Federal theory on constitutional asymmetries: revisited
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ABSTRACT

It has been more than a half a century since the publication of Tarlton’s article on symmetry and asymmetry in federalism. This was among the first, if not the first, academic work addressing the symmetry-asymmetry relationship in federalism directly. Tarlton belongs to the traditional federal theory that considers asymmetries in the federal state an exception. Recent literature stresses that the traditional federal theory suffers from a few limitations. It fails to recognise that the asymmetry is identifiable, although covert in quasi-federal states, regionalised unitary states, and even in a transnational setting. These systems are addressed as the multi-tiered systems. Besides this, many multi-tiered systems are multinational in their essence. Given this, it may be deduced that the asymmetry is linked to so-called multi-tiered multinational systems. Finally, asymmetrical federalism is mainly addressed in the political science scholarship rather than within the scope of constitutional law. Therefore, legal analyses of asymmetrical federalism and constitutional asymmetries are occasional and scarce. The first aim of this article is to provide a legal analysis of constitutional asymmetry in the multi-tiered multinational systems from a legal point of view. The second aim is to develop the indicators for studying the constitutional asymmetry in contemporary constitutional law. This will allow us to draw conclusions on the influence of asymmetries on constitutional structures and processes, and examine the options for a consolidation of federal theory.

I. FROM TRADITIONAL TOWARDS CONTEMPORARY INTELLECT

While Riker claims that the other half of the 20th century is ‘the age of federalism’¹, Gibson notices that Riker’s ‘age of federalism’ is less federal than it

is in the 21st century.² Currently, the majority of the world’s population lives in federal systems.³ Also, the majority of federal systems have been established as multinational states.⁴ Finally, some of them have established constitutional asymmetries.

Although constitutional asymmetry is subject to increased interest only for the last couple of decades, this topic broke into the federal theory discussion in 1964 with Tarlton’s work on the concepts of symmetry and asymmetry.⁵ Tarlton introduces the concept of asymmetry through an analysis of the relationship between constituent units and central power in the federal system. Also, Tarlton addresses differentiation between symmetrical and asymmetrical models of the federal system as two concepts opposing one another. On the whole, he proposes that symmetry refers to the extent to which constituent units in the federal state share common features, and asymmetry to the extent to which they do not share these features.⁶ This reasoning fits a concept of the federal system in the traditional federal theory. The description that follows originates well before the Second World War when federalism was understood as a poor alternative to the unitary state.⁷ As a rule, a federal state is a form of state organisation with two or more roughly equal constituent units, more than one constitution or other act matching the constitution, more than one system of government, and distribution of competences.⁸ Research demonstrates that a number of studies had assumed that the federal state comprised identical constituent units and that they were

⁴ Alfred Stepan, ‘Toward a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism’ in Gibson (n 2) 29. Stepan suggests that “[i]f our unit of analysis is the total number of people who live in long-standing democracies, the majority of them live in federal systems” providing examples of the United States of America, the Federal Republic of Germany, the Republic of India, Commonwealth of Australia, the Republic of Austria, the Kingdom of Belgium, Canada, the Kingdom of Spain, and the Swiss Confederation. Also, “[i]f our unit of analysis is [...] multinational and multilingual democracies, all the politics that fall most clearly into this category are federal’.
⁵ Charles D. Tarlton, Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation (Southern Political Science Association 1965).
⁶ ibid.
⁸ For instance: Riker.
equal in their relationship with each other and with the centre. Moreover, symmetry is used as a synonym for equality, while asymmetry as the synonym for inequality. In addition, the traditional federal theory insists on symmetry. It argues that more symmetry means more potential for federalism to be a suitable form of governmental organisation. However, it does not comprehensively explain why is it required. Further research shows that the traditional federal theory uses symmetry as a mechanism for integration. In particular, it is argued that the centralisation is an essential feature of the federal system as more symmetry means more harmony for the federal state. This is due to the fact that the harmonious federal system is not expected to develop if the system is asymmetrical to a great extent. In other words, asymmetry is regarded as a prospect of disunity or even of separation of constituent units. Therefore, asymmetry challenges the federal state authority to increase coordination and coercion to relieve tensions dependant to asymmetrical systems. Then, symmetrisation is considered to be the mechanism to deal with the differences in the federal state. This way, symmetry is regarded as a safeguard of the federal system’s stability. Aforementioned shows that while symmetry is naturally implied, asymmetry is considered an exception.

Attempts to address these issues have been broadened with another restrictive matter. Recent literature stresses that the traditional federal theory links symmetry to uni-national entities and to their processes of nation building.

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11 Tarlton (n 5) 872.
12 Michael Burgess, Comparative federalism: theory and practice (Routledge 2006) 212.
13 Tarlton (n 5) 871.
14 ibid.
16 Tarlton (n 5) 874.
17 Nagel and Requejo, ‘Conclusions: Asymmetries and Decentralisation Processes’ in Nagel, Requejo and Dosenrode (n 15) 249.
18 Similar: Burgess (n 12) 212.
19 Tarlton (n 5) 871. See also Palermo (n 15) 2.
Finally, such a construction of federalism cannot be expected to deal with, at least not effectively, confronting challenges.

II. DYNAMICS OF THE FEDERAL ARRANGEMENTS – SYMMETRY CHALLENGED AND PROTESTED

Recent federal systems are primarily fragmenting states\(^{21}\) such as the Kingdom of Belgium, Bosnia and Herzegovina, the Italian Republic, the Kingdom of Spain, the United Kingdom, but also include those that are not considered an example of the federal state, ie the United States of America, the Swiss Confederation, Canada, etc. Federal systems cannot be reduced solely to federations, which are the most prominent exercising forms of federal state. Additionally, federal systems re-emerge in shapes that provoke a re-examination of the federal system understanding. These arguments are further advanced by Elazar.\(^{22}\) His comparative study of federalism delivers a solid argument on how the concept of federalism can be used to address a wide array of systems of government. In contrast to the traditional theory of federalism, Elazar introduces a multiplicity of federal forms (confederation, federation, federacy, associated state arrangement, common market, consociational polity, union, league, functional authority, condominium) that resurface in the ever more complex world, under the one single term ‘federal arrangements’.\(^{23}\) He also argues that the term ‘federal arrangements’ implies that there is a number of ways to apply federal principles.\(^{24}\) Elazar’s observations support a finding that besides the federal state, contemporary asymmetrical arrangements are identifiable, although covert in quasi-federal states, regionalised unitary states and even in a transnational setting.\(^{25}\) Even the state’s institutional structure does not always reveal a true

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\(^{22}\) Elazar (n 3).

\(^{23}\) ibid 6. It is worth noting that Elazar later broadened his list of possible forms for the accommodation of autonomy pretensions and included following: federations, confederations, unions, feudal arrangements transformed, federacies or associated state relationships, home rules, cultural home rules, autonomous provinces or national districts, regional arrangements, customs unions, leagues, state-diaspora ties, extraterritorial arrangements or enclaves, condominiums, special central government arrangements for specific regions and groups, states structures imposed upon autonomous tribes and consociational arrangements.

\(^{24}\) ibid. Elazar is not alone in his attempt to consolidate exercising forms of federalism. For instance, Delmartino refers to these as to ‘federal-type arrangements’. F. Delmartino, ‘New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union’ in Palermo et al (n 15) 37.

\(^{25}\) Palermo (n 15).
nature of the state for the fact that institutional structure may be established as a unitary but act as federal and vice versa. Furthermore, there is a growing body of evidence that even the perception of the unitary state is influenced by federal shifts. Echoing Lane, I suggest that increasing regionalisation and local government autonomy is present in unitary states as well.

A possible explanation may be sought in the identification of federalism with a process and the definition of federalism in dynamic terms. Friedrich introduces the idea of federalism that is not a static design with a precise division of powers. For him, it is instead a process by which a number of different political communities create arrangements for accommodation of differences. It is also the process by which a unitary political community may transform into the federal one. Friedrich’s idea has gained a considerable support in the contemporary theory. Some prominent scholars have taken up the challenge to further elucidate Friedrich’s arguments. Arguing on the ‘Hamilton tradition’ approach, Popelier isolates this theory for three reasons: (1) there is no beholden necessity to differ between the federal and territorial decentralisation owing to the fact that the concept of sovereignty is losing its importance in federal and other multilevel systems; (2) contemporary federal states divulge dynamic processes under the dynamic approach to federalism, meaning a constant search for the autonomy of subnational levels and an efficiency of the state level balance, or squarely a constant search for balancing the association and differentiation tension – to this end, the differentiation between federalism, regionalism and devolution is just a gradation; and (3) the subnational entities’ power immanent to the most but not all federal systems mainly originates from previously independent states with previously present constitutions. This is also consistent with Palermo’s view that the satisfying reason to allow arrangements not necessarily being truly ‘federal’ for the analysis is that regionalised or devolved systems, notwithstanding differences in defining, ‘contribute significantly to the development of theory and the practice of federalism.’

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26 William S. Livingston, A Note on the Nature of Federalism (Academy of Political Science 1952) 84.
27 J.E. Lane, Constitutions and Political Theory (Manchester UP 1996) 100.
30 Palermo (n 15) 15.
Watts widely approaches these issues relying on the idea of shared rule and self-rule\textsuperscript{31} in the comparative perspective distinguishing federalism, federal political system, and federations.\textsuperscript{32} Watts, by his own affirmation\textsuperscript{33}, follows the normative concept of federalism introduced by King\textsuperscript{34}. However, Watts has received much attention in the contemporary literature because he links the idea of shared rule and self-rule to approach federalism from the perspective of a multi-tiered government.\textsuperscript{35} He observes that federal arrangements have adopted the multi-tiered character of the system.\textsuperscript{36} This refers to a system where the central level in the federal arrangement is mixed with subnational entities with the law-making power.\textsuperscript{37} These levels are at the same time divided and associated. Hence, the system is called multi-tiered with a reason: to avoid specifying whether the system is truly federal or not following the dynamic notion of federalism. In addition, an application of the federal theory of the multi-tiered system is important because many multi-tiered systems are federations, and federal principles usually apply to multi-tiered systems.

Finally, the contemporary federal theory emphasises that the concept of federalism indicates ‘the significance of diversity – the quality of difference’\textsuperscript{38} where the main purpose of federalism is to accommodate differences and diversity\textsuperscript{39}. In general, federalism has been related to multinationalism since not a long ago, historically and normatively.\textsuperscript{40} Requejo’s observation that most modern states were uncomfortable with the idea of national diversity within their

\textsuperscript{31} For Elazar, federal principles are concerned with the combination of shared rule and self-rule. Elazar (n 3) 5.
\textsuperscript{32} Ronald L. Watts, Comparing Federal Systems (2\textsuperscript{nd} edn, McGill-Queen’s UP 1999) 1.
\textsuperscript{33} Ronald L. Watts, ‘Federalism, Federal Political Systems, and Federations’ [Annual Reviews Inc.] 1 Annual Review of Political Science 117, 120.
\textsuperscript{34} P.T. King, Federalism and Federation (Croom Helm 1982).
\textsuperscript{35} Watts (n 32) 6.
\textsuperscript{36} ibid 64.
\textsuperscript{37} To enable and facilitate drawing an analogy across federal arrangements the following terminology has been adopted: (1) the term ‘central level’ describes the highest level of the government in federal arrangements; (2) the term ‘subnational entities’ has been adopted to describe sub-levels of the government with the law-making power. In the federal theory, member units are usually referred to as states, provinces, regions, cantons, communities, entities, etc. More generic terms include terms such as sub-state units, sub-state entities, subnational units, subnational entities, federal subunits, federal entities, constituent units, etc; (3) country-specific terminology applies where needed.
\textsuperscript{38} Burgess and Greer, ‘Symmetry and Asymmetry Revisited’ in Robert Agranoff (ed), Accommodating diversity: asymmetry in federal states (Baden-Baden 1999) 43.
\textsuperscript{39} M Burgess, ‘The Paradox of Diversity: Asymmetrical federalism in Comparative Perspective’ in Palermo et al (n 15).
\textsuperscript{40} Requejo (n 15) 7.
territory and therefore had tried to impose the identity of the majority group.\textsuperscript{41} can explain a previous finding that the traditional federal theory still revolves around uni-national federal systems. Meanwhile, federalism has been an appealing concept to apply in multinational polities.\textsuperscript{42} Stepan describes multinationality as territorially based differences built on linguistic, religious, cultural, ethnic, and other identities where significant groups with one or more identities distinction claim the important political autonomy around these differences.\textsuperscript{43} In the increasingly plural world, this provokes constitutional entanglements in multi-tiered systems.\textsuperscript{44} Therefore, it is critical to appreciate the true impact of multinationalism on the multi-tiered system. This is because of the fact that many of multi-tiered systems are multinational in their essence.\textsuperscript{45} Three of them, that are being of a particular interest, are clearly multinational, namely the Kingdom of Belgium, the Kingdom of Spain and the United Kingdom\textsuperscript{46} as well as Bosnia and Herzegovina, the Italian Republic, etc.

\textbf{III. \textit{DE IURE} ASYMMETRY CONSIDERED}

Since asymmetries emanate in any system that possesses the potential for a claim based on differences, it cannot be considered to emerge in relation only to federal systems, as they are sometimes covert in quasi-federal systems, unitary regionalised states, and the transnational setting. For instance, while they are considered to be unitary systems, it is hard to disregard the devolution process in the United Kingdom\textsuperscript{47} and federal processes in the Italian Republic.\textsuperscript{48} Hence, the term multi-tiered system properly fits. Furthermore, differences in any arrangement have the respective ambiance of emergence. An overwhelming number of cases (eg the Kingdom of Belgium, Bosnia and Herzegovina, the Kingdom of Spain, and the United Kingdom) show that differences originate in

\textsuperscript{42} Stepan (n 4) 38.
\textsuperscript{43} ibid.
\textsuperscript{44} Requejo (n 41) 13.
\textsuperscript{45} Stepan (n 4) 39.
\textsuperscript{46} Willfried Swenden, Federalism and regionalism in Western Europe: a comparative and thematic analysis (Palgrave Macmillan 2006) 244.
\textsuperscript{47} See eg Martin Laffin and Alyss Thomas, ‘The United Kingdom: Federalism in Denial?’ (1999) 29 Publius 89.
multinational states. Over time, differences produce either a divergent constitutional position or at least volition for a divergent constitutional position of subnational entities. Following factors then become important: the number of subnational entities; the size of the majority/minority population; the allocation of powers; the relationship between the central level and subnational entities; the relationship between subnational entities; the decision-making procedure; etc. These factors may produce two types of asymmetrical outcomes. *De facto* asymmetries, or relationships that emerge in federal arrangements on the basis of linguistic, religious, cultural, ethnic, and other identity differences in federal arrangements. They seem to be preconditions for *de iure* asymmetry. *De iure* asymmetries are socio-economic and cultural-ideological relationships that are established in constitutional and legal frameworks in such a way that they produce an unequal positioning of subnational units.

When entrenched in the constitutional system of the state, asymmetries produce a considerable impact on structures and processes. Also, particular interest is given to the relationship between subnational entities, rather than to their relationship toward the central level. This is due to the fact that 'a general norm of equal powers, [...] does not make sense for [...] comparisons' as well as for the fact that 'symmetric division of powers along the vertical axis between federal and constituent governments is almost impossible to imagine' as subnational entities clearly cannot have the same powers as the state level (foreign policy, coin money, etc.). To this end, appropriate attention is given to horizontal *de iure* asymmetries.

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49. Agranoff (n 38) 16 and Watts (n 32) 63.
50. Under a mere assertion that preconditions manifest an actual reality in a constitutional system, Burgess (and Gress) identify the objective empirical criteria of preconditions, broken down in two groups: Socio-economic (among other including economic disparities and territorial differences), and cultural-ideological (with its own peculiar sublayers including religious pluralism, linguistic pluralism, territorial pluralism, and ethno-national pluralism). See also Palermo et al (n 24) and Agranoff (n 38).
51. Agranoff (n 38) 16; Burgess (n 15) 24; Swenden (n 46) 48; and Watts (n 32) 63.
52. Burgess (n 15) 24; and Agranoff (n 38) 30.
Indicators of de iure asymmetries

The central level constitutions usually stipulate de iure symmetry between subnational entities' constitutions (if there are any) for the sake of introducing at least a sense of coordination within the system as a whole. Alterations in favour of asymmetry often occur in the constitutional entrenchment of the multi-tiered multinational states, where they range from the basic to the utmost demands and everything in between. The issue of the constitutional asymmetries then is a balance between symmetry and asymmetry. This is linked to the extent of asymmetries that the system can ‘suffer’ and yet remain stable. It is possible to identify relevant indicators that are mirrored in the number and size of subnational entities and population, the relationship between subnational entities and their singular and common relationship towards the central level, allocation of powers, decision-making procedures, etc.

Multi-tiered multinational systems that are established as ‘coming together’ or ‘putting together’ arrangements\textsuperscript{54} usually take over the existing territorial delineation and population size by default. Their status is not a subject of constitutional modifications, transformations or adjustments. Nevertheless, in ‘holding together’ arrangements\textsuperscript{55} alterations in the territorial delineation are presumed. The reason for this is the interests and demands of distinguished subnational entities that do not necessarily reflect the opinion of existing ‘significant others’ entities. When constitutionally entrenched, these alterations provide de iure asymmetries. For instance, in Belgium, the process of federalisation brought forth the delineation of the Flemish, Walloon and Brussels regions along the Flemish, French and German-speaking communities. In Bosnia and Herzegovina, the General Framework Agreement for Peace in Bosnia and Herzegovina entrenched one weak federal state, two strong entities, and three constituent peoples.

\textsuperscript{54} According to Stepan, federal states are being established coinciding more or less as ‘coming together’ federations (based on Riker’s voluntary federal bargain of the autonomous entities) or even ‘putting together’ federations (a compulsive attempt to assemble previously independent states). But, new multi-tiered and multinational systems have the opposite rationality behind. These systems rather evolve as ‘holding together’ systems whose authorities develop and implement constitutional norms on the devolution of powers to accommodate existent differences produce an attempt to hold the state together. Stepan (n 4) 33.

\textsuperscript{55} Please refer to the discussion above of fragmenting systems and multi-tiered multinational systems for a comparison.
The distribution of competences in multi-tiered multinational systems is equally as important as the distribution of financial resources. *De iure* asymmetries emerge when constitutional texts identify and legalise alterations in the size of territory and population, political differences, economic disparity, and especially variations in linguistic, religious, cultural, ethnic and other identities. There are few options. First, reducing the competences of individual subnational entities. Second, increasing the competences of individual subnational entities. Third, allowing subnational entities to ‘opt-in’ or ‘opt-out’ with regard to specific competences,\(^\text{56}\) enabling subnational entities with asymmetrical settings to vote on common matters but refrain from voting when on matters concerning competences of the entity itself. Finally, the distribution of financial resources is a challenging task in multi-tiered multinational systems. Uneven distribution of fiscal resources between subnational entities, along with returns that do not correspond to the participation of the entity, causes uneasy relations between subnational entities and the central level. This is visible in the Kingdom of Spain, where subnational entities receive discretionary fiscal resources from the central level, creating tensions between the entities.

Representation in the first chamber of the central level legislature is usually based on the size of the population of each subnational entity. This way *de facto* asymmetry is acknowledged as *de iure* symmetrically towards the subnational entities. Representation in the second chamber is based on symmetrical representations of each subnational entity and individual group. Being constitutionally entrenched, regardless of the size of the subnational entity and/or the population, it is *de iure* asymmetry of its kind. These types of representation seem to be two sides of the same coin. The representation asymmetry may interfere with the distribution of competences. This happens when the claim for a greater jurisdiction revolves around the increased representation in the central level legislature. It allows a subnational entity with an asymmetrical setting to vote on matters of no concern to itself, but also to withhold others from voting on matters relating to the entity. In the United Kingdom, this is known as the West Lothian question.

\(^{56}\) See Watts (n 32) 66.
Constitutions in multi-tiered multinational systems usually provide the symmetrical influence of subnational entities in a constitutional amendment procedure. However, there may be certain requirements that need to be fulfilled: the majority or the special majority of the subnational entities legislatures; the referendum decided by the majority of voting and the majority of the subnational entities. For instance, in Canada, asymmetry appears when the majority requirement applied reveals the obligatory influence of the individual subnational entity.

Other possible indicators such as representation in intergovernmental bodies and human rights provisions\(^\text{57}\) do not seem to pose a significant impact as it was not possible to prove that they create one.

Defined indicators are relevant for at least a few reasons. First, they allow us to develop a basis for the comparative analysis of asymmetries. By using these to recognise asymmetries in a specific state we are able to evaluate the relationship between historical background and constitutional asymmetry. We are also able to determine the role of multinationalism in establishing constitutional asymmetries. This is done in a few ways: through identification of constitutional asymmetries in states of interest; determining the reasons behind constitutional asymmetries through comparative case studies; and answering how far multinationalism can explain constitutional asymmetries. Second, indicators allow us to test the impact of constitutional asymmetries for the constitutional values (cohesion, equality, and transparency) that guarantee the stability of the system. To that end, indicators allow us to evaluate the simultaneous relationship of constitutional values and asymmetries and answer when asymmetries threaten stability. This is the backbone of asymmetrical federalism: how to reach equilibrium between autonomy claims and a stable constitutional system. If the impact of asymmetries is proven, indicators allow us to look for safeguards of stability in the constitutional arrangement. Third, originating from the first and second, indicators allow us to determine the importance of existent asymmetries on constitutional structures and processes. Fourth, indicators allow us a possibility to examine the options for a consolidation of the federal theory as have been shown above. There is not enough space for detailed analysis of the indicators in this

\(^{57}\) Watts mentions these in Agranoff (n 38) 34.
paper as it requires an extensive academic polemic. Instead, this short analysis serves as an example of how constitutional asymmetries may be grasped from the legal point of view, and towards which directions in the theoretical framework research should be pointed. The first direction is towards linking the nature of the multi-tiered multinational system to constitutional asymmetries. The second direction is towards determining when constitutional values are threatened by constitutional asymmetries.

IV. INSTEAD OF A CONCLUSION, OR NEARLY A CONCLUSION

Recently reinforced interest in federalism research, especially asymmetrical federalism, does not come as a surprise for its continuous account and influence and ‘because federalism is one way to solve the problem of enlarging governments – a problem that is one of the most pressing political concerns in the modern world’. 58 Being a globalisation aftereffect, asymmetrical federalism gravitates rather towards new forms of systems, forcing and out-turning changes in the direction of multi-tiered systems which are usually multinational in an essence. Stimulation for these changes comes from the brass-tacks that asymmetry in federal systems is not less essential to federalism than symmetry. 59 And, because of their character, multi-tiered multinational systems that involve asymmetry presuppose a trigger for disintegration. 60

In this paper it is argued that the traditional federal theory still neglects the fact that the federal arrangements are noticeable, although covert in quasi-federal states, regionalised unitary states and even in a transnational setting. However, it has been pointed out that unitary and federal features intermingle in traditionally established forms of the state organisation providing examples that a theoretical assumption of the pure unitary or pure federal polity is not easy to be proven. Therefore, the term multi-tiered system is introduced. Moreover, the principal weakness of traditional federal theory lies in the fact that it considers the symmetry as an essential integrative part of federal states that, in the end, determines the quality of federalism. 61 Asymmetrical arrangements are a rather

58 Riker (n 1) 2.
60 Burgess (n 39).
61 Tarlton (n 5) 867.
significant, even though pinpointed as snappy, research direction in (comparative) federalism studies. The intellect behind it is manifold. The leitmotiv lies in developing methods of the territorial integrity maintenance provoked by the distinct groups’ claims to choose their political status which is often shifted and boosted towards autonomy claims. In addition, it may be even advisable to introduce constitutional asymmetrical solutions where multinationality is de facto present.

Finally, it has been implied that there is no single theoretical design that is the most fitting to respond to challenges posed by asymmetries in multi-tiered multinational states. For that purpose, indicators or parameters of the constitutional asymmetry are introduced to assist at drawing conclusions on the influence of asymmetries on constitutional structures and processes; to develop the basis for the comparative analysis; and to examine options for the direction in which federal theory shall be pointed at when dealing with constitutional asymmetries.

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62 Agranoff (n 38) 19.
63 McGarry (n 9) 112.
64 Requejo (n 15) 5.