

**ASYMMETRICAL FEDERALISM: THEORETICAL ORIGINS AND TAUTOLOGY
IN THE TERM****FEDERALISMO ASSIMÉTRICO: ORIGENS TEÓRICAS E TAUTOLOGIA NO
TERMO**Leonam Liziero¹**ABSTRACT**

This article aims to analyze the theoretical origins of the asymmetrical federalism in the 20th century as a basis for justifying the asymmetries existing in federal States, such as Canada, Germany, Russia and India, and which would justify the *de jure* asymmetry in symmetric federal states as Brazil. Therefore, deduction will be used as a methodological option, since, based on theoretical premises in the sources indicated in the text, it is intended to demonstrate the proof or not of the hypothesis that the expression “asymmetric federalism” is of an analytical judgment and, therefore, its use makes up in order to characterize the federalism of some State falls in a tautology. The main source of research will be the article that first proposed this approach, authored by political scientist William S. Livingston. The first part of the article, therefore, will deal with Livingston's proposal. Then, we proceed to verify the notion developed by Tarlton, which explores the contrast between the idealism of symmetry and the concreteness of symmetry in federative relations. Finally, the results will be discussed regarding the question whether there is tautology involving the term “ asymmetric federalism ”.

Keywords: Asymmetrical Federalism; William S. Livingston; Charles D. Tarlton.

RESUMO

Este artigo tem como objetivo analisar as origens teóricas do federalismo assimétrico no Século XX como um fundamento para justificação das assimetrias existentes nos Estados federais, tais quais Canadá, Alemanha, Rússia e Índia, e que poderia justificar a assimetria de direito em Estados federais simétricos como o Brasil. Para tanto, utilizar-se-á como opção metodológica a dedução, uma vez que, a partir de premissas teóricas nas fontes indicadas no texto, pretende-se demonstrar a comprovação ou não da hipótese de que a expressão “federalismo assimétrico” trata-se de um juízo analítico e, portanto, seu uso perfaz de modo a caracterizar o federalismo de algum Estado recai em uma tautologia. A principal fonte de pesquisa será o artigo que pela primeira vez propôs esta abordagem, de autoria do cientista político William S. Livingston. A

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primeira parte do artigo, portanto, irá tratar sobre a proposta de Livingston. Então, prossegue-se para verificar a noção desenvolvida por Tarlton, que explora o contraste entre o idealismo da simetria e a concretude da simetria nas relações federativas. Finalmente, serão discutidos os resultados acerca do questionamento se há tautologia envolvendo o termo “federalismo assimétrico”.

Palavras-chave: Federalismo Assimétrico; William S. Livingston; Charles D. Tarlton.

INTRODUCTION

The knowing of asymmetry in federalism and federal relations is ancient and dates to the formation of many of today's federal States, such as Germany, Canada, India, Belgium, and Russia. In many forms it is possible in these States to make comparisons between their structural federal formations and their conceptions of federalism.

Although sparse, it is already possible to note references to the problem of asymmetry in federalism (and in federations) in the theoretical literature about this matter. The analysis must begin from the conceptual distinction between federalism and the federal State for a better understanding of what federal asymmetry is, or how the asymmetrical configuration can affect a legal-political system of a State.

The idea of asymmetrical federalism first appeared unvoiced in a famous article by William S. Livingston, *A Note on the Nature of Federalism*, which sought to demonstrate a new perspective, in which it was the range of diversity in a society that was what defined federalism in a State, not the injunction of the term in its Constitutions. Therefore, from the survey of this source, the method used is the hypothetical-deductive, which aims to demonstrate, based on more general assumptions, that the discussion about the terminology “asymmetric federalism” can constitute a tautology in the conceptual characterization of the federalism as an object of research.

Livingston's thinking directly influenced Charles Tarlton, who published in 1965 another high-impact article, *Symmetry and Asymmetry as Element of Federalism: A Theoretical Speculation*. In the text, Tarlton speculates that the asymmetric federal relations in a system can be variable in each one of its units. Federalist asymmetry concludes Tarlton in his work has been a universal response to overcome the problems arising from inequality and disparity between federal units in the same federal State. Because of this, Tarlton's text also constitutes

an essential source of analysis for this research for the proposed later discussion about federalism as an object of knowledge to contain in itself the adjective “asymmetric”, resulting in the expression "asymmetric federalism" in a tautology.

In follow up, the research demonstrates who the term “asymmetrical federalism” is a tautology: it is not possible qualify the federalism as asymmetrical (like if there was a species of federalism who is not be) because the asymmetry is inherent to the concept of federalism. This is an epistemological matter who concur the concept of federalism’s nature purposed by Livingston, as will show next.

THE NATURE OF FEDERALISM BY LIVINGSTON: A CONCEPTUAL AND EPISTEMOLOGICAL MATTER

The non-juridical approach of federalism finds in William S. Livingston's thesis his greatest theoretical reference, since it breaks an established paradigm that although federalism and federation are not identical concepts, the essence of federalism would be in the constitutionally established organization.

For the sake of example, John Kincaid (2005, p.411) explain what is essential that the federal States are prescribed by written Constitutions. Thus, in the legal notion of federalism, it is impossible to manifest federalism and the consequent configuration of the federal State in states without a written Constitution.

Livingston, in his research, makes an interesting questioning, central to the debated topic: what are the boundaries between the central power and the powers of the parties that create a federation? How much power should be assigned to the center and to the other units? And immediately the author mentions that traditionally this answer is sought in the legal approach, for which the existence of a written Constitution is needed, as seen above.

Also, traditionally from a legal perspective, federalism requires a rigid Constitution. If this was not so, a mere ordinary law could change the form of State. This is essential if it is understood that federalism is in State law and the need for rigidity, it is argued, is related to the protection of the autonomy of federative entities, as well as the distribution of powers between the powers at different levels (LIVINGSTON, 1952, p.82).

Like any constitutional change requires the approval of a house of the federal parliament in which the States have representation, there must be a mutual consensus among the federated

units and the Union. That consensus must be majority, but not unanimous, which would weaken federalism in the State. However, the problems of federalism are reduced to legal aspects.

For Livingston (1952, p.83) there is one aspect of federalism that is largely ignored, above and prior to legality: its nature. The essential nature is “in the forces - economic, social, political, cultural - that necessitated the necessary external forms of federalism”. Federalism emerges as a solution to a certain type of political organization problem.

Therefore, what makes a constitutional structure denominated federal is not the institutional arrangement (LIVINGSTON, 1952, p.83). In this way, a society can have institutions that are federal in appearance, but that works differently, as well as having a unitary structure and functioning federally. There is a dissociation between the legal form of the State and praxis.

With these premises, Livingston (1952, p. 84) purposes what federalism is a sociological concept: “the essence of federalism lies not in the institutional or constitutional structure, but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected”.

Each society is marked by unique features: historical, social, cultural and economic elements that communicate and form a complex web of variables that can generate variations within the same company in the same geographical space. When analyzing the formally federal States, it appears that their origins and motivations are different. Even in two well-known models of federalism, the German and the American, its structure is the result of many events in each of them, like the National Socialist regime and the Civil War, respectively.

These diversities found in social groups (which can be differentiated from others) concentrated in the same geographical area, within a same society, result in what Livingston understands to be the nature of federalism. Territoriality is a determining factor: “if they are grouped territorially, that is geographically, then the result may be a society that is federal. If they are not grouped territorially, then the society cannot be said to be federal” (LIVINGSTON, 1952, p. 85).

Burgess (2006, p. 216) provides samples of territorially: “two obvious examples are Quebec in Canada and Jura in Switzerland where territory has combined with language, religion and history to produce a set of cleavage patterns that required the politics of recognition”.

In this way, society will be federal if it contains different social groups that identify with something in common, forming a larger society and if these groups are concentrated in different areas. This even is a factor that differentiates a federal society from a merely plural society.

Territoriality is also linked to the distribution of powers. Federalism requires that the political power of the State (as a whole) be shared according to a territorial criterion, which is different from mere distribution among the functional institutions of society (LIVINGSTON, 1952, p. 86). Besides the existence of functional diversities, for federalism to find its reason for existing, these diversities need to be grouped territorially (LIVINGSTON, 1952, p. 89).

This is an alternative view to that which considers as federal a State that contains federated States; in this proposal it is not a state itself that is federal but the society: the federal characteristic comes from a macrocosm of diverse societies that are concentrated geographically, but they have a certain bond and that for that reason the formal institutions appear.

The Livingston's theory (1952, p. 88) admits a gradation of the federal nature of a society (and not of a State, as the scale of kelsenian centralization / decentralization). If a political society has a middling centralized federal characteristic, there is dependence on several non-formal elements. In this sociological reasoning, the federal manifestations in formal institutions will be the result of the diversity of their society (LIVINGSTON, 1952, p.89).

These diversities justify the asymmetry in the configuration of the federal system. Although not expressly, Livingston understands the manifestation of asymmetry in the formal system motivated by the asymmetry found among social groups, since such differences are that lead to the need for recognition by federal power. According to the author,

The social diversities that produce federalism may be of many kinds. Differences of economic interest, religion, race, nationality, language, variations in size, separation by great distances, differences in historical background, previous existence as separate colonies or states, dissimilarity of social and political institutions - all these may produce a situation in which the particular interests and qualities of the segments of the larger community must be given recognition (LIVINGSTON, 1952, p.89).

In that sense, there are a myriad of differences that need to be considered for the federal configuration. It is evident that in Livingston's theory the recognition is an essential factor for the success of a federation. If such diversities require instruments that are compatible with the demands, then it is quite possible that the distribution of competencies or representativeness in the federal government is different for certain federative units. In this perspective, formal differences are justified because social diversities demand this.

These social diversities are cleavages that, when asserting themselves territorially, produce demands for federal recognition of these same diversities, which in turn finds a

counter-demand of the central power (LIVINGSTON, 1952, p.89). These two tensile forces, on the one hand, the reaffirmation of the territorial autonomy of that society, and on the other, the integration and the need for equalization and unity, motivate the emergence of the federal system.

In other words, a formal structure to balance the centrifugal and centripetal forces is needed. Based on this view, Livingston (1952, p. 89) concludes: “the federal system is thus an institutionalization of the compromise between these two demands, and the federal constitution draws the lines of this compromise. The constitution will be more or less federal in accordance with the relative strength of the two demands”.

Thus, as explains Tarlton (1965, p. 867), “federalism, for Livingston, was basically a question of the real social and other geographically expressed divisions in the basic makeup of the nation”. Burgess (2009, p. 39) affirms similar sense, in teaching that the term federalism can mean different contexts depending on the State in which it is analyzed. While in countries such as India (federal State) and the United Kingdom (which is not federal), federalism is associated with a context of increasing fragmentation, currently in the United States and Germany means centralization of fragmented parts.

Because of this alternative view of federalism, Livingston's ideas are important in understanding the justifications for asymmetry as the best setting for certain federal States. Moreover, by detaching federalism from formal structures, this view allows us to identify not only federalism in formally unitary, but also to refute it in formally federal States.

THE THEORETICAL SPECULATION OF TARLTON

Symmetry, as an originally geometric concept, signifies a relation of parity and harmony among several parts for the composition of a whole, as well as the reproduction of the whole in the parts analogously. The mathematical quality of a symmetric object, “in the one sense symmetric means something like well-proportioned, well-balanced, and symmetry denotes that sort of concordance of several parts by which they integrate into a whole. Beauty is bound up with symmetry” (WEYL, 1989, p. 3).

Federalism arises from a symmetrical ideal. As Tarlton notes, the problem of symmetry in the federal system is one of the main elements in federal relations. Symmetry, in this sense, is the “level of conformity and commonality in the relations of each separate political unit of

the system to both the system as a whole and to the other component units” (TARLTON, 1965, p.867).

The degree of symmetry and the specific elements of each of the constituent units of a federal state in relation to the Federation and the other units are essential to evaluate the quality of federalism, according to the theoretical speculation proposed by Tarlton (1965, p. 868). In this way, it is important to study the symmetry to assess whether there is adequacy to the constitutional project and the effectiveness in its achievements.

In the origins of federalist thinking the importance of formal equality among the federated members is very evident. In considering this perspective, it is observed that the federal State as the model of competition inaugurated by the founding fathers is between the decentralization of the quondam confederations and the centralization of the unitary States. Since the idea of the federal state was developed over a past confederation that was intended to be more centralized, equanimity among the federated members was an essential issue to be considered especially by the extinction of the sovereignty of the former Republics that formed the American federation.

There are highlights the specific criticisms that Hamilton (2005, p.110-114) to the North American Confederation in Federalist 21. The first, the lack of enforcement mechanisms for the laws of the confederation. Since the confederation supposes an association of sovereignties, there is no way to think of the effectiveness of the laws, since they do not belong to the same national order. Factually, confederations are legal ordering groups with common norms that direct their conduct, but without being able to guarantee their effectiveness against the confederated Republics. There is also a lack of mutual guarantees from the governments of the States.

The Union without coercive power cannot also aid States to deal with the domestic dangers, especially of government encroachment. Without a strong Union, any one of the republics of the confederation could turn into a tyranny formed by a strong faction and thus have the freedom of its people suppressed. Another animadversion made by Hamilton is the current tributary and financial system of the confederation, which was not coherent because it depends on share and requisitions, without coercive character and without concern for equality among States.

This reasoning already found theoretical support in Montesquieu. The federation idealized by him (also based on confederacy models) presupposes an earlier situation of associating Republics. The federative republic proposed by Montesquieu is an association of

republics, which form a new state and a new political context, which will have direct repercussions on the relationship between citizens and the emergence of laws. According to the concept developed by Montesquieu (1989, p. 165):

This form of government is a convention, by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing, by means of farther associations, till they arrive to such a degree of power, as to be able to provide for the security of the whole body.

The association is justified by some purposes - mutual defense is the most common. In federations of unions among States (and therefore with a centripetal movement) their sovereignties are transformed into a common sovereignty and the former State ceases to exist, but the condition of equality before the Union remains.

Federal States in which all federative entities on the same level are formally equal to the Union, such as the United States, shall be symmetrical federal states and are based on the presupposed prior equality of their component units (TARR, 2005, p. 387), despite the substantial differences among the federative units in the scope of federalism (BURGESS, 2006), considering the sociological concept of federalism proposed by The symmetrical organization of the American federal state is consistent with the competitive character of its federalism.

According to Tarlton (1965, p. 868),

In the model symmetrical system each of the separate political units would in effect be miniature reflections of the important aspects of the whole federal system. Each state would, because of this basic similarity, be concerned with the solution of the same sorts of problems and with the development of the same sorts of potential. There would be no significant differences from one state to another in terms of the major issues about which the political organization of a state might be concerned.

The symmetry in this way is justified by “the basic justification for having a federal constitutional arrangement rather than a unitary one would be found in the completeness and integral character of the various political sub-systems” (TARLTON, 1965, p. 868). Thus, the separate political existence of each unit as an arrangement of political loyalties granted to local rulers has become a permanent arrangement of a certain central ideology (BURGESS, 2006, p. 212).

According to this notion proposed by Tarlton (1965, p.868), in an ideal federal State model, the political system should be composed of units with equivalent population and

territorial extension, as well as similar financial resources, cultural patterns, climatic conditions and institutions policies. This idealistic aspect could be defined as the utopian idea of symmetrical federalism. Between form and matter, the symmetrical federal State prioritizes the form, not being influenced so much by the substantial differences of the federative units. This creates a division between the reality of States and how these units are handled by Constitutional Law.

This symmetrical model, according to Tarlton (1967, p.862), finds much support in the legal perspective of approaching federalism (the approach criticized by Livingston). In this way, there is no correspondence between the sociological nature and the normative plan of these units. The norm, when determine equality between (a) the autonomies between them and (b) the autonomies before the Federation, establishes a duty-of being equal parts that make up a whole although not materially they are equanimous, nor similar.

In the symmetrical utopian model also, each of the parts must be a miniature reflection of the federal system as a whole (TARLTON, 1965, p. 868). Symmetry in the federal State not only means the relation of similarities among the federative unities and their relation to the central power, but also in how each unit represents to a lesser extent the whole that it composes, especially in institutional structures.

The most evident way is how central institutions are replicated at the federated State level. In contemporary States that have as a guideline the realization of a Rule of Law, there is an organic separation of powers into specialized functions, although an intercommunication among them is necessary. There is basically a Branch with judicial functions, one with legislative and one with executive.

In federal States, usually the federal legislative Power is bicameral, a lower chamber and an upper chamber (like the United States House of Representatives and the Senate, for example). The Supreme Court is generally competent to resolve disputes among the federal units. The government of the federation exercises administrative functions throughout the territory. These institutions are reflected in the federal units (States, Provinces, Lander, Cantons, etc.). There is usually a separation of powers into functional specialties in each of these federative units that does not innovate or differs greatly from federal power.

In this utopian conception of symmetrical federalism, each state should direct its policies to solve similar problems. Because of the surmise of financial and budgetary symmetry, difficulties faced by each of them would not present major concerns to the federation.

Therefore, there would be no justification for differential treatment among units, with special forms of protection or representation (TARLTON, 1965, p. 868).

Regarding representativeness, the symmetry finds in the federal scope a dilemma: the population contingent of each one of the federative units. If the Constitutional Law determines a symmetry, why would there be a difference in treatment among the States in relation to the representatives in the federal parliament or even the weight of the vote for the President? This is an interesting question and deserves a reflection on its relation to symmetry.

SYMMETRY OF FEDERATION AND DIFFERENCES IN STATE STRUCTURES

From this perspective, the bicameralism of the federal parliament serves as an equalization between the State level and the federation, in which the federated States are represented in legislative decision-making. The proportional system of representatives in the lower chamber is due to the scope of those who are represented. The members of this house exercise sovereignty representing the people of the federal State as a whole, that is, the people as recipients of the legal order of the federation. Since there is only one national order, there can be only one people under one sovereignty.

There is no exception to the symmetry in the law of federation because of the lower chamber: the existence of a proportional system of representatives is necessary by the federative logic. The territory of the federation is only one and the population is more concentrated in certain places, such as the State of California in the United States or the State of São Paulo in Brazil. This does not mean that the share of the people living in more populous States is more favored by having more representatives. In relation to the lower chamber, the deputy by any of the States represents the national people in their totality.

Meanwhile, generally in the symmetrical federal States the upper chamber contains the representatives of the federated States. Apart from this reasoning, they are also representatives of the population of these States, subject to the partial legal order that is each of the federated units. In this case, the federative units are considered equal, in order to correspond to the utopia of symmetrical federalism. And equally, they have the same number of representatives, regardless of any material condition of the State, not even the population (which is the determining factor in the lower chamber to equalize the population as recipients of the federal legal order).

The US Constitution, which gives rise to the first federal State (which is symmetrical), doesn't mention determines the powers that the federated States have (being in formal equality). The powers of the Union are enumerated (even with the recognition of residual powers by the Supreme Court) and the federal government can promote few purposes.

The exclusive legislative powers of the Congress are set forth in Sections 8 to 10 of Article I and the extension of the Supreme Court's power in Section 2 of Article III. The superiority over all the other Constitutions of the federated States is disposed in the Clause 2 of Article VI, which determines the submission of those to the US Constitution, withdrawing the effect of State normative dispositions that contradict it, denominated as Supremacy Clause (STEPHENS JR; SCHEB II, 2008, p.297).

The Supremacy Clause was contained in Paterson Plan, presents by the Anti-federalist Luther Martin (delegate by Maryland) during the Federal Convention. This motion was approved unanimously on July 17, 1787 (MADISON, 1787). This Clause sired the constitutional principle of preemption. The preemption, according to logic of symmetry (once upon the US are a symmetrical federal State), has efficacy over all federated States equally. Nevertheless, the Amendment X guarantees the powers reserved to the federated states that are not delegated by the Constitution to the United States or that do not fall under its exclusive power.

Although it does not determine how each State should organize itself, the US Constitution clearly establishes a system of integration between state and federal legal orders based on competitive federalism. Thereby, the state legal orders reproduce the institutions same way the federal ones and establish a relation of strain with the federal government.

In general, the separation of power is present in all American federated States equally. Just as the federation's sovereignty is exercised jointly by the tripartition of powers, the self-governing is also exercised by three powers at the State level. The States have a governor (for executive branch), courts - as least trial courts and a court of last resort -, and a bicameral legislative branch composed of a lower chamber and an upper chamber - apart from Nebraska, which has a unicameral legislative composition.

The case of the Nebraska legislative power points toward a reflection to this discussion: does the unicameral parliament of Nebraska characterize the US federation as asymmetrical? Or is it a manifestation of the self-government of the American federal system? I think it's the second alternative. Nebraska decided by a referendum in 1936 to abolish its lower chamber, which demonstrates the self-government of that State in organize itself institutionally according

to the guidelines of the federation without this necessarily distorting it since the separation of powers remains at the state level.

FEDERALISM IS ASYMMETRICAL: CONCEPT, SYNTHETICAL EXPRESSION, SIGN AND SIGNIFICATION

Federative symmetry can often be an obstacle to the functioning of the checks and balances in vertical decentralization. Many of the studies involving the problem of symmetry in federalism and in federal State make clear reference to some authors which offered a new perspective and that led to a new way of thinking about federalism.

Understanding that asymmetry is an inherent characteristic of federalism provides a more realistic view of the federative phenomenon, adapted to the factors that effectively justify a formal inequality within the federal State to alleviate tensions and allow balance (TARLTON, 1965, p. 873).

The asymmetry, in the scope of the division of competences, is a technique to find the balance in federative units that does not have an approximate degree of equality in several material aspects and that need the federation for the own maintenance. In addition, the factors of asymmetry are related to the notion of constitutionalism and the Rule of Law that was constructed in each of the federal States' constitutional history.

The defense of the asymmetry in constitutional organization, as advocates Tarlton, is to enable federal States to rearrange their federative institutions according to the needs of suppressing some inequality in material aspects. A viable federal system, according Tarlton (1965, p. 872), can be analyzed in at least two ways: "one can concentrate on the question of the desirability of adopting a federal system in a particular set of social and political circumstances, or one can inquire into the workings of a particular extant federal system with a view to unearthing the factors contributory to its success". It is an import question to justify the legitimacy of constitutional choice in some States for an asymmetrical arrangement.

In this context, Tarlton (1965, p.873) proposes the following formula: "the elements of similarity among component units of a federal system must, it that system is to function at an optimum level of harmony, predominate over existing elements of diversity". I explain. Some federal States can function satisfactorily harmoniously; such harmony is a consequence of the degree of symmetry (but there is always some degree of asymmetry within federalism). If the degree of symmetry is high, there is a greater possibility of sharing competences equally

between the federative units providing an adequate organization. However, if the asymmetric factors of federalism are high, it seems unlikely that a federal system based on symmetry will give satisfactory results.

What are these asymmetric factors of federalism? An interesting demonstration is given to us by Burgess's research. Asymmetry in federalism can be identified in states according to some of its preconditions (BURGESS, 2006), which may or may not correspond to the configuration of the federal State organization.

On asymmetry in federalism, based on the writings of Livingston, Tarlton and Burgess, the following hypothesis can be proposed here: The asymmetric preconditions of federalism in high disproportionality justify the adoption of some form of asymmetry de jure.

Each society has its political culture, which expresses itself in its mode of organization, its institutions and its customs. There are different legal, philosophical and political discourses as local interest groups, seeking to reconcile their particularities with the totality of the nation built tendentially by the federal constitutional order. The point is that something in the asymmetrical federal State needs to ensure this cohesion of so many different cultures and orders under the same identity, that paradoxically allows every citizen to belong to the whole and to the part without it becoming a cultural imposition. About this, Watts (1996, p.96) notes:

Federations are essentially a territorial form of political organization. Thus, as a means of safeguarding distinct groups or minorities, they do this best when those groups and minorities are regionally concentrated in such a way that they may achieve self-government as a majority within a regional government.

Burgess (2006, p. 216) also identifies social cleavage as an asymmetrical precondition in federalism. The term means separation of groups in society for cultural, political and ideological reasons. Such reasons have linguistic, religious or even ethnic aspects. It is an institutional separation by nations within a federal State.

This social variety is common in federal States, but to a high degree it is a problem to be solved institutionally, since cleavage can usually be motivated by the unequal conditions resulting from the State's mode of organization, such as the division of competencies.

Cleavage is a condition for institutional cultural diversity. Different people organize themselves in different ways, although they may have some similarity. Distinct groups have different customs (although common in some points by territorial proximity) and soon, originate a diverse political and juridical tradition.

There are some good examples of cultural diversity and social cleavage in federal States. The Russian Federation owns among its federative units the Jewish Autonomous Oblast, which was initially created to be a Jewish settlement in the defunct USSR, continued as a political division of the Federation with a different distinction from the rest of the units, although institutionally structured as if it were an Oblast.

In turn, India has its cleavage motivated mainly by linguistic aspects, so much so that its political organization uses this criterion for separation. Throughout the process of formation of the Indian State in the time of independence there was a feeling of non-identification among the groups that inhabited the former English colony. The formation of Pakistan was motivated by the cleavage between the Hindu people and the Muslims, although among the Hindus themselves there is a segregation such that it is hardly possible to speak of an "Indian nation", but rather of diverse nations to which the people belong Indian.

Also, Canada has a federalized society in the sense advocated by Livingston (1952, p.85), due to the territorial grouping of diversity. Thinking about the nature of federalism that the author proposes, the essence of Canadian federalism would not be in its juridical order, but in its society, due to the concentration of a certain group in Quebec, whose cultural similarity differs from the other Provinces and Territories. According to Watts (1996, p.91):

A distinctive feature of the Canadian federation is the continuing existence and vitality of a French-Canadian major concentrated within one province. Approximately 80 percent of the French-Canadian population lives in Quebec where they constitute 80 percent of the population. Throughout its history the Canadian federation has been marked both by the French-English duality and by a strong regionalism expressed through the provinces

This cultural difference reflects in the customs and the identification of the people of Quebec in relation to the others. Although Quebec is a Province of considerable strength in the Canadian political configuration, there are divergences between its government, with a tendency to preserve its culture, and the federation, in order to grant Quebec citizens, the same rights and duties of citizens of other Provinces.

Especially about such inequalities, it is important to consider that poorer units tend to have poorer populations with less access to basic services, even if they are the neediest. In addition, the factor may be cumulative with the concentration of a given minority in less developed federated States or regions.

The symmetrical configuration in a federal State with such high socioeconomic inequality indexes can generate a scenario that can aggravate them: centralization. A

symmetrical and centralizing federation with the purpose of developing impoverished States may be an obstacle to its development, in addition to creating a scenario in which the federative constitutional foundation weakens.

In Brazil, in this regard, it particularly affects the super concentration of legislative and executive competencies in the Union, which in its general laws applied to it, States, Federal District and Municipalities, often creates obstacles to the effectiveness of the rights of the population.

Germany, on the other hand, has indicators that demonstrate the socioeconomic inequality in its federative units. When comparing the Länder, one can perceive differences between those of higher GDP, such as North Rhine-Westphalia and Bavaria, and smaller ones, such as Saarland and Bremen. Even with one of the highest Human Development Indexes in the world, Germany has had challenges to promote material equality in its recent history with reunification.

In addition to the differences of law already existing in the former FRG, with the incorporation of the GDR into the legal order, the disproportionality among the States reigns as a characteristic of this political organization. Based on what Tarlton defines as characteristics of symmetry, it can be inferred that: (a) not all Länder are equal before the federal government and are not equal in law to each other; (b) they do not basically reproduce the characteristics of the Federation on a smaller scale.

This asymmetrical scenario is in line with the cooperation among the federative units and with the material equality of the German constitutional order. According to Article 72 (2) of the Basic Law (*Grundgesetz*), the federation may legislate on certain matters foreseen in items in Article 74 (competing legislative competencies) to equalize the conditions of life in all federal territory.

Based on these demonstrations of how asymmetry is present in federalism (since the preconditions are themselves asymmetrical), it is inferred that asymmetry is part of the concept of federalism. When thinking of federalism, by a semantic extension, one must also think of asymmetry.

When one considers the term “federalism” as an artificial sign, according to Saussure's lessons, one must separate understanding into a plane of content and a plane of form. The linguistic sign, as in the case the word federalism, is composed of two meanings: (a) the signifier, the physical representation of the sign (the word federalism expressed in written or verbalized form), related to the plane of form; (b) the signified, which makes up the idea

inherent in the cognition of the sign and which forms a concept (the mental representation of federalism), in the content plane (SAUSSURE, 2011).

The idea of federalism therefore carries within itself the notion of asymmetry. The signified of federalism requires considering Livingston's epistemological proposition that the nature of federalism is in society, not constitutional law. In this way, it is possible to isolate the study of federalism from the study of the federal State and to establish conceptual clarity. Thus, it is a more reliable and less refutable way to understand why some federal States are asymmetrical and the other not, even though federalism is asymmetrical.

It is necessary to verify in a federal State the factual differences existing among units so that a method of juridical-constitutional organization can be found to ensure the correspondence of federalism in the relation of the distribution of competences, considering the notable diversities that may jeopardize the maintenance of the federation.

Thus, I propose, in a complementary manner to Tarlton, a formula to comprehend the legitimacy of an asymmetric federal State: *if the federal system does not function harmonically, the elements of diversity should predominate over the elements of similarity.*

In this sense, the de jure asymmetry is justified by the high degree in the asymmetric preconditions of a country's federalism. The sociological approach proposed by Livingston on federalism, as well as the correspondence of his degrees of asymmetry observed by Tarlton, make it possible for the asymmetric configuration of a State to be a more adequate model to solve problems generated by formal symmetry.

So, how higher is the degree of difference of the asymmetrical preconditions of federalism, more indicated is the asymmetric configuration of the federal State. To alleviate the disharmony between reality and the federative organization of the legal plane, asymmetry is the appropriate technique to solve the problems arising from the internal imbalance in federal States.

CONCLUSION

As a feature, the asymmetry is inherent in its nature of federalism. In all States where federalism has developed or is in the process of development, the component parts, which must unite by consensus and trust, are not the equal, for various reasons, such as military capacity, socioeconomic indicators or demography. These degrees of asymmetry, depending on high differences, may justify de jure asymmetry in federal States.

Equality among federative units is a legal fiction created to legitimize federalism in the United States during the emergence of the US federal State, the first federation in history and, consequently, the first symmetrical. Subsequently, other federations with an asymmetric configuration were developed, thus following the reality of their federalism as an experience.

In this context, Livingston's contention that federalism is not a question of the constitutional law of a State, but of society is even more meaningful. The federal lettering in a State, for Livingston, before being in his law, is in society. In this way, in a society characterized by territoriality, federalism emerges.

The federal State may or may not correspond to the elements found in becoming of federalism. Thus, Livingston argues that it is not constitutional law (so the State) which has the status of federal: it is, therefore, the society. Federalism, accordingly, is a matter of concrete reality, not of legal abstractions. The object of knowledge for jurisprudence (because it depends on the normative phenomenon) is the federal State, not federalism.

Based on this definition, however, it may be questioned whether smaller and homogeneous countries could be included among federal systems, despite the federal denomination in their Constitutions and the existence of the division of competences.

Influenced by Livingston's theoretical proposal, Tarlton questions the lack of realism of so-called "symmetrical federalism," since no existing federation can have the parties with equivalents in their indicators. In this way, asymmetry makes it possible for the federal State to correspond more closely to federalism, since it expresses in the law the degrees of asymmetry between the different federative units, in order to appease tensions and seek balance.

REFERENCES

BURGESS, Michael. *Comparative Federalism: Theory and Practice*. London: Routledge, 2006.

_____. Federalism. In: WIENER, Antje; DIEZ, Thomas (org.). *European Integration Theory*. New York: Oxford University Press, 2009.

HAMILTON, Alexander; MADISON, James; JAY, John. *The Federalist*. Edited with historical and literary annotations, and introduction, by J.R. Pole. Indianapolis: Hackett Publishing Company, 2005.

KINCAID, John; TARR, G. Alan (Org.). *A Global Dialogue on Federalism: Constitutional Origins, Structure, and Change in Federal Countries*. London: McGill-Queens University Press, 2005.

LIVINGSTON, William S. A Note on the Nature of Federalism. *Political Science Quarterly*, Vol. 67, No. 1, pp. 81-95, 1952.

MADISON, James. Notes of Debates in the Federal Convention of 1787: July 17. Disponível em http://avalon.law.yale.edu/18th_century/debates_717.asp. Acesso em 05 de fev. 2019

MONTESQUIEU. *The Spirit of the Laws*. Edited by Anne M. Cohler, Basia C. Miller and Harold S. Stone. Cambridge: Cambridge University Press, 1989.

SAUSSURE, Ferdinand de. *Course in General Linguistics*. Translated by Wade Baskin. New York: Columbia University Press, 2011.

STEPHENS JR, Otis H.; SCHEB II, John M. *American Constitutional Law Volume I: Sources of Power and Restraint*. 4th edition. Belmont: Thomson, 2008.

TARLTON, Charles D. Federalism, Political Energy, and Entropy: Implications of an Analogy. Salt Lake City. *The Western Political Quarterly*, University of Utah Western Political Science Association, v. 20, n. 4, pp. 866-874, 1967.

_____. Symmetry and Asymmetry as Elements of Federalism. *The Journal of Politics*, Chicago, vol. 27, nº. 4, pp. 861-874, 1965.

TARR, G. Alan. Introduction: Constitutional Origins, Structure, and Change. In: KINCAID, John; TARR, G. Alan (Org.). *A Global Dialogue on Federalism: Constitutional Origins, Structure, and Change in Federal Countries*. London: McGill-Queen's University Press, 2005.

WATTS, Ronald. *Comparing Federal Systems in the 1990s*. Ontario. Queen's University Press, 1996.

WEYL, Hermann. *Symmetry*. Princeton: Princeton University Press, 1989.

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