RDPC

Revista de Direito Público Contemporâneo

ISSN 2594-813X

RDPC

Revista de Direito Público Contemporâneo

Ano nº 04 | Volume nº 01 | Edição Nº 01 | Jan/Jun 2020

Año nº 04 | Volumen nº 01 | Edición Nº 01 | Jan/Jun 2020

UFRRJ
UNIVERSIDADE FEDERAL RURAL DO RIO DE JANEIRO

INSTITUTO DE ESTUDIOS CONSTITUCIONALES

Revista de Direito Público Contemporâneo
Revista de Derecho Público Contemporáneo
Journal of Contemporary Public Law

PARTILHA DOS ROYALTIES NO FEDERALISMO BRASILEIRO À LUZ DOS JULGAMENTOS DAS ADI 4916/DF e 4917/DF PELO SUPREMO TRIBUNAL FEDERAL ACERCA DA LEI FEDERAL Nº 12.351/2010 E A PROPOSTA DA EMENDA CONSTITUCIONAL Nº 188/2019

SHARING OF ROYALTIES IN BRAZILIAN FEDERALISM IN THE LIGHT OF THE JUDGMENTS OF ADI 4916 / DF and 4917 / DF BY THE SUPREME FEDERAL COURT ON FEDERAL LAW No. 12.351 / 2010 AND THE PROPOSAL FOR CONSTITUTIONAL AMENDMENT No. 188/2019

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RESUMO: A análise da situação do regime de partilha dos royalties instituído pela lei federal nº 12.351 de 2010 diante da decisão do Supremo Tribunal Federal no julgamento das ações diretas de inconstitucionalidade nº 4916/DF e 4917/DF, bem como, da proposta de emenda constitucional nº 188/2019 é o tema posto em debate, a partir do estudo do regime federalista brasileiro que embora simétrico é marcado pela repartição de bens e partilha de competência desigual entre os entes federativos, do regime liberal de exploração da atividade econômica no Estado Brasileiro, porém, com a previsão do monopólio sobre bens e atividades estratégicas como o petróleo e seus derivados garantida a concessão na exploração e, por fim, da participação estatal nos resultados da produção com análise crítica do regime legal de partilha dos royalties entre os entes federativos à luz das ADI's e da PEC.

PALAVRAS-CHAVES: Federalismo; Petróleo; Royalties; Lei nº 12.351/2010; Proposta de Emenda Constitucional nº 188/2019.

ABSTRACT: Analysis of the situation of the royalty sharing regime instituted by federal law No. 12,351 of 2010 in view of the decision of the Supreme Federal Court in the judgment of direct unconstitutionality actions No. 4916 / DF and 4917 / DF, as well as the proposed amendment Constitutional No. 188/2019 is the subject of debate, based on the study of the Brazilian federalist regime, which, although symmetrical, is marked by the distribution of assets and the

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sharing of unequal competence among the federal entities, of the liberal regime for the exploitation of economic activity in the Brazilian State. however, with the provision of a monopoly over strategic goods and activities such as oil and its derivatives, the concession on exploration is guaranteed and, finally, state participation in production results with a critical analysis of the legal regime for sharing royalties between federal entities in the light of the ADI's and the PEC.

KEYWORDS: federalism; oil; royalties; pre-salt; federal law no. 12.351, 2010

Data da submissão: 13/06/2020 **Data da aprovação:** 13/07/2020

1. INTRODUTION

The Brazilian State is marked by the typically symmetrical federalist political system with the guarantee of the political-administrative autonomy of the federated entities, with the attribution of a regime of assets and sharing of competences between its four levels - Union, States, Municipalities and the Federal District - although in the current court with a certain prominence from the Federal Government that secures the largest list of attributions, among which, tax and the largest patrimony.

Although it enshrines a liberal regime for the exploitation of economic activity, which will be exercised primarily by private initiative, the Federal Constitution of 1988 provided for the state monopoly over goods and activities considered strategic for the sovereignty of the state entity, without this preventing exploitation through the system of concession to private economic agents.

With regard to oil, natural gas and other fluid hydrocarbons, the fundamental law provided for the monopoly on the research and mining of deposits, their refining, the import and export of basic products and derivatives resulting from activities, maritime transport, although it was admitted pursuant to Constitutional Amendment No. 09 of 1995, permission to hire state or private companies to exercise these activities.

Under such aegis, federal regulatory law No. 9,478 of 1997 provided for the energy policy and activities related to the oil monopoly, stating that the concession contract concluded after the bidding process should provide for government participation in the revenues acquired from the exploration, among which the royalties provided for the producing entities.

In 2010, after the discovery of an area with oil reserves defined as pre-salt between the states of Santa Catarina and Espírito Santos, federal law No. 12,351 was enacted, which provides for the exploration and production of oil, natural gas and other fluid hydrocarbons, as well as the production sharing regime in the respective areas and the definition of financial compensation due to the state entity.

In this regard, although royalties have a compensatory nature to the federal entities where the production of the respective mineral resources occurs due to the environmental and social impacts related to their exploration, the respective legal regime established the payment not only for the States, Federal District and Municipalities, but also the distribution of a portion of government revenue to other federal entities.

The present work seeks to analyze the situation of the royalty sharing regime instituted by federal law No. 12,351 of 2010 in view of the decision of the Supreme Federal Court in the judgment of the direct unconstitutionality actions No. 4916 / DF and 4917 / DF, as well as the proposal for constitutional amendment no. 188/2019

At first, the characteristics of the Brazilian federalist model are verified, which, although symmetrical, is marked in the current term by the distribution of assets and the sharing of unequal competence between the federal entities, in order to concentrate in the Union a greater spectrum of attributions and patrimonial collections that generate imbalances in the federation and result in greater financial dependence on other federated entities.

Afterwards, work is back on investigating the liberal regime for the exploitation of economic activity in the Brazilian State, with the provision of a monopoly for the Union on strategic goods and activities such as oil and its derivatives, guaranteed the concession of its exploration to public entities or provided that participation in the exploration is guaranteed as financial compensation for the effects of the activity carried out.

Finally, it focuses on the study of the participation of federated entities in the results of production with a critical analysis of the legal regime for sharing royalties established by federal law No. 12.351 of 2010 in the light of article 20 §1 of the Federal Constitution, including, in the decisions of the Supreme

Federal Court in ADI 4916 and 4917 regarding the distribution of a parcel to non-producing entities and Constitutional Amendment 188/2019.

It is used as a hypothesis, that the best exegesis given the constitutional norm is that which guarantees the participation of the result by the exploration in the territory of the federative entity only between the States, Federal District or Municipalities producing and that the institution of legal regime that disposes contrary, even for areas already bid, it is in violation of the principles of legal certainty and legality.

To this end, the methodology used in this work is dialectical criticism, through the analysis of the cooperative federalist regime and the distribution of revenue from its activities, the previous legal regime of oil royalties and the normative proposal after the pre-salt with adoption the bibliographic research medium, based on national legal doctrine, using legislation and jurisprudence when necessary to substantiate this work.

2. BRAZILIAN FEDERALISM AND PROEMINENCE OF THE UNION

Typical product of transformation of the successor Independent States of the 13 North American Colonies, federalism is a structure of overlap - where each citizen is subject to total and national and partial and local order - and of participation - with the central political power resulting from the aggregation the political powers of the federal states. (CANOTILHO, 1997, p. 143).

The federative model is marked by ensuring a complex of political, administrative and financial attributions capable of assuring the State's component entities that, although part of its sovereignty has been granted to form the federation, it maintains autonomy capable of reserving an autonomous sphere of action for each federated unit preservation of its local characteristics (DALLARI, 2005, p. 260-261).

Thus, it is based on the principle of legal equality between the federal states, which is not limited only to the ability of the national will to participate in the ordinary legislative process or to the constituent of revision or reform, nor is it to equality between citizens and recognition of public acts, but in the isonomic relationship that should exist between federative entities and the federation. (CANOTILHO, 1997, p. 143).

In its origin, federalism in Brazil did not mark the autonomy of the member entities, but it invariably served the regional oligarchies that used the newly won additional power as an instrument of domination and perpetuation of their interest groups at the local level, in addition to returning to central power the forces they exerted in locus (BASTOS, 1999, p. 223).

In its evolution, it did not form a federative tradition, with movements throughout Brazil Republic of centralization - with concentration of competences in the Union - and of decentralization - with a wide range of attributions to States - without even in the latter, autonomy was not achieved for member entities characteristic of pure federalism. On the other hand, the Brazilian model is marked by the relative autonomy of the Member States and the consequent strengthening of the Union (BASTOS, 1999, p. 233).

In the current term, the 1988 Constitution seeks to grant greater autonomy to the Member States, attempting a federal rebalancing, the expansion of state autonomy in search of a cooperative model and the creation of new levels - the Municipality and the Federal District - which denotes the proposal of decentralization with the sharing of competence and income by all components of the federation (FERREIRA FILHO, 2013, p. 89/90)

Although the October Charter adopts a complex system of division of competence among the component entities for the purpose of guaranteeing the federal balance, however, it results in the technique of enumerating the powers of the Union with the definition of the remaining powers to the States and indicative powers to the Municipalities , in addition to the provision of private, common and competing competencies. (SILVA, 2005, p. 479).

Thus, although in federalism the division of autonomous powers is the core of the concept of the Federal State, in the Brazilian model, the Union was well established in the sharing of competences with a wide range of administrative, legislative and tax attributions, as well as, goods, including mineral resources such as oil (SILVA, 2005, p. 496).

Regarding political attributions, the Union is responsible for maintaining relations with foreign states and participating in international organizations, declaring war and celebrating peace, ensuring national defense, allowing, in the cases provided for in complementary law, foreign forces to pass through

national territory. or remain in it temporarily, in addition to decreeing a state of siege, a state of defense and federal intervention.

With regard to administrative competences, for example, authorizing and supervising the production and trade of weapons, issuing currency, preparing and executing national and regional plans for land use and economic and social development, maintaining the postal service and the national air mail, to exploit, directly or through a concession to companies under state control, telephone, telegraph, data transmission and other public telecommunications services.

With regard to tax attributes, the Union is responsible for instituting taxes on imports of foreign products, exports abroad of national or nationalized products, income and earnings of any kind, industrialized products, credit, foreign exchange and insurance operations, or related securities, rural property and large fortunes, under the terms of a complementary law.

The Brazilian State in the Federal Constitution of 1988 gains levels of centralization superior to the majority of States that consider themselves unitary and that, through the decentralization by regions or provinces, achieves a level of transference of powers both legislative and of execution much higher than that achieved by the Brazilian State. (BASTOS, 1999, p. 223).

It is typical of federal constitutions to provide for an income distribution, which gives life to the autonomy of the Member States and enables them to carry out their competences.

In this regard, for example, the Brazilian Constitution even provides for the sharing of revenues collected by the Union from federal taxes, favoring not only the states, but also the municipalities (MENDES; COELHO; BRANCO, 2009 p. 849)

With regard to the division of incomes, which deals with the real autonomy of the Member States, therefore, it discriminates against broad tax attributions related to the Union, in addition to participation quotas, in sharing that ends up reducing the autonomy of the other entities that depend on the aid of the same that invades the competences of those in favor of this aid (FERREIRA FILHO, 2012, p. 92).

In such a vertex, although the Constitution of 1988 has in the political chronicle of oscillations, politically recognized the local entity endowing it with

autonomy and attributing the character of a federative entity (BONAVIDES, 2004, 346), it is inexorable that the creation of different municipalities in Brazil with attributions reduced tax rates resulted in the formation of entities without real financial autonomy that become dependent on public resources.

Although the municipalities were beneficiaries of the new revenue discrimination brought by the Federal Constitution of 1988, the system of sharing political and administrative competences with chronic uncertainties and overlapping of attributions, the existence of fiscal wars due to the existence of internal and interstate tax rates generated distortions that translate into a financial collapse of States and Municipalities. (BARROSO, 2000, p. 109/110).

In addition, the Brazilian centralizing tradition has resulted in financial crises of member entities that, in order to guarantee the provision of their essential services, had to adhere to political projects of the Union, including by entering into abusive contracts such as the provision of payment of the obligation with the values of oil royalties that lives up to the producer entity. (ARAGÃO, 2010, p. 2).

In effect, although Brazilian federalism is formally symmetrical with all federal entities in relation to equality, the concentration of competences in the Union ends up generating financial dependence that influences the autonomy of the federated entity in the political vertex. In this context, that includes revenue concessions, among which, the regime for sharing compensation arising from oil exploration under a concession regime. The topic will be discussed below.

3. OIL EXPLORATION AND PRE-SALT SCHEME

The Federal Constitution of 1988 enshrined the liberal model in the economic order with the primary role of private agents in economic activity and the role of the State's regulatory agent in the economic system. Exceptionally, it guaranteed the execution of economic activities with direct exploitation by the state entity, provided that imperative reasons of national security or relevant public interest are present. (CARVALHO FILHO, 2012, p. 903 and 917)

Regarding certain goods and activities, the Constitution expressly establishes ownership and exclusivity for the state entity. The Federal Constitution distinguished for the purposes of exploration or exploitation the

concepts of deposit and soil, as provided in art. 176. Although the property covers, in terms of civil law, the respective airspace and subsoil, when there is a mineral deposit in a specific location, the subsoil will be owned by the Union and not by the owner of the soil, be it public or private.

It also stipulates article 177 that corresponds to the Union's monopoly the activities related to the exploration and exploitation of deposits, refining, import and export of derived products, as well as the respective maritime transport, although the fundamental law allowed the transfer to private initiative not of the deposit itself, but of the exploratory economic activity.

In regulation to the constitutional precept, Federal Law no. 9,478 of 1997, which provided for the concession model for the delegated exercise of the monopoly of oil production. Under such a regime, exploration is at the concessionaire's own risk and risk, in the event of a discovery with the result of production, and the payment of royalties to the state entity (CARVALHO FILHO, 2012, p. 925).

The concession contract is divided into the oil exploration and production phases. The exploration phase aims to allow the concessionaire to achieve the object of the contract, production. From the concessionaire's point of view, it is only with production that it will be possible to obtain a return on investment and subsequently profit from the activity.

From the perspective of the State, the interest falls on the subscription bonus, which is the amount paid by the concessionaire to have the right to explore, for possible and future royalties, when after the exploration phase the concessionaire is successful, finding oil and consequently, it must pay a percentage of production and also special stakes, those resulting from high productivity blocks. (ARAGÃO, 2013, p. 487)

The traditional concession contract model, used in Brazil for oil blocks in the post-salt layer, is considered to be adequate insofar as it deals with very high-risk prospecting. In this type of contract, the winning bidder pays a certain amount to obtain the research privilege to explore a certain area, and therefore the entire risk of the operation is assumed by the bidder.

However, with regard to the pre-salt layer there is minimal risk of research and exploration. As a result of these geological characteristics, once the pre-salt layer was discovered, all bids for these new areas were suspended

and studies were started in order to define a new contractual regulatory framework adequate to the low risk inherent to exploration and production, with a strong tendency in the Union exercise of monopoly. (ARAGÃO, 2013, p. 488).

Under such aegis, the National Congress, aware of the characteristics of the most used concession contracts in the world, opted by issuing laws No. 12,351, 12,304 and 12,276 / 10 for a model that combines typical characteristics of a sharing contract, with elements of joint venture.

As a result, the Union, represented by the newly created State-owned Company known as the Brazilian Company for the Administration of Petroleum and Natural Gas - Pré-Sal Petróleo SA (PPSA), Petróleo Brasileiro SA - Petrobras, with a minimum percentage of participation in 30% and always playing the role of operating company, that is, the exploration of oil in the pre-salt layer and finally the private company that wins the bidding through the largest offer to the Union after its reimbursement.

The model also provides for a Steering Committee for the activities of each contract, integrated by Petrobras, the winning bidder and PPSA, a state-owned company with a hybrid function that is somewhat contradictory by the law itself. It is to some extent inspired by the Norwegian model in which Statoil, a state-owned company that performs a similar function to Petrobras in Brazil, acts as operator and licensee, operating in the market together with other private companies. In this context, PPSA will have important prerogatives, such as, for example, vetoing decisions made by contracted parties in relation to goods and services.

In effect, under Brazilian law there are three main contractual models for oil and natural gas exploration and production, the concession contract, for pre-salt areas or considered strategic by CNPE, in both cases if they have not yet been granted and the onerous assignment to Petrobras, under the terms set out above. (ARAGÃO, 2013, p. 491).

4. SHARING OF ROYALTIES AND LAW REGIME No. 12.351 / 2010

The oil law provides for four basic ways in which the government has a share in the results of production, namely, the signing bonus, royalties, special participations and the occupation and retention rate of the area, being royalties

and fees mandatory occupation in all concession contracts and the signature bonus paid in full upon signature of the concession contract.

Royalties constitute a sum of money on the gross monthly production, the resources of which are divided between producing and confronting Member States and Municipalities. Special participations are extraordinary compensation given to the State on high-yield fields. This tax is applied based on rates that vary according to rules that take into account the depth of field and the volume of production.

In this regard, Law no. 12,351 of 2010 at the disposal of the exploitation of oil, natural gas and other fluid hydrocarbons in the pre-salt area provided for new rules for sharing royalties with the concession in addition to the producing States and Municipalities to form a special fund and distribute its resources to entities federations that did not participate in production.

Such proposed changes are of odd relevance to the Member States and municipalities involved since it implies a reduction in their revenues and reaches, under the terms of article 20 §1 ° of the Constitution, their right to “profit sharing” or “financial compensation” as compensation to the aforementioned federal entities on account of environmental and social costs arising from oil activities.

Inevitable, disregarding the fact that the cities where the oil activity takes place suffer environmental and social costs due to the greater demand for public services, as well as a greater risk of environmental disaster of continental proportions, generating stratospheric costs for the responsible State, which demands some form of compensation in view of the risks and demands to which it is subject.

In effect, although the constitutional norm gives rise to interpretation to include federative entities that do not necessarily participate in the exploration of oil, such exegesis implies in the granting of compensation to the federative entity that has not used its territory so little potential environmental damage, which leads to full violation of isonomy in the material spectrum that must exist between the components in the Federation.

Since the Union is the owner of mineral resources, there is only sense in such a specific link due to the compensatory nature of the royalties, which are destined to state entities and the agencies burdened by the economic activity in

question. In fact, if it is so in relation to the federal government itself, there would be no reason to apply different logic to States and Municipalities. (BARROSO, 2010, p. 13).

The oil regime itself aimed to preserve this compensation feature since the promulgation of the 1988 Federal Constitution. So much so that the tax on the circulation of goods and services for the purpose of oil and natural gas is levied in the State of destination, since the producing Member States have already benefited from the royalties received as a result of oil exploration and production.

In such a way that the producing states receive financial compensation, which has the nature of public prices for the use of natural resources located in their territories, justifying itself as a consideration for the expenses that companies exploiting natural resources cause to public authorities, which are seen in the contingency of guaranteeing the infrastructure of goods and services and assistance to the populations involved in large economic activities. (SILVA, 2005, p. 258).

V. THE JUDGMENT OF THE SUPREME FEDERAL COURT OF ADI 4916 / DF and 4917 / DF

In view of this new scenario of distribution of royalties and special participations, implemented by the sharing regime, governed by laws 12.351 / 10, 12.276 / 10 and 12.734 / 12, the States of Espírito Santo and Rio de Janeiro, proposed ADI 4916 / DF and 4917 / DF, questioning the constitutionality of several provisions of these legal diplomas.

Espírito Santo argued that the changes introduced by law 12.734 / 12 to the current concession regime, inaugurate a new legal discipline for the distribution of royalties and special partitions to States and Municipalities, which did not observe the necessary equality between the federal entities, provided for in the Constitution.

He added that the new regime substantially changed the percentages of royalties due to producing states, in addition to providing for a gradual reduction in the percentages related to contracts already in force, under the current regime, with effect from 2012, the year of its publication, until the year 2020.

Predicting the impact of changes in the new regulation, the federative entity requested, by means of a precautionary measure, the maintenance of the current concession regime regulated by law 9.478 / 97, in violation of the federative principles, legal security and isonomy.

However, these were not the only elements brought to caution, as, with regard to the criteria for the distribution of royalties and special participation disciplined by the new regime and applicable to the so-called non-producing States and Municipalities, the ordinary legislator opted for those provided for in the National Fund of Participation of Municipalities - FPM.

However, the criteria chosen were, at least in theory, considered unconstitutional by the STF[3], as the Supreme Court decided in analogous cases that the choice did not meet the will of the constituent legislator, as they did not consider art. 161, II of the Constitution, which imposes apportionment criteria that aim to promote socio-economic balance between States and between Municipalities.

Finally, but no less relevant, the federative entity justifies the precautionary request by demonstrating the magnitude of the financial impact on the State's accounts, if the new rules are applied immediately.

It affirms that the maintenance of basic services of education, security, health and social assistance would be threatened due to the loss of collection in royalties and special participations of the order of 23,700,000,000.00 (twenty-three billion and seven hundred million reais) between the years from 2012 to 2020.

In the same area, the State of Rio de Janeiro, as one of the main producing States, has opposed the new rules for the distribution of royalties and special participations, introduced by Federal Law no. 12,734 / 12.

However, its non-conformity was mainly based on the offense to materially isonomic treatment, inherent to the constitutional principle of the federative pact. In ADI 4917 / DF, he argued that the payment of royalties and special participations is a counterpart to the differentiated regime of the ICMS levied on oil, since in this case, the tax is paid in the State of destination, and not in the State of origin.

[3] *ADIN: nº 875; ADIN nº 1.987; ADIN nº 2.727; ADIN nº 3.243*

Thus, the law establishes a new form of apportionment of participations for federated entities that already benefit from a special rule regarding the incidence of ICMS, favoring non-producing States and Municipalities, which, evidently, do not suffer the impacts resulting from the exploitation.

He argued that royalties and special participation involve, under art. 20, § 1, of the Constitution, a compensation for the environmental and demand for public services generated by the exploitation of this natural resource.

It adds, along the same lines approached by the State of Espírito Santo, that the new law does not even exempt contracts already in progress, in flagrant offense to legal certainty. This is because the contracts regularly signed and based on the objective good faith of the contracting parties enabled long-term decisions that impact the fiscal responsibility of the contracted entity.

The estimate indicated reveals that the State of Rio de Janeiro would stop collecting around 75.4 million euros (seventy-five billion and four hundred million reais) between the years 2012 to 2020 in royalties and participations.

When examining the matter, the STF, in a monocratic decision by E. Minister Carmen Lúcia of 03/18/2013, granted the precautionary request, recognizing its urgency of the matter, which is typical of the great federative themes.

In the decision, the minister considered that royalties are paid monthly to producing states and that, in fact, the immediate redistribution of this revenue would affect the legal security of the constitutional, legal and contractual obligations assumed and would make the public accounts of the respective federative entities unfeasible.

He added that the legislation that regulates compensation to producer states existed long before the 1988 Charter, having been its first law passed in 1953 (law 1,004 / 53).

It corroborated the arguments brought by the State of Rio de Janeiro when it stated[4]:

> "... the Constitution makes a direct and unmistakable association between the payment of compensation and

[4] The document can be accessed at the electronic address http://www.stf.jus.br/portal/autenticacao/ under number 3518637.

> the fact that there is production located in the entity" In addition to the literality of the provision, the logic of compensation to producers is justified for several objective reasons, also based on the Constitution . ... Although the property belongs to the Union (CF / 88, arts. 20, IX, and 176, caput), its production generates a series of burdens and risks for the local entities in whose territory the exploitation occurs. Because of this, the Constitution requires that producing States and Municipalities be compensated ... ”
>
> “... right after the discovery of the pre-salt reserves, the State of Rio de Janeiro was asked to conform to giving up part of the revenue to which it was entitled, under the terms of the legislation in force. Only in relation to the pre-salt, it was said. Gradually, however, legislation was being attempted to also affect the participation of producer states in areas located outside the pre-salt layer. And, by the way, they do not intend to respect even the revenues related to concessions signed years ago ”

Furthermore, the decision emphasized the limited effectiveness of the rule contained in § 1 of art. 20 of the Federal Constitution of 1988, which depends on a specific law to produce full effects.

He concluded that the producing States, authors of the respective ADI 4916 / DF and ADI 4917 / DF, although at first as a precautionary measure, due to the “*plausibility of the grounds presented, which put at the center of the procedural discussion the effectiveness of the federative principle and the model rules constitutionally adopted*”[5].

Said precautionary measure is precarious in nature and, if its assumptions are changed, may be revoked at any time by E. Minister Carmen

[5] Ibid., pág. 21.

Lúcia. The monocratic decision produces immediate effects, but it still needs to be endorsed by the STF plenary for its content to produce definitive effects.

Despite all the arguments of the producing States, some non-producing States and interested entities entered the respective ADIs in the condition of amicus curiae, bringing a different position from that advocated by the producing States, that is, the interpretation of the possibility of renegotiation as to the apportionment of royalties and special participations in order to better benefit non-producing States and Municipalities.

Among the entities that joined as amicus curiae is the National Confederation of Municipalities, an entity representing state, micro-regional and municipal associations, which, in their reasons, presented historical arguments that enrich the debate about the constitutionality of the new sharing regime.

As mentioned in the precautionary decision of E. Minister Carmen Lúcia, oil royalties were created in 1953 with law No. 20,004, where 5% of the production extracted on land was passed on to the States and of this amount, 20% should be passed on Municipalities.

In 1985, with the advent of Law No. 7,453, the Special Fund was created, resulting from the State Participation Fund - FPE and the National Fund for Municipalities - FPM, where 1% of royalties resulting from oil production would be allocated to all the States and Municipalities of the country, producers or not.

As can be seen, although the legislation has changed over the years, non-producing States and Municipalities have always benefited at some level from the percentages of oil royalties resulting from exploration.

The National Confederation of Municipalities argues that with the discovery of the pre-salt reserves in 2003, the volume of values resulting from royalties and special participation will increase exponentially. Also according to the Confederation, this situation did not go unnoticed by the National Congress that edited and published the new sharing regime, enshrined in Law 12.351 / 10.

The constitutional issue was scheduled to be judged by the STF plenary in April 2020, but after the acceptance of a surcharge by the Rio de Janeiro State Attorney's Office, due to the current situation of social isolation, there is no forecast of a new trial date.

VI. CONSTITUTIONAL AMENDMENT PROPOSAL No. 188/2019

In 2019, a constitutional amendment proposal was offered under No. 188 entitled Federative Pact, which is part of a set of measures of the federal government for tax reform with a wide change in the Constitution and the Transitional Constitutional Provisions Act[6].

Among the measures provides for the inclusion in Article 20 of the Federal Constitution of a §3 ° which provides that to ensure the strengthening of the Federation, the Union will transfer part of the resources to all States, Municipalities and the Federal District, with the law establishing percentages, base calculation and conditions.

However, as an innovation that is subject to disciplinary law, distribution criteria that include, among others, result indicators, as well as, in §4 °, prohibit the use of resources to pay expenses with active, inactive and pensioner personnel.

It is inexorable that, from a teleological point of view, the respective norms intend to guarantee efficiency in the application of the management of public resources, however, it is not for the Union to determine how the disposition will be carried out by the federated entities, since there is no hierarchy between the federated entities, subject to their own control mechanisms.

It provides for the Federal Constitution itself and federated legislation - such as the Fiscal Responsibility Law - institutions - such as the Legislative Branch assisted by the Court of Auditors - and control instruments - for political-administrative, criminal and civil liability - for improper handling of resources.

It corresponds to the violation of the federative pact, since such norms interfere in the political-administrative autonomy of each federated entity to

[6] The constitutional amendment in its current wording proposes: to change arts. 6, 18, 20, 29-A, 37, 39, 48, 62, 68, 71, 74, 84, 163, 165, 166, 167, 168, 169, 184, 198, 208, 212, 213 and 239 of Federal Constitution and arts. 35, 107,109 and 111 of the Transitional Constitutional Provisions Act; add to the Federal Constitution the arts. 135-A, 163-A, 164-A, 167-A, 167-B, 168-A and 245-A; add to the Transitional Constitutional Provisions Act the arts. 91-A, 115, 116 and 117; revoke constitutional and legal provisions and take other measures. Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=8035580&ts=1594008470053&disposition=inline accessed on 08.06.2020

organize their own activities, implying undue interference by the Union in the competences that are proper to other federative entities.

The subjection to “result indicators” imposes a control by the Union of the application of resources by the States and Municipalities, which represents a formation of hierarchy incompatible with the equality of all the referred entities in the Federation.

This remains clear also in the prohibition of the use of resources for the payment of personnel, which ignores the fact that it is not the Union's responsibility to provide how the federated entities will apply their resources, since there will be instances of control, including the society itself in the exercise of accountability. .

Note, therefore, that the uproar over the division of resources from oil royalties is not yet pacified among public authorities, so that alongside the decision already taken by the Supreme Court, there are new manifestations to be discussed on the matter.

VII. CONCLUSION

The present work sought to analyze the constitutionality of the royalty-sharing regime instituted by federal law No. 12,351 of 2010 for the exploration of the pre-salt between states in the producers under article 20 §1 of the Federal Constitution that guarantees the participation of federated entities in the result of the exploration of oil or natural gas, as financial compensation for such activity.

At first, it was verified that the Brazilian federalist model, although symmetrical, is marked by the distribution of assets and the sharing of unequal competence among the federal entities, in order to concentrate in the Union a greater spectrum of attributions and patrimonial collections that generate imbalances in the federation and result greater financial dependence on other federated entities.

After that, a monopoly was guaranteed to the Union over strategic assets and activities such as oil and its derivatives, the concession of its exploration to public or private entities was allowed, provided that participation in the exploration was guaranteed to the public authority.

Finally, that the legal regime for sharing royalties established by federal law No. 12,351 of 2010 in the light of article 20 §1 of the Federal Constitution is unconstitutional since it seeks to ensure financial compensation to producer entities as financial compensation for the effects of the activity developed to the public power due to the social and environmental impacts caused.

The issue is still pending final judgment by the Supreme Federal Court and may become more complex in view of the constitutional amendment proposal, which leads to new debates about the dimension of federalism and its fiscal aspect in Brazil.

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