

§ 7 Special fundamental concepts in other constitutional systems

I. Pancasila

- see presentation by MOHAMMAD IBRAHIM

- 1) Historical background
- 2) The Five Principles
- 3) Pancasila as basis of the Constitution of the Republic of Indonesia of 1945

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 "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