

# § 7 Special fundamental concepts in other constitutional systems

## I. Pancasila

- see presentation by MOHAMMAD IBRAHIM

## II. Other special concepts in Asian constitutionalism

- see presentation by MOHAMMAD IBRAHIM

## III. Special concepts in socialist constitutionalism

### 1) From totalitarianism to socialist constitutionalism

- the principle of a - very limited - "socialist legality" under the totalitarian socialist rule did not allow a real primacy of the constitution
- slow development towards a special socialist kind of constitutionalism since the 1990s

### 2) Dominating role of the Communist Party instead of Western democracy

- see for Vietnam art. 4 Const. 2013, for China art. 1(2) Const. 1982 as amended 2018
- party and state institutions closely interconnected and interleaved; not always clear who really takes the decisions
- however, in Vietnam also the Party is bound to constitution and law (cf. art. 4(3))

### 3) Principle of democratic centralism instead of separation of powers

- see for Vietnam art. 8(1) Const. 2013, for China art. 3(1) Const. 1982
- a formerly Leninist concept of a radically centralist and hierarchical structure of the state
- in particular no independence of the judiciary
- however, see for Vietnam the *principle of coordination and mutual control of the state institutions* in art. 2(3) of the Const. of 2013
- however, in Vietnam the introduction of a Constitutional Council was discussed and even proposed in the draft constitution 2013 but finally rejected

### 4) The principle of the socialist rule of law

- see art. 2(1) of the Vietnamese Const. 2013, art. 5(1) Chinese Const. 1982
- discussed in a multidisciplinary Vietnamese-German conference in Hanoi in 2014
- problem: What is the difference between ordinary and socialist rule of law?

### 5) The principle of a socialist or socialist-orientated market economy

- see for China art. 15 Const. 1982, for Vietnam art. 51 Const. 2013
- parallelism of state and private economy
  - with (alleged) leading role of state economy in Vietnam

### 6) People ownership of Land

- see for Vietnam art. 53 Const. 2013

## IV. Special concepts in islamic constitutionalism

- islamic constitutionalism - a heterogeneous, in many aspects still unclear concept

### 1) **The principle of supremacy of the Sharia**

- recognised only in a few muslim states (e.g. Iran, Pakistan, Saudi Arabia)
- Sharia not only partially implemented but generally binding
  - laws contravening Sharia are unconstitutional
  - laws are intended to implement Sharia
  - in some states the whole Sharia is directly binding law
- *conflicts with the rule of law* since many rigorous Sharia rules are incompatible with the principle of proportionality or other essential rule of law elements

### 2) **The limitation of human rights with regard to Sharia and islamic values**

- see the controversial "Cairo Declaration on Human Rights in Islam" of the Organisation of Islamic Cooperation of 1990 that aimed to subject human rights to the Sharia
- see the Arab Charter of Human Rights of 2004 that is criticised by the UNHCHR for not meeting international standards
  - preamble refers to the Cairo Declaration
  - allows death penalty for children (art. 7(1))
  - allows "positive discrimination established in favour of women by the Islamic Shariah, other divine laws..." (art. 3(3))
  - guarantees freedom of expression only if "exercised in conformity with the fundamental values of society" (art. 32(2))

### 3) **The shura principle (principle of consultation)**

- political decisions must be taken in a process involving others in the form of consultation
- often understood as a special islamic manifestation of democracy
- concept still vague and controversial

### 4) **Others**