12.Summary

My diploma work is focused on the Constitutional Court of the Czech Republic and the base of decision-making in the period from the half of 2007 to the end of 2007 with consideration to some cases in the first half of 2008.

At the beginning of the work there is shown the history of the constitutional jurisprudence in historical Czech countries and very shortly main procedures of the Constitutional Court. The object of my diploma work was finding and evaluation of the bases leading the Constitutional court to its decisions and also to find the main argumentation bases of the CC from the point of law-philosophy and theory of law.

In following chapters I attempted to depict main streams of law philosophy and law theory of euroathlantic law civilzation impacting on the Czech legal environment and the most important members of iusnaturalistic and positivistic law ideology and some theorists finding other ways of legal thinking.

In the casuistic part of this work I tried to show the CC´s methods of law-theoretical thinking and its most important philosophical attitudes thanks to its cases. I devoted a considerable interest to hard cases in the researched time.

In the analysed period there could be seen an effort of the Costitutional Court to find an algorithm of proceeding of the decision, reasoning and adjustment of some methodic steps resembling three steps of the Supreme court of the United States :
- rational basis steps
- the suspect classification (strict scrutiny test)
- the intermediate level of scrutiny

I consider the test of constitutionality as very important.

The test of constitutionality of the legal regulations consists of four parts :

1.The test of constitutional procedure of enactment of a law
2.The test of legitimity, expediency of a law
3.The test of racionality, reasonability
4.The test of proporcionality, adequacy

I occupied with the test of constitutionality of statutary instruments issued by territorial self-governing units:

A) review of a municipality competence to make statutory instruments
B) research whether a municipality does not exagerate its competence by enacting statutory instruments
C) research whether a municipality does not abuse given competences
D) research of these instruments from the point of unreasonability

This test is evidently similar to the test of constitutionality.

The Constitutional Court extended the test of rationality for other four criterions by economic, cultural and social rights :

1) a definition of the meaning and the base of individual social right, its essential content
2) evaluation of a legal act if does not aim the essential base of this right
3) consideration whether the legal adjustment aims to a legitimate goal, whether is not a lowering of basic rights standard
4) consideration of the question whether a used legal instrument is rational, reasonable, although this is not the most suitable, the most effective, the wisest

The CC extended the test of proportionality in the case of two contradictory rights for next three steps :

1) The test of suitability
2) The test of necessity
3) The method of balancing of contradictory constitutional values

The CC delimited the three points´ (in fact the five points´) test of legitimacy of difaming information by the personal rights:

1) the existence of reasonable reasons to rely on veracity of difaming information
2) to realise all available steps to verify the truth of such information in intensity and measure which were available and definitive
3) the person who released information could have reason not to believe in this information
4) the absence of checking the truth of information by inquiring into a person touched by this difaming information and the absence of releasing opinion
5) the examination of a motive.

From above mentioned there can be seen a strong effort of our constitutional judges to elaborate an axis, a more solid structura for decision-making and an evaluation of constitutionality or unconstitutionality. This effort inclines towards the cognitivistic attitude and looks for the only solution of a case.

All decisions of the Constitutional Court could be divided in two parts:

1.Normal judicial cases with no interest of mass media, when judges work quietly and make a decision according to their true opinions and faith based on the legal values.

2.Hard cases with a huge attention of society or mass media. In these cases some judges do not resist to the pressure leading to the „right“ decision and in my opinion these judges crack law area, use non legal arguments and act ultra vires. During analysing of the hard cases there could be seen the majority vote arguments as not too persuasive arguments even as purpose built and frequently can be submited to the unformal logic arguments.

In the analysed period I must have noticed relevant differences in decicions of our constitutional judges when some of them operate with the non normative, mainly sociological acces.

On the other hand some judges as Jiří Nykodým, Pavel Holländer, Pavel Rychetský must be appreciated for their consistent opinions, resistence to media and executive power pressure and also for right-minded effort to protect achieved standard of human rights in our country.

The acces of these named judges shows the effort to continuity of legal system and not to negate everything coming from former political system till 1989, not to repete the error of lassez faire market mechanism, but on the tradition of social oriented acces and achieved high living standard to find new ways of business and effectivity of the Czech society .

These judges present very good knowledge of micro and macroeconomic questions. They look for a new modern legal system like a helpmate to a better life of all citizens.

A special chapter is the judge, Eliška Wagnerová, as a routin dissenter . In spite of this fact it is evident, that she draws water from the well of the German constitutional law which, veneration of it, has still been living with past traumas after the deconstruction of national socialism 63 years ago. Reactions of society and judges do not match to the contemporary acces, mainly in the area of freedom of speech.

Above mentioned information explains an enormous role of a judge´s personality, judge´s moral credit and professionalism during judging and must be approved hesitation in nominating judges who are younger than 30 and become from school banks without any practice outside the protection of the state power.

Questions of a judge´s personal attitude during decision-making are out of range of this diploma work, but it is apparent, they will be an object of the theoretical front in the Czech Republic in near future because a judge´s balance, wisdom and experience can be a way how to find new dimensions of justice and rightness in the era of the exponential expansion of legislation.

The issue of natural law I practically did not meet in the analysed period and can be declared that the natural law attitude is invisible in decision-making or argumentation of the Constitutional Court. It is a display without any doubts that lots of natural principles were built in the Charter of human and basic rights of the Czech people. It is very progressive in comparison to other countries. Economic, social and cultural rights are a step ahead other european countries. The comparison to other non european countries or the U.S. is out of discussion.

The Savigny´s procedure of interpretation, it means, semantic, logical, systematic and historical-teleological interpretational methodology is a set of standard methodology of the Constitutional Court. Historical-teleological method used in reasoned messages of the Parliament, during enacting the rule, can´t be opposed. Different cases are, however, some historical and historical-teleological arguments like more or less argumentatio claudians. Extraction of used historical teleological arguments from a country legal context and also from legal culture is confusing and it is not exact historically.

The interesting point is a regular application of comparative methodology with different legal systems, mainly with similar legal culture. The first position belongs to the decisions of the German Constitutional Court (Bundesverfassungsgericht), when the German legal system due to longtime, geologic nearness and mutual influence resembles to our one very much. Other countries of the middleuropean region and also the U.S., Canada, Australia are

comparised as well. I noticed only a very little comparison to countries of Latin or Spanish origin in spite of their huge influence through the former colonial world. The views outside of anglosaxon and european region were not visible.

The CC was very carefull with use of general law principles´argumentation, but frequently argues with principles based on positive law either constitutional or subconstitutional. The effort to establish some new principles is very clear. In some cases the Constitutional Court uses euroconform interpretation, but very rarely uses decisions of European Court of Justice. The precedential arguments based on European Court of Human Rights are not exceptional.

In some findings can be seen an extraordinary effort to solve a concrete sociable problem at any price with ignoring other methods of the control system exept of the legal regulation. In these cases there are proved attributes of the legislative optimism, which is declared in Pavel Holländer´s works very exactly.

This mentioned style of decision-making as the ultima ratio damages reputation of the Constitutional court, smells of social ingeneering and does not impress credibility of the Constitutional court. Some political attacks against its role in the Czech legislative system can be released in near future or an effort to change a lineup of judges.

In some cases the Constitutional Court should perhaps use its discretional power not to decide in the cases not reached the constitutional intensity than to look for a law solution if economical or political solutions could be more efficient.

In hard cases there are explicit elements of the decisionism with sociologically based overtones. This typical attitude is seen in the case of regulatory lease of appartments and regulatory fees in medicalcare services. Questions of sociable discourse in the Czech legal system do not have tradition and nowadays it does not bring good results.

It seems, that our top representatives and also judges do not trust Czech people and do not have enough courage to come in front of the people and discuss about problems of society. A deficit of a public discourse before or during the legislative process is one of the main mistakes of our legislative procedure and consequent misunderstandings and quarrels. Effects of such methods of a social dialogue e.g. a discourse show very evidently that is what to do on way to democracy and respect to ideas and reasons of other people.

Outputs of the Constitutional Court as to hard cases can not be named consistent and the theory of the self restrained judge as the opposite of the activistic judge was not accepted in many points of view.

As for the matter of my diploma work I can ascertain more cognitivistic attitudes of the Constitutional Court and wide use of the argumentation with the constitutional principle, but in hard cases there are evidently seen components of the decisionism based on socilogical values. Irradiation through the legal system by the constitutional adjustment of basic human rights and liberties is a very transparent principle of the CC. This principle evokes lots of questions and much discussion about its practical application is expected soon.
As could be evidently seen from above mentioned the recent argumentation bases of decision-making of the CC, mainly in hard cases, are ambiguous.

There are visible two main groups of judicial lines of decision making of the CC´s judges:

1) cognitivistic line, strictly based on positive law and constitutionally confirmed values in the position of a selflimited judge
2) decisionistic line, taking to decision making other extralegal values

These both streams were in a conflict in the most number of hard cases I treated during the monitored period .

What is not to much discussed between lawyers and society is that judicial judging of the Constitutional Court reflects the battle of ideas. (We do not want to see it, however, it does not mean it does not exist). These value attitudes can be measured very rarelly in spite of the fact that judges´ decision-making is based on these extralegal values which are frequently included in its reasoning and argumentation. The ideas are different characters. Economic ideas how to manage the economic function of society, content ideas of legal institutes of civil or public law, ideas about the function of the state managment, administrative system and lots of other questions which in their concentrated form and transposed in the individual cases fight to each other in the Constitutional Court´s area. This element must be elevated.

In conclusion I must appreciate that practically every Czech citizen has the possiblity to claim a solution of his problem from very respected Czech lawyers (judges of Constitutional court). And that is the element of real democracy and a massive part of the material legal state.