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Unitary State

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A. A Notion

1 The unitary state can be seen as the archetype of the state. Still today, the vast majority of states is considered to pertain to this category.

2 When legal philosophers began to think about the state, they had the unitary state in mind. The fact, surprising at first sight, that the concept of the unitary state receives little attention in literature, might be explained by the consideration that this category of state is so common that no academic attraction is perceived in dealing with it. As a consequence, much more attention is devoted to what is considered to be the opposite concept, the federal state, which is retained to constitute the exception, at least in regard to the number of states having adopted such a constitutional order.

3 In reality, however, the concept of the unitary state is by far not so clear as it might seem at first sight. This holds true for both of its constituting elements, 'unitary' and 'state'. It will be shown that any approach aiming at devising a workable analysing tool in this area will have to look for a dynamic perspective that considers both unitary and federal elements as they can regularly be identified in practice in their reciprocal interaction.

4 Therefore, already at this point, it can be stated that the concept of the 'unitary state' is a rather vague one that should not be expected to find application in sort of a schematic or mathematical way. Nonetheless, it can prove to be useful for purposes of categorization, systematization, and explanation, especially if additional definitional elements are added. With these caveats in mind, an attempt to identify elements of a substantive meaning of this concept can be undertaken.

5 In the following, it shall also be differentiated between the national (public) law and the international (public) law perspective. It shall be shown that, also for international law, the understanding of the state has been very much influenced by the concept of the unitary state. This does not preclude, however, that also in this area a more differentiated picture is about to emerge.

6 A further clarification has to be made from the outset. The 'unitary state' has to be distinguished from the 'unity of state'. The unitary state is a concept of the *Staatslehre* and addresses—the same way as the 'federal state'—the question as to how a state is structured as regards the subdivision of power and competences in its (internal and primarily) territorial organization. Both the 'unitary state' and the 'federal state' are, in principle, meant to guarantee the unity of the state in its external relations. This is connatural with the idea of the state: all essential constituent elements of the state are closely related to the idea of unity. The State as a legal concept presupposes some degree of unity between its parts. The delimitation of its territory by common → *borders* again aims at unity. There is some discussion as to which organization model of the state, the federal state or the unitary state, is better suited to guarantee the (external) unity of the state.

B. The Two Elements of the Concept and Their Interplay

7 Any attempt to define the two components of the concept of the 'unitary state' from the viewpoint of national public law has, first of all, to reckon with the fact that there is no unanimously agreed concept of the state. The idea of an institutionalized state with legal personality is typical for continental European scholarship (and emphasized by the German 'General Theory of the State'—the *Allgemeine Staatslehre* (see Schönberger)——while the

common law world adopts a more pragmatic viewpoint avoiding any over-theorization (Beaud).

8 An objectivized and legalized concept of statehood is inherently associated with the idea of unity; first of all, in its external dimension, but then also, to some degree, in an internal perspective. Unity of a social entity is both a pre-condition for its qualification as a 'state' and a consequence of this qualification. In this sense, both declaratory and constitutive consequences lie inside a state formation process. Once a social entity is qualified as a State, processes are set into force that can generate strong unifying effects. This is, for example, the case for the creation of a common administration, the introduction of one or more → *official languages*, a common education and tax system, the creation of a common transport infrastructure, or the imposition of general duties such as a compulsory military service.

9 The theory of → *federalism* distinguishes between 'coming together federalism' and 'holding together federalism' (Stepan; see also Bifulco 313). The former describes the phenomenon—not always historically fully accurate—of pre-existing smaller entities joining for a federal state, such as the US, Switzerland, Australia, Canada, Germany, or Austria, while 'holding together federalism' designates the process whereby unitary states transformed into federal states in order to preserve state unity—an example in kind could be, to some degrees, Spain. This distinction, however, also re-confirms the unifying function of the state. This bond may also be strengthened, in some cases, by the introduction of federal elements.

10 The concept of the 'unitary state' is prevailingly thought in territorial terms, but also a different perspective, in functional terms, can be adopted. In this case, questions of uniformity or plurality of opinions and political positions arise.

11 In fact, the term 'state' can also designate the central power, the highest authority, the ultimate sovereign of a legally organized nation. The declaration '*L'état c'est moi!*', made in 1655 by the French absolute monarch Louis XIV (→ *absolutism*), or also the concept of the 'deep state'—implying the existence of a government apparatus beyond any control of democratic institutions and acting in a ruthless, power-oriented Machiavellian style—are—(extreme) examples of such an understanding of the 'State'. The more the → *central government* is of an autocratic, anti-democratic nature, the more it is able to impose the will of the ruling elite on the whole → *population*, the more it is possible to speak of a 'unitary state' in this sense. Conversely, this implies that power sharing, not only if it happens in a territorial sense, but also if it takes place in an institutional or personal way, works against the 'unitary' character of a State. This does not preclude, however, that power sharing can also prove to be beneficial for the longer-term resilience and therefore also for the unity of a State. In fact, the introduction of a 'consociational' constitutional structure (Lijphart) or of a system of 'multi-level-governance', aiming at the establishment of a participatory constitutional system with the systematic integration also of minorities and politically weaker groups may work against a concept of a 'unitary state' where only one central power decides, and strengthen, at the same time, the effective unity of the State by integrating its constituent population in all its diverse identities to the utmost extent.

C. The Unitary State in Legal Philosophy

12 It might be no coincidence that one of the foremost first thinkers of the State in general, Thomas Hobbes (1588–1679), was, at the same time, one of the most fervent advocates of the unitary state. Seeing himself and England as a country threatened, throughout his life, by external enemies and by internal strife, he identified a strong central government as a pivotal guarantee for survival. The individuals had to renounce their individual liberties as they would abuse them in an eternal fight against each other (*homo*

homini lupus) while at the same time these liberties would not suffice to grant them sufficient protection. In a 'social contract'—implied as a theoretical explanation for the cession of these powers and not to be understood as an effectively concluded contract—the individuals would give up vast parts of their liberties in favour of the 'Leviathan', the state personified by the Emperor. Hobbes was aware of the fact that this empowerment of the Leviathan implied considerable restrictions and limitations for the individual and the term used for the central authority ('Leviathan', 1651, as an awesome biblical monster) gave in itself expression to this negative aspect. However, he saw no alternative to the creation of such an authoritarian societal order (→ *authoritarianism*). The centralized, unitary state becomes the natural environment where human beings can expect to have a life that is something more than 'nasty, brutish and short', though at the price of having most part of their → *individual rights* waived. Later thinkers, living and writing in a less extreme social reality, saw more leeway for reconciling unity with individual liberties.

13 Already with the contributions of John Locke (1632–1704), in particular 'Two Treatises of Government' (1690), this perspective had changed to a considerable extent. While Locke was surely influenced by Thomas Hobbes's Leviathan, as he too accepted the Crown's prerogatives to act with a considerable degree of discretion, he identified some limits of these powers which he derived from natural law and attributed to the individual, whose will should, in extreme cases, also prevail over that of the ruler (→ *natural law theories and constitutionalism*). In fact, the very basis of the rulers' power should be the consent of the governed, in an approach we would today qualify as hinting at democratic ideas.

14 When it is stated that John Locke saw the ultimate end of government in the good of the governed, there is no fundamental conflict with Hobbes's ideas, as Hobbes too had such an end in mind when he opted for the total empowerment of the Leviathan. The fundamental difference lies, however, in Locke's belief that it should and it would be possible to balance strong central powers needed to preserve order and security with the guarantee of individual (natural) rights—with a strong emphasis on personal liberty and property rights—in a constitutional setting that would nonetheless remain unitary. In further developments it was often sustained that democratic government would give additional cohesiveness and stability to a state and therefore also contribute to upholding the unitary state.

15 It was Baron de Montesquieu (1689–1755) who first presented an elaborate theory on the → *separation of powers*. In 'The Spirit of Law' (1748) he looked at England and saw there the virtue of a unitary system that has found strength and stability by rules of check and balances that avoided despotism following from the concentration of too much power in the Crown. The unitary character of the state, therefore, does not stand in contrast to the protection of individual liberties, quite the contrary.

16 In the age of enlightenment—generally considered to have grossly started around 1700—the position of the individual moved more and more towards the centre of the interest of state philosophers, in particular through the theory of the social contract. Differently than in Hobbes's Leviathan, in the writings by Jean-Jacques Rousseau (1712–1778) and Immanuel Kant (1724–1804) the individual in their social contract with the ruler no longer had to forfeit all or nearly all their individual liberties in exchange for protection against an otherwise anarchic and brutish environment. This contract became more and more an agreement between equals.

17 Georg Hegel (1770–1831) can be seen as one of the foremost advocates of the unitary state. Writing in the Napoleon and the post-Napoleon era, primarily from the German (Prussian) perspective, he had lasting influence on state theory. He no longer pursued a contractual perspective but rather idealized the State as a superior construct which had to protect the individual liberties independently from the consent and the will of the

individual. He was in favour of a (hereditary) monarchy as he saw in the monarch the most reliable protector of individual rights and the ensuing responsibilities while, according to him, the feudal structure of Germany only served the interests of the vassals. In this sense, he was in favour of a modern, though not a democratic unitary state which was, according to him, best suited to grant an utmost degree of liberties within a rational social order. In the German unification process fragmentation and the federal structure of the → *Holy Roman Empire* were long seen as tantamount to backwardness and a relic of an outdated feudal system, while France's unitary system stood for modernity and national strength. In Germany, in the nineteenth century, for a long time it had been unclear whether unity, widely aspired to, should be achieved via a democratic or an authoritarian process. As is well known, eventually, the authoritarian approach prevailed, with all the ensuing consequences for the resulting 'unitary state'.

18 In the writings by Karl Marx (1818–1883) the unitary state was identified as the primary tool for the exploitation of the masses, at least as long as it was ruled by bourgeois elites who acted in their self-interest. This situation would change as soon as the proletarians, through a revolutionary act, would take power (→ *revolution*). For Karl Marx, for a transitional period, the (unitary) state should be preserved and only on a later stage would the working class overcome and abandon state structures altogether, bringing about a class-free society. Karl Marx, therefore, based on a thoroughly different interpretation of men's (and women's) nature, advised—for the long term—the absolute opposite to what Thomas Hobbes had commended. At least for the transitional stage, when Marxists also continued to stick to the State, human nature failed to rise to these high expectations, making the state purportedly ruled by the working class at least as repressive a tool as the bourgeois-led state had ever been.

D. The Unitary State in Context

19 As already hinted at, the relative dearth of substantive analysis of the concept of Unitary state invites the consideration of this concept in a broader context, so that additional elements to understand the Unitary state can be drawn from related but different areas.

20 For a conceptual distinction, often, the unitary state is set on the outer limit of a continuum on which follows the federal state and, on the opposite end, the confederation of states (→ *Confederations of States*).

21 These concepts are distinguished in the sense that the unitary state is a single state, while the federal state is constituted of several states in a constitutional perspective—and continues to be one state from the viewpoint of international law—while the confederation of states is formed of several states from the perspective of international law and does not constitute in itself a state—neither from the viewpoint of constitutional law nor from that of international law—and will therefore be paid lesser attention in the following.

22 Within EU law, the → *Federal Constitutional Court of Germany (Bundesverfassungsgericht)* (BVerfG) has identified, in the 'Maastricht Judgment' of 1993 (BVerfGE 89, 155 (1993) (Ger) at 181 ff), a fourth category, the *Staatenverbund* (union of states), related to the EU itself. Thereby, the BVerfG intended to express the notion that the EU has evolved beyond the stage of a mere association of states but at the same time it has not yet become a State. On this occasion, the BVerfG pointed out that that there was no basis for transforming the EU into a State, neither from the constitutional nor from the European viewpoint. In the 'Lisbon judgment' (→ *Lissaboner Vertrag Case (Ger)*) the BVerfG gave further emphasis to this picture of a 'close and stable relation between sovereign states' (BVerfGE 123, 267 (2009) (Ger) at 348; see also Hilpold (2022)). Contrary to the federal state, the single units of this 'union of states' are (remain) states also on the level of

international law. At the same time, this ‘union of states’ is more than a confederation of states, due to the specificities developed by the jurisprudence of the European Court of Justice (in particular direct effect and → *supremacy / primacy* of European Union (EU) law; Wieland 6). This is, however, a specific German vision of EU law—or, even more specifically, a specific vision by the German Constitutional Court—and it is not clear, up to which extent it can claim more general recognition. In any case, outside EU law, this concept finds no parallel.

23 It stands to reason that, first of all, a comparison between the unitary state and the federal state will be undertaken, as both concepts seem to stand for radically different ideas for state organization, with the first concept usually referred to a situation with a strong concentration of political power at a central level while the second concept often being related to → *decentralization*, autonomy, empowerment of the regional and local level. At a closer look, however, it appears that this classification, if primary reference is made to formal qualifications as they result from individual legal orders, is difficult to apply in practice or leads to contradictory results. In fact, there are states, officially qualified as federal, where political power is highly concentrated, and the federal units have only limited autonomous decision power. A good example in kind is the Federal Republic of Austria. While, officially, the commitment to federalism is a very strong one in Austria (see Art. 15 Federal Constitutional Law of Austria: 1 October 1920 (as Amended to 2019) (Austria)) with federalism often being presented as an expression of the Austrian identity, in practice the unitary elements visibly prevail (Hilpold (2023)). In other countries, like Italy, which is often portrayed as a typical example for a unitary state, the ongoing process of regionalization has ended up in a situation where the central state’s powers have become strongly limited, in particular with regard to the regions with special statute (so-called ‘asymmetrical federalism’). Similar developments are under way in Spain.

24 State structures are often in a flux, even without revolutionary changes happening. This is, for example, the case with Canada, with a federal constitution which was initially balanced in favour of the centre but within which, over time, after World War II, federalism was continuously strengthened. Also, in a state like Great Britain, typically retained to constitute a unitary state, in the meantime some autonomy has been granted to Wales, Scotland, and → *Northern Ireland*.

25 It might therefore be useful not to look primarily at the formal designation of a state or at the ‘nominal Constitution’ but rather at the ‘constitutional reality’, at the interplay between the constitutional organs, and the central and regional/local institutions in their exercise of the political power.

26 It has been said that the distinction between the unitary state and the federal state lies in whether sub-state entities enjoy an original constitutional autonomy—this would be the case for federal states—or only a derived one—in the case of unitary states (so Broschek 332). Such a distinction is acceptable but again the question arises whether such a classification is of greater substantive value, beyond providing a tool for a first formal distinction.

27 Others have tried to distinguish the ‘federal state’ from the ‘regional state’ according to a series of criteria—referring, for example, to a greater constitutional autonomy of federal units in respect to regions or sustaining that the federal units have all competences in all fields not attributed to the federation, while in regional states the situation would be exactly

the contrary. As has been stated in literature, such a distinction does not withstand an empirical test (De Vergottini (2022) 445).

28 The best approach might lie in the following: it has been suggested to devise a categorization not referring to the static concepts of the 'unitary state' v the 'federal state', but rather to use the terms 'unitarianism' and 'federalism' as dynamic concepts, describing tendencies in the development of a constitutional structure. These elements, regularly present in combination, can be identified, as to a concrete constitutional order, to a greater or a lesser extent (Isensee 6). In this sense, it could be stated that elements of federalism will be present with particular intensity in States which are considered to be 'federal states', but at the same time it has also to be recognized that the element of unitarianism is present in any state. As it has been correctly affirmed, 'without unitarianism there is no State' (Isensee 6).

29 Such a dynamic, process-oriented approach presents the great advantage of avoiding the construction of neat categories that cannot find any immediate correspondence in reality. Even if a state is qualified as a 'federal state' a closer look is necessary, as to how strongly the elements of federalism are present in reality. Vice versa, in many so-called 'unitary states', some elements of federalism can be identified. Furthermore, this approach allows continuous re-assessment of the situation according to ongoing constitutional developments within single states.

30 The case of the Federal Republic of Germany merits special attention, both due to the practical-political importance of its constitutional order with its very specific, continuously evolving combination of unitarian and federalist elements and due to the intense academic interest this system has found inside and outside Germany.

31 According to a widely held position (Wieland 539), the introduction of a federal constitutional regime in Western Germany has not been the result of a deliberate choice by the German people. It was, rather, a sort of octroy by the victorious powers, who thereby intended to lay the foundations for a peace-oriented rebuilding of a German nation after the experiences with the German Reich which, since its creation in 1871 as a pre-eminently unitarian state—though also with weak federal structures—had proved to exercise an authoritarian internal and a militant foreign policy. While, according to this opinion, there have been no specific historic roots for this specific federalist orientation, over time federalism has become a defining trait of this country's constitutional order.

32 Conversely, according to another current of thought, federalism has long-standing roots in German constitutional history and, therefore, the reestablishment of federal structures after World War II was next to a necessity (Stolleis 269; Fassbender 282).

33 The federal character of the German constitutional order finds its base in Article 20 Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 13 July 2017) (Ger) (Grundgesetz, hereinafter 'GG'). It is not derogable ('eternity clause' in Art. 79 para. 3 GG; → *entrenched clauses*). The formally clear commitment to federalism is, however, contradicted by a constitutional practice strongly favouring a 'unitarian federal state' (Wieland 509, 542, with reference to Konrad Hesse, *Der unitarische Bundesstaat* (1962), who referred to the mechanisms of social policy, to the common political parties and to the common jurisprudential system as motors of harmonization).

34 While in the Swiss constitutional order federalism is, due to a long historical tradition, strongly rooted, the unitarian character of the Austrian legal order, formally again a federal system, is even more pronounced than that of Germany. As it was said, in the Austrian constitutional order, the elements of federalism are at the lower end of the yardstick that allows a legal order to be still qualified as a federal one. The costs of the duplicities thereby

created, the unclear delimitation of competencies between the central and the country level and the inefficiencies the federal order has evidenced during the COVID-19 crisis have re-enhanced calls for more Unitarianism; but the main causes, responsible after World War I for the introduction of a federal system—the existence of a large capital in contrast to a much more sparsely populated countryside, as well as a pronounced ideological divide between the capital and the countryside—still render federalism in Austria widely untouchable (Hilpold (2023)).

35 Some considerations are also needed as to the question whether there is a specific 'third world perspective' compared to the debate about the 'unitary state'. Objections could be raised against such an inquiry already in view of the fact that it might be difficult to generalize a 'Third World perspective' in this regard. In fact, state organization—and also state theory—varies considerably from continent to continent, from region to region.

36 However, the colonial past, the resolve to engage in an accelerated nation-building process in order to stabilize the newly created states in their boundaries again reflecting a colonial history, the presence of external threats coming from or from within neighbouring, as well as the existence of tribal realities, were all factors which, alone or in combination, unleashed forces that favoured unitarian tendencies on the one hand and federal ones on the other (Mawhood 1984). Economic turmoil and strong political divisions prompted experiments with → *fiscal federalism,* in part with a disastrous outcome (Argentina, 2001). Throughout the third world, federalism assumed different traits, for example 'ethnic' ('tribal') federalism in Ethiopia, Nigeria and South Sudan, and 'co-operative' federalism in India (relating to the power sharing between the central and the state governments; Vasudeo 72).

37 In sum, it can be argued that in the Third World the discussion about the unitary state and the federal state was not categorically different from that in the rest of the world but it assumed specific traits in relation to the various existential challenges these countries had to face, several of them related also to their colonial past.

E. The Unitary State in International Law

38 In international law, the state is treated, at least at first sight, primarily in its unitarian dimension. This becomes apparent already in the Charter of the → *United Nations (UN)* where states are treated as sort of a 'black box': the internal constitutional structure of UN Member States seems to be of no interest to the United Nations. According to Article 2(2) of the Charter, 'sovereign equality' applies. As a consequence, no difference can be made in relation to the internal structure of the various Member States. According to Article 2(7) of the Charter, the UN is not authorized to interfere into internal affairs. The true extent of the delicate nature of the issue of dealing with the federal structures of states became apparent during the drafting process of the → *Vienna Convention on the Law of Treaties (1969)*. Attempts to consider also the specific situation of federal states, to whom it was thought to attribute some treaty-making power, had finally to be abandoned, primarily due to the resistance of some larger federal states, which feared that even a limited recognition of their member units' international subjectivity could disrupt the delicate internal constitutional balance and foster → *secession* attempts. Nonetheless, various international documents, from a rather early stage on, take the federal structure of states into account (see Art. XXIV(12) of the 1947 GATT; → *General Agreement on Tariffs and Trade (1947 and 1994)*). A great challenge in this sense has come from the area of minority protection (→ *Minorities, International Protection*). Here, a long-tested tool for granting effective protection, → *autonomy*, has been getting some recognition. The Lund Recommendations on the Effective Participation of National Minorities in Public Life of 1998, issued by the → *Organization for Security and Co-operation in Europe (OSCE)* High Commissioner on

National Minorities, highlight the importance of territorial arrangements for the realization of effective participation of minorities. The United Nations Declaration on the Rights of Indigenous Peoples of 2007 goes even farther when it grants to → *indigenous peoples* a right to autonomy (Art. 4), excluding, however, any right to secession (Art. 46; → *rights of indigenous communities*).

39 No reference to a right to autonomy is contained in the UN Declaration on Rights of Persons belonging to National and Ethnic, Religious or Linguistic Minorities of 18 December 1992, while Article 8(4) of this document emphasizes the need for respect for territorial integrity (→ *protection of linguistic minorities*; → *Territorial Integrity and Political Independence*).

40 While views are not unanimous, most probably no general right to a 'remedial secession' for discriminated groups exists in international law, even though the 'salvation clause' in the seventh paragraph of Principle V of the 'Friendly Relations Declaration' (UNGA Resolution 2625 (XXV); → *Friendly Relations Declaration (1970)*) for some seems to suggest the opposite (Hilpold (2018) 39).

41 In general, it can be stated that even though international law continues to consider states pre-eminently as unitary states, the sensibility for situations seems to arise where recognition of the federal element appears to foster squarely the aims pursued by international law. In other words: to recognize states that do not constitute monolithic blocs but are rather a conglomerate of diverse interests and realities, the appreciation of the virtues of 'multi-level-governance' (Petersmann) may not only better suit a value-oriented international order which appreciates → *tolerance* for difference and plurality (De Vergottini (1990) 832), but ultimately also strengthen those states which are prepared to accept and to sustain these values.

F. Conclusions

42 This contribution has attempted to evidence that the 'unitary state' and what is often perceived to be its opposite, the 'federal state', are, first of all, abstract and static concepts. They can be used for a first formal distinction on the basis of individual constitutional auto-qualifications. For a more substantive assessment, additional elements and a different approach are necessary. Important insights are gained if individual constitutional systems are observed in their evolving over a longer period. In fact, the various constitutional systems evidence a variety of facets and are often in continuous development. To assess specific state systems, it is advisable to take recourse to the dynamic, process-oriented concepts of 'unitarianism' and 'federalism' which are regularly present, to a varying degree, as to specific constitutional systems. The assessment, based on a specific state system, on how these elements interact or which one might be prevailing, is again heavily dependent on a subjective judgment but at least in general lines it will be possible to find an agreed appraisal of individual systems related to a specific moment in time. No state is like the other, each state is unique, if all elements of its constitutional order are considered. And nonetheless, some categorization, along the lines presented, should be possible.

43 It has also been pointed out that unitarianism is a necessary pre-condition for states to come into being and to exist. For this motive, it is small wonder that already the earliest state theoreticians emphasized this element. It can, however, also be noted that Federalism is gaining more and more currency, especially in larger states (Broschek 332). While this tendency might, at first sight, put into peril the unitary state, reality is more complex. In fact, federalism can be seen as an instrument helpful not only to facilitate territorial administration but also to enact a program of power sharing, to reach out to the unrepresented at the central level, to allow for more effective participation of the widest-possible part of the State's population. All these goals can be conducive to strengthening

state unity. These tendencies do not necessarily operate only into one direction: in a Federal State, characterized by strong cohesiveness, conviction my grow that unitarian standards, especially in the field of → *social security*, may have to be strengthened to achieve equal treatment for the whole population regardless of their regional residence. In this context, the concept of the 'unitarian federal state' (*Der Unitarische Bundesstaat* (Hesse)) has come up.

44 Thinking in state categories implies thinking about an entity that presents itself externally as a unit. A first reaction might be to conceive this entity also on the internal side as a unity. For quite some time, however, a more sophisticated image of the state has been gaining ground, according to which the virtues of federalism are recognized as an eventual contribution to the strength of the state. In this sense 'unitarianism' and 'federalism' are no longer conflicting principles, even if they operate differently: federalism may imply difficult and often cumbersome consensus-finding processes but in the end, the results obtained by these processes may provide greater resilience to the state as a whole if thereby all parts of the population better identify with the state as a *res publica composita* (Isensee 13; Oeter 752).

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