Federalist Distortions in the Organization of the Legislative Branch of Brazilian Government

Marcelo Labanca Corrêa de Araújo & Glauco Salomão Leite[*]

Abstract

This article examines the relationship between federalism and the legislature in Brazil. It examines distortions that occur in the structure of the federal legislature, in the powers conferred constitutionally and in the dynamics of legislative activity. It discusses how the role of the Senate as a house of representation of Member States has been mitigated, highlights the excessive concentration of legislative powers at the federal level and the suffocation of the autonomy of the state and municipal legislatures by the influx of the principle of symmetry.

Keywords: Brazilian federalism, legislature, distortions.

A. Presentation of the Issue: Federalist Legislative Power?

The present study aims to develop a critical analysis of the relation between the legislative branches of government and federalism in Brazil.

It is known that, as federalism is the form of the State that involves the union of federative entities grouped into a Federal Union, legislative power lies not only in the hands of the central government, but also at State and municipal level (especially in the case of the three-level federal system that pertains in Brazil).

Studying the legislative system in Brazil is thus equivalent to identifying *which* legislative branch at which level should be the focus of attention, or, in other words, which sphere of legislative power should concern us.

On this particular matter, three issues lie at the root of the relation between the legislature and the federation. The first of these pertains to the very structure of Congress. In other words, it concerns the question of whether the legislative branch is organized into one or two Houses and the reasons underlying this bicameral system. The second issue concerns the fact that the relation between legislative power and federalism is related to the distribution of matters subject to legislation by the various spheres of government. In other words, which issues

* Professor of Constitutional Law at the Catholic University of Pernambuco (undergraduate degree *stricto sensu* Postgraduate Program in Law). President of the OAB-Pernambuco's Constitutional Studies Commission. CAPES grant for post-doctoral program abroad, at the University of Pisa's Faculty of Law. Professor of Constitutional Law at the Catholic University of Pernambuco. Professor of Public Law at the Federal University of Paraíba. Vice-President the OAB-Pernambuco's Constitutional Studies Commission.

fall under the jurisdiction of the Union, the States and the municipalities? Furthermore, were a concrete legislative case to fall into the grey area between the jurisdictions of different federal entities, how should the conflict be resolved? The third issue, meanwhile, specifically concerns the development of legislative activity and asks whether the work of the legislature, and the legislative process in particular, is the same or not in different spheres. Should law-making at municipal and State level should be based on the same pattern adopted at federal level. Is there or is there not a need to impose symmetry in order to ensure that the process of law-making at federal level is identical to the legislative process at State and municipal level?

These questions will be addressed in this study, whose prime objective is that of laying bare the relation between the Legislative Branches of Government and the Federation. It should be noted from the outset that there has been an excessive centralization around the legislative branches of the Union, both in terms of greater concentration of the right to make laws and in terms of reproduction of the model of federal legislative organization at State and municipal level.

B. The National Congress and the 'Façade' of the Brazilian Federative Bicameral System

The term *foedus* means pact, alliance. Thus, the State did not wait for federalism to emerge; it is, above all, a social phenomenon. The best proof of this is that it is not only present in the form of organization of the State, but also in various social institutions, such as industry (Federation of Industry), sports (Football Federation), trade unions (Trade Union Federation), and others.[1]

The main idea that can be seen in institutions that adopt a federative format is precisely the union of diverse parts. Federalism is thus said to be union in diversity. Differing entities group themselves around a common objective. And it can thus be seen that there are differences in the union between the parts and that these differences need to be respected.[2]

Thus, when federalist discourse is translated into the formation of the State, it is understood that there are public bodies (member-States) that unite, as parts, to form a whole. It is thus said that a Union arises from a union. In other words, the union (as a combination of parts) leads to the creation of a new public body, the Federal Union.

1 "[…] federalism is one thing and the state another. Federalism did not wait for the state to appear: it is being used in various ways by the structures of numerous groupings that are totally or partially detached from political institutions, such as parties, trade unions and even sports associations" (T. Renoux, 'O federalismo e a União Européia. A natureza da Comunidade: uma evolução na direção de um Estado Federal?', *in* S.R. de Barros & F.A. Zilveti (Eds.), *Direito Constitucional. Estudos em Homenagem a Manoel Gonçalves Ferreira Filho*, Dialética, São Paulo, p. 268).

2 According to Pelayo, federalism represents "the dialectical unity of contradictory tendencies: the tendency towards unity and the tendency towards diversity" (M. García-Pelayo, *Derecho Constitucional Comparado*, Alianza, Madrid, p. 218).

It should also be remembered that each part of the whole is, legally and politically, a public body and, as a whole, the Federal Union should have a legislative branch to ensure that it works in accordance with the legal system.

In other words, the channel of expression of the will of a public body of a legal and political nature is the law itself, since it is not possible to imagine any other way in which the State might demonstrate its will, except through the law, assuming the existence of a constitutional State.

Each of the three spheres of Brazilian federalism (the Union, the member-States and the municipalities[3]) therefore has its respective legislature: the National Congress, at federal level (with federal deputies and senators), the legislative assemblies, at State level (with State Deputies) and the Council Chambers, at municipal level (with Councillors).

Clearly, the legislative organs of the spheres that make up the federal pact have complex structures of power. However, it is striking that, at State and municipal level, there is only one legislative chamber. In other words, these are single-chamber legislative powers. Nevertheless, the federal level differs in having a bicameral legislative power. What then is the relation between federalism and way the Brazilian legislature is organized?

The Federal Constitution of 1988 itself provides guidance on this issue, when, in Article 45 it states that federal deputies are representatives of the people, while Article 46 states that senators are representatives of the member-States and the Federal District.

It can thus be seen that the Brazilian bicameral system is rooted in federalism. Hence it is said to be a federative system: the law-making process is a process that constitutes a single decision in two phases: laws must be approved both by the Chamber of Deputies and the Federal Senate. This produces a legislature suited to the compound nature of the Brazilian State. Ultimately, one of the characteristics of the Federal State is the very participation of the various parts of the general will, which, in Brazil, are formally represented by the Federal Senate.[4]

In fact, although the individual States in Brazil have opted for a single-chamber system, while the federal State prefers a bicameral system, there are federal States that have adopted a single-chamber system and *vice versa*. Sully Alves de Souza[5] reports research on this subject, concluding that, of the 19 federal States examined, 3 have single-chamber systems, while of the 70 separate States examined, 29 have a bicameral system. In other words, bicameralism is not something exclusive to the federal State (since some individual States also adopt it). Despite this, it is commonly agreed that the existence of a second chamber, which may be called the Senate, the Chamber of Local Collectives or the like, is a characteristic

3 Without forgetting, of course, the Federal District, a *sui generis* entity in the political geography of Brazil.

4 C.M. da Silva Velloso, *Temas de Direito Público*, Del Rey, Belo Horizonte, p. 386.

5 S.A.de Souza *Apud* J.A.de O. Baracho, *Teoria geral do federalismo*, FUMARC/UCMG, Belo Horizonte, 1982, p. 30.

of the federal State.[6] It should also be noted that there are other types of bicameral system that are not federative, for example, the British system, with its House of Commons and House of Lords.

A number of criticisms can be raised regarding the Brazilian bicameral system at the level of the federal legislature. Despite its apparently federalist basis (as a second house – the Senate – representing the interests of the member-States and the Federal District), some articles of the constitution can be used to argue for another function of this second house; namely, those articles that establish a minimum age for access to a political career, the order of voting of the two Houses, and the upper limit set on the number of lawmakers per member-State.

With regard to the age of access to public office and the order of voting of the two Houses, it can be seen that Article 14, § 3º, VI, establishes the minimum age for a Federal Deputy to be 21 years and that of a Senator 35. It has thus been asked what the relation is between the Senate being a house whose members are older and the representation of the member-States?

Another intriguing question is that of the Senate being essentially a house that reviews laws drawn up by the Chamber of Deputies. In fact, almost all bills start out in the Chamber of Deputies. Only those sponsored by individual senators are initiated in the Senate, in which case the Chamber of Deputies operates to review legislation. This is exactly in accordance with Article 64 of the 1988 Constitution: "discussion of and voting on bills sponsored by the President of the Republic, the Federal Supreme Court and the Higher Courts shall be initiated in the Chamber of Deputies" – likewise, of course, the bills presented by federal deputies themselves. Questions have thus been raised regarding the relation between the Senate being an essentially revisory chamber and its role of defending the interests of member-States?

Reading the two articles cited above may lead to the conclusion that the Senate is, in principle, a house made up of older parliamentarians, and also responsible for reviewing legislation. This, therefore, creates a constitutional framework that always leads the Federal Senate to operate as a moderator of the laws produced by the Chamber of Deputies. After all, those reviewing legislation are generally individuals who lack the impetuousness of youth and are more 'mature'. But this constitutional arrangement is certainly not a federative one. These ideas have nothing whatsoever to do with the idea of defending local interests. There is no correlation between the two.

It can thus be concluded that, in practice, the constitutional status of the Federal Senate diverges in this regard from that of a federative bicameral system.

Another issue that involves the myth of the Senate representing member-States and the Chamber of Deputies representing the people is that of the compo-

6 "[I]t is a characteristic of a federal state to have two-fold representation. In the case of one of the legislative organs, the total population of the State sends its representatives, in the other, the particular collectives are represented". Baracho, 1982, p. 30. Notwithstanding this, the jurist Dalmo Dallari avers that, in Brazil, the Federal Senate could be abolished, since it attends to the interests of the ruling élite much more than to those of the individual States (<http://terramagazine.terra.com.br/interna/0,,OI3926269-EI6578,00-Jurista+Dalmo+Dallari+defende+o+fim+do+Senado.html>).

sition of the National Congress. According to Article 46 of the Federal Constitution, senators represent States. This is why three senators are elected for each member-State (and three for the Federal District). The number of senators elected for each member-State is not determined by the number of voters or inhabitants of that member-State (neither the people nor the population). The number is fixed at three, elected alternately, in the proportion of one to two thirds, every four years.[7]

This constitutional rule establishing a fixed number of three senators contradicts the federalist principle, since, in a federation, there is legal equality (although not always economic or political equality) between the federated entities.

At the level of the Chamber of Deputies, the rule contained in Article 45 stipulates that the deputies should represent the people (a qualitative political concept), although the number of federal deputies who should be elected by the member-States varies according to the population (a quantitative numerical concept) of the State.

So, more populous member-States, such as São Paulo, have more federal deputies than have less populous ones, such as Acre. However, the Federal Constitution, in Section 1 of Article 45, determines that the total number of deputies per member-State be proportionate to the population, with necessary adjustments being made in the year prior to elections, to ensure that no Federal unit has less than 8 or more than 70 deputies.

For many, these upper and lower limits generate inequality in terms of the value of citizens' votes, since federal deputies are representatives of the *people*, not of member-States. And, if they are representatives of the people, the division of the total number of seats in the Chamber of Deputies should be calculated so as to be proportionate to the distribution of the Brazilian population. Thus, if São Paulo is home to 80% of the population of the country, São Paulo should also have the right to elect 80% of the federal deputies. However, this does not occur, since no member-State is permitted to elect more than 70 deputies.[8]

7 "[i]t should be noted that there is a principle of parity in the representation of member-States in the Senate. In Brazil, each member-State sends three representatives to the Federal Senate. This is in fact an antiquated aspect of Brazilian constitutionalism, already present as an unalterable clause in the first Federal Constitution of 1891, under the inspiration of Art. V of the US Constitution of 1787" (M.L.C. de Araujo & G.B. Gadelha, 'Direito à igualdade de voto e Federalismo: Possibilidade de compatibilização do valor igual do voto à luz da integração regional na Federação brasileira', Retrieved on 2 February 2012 from <www.asces.edu.br/publicacoes/revistadireito/2011-1.html>, p. 11.

8 M.M. Soares & L.C. Lourenco, 'A representação política dos estados na federação brasileira', *Revista Brasileira de Ciências Sociais*, Vol. 19, No. 56, 2004, p. 118. The Governor of the State of Rio Grande do Sul once put forward ADI 815-3/DF, requiring the Federal Supreme Court to declare the lower limit of eight and the upper limit of seventy Federal Deputies per State to be in contravention of the Constitution, alleging that the rule contained in Art. 45 violated the principle of equality of vote outlined in Art. 12 of the Federal Constitution. The initial petition of the ADI was dismissed on the grounds that the Court did not deem it possible to declare unconstitutional a constitutional statute drawn up by the framers of the Constitution.

However, questions have been raised regarding the reasons why the constitution sets a lower limit of 8 and an upper limit of 70 elected representatives for each member-State.

The explanation is precisely the need to prevent any hegemony, in the Chamber of Deputies, on the part of lawmakers elected by one member-State or other, although this in fact contravenes the federative bicameral system.

The deputies are representatives of all the Brazilian people (Art. 45), but they are elected in the States. So, the mandate of the State electoral district rests on its electoral basis. Congressional amendments thus tend to benefit the region where the Electoral College is located. Were these upper and lower limits not to exist, there would be

> [A] concentration of economic and political power in a single Federal unit [...] which would exacerbate regional disparities and, as a result, risk subjecting the political-electoral system to what has been termed the 'tyranny of the majority'.[9]

In other words, the upper and lower limits exist to ensure that no one State that is part of the Federation becomes hegemonic in the Chamber. It can thus be seen that, to a certain extent, the Chamber of Deputies represents the member-States, since, if it did not, there would be no need to restrict the number of lawmakers elected by each State.

In short, an organic examination of the structure of legislative power focused on federalism must arrive at the conclusion that so-called 'federative bicameralism', according to which there are two legislative chambers because the Federal Senate has the function of representing the interests of the member-States does not in fact perform this role.

This formulation fails on all three counts listed above: one, because the Senate has an essentially revisory function in the legislative process, functioning as an 'upper house' (Art. 64 of the Constitution); two, because the fact that one needs to be older to be elected Senator has no relation to defending local interests (note that with the Senate being an older and, also, a revisory house, Brazilian bicameralism involves more 'moderation' than 'federation'); and three, because the constitutional imposition of a lower limit of 8 and an upper limit of 70 elected deputies per State reveals that the Chamber of Deputies plays a part in the federative interplay of representation of the interests of States, thereby detracting from the much-vaunted claim that this is the role of the Federal Senate.

Finally, it can be seen that the rule of parity between member-States in the Federal Senate is not sufficient to characterize Brazilian bicameralism as federative, since the problems mentioned above show, without doubt, that the division of the legislative process into two stages is far from being something that adds weight to the federalist principle.

9 Soares & Lourenco, 2004, p. 125.

C. The Centralized Distribution of Legislative Jurisdiction in Brazilian Federalism

Continuing with a critical analysis of the relations existing between the legislature and the federal system in Brazil, we come to the issue of the division of jurisdiction among federal entities, which allows us to show that the Brazilian legislature is centralized at federal level, for reason of the excess of law-making duties attributed to the National Congress.

As has already been noted elsewhere, federalism represents the idea of a union of diverse parts. Parts that are different, but possess something substantial in common that enables them to unite. If there are multiple entities, this is certainly because tasks are divided among these entities.

Doctrine tends to divide responsibilities between the Union, the member-States, the Federal District and the municipalities according to various criteria. One of them examines the type of activity, be it administrative or legislative. Others investigate the subject that exercises jurisdiction and whether this is exclusive or shared.[10]

In the case of Brazil, and in the specific case of the legislature, which is the subject of this study, the Constitution adopted the technique of implicit jurisdiction (those for which there are express provisions in the Charter) and residual jurisdiction (where the Constitution does not indicate any matters, or rather, is amiss in providing any attributions).

Thus, implicit legislative jurisdiction was established for the Federal Union and also for the municipalities, while the member-States were accorded residual jurisdiction (*i.e.*, jurisdiction not envisioned for any specific entity in the wording of the constitution applies to member-States).[11]

With regard to the possibility of shared responsibility, it is customary to speak in terms of exclusive and concurrent legislative jurisdiction.[12] First, it is understood that the Constitution hands over certain matters to certain spheres for the purposes of legislation. In accordance with the second (shared or concurrent) jurisdiction, it is understood that the Federal Constitution has handed over some issues to more than one sphere.

The Federal Constitution has tried to draw up a list of matters that may be covered by legislation, such as, for example, civil law, criminal law, labour law and

10 F.D.M. de Almeida, *Competências na Constituição de 1988*, Atlas, São Paulo, p. 55.

11 Raul Machado Horta says that the 1891 Constitution retained the jurisdiction of the (reserved) member-states and of the Union (implicit jurisdiction) separated in accordance with the manner of division of the Constitution of the United States. R.M. Horta, 'Organização Constitucional do Federalismo', *Revista de Informação Legislativa*, Vol. 22, No. 87, 1985, pp. 5-30.

12 We have chosen here not to make the distinction between private and exclusive jurisdiction, on the basis of the possibility or not of delegation. On this subject, *see* I. Dantas, *Instituições de Direito Constitucional Brasileiro*, (2nd edn), 2001, Juruá, Curitiba, p. 454. In fact, the Constitution itself calls some kinds of jurisdiction exclusive when then cannot be delegated (*see* Arts. 52 and 84, for example). Thus, semantically, it is understood that there is no difference between exclusive and private jurisdiction, making the second thesis, which uses the adjective 'private' to describe jurisdictions subject to delegation, unnecessary.

so forth and has ruled on which federal entity should be responsible for drawing up laws on these subjects.

In so doing, the Federal Constitution handed over to the Federal Union, in Article 22 (unlike other federal entities), a long list of matters that may be brought before the National Congress, while, nevertheless, pointing out, in the single paragraph of aforementioned Article 22, that a declaratory statute can be drawn up to delegate legislation to member-States.[13]

The Federal Constitution drew up an extensive list of matters in Article 22, with 29 sub-sections dealing with issues ranging from civil law to commercial advertising. It can thus be seen that the choice was clearly made to concentrate most legislation in the country in the hands of the Federal Union. This can be confirmed simply by reading the aforementioned Article 22 of the 1988 Constitution.

In an attempt to compensate for such centralization, the Constitution envisaged, in Article 24, a field where jurisdictions overlapped and matters could be legislated on by both the Union and the member-States/Federal District: the so-called concurrent legislative jurisdictions. Despite the omission of the municipalities from the caption to Article 24, it is understood that they too can rule on the matters outlined there, when using the prerogative established in Article 30, Subsection II, supplementary to Federal and State legislation, where relevant.

However, the provision of concurrent jurisdictions did not succeed in watering down the centralizing tendency of Brazilian legislative federalism, for two reasons.

First, there is a clear concentration of legislative jurisdiction in the Federal Union, as outlined in Article 22 and these are not decentralized, even though they could be according to the single paragraph of the aforementioned article.

A second point regarding legislative centralization concerns the fact that any local production of State and municipal laws, apparently included under the blanket of their concurrent jurisdiction, could be reinterpreted in such a way as to include them among the issues that are restricted to Union. In this case, hermeneutics has tended more towards centralization of law-making rather than decentralization. For example, a municipal law upholding the right to free parking at shopping malls, with a view to organizing traffic and commerce (and thus a matter of local interest) can be understood to be a violation of the private jurisdiction of the Union to legislate on civil and commercial law. Likewise, a State law obliging bus-drivers to stop even where there is not an official stop to pick up people with disabilities was apparently contained in Article 24, Subsection XIV (legislation protecting people with disabilities). Nevertheless, it is not unusual for it to be argued that such a State law intrudes upon the jurisdiction of the Union, which has the right to legislate regarding issues concerning transport.

In this regard, see the following precedent of the Federal Supreme Court, which, hermeneutically, opted to include this specific case within the reach of the centralized jurisdiction:

13 Such delegation of law-making has only occurred on one occasion, with the amendment of Declaratory Statute no. 103, of 14 July 2000.

> Abridgment: APPEAL FORMING PART OF INTERLOCUTORY APPEAL. CONSTITUTIONAL LAW. LEGISLATIVE JURISDICTION. STATE LAW 4.049/2002. PUBLIC AND PRIVATE PARKING. FREE FOR PEOPLE WITH DISABILITIES AND THOSE AGED OVER 65 YEARS. VIOLATION OF ART. 22, I, OF THE CONSTITUTION. FORMAL UNCONSTITUTIONALITY. PRIVATE JURISDICTION OF THE UNION TO LEGISLATE ON CIVIL MATTERS. APPEAL REJECTED. I – State Law 4,049/2002, providing free parking in all parts of the State of Rio de Janeiro for people with disabilities and those aged over 65 years owning motor vehicles was in violation of Art. 22, I, of the Federal Constitution. The aforementioned Law is declared unconstitutional, in view of the jurisdiction regarding legislation on civil matters being restricted to the Union. Precedents. II – Interlocutory appeal denied.[14]

As can be seen from the above ruling, the Federal Supreme Court had the option of understanding the law according to the constitutional jurisdiction contained in Article 24 (protection of the elderly and people with disabilities), and also Article 22, I (civil law), and, in the case of the latter, ruled that the State law intruded on the constitutional rights of the Federal Union. It was thus that the Federal Supreme Court chose to interpret the law. It was a choice. It could have favoured decentralization of law-making and jurisdiction as laid out in Article 24, but chose not to.

It can thus be seen that the problem of centralization of legislative jurisdiction in the Union does not exist only in relation to the issues distributed by the original constitution (more issues to be legislated on by the Union and less by the member-States and municipalities), but is also a problem that goes through the centralizing interpretation of the court, which imposes a centralizing analysis on matters legislated on by decentralized entities, and consequently stands in the way of the free creation of laws by member-States and municipalities, thereby compromising the consolidation of democracy in State legislative assemblies and municipal Council Chambers.

Finally, this is, without doubt, a problem that directly affects the relation between the legislative power and the federation, causing a serious distortion in Brazilian federalism, for reason of the reduced number of issues on which decentralized entities are permitted to make laws.

D. The Principle of Symmetry in Law-Making and the Distortion of Brazilian Federalism

A final critical analysis that could be made, always taking as our starting point the relation between the legislature and the federal system, concerns the procedures involved in the framing of laws, in other words, the legislative process.

14 Appeal as Part of Interlocutory Appeal AI 742679 AgRg/RJ. Reporting Justice Ricardo Lewandowski Ruling on 27 September 2011. Second Panel. Published in DJe-195 Divulg 10 October 2011 public 11 October 2011 Ement Vol-02605-04 PP-00619.

There is a settled case law from the Supreme Court that determines the reproduction, at local level, of the law-making model adopted at federal level, in accordance with the principle of symmetry. Various rulings thus need to be reproduced. In the words of Justice Peluso:

> In settling related cases, the Court frequently has had recourse to the so-called principle or rule of symmetry, which is a construction of the court that tends to guarantee, in terms of reputedly substantive aspects, homogeneity in the statutory ruling on the separation, independence and harmony of the three branches, at the three levels of government.[15]

Here, however, we will pause to examine a specific ruling, where the Federal Supreme Court missed the opportunity to revert centralizing thinking. This was ADI 2872-PI, an interesting ruling, precisely because it proved how the interpretation of the Constitution could be carried out in a centralizing manner, scaling down and smothering local legislative power to the benefit of the federal level, on the grounds of a rather shallow idea of the need for blind reproduction of political models of organization.

In fact, the criteria for using the principle of symmetry have never been properly explained by the court. According to this principle, it can be understood that the basic rules for organizing the three branches of government at federal level should be reproduced in the States and municipalities. But, it should be pointed out, that there is a specific reason for this obligatory symmetry: the preservation of the principle of separation of powers. In other words, the golden rule of the principle of symmetry suggests that the reproduction of the federal at the local level should only be considered obligatory in cases involving preserving harmony between the powers of the three branches of government.[16]

Thus, for example, if at federal level, it is the responsibility of the President of the Republic to take the initiative regarding laws involving the Armed Forces, at State level, *mutatis mutandis*, the State Governor has the same responsibility with regard to the Military Police. If, on the contrary, this responsibility for initiating State legislation on this matter were given to the State Deputies, and not the Governor, this would be in contravention of the principle of symmetry, since the model of separation of powers at the level of the Union would not be reproduced in the member-State.

It is thus understood that the powers of the Union are organized in such a way and that this is a structure that should be reproduced at local level, on pain of contravening the principle of separation of powers at State level.

ADI 2872-PI discusses whether a member-State may provide, in its State Constitution, a complementary jurisdiction to rule on a matter at local level, which, at the federal level, is governed by an ordinary law.

15 ADI 4298-MC, available at <www.stf.jus>.

16 M.L.C. de Araujo, *Jurisdição Constitucional e Federação: o princípio da simetria na jurisprudência do STF*, Campus, Rio de Janeiro, 2009, p. 96.

In fact, the Constitution of the State of Piauí provides complementary legal jurisdiction to rule on the State's civil servants' statute; its State military statute; the Organic Law of the State Ministry of Justice; the Organic Law of State Public Administration; the Civil Police Statute; and the State Treasury Statute.

At federal level, in relation to all the issues addressed above, no complementary federal law is required; a simple ordinary law suffices.

Questions have thus been raised regarding the constitutionality of the State Constitution Rule that requires a declaratory statute to be drawn up to govern matters at State level which, at federal level, could be governed by an ordinary law.

The reporting justice ruled such a requirement to be unconstitutional in so far as it goes against the principle of symmetry. Eros Grau argued that

> [T]he 1988 Constitution, in conferring on member-States the capacity for self-organization and self-government, obliges them to abide by the principles of these, including the one regarding the legislative process, to the effect that the State Constitution cannot require a declaratory statute regarding matters covered by ordinary law in the Brazilian Constitution.[17]

If it is true that, on the one hand, the Federal Constitution, determines, in Article 125, that the member-States can draw up their own constitutions, so long as these respect the principles of the Republican Charter, on the other, it is also true that the provisions, according to CF/88, on matters that, at federal level should be legislated on by way of declaratory statute, are, in fact, rules and not principles.

The purpose of this was in truth to state that the 1988 Constitutions is, in fact, full of rules, determining that declaratory statutes be reserved for governing specific matters. But these rules should not be taken to be 'principles' to the extent that they trigger the restrictions contained in Article 125 of CF/88 and member-States are thus able to legislate on such matters at State level also by way of declaratory statutes.

The replication of Federal Constitutional State statutes, on matters regarding the legislative process has already been settled by case law in the STF. But this jurisprudence is framed in such a way as to respect the principle of the separation of powers, lest a matter of a private initiative on the part of the Chief Executive be usurped and initiated in Congress. It can thus be seen that the reproduction of the federal legislative process at State level was designed to provide harmony between the three branches of government.

In this specific case, the requirement of the ordinary law or declaratory statute at State level, differently from what occurs at Federal level, is not a matter that violates the principle of the separation of powers (as would be the case in the matter of a law reserved for the Chief Executive).

See the precedents used in ADI 2872-PI, for the application of the principle of symmetry in matters regarding the law-making process. The cases cited are ADI

17 ADI 2872-PI. Available at <www.stf.jus.br>.

MC 1353, ADI 1434, ADI MC 2417 and ADI 1391. However, all these cases relate to the need to reproduce a rule regarding federal legislative procedures at State level, in particular those relating to the issue of whether the initiative lies with the executive or the legislative branch of government. This has nothing to do with the question of the reproduction of types of law, which is more of an internal legislative matter.

If a matter is to be legislated on by way of a declaratory statute or ordinary law, this does not affect the relation between powers and there is thus no need to reproduce the federal model at State level in order to respect the 'principles' laid out in the Republican Charter (Art. 125).

Justice Menezes Direito, in his opinion, argued that the principle of symmetry was being invoked in ADI 2872-PI, given the nature of the statute (declaratory statute or ordinary law), and not taking into account the need to preserve the prerogative of private initiative on the part of the Governor to draft a Bill. The aforementioned justice also remarked that the principle of symmetry implies modulation, since it does not have the power to curb the liberty of the State Constitution when it diverges from Federal law on points that do not constitute violations of the social ideal or the organization of the State. It is thus understood that symmetry would be applicable in cases in which there is intrusion on the private jurisdiction of the executive in the drafting of bills, since

> [I]n these cases, there is, without doubt, a fundamental issue regarding the organization of the State, i.e., the need to preserve the indissoluble basic principle of the separation of powers in the federation.[18]

It is worth pointing out that, in this ruling, the dissenting opinion of Justice Menezes Direito was a genuine attempt to preserve the autonomy of the States by way of an interpretative position on the part of the court.

> It is interesting to observe that we have always been moving in this direction of developing closer federative ties, in such a way as to concentrate more and more power in the hands of the Union, and have failed to acknowledge that the constitutional form of the state, although created as an expedient of a political nature, in the model of the evolved form in the articles of the 1777 confederation of the United States of America, which should incline the inter-

18 Extract from the Justice's opinion on ADI 2872-PI, available at <www.stf.jus.br>. Justice Carlos Menezes Direito also argued that "[…] either we live in a federal state and we are thus faced with the – almost always benign – consequences of regional differences, or we come to interpret the Federal Constitution as the Constitution of a Unitary State." As grounds for his opinion, attached an extract from Ruy Barbosa's Comments on the Constitution, where he mentions that Brazil is a country of continental size replete with differences in climate, geology, costumes, the physical environment and morality and that, for this reason "local government also needs to vary without limit, according to these innumerably multiple, heterogeneous, opposed accidents, like a kind of plastic bond which can be molded to fit all these natural and social divergences of a people scattered across a territory inferior in size only to the British, Russian and Chinese Empires and the American Republic" (Commentaries on the Brazilian Federal Constitution, collected by Homero Pires, Vol. I, 1932, pp. 52-53).

> pretation of the Federal Constitution in this direction. It is thus in the direction of greater acceptance of the autonomy of the member-States and not in the opposite direction, as has been happening and of which the expansion of the principle of symmetry is an example.[19]

Justice Menezes Direito concludes that the provision of ordinary legislation at Federal level does not prevent member-States from establishing, in their own State Constitutions, the need to make use of declaratory statutes, so long as the State opts to use one of the models of a normative kind outlined in the Federal Constitution:

> It does not seem reasonable to me that this principle of symmetry reach the point of depriving the State constituent assembly of the option to choose one of the normative models available in the Federal Constitution. How does this option jeopardize the organization of the Nation? Does this option undermine any especially sensitive principle of a federatively organized nation-state? In no way, absolutely none. On the contrary, narrowing the principle of symmetry, which is jurisprudential construction, confers greater strength and meaning on the Brazilian federation, the form of the state chosen by the framers of the constitution since the Proclamation of the Republic.[20]

The opinion of Justice Carmem Lúcia followed that of Menezes Direito in favouring autonomy. However, the majority of the court did not rule in this way. The opinion of Justice Gilmar was based on a personal view that requiring the production of a declaratory statute would be an excess. His grounds for this were political and based on a personal opinion. He did not in any way provide an interpretation of the principle of symmetry. He replaced the will of the State lawmakers to say that it was excessive to require declaratory statutes from the Ministry of Justice, the State Police Force and so forth, since "this would involve an absolute majority, with implications for the whole legislative process". He noted, however, an alternative viewpoint: "the straitjacket that is always created for a federal unit regarding the constitutional model it adopts".[21]

As mentioned above, however, the majority position of the court was that the former jurisprudence should be upheld, when it determines that the basic rules of

19 Vote of Justice in ADI 2872-PI. In the same vote, Justice Menezes Direito avers that the issue of the autonomy of member-States in terms of their constitutions and ordinary legislation or declaratory statutes will require at some point that the Supreme Court rethink the strict position that it has adopted. In many cases, such as those involving public health or education, there are peculiarities that should be respected and that cannot therefore be fitted into the standard of symmetry as laid out in the Federal Constitution.

20 Justice Menezes Direito further remarks, in his lucid statement, "I do not see any reason whatsoever for broad application of the principle of symmetry. On the contrary, I understand that the Brazilian Federation derives its strength precisely from the understanding that the member-States can make local constitutional decisions using the normative standards laid out in the Federal Constitution, without this in any way being detrimental to any sensitive principle or any express or implicit restriction", pp. 14-15.

21 Vote in ADI 2872-PI. Available at <www.stf.jus.br>.

the federal legislative process should be reproduced by the State legislative process. In other words, the justices opted for the so-called 'Gabriela syndrome', which is when someone does not wish to change their position, arguing that 'I was born like this, I grew up like this'. In such situations, postures are adopted simply because they have always existed and thus need to be maintained.

The case commented on here is emblematic, since it reveals a tendency to maintain the centralizing jurisprudence of the court merely for reason that it is already settled (by the application of the principle of symmetry in the legislative process). However, it can be seen that, if, in a concrete case, an ordinary law or declaratory statute were used at State legislative level, this would in no way vitiate the harmony between the State powers.

This is then yet another distortion of federalism involving the 'top-down' application of law-making techniques. It shows disrespect for the State and municipal legislature, imposing a symmetry that eliminates the kind of freedom to innovate at State level that would generate diversity in the unit, suggesting that the relation between the legislative branch and the federation needs much more maturity.

E. Concluding Remarks

As can be seen from the present study, relations between the legislative branch of government and the federalist system are marked by a centralizing distortion at the level of the National Congress.

The dysfunction has its origins in the façade of the federative bicameral system. In other words, everyone believes that our National Congress is bicameral for federative reasons. The Federal Constitution itself says that the Senators of the Republic are elected to represent the member-States. And, furthermore, that they are elected on terms of parity, since each member-State has three senators. However, there are some aspects of the Constitution that reveal a different picture, of a moderating bicameral system, where the Senate, in so far as it is a house that is *a priori* made up of more experienced lawmakers than the Chamber of Deputies, almost always ends up reviewing laws passed by the Chamber of Deputies.

In addition to this there is the fact that, as mentioned above, the Chamber of Deputies ends up, in the game of politics, taking on the role of representing territorial interests. This can easily be seen from the ceiling imposed by Article 45 of 70 federal deputies per member-State, the logical consequence of which is that an attempt is made to prevent any one State in the Federation from achieving hegemony within the Chamber of Deputies. This shows that the discourse regarding protecting territorial interests (proper to a Senate) is also at play in the House of the People, the Chamber, thereby causing a breakdown in the idea of a federative bicameral system, in which the upper house (the Senate) should rightly be thought to exercise this kind of territorial representation. In other words, in Brazil, the Senate has elements that mitigate its characterization as a house representing the member-States, while the Chamber of Deputies has elements that

bolster its role as interlocutor in the federal dialogue between central and local power.

The grave federalist distortions in the legislature can also be seen from the excessive provision of legislative jurisdiction for the Federal Union (a centralizing posture adopted by the original framers of the constitution), and also from the centralizing interpretations of law handed down by the Supreme Court, since it is not unusual for them to give more weight to federal than to State jurisdiction, when ruling on a concrete case, where the issue falls into the grey area between State and federal jurisdiction. The decision, as part of the hermeneutical game, to declare State law unconstitutional, using the principle of intrusion on jurisdiction, is another centralizing trend that gradually undermines the functioning of State and municipal legislative bodies in Brazil.

Finally, State and municipal lawmakers are further smothered by the application of the principle of symmetry by the Federal Supreme Court, requiring that the federal legislative process be used as a model in the legislative processes of legislative assemblies and municipal Council Chambers.

It can be concluded that the federal pact has still not come to influence the legislative power of federated entities in Brazil, for reason of the grave institutional distortions recounted above.