obligations shall be laid down in an Act of Parliament. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right." The restriction under Article I (3) of the Fundamental Law has been consistently enforced by the Constitutional Court with the provision that, in line with the precautionary principle, the actual deterioration of the

environment shall not be a precondition for the declaration of the breach of non-derogation, as already a risk of the deterioration of the conditions shall justify declaring the breach of non-derogation {Decision 16/2015. (VI. 5.) AB, Reasoning [110]}.

[66] In his reply sent to the Constitutional Court's request, the minister of the interior mentioned the reduction of bureaucracy and of the redundant administrative burdens imposed upon the citizens in the cases of lesser weight, as the reason behind the regulation. As recalled by the Constitutional Court in this context, only 4% of the stock of surface waters of Hungary is generated within the borders of the country, at the same time, Hungary is located in an area significantly subject to the consequences of climate change, therefore the responsible management of the stock of sub-surface waters is of particular importance, because – among others – it is the basis of the drinking water supply. Based on the role fulfilled by the permission system in water management, the obligation of obtaining an advance permission for individual wells shall not be considered as a redundant administrative burden, as, in fact, the permission system is the only potential legal solution for the State to guarantee the protection of the quantity and the quality of sub-surface waters.

[67] Based on the above arguments, the Constitutional Court holds that by way of the regulation of the Act, the legislator implemented a step-back from the already achieved level of protecting the environment by not indicating any other fundamental right or constitutional interest being commensurate and acceptable in the particular case according to Article I (3) of the Fundamental Law, and neither has the Constitutional Court found any such right or interest.

[68] 8.6. The Constitutional Court points out at the same time that maintaining the water rights permission system serves the purpose of preserving the quantity and the quality of the stocks of sub-surface waters, therefore, any regulation aimed at the modification of the permission system applicable to using the stocks of sub-surface waters should present particularly strong reasons against this obligation, resulting from Article P) (1) and Article XXI (1) of the Fundamental Law, that may justify the necessity and the proportionality of changing the permission system, in accordance with Article I (3) of the Fundamental Law.

[69] Upon taking into account the statements made about the importance of sub-surface waters and about the role fulfilled by the permission procedure in the quantitative and qualitative protection of sub-surface waters, one may conclude that the full-scale maintenance and the effective enforcement of the permission system, rather than its elimination, shall be indispensable for the protection of the rights and interests enshrined in Article P) (1) and Article XXI (1) of the Fundamental Law. It follows from Article P) (1) of the Fundamental Law that the State may only manage sub-surface waters, as a natural resource that form part of the nation's common heritage, in a manner that guarantees the sustainable fulfilment of the demands for water-use not

only in the present, but in the future as well. The stocks of water presently available shall only remain usable in the future, if they enjoy protection of quantity and quality. A regulation that allows use without the official knowledge and control of the authorities with respect to a not clearly defined scope of using sub-surface waters, shall not be held compliant with this requirement, as follows.

[70] Since sub-surface waters are limitedly renewable resources, the level of their renewability should be taken into account in the course of using them. However, if water projects using sub-surface waters can be established without permission and reporting, the authorities shall not be in a position to assess the quantity of the unbound stocks of water, and thus the admissibility of further individual permits. In an extreme situation, the significant share of activities without permission and reporting may even result in imposing restrictions – as allowed in particular in Section 15 (5) and (6) of the AWM –, due to overusing the stock of water, on the activities of those users of water who do possess permits, because of the non-reported uses of water.

[71] However, the water right permissions to be obtained mandatorily in advance for the individual wells not only provide the authorities with information on the volume of usable waters, but they may also motivate economizing water, for example due to the obligation of paying water resource fee. This way, permits can also play a role in setting reasonable limits for using water by individual users, making the State able to enforce its obligation – binding "everyone" on the basis of Article P) (1) of the Fundamental Law – of preserving for the future generations the elements that form part of the nation's common heritage. In the case of wells established without a permit issued by the authorities or without reporting, the State shall have no chance to facilitate the reasonable using of water, for example by way of water resource fee. A regulation that fails to encourage the economic management of natural resources shall be in breach of the requirement, resulting from Article P) (1) of the Fundamental Law, that present generations may freely access the resources available as long as they pay respect to the equitable interests of future generations. {Decision 28/2017. (X. 25.) AB, Reasoning [33]}.

[72] At the same time, the significant risk of the quality deterioration of conditions caused by the possibility of establishing wells without permission, and thus by neglecting – without any consequence – the professional and quality requirements shall directly influence the living conditions of the present generations as well, not only through Article XXI (1) but, as the case may be, also by way of Article XX (1) granting the right to physical and mental health, the enforcement of which is supported by Hungary, among others, by securing access to healthy drinking water. In addition to other strategic documents, for example Hungary's reviewed river basin management plan for the year 2015 also states that more than a half of sub-surface water reserves is vulnerable as they can be found in a natural-geological environment where polluting

substances got under the surface may reach down to the water body that provides the water supply. The authorities may determine, by way of issuing advance water right permits, the geographical areas of and the applicable technologies as well as the depth for the safe establishment of new wells, and the continuous supervision of these wells shall also be guaranteed, because the authority shall be aware of their exact location and of the professional requirements applicable to their establishment. However, in case the authorities are not officially aware of the location of individual wells, there shall be an increased risk of the operation of some wells falling completely out of the scope of knowledge of the authorities, and as a result, neither the enforcement of the advance professional requirements applicable to the establishment of wells, nor the effectiveness of the ex-post supervision of the operation shall be guaranteed. Wells established in an unprofessional way may create links between the already contaminated groundwater and the aquifers, and the water abstracted from these wells may also reach the drinking water network that may cause public health problems even in the short run. Due to the limited regeneration ability of sub-surface waters, creating a possibility for contaminating sub-surface waters in the present is contrary to the obligation resulting from Article P) (1) that endeavours should be made to hand over the natural environment to the future generations at least in the same state as the one we received it from past generations. {Decision 28/2017. (X. 25.) AB, Reasoning [33]}. In this context, the Constitutional Court recalls that "in accordance with the precautionary principle generally accepted in environmental law, the State must guarantee that the conditions of the environment are not derogated due to a particular measure" {Decision 27/2017. (X. 25.) AB, Reasoning [49]}, and that from the aspect of the effective protection of the environment, the preventive principle embodied in advance permissions by the authorities should enjoy priority over the polluter pays principle that offers a chance for subsequent sanctions, but which is applicable for preventing only the causing of further damages.

[73] 8.7. Taking all of these aspects into account, the Constitutional Court concluded that, by allowing water abstraction without permission and without reporting from sub-surface waters, Section 1 and Section 4 of the Act violate the principle of non-derogation, and thus Article P) (1) and Article XXI (1) of the Fundamental Law.

[74] 9. According to the consistent case law of the Constitutional Court, if the Constitutional Court declares that the law challenged in the petition or a part of it is contrary to the Fundamental Law, then it shall not examine the violation of any further constitutional provision in the context of the same provision. {see for example the Decision 35/2017. (XII. 20.) AB, Reasoning [57]}. Accordingly, the Constitutional Court did not review the element of the petition submitted by the President of the

Republic, alleging the violation, by Section 4 of the Act, of the principle of legal certainty under Article B) (1) of the Fundamental Law.

[75] Due to the declaration of its conflict with the Fundamental Law, the Act shall not be promulgated in accordance with Section 40 (1) of the ACC.

[76] 10. According to the second sentence of Section 44 (1) of the ACC, this decision shall be published in the Hungarian Official Gazette.

Budapest, 28 August 2018.

Dr. Tamás Sulyok
President of the Constitutional Court

Dr. István Balsai
Justice of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court,
on behalf of *dr. Ágnes Czine*
Justice of the Constitutional Court,
unable to sign

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court,
on behalf of *dr. Attila Horváth*
Justice of the Constitutional Court,
unable to sign

Dr. Ildikó Hörcherné dr. Marosi
Justice of the Constitutional Court

Dr. Tamás Sulyok
President of the Constitutional Court,
on behalf of *dr. Juhász Imre*
Justice of the Constitutional Court,
unable to sign

Dr. Béla Pokol
Justice of the Constitutional Court

Dr. László Salamon
Justice of the Constitutional Court

Dr. Balázs Schanda
Justice of the Constitutional Court

Dr. István Stumpf
Justice of the Constitutional Court

Dr. Marcel Szabó Justice of the Constitutional Court, rapporteur	*Dr. Péter Szalay* Justice of the Constitutional Court
Dr. Mária Szívós Justice of the Constitutional Court	*Dr. András Varga Zs.* Justice of the Constitutional Court

Constitutional Court file number: I/1216/2018

Concurring reasoning by Justice *Dr. Ágnes Czine*

[77] I agree with the holdings of the decision and with its reasoning, but at the same time I hold it important to point out the following as well.

[78] 1. As mentioned by the Constitutional Court in several decisions, the right to a healthy environment requires legal protection of an attitude different from that of other fundamental rights. The reason for this is that the failure to protect the nature and the environment may induce irreversible processes {Decision 3223/2017. (IX. 25.) AB, Reasoning [27]}. Therefore, in the scope of protecting the right to a healthy environment, maintaining the level of protection already achieved and taking into account the needs of future generations are priorities. Accordingly, Article P) (1) of the Fundamental Law clearly states that "natural resources, [...] shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

[79] As emphasized by the Constitutional Court in the Decision 28/2017. (X. 25.) AB, "it follows directly from Article P) of the Fundamental Law, as the will of the legislator, that human life as well as its vital conditions [...] should be protected in a way securing the chances of life for the future generations and not derogating it in any way, in accordance with the generally accepted principle of non-derogation" (Reasoning [28]). The Constitutional Court also underlined that on the basis of this Article of the Fundamental Law, the present generation is bound by three main obligations: to preserve the possibility of choice, to preserve quality and to provide the possibility of access" (Reasoning [33]). Actually this set of requirements essentially attempts to guarantee that the decisions of the present do not place the future generations on a forced track and that we hand over the natural environment to the

future generations at least in the same state as the one we received it from past generations.

[80] Therefore, the Constitutional Court's case law is consistent in stating that "the State is not free to allow either any deterioration of the environment or a risk thereof". The Constitutional Court also stated that "prevention has precedence over all other means to guarantee the right to a healthy environment, for subsequent penalties for irreparable damages cannot ensure restoration of the original condition. The enforcement of the right to a healthy environment constitutionally obliges the State – as long as legal protection is indeed necessary – not to regress from a degree of protection already achieved unless the conditions are such that would also allow restrictions of individual fundamental rights. The enforcement of the right to a healthy environment by upholding the degree of protection also compels the State not to regress from preventive rules of protection to protection ensured by sanctions." {Decision 28/1994. (V. 20.) AB, ABH 1994, 134., 140–141.; Decision 16/2015. (VI. 5.) AB, Reasoning [109]}.

[81] Due to the above points, prevention and the precautionary principle play a decisive role in the protection system of the right to a healthy environment. The Constitutional Court explicitly underlined in the Decision 28/2017. (X. 25.) AB that for the purpose of protecting the environment "the legislator shall also take into account the precautionary principle, according to which the State shall verify, by taking into account the insecurity of science as well, that the conditions of the environment shall not be derogated at all due to a particular measure" (Reasoning [75]). The Constitutional Court pointed out in another decision as well that "in accordance with the precautionary principle generally accepted in environmental law, the State must guarantee that the conditions of the environment are not derogated due to a particular measure" {Decision 27/2017. (X. 25.) AB, Reasoning [45]}. Thus the precautionary principle has been applied by the Constitutional Court in its practice.

[82] At the same time, the precautionary principle enjoys a prominent position not only in the domestic case law of the Constitutional Court, but also in the Union law. Title XX ("Environment") of the Treaty on the Functioning of the European Union makes an explicit reference to the precautionary principle as one of the general principles of the Union's environmental policy [Article 191 (2)]. It essentially means that measures may also be applied in the case of risks that might bear a danger of damage, but the actual occurrence of the damage cannot be verified with scientific methods. Therefore, the precautionary principle is a risk management tool that may be invoked when there is scientific uncertainty about a suspected risk to human health or to the environment emanating from a certain measure. (source: http://www.europarl.europa.eu/ftu/pdf/hu/FTU_2.5.1.pdf)

[83] The precautionary principle is also known in and applied by the international law (in particular the Convention on Biological Diversity, the United Nations Framework

Convention on Climate Change promulgated with the Act LXXXII of 1995, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity) and the international case law [European Court of Human Rights (hereinafter: ECHR), *Tatar vs Romania* (67021/01), 27 January 2009]. As underlined by the ECHR in the decision referred to above, in case of a danger of damage, States shall assess the risks and they shall take the steps necessary for protection and prevention. The obligation of assessing risks shall be continuously applicable throughout licensing and exercising the activity.

[84] 2. I hold that with regard to the precautionary principle the Constitutional Court had to explore the environmental risks implied in the regulation challenged by the petition. In the course of assessing the real dangers posed by these risks, the scientific background of the problem had to be examined as well.

[85] In the particular case – as referred to in the petition of the President of the Republic as well – the available position papers, expert opinions provided significant support for the exploration of the scientific background of the case. In my view, it was verifiable beyond doubt that interventions into the aquifers without permission or reporting bear the real risk of contamination and thus the reduction of drinking water reserves. I hold that it is important to highlight the following statement from the position paper of the Hungarian Academy of Sciences: "the construction of wells without any obligation of obtaining permission or making a report as well as the operation of wells without supervision would pose a great risk of contaminating our aquifers presently considered to be clean and protected, or of creating unintentional links between the contaminated and non-contaminated aquifers, which would continue to deteriorate the situation in many areas of Hungary."

[86] In addition to the above, I think the following facts also present important aspects of assessment.

[87] Hungary is situated in the central part of the Carpathian Basin, called the "Pannonian Basin", according to the geographical nomenclature. The basin is dominated by clastic sediment rocks – gravel, sand, rock flour, clay – but harder crystalline rocks – limestone, dolomite, vulcanites, granite – can also be found on the one-fifth of the country. The hydrogeologic characteristics of a certain area, namely the initial watertable of sub-surface waters from the surface, their flow, recharge and chemical composition are determined to a large extent by its lithological composition. On the Great Plain, the flow of water is relatively swift and thus contamination is proliferating quickly in the porous sand-gravel sediment until the depth of approx. 1000 meters. Therefore, on the Great Plain, due to animal farming, household wastewater, excessive use of fertilizers and the uncontrolled illegal groundwater wells, waters are already contaminated, mainly with nitrate, down until the depth of 60-80 meters.

[88] Today, drinking water abstractions are typically made from the depth of 30-120 meters. Under this depth, the natural salt content of the so called fossil waters (being

several hundreds of thousands years old) make them unsuitable for consumption. The arsenic content of some wells poses a health risk even today (it is not related to the criminal cases of mass arsenic poisoning in the Tiszazug region in the early 20th century). The karst waters found in the carbonate rocks (limestone, dolomite) of the hilly regions are even more sensitive to contaminations leaking down from the surface, and the contamination can reach the drinking water systems in a couple of days.

[89] In Hungary, the estimated number of shallow (10-100 meters deep) groundwater wells is several tens of thousands, and a significant share of them has been established illegally and constructed unprofessionally. This is because the space around the boring hole is often not filled up with cement above the infiltrated aquifer, thus contaminated water from the upper contaminated aquifer may flow down to the clean layers. The increased abstraction of the stock of shallow groundwater results in the further reduction of the level of the so called initial groundwater table, although it has already decreased by several meters in the past decades, resulting in drying out the soil and in reduced productivity. Let me note in this context that also according to the position paper of the Hungarian Academy of Sciences, the biggest threat is the mass establishment of wells without proficiency. This is because "improperly constructed cemented wells may almost serve as vertical gravitational downpipe wells draining contaminations of various types under the surface. Then, due to the sub-surface currents, the horizontal or vertical proliferation of the contamination dissolved in the water would be unstoppable."

[90] One may verify on the basis of the above that the further liberalisation of the legal regulation would irreparably jeopardise the access to clean drinking water of the generations of the present and of the near future. This is because of the existing contamination of shallow ground waters. As an alternative, water wells of a maximum depth of 20-30 meters might be established without permission outside the protective area of water protection, but even in these cases, imposing a reporting obligation to the authority should be considered. The elaboration and publication of a simple "traffic light" map should also be considered (red: absolute prohibition, green: allowed with reporting, yellow: allowed with permit), based on the good example applied for decades in several provinces of Germany in the case of groundwater heat pumps.

[91] 3. I hold it important underline with regard to the above that the legislative reasoning attached to the provisions of the AWM challenged by the petition has not verified – contrary to the content of the Decision 28/2017. (X. 25.) AB – that the deterioration of the environmental conditions shall not assuredly take place, as the consequence of the new regulation.

[92] The legislative reasoning essentially contains the aim of amending the Act of Parliament. As underlined by the legislator, "the aim of the draft bill is the elaboration

of a regulation that does not require any permission or reporting procedure to be carried out, provided that the depth of the well is not more than 80 meters." Furthermore, the legislator also stated that "the relevant detailed regulations shall be specified in the government decree on exercising the competence of the authority for water management."

[93] In my opinion, the legislative reasoning of the challenged normative text should not be left unnoticed, and it clearly indicates the content of the government decree to be adopted in the future on the detailed rules. As clarified in the Seventh Amendment of the Fundamental Law by the power adopting the constitutional regulations, the legislative reasoning has become a priority element in exploring the legislative objective. Indeed, the reasoning of a proposed adoption or amendment of a legal regulation – if published – shall be "in the complete legislative process, an appropriate and authentic source of exploring the legislative objective" (the reasoning attached to the Seventh Amendment of the Fundamental Law).

[94] 4. In addition to the above, I also hold it important to underline that according to Section 4 (1) *d)* of the ANA, sub-surface waters fall into the scope of the State's exclusive ownership. Consequently, the ownership of sub-surface waters is separated from the ownership of the real estate's owner, and the owner should not consider as his own property the water abstracted from the well dug/bored on his land.

[95] The State is bound by prominent obligations to protect sub-surface waters, as elements of national assets. The general reasoning of the ANA explicitly provides – in line with Article 38 (1) of the Fundamental Law – that "the aim of the management of national assets shall be the protection of natural resources, the preserving and the appropriate utilisation of national values, by taking into account the needs of future generations."

[96] 5. According to the above, I hold that maintaining the water right licensing procedure is an important guarantee of preserving the quantity and the quality of the stocks of sub-surface waters. Water right permits issued in advance are the only tools available for the authorities to determine, with regard to a specific geographical area, the technology and the depth to be applied in the case of establishing safe new wells.

[97] On the basis of the above arguments, I hold that the regulation challenged by the petition is in conflict with the Fundamental Law.

Budapest, 28 August 2018.

Dr. Tamás Sulyok
President of the Constitutional Court,
on behalf of *dr. Ágnes Czine*
Justice of the Constitutional Court, unable to sign

Concurring reasoning by Justice *Dr. Balázs Schanda*

[98] According to the National Avowal, the Fundamental Law is "an alliance among Hungarians of the past, present and future", and it also lays down our responsibility for our descendants, including the safeguarding of the living conditions of the generations that follow us. The Fundamental Law orders the preservation of natural resources and it acknowledges the right of everyone to a healthy environment.

[99] As stated correctly by the Constitutional Court, the fact that until now all water projects have been subject to permission, and that there shall be exceptions in the future, shall be considered as a reduction of the level of protection of the water assets, without justifying the necessity of this change with the enforcement of another fundamental right or constitutional value. The reduction of the level of protection is unconstitutional unless it is made necessary by the enforcement of another fundamental right or constitutional value. However, the prohibition of step-back should be assessed in the complete regulatory context, rather than in itself. Therefore, the fact that the legislative amendment under review is in conflict with the principle of non-derogation does not mean an absolute prohibition for the State on reforming the system of guarantees for the protection of sub-surface waters, however, the State should make it clear that the changes do not lead to the reduction of the level of protection and they secure adequately the protection of state property.

Budapest, 28 August 2018.

Dr. Balázs Schanda,
Justice of the Constitutional Court

Concurring reasoning by Justice *Dr. István Stumpf*

[100] Our water reserve is one of our most valuable natural resources. It is an inappreciable and non-negligible component of our common heritage. As such, it is protected by the Fundamental Law of Hungary in the National Avowal and in Article P) (1). It is a treasure acknowledged and considered as significant and important in this land from the very first moment. When our conquering ancestors arrived to Pannonia, "they found the place to be beautiful, the land around to be good and fertile, the river's water to be good and the riverside to be a good pasture". "Surrounded by his people,

Chief Árpád filled his cornet with the water of the Danube and in front of all the Hungarians he requested the grace of the Almighty God to that cornet, in order to let the Lord allow them to have that land for ever" – according to the accounts of the Illustrated Chronicle.

[101] In line with the value of the topic, the Fundamental Law of Hungary makes a commitment in the very beginning of it, in the National Avowal, "to promoting and safeguarding […] the natural assets of the Carpathian Basin" and to "protect the living conditions of future generations by making prudent use of our […] natural resources" by bearing responsibility for our descendants.

[102] According to Article P) (1) of the Fundamental Law, it is the obligation of the State and of everyone to protect, maintain and preserve for future generations the stocks of water, among our natural and cultural resources. The obligation laid down in Article P) (1) of the Fundamental Law shall be enforced through granting the fundamental right under Article XXI (1). {Decision 16/2015. (VI. 5.) AB, Reasoning [109]}. In this form, the Constitutional Court has already provided protection for the right to a healthy environment and it has enforced the State's obligation of protecting our natural resources {Decision 16/2015. (VI. 5.) AB, Reasoning [111]}.

[103] In the present case, as pointed out by the majority decision's reasoning, only 4% of the stock of surface waters of Hungary is generated within the present borders of the country, therefore, in addition to protecting the waters of our rivers and lakes, the responsible management of the stock of sub-surface waters is of particular – and increasing – importance, as it is also the basis of the drinking water supply. This is why undertaking a role by the State regarding the protection of the natural environment is of particular importance in the 21st century, also called the "century of water", as any uncontrolled intervention shall/may trigger irreversible consequences.

[104] On the level of the statutory regulation reviewed, the current amendment would refer to regulation by a government decree to specify "the scope of activities that may be commenced and carried out without water rights permit and reporting". In fact, the government decree to be issued for the implementation of the Act might even sustain the reporting and licensing obligations presently in force. Thus the text of the challenged Act (without its reasoning) still leaves the question open whether or not the content of the decree-level regulation on the protection of sub-surface waters is going to change.

[105] However, since, in the case of water projects, the Act provides a general and unlimited authorisation to regulate the issue in a government decree, this may offer a possibility for eliminating not only the obligation of obtaining a permit, but also the obligation of reporting with regard to water projects for water abstraction (wells). This way, the regulation makes a shift from the preventive principle towards the polluter pays principle (sanction). The legislative amendment does not provide any

guarantee for the introduction of more effective ex-post supervisions by the authorities to secure the State's presence in the regulatory area; moreover, – as pointed out in the majority reasoning – due to the elimination of the obligations of obtaining a permit and of reporting, the establishment and the operation of new wells would completely fall outside the authorities' scope of knowledge, which would actually make exercising supervision by the authorities impossible.

[106] Thus the conflict with the Fundamental Law can be identified in the fact that – by reducing the guarantees of statutory level – the amendment opens up the possibility for regulating the issue with a government decree, reducing the former level of protection of the stock of water, which is against the requirement of precaution and it is contrary to the State's obligation of carefully protecting the nation's natural heritage and of preserving it for the future generations.

Budapest, 28 August 2018.

Dr. István Stumpf
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Egon Dienes-Oehm*

[107] I disagree with the decision.

[108] In the concurring reasoning attached to the Decision No. 16/2015. (VII. 5.) AB of the Constitutional Court on the preliminary review of certain Acts of Parliament related to the management of the State's land assets, I expressed my reservations concerning the sustainability of the Constitutional Court's earlier practice related to the prohibition of reducing the level of protection achieved in the field of the conservation of nature, and which had been used in the majority decision as the basis for declaring the conflict with the Fundamental Law in the relevant case. That decision was based on the risk of an assumable, i.e. conditionally existing risk, while the entirety of nature protection regulations was suitable for guaranteeing compliance with the State goal concretely specified in Article P) (1), the prevention of reducing the relevant level of nature protection.

[109] In the present case, the majority decision makes an attempt to support with a new and legally questionable argument the prohibition of reducing the level of protection, which is, in itself, disputable and disputed. The decision tries to develop from the Fundamental Law the so called precautionary principle and to raise it to constitutional level in the interest of establishing the existence of a breach of Article P) (1), among

circumstances where the challenged legislative amendment – Section 1 and Section 4 of the AWM held by the decision to be in conflict with the Fundamental Law – is still a *lex imperfecta*, i.e. an – undoubtedly determining and risk-bearing – element of a full-scale future regulation on water abstractions, to be completed with a government decree on the basis of the statutory authorisation,

[110] However, in itself, the formal elimination by the Act of the permission system shall not result in the reduction of the level of protection. (In particular, with regard to the fact that the permission system is hardly enforced in reality.) In my opinion, the reporting obligation as well as the obtaining of other water right permits necessary for a water project, together with more severe supervision and with the consistent application of misdemeanour sanctions (or even the aggravation of the sanctions as necessary) would be suitable for guaranteeing the protection of nature as a prominent subject of protection under the Fundamental Law. Of course, the Constitutional Court shall enjoy competence to review the constitutionality of the complete regulation applicable to water abstractions, but it may only take place after the adoption of the implementing regulation.

[111] Altogether, in these circumstances, I hold it premature to declare the conflict with the Fundamental Law as contained in the decision.

Budapest, 28 August 2018.

Dr. Egon Dienes-Oehm
Justice of the Constitutional Court

[112] I second the above dissenting opinion.

Budapest, 28 August 2018.

Dr. Mária Szívós
Justice of the Constitutional Court

[113] I second the above dissenting opinion.

Budapest, 28 August 2018.

Dr. András Varga Zs.
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Imre Juhász*

[114] By agreeing with the objections put forward by fellow-justices *András Varga Zs.* and *Egon Dienes-Oehm*, I do not support the majority decision also for the following reasons.

[115] In my view, the decision shall erode the principle of the separation of the branches of power, actually taking away the competence of the executive power when it declares that the statutory provisions are contrary to the Fundamental Law. Implementing the Acts is the duty of the Government (as well), and here the Act simply authorises the Government to issue a decree on specifying the details of certain provisions of the AWM. However, even before the Government had an opportunity to adopt this decree, the majority decision deprived it of the chance to implement the Act. This way, on the one hand, the decision interfered with the division of competences between the branches of power, and on the other hand, it declared that an Act of Parliament was contrary to the Fundamental Law before examining the entirety of the regulations. One should not exclude the possibility that the subsequent regulation to be presented in the government decree could have been more effective than the previous one in terms of protecting the environment, the water reserve. We should have been granted the opportunity to know the government decree in order to be in a position to assess which option would serve the best the purpose of protecting our waters: a single licensing procedure, or, for example, a new regular control mechanism where the quality and the quantity of water would be subject to periodically recurring mandatory tests.

[116] To sum up: it is my consistent position represented during the adoption of other decisions as well that the judicial branch of power should not drag away the legislator's competence – not even on the basis of *bona fide* assumptions. Although the Constitutional Court is not part of the judicial branch of power, a procedure contrary to the above principle would be incompatible, even in the case of the Constitutional Court, with the requirement of the separation powers declared in Article C) (1) of the Fundamental Law.

Budapest, 28 August 2018.

Dr. Tamás Sulyok,
President of the Constitutional Court
on behalf of *dr. Imre Juhász*
Justice of the Constitutional Court,
unable to sign

Dissenting opinion by Justice *Dr. Béla Pokol*

[117] I do not support the holdings of the decision declaring the conflict with the Fundamental Law; I only could have voted for rejection.

[118] 1. The petition – and on that basis, the majority decision – challenged two sections of the amended legislation not because of its content, but due to reporting about the future regulatory changes foreseen in its reasoning. (According to this reasoning, it is planned to allow by the law in certain cases to bore wells with a maximum depth of 80 meters to meet household demands, with advance permissions and with only an ex-post reporting obligation.) However, this provision and its details would be the subject of a planned future government decree, therefore, a question in principle may arise: is it possible to annul, because of the subsequent regulatory plans mentioned in the reasoning, a statutory regulation that does not contain the relevant regulation? In my view, it is not possible, and – with regard to the enhanced importance of the reasoning of the legislation as laid down in the latest amendment of the Fundamental Law – the maximum we can do in such a case is prescribing a constitutional framework to indicate the limitations set by the Fundamental Law with respect to the implementation of such plans. For example, in the present case, we could have referred to the water management expert opinion of the Hungarian Academy of Sciences, by stating that increasing the former threshold of 50 meters by the planned government decree may raise concerns in the field of the protection of a healthy environment, and, subject to an appropriate future petition, the Constitutional Court might be able to annul this regulation.

[119] 2. However, a question may arise about the alleviations under the planned future government decree: shall it eliminate the obligations of licensing and advance reporting regarding sub-surface waters, or shall it transform the obligation into one of ex-post reporting? The reason for posing this question is the following: while the provision of the Act – Section 1 – quoted and challenged by the petition makes it clear that the exemption from permission and advance reporting shall not be applicable performing water works, the construction and the transformation of water projects etc., the petition interprets this as follows: "allowing to carry out on the basis

of the law (even) without a permit the water rights activities that formerly required reporting or permission, including the performance of water-works, the establishment, transformation, putting into service, operation and termination of water projects and water usage" (petition, point 3). I hold this to be an unsubstantiated statement – with the exaggerated interpretation of certain parts of the reasoning –, and it should not have been used as a basis for establishing an environmental danger that leads to establishing a conflict with the Fundamental Law.

[120] 3. Consequently, if we examine the challenged Section 1 of the legislative amendment in its real scope of effect – rather than in the falsely extended scope of action – it is about eliminating the licensing obligation and possibly replacing it with an ex-post reporting obligation only with regard to meeting the household water demands of land owners. It shall, however, raise the question whether or not the undifferentiated licensing obligation that has been applicable to using the groundwater under the lands of all land owners since 1960, but systematically from 1992, was compatible with the constitutional foundations of property. This problem was not taken into account at all in the early 90's by the justices of the Constitutional Court, who adopted in this topic the decisions still applied – although the power adopting the constitutional regulations attempted in the Fourth Amendment of the Fundamental Law, without success, to annul such decisions –, and they completely neglected the problems related to the fundamental rights in connection with the direct restrictions imposed by certain aspects of environmental protection on using one's property. Actually – according to the water management surveys we also received – 90% of the hundreds of thousands of wells made subject to an obligation of licensing in principle, but established without permit and without reporting are used by small-scale owners to meet the irrigation demands of their household gardens, and the really problematic illegal well-borings for agricultural purposes only form a minority. Despite of the above, no differentiation can be found in the environmental documents – and neither can it be found in the decisions of the Constitutional Court –, as only the protection of the environment is presented as a constitutional value and a fundamental right. Nevertheless, if we remedy now the lack of this differentiation and include in the review the aspects of the small holders' constitutional right of ownership – to correct the one-sidedness of our predecessor justices of the Constitutional Court – then we can see that indeed the present regulation shall implement the inclusion of the fundamental rights of the land owners and eliminate the former restriction on the use of their land with regard to using the groundwater under their land. Of course, the planned future government decree should secure a balance between this fundamental right and the interest in preserving healthy stocks of water, and here we should again mention the introducing in the reasoning of a constitutional requirement about the potential

conflict between the Fundamental Law and allowing the establishment without permission of wells with a maximum depth of 80 meters.

[121] 4. Leaving out in the past the constitutional right of ownership from the questions discussed here may also raise a problem about arguing with the principle of "non-derogation" widely used by environmentalists and also referred to several times in the majority decision (see in particular in the decision's reasoning [16]–[21]). As the last sentence of Article I (3) of the Fundamental Law provides for the possibility of restriction, with respect to all fundamental rights, by another fundamental right or a constitutional interest, it has been dissonant to hear also in the past years about the unrestrictability of the right to a healthy environment, formulated as non-derogation. Why should this right be assessed differently from all the other equally very important fundamental rights and constitutional values? At least from the entry into force in 2012 of the Fundamental Law, this approach should not be tolerated any more, and not a single fundamental right should be exempted from a comparative assessment with another fundamental right. However, if we examine with scrutiny the decision of the Constitutional Court used as a basis of this problematic thesis, we shall see that the original decision had not declared the prohibition of step-back (non-derogation) in this form, and the relevant form has only been attributed to it in the course of the subsequent fights in the media. In the section indicated, the reasoning quotes the complete relevant text of the Decision 28/1994 (V. 20.) AB, and it is obvious from the text that it did not state the prohibition of step-back in this field, as it only provided for the possibility of restriction, subject to an assessment of comparison with another fundamental right and constitutional value: "the State must not reduce the degree of protection of nature as guaranteed under law, unless it is necessary to do so in order to enforce another constitutional right or value" (Reasoning [16]–[21]). Later on, in the public debates, the "unless" part has been left out, and the absolute prohibition of "non-derogation" has been solidified as an "eternal truth". Subsequently, the Constitutional Court's decisions also started to use it in this way, as if it had been originally laid down. The same can be observed now in further parts of the majority decision's reasoning, and it qualifies as a breach of Article I (3) of the Fundamental Law, which provides for a mandatory assessment in the case of each fundamental right, not allowing to state unrestrictability, the prohibition of step-back, with regard to any of them.

[122] Therefore, on the whole, I cannot support declaring that the sections of the Act challenged by the petition are contrary to the Fundamental Law, and I hold that the concerns raised in the petition with regard to the government decree-level regulation to be issued in the future could have been remedied by placing a constitutional warning in the reasoning of the decision. In this respect, I also prosed in the course of the debate a draft that unfortunately has not gained majority support: "The Constitutional Court notes in the context of the future regulatory purposes

mentioned in the reasoning of the challenged sections of the Act that the protection of healthy stocks of water as a part of the right to a healthy environment may raise concerns of a conflict with the Fundamental Law in the case of the subsequent regulation issued on the basis of this Act would allow boring wells without permission for business purposes exceeding the fulfilment of the land owners' household water-demands. Similarly, according to the expert opinion of the Hungarian Academy of Sciences, boring wells without permission to the depth of 80 meters, as foreseen in the reasoning of the Act, would jeopardise the national stock of drinking water, therefore, on the basis of an eligible person's petition, a future regulation of such content would be annulled by the Constitutional Court due to being contrary to the Fundamental Law. In my opinion, such a warning could have provided the regulators of the future with a substantial guidance about the limitations within which the planned liberalisation can take place, by providing an opportunity for appropriately differentiating between the wells of land owners used for meeting household demands and water uses for agricultural purposes.

Budapest, 28 August 2018.

Dr. Béla Pokol
Justice of the Constitutional Court

[123] I second the above dissenting opinion.

Budapest, 28 August 2018.

Dr. Mária Szívós
Justice of the Constitutional Court

[124] I second the above dissenting opinion.

Budapest, 28 August 2018.

Dr. András Varga Zs.
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. Mária Szívós*

[125] Based on my powers granted in Section 66 (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), I attach the following dissenting opinion to the decision.

[126] 1. I share the views expressed in the dissenting opinions by Justices *dr. András Varga Zs.* and *dr. Béla Pokol*, as I also hold that without being aware of the rules of the future government decree, we can't reach a well-founded conclusion about the challenged provisions of the law causing a conflict with the Fundamental Law.

[127] 2. According to the essence of the decision's reasoning, the challenged provisions breach Article P) (1) and Article XXI (1) of the Fundamental Law, as due to their entry into force, the level of protecting the environment "as guaranteed under law" would be reduced. In my opinion, the decision failed to adequately determine the level of protection achieved, as it examined the question only from formal aspects, i.e. it is based on the normative text of the legal provisions presented in details in the decision. Nevertheless, it is obvious in the context under review that actually the level of protection presently enforced in practice – as the "living law" – is far from the content of the laws. By examining the issue in details, it is beyond doubt that – in line with the concerns that have been expressed by the professional organisations for a long time – the cause of the problem is indeed the fact that as much as 90% of the relevant wells have been established illegally, i.e. their establishment is not preceded by licensing procedure and the authorities in charge of providing supervision have no information about these wells. This is because the State has failed, for a long time, to enforce (through the competent organs) the level of protection ensured – in principle – by the laws. It is important to underline that it's not about some isolated omissions by the authorities, as the authorities (and the citizens) tendentiously and openly neglect the provisions of the law in the whole territory of the country. Accordingly, the presently (actually) enforced level of protection is very low.

[128] Therefore, I hold that – also with account to the absence of the detailed rules to be laid down in the government decree mentioned above – it is not possible to state with constitutional certainty that the challenged regulations reduce the level of protection achieved.

[129] Based on all the above, I could have supported the rejection of the petition.

Budapest, 28 August 2018.

Dr. Mária Szívós
Justice of the Constitutional Court

[130] I second the above dissenting opinion.

Budapest, 28 August 2018.

Dr. András Varga Zs.
Justice of the Constitutional Court

Dissenting opinion by Justice *Dr. András Varga Zs.*

[131] 1. The petition of the President of the Republic fully complies with the requirements applicable to cases of preliminary review, and as far as its content is concerned, it is based on the interpretation developed in the case law of the Constitutional Court. In accordance with Section 39 (1) of the ACC, past decisions are binding upon everyone, including the President of the Republic, as long as the Constitutional Court passes a decision different from the previous one. The subject matter of the petition, the statutory amendment of the substantive rules of administrative law affecting the drinking water reserve of Hungary is clearly a constitutional question of primary importance. The majority decision is also based on the case law of the Constitutional Court by repeating it, and – by raising the precautionary principle to the level of a constitutional criterion – by expanding it further. Therefore, it the relevant practice is right and sustainable, the only possible decision of the Constitutional Court was to entertain the petition and to state that the Act adopted is contrary to the Fundamental Law. At best, just a few elements of the decision would remain debatable: the application of the Constitution as a basis of reference standing behind/above the Fundamental Law, or the "melting out" of the precautionary principle from the text of the Fundamental Law.

[132] 2. With regard to the two partial questions – independently from the holdings of the decision –, I hold it important to note the following.
a) The Fundamental Law is not the revision or the further development of the provisional Constitution. The Fundamental Law is Hungary's new and independent constitution adopted in 2011 and entered into force in 2012. Therefore, I hold it indispensable for the Constitutional Court to act in accordance with its duty laid down in Article 24 (1) of the Fundamental Law, by applying points 5 and 26 of the Closing and miscellaneous provisions. Accordingly, the practice of carrying out the reasoning of our decisions adopted on the basis of the Fundamental Law by referring

to the Constitution and the decisions of the Constitutional Court interpreting the text of the Constitution must be ended. Petitions should be assessed on the basis of the Fundamental Law and nothing else but the Fundamental Law.

b) Based on the above, the consequences of the Fourth Amendment of the Fundamental Law should be applied consistently:

– as a general rule, a decision of the Constitutional Court adopted before 1 January 2012 shall not be referred to,

– if the Constitutional Court exceptionally considers that one of its earlier decisions is necessary, then it should reinforce that decision,

– the reinforcement should not be limited to the sameness of the texts [as done in the decision by using the Decision 3068/2013. (III. 14.) AB], as it should also take into account the mandatory rules of interpretation laid down in Article R), and the compliance with those rules should be supported,

– if a former decision had been reinforced by the Constitutional Court, then it should not be referred to any more, and the new reference shall be made to the reinforcing decision.

c) If, with the application of the above, making a reference to an earlier decision of the Constitutional Court is still necessary, then it should be carried out in the framework of presenting the historical background of the regulations applicable to the case.

[133] 3. Although it may seem to be a marginal question, but in fact the "melting out" of the precautionary principle from the text of the Fundamental Law leads to the merits of the decision. The technique is similar to the one applied with respect to the prohibition of "reducing the level of protection". It is my position in principle that the Constitutional Court should refrain from using such technique. This is, in fact, providing an addition to the Fundamental Law under the camouflage of interpreting the text of the Fundamental Law. It is indeed a role reserved for the power adopting the constitution, and the Constitutional Court is not empowered to take part in it.

[134] Undoubtedly, the text of the Fundamental Law – just as any norm – shall require interpreting. In the course of interpreting, it is the duty of the Constitutional Court to declare what is the meaning of the text in general and in a particular situation. The interpretation, as a text, is necessarily longer than the text of the Fundamental Law. Therefore, it should be applied in a restrictive manner in order to extend the original normative text to the least possible extent. Consequently, the interpretation should only contain a new textual element (range of interpretation, principle), which is connected so closely to a right granted in the Fundamental Law or to another rule that the text would not be enforced without that.

[135] Replacing the text of the Fundamental Law with a new principle is absolutely unacceptable. This is why it is necessary to re-examine in each case whether an earlier

decision and the underlying interpretation is still applicable or not. In other words: we should return to the text of the Fundamental Law in each case, as a starting point, and interpretations by the Constitutional Court provided in other cases are not automatically applicable. (Some procedural criteria shall form exceptions in the interest of granting equality before the law.) If an interpretation formed in another case proves to be applicable, this should be declared formally in the reasoning.

[136] Finally, in the course of interpreting any provision of the Fundamental Law, we should take into account that the Fundamental Law, as the foundation of the legal system, is not a technical (specialised) law. It should be enforced in its entirety and not only by way of its specific rules referred to in a particular petition. Therefore, in the course of interpreting the relevant rule, care should be taken for not emptying out another rule as a result of the interpretation. No fundamental right can be protected by way of emptying out or rendering inapplicable another fundamental right or a rule of the Fundamental Law, or by depriving it from the quality of being the foundation of the legal order. Being bound to the petition should not lead to turn the Constitutional Court into a committed enforcer of a fundamental right or another rule. Thus the fundamental right or another rule referred to should be interpreted in the context of the entire Fundamental Law. This is indeed the guarantee of the Constitutional Court protecting the Fundamental Law as the foundation of the legal system. In the present case, the abstract right to a healthy environment should have been compared to the right to drinking water as a part of the right to life of the people living presently. Although the Constitutional Court has not yet declared the right of access to drinking water to be a fundamental right, but there is no life without drinking water. As not everyone has access to the drinking water network, the only possible source of water for them is an own well. In such a case, making the access to drinking water subject to a permission would obviously be unconstitutional.

[137] 4. The above arguments result from the principle of the separation of powers enshrined in Article C) (1) of the Fundamental Law. This principle is the foundation for judicial independence (including the independence of the Constitutional Court as well) that guarantees the ability to adopt final (i.e. indisputable in the future) decisions, the freedom of the legislature to adopt the constitution and – within the limits set by the Fundamental Law – the laws, as well as its exemption from responsibility, and it is also the basis for the Government's authorisation to act in the field of determining general and special policy directions and to implement them. It is also the basis of the presumption of the laws being constitutional.

[138] The question – in general and also in the current case – is the following: what is the standard (or criterion) that can overturn the presumption about the constitutionality of a law. Is it a certain injury of one of the Constitutional Court's provisions that takes place logically, on the basis of our knowledge of the reality, or is it a certain degree of probability of such an injury, or the mere possibility of the injury. I hold that the

presumption of constitutionality is always turned over by the injury of a provision that has taken place (in case of a constitutional complaint) or that is to take place assuredly (in case of other norm controls). However, the sheer possibility of an injury shall not overturn the presumption. (It is a forcing logical necessity: each regulation can be injured or not enforced consistently; in a case to the contrary, no punitive law would be necessary.) The probability of the injury should obviously be subject to an assessment, as we can't set a general rule about the degree of probability that already overturns the presumption; it needs to be determined individually in each case.

[139] 5. By applying the above to the current case, I share the position taken by Justice *dr. Béla Pokol*. Section 1 and Section 4 of the AWM does not result in any concrete injury of the Fundamental Law, not even due to the fact that the reasoning makes a reference to the intentions of the legislator. Indeed, the legislator's intention, in itself, does not make a law being contrary to the Fundamental Law, and the Constitutional Court possesses tools to secure that a law shall not violate the Constitutional Court even in spite of the intention that the legislator may have.

a) Section 1 of the AWM does not specify the scope of "activities that can be carried out without permission on the basis of the law", and Section 4 authorises the Government to determine it. Therefore, no activity endangering the water reserve, and this way Article P), can be carried out directly on the basis of the AWM. Consequently, for this reason, the AWM is not contrary to the Fundamental Law.

b) The failure to carry out an impact assessment, the lack of professional arguments and the violation of other rules of the Act on Legislation do not, *per se*, cause a conflict with the Fundamental Law. For the above, the Government that prepared the draft legislation shall bear a political responsibility the same way as for any unforeseeable consequences of it during the implementation that might be avoided in case of obeying the provisions of the Act. This political responsibility should not be assumed by the Constitutional Court.

c) Article P) (1) of the Fundamental Law does not require the adoption of detailed statutory regulations, but – as referred to in the position taken by the minster of the interior – the AWM does not even provide the Government with an authorisation to adopt the decree in its free discretion. Section 2 of the AWM describes the duties of the State, its Section 29 (1) contains exact conditions. If the Constitutional Court "does not believe" these, how could or should it believe other rules?

d) Undoubtedly, the government decree according to Section 4 of the AWM shall only be adopted in the future, but this is not contrary to the Fundamental Law (there is no rule in the Fundamental Law requiring the issuing of the implementing decree of an Act of Parliament not yet promulgated), and neither is it against the law, as according to Section 7 (6) of the Act on Legislation, it is possible to issue it at a later date.

e) Holding the general licensing obligation laid down in the statutory provisions in force as the exclusive guarantee, in itself, of the level of protection is unfounded. On the one hand, licensing does not mean a secure and unbreakable practical guarantee for the protection of the water reserve, or at least, this guarantee is not inevitably stronger than the reporting obligation. In this respect, I share the position taken by Justice *dr. Mária Szívós*. On the other hand, procedural rules, such as a suspended decision may lead to the same result as the adopted Act of Parliament challenged in the majority decision: one may not exclude that the authority shall pass a favourable decision with regard to all applications for water project permits. Thirdly, carrying out the authorities' procedures shall form the competence of the public administration organs operating in subordination to the Government. It would be unreasonable to assume that the Government would act less cautiously in the course of adopting a decree than during instructing the public administration.

f) Thus Section 1 and Section 4 of the AWM cannot be held to be contrary to the Fundamental Law under any consideration. If, however, the Constitutional Court holds that the probability of injuring the water reserve, and thus violating Article P), is so high that the existing rules of substantive law of the AWM do not form an appropriate counterweight against it (as actually supported by the majority decision), then it could have laid down in the reasoning of its decision regulatory requirements related to Section 4 of the AWM. In other words: if, according to the Constitutional Court, maintaining the obligation of advance reporting allowing for an intervention by the State is necessary in a certain scope of cases, just as the maintaining of the licensing system in other cases, then the Constitutional Court could have stated it also along with rejecting the petition. Should the future government decree differ from this requirement, the Constitutional Court shall then be in a position to annul it. Such a solution could also have increased the actual level of protection. This way, the Constitutional Court could also have reinforced the well-foundedness of the petition of the President of the Republic, as the President can only request the declaration of an incompatibility with the Fundamental Law; he is not entitled to initiate the prescription of a regulatory requirement.

[140] 6. On the whole, in my view, the rejection of the petition and prescribing a regulatory requirement about the government decree to be adopted could have been deductible from the Fundamental Law. I hold that the solution applied by the majority decision does not follow from the Fundamental Law.

Budapest, 28 August 2018.

Dr. András Varga Zs.
Justice of the Constitutional Court

[141] I second the above dissenting opinion.

Budapest, 28 August 2018.

Dr. Béla Pokol
Justice of the Constitutional Court

[142] I second the above dissenting opinion.

Budapest, 28 August 2018.

Dr. Mária Szívós
Justice of the Constitutional Court

Constitutional Court file number: I/1216/2018.