I. ÚS 2617/15 of 5 September 2016

Restrictions on judges' freedom of expression when commenting on the political campaign

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

1. A person who assumed the office of judge shall be bound by the duty of loyalty and discretion while exercising his or her freedom of speech under Article 17 of the Charter and Article 10 of the Convention. The freedom of speech of such person is therefore subject to special limitations arising from that duty. By his or her speeches, a judge may not in particular undermine the public confidence in that he or she will act in accordance with the fundamental principles of the democratic rule of law or the confidence in the impartiality and independence of the judiciary. Each judge must therefore act with discretion in any of his or her speeches made concerning political competition, especially in the public evaluation of individual candidates and political parties and groups and the formation of political coalitions. Each case, however, must be assessed individually, considering all the circumstances, while it is necessary to take into account the particular position of a judge making a speech, the content of his or her statements, the place and manner of speech, and the overall context in which such statements were made.

2. It is essential for maintaining the public confidence in the judiciary that judges keep their distance from political competition in their speeches, at any level, including the local one. Judges may not participate in the campaign of political parties, political movements or election groups or individual politicians. By analogy, it is not fitting that judges attempt to influence, by their public speeches, the form of coalitions in a municipal council or who will hold the office of mayor. Such speeches undermine the public confidence in that judges will decide disputes according to law and not according to political interests.

JUDGMENT

The Constitutional Court has decided through the panel composed of its Presiding Judge David Uhlíř, Judge Tomáš Lichovník, and Judge Rapporteur Kateřina Šimáčková in the case of the constitutional complaint filed by the complainant, Mr K. K., represented by JUDr. Michal Paule, lawyer based at Benešovská 1897/24, Prague 10, against the decision of the Supreme Administrative Court, ref. No. 16 Kss 7/2014-92, of 11 June 2015, with the participation of the Supreme Administrative Court as a party to the proceedings and the President of the Municipal Court in Prague as an intervener, as follows:

The constitutional complaint is dismissed.

REASONING

I. Summary of the previous proceedings and the petition

1. The complainant is a judge of the Municipal Court in Prague (hereinafter referred to as the "Municipal Court"). The President of the Municipal Court filed a petition to institute disciplinary proceedings against the complainant. This petition was decided by the Supreme Administrative Court as the disciplinary court (hereinafter referred to as the "Disciplinary Court") by the contested decision.

2. Through its contested decision, the Disciplinary Court found the complainant guilty of a disciplinary offence. According to the Disciplinary Court, the complainant deliberately breached the duties of a judge arising from Section 80 (4) and (5) (a) of Act No. 6/2002 Coll., on courts and judges, as amended, as a result of exercising his political rights in the manner threatening the dignity of judicial office and abusing his position of a judge for the promotion of private interests. However, the Disciplinary Court, in accordance with Section 88 (3) of the Act on Courts and Judges refrained from imposing a disciplinary measure upon the complainant.

3. In view of the Disciplinary Court, the complainant committed a disciplinary offence by the following conduct: "during the election campaign before the municipal elections held on 10 and 11 October 2014, he made it possible that, on his behalf and stating his position of a judge of the Municipal Court in Prague, a leaflet was drawn up and distributed to letter boxes in the municipality of Mnichovice, district of Praha-východ, where he owns a cottage, while in the leaflet at issue, he evaluated the election campaign in the municipality of Mnichovice run by:

- the association of candidates "Mnichovice - město na Vaší straně" as unfair, claiming another's successes as their own, and populist;
- the party TOP 09 as unfair and promising a land-use plan which is incompetent and legally contestable;
- the party KDU-ČSL as not containing any election programme related to the municipality; and
- the party "Volba pro město - Volba pro Mnichovice" as not engaging in any objectionable conduct during the campaign,

while subsequently, after the elections, continued in his involvement by publishing in Issue No. 7 [of the local magazine Život Mnichovic] an article in which he thanked all the voters who "considered responsibly who to vote for" and elaborated upon what coalition might be formed in the council of the municipality of Mnichovice and appeals to the newly elected representatives to realise that the absolute winner of the elections was the party "Volba pro město - Volba pro Mnichovice" led by Ing. Peter Schneider who was better suited to lead the municipality than candidates of other parties, also thanks to his technical education, and expressed his concerns that "if the municipality is not led by Ing. Schneider, the municipality faces a disaster".

4. According to the Disciplinary Court, it has been proved that the complainant had drawn up that part of the leaflet assessing the election campaign run by all four parties. The complainant claimed the authorship of this part of the leaflet and admitted that he prepared the evaluation of the election campaign while expecting that it will be published in Mnichovice before the elections.

5. On the other hand, however, it has not been proved that the complainant had written another part of the leaflet. That part points out that the complainant "is the judge of the Municipal Court in Prague who passed an unsuspended sentence upon the "asset-stripper" of H-Systém, Mr Smetka, [who] disputed in the media the amnesty proclaimed by the President Klaus, and [... who] has been engaged in the judiciary in the long-term". Nor was it proved that the complainant had ordered the delivery of leaflets to letter boxes of voters in Mnichovice. The complainant denied that he had written that part of the leaflet or that he had ordered its distribution. On the contrary, Mr Luboš Janoud, witness, testified that he had written that part of the leaflet and that the distribution of the leaflet had been ordered by his wife with the post office. As the authorship of that part of the leaflet and the order for its distribution were originally in the disciplinary petition attributed to the complainant, but the facts were not proven, the Disciplinary Court omitted them from the statement of the offence. However, in view of the Disciplinary Court, the identity of the offence remained unchanged since the alleged consequence was proved.

6. According to the Disciplinary Court, it remained "somewhat unclear" why the complainant failed to familiarise himself with the final form of the leaflet after returning from training in Kroměříž on 3 October, as it had been agreed with Mr Luboš Janoud. The complainant stated that Mr Luboš Janoud sent him an edited version of the leaflet on 3 October. On that day, as said by the complainant himself, the complainant met with Mr Luboš Janoud who told him that he had already ordered the leaflet distribution. However, according to the order, the order for the distribution was placed with the post office as late as 6 October. On the contrary, Mr Luboš Janoud testified as a witness that no meeting occurred and that he could not contact the complainant on 6 October and that they met as late as a week later. Under this state of affairs, the Disciplinary Court wonders why the complainant failed to "distance himself at least verbally in his subsequent article in Issue No. 7 of Život Mnichovic" from the indication of his office of judge in the leaflet, which according to the Disciplinary Court "suggests rather that [the complainant] knew the actual content of the leaflet before its distribution, or at least could have known, and failed to object to that". The complainant indirectly upheld the tone of the leaflet according to the Disciplinary Court also by including the words "Part Two, Post-election" in the title of his article.

7. The complainant's authorship of this article is undisputed; he sent it himself for publication in the local magazine Život Mnichovic.

8. According to the Disciplinary Court, the complainant as a judge may not be completely excluded from exercising his constitutionally guaranteed political rights, but exercising the freedom of speech includes pursuant to Article 10 (2) of the European Convention on Human Rights (hereinafter referred to as the "Convention") also the duties and responsibilities and it may be restricted by law if it is necessary in a democratic society, among other things, in order to maintain the authority and impartiality of the judiciary. These starting points are reflected in Section 80 (1) (4) and (5) (a) of the Act on Courts and Judges. In view of the Disciplinary Court, the

complainant exceeded the thus established framework of exercising his rights - particularly the freedom of speech.

9. Referring to the judgment file No. III. ÚS 1076/07, of 28 January 2008 (N 14/48 of the Collection of Judgments of the Constitutional Court 145), the Disciplinary Court stated that a judge is perceived by the public as a judge continuously, not only while serving in his capacity of judge, high demands are laid on judges and, in order to avoid any conflict of interests, judges should virtually be dedicated only to their professional judicial activities. The relevant public was aware that the complainant is a judge and it is, therefore, immaterial whether the complainant himself pointed to this fact expressly.

10. According to the Disciplinary Court, the complainant allowed that his office was misused to promote private interests. The relevant part of the local community perceives him as a judge with the relevant informal authority and his texts favour the party "Volba pro město - Volba pro Mnichovice" and disfavours the remaining three parties. In addition, according to the Disciplinary Court, the texts included confrontational features and statements "subject to subjective interpretation as expressive and capable of harming the honour of some representatives of criticised political parties". This is according to the Disciplinary Court in breach of the duty to refrain from anything that would compromise the dignity of the judicial office.

11. The Disciplinary Court holds that a judge may engage in election meetings in the local elections where he or she has the right to vote, and reasonably also where he or she, for example, owns a real property and frequently resides there. Such judge, however, must do so with discretion and in a moderate manner which does not result in a misuse of the office of judge for promoting the private interests of a particular party or candidate. A judge's behaviour should "not deviate from the general ideas of citizens about public involvement in pre-election events and from the usual average of the performance of such activities"; a judge should not express himself or herself in an authoritarian or a confrontational manner even in individual cases. Any speech of a judge might be critical but must be within the matter-of-fact criticism and must not harm the honour of those criticised. As a result of any failure to abide by these limits, a judge brings his or her office into disrepute.

12. Given the current judicial office of the complainant, the Disciplinary Court considered the disciplinary proceedings conducted in the case to be sufficient and waived imposing any disciplinary measure.

13. The Constitutional Court further established from the file of the Disciplinary Court the following facts about the course of disciplinary proceedings.

14. The Disciplinary Court sent a petition to institute disciplinary proceedings to the complainant in writing, advising him of the "right to choose a defence counsel from among judges or lawyers [...]; the right to comment on the matters which he is blamed for and the evidence thereof; the right to give facts in his favour and propose the evidence thereof; the right to remain silent", provided that those are "reasonably exercised rights of the accused under the Criminal Procedure Code" (Article 20 of the file of the Disciplinary Court). During the hearing, the Disciplinary Court noted that the complainant "has been advised of his rights in writing and exercised his right to a defense counsel" (Article 67 of the file of the Disciplinary Court). During the hearing, the Disciplinary Court also heard Mr Luboš Janoud, witness, and advised him

"adequately under Section 101 of the Criminal Procedure Code" (Article 71 of the file of the Disciplinary Court).

II. Parties' Arguments

15. The complainant notes that the proceedings before the Disciplinary Court are single-instance proceedings and there is "no way to defend oneself" against a decision of the Disciplinary Court. He holds that it constitutes an infringement upon his right to a fair trial and argues that the provisions of the Criminal Procedure Code providing for the two-instance nature of proceedings shall also be applied, by analogy, to the disciplinary proceedings.

16. He further argues that he was "sentenced for (convicted of) the idea the dissemination of which he could not prevent", though it was not created by him and he did not disseminate it either. In view of the complainant, his freedom of thought under Article 15 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") has thus been infringed upon.

17. Further, according to the complainant, the Disciplinary Court also infringed upon his freedom of speech under Article 17 of the Charter. The complainant states that he communicated to a third party - Mr Luboš Janoud - his political view on the pre-election situation in Mnichovice, on the assumption that his ideas would be elaborated upon further. Mr Luboš Janoud, without the knowledge of the complainant, used his opinion for the production of a leaflet where he identified the complainant expressly as a judge and even listed some "cases" decided by the complainant, while mentioning, however, obviously incorrect data. Mr Luboš Janoud then distributed the leaflet in that form. According to the complainant, it was Mr Luboš Janoud who mentioned the information threatening the dignity of judicial office and misused the office of judge for the promotion of private interests. The complainant argues that he cannot be punished for that he expressed his opinion to a third party, as this would infringe upon his freedom of speech. He states that the contested decision deprives him of the right to your own idea or political opinion in private, since it makes him responsible for any misuse of such thoughts or political opinion by a third party.

18. The complainant does not dispute that he is the author of the article published in Issue No. 7 of Život Mnichovic and that this article was published in the magazine with his knowledge. However, the complainant points out that this article responds to the previous article written by another person, in which the complainant was attacked. The complainant also points out that did not sign under the article as a judge, but as a natural person identifying himself also as a "cottager". In that article, the complainant then exercised his right to participate in public affairs pursuant to Article 21 of the Charter, by publishing his political opinion. The complainant emphasises that he expressed his opinion as a cottager, therefore, like everyone else who is interested in the municipality public affairs, and did so because of a personal relationship to the municipality, without expressly attacking anyone. He refuses to be held liable in a disciplinary manner for such conduct only because according to the Disciplinary Court it is common knowledge in the municipality that the complainant serves as a judge. In this context, the complainant asks the question what he would have to do to be able to publish as a citizen his political opinion and not to be held liable in a disciplinary manner.

19. Finally, according to the complainant, the proceedings before the Disciplinary

Court involved serious procedural deficiencies and a decision arising from the proceedings may not be subject to review. Specifically, the complainant argues that contrary to the Criminal Procedure Code he was advised of neither his right to refuse to testify and to comment on all the facts and the evidence presented nor related rights. Neither was Mr Luboš Janoud, as a witness, advised of his rights according the complainant. Further, the complainant argues that under the disciplinary action he was blamed for a "completely different conduct" than for which he was found guilty by the Disciplinary Court. He considers the lack of identity of the offence "a fatal misconduct". He argues that the disciplinary action specifically describes the conduct which he allegedly committed, but the Disciplinary Court found him guilty of that he made that conduct possible for a third party. The conduct thus defined, however, was not contained in the disciplinary action. Moreover, the decision does not contain any description of what specifically the complainant did, i.e. lacks the description of the conduct.

20. The Disciplinary Court, in its statement, at first pointed out that according to the judgment, file No. Pl. ÚS 33/09 dated 29 September 2010 (N 205/58 of the Collection of Judgments of the Constitutional Court 827; 332/2010 Coll.), the single-instance disciplinary proceedings are in accordance with the Constitution. The Disciplinary Court further notes that its decision is not directed against the exercise of the fundamental rights pursuant to Articles 15, 17, and 21 of the Charter by the judge, but to the way in which the complainant did so and, in this context, refers to the contested decision. The Disciplinary Court emphasises that the complainant as a judge may engage in the election events in the municipality where he owns a cottage; however, as a judge, he must do so with discretion and in a manner which does not lead to any misuse of the office of judge for private interests. The conduct of a judge should not deviate "from the general ideas of citizens about public involvement in pre-election events and from the usual average of the performance of such activities". While doing so, according to the Disciplinary Court, a judge should never behave in an authoritarian or a confrontational manner. The complainant, however, conducted in a manner which could threaten the dignity of the judicial office and his conduct showed signs of misuse of the office of judge for promoting private interests, since the complainant by his speeches sought the advantage for one of the political parties and its leader, at the disadvantage of the other parties, and his speeches include confrontational elements.

21. According to the Disciplinary Court, the identity of the act between the petition to institute disciplinary proceedings and its decision has been preserved. The act was only modified with respect to the findings of fact made. The Disciplinary Court further notes that the complainant and witnesses were both advised of their rights in writing before the hearing. At the hearing, such advice was referred to and its content was recalled. As for the complainant, such advice was merely restricted to stating that "as for his rights, the limits of Section 33 of the Criminal Procedure Code are followed", because the judge is a criminal judge and advise people of such rights "virtually every day". Any simplification of such advice could not be and was not to the detriment of the complainant or witness.

22. Finally, the Disciplinary Court emphasised that a judge must not use his or her office to promote private interests. This is related, according to the Disciplinary Court, to the fact that a judge is forbidden to participate in the executive power and according to Article 82 (3) of the Constitution is incompatible with any office in public administration. Therefore, a judge should make his or her political speeches with utmost

discretion. However, through both speeches, the complainant intended to promote the private interests of a particular political party, close to himself, which was additionally supported by his expressive criticism of political opponents.

23. The President of the Municipal Court in Prague commented on the single-instance nature of disciplinary proceedings. Even though the President of the Municipal Court does not consider this issue as disputable from a constitutional law perspective, he highlights the deficiencies of the current regulation of disciplinary proceedings. In his view, the two-instance proceedings would facilitate the achievement of a higher standard of judicial protection and, in addition, would give the parties to proceedings room for negotiations and "certain moderation of the disputed story". The President of the Municipal Court is of the opinion that the current single-instance model restricts disciplinary claimants, does not allow imposing cumulative or aggregate sentence, often leads to the expiry of the limitation period or the creation of *res judicata*, and reduces the possibility of complementing the evidence. The person accused of a disciplinary offence has the opportunity to respond to the factual and legal findings of the Disciplinary Court only through a constitutional complaint.

24. The complainant decided not to comment on this in his reply.

III. Assessment by the Constitutional Court

25. The constitutional complaint complies with the requirements for the subject-matter consideration.

26. The Constitutional Court notes that according to the contested decision of the Disciplinary Court, the complainant committed a disciplinary offence by his two speeches, namely those contained in the leaflet and in the article, which were disseminated in Mnichovice. In view of the Disciplinary Court, the complainant threatened the dignity of judicial office by his speeches and misused the office of judge in order to promote private interests.

27. The complainant argues that the regulation of disciplinary proceedings is unconstitutional because the decision of the Disciplinary Court may not be appealed against. Further, he raises several objections to the procedure of the Disciplinary Court and its decision which concerns with regard to contents thereof the right to a fair trial. Moreover, the complainant argues that the contested decision has infringed upon his freedom of thought and freedom of speech.

28. At first, the Constitutional Court will examine the procedural aspect of the case - inadmissible appeals in disciplinary proceedings (Part A below) and objections concerning the right to a fair trial (Part B below). Then, the Constitutional Court will examine the substantive aspect of the case - an alleged infringement upon the freedom of thought (Part C below) and the freedom of speech (Parts D to E below).

A. Single-instance nature of disciplinary proceedings

29. Firstly, the complainant argues that he was unable to appeal against the decision of the Disciplinary Court. This is according to the complainant contrary to the right to a fair trial. According to the complainant, the provisions of the Criminal Procedure Code providing for the two-instance proceedings shall apply by analogy to the disciplinary

proceedings.

30. The Constitutional Court notes that pursuant to Section 21 of Act No. 7/2002 Coll., on proceedings relating to judges, public prosecutors and enforcement officers, as amended, "an appeal against the decision in the disciplinary proceedings is inadmissible".

31. The issue of the constitutionality of this provision has already been dealt with by the Constitutional Court, namely in its judgment, file No. Pl. ÚS 33/09 of 29 September 2010 (N 205/58 of the Collection of Judgments of the Constitutional Court 827; 332/2010 Coll.), as correctly pointed out in its statement by the Disciplinary Court. In this judgment, the Constitutional Court has come to the conclusion that the provision referred to herein is not unconstitutional, for two reasons. Firstly, neither the Constitution nor the Charter guarantees the right of appeal at all (judgment, file No. Pl. ÚS 33/09, Items 44 and 56). Secondly, disciplinary proceedings are not criminal proceedings under the Convention and have a disciplinary nature. The right of appeal in criminal cases under Article 2 (1) of Protocol No. 7 to the Convention, which is not even absolute and contains a number of exceptions, shall not apply to disciplinary proceedings conducted against judges (judgment Pl. ÚS 33/09, Items 45 to 55).

32. At the moment, the Constitutional Court does not see any space for a different assessment of the issue.

33. The European Court of Human Rights (hereinafter referred to as the "ECtHR") in its current case-law considers disciplinary proceedings conducted against the judge and leading to his or her dismissal or other serious consequences as civil proceedings, covered by the civil branch of Article 6 of the Convention. However, the ECtHR has not yet reached a conclusion in any of its decisions that the disciplinary proceedings could be regarded as criminal proceedings in terms of the Convention. In its judgment in the case of Olujić v. Croatia of 5 February 2009, No. 22330/05, Section 32 to 44, dealing with the removal from office of judge, as well as in its judgment in the case of Harabin v. Slovakia of 20 November 2012, No. 58688/11, Sections 119 to 124, dealing with a serious disciplinary offence connected with a salary reduction, the ECtHR only applied the civil branch of Article 6 of the Convention. In its judgment in the case of Oleksandr Volkov v. Ukraine of 9 January 2013, No. 21722/11, which also covers the removal from the office of judge, the ECtHR also applied the civil branch under Article 6 of the Convention (Section 87 to 91), and not the criminal branch under Article 6 of the Convention (Section 92 to 95), although in this respect the ECtHR emphasised that the complainant's removal from the office of judge does not prevent that judge from pursuing another legal profession (Section 93). Only the civil part of Article 6 of the Convention has been applied in the recent cases of removed judges (cf. the judgment in the case of Jakšovski and Trifunovski v. Macedonia of 7 January 2016, No. 56381/09 and 58738/09, Section 32; the judgment in the case of Gerovska Popčevska v. Macedonia on 7 January 2016, No. 48783/07, Section 38).

34. The Constitutional Court states that in accordance with the case-law of the ECtHR, from a constitutional point of view, a judge applies the standards of civil branch of the right to a fair trial under Article 6 of the Convention to any disciplinary proceedings, regardless of the outcome of such proceedings. The very fact that the decision on a disciplinary charge is entrusted to the court means the full applicability of the civil branch of Article 6 of the Convention (cf. the judgment of the Grand Chamber

in the case of Vilho Eskelinen and others v. Finland of 19 April 2007, No. 63235/00, Section 61, according to which disputes with government employees shall always be governed by the civil branch of Article 6 of the Convention, provided that for a particular type of dispute a judicial review is not expressly excluded and, at the same time, the exclusion of judicial review is justified by the nature of the dispute; in relation to judges, see also the judgment in the case of Juričić v. Croatia on 26 July 2011, No. 58222/09, Sections 55 to 56; and see also the judgment of the Grand Chamber in the case of Baka v. Hungary of 23 June 2016, No. 20261/12, Section 103 to 106).

35. As regards the application of the criminal branch of Article 6 of the Convention, the Constitutional Court notes that although the ECtHR did not exclude expressly the application of the criminal branch to the disciplinary proceedings against judges, the exceptional circumstances which would allow according to the ECtHR (cf. the judgment in the case of Oleksandr Volkov v. Ukraine of 9 January 2013 No. 21722/11, Sections 92 to 95) the application of the criminal branch under Article 6 (1) of the Convention (although until now the ECtHR has never found the application of the criminal branch justified) - i.e. the removal from the office of judge and, at the same time, the impossibility to pursue another legal profession afterwards - obviously did not occur in the present case. The Disciplinary Court regarded the consideration of the case in the disciplinary proceedings as sufficient and refrained from the imposition of any disciplinary measure. Neither the complainant's continuance in his judicial office nor the possibility to pursue any other legal profession (voluntarily in the future upon his discretion) have therefore been jeopardised. It can be stated that the disciplinary proceedings with the complainant may not be regarded as criminal proceedings under the Convention or the Charter (for more on this, cf. the above-mentioned judgment of the Constitutional Court, file No. Pl. ÚS 33/09). This conclusion is not affected by the subsidiary application of the Criminal Procedure Code to the disciplinary proceedings against judges (cf. Section 25 of Act No. 7/2002 Coll., on proceedings relating to judges, public prosecutors and enforcement officers, as amended), which however does not indicate an intention to consider disciplinary proceedings against judges as a specific form of criminal proceedings (this intention is unequivocally excluded by Section 15 (1) and (2) of Act No. 7/2002 Coll.). This interpretation is supported also by the judgment of the ECtHR in the case of Olujić v. Croatia in which the ECtHR considered a similar Croatian legal regulation under which the disciplinary proceedings conducted against Mr Olujić, the then President of the Croatian Supreme Court, are governed on a subsidiary basis by the Criminal Procedure Code (cf. Olujić against Croatia of 5 February 2009, No. 22330/05, Section 41), and despite that concluded that the criminal branch of Article 6 (1) of the Convention did not apply to the case (cf. Olujić v. Croatia of 5 February 2009, No. 22330/05, Section 44).

36. In this respect, the Constitutional Court also notes that there are "admissible exceptions" to the right of appeal in criminal cases under Article 2 (1) of Protocol No. 7 to the Convention "if the person concerned was tried in the first instance by the Supreme Court". Even if the disciplinary proceedings against a judge have the nature of criminal proceedings under the Convention, it would be possible to regard disciplinary panels at the Supreme Administrative Court as the supreme court within the meaning of the quoted provision (cf. also the judgment Pl. ÚS 33/09, Items 55 and 61).

37. The single-instance disciplinary proceedings may not be regarded as unconstitutional (cf. also the judgment Pl. ÚS 33/09, Items 57 to 58).

38. The fact that the complainant could not appeal against the decision of the Disciplinary Court, therefore, did not infringe upon any of the complainant's fundamental rights and freedoms.

B. Right to a fair trial

39. The complainant further raises a number of objections relating to other aspects of the right to a fair trial.

40. As an introduction, the Constitutional Court notes that the right to a fair trial under Article 36 of the Charter shall always apply to the disciplinary proceedings against a judge. The disciplinary proceedings against a judge are also to be considered as civil proceedings under Article 6 of the Convention and subject to the standards of the civil proceedings arising from this provision (cf. Items 33 to 34 of this judgment).

41. Specifically, the complainant argues that the Disciplinary Court has infringed upon his right to a fair trial by failing to advise him or the witness interrogated in the disciplinary proceedings of their rights.

42. The Constitutional Court pointed out in its case-law that the person accused of a disciplinary offence must be advised by a disciplinary court of his or her rights [judgment file No. III. ÚS 1076/07 of 21 January 2008 (N 14/48 of the Collection of Judgments of the Constitutional Court 145), Item 23 *in fine*]. Generally, however, it is sufficient if the disciplinary court gives such advice to the person accused of a disciplinary offence in writing, e.g. together with a petition to institute disciplinary proceedings [judgment file No. III. ÚS 1076/07, Item 28]. The advise must be repeated only if it turns out that the person accused of a disciplinary offence did not understand it [judgment file No. I. ÚS 2420/11 of 16 November 2011 (N 197/63 of the Collection of Judgments of the Constitutional Court 291), Item 29].

43. In the present case, the Disciplinary Court advised the complainant of his rights in writing (cf. Item 14 of this judgment). Nothing indicates that the complainant did not understand that advice. Therefore, the Constitutional Court does not see any misconduct as to the advice of the complainant.

44. According to the complainant, the Disciplinary Court did not advise Mr Luboš Janoud, witness, of his rights properly either. The Constitutional Court, however, must note that a complainant may only defend himself or herself through a constitutional complaint against any infringement upon his or her fundamental rights and freedoms [Section 72 (1) (a) of the Act on the Constitutional Court]; a constitutional complaint may not be filed in the interest of another person to protect his or her fundamental rights and freedoms. The complainant failed to explain how his fundamental rights and freedoms could have been infringed upon due to an inadequate or lack of advice given to the witness. The Constitutional Court does not see any such connection there.

45. The decision of the Disciplinary Court is not based on the testimony of Mr Luboš Janoud, witness. The judgment of the Disciplinary Court was based primarily on the testimony of the complainant and the documentary evidence - leaflet, article, and distribution order (cf. Items 3 to 7 of this judgment). The testimony of Mr Luboš Janoud, witness, had only positive effect on the complainant's position. As a result of this testimony, the Disciplinary Court concludes that it has not been proved that the

complainant had presented himself in the leaflet as a judge or that he had ordered personally the distribution of that leaflet (cf. Items 5 to 6 of this judgment).

46. The complainant's objection that his fundamental rights and freedoms have been infringed upon as a result of that Mr Luboš Janoud, witness, had been improperly advised of rights is, therefore, unjustified.

47. The complainant further argues that the Disciplinary Court found him guilty of a different offence than that mentioned in the petition to institute disciplinary proceedings. In addition, according to the complainant, the contested decision does not contain a description of the conduct and may not be subject to review.

48. The Constitutional Court in the past reviewed also whether the verdict of guilt corresponds to the offence for which the petition to institute disciplinary proceedings has been filed [judgment file No. I. ÚS 2420/11, Item 28]. Therefore, the Constitutional Court reviewed the contested decision also in terms of this objection and related objections filed by the complainant.

49. In the present case, a disciplinary petition was originally filed against the complainant on the grounds that he drawn up and distributed in Mnichovice a leaflet (with the contents described in Items 3 and 5 of this judgment) and that he had an article (with the contents referred to in Item 3 of this judgment) published in the mentioned local magazine. The Disciplinary Court, however, concluded that a part of disciplinary petition related to the leaflet does not correspond to the facts found. It has not been proved that the complainant had drawn up a whole leaflet - namely that part of the leaflet mentioning his office of judge, recounting part of his activities, and noting that the complainant has been engaged in the judiciary throughout his life. The fact that the complainant had the leaflet distributed in Mnichovice has not been proved either. The complainant denied those two facts and Mr Luboš Janoud, witness, said that he had added the controversial passage in the leaflet himself, while the distribution of the leaflet had been ordered by his wife. In this respect, therefore, the Disciplinary Court attempted to modify the definition of the offence (cf. Item 5 of this judgment). At the same time, however, the Disciplinary Court reached the conclusion that the established circumstances indicated that the complainant was aware of the entire contents of the leaflet including the controversial parts of the text or could have familiarised with its wording (cf. Item 6 of this judgment) even before its distribution. Therefore, the Disciplinary Court found the complainant guilty for that "he allowed that a leaflet [...] in his name and stating his office of judge [...] was drawn up and distributed [...] in the municipality of Mnichovice [...]". The remaining part of the verdict of guilt referring to the article drawn up by the complainant is not disputed. According to the Constitutional Court, there is a difference between "drawing up and distributing" a leaflet and "allowing drawing up and distributing" a leaflet, nevertheless - given the nature of the disciplinary proceedings against judges which are not conventional criminal proceedings within the meaning of the Charter and the Convention and are only governed by the standards of civil branch of the right to a fair trial under Article 6 of the Convention (cf. for more details, Items 34 to 35 of this judgment) - the identity of the offence in the present case is preserved due to the identity of the consequence, even if the conduct of the person accused of a disciplinary offence is not identical to the way it was defined in the petition. However, the procedure of the Disciplinary Court does not affect the constitutionality of the contested decision.

50. The wording of the verdict of guilt is not entirely clear in the part relating to the leaflet, however, the Constitutional Court notes that in conjunction with the reasoning it is clear what the complainant's conduct consisted in.

51. Before the municipal elections, the complainant drawn up an evaluation of the election campaign of all four parties, while the evaluation was to be distributed in some form in Mnichovice before the elections, on which he collaborated with Mr Luboš Janoud. According to the testimony of the complainant, Mr Luboš Janoud sent an edited version of the leaflet on 3 October and on that date the complainant met, as said by himself, with Mr Luboš Janoud. As indicated in the order, the distribution of the leaflet was ordered with the post office as late as 6 October (cf. Item 6 of this judgment). The complainant therefore knew that in accordance with his intention Mr Luboš Janoud was going to publish the prepared evaluation of the election campaign and that Mr Luboš Janoud edited the leaflet. Between the dates of 3 and 6 October, the complainant had sufficient opportunity to check the contents of the leaflet and possibly prevent its distribution. The complainant's claim that Mr Luboš Janoud notified him that he ordered the distribution of leaflets as early as 3 October changes nothing - also in this case, the complainant was able to check the contents of the leaflet and prevent the distribution which could only begin only after the actual date of order, i.e. on 6 October. The complainant thus drawn up his evaluation of the election campaign, collaborated in the publication thereof with Mr Luboš Janoud, and even though - in his own words - he knew about the final version of the leaflet and its forthcoming distribution, he did not stop it even though he could have stopped it. The culpability of the complainant thus relates to the active preparation of the main part of the leaflet and the passive acceptance of that its edited version complemented by the controversial part, namely the information that the complainant is a judge, will be distributed. It is a combination of an act of commission and an act of omission, while both types of conduct can constitute a breach of the duties of a judge and a disciplinary offence. For these reasons, also the disputed part of the leaflet and the fact that an edited version of the leaflet was distributed in Mnichovice are also attributable to the complainant.

52. On the contrary, the Constitutional Court does not share an opinion of the Disciplinary Court that the complainant claimed the authorship of the leaflet as a whole in his article by including the words "Part Two, Post-election" in the title of his article. The full title of the complainant's article "May a Question Mark Be at the Beginning? Part Two, Post-election". It is a response to the article "May a Question Mark Be at the Beginning?", published in the previous issue of Život Mnichovic by another author [see Život Mnichovic, Issue 6/2014, page 9, and Život Mnichovic, Issue 7/2014, pages 11 to 12, both available at http://www.mnichovice.info/index.php/zivot-mnichovic/casopis]. Although the consideration of the Disciplinary Court is mistaken, for the reasons described in the preceding item, it does not constitute the defectiveness of the decision.

53. The second part of the verdict of guilt relates to an article which the complainant wrote and had published in a local magazine ("he continued in such his engagement by publishing an article [...] in Issue No. 7 [of the local magazine Život Mnichovic]"). The wording of this part of the verdict of guilt is unequivocal and the complainant's objections do not apply to it.

54. It can thus be summarised that the main part of the leaflet evaluating the election campaign of four parties is a manifestation of an opinion of the complainant. The remaining part of the leaflet stating that the complainant is a judge is attributable to the

complainant. Also the fact that the leaflet was distributed in Mnichovice is attributable to the complainant. Regarding the article as a whole, it is a manifestation of an opinion of the complainant.

55. The complainant's objections as to the right to a fair trial are therefore not justified. The complainant's right to a fair trial has not been infringed upon.

C. Freedom of thought

56. The complainant further alleges that the contested decision has infringed upon his freedom of thought because he was punished for the ideas that he held and that were disseminated by a third party (Mr Luboš Janoud) without his knowledge.

57. The freedom of thought is protected by Article 15 (1) of the Charter and only applies to the internal process of thought of each person (*forum internum*). It is an absolute right which may not be interfered with in any manner whatsoever [judgment file No. Pl. ÚS 18/98 of 2 June 1999 (N 82/14 of the Collection of Judgments of the Constitutional Court 181; 151/1999 Coll.)]. The Disciplinary Court, however, did not find the complainant guilty of ideas that he held but of the opinions expressed publicly. The argument that the complainant's opinions were disseminated by Mr Luboš Janoud without the complainant's knowledge and consent cannot be held valid for the reasons set out above (cf. Items 51 and 54 of this judgment).

58. Therefore, the freedom of thought of the complainant has not been infringed upon by the contested decision.

D. Freedom of speech - general principles

59. Finally, the complainant argues that the contested decision has infringed upon his freedom of speech.

60. The Constitutional Court recalls that the freedom of speech is guaranteed by Article 17 of the Charter and Article 10 of the Convention. The mentioned provisions guarantee the freedom of speech of everyone, even persons holding a public office, such as judges.

61. The Charter does not imply in any of its provisions that it would be possible to deny the freedom of speech of anyone only because that person holds a public office (cf. *a contrario* Article 44 of the Charter which relates to possible legal limitations of fundamental rights and freedoms of persons holding a public office). The fact that a person holds an office of judge, therefore, does not deprive the person of the freedom of speech under Article 17 of the Charter.

62. Also the European Court of Human Rights (hereinafter referred to as the "ECtHR") has concluded in its case-law that also civil servants are entitled to the right to freedom of speech under Article 10 of the Convention [see the judgment of the Grand Chamber in the case of Vogt v. Germany of 26 September 1995, No. 17851/91, Section 43; the judgment of the Grand Chamber in the case of Guja v. Moldova of 12 February 2008, No. 14277/04, Section 52], including judges [the judgment of the Grand Chamber in the case of Wille v. Liechtenstein of 28 October 1999, No. 28396/95, Sections 41 to 42; the judgment in the case of Kudeshkina v. Russia of 26 February 2009, No. 29492/05, Section 79; the judgment in the case of Harabin v. Slovakia of 20 November

2012, No. 58688/11, Section 149; cf. also the judgment of the Grand Chamber in the case of Baka v. Hungary of 23 June 2016, No. 20261/12, Sections 140 to 142].

63. The freedom of speech of any person holding the office of judge is thus protected by Article 17 of the Charter and Article 10 of the Convention; however, it is subject to special limitations.

64. The case-law of the ECtHR is based on the fact that civil servants are bound when exercising their freedom of speech by a duty of loyalty and discretion - cf. e.g. the judgment of the Grand Chamber in the case of Guja v. Moldova of 12 February 2008, No. 14277/04, Sections 70 to 71; the judgment of the Grand Chamber in the case of Vogt v. Germany of 26 September 1995, No. 17851/91, Section 53; the judgment in the case of Ahmed and others v. the United Kingdom of 2 September 1998, No. 22954/93, Section 56, and the judgment in the case of De Diego Nafria v. Spain, of 14 March 2002, No. 46833/99, Section 37. This duty is also binding on judges (cf. e.g. the judgment in the case of Kudeshkina v. Russia, Section 85). The freedom of speech under Article 10 (2) of the Convention also includes duties and responsibilities (in relation to the freedom of speech of judges, cf. the judgment of the Grand Chamber in the case of Baka v. Hungary of 23 June 2016, No. 20261/12, Section 162).

65. The Constitutional Court concludes that also Article 17 of the Charter needs to be interpreted by analogy.

66. The Constitutional Court has already stressed in its case-law that the judiciary must enjoy public confidence if it is to fulfil its role successfully [see the judgment, file No. Pl. ÚS 11/04, of 26 April 2005 (N 89/37 of the Collection of Judgments of the Constitutional Court 207; 220/2005 Coll.); and the judgment, file No. I. ÚS 750/15, of 19 January 2016, Items 23 and 27 to 28]. Similar comments were made by the ECtHR [cf. the judgment in the case of De Cubber v. Belgium, of 26 October 1984, No. 9186/80, Section 26; the judgment of the Grand Chamber in the case of Kyprianou v. Cyprus, of 15 December 2005, complaint No. 73797/01, Section 172; the judgment of the Grand Chamber in the case of Micallef v. Malta, of 15 September 2009, No. 17056/06, Sections 97 to 98; the judgment of the Grand Chamber in the case of Morice v. France of 23 April 2015, No. 29369/10, Section 78 and especially Section 128; and the judgment of the Grand Chamber in the case of Baka v. Hungary, of 23 June 2016, No. 20261/12, Section 164]. It is essential to protect this public confidence in the judiciary and its impartiality.

67. The primary duty of any judge is to protect the fundamental rights and freedoms (Article 4 of the Constitution) and decide in accordance with the fundamental principles of the democratic rule of law (Article 1 (1) of the Constitution). Disputing those fundamental values in a judge’s speeches would even dispute his or her basic duties and, therefore, hardly could inspire public confidence. In relation to these fundamental values, a judge has therefore the duty of loyalty that restricts the judge while exercising the freedom of speech.

68. The Constitutional Court notes that it does not intend to restrict thus the public debate about the scope, content, and impact of these fundamental principles. On the other hand, however, the judge must refrain from any speeches that challenge the very essence of such principles and contravene them grossly. As the Constitutional Court noted in its judgment, file No. Pl. ÚS 19/93, of 21 December 1993 (N 1/1 of the

Collection of Judgments of the Constitutional Court 1; 14/1994 Coll.), the Constitution of the Czech Republic is not neutral in terms of values. A judge may not challenge the basic values by his or her speeches.

69. While the judge has a duty of loyalty only towards the fundamental principles and values of the democratic rule of law, the duty of discretion is broader.

70. The public confidence can only be enjoyed by the courts and judges who are impartial and independent. In assessing the impartiality and independence, a certain importance is also given to the appearance shown by courts and judges [the judgment in the case of Piersack v. Belgium, of 1 October 1982, No. 8692/79, Section 30; the judgment in the case of Campbell and Fell v. the United Kingdom of 28 June 1984, No. 7819/77 and 7878/77, Section 78; the judgment of the plenum in the case of Sramek v. Austria of 22 October 1984, No. 8790/79, Sections 37 to 42; the judgment of the Grand Chamber in the case of Incal v. Turkey of 9 June 1998, No. 22678/93, Section 65; cf. accordingly the judgment Pl. ÚS 11/04]. Judges then have a duty of discretion while making their speeches in order not to compromise the impartiality and independence of the judiciary (cf. the judgment of the Grand Chamber in the case of Baka v. Hungary of 23 June 2016, No. 20261/12, Section 164).

71. To maintain public confidence, it is also essential that judges keep their distance from political competition, even when exercising the freedom of speech.

72. The judiciary is the guarantor of justice in the democratic rule of law and its activity consist in deciding disputes according to law. However, this requires a certain distance from political actors and their interests, i.e. from political competition and party politics. The speeches of judges given while participating in the party politics (within the meaning of *partisan politics*, i.e. "political politics"; as for this, cf. Brian Z. Tamanaha, The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship", Emory Law Journal, 2012, Vol. 61, Issue No. 4, pages 759 to 778) undermine the public confidence in that the courts and judges will decide disputes according to law and not according to political interests.

73. The separation of the judiciary from political competition is based on the separation of powers. This concept is supported in the wording of Article 2 (1) of the Constitution; however, it permeates the whole system of the Constitution and is reflected in the system of checks and balances established by the Constitution [see e.g. the judgment, file No. Pl. ÚS 7/02 of 18 June 2002 (N 78/26 of the Collection of Judgments of the Constitutional Court 273; 349/2002 Coll.); judgment, file No. Pl. ÚS 77/06, of 15 February 2007 (N 30/44 of the Collection of Judgments of the Constitutional Court 349; 37/2007 Coll.), Item 47; judgment, file No. Pl. ÚS 18/06, of 11 July 2006 (N 130/42 of the Collection of Judgments of the Constitutional Court 13; 397/2006 Coll.); judgment, file No. Pl. ÚS 14/15, of 2 February 2016 (87/2016 Coll.), Item 41 to 42]. The concept of separation of powers is taken into account when interpreting the fundamental rights and freedoms protected by the Convention also by the ECtHR (see e.g. the judgment of the Grand Chamber in the case of Kleyn and others against the Netherlands of 6 May 2003, No. 39343/98 and others, Section 193; in relation to the judges, the judgment of the Grand Chamber in the case of Baka v. Hungary of 23 June 2016, No. 20261/12, Section 165). While the legislative power and the executive power (at the highest level) are inseparably linked to political competition (see e.g. Article 16 et seq. of the Constitution on the parliamentary elections, Article 68

of the Constitution on the responsibility of the government to the Chamber of Deputies, and Article 56 of the Constitution on the election of President), the situation is different in the case of the judiciary.

74. Moreover, the Charter is based on the fact that judges may be limited in their right to form political parties and political movements and to associate therein under Article 20 (2) of the Charter (Article 44 of the Charter). The Constitution provides that "the office of a judge is incompatible with that of the President of the Republic, a Member of Parliament, as well as with any other office in public administration" (Article 82 (3) of the Constitution). It should be stressed that this provision also prohibits judges from holding any office in "public administration" and the incompatibility of offices relates to any office in both the public government and the self-government, both the regional and the municipal. The Constitution thus limits the interconnection between the judicial power the legislative power, executive power, as well as the local self-government. In this context, the Constitutional Court emphasises that the political competition also takes place in the local self-government (see e.g. Article 102 of the Constitution) and, therefore, a judge may not be excessively involved at that level either.

75. Judges' keeping distance from political competition and the interests of political parties or individual politicians have a special importance with regard to historical experience. Before 1989, the judiciary was linked with the Communist Party, subject to its interests, and in "politically sensitive" cases carried out specific instructions, not to mention the political trials in the fifties of the last century. The independence of the judiciary was thus liquidated (for details, see KÜHN, Zdeněk. Socialistická justice (*Socialist Justice*). In BOBEK, Michal, Pavel MOLEK and Vojtěch ŠIMÍČEK. Komunistické právo v Československu: kapitoly z dějin bezpráví (*Communist Law in Czechoslovakia: The History of Injustice*). Brno: Masaryk University, International Institute of Political Science, 2009, pages 822 to 847. Also available at www.komunistickepravo.cz). The current Constitution, based on the value discontinuity with the communist regime (cf. the judgment, file No. Pl. ÚS 19/93), has a special interest in preventing any links between judges and political parties and the excessive involvement of judges in political competition. Given the recent past, it is necessary to strengthen the public confidence in the fact that the judiciary is not subject to political interests.

76. Therefore, while exercising their freedom of speech, judges must act with discretion and in relation to political competition at all levels. Each case, however, must be assessed individually, considering all the circumstances, while it is necessary to take into account in particular the position of a judge making a speech, the content of his or her statements, and the overall context in which such statements were made (cf., by analogy, the judgment of the Grand Chamber in the case of Baka v. Hungary of 23 June 2016, No. 20261/12, Section 166).

77. The Constitutional Court notes that the duty of discretion also applies to some other areas - for example, judges are imposed upon the confidentiality obligation to protect the rights of parties to the proceedings. The Constitutional Court, however, does not consider it necessary to comment on these other areas in this judgment, because they do not relate to this case.

78. The Constitutional Court notes that it is aware that Article 17 of the Charter does not refer expressly, in contrast to Article 10 (2) of the Convention, to the duties and

responsibilities. The duties and responsibilities of judges, however, arise from different standards of the constitutional order of the Czech Republic, namely from Articles 81 to 82 and Articles 90 to 96 of the Constitution. The Constitutional Court is also aware of the fact that the number of possible legitimate aims for restricting the freedom of speech (not only judges) in Article 17 (4) is smaller than under Article 10 (2) of the Convention. In contrast to its equivalent in the Convention, Article 17 (4) of the Charter does not expressly set out, *inter alia*, the possibility to limit the freedom of speech in order to protect the impartiality and authority of the judiciary. However, as the Constitutional Court has already stated in Item 93 of its judgment, file No. I. ÚS 517/10, of 15 November 2010 (N 223/59 of the Collection of Judgments of the Constitutional Court 217), the impartiality and authority of the judiciary are constitutional values that are part of the concept of the rule of law pursuant to Article 1 (1) of the Constitution of the Czech Republic (hereinafter referred to as the "Constitution") and that may be a legitimate objective of limiting the freedom of speech,while the impartiality of the judiciary is protected at the constitutional level also by Article 36 (1) of the Charter, which guarantees, *inter alia*, the right to a fair trial, and Article 82 (1) of the Constitution, according to which no one may endanger the impartiality of judges (cf. also the judgment, file No. I. ÚS 750/15, of 19 January 2016, (22); and the resolution, file No. I. ÚS 1486/15, of 9 February 2016, Item 21). For the sake of completeness, the Constitutional Court notes that the freedom of speech may be restricted even for the purpose of protecting the independence of judges and the judiciary, namely pursuant to Article 36 (1) of the Charter and Articles 81 and 82 (1) of the Constitution. It can be stated that the decision of the Disciplinary Court and the legislation applied pursue a legitimate objective of protecting the impartiality and independence of the judiciary within the meaning of Article 10 (2) of the Convention, Article 6 (1) of the Convention, and Article 36 (1) of the Charter in connection with Articles 1 (1), 81, and 82 (1) of the Constitution. In this respect, the Constitutional Court also emphasises that the complainant submits to these constitutional limitations of the freedom of speech based on his own free decision, at a moment when he assumed the office of judge and took a judge's vow.

79. Therefore, the Constitutional Court notes for the reasons mentioned above that a person who assumed the office of judge shall be bound by the duty of loyalty and discretion while exercising his or her freedom of speech under Article 17 of the Charter and Article 10 of the Convention. The freedom of speech of such person is therefore subject to special limitations arising from that duty. By his or her speeches, a judge may not in particular undermine the public confidence in that he or she will act in accordance with the fundamental principles of the democratic rule of law or the confidence in the impartiality and independence of the judiciary. Each judge must act with discretion in any of his or her speeches made concerning political competition, especially in the public evaluation of individual candidates and political parties and groups and the formation of political coalitions. Each case, however, must be assessed individually, considering all the circumstances, while it is necessary to take into account in particular the position of a judge making a speech, the place and manner of speech, the content of his or her statements, and the overall context in which such statements were made.

80. From a constitutional point of view, any speech of a judge should be assessed using the criteria listed below.

81. First and foremost, any speech or its individual parts must be examined as whether they contain factual allegations, value judgments or - as it will be in most cases

- hybrid statements. As already stated by the Constitutional Court in its judgment, file No. I. ÚS 750/15, of 19 January 2016, Item 24:

> In assessing the admissibility of statements in terms of the freedom of speech, the ECtHR distinguishes between the factual statements the truth of which can be verified by evidence and the value judgments as for which - by definition - it is not possible (the judgment of the Grand Chamber of the ECtHR in the matter of Pedersen and Baadsgaard v. Denmark, of 17 December 2004, complaint No. 49017/99, Section 76). Often, however, the nature of the statement excludes that it is thought of as a purely factual statement or a value judgment. The latest case-law of the ECtHR thus abandons the strict dichotomy of factual statement/value judgment and instead works with the factual statement and value judgment as two counterparts, while the imaginary line between these opposites constitutes a sort of continuum (cf. e.g. the judgment of the ECtHR in the case of Karsai v. Hungary of 1 December 2009, No. 5380/07, Section 53). The statements which combines the factual basis and an evaluation component are known as hybrid statements (for hybrid statements, cf. Kosař, D. Kritika soudců v České republice (*Criticism of Judges in the Czech Republic*). Soudní rozhledy, 2011, Issue No. 4, page 118) or value judgment with the factual basis (cf. e.g. Lindon, Otchakovsky-Laurens and July v. France, the judgment of the Grand Chamber, 22 October 2007, No. 21279/02 and 36448/02, Section 57; or Kuliś and Różycki v. Poland, the judgment, of 6 October 2009, No. 27209/03, Sections 37 to 39). In that event, it is therefore necessary to determine to what extent such hybrid statements have a factual basis and whether any such statements are not exaggerated due to the proven factual basis (the judgment of the Grand Chamber of the ECtHR in the case of Pedersen and Baadsgaard as cited above, Section 76; hereinafter the judgment of the ECtHR in the case of Jerusalem v. Austria of 27 February 2001, complaint No. 26958/95, Section 43; and the judgment of the Grand Chamber of the ECtHR in the case of Morice v. France of 23 April 2015, complaint No. 29369/10, Section 126). When assessing the nature of the statements, according to the ECtHR, it is also necessary to take into account their overall tone and circumstances of the case (ibid, Section 126; the judgment of the ECtHR in the case of Brasilier v. France, of 11 April 2006, complaint No. 71343/01, Section 37).

82. The distinction between factual statements, value judgments, and hybrid statements shall also be applied to assessing any speech of the judge [the judgment in the case of Kudeshkina v. Russia, Section 84, as for the application, see Section 91 et seq.; cf., by analogy, the judgment of the Grand Chamber in the case of Wille v. Liechtenstein, Section 67, in which the ECtHR examined whether it was not an untenable proposition]. The Constitutional Court notes that this distinction is applied in the assessment of speeches in general [see e.g. the judgment, file No. I. ÚS 453/03, of 11 November 2005 (N 209/39 of the Collection of Judgments of the Constitutional Court 215); the judgment, file No. II. ÚS 2051/14, of 3 February 2015, Item 26; the judgment I. ÚS 750/15, Items 24 to 25], and does not see why the criterion should not be applied to assessing the speeches of judges. In this context, however, the

Constitutional Court notes that due to the specific role of a judge in a democratic rule of law and the principle of separation of powers, this criterion is secondary for certain judges' speeches (especially the speeches made in the context of political competition and election campaign). This means that some political value judgments made by a judge (as for which, other speakers would enjoy constitutional protection) may be limited because of the special status of judges in the Czech constitutional order, because it is necessary in a democratic society within the meaning of Article 17 (4) of the Charter and Article 10 (2) of the Convention (cf. also Item 79 of this judgment).

83. It is also necessary to deal with the extent to which the judge in his or her speech complied with the duty of loyalty and discretion.

84. Firstly, it assesses whether or not the speech of a judge is contrary to the fundamental values of the democratic rule of law (as for the duty of loyalty, cf. Items 67 to 68 of this judgment).

85. Secondly, it is necessary to examine whether a judge by his or her speech has not undermined the public confidence in the independence and impartiality of the judiciary and whether that speech was not excessively involved in political competition (cf. the duty of discretion, Item 69 et seq. of this judgment). A judge must maintain distance from the remaining branches of government and self-government, especially at a time when an election campaign culminates, i.e. before the elections and immediately after them.

86. The duty of loyalty and discretion is binding on a person starting from the moment when such person assumes the office of judge (cf. Item 78 of this judgment), even in private life. The circumstances under which a speech is made, however, have an impact on the extent of that duty.

87. A speech in which a person expressly refers to his or her office of judge should be considered more strictly. It is because such speech will increasingly be associated with how the person in question performs his or her office. By analogy, it is necessary to perceive a situation where the person focuses in his or her public speech on the circle of persons who are aware of that he or she serves as a judge (i.e. the circle of persons with whom the person previously communicated following the assumption of the office of judge). Such speech will also be associated with the performance of duties of a judge and increased demands can be placed on the person making such speech. Any speech in this situation should then also be considered more strictly. If it cannot be objectively established that a speech has been made by a judge, an increased protection and tolerance towards that speech should be applied. Such speech reduces the extent to which the speech will be associated with the office of judge.

88. On the contrary, a high level of protection shall be enjoyed by the speeches of judges, especially the representatives of the judiciary, which cover the issues related to the management and organisation of the judiciary and judicial reforms, even though such speeches intervenes in the politics (the judgment of the Grand Chamber in the case of Wille v. Liechtenstein, Section 67; cf. identically the judgment of the Grand Chamber in the case of Baka v. Hungary of 23 June 2016, No. 20261/12, Sections 165 to 167 and 170 to 171). Even in such cases, however, the judge must observe prudence and caution in his speeches and engage in a political struggle only to the necessary extent.

89. The Constitutional Court notes that the above-mentioned criteria give an outline, not an exhaustive list of factors that must be taken into account when evaluating the speech the judge in question. When evaluating speeches of judges, it is possible to apply adequately the criteria applied by the Constitutional Court to evaluate speeches in general, e.g. in defamation cases (e.g., the judgment, file No. I. ÚS 453/03, of 11 November 2005 (N 209/39 of the Collection of Judgments of the Constitutional Court 215); the judgment, file No. II. ÚS 2296/14, of 14 March 2015, Item 20). Given the limited scope of the case-law relating to the limits of the freedom of speech of a judge, first and foremost, it is upon the Disciplinary Court to substantiate its considerations taking into account the particular circumstances of the case.

90. The Constitutional Court also stresses that each test step must define the speech sufficiently and precisely; if necessary, also by referring specifically to the assessed statements. It is always necessary in the event that certain statements are assessed by the court as excessive (cf., by analogy, the judgment, file No. I. ÚS 750/15, of 19 January 2016, Item 46 *in fine*).

91. Finally, it must be determined whether the nature and severity of any sanction are adequate in relation to the misconduct established (the judgment of the Grand Chamber of the ECtHR in the case of Cumpănă and Mazăre v. Romania, of 17 December 2004, complaint No. 33348/96, Section 111; the judgment of the Grand Chamber of the ECtHR in the case of Morice v. France, Section 127) and whether or not the sanction has a chilling effect on the freedom of speech of other judges, especially on their involvement in discussions concerning the administration of the judiciary (cf. the judgment in the case of Kudeshkina v. Russia, of 26 February 2009, No. 29492/05, Sections 99 to 100, and the judgment of the Grand Chamber in the case of Baka v. Hungary, of 23 June 2016, No. 20261/12, Section 167).

E. Freedom of speech - as applied to the present case

92. The Constitutional Court considered also the present case in the manner described above. The facts of the case and the content of the contested decision may be summarised as follows.

93. According to the contested decision of the Disciplinary Court, the complainant had committed a disciplinary offence by two of his speeches - in a leaflet which was disseminated in the municipality of Mnichovice and in the article published in the local magazine. Both speeches were related to the municipal elections and to the political situation in Mnichovice. The complainant does not have a permanent residence or the right to vote in the municipality but he owns there a cottage where he stays regularly. According to the Disciplinary Court, it is a common knowledge in Mnichovice that the complainant is a judge.

94. The complainant commented on the campaign of political parties in the leaflet. He stated there that he had not found any objectionable conduct of the party "Volba pro město – Volba pro Mnichovice" during the campaign; on the other hand, he evaluated the campaign of other three parties negatively. The complainant is also regarded as the author of that part of the leaflet mentioning him as a judge and is also deemed responsible for the fact that the leaflet was distributed in Mnichovice before the elections (cf. Items 51 and 54 of this judgment).

95. In an article published after the elections in the local magazine, the complainant discusses possible coalitions in the municipal council. He appealed in the article to the councillors to bear in mind that the party "Volba pro město - Volba pro Mnichovice" led by Mr Ing. Peter Schneider had won the elections. The complainant expressed his opinion in the article that the named leader was better suited to lead the municipality than the candidates of other parties, due to his technical education. The complainant also expressed his concern in the article that otherwise the municipality faces a "disaster". The article does not mention that the applicant is a judge; the complainant only identified himself as a "cottager".

96. According to the Disciplinary Court, both speeches were made with the intention to favour the party "Volba pro město - Volba pro Mnichovice" led by Mr Ing. Peter Schneider. Because it is a common knowledge in Mnichovice that the complainant is a judge, it does not matter whether the complainant mentioned it expressly. According to the Disciplinary Court, however, the complainant allowed the leaflet to be distributed including the information that the complainant serves as a judge. In both his speeches, in view of the Disciplinary Court, the complainant did not act with sufficient discretion and allowed that his office of judge was "misused to promote private interests". According to the Disciplinary Court, the speeches by the complainant further showed confrontational elements and contained statements that could harm the honour of the representatives of criticised political parties. According to the Disciplinary Court, the complainant, therefore, failed to comply with the duty to refrain from anything that would compromise the dignity of the judicial office and committed a disciplinary offence.

97. The Constitutional Court has reached the following evaluation.

98. The speeches in both the leaflet and the article are hybrid in nature. Although both speeches have a factual basis (e.g. a statement about the content of election programs or the education of candidates), the element of evaluation is entirely predominant - in its leaflet, the complainant primarily evaluated the campaign of four political parties; in the article, he commented on possible coalitions in the municipal council and assessed the quality of various representatives of political parties. In the present case, the essential question is not whether this evaluation had a sufficient factual basis, but whether the complainant did not breach any of his specific duties as a judge by his evaluation.

99. It is therefore necessary to examine whether the complainant did not breach by his speeches the duty of duty of loyalty and discretion he has as a judge.

100. Regarding the duty of loyalty, neither of the complainant's speeches relate to the matters relating to the fundamental principles of the democratic rule of law. However, the complainant did not breach this duty by his speeches.

101. It is also necessary to examine whether the complainant complied with the duty of discretion. The Constitutional Court notes that this duty of the complainant arose upon his assumption of his judicial office and the complainant shall abide by the duty even in his private life (cf. Item 86 of this judgment).

102. In its leaflet, the complainant evaluated the campaign of all four political parties. He had no objections against the campaign run by the party "Volba pro město - Volba pro Mnichovice"; on the other hand, he commented on the campaign of other three

parties in a negative manner. From an objective point of view, the purpose of this speech was supporting the party "Volba pro město - Volba pro Mnichovice" in the elections and disadvantaging the remaining three parties.

103. This leaflet was distributed in Mnichovice before the elections (and the complainant is deemed responsible for that kind of publication, cf. Item 94 of this judgment). The mass distribution of the leaflet in the municipality represents a significant entry into the local public debate with the aim to influence as many people as possible. In the present case, the leaflet was to persuade voters to vote for the party "Volba pro město - Volba pro Mnichovice" and discourage them from voting for the remaining three parties. The complainant thus participated by his speech in the leaflet in the election campaign of the party "Volba pro město - Volba pro Mnichovice".

104. The leaflet mentions that the complainant is a judge (while he is deemed responsible for this fact, cf. Item 94 of this judgment). The office of judge was thus specifically used in the campaign in favour of a particular party.

105. The Constitutional Court notes that it is essential for maintaining the public confidence in the judiciary that judges keep their distance from political competition, at any level, including the local one (cf. Items 74 and 85 of this judgment). The complainant, however, by his speech in the leaflet, actively participated in the election campaign of one of the parties in the local elections, and he did so while expressly mentioning his office of judge. By this step, the complainant became openly involved in the election struggle with the aim to influence its outcome, and he did so in the most sensitive period, i.e. before the elections (cf. Item 85 of this judgment). Such a speech based on the partisan politics or "political politics" (cf. Item 72 of this judgment) undermines the public confidence in that the courts and the judges will decide according to the law and not according to political interests. The complainant thus in this speech breached his duty of discretion he has as a judge since he became actively, openly, and with excessive intensity involved in political competition by his speech made by himself and on its own initiative.

106. After the elections, the complainant published an article in the local magazine, analysing possible coalitions. He stated that the winner of the elections was the party "Volba pro město - Volba pro Mnichovice" led by Ing. Peter Schneider who was better suited to serve as mayor than candidates of other parties. By making his speech, the complainant supported the mentioned party in coalition negotiations, as well as a particular politician in negotiations on who will occupy the office of mayor. In other words, the complainant wanted to influence the form of the coalition and who will hold public offices in the local self-government.

107. Publishing an article in a local magazine also presents a significant entry into the public debate, though not as pronounced as the distribution of leaflets. The complainant in this article did not mention that he is a judge; in addition to his name, the complainant only identified himself as a "cottager". It is true that in general it would be indicative of an increased protection of the complainant's speech as the complainant does not refer to his office of judge but to his connection to the community. Before publishing the article, however, the complainant had already entered the public debate concerning the elections in Mnichovice by his leaflet, where he identified himself specifically as a judge. Therefore, the complainant must have been aware of that his later speeches in this debate would also be connected to his office of judge. It is to the

complainant's credit then that he did not refer to his office of judge in the article expressly. Yet, even this speech must be assessed severely because there was a reason to make this speech associated with the complainant as a judge. For completeness, the Constitutional Court notes that neither this speech may be classified under a category of judicial speech enjoying an increased protection (cf. Item 88 of this judgment).

108. The Constitutional Court notes that it is inconsistent with the Czech constitutional order if any judge in his or her public speeches attempts to influence the form of coalitions in a municipal council or who will hold the office of mayor. The complainant, however, did so in his article, and in addition in a situation where he must have known that his speech would be associated by the public with his office of judge, and shortly after the elections when the political struggle is particularly fierce (cf. Item 85 of this judgment). By making this speech, the complainant also became engaged in the "political politics" (cf. Item 105 of this judgment), in which a judge may not participate. The public confidence in the fact that the complainant as a judge keeps his distance from political competition has thus been compromised by the complainant's article. By making this speech, the complainant also breached the duty of discretion, though less severely than in the case of his leaflet.

109. The Constitutional Court therefore notes that the complainant had breached his duty of discretion by both of his speeches.

110. In addition, according to the Disciplinary Court, the complainant's speeches show confrontational elements and contain statements that could harm the honour of the representatives of criticised political parties.

111. However, the Constitutional Court disagrees with this assessment. The Disciplinary Court failed to mention which particular complainant's statements are confrontational in nature and are liable to harm the honour of criticised politicians. The Constitutional Court reiterates that if any speech or any part of such speech is assessed by a judge as deviating from the protected limitations, it is the responsibility of the court to mention such statements expressly in the decision (cf. Item 90 of this judgment) and to interpret its considerations in relation to specific statements and the circumstances under which they were made. This Disciplinary Court did not comply with this responsibility.

112. The purpose of disciplinary proceedings is not to provide the protection of moral rights of the persons who feel affected by the statements of judges. The task of the disciplinary court in the disciplinary proceedings is merely to examine whether the particular complainant's statements were capable of undermining the public confidence in the judiciary. Any action to protect personality and disciplinary action are two different proceedings pursuing a different purpose and requiring different criteria for assessing the admissibility of a certain speech and its implications. Considering whether a judge has interfered by making his speeches with the protected personal sphere of other persons has thus only a supporting role in the disciplinary proceedings and the outcome of these reflections cannot by itself justify the imposition (or the absence thereof) of a disciplinary sanction.

113. For these reasons, the Constitutional Court cannot accept the opinion of the Disciplinary Court that the complainant's speech showed unacceptable confrontational elements and was liable to harm the honour of criticised politicians.

114. These considerations, however, cannot alter the conclusion that the complainant made his speeches himself and on its own initiative, and became actively, openly, and with excessive intensity involved in political competition, and thereby breached the duty of discretion. The Constitutional Court summarises that it is essential for maintaining the public confidence in the judiciary that judges keep their distance from political competition in their speeches, at any level, including the local one. Judges may not participate in the campaign of political parties, political movements or election groups or individual politicians. By analogy, it is not fitting that judges attempt to influence, by their public speeches, the form of coalitions in a municipal council or who will hold the office of mayor. Such speeches undermine the public confidence in that judges will decide disputes according to law and not according to political interests. The complainant, however, had breached its duty to refrain from such statements, and therefore it was possible to intervene in his freedom of speech.

115. Finally, the Constitutional Court dealt with the question of whether the sanction imposed upon the complainant by the Disciplinary Court is adequate.

116. The Disciplinary Court concluded in the contested decision that the complainant had committed by making his speeches a disciplinary offence, but no disciplinary measure has been imposed upon the complainant by that court. The Constitutional Court notes that such sanction should be seen as a separate decision that the complainant is guilty of a disciplinary offence. Such decision may lead to the fact that with any subsequent disciplinary offence a harsher penalty will be imposed. Above all, however, it should discourage the complainant and other judges from similar conduct in the future. On the other hand, it is the mildest possible sanction. Based on these facts, the Constitutional Court notes that the sanction imposed upon the complainant is not inadequate in relation to the nature of the disciplinary offence and has no significant chilling effect on the freedom of speech of other judges.

117. The Constitutional Court, therefore, concludes that the contested decision has not infringed upon the complainant's right to the freedom of speech.

F. Conclusion

118. The Constitutional Court concluded that none of the objections of the complainant were successful. First, the complainant's right of appeal in criminal matters under Article 2 (1) of Protocol No. 7 to the Convention was not infringed upon because the disciplinary proceedings conducted against the complainant could not be regarded as proceedings in a criminal case within the meaning of Article 2 (1) of Protocol No. 7 to the Convention. Secondly, the contested decision did not infringe upon the complainant's freedom of thought within the meaning of Article 15 (1) of the Charter either because the Disciplinary Court did not find the complainant guilty of ideas that he held but of the views that he publicly expressed. Third, the Disciplinary Court did not infringe upon the complainant's freedom of speech as the complainant himself, from his own initiative, actively, openly, and with excessive intensity had become engaged in political competition and thereby breached the duty of discretion. Fourth, the Constitutional Court has not found any infringement upon the complainant's right to a fair trial, which would have constitutional intensity.

119. For the above-mentioned reasons, the Constitutional Court, under Section 82 (1) of Act on the Constitutional Court, dismisses the constitutional complaint since the

contested decision did not infringe upon the constitutionally guaranteed rights of the complainant.

Appeal: No appeal is admissible against the judgment of the Constitutional Court.

In Brno, 5 September 2016

David Uhlíř, m.p.
Presiding Judge