

Decision 3328/2022 (VII. 21.) AB
on the annulment of a judicial decision

The panel of the Constitutional Court, in the subject-matter of a constitutional complaint – with the concurrent reasoning of the Justices *dr. László Salamon* and *dr. Marcel Szabó*, and the dissenting opinion of Justice *dr. Egon Dienes-Oehm* – has adopted following

decision:

1. The Constitutional Court establishes that the judgement No. 5.K.700.188/2020/9 of the Pécs Regional Court is in conflict with the Fundamental Law and therefore annuls it.
2. The Constitutional Court dismissed the constitutional complaint aimed at establishing that Section 43 (2) of the Act LXXVIII of 2017 on the Professional Activities of Attorneys-at-law is in conflict with the Fundamental Law and at its annulment.

Reasoning

I

[1] 1 In the constitutional complaint filed by his legal representative (Dr. István Marján, attorney-at-law), the petitioner requested, on the basis of Section 27 of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), primarily the declaration that the judgement No. 5.K.700.188/2020/9 of the Pécs Regional Court and, secondly, section 43 (2) of the Act n. LXXVIII of 2017 on the Professional Activities of Attorneys-at-law (hereinafter: APAAL) was in conflict with the Fundamental Law and its annulment.

[2] As a background to the case, the petitioner submitted that he had made a legal declaration of acceptance by exercising his right of pre-emption in respect of the agricultural land property used by him under a contract for usufructuary lease. In connection with the sales contract, two other people made declarations of acceptance under different legal titles. The local land commission supported the approval of the sales contract for all three declarants. In the official procedure, the Government Office found that the petitioner's declaration of acceptance would, on the basis of the title claimed by the petitioner, rank ahead of the purchase option right of the other two

declarants, but did not take the petitioner's declaration into account due to a formal error, as the Bar Association identification number (hereinafter: KASZ) of the countersigning attorney-at-law was included only in the deed but not in the attorney-at-law's countersignature itself. The decision states that pursuant to section 21 (9) of Act CXXII of 2013 on the Trade of Agricultural and Forestry Land (hereinafter: Land Trade Act), in view of the infringement of Section 21 (5) of the Land Trade Act, the plaintiff's legal declaration of acceptance shall be deemed to be as if it had not exercised its right of pre-emption. In view of this, the authority did not approve the sales contract with the petitioner, but with the declarant who was ranked after him.

[3] In its claim, the petitioner, as the plaintiff, sought the amendment of the decision, claiming that the authority had wrongly found that his declaration to exercise the right of pre-emption was defective in form. In his view, a statutory requirement that certain particulars on a document must be signed at the bottom, top or side of the page would not be in accordance with the requirements of common sense. The only requirement imposed by the law is that the particulars required for the formal validity of a document must be stated on the document and, if they are present, must be countersigned by the attorney-at-law. The purpose of the KASZ is to ensure that the proceeding attorney-at-law is identifiable in the Bar Register. The defendant had the opportunity to see the KASZ on the numbered first page of the deed and to ascertain its accuracy, and therefore, in the petitioner's view, there was no breach of section 21 (5) of the Land Trade Act and no basis for qualifying his legal declaration according to section 21 (9) of the Land Trade Act.

[4] The court dismissed the action in its judgement No. 5.K.700.188/2020/9. According to the judgement, the statement made by the plaintiff that the KASZ serves to identify the proceeding attorney-at-law was undoubtedly fulfilled in the case of the deed in question, but it is not relevant; and the plaintiff's argument that the APAAL does not prescribe where certain elements must appear on a page is not correct. In the view of the court, Section 43 (3) (d) of the APAAL contains, on the basis of a grammatical and logical interpretation of the text, a list, the elements of which are closely connected. According to the provisions of the APAAL, the KASZ is part, a mandatory element of the counter-signing. Both the wording of the Act and the function of the counter-signature itself suggest this. All the elements must, according to the wording of the Act, be contained in the same place, the counter-signature of the deed. On this basis, the court concluded in its judgement that the plaintiff's legal declaration of acceptance was defective in form, as correctly pleaded by the defendant and the interested party.

[5] The petitioner subsequently brought a constitutional complaint before the Constitutional Court.

[6] 2 The Constitutional Court called upon the petitioner to submit missing documents because his petition did not contain sufficient reasons from a constitutional point of view as to how and why the challenged judicial decision infringed the petitioner's right guaranteed by the Fundamental Law; it also informed him that, since he had also alleged in his petition that section 43 (2) (d) of the APAAL was in conflict with the Fundamental Law, his petition must also meet the conditions for an explicit request for this part, too.

[7] The petitioner supplemented its constitutional complaint in response to the notice on missing documents within the deadline.

[8] 3 In his constitutional complaint, the petitioner alleges a violation of his right to a fair trial on the grounds that, in his view, the authority and the court interpreted the rules on the countersignature of attorneys-at-law in a manner contrary to Articles XXIV (1) and XXVIII (1) of the Fundamental Law, read in conjunction with Article B (1) and Article 28 of the Fundamental Law, which led to a violation of his right to property protected by Article XIII of the Fundamental Law.

[9] The applicant submits that the contested judgement infringes his right to acquire property guaranteed by the Land Trade Act; the decision of the Government Office and the judgement of the court reviewing it also infringe his right to a fair hearing by applying the provision of the APAAL cited, which is contrary to the Fundamental Law. According to the petitioner, the defendant erroneously interpreted the form of the deed, drafted and countersigned by an attorney-at-law, which he had made in order to exercise the right of pre-emption, and the relevant legal provisions in this connection, in a manner that departed from the rules of grammar and bypassed the requirement of the application of common sense, thereby also violating the will of the law-maker. The petitioner is confident that "a statutory requirement that certain particulars on a document must be signed at the bottom, top or side of the page would not be in accordance with the requirements of common sense. The only requirement imposed by the above statutory provisions is that the particulars required for the formal validity of a document must be stated on the document and, if they are present, must be countersigned by the attorney-at-law."

[10] If this is not apparent from the wording of the Act, the statutory provision is, in his view, contrary to the Fundamental Law. The defendant's decision caused him significant damage of interests, as it prevented him from exercising his statutory right of pre-emption, which would have resulted in the acquisition of ownership. The petitioner describes, on the basis of several decisions of the Constitutional Court cited by him, the role of the right to property in the system of fundamental rights, to provide the subjects of fundamental rights with property rights and thus to enable them to freely shape their situations of life. Considering that the contested judgement, by applying

the above mentioned provision of the APAAL, "reduced" beyond doubt his right of "acquiring property" guaranteed by the Land Trade Act, the petitioner concluded that the contested judgement thus restricted in a manner contrary to the Fundamental Law his fundamental right to property enshrined in Article XIII (1) of the Fundamental Law. The petitioner also argued that the right to a fair procedure had been infringed on the ground that the defendant had applied Section 43 (2) of the APAAL "in a manner lacking any constitutional basis" by treating his declaration as if it had not been made, on the ground of a formal error, and that the court had upheld this procedure which was contrary to the Fundamental Law.

[11] 4 Based on section 57 (2) of the ACC, the Constitutional Court called upon the Minister of Justice to make a statement in order to communicate its position on the purpose of the statutory provision contained in Section 43 (2) (d) of the APAAL, and the President of the Hungarian Bar Association (hereinafter: MÜK) concerning the interpretation of the provision as generally applied in the practice of attorneys-at-law.

[12] In its reply to the request, the President of the MÜK pointed out that the issue is dealt with in detail in the publication entitled "Information on good practice in the countersigning by attorneys-at-law" placed on the MÜK's website and in the commentary to the APAAL. Both documents consider it a good solution – for recommendation purposes only – if the countersignature itself contains the attorney-at-law's Bar Association identification number. However, in his view, a less good solution is also acceptable in addition to the good solution, since the purpose and function of the provision is to ensure – in order to guarantee the security of trade and the enforcement will of the declarant – that it is clear from document itself who made the countersignature, when and where. In the event that the deed contains these elements in such a way that the above circumstances are clear from the instrument itself (without further proof), the attorney-at-law is considered to have validly countersigned the document, irrespective of where these elements are found in the document.

[13] According to the reply of the Minister of Justice, neither the APAAL nor any other legislation provides for the specific place and wording of the countersignature to appear on the instrument, therefore the mere fact that the KASZ is not placed within the separate countersignature section of the instrument does not render the countersignature invalid, provided that the KASZ indicated in the instrument is clearly linked to the person of the attorney-at-law who countersigned the deed and at the same time to the act of countersignature by the attorney-at-law. In its view, the use of the word "along with" in Section 43(2)(d) of the APAAL should not be taken as a definition of place, since it refers to temporal concurrence. The formal requirements listed must appear in the same document, but not necessarily side by side. According to the Minister, the legislative objective pursued by the formal requirements in the

APAAL for countersigning by an attorney-at-law is to identify the person of the countersigning party beyond doubt. Clause 6.6.1 of the MÜK Regulation No. 5/2017 (XI. 20.) on the detailed rules for the use of the name of attorneys-at-law states that the attorney-at-law's Bar Association identification number must also be indicated on the cliché of the dry stamp. Pursuant to the APAAL, the countersigning attorney-at-law must affix his/her dry stamp on the signature side of the paper document, and the electronic document must be provided with his/her electronic signature and time stamp in accordance with the requirements of section 18 (1), which shall form part of the countersignature. Pursuant to section 18 (1) (a) of the APAAL, the trust service provider shall indicate in the attestation or the attached certificate of role, which belongs to the electronic signature that the signatory is a member of the Bar Association or is registered with the Bar Association, therefore that signature certificates issued after 1 January 2018 include the KASZ. In view of the above, the obligation to indicate the KASZ may be fulfilled either by using a dry stamp, any other stamp impression used by the attorney-at-law for this purpose or the signature certificate.

II

[14] 1 The provisions of the Fundamental Law referred to in the petition:

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

"Article 28 In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for or for amending the law. In the interpretation of the Fundamental Law and of the laws one should assume that they serve a moral and economic purpose, which is in line with common sense and the public good."

"Article XIII (1) Everyone shall have the right to property and inheritance." Property shall entail social responsibility."

"Article XXIV (1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act."

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

[15] 2 The provision of the APAAL challenged by the petitioner is as follows:

“Section 43 (2) The countersigned document, unless otherwise provided by law –

[...]

d) shall be signed by the countersigning attorney-at-law along with indicating his or her name, the Bar Association identification number, the fact of the countersignature and the place and date of the countersignature.”

III

[16] 1 In accordance with section 56 (1) of the ACC, the Constitutional Court shall decide on the admissibility of a constitutional complaint in a panel sitting as defined in its Rules of Procedure, and pursuant to section 56 (2), the panel entitled to decide on admissibility shall examine the statutory substantive conditions for the admissibility of a constitutional complaint, in particular the affectedness, the exhaustion of legal remedies pursuant to sections 26 to 27 and the conditions pursuant to sections 29 to 31.

[17] Pursuant to section 29 of the ACC, a constitutional complaint may be admissible in the case of the infringement of the Fundamental Law which substantially affects a judicial decision, or a question of fundamental constitutional significance.

[18] 2 In its examination of the petition, the Constitutional Court found that the petitioner had filed his constitutional complaint within the statutory time limit; he was a plaintiff in the court proceedings and therefore qualified as a person concerned; he also invokes a violation of his rights guaranteed by the Fundamental Law; the violation occurred against him as a result of a decision – judgement – on the merits of the case; and he had already exhausted his ordinary remedies, there is no room for appeal against the contested judgement [section 27 (1) and (2), section 30 (1) of the ACC]. The petition specifies section 27 of the ACC, which establishes the competence of the Constitutional Court to rule on the petition and provides ground for the petitioner's entitlement; it details the grounds for initiating proceedings before the Constitutional Court and – with regard to the right to property and the right to a fair trial – outlines what it considers to be the essence of the violation of the right guaranteed by the Fundamental Law; it specifies the judicial decision to be reviewed and the provision of the APAAL held to raise concerns; it seeks the annulment of the former ones; and it indicates the provisions of the Fundamental Law alleged to have been infringed [section 52 (1b) (a) to (f) of the ACC]. The petition states the name and address of the petitioner; the petitioner has also declared that he consents to the disclosure of his

personal data; he has also sent to the Constitutional Court, as an annex, the documents referred to in the petition [section 52 (5) and (6) of the ACC].

[19] In the petition, the petitioner claimed a violation of his right to a fair trial due to the interpretation of section 43 (2) of the APAAL, which caused him significant damage of interests, i.e. that the court – despite the petitioner's express reference to the requirement of a legal interpretation in accordance with common sense and the purpose of the Act – considered it a formal error that the KASZ was not indicated next to the signature of the attorney-at-law, but in a different place on the document. Examination of the court's response to the petitioner's (plaintiff's) argument based on the requirement of common sense is of constitutional significance and, since it formed the essence of the petitioner's argument in the court proceedings concerning the formal requirements of the attorney-at-law's countersignature, it raises the possibility of an infringement of the Fundamental Law, which could have a material effect on the court's decision, in the context of Article XXVIII (1) of the Fundamental Law (section 29 of the ACC).

[20] In the light of the above, the Constitutional Court has admitted the constitutional complaint in order to examine the merits of the above issues relating to the right to a fair trial.

[21] 3 However, the Constitutional Court also found that the petition, even after sending the supplement in response to the Constitutional Court's request for missing documents, failed to contain any constitutionally relevant reasoning as to why the contested judicial decision is contrary to Article B and Article XXIV of the Fundamental Law. [Cf. section 52 (1b) (e) of the ACC].

[22] The Constitutional Court has not yet formally ruled on the conformity with the Fundamental Law of a challenged judicial decision and the provision of the law (cf. section 31 of the ACC), however, it has already dealt with the relationship between the right to property protected by Article XIII of the Fundamental Law and the right of pre-emption of agricultural land granted by the law-maker; in this context, in the Decision 3244/2017 (X. 10.) AB, it established that the beneficiary of the right of pre-emption is not an owner; in this context again, it also did not find the protection of fundamental rights justified in the Decision 3157/2020 (V. 21.) AB (cf. Reasoning [64]). In this respect, the constitutional complaint did not raise a constitutional issue to be examined in the context of the right to property.

[23] On the basis of the above, the merits of the elements of the petition relating to Article B, Article XIII and Article XXIV of the Fundamental Law could not be examined.

[24] 4 In connection with its petition for the annulment of Section 43 (2) (d) of the APAAL, the petitioner – in addition to challenging the judicial application of the

statutory provision as presented above – failed to provide any independent, constitutionally relevant reasons in its constitutional complaint supplemented following the Constitutional Court's call for the submission of missing documents as to why the provision is contrary to the articles of the Fundamental Law cited in the petition [cf. Section 52 (1b) (e) of the ACC.] Therefore, the Constitutional Court dismissed the petition challenging the statutory provision on the basis of Section 64 (c) and (d) of the ACC.

IV

[25] The petition is well-founded according to the following.

[26] 1 The Constitutional Court therefore examined on the merits, based on the admitted petition, whether the challenged court decision – which rejected the interpretation of section 43 (2) (d) of the APAAL, invoking the requirement of common sense and the requirement of interpretation of the law in accordance with the purpose of the Act – violates the right to a fair court trial guaranteed in Article XXVIII (1) of the Fundamental Law.

[27] 2 Before examining the substance of the petition, the Constitutional Court reviewed its previous case-law in relation to Article XXVIII (1) and Article 28 of the Fundamental Law, which is relevant to the present case

[28] The Constitutional Court recalls, first of all, its consistent case-law stating that a constitutional complaint, which allows for the constitutional review of judicial decisions (section 27 of the ACC), is a legal instrument for the enforcement of Article 28 of the Fundamental Law {Decision 3/2015 (II. 2.) AB, Reasoning [18]}, and in the course ruling on it, the duty of Constitutional Court is to facilitate the effective enforcement of fundamental rights recognised in the Fundamental Law. Consequently, it is also within the remit of the Constitutional Court to determine which judicial interpretation of a given piece of legislation meets certain requirements incorporated in the rights recognised by the Fundamental Law. In assessing the specific decision and the arguments put forward in the constitutional complaint challenging that decision, the Constitutional Court also takes into account the limits of its powers of investigation under Article 24 (2)(d) of the Fundamental Law {Decision 13/2014. (IV. 18.) AB, Reasoning [51], Decision 3285/2017. (XI. 14.) AB, Reasoning [38]}. Accordingly, the Constitutional Court refrains from taking a position on questions of interpreting an Act of Parliament and of specific fields of the law {Decision 7/2013 (III. 7.) AB, Reasoning [33], [38]}, as long as the interpretation of the law by the judiciary does not directly affect the exercisability and effective enforcement of a fundamental right. {Decision 13/2014. (IV.18.) AB, Reasoning [51]; reinforced in: Ruling 3208/2014. (II. 21.) AB,

Reasoning [16]]. Laws shall be interpreted by the courts, the Constitutional Court may only set the constitutional limits of the range of interpretation. This competence, however, may not establish a ground for the Constitutional Court to interfere with the courts' activities every time when an (allegedly) unlawful application of the law takes place that cannot be remedied by other means of legal remedy. Neither the abstract principle of the rule of law nor the fundamental right to a fair trial can provide a basis for the Constitutional Court to assume the role of a "super-court" above the judiciary and act as a traditional forum for legal remedies {Ruling 3352/2012. (XI. 12.) AB, Reasoning [14] to [15]}. The Constitutional Court also stresses that alleged or actual breaches of the law committed by ordinary courts cannot in themselves constitute grounds for a constitutional complaint {see: Ruling 3268/2012. (X. 4.) AB, Reasoning [28]; see most recently for example: Ruling 3379/2018. (XII. 5.) AB, Reasoning [12]}. In general, the Constitutional Court does not have the power to examine the correctness of legal grounds.

[29] The Constitutional Court, as stated above, when examining the infringement of the Fundamental Law, acts by taking into account the requirement of Article 28 of the Fundamental Law, which determines the judicial activity of the courts. According to this provision, in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for or for amending the law. In the interpretation of the Fundamental Law and of the laws one should assume that they serve a moral and economic purpose, which is in line with common sense and the public good. Therefore, according to the consistent case-law of the Constitutional Court, Article 28 of the Constitutional Court lays down as a constitutional requirement for the courts in the course of the application of law to interpret the laws primarily in accordance with the Fundamental Law. Based on this obligation, the courts should identify the fundamental rights' aspects of the relevant case within the limits of interpretation provided by the laws, and they should interpret the laws applied in the judicial decisions with due account to the constitutional content of the affected fundamental right {Decision 7/2013. (III. 1.) AB, hereinafter: CCDec, Reasoning [33]; Decision 28/2013. (X. 9.) AB, Reasoning [29]; Decision 3/2015. (II. 2.) AB, Reasoning [17]}.

[30] In accordance with the consistent case-law of the Constitutional Court {see Ruling 3237/2012 (IX. 28.) AB; Ruling 3309/2012 (XI. 12.) AB, Reasoning [5]}, it cannot examine whether the evidence and arguments stated in the reasoning are well-founded. The constitutional requirement of fair procedure, however, sets the minimum expectation for judicial decisions to have the participating parties' comments on the essential parts of the case examined with due scrutiny and to give account of evaluating it in the decision {Decision 7/2013. (III. 1.) AB, Reasoning [34]}. The right to a reasoned judicial

decision imposes an obligation on the proceeding court to state reasons on issues relevant to the merits of the case {Decision 3159/2018. (V. 16.) AB, Reasoning [31]}.

[31] 3 In examining the contested court decision, the Constitutional Court found the following in the light of the above-quoted case-law.

[32] The requirement laid down in Article 28 of the Fundamental Law that the wording of legislation must be interpreted in accordance with its purpose and that, in interpreting it, the purpose must be presumed to be in accordance with common sense and the public interest, lays down criteria to be followed by the courts in their interpretation of the law. However, the provision of the Fundamental Law does not confer a substantive right on the parties to the judicial proceedings and therefore cannot in itself give rise to a violation of a right guaranteed by the Fundamental Law.

[33] The Constitutional Court was also unable to establish a substantive connection between the qualification, according to the standard of common-sense, of the provision of the APAAL determining the necessary elements of countersigning by an attorney-at-law and the content of the right to a fair trial under Article XXVIII (1) of the Fundamental Law. Accordingly, in the present case, the Constitutional Court could not assess whether the interpretation adopted by the court with regard to section 43 (2) (d) of the APAAL was contrary to the Fundamental Law merely by reference to the conflict with common sense, in the absence of the verified affectedness of any other fundamental right. The Constitutional Court observes that if it did not do so, and if it were to examine on that basis alone any judicial interpretation of law which is allegedly or actually contrary to the requirement of common sense, it would be assuming the role of a "super-court" over the judicial organisation.

[34] However, the foregoing does not mean that the requirement of the interpretation of the law taking into account the legislative purpose – which is also in accordance with common sense – laid down in Article 28 of the Fundamental Law cannot be enforced in any respect in the framework of the Constitutional Court proceedings in the absence of the normative content of the given provision of the law being affected by a right guaranteed by the Fundamental Law. It follows from the right to a reasoned judicial decision, which is part of the right to a fair trial, that – in the light of the case-law of the Constitutional Court cited above and Article 28 of the Fundamental Law – it is to be expected that, where a party to legal proceedings puts forward arguments relating to the purpose of the legislation and its reasonableness in interpreting a provision of law relevant to the merits of the case, the court will examine them in due depth and give an assessment of that in its decision.

[35] In the court proceedings which are the basis of the present constitutional complaint, the petitioner, as plaintiff, in the context of the interpretation of Article 43 (2) (d) of the APAAL, expressly relied in his action on the purpose of the requirement

to indicate the KASZ – which is to allow the identification of the proceeding attorney-at-law – and on the requirement of common sense, namely that it would not be consistent with them if the formal validity of the document depended on the exact place where the information was indicated on the relevant document (this fact was also stated in paragraph [9] of the contested judgement).

[36] The Minister of Justice and the President of the MÜK, in their statements in response to the Constitutional Court's request, both took the same position as the petitioner, namely that the mere fact that the KASZ is not included in the counter-signature section of the deed does not render the counter-signature irregular; the use of the word "along with" in section 43 (2) (d) of the APAAL should not be taken as a requirement of location, since it refers to temporal concurrence; they also stated that the inclusion of the KASZ serves to identify the attorney-at-law.

[37] In its judgement (see paragraphs [29] to [31]), the court took the view, in relation to section 43 (2) (d) of the APAAL, that "on the basis of a grammatical and logical interpretation of the text", "all the elements must appear side by side on the instrument", since, in its view, "both the wording of the Act and the function of the countersignature itself suggest that this is the case", without, however, specifying the nature of the function of the countersignature. The court held that the plaintiff's claim that the KASZ serves to identify the proceeding attorney-at-law "was undoubtedly fulfilled in the case of the deed in question" but it was "not relevant". The judgement emphasised that, according to the statutory wording, all the elements under section 43 (2) (d) of the APAAL must be included in one place.

[38] On the basis of the above, the Constitutional Court held that the contested judgement

- established that an interpretation of section 43 (2) (d) of the APAAL, based solely on grammatical and logical grounds, was to be applied, in comparison with which an alternative – more permissible – interpretation could be formulated even by means of a grammatical method;
- considered, in the course of the interpretation it has chosen, that the petitioner's reference to the purpose of the requirement to indicate the KASZ was irrelevant;
- failed to give reasons for the above consideration, but at the same time it did not provide an alternative interpretation of the purpose (function) of the provision applied, and did not assess the petitioner's observations concerning common sense at all;

therefore, the Constitutional Court finally concluded that the contested judgement, without paying sufficient attention to the rule of interpretation of the law laid down in Article 28 of the Fundamental Law, did not satisfy the requirement of the right to a

reasoned decision, which is part of the right to a fair trial guaranteed by Article XXVIII (1) of the Fundamental Law, on a relevant issue of the merits of the case.

[39] 4 On the basis of the above, the Constitutional Court found that the judgement No. 5.K.700.188/2020/9 of the Pécs Regional Court is contrary to the Fundamental Law, and therefore annulled it pursuant to Section 43 (1) of the ACC as set out in the holdings of this decision.

Budapest, 28 June 2022.

Dr. Egon Dienes-Oehm head of the panel,
Justice of the Constitutional Court

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

Dr. Marcel Szabó, Justice of the
Constitutional Court

Dr. László Salamon, Justice of the
Constitutional Court

Dr. Egon Dienes-Oehm head of the
panel, Justice of the Constitutional
Court on behalf of rapporteur Justice
dr. Péter Szalay unable to sign

Concurring reasoning by Justice *dr. László Salamon*

[40] I uphold both clause 1 of the holdings of the decision, which includes the annulment of the contested judicial decision, and clause 2 of the decision, which dismisses the element of complaint under section 26 (1) of the ACC.

[41] However, I consider that the annulment of the judgement of the Pécs Regional Court is justified on different grounds and in view of the infringement of another right guaranteed by the Fundamental Law.

[42] 1 The decision holds that Article XXVIII (1) of the Fundamental Law has been infringed on the grounds of breach of the court's duty to state reasons (lack of reasoning). Although this is an argument which could undoubtedly justify a finding of a breach of the right to a fair trial, which in my view has a strictly procedural content, it is not, in my opinion, applicable to the present case. I myself agree with the approach taken in the judgement, essentially confirmed by the Minister and the President of the Bar Association, to the effect that the interpretation of the law seen in the contested judgement (and, I note, also in the underlying administrative proceedings), in the context of the purpose of the statutory provision concerning the obligation to include the KASZ on the document countersigned by the attorney-at-law and the effect of the

inclusion of the KASZ on the first page on the formal validity of the countersignature in the present case, is contrary to "common sense"; and that, as such, it is contrary to the rule of interpretation laid down in Article 28 of the Fundamental Law. However, it cannot be said, in my view, that the essential argument of the petitioner was not examined or considered by the court in the course of its proceedings or that its position on it was not set out in the reasons for its decision. In a procedural sense, the court has in fact fulfilled its obligation to state reasons: solely because the arguments set out in that reasoning are contrary to the rule of "common sense"; or because the contested decision, while recognising the identifiability of the proceeding attorney-at-law achieved in this way, nevertheless considered it "irrelevant" in the context of its decision, would allow the establishment of a violation of Article 28 alone and not of Article XXVIII (1). However, since the former provision cannot be the basis of a constitutional complaint, as the decision itself indicates, there can (should) be no annulment on that ground alone.

[43] 2 In my opinion, however, the petitioner invoked, in addition to Article XXVIII (1), another right enshrined in the Fundamental Law, which is indeed violated by the challenged judicial (and official) interpretation of the law; I supported the admission of the petition in view of this.

[44] That right enshrined in the Fundamental Law is none other than the petitioner's right to property. I do not agree that, as stated in clause III/3 of the reasoning of the decision (Reasoning [21] et seq.), the previous decisions of the Constitutional Court in the context of the right of pre-emption of agricultural land and the constitutional protection of property – two of which are referred to in the decision – would, in the context of the present case, preclude recognition of the protection of the petitioner's right to property as a fundamental right. It does not, in my view, follow directly from those decisions that an examination of the merits on the basis of the relevant context is precluded; the decisions cited did not deal with the same scope of issues as the present one [they examined, rather, the relationship between the legal provisions conferring the right of pre-emption and the right to property of the various parties to the legal relationships concerned (seller, buyer, beneficiary of the right of pre-emption), or whether there is any such relationship at all].

[45] The fact is that, as those decisions have held, (i) in general terms, Article XIII (1) is not infringed, either from the seller's or from the potential buyer's point of view, by the institution of the right of pre-emption itself; and (ii) no automatic right of first pre-emption can be derived from the right to property (it is a matter of legislative intention to grant such right). It is also a fact that (iii) the constitutional protection of the right to property essentially relates to property already acquired, but does not generally create a right to acquisition itself.

[46] However, in my opinion, the situation examined in the present case falls within the scope of the exceptions to the latter finding, and it is certainly different from the cases examined earlier in that the petitioner does not invoke his right to property against the State in connection with legislation. On the contrary, in this case, the petitioner was clearly entitled (and recognised by all, even by the authorities and the courts, in a position of precedence over the other pre-emption beneficiaries) to pre-emption and to the acquisition of ownership by means of pre-emption, in accordance with the relevant provisions of the law. On this basis, the sale and purchase agreement should in any event have been concluded with him from among of all the applicants, if he had properly exercised this right. However, the problem in his case arose precisely because an interpretation of the law by the authorities and the courts, which was subsequently considered by everyone, including the law-maker and the Constitutional Court, to be manifestly erroneous, deprived him of the ownership of the arable land to which he was automatically entitled by virtue of the law precisely by challenging the lawfulness of his exercise of this right, and indeed doing so by attributing to the applicable provision of the law a content which is contrary to the rules of "common sense" and the purpose of the law. In my opinion, if we accept the statements made in the decision concerning the manifestly erroneous interpretation of the law by the courts, contrary to "common sense" and thus also contrary to Article 28 of the Fundamental Law, they, as an interpretation of the law which led to delivering the contested judgement, may be regarded as a condition laid down in section 29 of the ACC (a conflict with the Fundamental Law which materially affects the judicial decision) exactly in relation to the right to property.

[47] As I myself am one of those who accept the arguments mentioned, I was able to support the annulment on this ground, i.e. establishing the applicability of Article XIII (1).

Budapest, 28 June 2022.

Dr. László Salamon,
Justice of the Constitutional Court

[48] I join the concurring reasoning.

Budapest, 28 June 2022.

Dr. Marcel Szabó,
Justice of the Constitutional Court

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

[49] I do not agree with the decision regarding the annulment of the court's decision.

[50] The primary reason for my position is that the petitioner did not allege in his constitutional complaint, nor did he indirectly challenge, the infringement of his right to a reasoned decision.

[51] Nor do I consider it justified for the Constitutional Court to depart in the present case from its established and consistently applied case-law, cited in the reasoning of its decision, with regard to the constitutional content of the right to a reasoned decision.

[52] In conclusion, I note that, in accordance with the general case-law of the Constitutional Court, even a possible *contra legem* interpretation of the law could not have raised a question of constitutionality in this case.

Budapest, 28 June 2022.

Dr. Egon Dienes-Oehm,
Justice of the Constitutional Court