# 2004/03/09 - PL. ÚS 38/02: FINE PROPERTY SITUATION

**HEADNOTE**

**The Constitutional Court does not understand equality to be absolute, but relative (and, moreover, an accessory in relation to other fundamental rights and freedoms). The concept of relative equality is closely related to the concept of commensurate interference in fundamental rights. It follows necessarily from the nature of a fine as a property-based penalty that if it is to be customized nad commensurate, it must reflect the punished party's property situation. A fine in the same amount imposed on a wealthy person will be laughable and ineffective, whereas in the case of punishing a non-wealthy person, it can be draconic and liquidatory. Thus, the principle of relative equality is not violated if two persons in various situations are given fines of different amounts, although the only difference in their situations may be different property situations. The criterion of examining the offender's property situation when considering the amount of a fine is necessary and complementary – of course, not because high fines would be unenforceable (as the Chamber of Deputies claims), but because of the risk of a "liquidatory" effect of a disproportionately high fine. Fines, as punishment, must be differentiated in order to function as a punishment and as a deterrent (individual and general prevention).**

**CZECH REPUBLIC**

**CONSTITUTIONAL COURT**

**JUDGMENT**

**IN THE NAME OF THE REPUBLIC**

The Plenum of the Constitutional Court, comprised of JUDr. František Duchoň, JUDr. Vojen Güttler, JUDr. Pavel Holländer, JUDr. Dagmar Lastovecká, JUDr. Jiří Malenovský, JUDr. Jiří Mucha, JUDr. Jan Musil, JUDr. Jiří Nykodým, JUDr. Pavel Rychetský, JUDr. Pavel Varvařovský and JUDr. Miloslav Výborný, ruled today on a petition from a group of deputies of the Chamber of Deputies of the Parliament of the Czech Republic seeking the annulment of the part of § 11 par. 3 of Act no. 129/2000 Coll., on Regions (Regional Establishment), as amended by of Act no. 273/2001 Coll., Act no. 320/2001 Coll., Act no. 450/2001 Coll. and Act no. 231/2002 Coll., which reads "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct," with the participation of the Chamber of Deputies and of the Senate of the Parliament of the Czech Republic, as follows:

**The petition is denied.**

**REASONING**

I.

A group of 41 deputies of the Chamber of Deputies of the Parliament of the Czech Republic (the "group of deputies" or the "petitioners") filed with the Constitutional Court a petition to annul the part of § 11 par. 3 of Act no. 129/2000 Coll., on Regions (Regional Establishment), as amended by Act no. 273/2001 Coll., Act no. 320/2001 Coll., Act no. 450/2001 Coll. and Act no. 231/2002 Coll. (the "Act on Regions" or the "Regional Establishment Act"), which reads "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct," on the grounds of inconsistency with Art. 1, Art. 3 par. 1, Art. 7 par. 1 and Art. 10 par. 2 and 3 of the Charter of Fundamental Rights and Freedoms (the "Charter"). The group of deputies believes that passing that provision of the Act on Regions created considerable interference in the constitutionally guaranteed equality of rights (Art. 1 of the Charter), the ban on discrimination (Art. 3 par. 1 of the Charter), the right to privacy (Art. 7 par. 1 of the Charter) and the right to protection of personality (Art. 10 par. 2 and 3 of the Charter).

The group of deputies claims that "the aspect of the proportionality of the amount of a fine to the property situation of the person who committed the unlawful conduct is not expressed in other norms of the legal order of the Czech Republic which govern administrative infractions." Therefore, it can not be permissible for the legal order to establish in this way an inequality between persons who commit unlawful conduct in various areas of public administration. Moreover, the intent of the legislature (or the sponsor of the legal framework) is not clear from the background report. The group of deputies also believes that even if this intent were to strengthen the effectiveness of an imposed penalty or an an effort to prevent excesses in discretion or arbitrariness by administrative bodies – with the help of a statutory statement of the decisive factors – this can not be done in an unconstitutional manner.

The group of deputies also points to the lack of clarity in the term "property situation," the examination of which by an administrative body it considers unacceptable primarily because this is impermissible interference in the private sphere of individuals. The "perpetrator's situation" is alleged to be relevant only for imposing a penalty in criminal law (see § 31 par. 1 of the Criminal Code), and is consistently interpreted to mean the personal and family situation, not the property situation. Moreover, in the opinion of the group of deputies, examination of the property situation is not related to the subject matter of the proceedings in which a penalty is imposed for unlawful conduct, so this amounts to unconstitutional gathering of data about the person who committed such conduct.

The group of deputies believes that sufficient protection against any possible harshness in the law which the contested legal framework is apparently intended to prevent, exists in the review of decisions to impose penalties through appeals (or, after 1 January 2003 by

judicial review of a decision in full jurisdiction); in contrast, the examination of "property situation" by the Region as imposed by the Act creates a basis for impermissible and unconstitutional unequal treatment of persons who commit the same unlawful conduct. In view of the fact that this could be a legal entity or a natural person, interpretation and application of the term "property situation" would necessarily be different (cf. a contrario judgment Pl. ÚS 47/95); this is the case, e.g., in cases deciding "on the situation of an applicant for exemption from court fees under § 138 of the CPC".

The group of deputies points out that under Art. 1 and Art. 3 par. 1 of the Charter the fundamental rights and freedoms are guaranteed to all people without differentiation, so even a statute may not disadvantage or give privileges to a group of persons in setting the amount of a fine for the same conduct. Such an action would be contra constitutionem, or inconsistent with the cited provisions of the Charter. The group of deputies again emphasizes that examination of one's property situation by an administrative body in connection with imposing a fine under Art. 7 par. 1 and Art. 10 par. 2 and 3 of the Charter would be unconstitutional interference in privacy and unauthorized gathering of data.

II.

The Constitutional Court requested opinions on the petition to annul the contested provision from the parties to the proceedings, the Chamber of Deputies and the Senate of the Parliament of the CR, as well a the bodies which issued the contested decision (§ 69 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court). These entities provided opinions on the petition.

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The Constitutional Court also requested, under § 48 par. 2 in conjunction with § 49 par. 1 of the Act on the Constitutional Court, an opinion from the Ministry of the Interior of the CR.

In its statement, the Ministry of the Interior of the CR (the "Ministry") pointed to the fact that the term "property situation" is explained in the commentary to § 54 of the Criminal Code (source ASPI). It states that this term appears fairly frequently in the legal order, especially – in addition to § 83 of the Act on the Constitutional Court – in Act no. 140/1961 Coll., the Criminal Code, as amended by later regulations (the "Criminal Code"). Under § 54 par. 1 of the Criminal Code, in assessing a monetary penalty, the court shall take into account the personal and property situation of the perpetrator in the elements of crimes established in § 129 or § 256c of the Criminal Code. This term also appears in Act no. 141/1961 Coll., on Criminal Court Procedure (the Criminal Procedure Code), as amended by later regulations (the "Criminal Procedure Code"), specifically in § 73a par. 2 let. a), in § 91 par. 1 and in § 309 par. 1, also in § 450 of Act no. 40/1964 Coll., the Civil Code, as amended by later regulations (the "CC"), and finally also in Art. 13 of the Convention on

International Access to Courts (announcement of the Ministry of Foreign Affairs no. 58/2001 of Collection of Intenational Treaties). Therefore, the Ministry concludes that if the fact that, under the law, the courts take the personal and property situation of the perpetrator into account when assessing monetary penalties was not found to be unconstitutional, then it should also not be considered unconstitutional if a region, under § 11 par. 3 of the Act on Regions, when setting the amount of a fine – which it can impose for violation of obligations set by the region's legal regulation, up to CZK 200,000 on a legal entity or natural person who is an entrepreneur – takes the property situation of the person who committed the unlawful conduct into account. The Ministry also pointed to the fact that the by setting criteria for the amount of a fine in § 11 par. 3 of the Act on Regions (one of them is expressed by the words "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct"), the Act provides a guarantee that these criteria are binding in imposing fines on all parties without differentiation, and thus when they are used there is no unequal treatment of persons who commit the same unlawful conduct.

Finally, the Ministry added that when the new wording of § 11 par. 3 of the government's draft act was being prepared, the Constitutional Court's opinions pronounced in connection with various adjudicated cases were taken into account, especially the opinions contained in Constitutional Court judgment no. 405/2002 Coll.; the aim was to rule out such interference in the property of the perpetrator of an infraction as a result of which his property base for further entrepreneurial activity would be "destroyed," and also to eliminate serious impact not only on the delinquent person but also on other members of his household. In this regard one can also cite the decision of the Plenum of the Constitutional Court file no. Pl. ÚS 47/95. The aim there was to prevent imposition of a fine at a "liquidatory" level, which would be basically the harshest instance of interference in a property situation. This could also result in violation of Art. 26 par. 1 of the Charter, as well as violation of the right to own property under Art. 11 par. 1 of the Charter and Art. 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, under which states may enforce such laws as they deem necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. It was also the intention to prevent violation of Art. 1 of the Charter, because imposing fines in a liquidatory amount would create a fundamental inequality between subjects of law in the social sphere (cf. Constitutional Court judgment no. 168/1995 Coll., or the decision of the Plenum of the Constitutional Court, file no. Pl. ÚS 3/02).

## III.

## Analysis of the Matter

In their petition, the petitioners seek the annulment of the part of § 11 par. 3 of the Act on Regions which reads "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct."

1. The Constitutional Court learned from the record of the 47th session of the Chamber of Deputies of the Parliament of the CR that on 26 March 2002 the draft of Act no. 231/2002 Coll., which amends and supplements the Act on Regions (the “draft of Act no. 231/2002 Coll.”), was approved by the necessary majority of deputies (94 deputies voted in favor, 65 deputies against). The Constitutional Court learned from the record of the 17th session of the third term of the Senate of the Parliament of the CR that on 10 May 2002 the amending proposal from Senate committees to delete the part of § 11 par. 3 of the Act on Regions which reads “as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct” was approved by the necessary majority of senators (55 senators voted in favor, none against). However, the motion to return the draft of Act no. 231/2002 Coll. to the Chamber of Deputies as amended by the amending proposals was not passed (out of 65 senators present, 20 were in favor, 4 against ). Under the Senate rules of order, the failure to pass a motion ended discussion of the draft of Act no. 231/2002 Coll., and in accordance with Art. 46 par. 3 and par. 1 of the Constitution of the CR the draft of Act no. 231/2002 Coll. was passed upon the expiration of thirty days (during which the Senate took no action). The draft of Act no. 231/2002 Coll. was then signed by constitutionally designated persons and duly promulgated in the Collection of Laws in part 87, distributed on 16 May 2002.

2. On the substantive side, the petitioners specifically allege (as is apparent from the petition) that the legal framework in the cited part of § 11 par. 3 of the Act on Regions creates an inequality in the legal order between persons who commit unlawful conduct in various areas of public administration, and that (even if this were to strengthen the effectiveness of the penalty imposed or protection against exceeding the bounds of the administrative body’s discretion) that this can not be done in an unconstitutional manner. Therefore, they believe that the contested part of that provision is inconsistent with the constitutional order of the CR, because its passage results in violation of the constitutionally guaranteed equality of rights (Art. 1 of the Charter), the ban on discrimination (Art. 3 par. 1 of the Charter), the right to privacy (Art. 7 par. 1 of the Charter and the right to protection of personality (Art. 10 par. 2 and 3 of the Charter).

A. The Constitutional Court considered first of all whether the part of § 11 par. 3 of the Act on Regions which reads “as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct” is inconsistent with Art. 1 and Art. 3 par. 1 of the Charter, on which the petitioners’ arguments rely.

a) The related provisions of § 11 par. 1 of the Act on Regions indicate that a region may impose a fine of up to CZK 200,000 if a legal entity, or a natural person who is an entrepreneur, violates an obligation (within the independent jurisdiction or the transferred jurisdiction of the region) that is imposed in a particular legal regulation (decree, directive) of the region.

The text which the group of deputies proposes to be annulled (i.e. the words “as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct”), is part of § 11 par. 3 of the Act on Regions,

which reads in its entirety: “In setting the amount of a fine under paragraph 1, the region shall take into account, in particular, the nature, gravity, length and consequences of the unlawful conduct, as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct.” This provision is tied to the abovementioned provision of § 11 par. 1 of the Act, which reads: “A region may impose a fine of up to CZK 200,000 to a legal entity or a natural person who is an entrepreneur (a “person”), if it violated an obligation imposed by a legal regulation of the region.” That provision is not contested.

b) Under Art. 1 of the Charter, people are free, have equal dignity, and enjoy equality of rights. Their fundamental rights and basic freedoms are inherent, inalienable, non-prescriptible, and not subject to repeal. Under Art. 3 par. 1 of the Charter, everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, color of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.

It is evident from the petition to annul the text in question that the petitioners point to, among other things, the incompatibility of applying the factor of one’s property situation to evaluating the proportionality of the amount of a fine with the guarantee of fundamental rights and freedoms under the cited provisions of Art. 1 and Art. 3 par. 1 of the Charter.

In the settled case law of the Constitutional Court, equality under Art. 1 of the Charter is not understood in the abstract, but in relation to the dignity and rights of an individual, that is, without privileges, and without discrimination (e.g. in property). This connection was pointed out by the Constitutional Court of the CSFR, which said that “the equality of citizens before the law was not understood as an abstract category, but was always ascribed to a particular legal norm, understood in the relationship between various entities, and so on. … Relative equality, as it is conceived by all modern constitutions, requires merely the removal of unjustified differences … Special norms may set special criteria of equality for certain fields, which do not follow from the general principle, because application of the principle of equality does not set such precise bounds as to rule out any discretion by those who apply them” (see judgment of the Constitutional Court of the CSFR Pl. ÚS 22/92 In: Collection of Decisions. Constitutional Court of the CSFR no. 1, year 1992, judgment no. 11, pp. 37-38).

The Constitutional Court concludes that in § 11 par. 3 of the Act on Regions the words “in particular” express the illustrative nature of the criteria which the region takes into account (must take into account) when setting the amount of a fine. The term “property” must be interpreted in conjunction with the words “in particular” and “as well as,” so the Act does not rule out the possibility of taking into account other aspects of the prosecuted person’s situation than solely his property situation. The Constitutional Court states that the wording chosen by the legislature is not the most suitable in grammatical terms, but that it can be, in accordance with the principle of minimizing interference by the Constitutional Court, integrated into the legal order by a constitutional interpretation of the contested norm. The fact that the legislature, in its illustrative list of criteria which the region must take into account when imposing fines, included objective criteria

(nature, gravity, length and consequences of the unlawful conduct) but only one subjective criterion (the offender's property situation) can not be understood as a ban which prevents the region from appropriately taking into account aspects other than property aspects of the prosecuted person's situation. In any case, the examination of one's property situation is established in the Czech legal order (similarly to the legal orders of other developed countries) in a number of contexts (not only as a criterion for the proportionality of an imposed penalty), and in the opinion of the Constitutional Court it can not be interpreted a limine as unconstitutional because it introduces inequality in dignity and rights.

Insofar as the petitioners claim that introducing the criterion of property situation into the decision making on the amount of a penalty creates possible discrimination based on property, i.e. violation of the principle of equality, this claim must be rejected. The Constitutional Court consistently rules that it does not understand equality to be absolute, but relative (and, moreover, an accessory in relation to other fundamental rights and freedoms). The concept of relative equality is closely related to the concept of proportional interference in fundamental rights. It follows necessarily from the nature of a fine as a property-based penalty that if it is to be customized and proportional, it must reflect the punished party's property situation. A fine in the same amount imposed on a wealthy person will be laughable and ineffective, whereas in the case of punishing a non-wealthy person, it can be draconic and liquidatory. Thus, the principle of relative equality is not violated if two persons in various situations are given fines of different amounts, although the only difference in their situations may be different property situations. From a substantive viewpoint (the purpose of the law) one can even conclude that the criterion of examining the offender's property situation when considering the amount of a fine is necessary and complementary – of course, not because high fines would be unenforceable (as the Chamber of Deputies claims), but because of the risk of a "liquidatory" effect of a disproportionately high fine. Fines, as punishment, must be differentiated in order to function as a punishment and as a deterrent (individual and general prevention). The Constitutional Court has already said, some time ago, that "egalitarian universalism would necessarily cause deeply non-functional social effects" (cf. judgment no. Pl ÚS 4/95 – in: The Constitutional Court of the Czech Republic: Collection of Decisions – volume 3. 1st edition. Praha C.H.Beck 1995, p. 215). The Constitutional Court gave detailed consideration to the issue of the proportionality of property penalties in relation to the personal situation of penalized persons in its Judgment no. Pl. ÚS 3/02, to which it refers, and it considers it necessary to emphasize that in that judgment too it stated that "a fine may be compatible with Art. 11 of the Charter and Art. 1 of the Protocol if it permits – at least to a certain degree – taking into account the offender's property situation" (cf. Judgment no. Pl. ÚS 3/02 – In: the Constitutional Court of the Czech Republic: Collection of Decisions – vol. 27, C.H.Beck 2002, p. 187).

B. The Constitutional Court emphasizes that the part of § 11 par. 3 of the Act on Regions which reads "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct" is not unconstitutional interference in the principle of equal rights. The petitioners err when they claim that "the criterion of the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct is not used in other norms in the legal order of the Czech Republic that govern administrative

infractions.” Examination of a particular person’s situation is found numerous times in the legal order, e.g. in § 83 par. 1 of the Act on the Constitutional Court (“If it is justified by the complainant’s personal and property situation, in particular if he does not have sufficient funds to pay the costs of representation .. the judge rapporteur shall rule on the complainant’s petition, filed before oral proceedings, that the state pay his costs of representation in full or in part.”), in § 31 par. 1 of the Criminal Code (“In setting the kind of punishment and its degree the court shall take into account … the possibility for rehabilitation and the situation of the perpetrator.”), in § 54 par. 1 of the Criminal Code (“In assessing a monetary penalty, the court shall take into account the perpetrator’s personal and property situation …”), in § 73a par. 2 of the Criminal Procedure Code (“accepting a monetary guarantee is permissible …, together with taking into account the person and property situation of the accused or the person who offers to deposit a monetary guarantee on his behalf …”), in § 91 par. 1 of the Criminal Procedure Code (“Before the first interrogation it is necessary to determine the identity of the accused, ask about his family, property and earning possibilities and previous punishments …”), in § 309 par. 1 of the Criminal Procedure Code (apart from the conditions cited therein, approval of settlement and stopping criminal prosecution is also possible in view of “the person of the accused and his personal and property situation”), also in § 450 of the Civil Code (permitting reducing compensation of damages in view of, among other things, “the personal and property situation of the natural person” who caused the damage, and “the situation of the natural person who was damaged”), in provisions concerning support payments in the Act on the Family – § 85 par. 2 (“according to his abilities, possibilities and property situation”), § 89 (“abilities, possibilities and property situation”), § 92 (“abilities, possibilities and property situation”). In the area of imposing fines for administrative infractions in this regard we can point to, e.g. Act no. 15/1998 Coll., on the Securities Commission (§ 10 par. 4 – “When deciding on the choice of measures for correction or penalties under this Act the Commission is required … to apply proportionality as a starting point when imposing a fine in view of the person’s property situation.”).

It is evident that in a number of cases the legal order requires examination of the personal, property and other situation of the person concerned in the particular proceedings. Thus, in the Constitutional Court’s opinion, statutory regulation allowing an examination of the “situation” of a natural person doing business or a legal entity, as such, is not unconstitutional and does not introduce inequality in dignity and rights, as the petitioners believe. In this regard, the Constitutional Court points out that knowledge of the situation of the person in question (the offender) must also be assumed in the case of judicial review of a regional body’s decision to impose a fine – a review which the group of deputies believes is sufficient protection – because if judicial review is to protect against possible harsh impact of the law (especially in full jurisdiction), the court also can not do without information about the situation of persons on whom the fine was imposed.

The Constitutional Court also does not believe that statutorily required examination of the property situation of a legal entity or a natural person who is an entrepreneur (§ 11 par. 1 of the Act on Regions), creates “a basis for impermissible and unconstitutional unequal treatment of persons who commit the same unlawful conduct” The group of deputies cites as grounds the necessarily different interpretation and application of the term “property situation,” especially because it can be applied to both a legal entity and a natural person. In this regard the Constitutional Court considers decisive that in the present matter a legal

entity and a natural person who is an entrepreneur (cf. § 11 par. 3 of the Act on Regions) are similar persons, because the criterion for their status must be their business activity and property situation arising from and related to it. Therefore, the property situation must be interpreted in the same way, and there is no reason to differentiate between these persons. Therefore, in the given case – where imposing fines on legal entities and natural persons who are entrepreneurs could not lead to different interpretation of the term “property situation” in relation to these persons – it is inappropriate for the group of deputies to argue on the basis of the Constitutional Court’s opinion (a contrario) in file no. Pl. ÚS 47/95 in fine (In: the Constitutional Court of the Czech Republic: Collection of Decisions – volume 5. 1st Edition. Praha, C. H. Beck 1997, p. 213).

C. Therefore, the Constitutional Court did not conclude that examination of property situation by a regional body would be unconstitutional interference in the privacy of a natural person who is an entrepreneur or unauthorized gathering of data about that person, and that it would thus violate Art. 7 par. 1 and Art. 10 par. 2 and par. 3 of the Charter; in any case the group of deputies does not specify that in greater detail. Naturally, this is also not so with legal entities. In this regard, one can point to Act no. 101/2000 Coll. on Protection of Personal Data and Amending Certain Acts, as amended by later regulations (“Act no. 101/2000 Coll.”), which in § 4 let. a) uses the term “personal data” (basically making it possible to determine the identity of the data subject) and in letter b) speaks of sensitive data, which it expressly lists, but does not include property data. Under § 5 par. 2 of that Act, an administrator (i.e. including regional bodies – cf. § 3 par. 1 of the Act) may process ?cf. § 1 and § 4 let. e) of the Act? personal data with the consent of the data subject. It may process them without that consent ?§ 5 par. 2 let. a) of the Act?, if it is performing processing set forth by a special act where necessary to fulfil obligations specified by a special act (it cites some laws as examples). The Constitutional Court considers that one such special act is the Act on Regions (the contested part) and that the region’s actions (weighing the proportionality of the fine amount in view of the offender’s situation) are processing personal data under the cited provision of Act no. 101/2000 Coll. A similar opinion for a range of cases where there may not be consent of the data subject under § 5 par. 2 of Act no. 101/2000 Coll. can be found in specialized literature (cf. Mates, P.: Ochrana osobních údajů. [Protection of Personal Data] Charles University in Prague. Karolinum 2002, p. 48).

However, as regards Act no. 101/2000 Coll., one can also argue first on a more fundamental level. This Act defines its personal jurisdiction in § 1 (Subject Matter) so that it governs protection of the personal data of natural persons. Thus, it does not protect legal entities. As regards natural persons who are entrepreneurs – and who are subject to § 11 of the Act on Regions, part of which is contested – one can conclude likewise, because the distinguishing criterion for their status must be their entrepreneurial activity. Thus, in the opinion of the Constitutional Court, data about this activity (as in the case of legal entities) do not enjoy protection under Act no. 101/2000 Coll..

For all these reasons the Constitutional Court denied the petition from the group of deputies to annul the part of § 11 par. 3 of the Act on Regions which reads “as well as the proportionality of the amount of the fine in view of the property situation of the person

who committed the unlawful conduct" under § 70 par. 2 of the Act on the Constitutional Court.

**Instruction: Decisions of the Constitutional Court can not be appealed.**

Brno, 9 March 2004

**Dissenting opinion**
of JUDr. Vojen Güttler

In my opinion the Constitutional Court should have ruled as follows:

I. The part of § 11 par. 3 of Act no. 129/2000 Coll., on Regions (Regional Establishment), as amended by Act no. 273/2001 Coll., Act no. 320/2001 Coll., Act no. 450/2001 Coll. and Act no. 231/2002 Coll. which reads "property" is annulled as of the day this judgment is promulgated in the Collection of Laws.

II. The rest of the petition is denied.

I base this on the following reasons:

A) 1. I consider that the words "in particular" used in § 11 par. 3 of the Act on Regions express the illustrative nature of the criteria which the region takes (must take) into account when setting the amount of a fine only visually (at first glance). It is impossible to see that the term "property" is expressly raised as the only element for evaluating the proportionality of the amount of the fine, so that any possibility of taking other situations into account (despite the expression "in particular") appears to be a secondary one in comparison with the leading and dominant aspect, which is the property situation. Thus, in my opinion, this fact can not be overcome by an interpretation which would make it sufficiently possible to appropriately take into account any other situation of the prosecuted person than its property situation; in other words, the text of the law – and its content – shifts to a disproportionately less significant position the possibility of the region (imposing the fine) to reflect the person's situation other than only the property situation. The express reference to (only) the property situation (and no other) would in this regard lead to discriminatory consequences, because – and the Constitutional Court has already ruled on this – Art. 3 of the Charter creates a substantive law guarantee of fundamental rights and freedoms and "is actually complementary to the principle of equality and strives to create a state of non-discrimination" (cf. Pl. ÚS 31/94 In: the Constitutional Court of the Czech Republic: Collection of Decisions – volume 3. 1st Edition. Praha, C. H. Beck 1995, p. 185). I believe that in this situation the text of § 11 par. 3 of the Act on Regions is not sufficiently clear, precise and foreseeable, in formal terms, so that in this regard the generally recognized requirements for the term "statute" have not been met.

Beyond these considerations, one can add that the expression "in particular" can also be interpreted only in relation to the first part of § 11 paragraph 3 of the Act on Regions (i.e. "In setting the amount of a fine under paragraph 1, the region shall take into account, in particular, the nature, gravity, length and consequences of the unlawful conduct"), whereas the text after the conjunction "as well as" concerns only the proportionality of the amount of the fine in view of the person's property situation. In terms of content, the text of this statutory provision thus expressly focuses (only) on the property situation which is to be taken into account when evaluating the proportionality of the fine amount. Thus, the text of the statute is not sufficiently precise and foreseeable in this regard either.

In this situation, I consider that, although the petitioner did not specifically raise this point, this makes this regulation inconsistent with Article 1 of the Constitution of the CR, because a statutory regulation thus formulated does not follow the principles of a state governed by the rule of law.

One can also conclude from these deliberations that the contested part of § 11 par. 3 of the Act on Regions, which reads "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct" when it uses the word "property," is inconsistent with Art. 1 and Art. 3 par. 1 of the Charter, because it basically does not reflect other situations (i.e. of the persons who committed the unlawful conduct) than property ones. In view of this, it is also inconsistent with the abovementioned case law and recognized literature, because it is possible to conclude, indirectly, that it affects differently individual affected persons in the same conditions (see Pavlíček, V., Hřebejk, J., Knapp, V., Kostečka, J., Sovák, Z.: Ústava a ústavní řád České republiky [The Constitution and the Constitutional Order of the Czech Republic. part 2: Práva a svobody [Rights and Freedoms], Linde, a.s. Prague 1995, p. 35), quotation: "the norms of the legal order are supposed to impose obligations or other disadvantages, e.g. punishments, and provide rights and other advantages, to all persons, equally under the same conditions."

Therefore, the Constitutional Court should have annulled the word "property" in § 11 par. 3 of Act no. 129/2000 Coll., on Regions (Regional Establishment), as amended by Act no. 273/2001 Coll., Act no. 320/2001 Coll., Act no. 450/2001 Coll. and Act no. 231/2002 Coll.

2. Naturally, if the Constitutional Court annulled the word "property" in the contested provision, it could not avoid considering whether to conclude that there was violation of the principle of equality and the ban on discrimination without there being a violation of a particular fundamental right guaranteed by the constitutional order. The petitioners claim that the contested part of § 11 par. 3 of the Act on Regions is inconsistent with the constitutionally guaranteed right to privacy (Art. 7 par. 1 of the Charter) and with the right to protection of personality (Art. 10 par. 2 and par. 3 of the Charter); however, the Constitutional Court should not reach that conclusion – as is stated in the following text. In this regard I point to the Constitutional Court's previous case law, under which the principles of the band on discrimination and equality between people can be

"fundamentally" or "as a rule" violated if another particular fundamental right or freedom is violated (cf. Pl. ÚS 4/95 In: The Constitutional Court of the Czech Republic: Collection of Decisions – volume 3. 1st Edition. Prague, C. H. Beck 1995, p. 209; Pl. ÚS 5/95 In: The Constitutional Court of the Czech Republic: Collection of Decisions – volume 4. 1st Edition. Prague, C. H. Beck 1996, p. 206). Thus, as regards violation of another particular right or freedom, this is not always a necessary condition (arg. "fundamentally," "as a rule"). This is also supported by the opinion of the recognized specialized literature (viz Sudre, F.: Mezinárodní a evropské právo lidských práv. [International and European Human Rights Law] Masaryk University Brno, European Information Center of Charles University 1997, p. 223 – 224), under which the ban on discrimination (non-discrimination) under Art. 14 of the Convention for Protection of Human Rights and Fundamental Freedoms (the "Convention") has independent significance and the applicability of this article should not be limited only to cases of concurrent violation of another article of the Convention. As a result of its recognized independent significance, "the non-discrimination clause can thus come into play even if there was no violation of another guaranteed right … Article 14 thus permits condemning discrimination in the exercise of a right which is itself observed." In my opinion a situation arose in the present case in which one can accent precisely this independent significance of the protection of equality (Art. 1 of the Charter) and the band on discrimination (Art. 3par. 1 of the Charter); thus, there is the possibility, envisaged in the cited Constitutional Court case law (see its abovementioned decisions, Pl. ÚS 4/95 and Pl. ÚS 5/95). This follows particularly from the fact that, as already stated, the contested part of § 11 par. 3 of the Act on Regions does not sufficiently meet the generally recognized requirements for the term "statute," which must be appropriately precise, clear, and have foreseeable consequences. This is a sufficiently fundamental defect that one can not fail to reflect it in the present situation.

B) 1. Therefore, I emphasize that the Constitutional Court should not have annulled the word "property" in § 11 par. 3 of the Act on Regions because examination of property situation – including the other situation of the perpetrator of an offense – is unconstitutional, but for the reason that it is provided in the Act as a considerably dominant relevant element concerning the situation of the person in question, which apparently can not be overcome even through interpretation (see arguments above). In any case, a reference to the situation of a particular person, or examination of the situation of a particular person, can be found fairly frequently in the legal order – as the Plenum of the Constitutional Court correctly states on p. 8 of the judgment; e.g. in § 83 par. 1 of the Act on the Constitutional Court ("If it is justified by the complainant's personal and property situation, in particular if he does not have sufficient funds to pay the costs of representation .. the judge rapporteur shall rule on the complainant's petition, filed before oral proceedings, that the state pay his costs of representation in full or in part." ), in § 31 par. 1 of the Criminal Code ("In setting the kind of punishment and its degree the court shall take into account … the possibility for rehabilitation and the situation of the perpetrator."), in § 54 par. 1 of the Criminal Code ("In assessing a monetary penalty, the court shall take into account the perpetrator's personal and property situation …"), in § 73a par. 2 of the Criminal Code ("accepting a monetary guarantee is permissible …, together with taking into account the person and property situation of the accused or the person who offers to deposit a monetary guarantee on his behalf …"), in § 91 par. 1 of the Criminal Procedure Code ("Before the first interrogation it is necessary to determine the

identity of the accused, ask about his family, property and earning possibilities and previous punishments …"), in § 309 par. 1 of the Criminal Procedure Code (apart from the conditions cited therein, approval of settlement and stopping criminal prosecution is also possible in view of "the person of the accused and his personal and property situation"), also in § 450 of the Civil Code, also in § 450 of the Civil Code (permitting reducing compensation of damages in view of, among other things, "the personal and property situation of the natural person" who caused the damage, and "the situation of the natural person who was damaged"), in provisions concerning support payments in the Act on the Family – § 85 par. 2 ("according to his abilities, possibilities and property situation"), § 89 ("abilities, possibilities and property situation"), § 92 ("abilities, possibilities and property situation"). It is evident that in a number of cases the legal order requires examination of the personal, property and other situation of the person concerned in the particular proceedings. personal, property and other situation of the person concerned in the particular proceedings. Thus, in my opinion, statutory regulation allowing an examination of the "situation" of a natural person doing business or a legal entity, as such, is not unconstitutional and does not introduce inequality in dignity and rights, as the petitioners believe. In this regard – in accordance with my opinion – the Plenum also pointed out that knowledge of the situation of the person in question (the offender) must also be assumed in the case of judicial review of a regional body's decision to impose a fine – a review which the group of deputies believes is sufficient protection – because if judicial review is to protect against possible harsh impact of the law (especially in full jurisdiction), the court also can not do without information about the situation of persons on whom the fine was imposed.

The fact that the property situation of the person in question, as well as his other (personal) situation may be relevant to the amount of the fine can also be concluded from the Constitutional Court judgment Pl. ÚS 3/02, which says in the introduction that "The statutorily provided minimum amount of a fine must be set so that it permits, at least to a certain degree, taking into account the property and personal situation of the offender" (cf. Collection of Decisions of the Constitutional Court – vol. 27, p. 177). That case concerned the imposition of a fine under § 106 par. 3 of Act no. 50/1976 Coll. (the Building Act), as amended by later regulations, in which the Constitutional Court annulled the words "from CZK 500,000."

2. Further, I do not believe – also in accordance with the Plenum's opinion – that the statutorily imposed examination of the situation of a legal entity or a natural person who is an entrepreneur (§ 11 par. 1 of the Act on Regions), that is the personal, family, property, etc. situation, creates "a basis for impermissible and unconstitutional unequal treatment of persons who commit the same unlawful conduct." The group of deputies cites as grounds the necessarily different interpretation and application of the term "property situation," especially because it can be applied to both a legal entity and a natural person. In this regard I consider decisive that in the present matter a legal entity and a natural person who is an entrepreneur (cf. § 11 par. 3 of the Act on Regions) are similar persons, because the criterion for their status must be their business activity and property situation arising from and related to it. Therefore, the property situation must be interpreted in the same way, and there is no reason to differentiate between these persons. Therefore, in the given case – where imposing fines on legal entities and natural persons who are

entrepreneurs could not lead to different interpretation of the term “property situation” in relation to these persons – it is inappropriate for the group of deputies to argue on the basis of the Constitutional Court’s opinion (a contrario) in file no. Pl. ÚS 47/95 in fine (in: The Constitutional Court of the Czech Republic: Collection of Decisions – volume 5. 1st Edition. Praha, C. H. Beck 1997, p. 213).

[3. Note: Insofar as I agree in the above arguments with the opinion of the Plenum of the Constitutional Court, I do so only because, in my opinion, the petition should have been partly denied, with the exception of the word “property.” This is discussed further under let. C) of this dissenting opinion.]

C. Therefore, I did not conclude that examination of the offender’s situation (i.e. personal, family, property, etc.) by a regional body would be unconstitutional interference in the privacy of a natural person who is an entrepreneur or unauthorized gathering of data about that person, and that it would thus violate Art. 7 par. 1 and Art. 10 par. 2 and par. 3 of the Charter; in any case the group of deputies does not specify that in greater detail. Naturally, this is also not so with legal entities. In this regard, one can point to Act no. 101/2000 Coll. on Protection of Personal Data and Amending Certain Acts, as amended by later regulations (“Act no. 101/2000 Coll.”), which in § 4 let. a) uses the term “personal data” (basically making it possible to determine the identity of the data subject) and in letter b) speaks of sensitive data, which it expressly lists, but does not include property data. Under § 5 par. 2 of that Act, an administrator (i.e. including regional bodies – cf. § 3 par. 1 of the Act) may process ?cf. § 1 and § 4 let. e) of the Act? personal data with the consent of the data subject. It may process them without that consent ?§ 5 par. 2 let. a) of the Act?, if it is performing processing set forth by a special act where necessary to fulfill obligations specified by a special act (it cites some laws as examples). I consider that one such special act is the Act on Regions (the contested part) and that the region’s actions (weighing the proportionality of the fine amount in view of the offender’s situation) are processing personal data under the cited provision of Act no. 101/2000 Coll. A similar opinion for a range of cases where there may not be consent of the data subject under § 5 par. 2 of Act no. 101/2000 Coll. can be found in specialized literature (cf. Mates, P.: Ochrana osobních údajů. [Protection of Personal data] Charles University in Prague. Karolinum 2002, p. 48).

However, as regards Act no. 101/2000 Coll., one can also argue first on a more basic level. This Act defines its personal jurisdiction in § 1 (Subject matter) so that it governs protection of the personal data of natural persons. Thus, it does not protect legal entities. As regards natural persons who are entrepreneurs – and who are subject to § 11 of the Act on Regions, part of which is contested – one can conclude likewise, because in terms of their status the distinguishing criterion must be their entrepreneurial activity. Thus, in my opinion, data about this activity (as in the case of legal entities) do not enjoy protection under Act no. 101/2000 Coll.

For all these reasons the Constitutional Court should have denied the petition from the group of deputies, only concerning the remainder of the text of the contested regulation (i.e. the words "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct").

Brno, 9 March 2004

**Dissenting opinion**
of JUDr. Dagmar Lastovecká

Imposing a fine for violation of an obligation imposed by a region's legal regulation is generally subject to the regions' discretion (through use of the term "may" in § 11 par. 1 of the Regional Establishment Act). In a situation where the region implements administrative law responsibility, the law provides criteria for administrative punishments. One can not very well substitute the possibility of considering whether to apply the responsibility at all with the circumstances of customizing a punishment. In the present case, therefore, it is necessary to review the matter from the point of view of a situation where the administrative body, upon consideration, concluded that the responsibility would be applied. Therefore, I believe that it is necessary to independently review § 11 par. 3 of the Regional Establishment Act from a constitutional viewpoint, as is indicated by the proposed judgment in the petition filed in this matter.

For purposes of a customizing criterion in administrative punishment in relation to the objective aspect of an administrative offense committed by violation of a region's legal regulation, § 11 par. 3 of the Regional Establishment Act gives an administrative body, in an illustrative list, the obligation to take into account the nature, gravity, length and consequences of the unlawful conduct. In addition, the part of that provision which is contested in this case requires the administrative body, in relation to the subject matter of the administrative offense, to take into account only the offender's property situation. The sentence structure of this provision indicates that the cited part of the sentence is not part of the illustrative list introduced by the words "in particular." Concluding that the criterion of property situation is illustrative would be inconsistent with the linguistic expression of the provision. Even if the legislature intended to understand that criterion as part of the illustrative list, and did not do so only as a result of unsuitable legislatively-technical construction of the provision, its "intent" is irrelevant, because the substantial element is the objective situation which is introduced by the text of the legal regulation. The opposite approach would be inconsistent with the principle which the Constitutional Court pronounced in its resolution of 1 March 1995 in file no. II. ÚS 109/94 (with reference to the judgment of the Supreme Administrative Court of 19 November 1923, no. 19.666, published in the Bohuslav Collection as no. A 2885/23, p. 2078), according to which: "Anything which can not be interpreted from the statutory text itself, using interpretive rules, can not be considered to be the expressed intent of the legislature." From a systematic viewpoint it is likewise necessary to conclude that the content of the term

“property” has a literal meaning, because when compared with other provisions of the Czech legal order in which the phrase “property situation” appears, one can not defend the opinion that the word “property” permits a broad interpretation, which would also permit taking into account other circumstances, even though closely related to the property situation. Even in view of this fact it must e concluded that § 11 par. 3 of the Regional Establishment Act, whose meaning is unambiguous, can not permit a constitutional interpretation which would allow weighing criteria of customizing a punishment not expressly provided in it in relation to the subject of unlawful conduct.

A penalty which is the consequence of liability for violation of an obligation imposed by a public law norm (on its basis) should be understood as “evaluation” of the unlawfulness of interference into a legally protected interested. If the legal norm governing customization of a penalty in relation to the subject of unlawful conduct assumes it will be necessary to take into account only the offender’s property situation, it thus makes the consequence of unlawful conduct largely dependent on precisely that criterion. Evaluation of the intensity of interference into a legally protected interest is thus causally related, above all, with the property situation of the penalized person; this (not taking into account other circumstances on the part of the person) can lead to suppressing the evaluation of the objective aspect of the administrative infraction. As a result of this situation, the degree of administrative law liability is secularized, depending on the material situation of the persons committing unlawful conduct, which denies its basic purpose, i.e. setting a degree of liability according to the socially acceptable value of a legally protected interest which was interfered with, with the use of all generally recognized criteria for imposing a punishment. Therefore, in my opinion it must be said that transferring the customizing criteria of an administrative punishment largely into the area of property situation creates inequality in rights, because that method of deciding on a penalty makes liability dependent primarily on property situation. The provision of § 11 par. 3 of the Regional Establishment Act can lead to discrimination through this disproportionately unilateral subjectivity of liability for offenses. Therefore, I believe that the reviewed provision creates inconsistency with Art. 1 and Art. 3 par. 1 of the Charter of Fundamental Rights and Freedoms.

The Constitutional Court previously considered the circumstances of setting a property penalty, taking into account the offender’s property situation in its judgment of 13 August 2002, file no Pl. ÚS 3/02 in connection with a petition to annul part of § 106 par. 3 of Act no. 50/1976 Coll., as amended by later regulations, when it annulled the words „from CZK 500,000” in that provision. In that case the Constitutional Court reviewed possible interference in the constitutionally guaranteed rights of the offender as a result of limiting the discretionary powers of an administrative body by raising the lower limit of a penalty, and stated that any setting of the lower limit of a penalty must be set so that imposing a fine, even if only a minimal one, would not have a liquidatory effect on the offender. In terms of meeting this requirement from the constitutional law review in that case, it followed that the criteria for customizing administrative law liability should permit taking into account both the circumstances of the objective aspect of the offense, as well as circumstances concerning the person of the offender, including his property situation.

The judgment's reasoning refers to a number of provisions in the Czech legal order in which the term "property situation" appears. These primarily reflect the need to consider property situation in connection with evaluating the scope of a substantive law entitlement (e.g. § 85 par. 2 of the Act on the Family), or, in a procedural legal norm, impose an obligation on a body to determine a circumstance (e.g. § 91 par. 1 of the Criminal Procedure Code). Analysis of these provisions is appropriate in a situation where it establishes the legal regime for punishment. From that point of view, one can also consider §§ 53 and 54 of the Criminal Code and § 10 par. 4 of Act no. 15/1998 Coll., on the Securities Commission and amending and supplementing other acts, as amended by later regulations. The first named provisions regulate the legal regime of imposing a monetary fine. It must first be emphasized that a monetary punishment is an alternative punishment, and the court weighs, according to the nature of a specific case (§ 53 par. 1 to 3 of the Criminal Code) whether there is statutory scope to impose it. The content of § 54 par. 1 of the Criminal Code indicates that property situation is only one of the criteria for customizing a monetary punishment in relation to the perpetrator of a crime; therefore, the statutory provision allows meeting the requirement of proportionality, as mentioned above. Moreover, the Criminal Code accents the possibility of implementing a monetary punishment; thus it deliberates from the viewpoint of potential execution of the decision, a consideration which can not be derived from the content of § 11 par. 3, and it must be reviewed as part of the conditions for execution of a decision (for example, by considering the possibility of stopping execution of a decision on some of the grounds contained in § 268 par. 1 of the Civil Procedure Code). As regards § 10 par. 4 of Act no. 15/1998 Coll., it must be said that this provision contains the offender's property situation as a criterion for customizing a penalty in the form of a fine, but this penalty is only one of a series of possible steps for removing or penalizing the unlawful situation. Therefore, the purpose and nature of this provision are not the same as the purpose and nature of § 11 par. 3 of the Regional Establishment Act, where a fine is the only instrument for reparation or penalization available to address conflict with the region's regulations.

In this situation, I believe that the Constitutional Court should have ruled on the petition from the group of deputies of the Parliament of the Czech Republic seeking annulment of the part § 11 par. 3 of Act no. 129/2000 Coll., on Regions (Regional Establishment), as amended by Act no. 273/2001 Coll., Act no. 320/2001 Coll., Act no. 450/2001 Coll. and Act no. 231/2002 Coll., which reads "as well as the proportionality of the amount of the fine in view of the property situation of the person who committed the unlawful conduct" by annulling the word "property" in the contested provision and denying the rest of the petition.

Brno, 9 March 2004