International Journal of Advanced Engineering Research and Science (IJAERS)
ISSN: 2349-6495(P) | 2456-1908(O)
Vol-8, Issue-1; Jan, 2021
Journal Home Page Available: https://ijaers.com/
Journal DOI: 10.22161/ijaers
Article DOI: https://dx.doi.org/10.22161/ijaers.81.3

Oil Royalties in Brazil: Constitutionality X Unconstitutionality

Ana Cristina Teixeira Alves

University of Rondonia, Brazil

Received: 22 Oct 2020;
Received in revised form: 15 Dec 2020;
Accepted: 25 Dec 2020;
Available online: 09 Jan 2021
©2021 The Author(s). Published by AI Publication. This is an open access article under the CC BY license (https://creativecommons.org/licenses/by/4.0/).

Keywords—***Oil Royalties, Constitutionality, Producing areas, Federated entities, Environmental damages.***

Abstract—*The purpose of this article is to analyze the constitutionality of the distribution of oil royalties in Brazil to federated entities. Oil royalties are financial compensation received by the state and municipal oil-producing areas for the environmental damage caused by oil exploration. Art. 20 1º§ of the Federal Constitution of the Republic of Brazil of 1988 defines the legal nature of royalties, which is the compensatory form for the use of non-renewable goods by the States, Federal District, and Municipalities. Article 14 of Law 6.938/1981 established the strict liability regime for repairing and indemnifying damages caused to the environment and affected third parties. The legal system that regulates the matter of oil royalties is clear when it exposes the net and true right of the producing areas to financial compensation for environmental, social, and economic damages. The Supreme Federal Court decisions are consistent with the Federal Constitution and the NEP - National Environment Policy, Law No. 6938/1981. The methodology is based on bibliographic research on printed books, electronic articles, the 1988 Federal Constitution, and relevant legal norms. According to the Federal Constitution, legal norms, legal scholars, and the Supreme Federal Court, the allocation of royalties should be paid to the federal entities directly affected by the exploratory activity, which bear the various damages and risks of oil exploration.*

I. INTRODUCTION

Recently, one of the major discussions about oil royalties in Brazil is the constitutionality or unconstitutionality of their distribution to all federated producers and non-producers. There is a divergence between the political class and the Federal Supreme Court – FSC.

In this context, the following problem arises: Is the distribution of oil royalties to all federated producing and non-producing entities constitutional or unconstitutional?

Considering the legal rules, we will see how the issue is approached in the country, whether it is of a political or legal nature.

Today, oil royalties are distributed to all states and the Federal District, regardless of oil production. However, producing states and municipalities bear the losses and the social and environmental damages of oil production. The environmental liability, the responsibility for repairing the environmental and social damage to nature and society, lies with the producing locations. Also, the percentage of the transfer of royalties to municipalities and producing states is less than 30% of the value produced by them.

The general objective was to analyze the constitutionality of the distribution of oil royalties in Brazil to the federated entities.

Regarding specific objectives, the aim was to:

Reflect on the unconstitutionality of the distribution of oil royalties in Brazil among federated non-oil producing entities.

Relate oil production to the liability of environmental liability and environmental damage to the producing entities.

The legal definition of the environment arises from Law No. 6938 of 1981, NEP - National Environmental Policy, in art. 3rd, item I:

> Environment is the set of conditions, laws, influences, and interactions of a physical, chemical, and biological order that allows, shelters, and governs life in all its forms.

The Federal Constitution of 1988 was based on the environmental part of NEP, originating art. 225 that deals with the principle of a healthy and balanced environment:

> Everyone has the right to an ecologically balanced environment, a common use good of the people and essential to a healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations.

Environmental policy in Brazil is constitutionally based on art. 225 and the State has the protection of the environment. Economic oil activities carry environmental risks and damages and are often confronted with this article that safeguards the environment as a fundamental and diffuse right.

II. DEFINITION OF OIL ROYALTIES

Royalties are a form of financial compensation owed by concessionaires given the exploitation of oil and natural gas (non-renewable natural resources), which affect their monthly production, according to Pires (2012).

In the 1st § of art. 20 of the Federal Constitution, the participation of oil-producing entities and municipalities in the capital generated by the exploitation of oil or gas, water, and mineral resources is defined:

> Under the terms of the law, States, the Federal District, and Municipalities, as well as organs of the direct administration of the Union, are guaranteed participation in the results of the exploitation of oil or natural gas, of water resources to generate electricity and other mineral resources in the respective territory, continental shelf, territorial sea or exclusive economic zone, or financial compensation for that exploration.

Mattos (2012) states that the theory of the legal nature of royalties is instituted from art. 20, 1º§ of the 1988 Constitution, which would be exclusively compensatory for the use of non-renewable goods.

The concept of royalties in the law of sharing of royalties, law nº 1234, of 30-11-2012:

> Single paragraph. The royalties correspond to the financial compensation due to the Union, the States, the Federal District, and the Municipalities for the exploration and production of oil, natural gas, and other fluid hydrocarbons, as referred to in § 1 of art. 20 of the Constitution.

The sharing of royalties between the federated entities and production on and offshore according to Law no. 1234/2012:

> Art. 42-B. The royalties due to the production of oil, natural gas, and other fluid hydrocarbons under the production sharing regime will be distributed as follows:
>
> I - when production occurs on land, rivers, lakes, lake or river islands:
>
> a) 20% (twenty percent) for States or the Federal District, if applicable, producers.
>
> b) 10% (ten percent) for producing Municipalities.
>
> c) 5% (five percent) for Municipalities affected by operations for loading and unloading oil, natural gas, and other fluid hydrocarbons, in the form and criteria established by the National Agency of Petroleum, Natural Gas and Biofuels (NAP).
>
> d) 25% (twenty-five percent) for the constitution of a special fund to be distributed between the States and the Federal District.
>
> II - when production occurs on the continental shelf, in the territorial sea, or in the exclusive economic zone:

a) 22% (twenty-two percent) for the confronting States.

b) 5% (five percent) for the confronting Municipalities.

> c) 2% (two percent) for the Municipalities affected by operations of loading and unloading oil,natural gas, and other fluid hydrocarbons in the form and criteria established by NAP.
>
> d) 24.5% (twenty-four integers and five-tenths of a percent) for the constitution of a special fund to

be distributed between the States and the Federal District.

There is a difference in the value of royalties paid between onshore and offshore production. Production on the offshore platform receives a higher royalty. The producing areas receive less than 25% of their production. From the exploration on the continental shelf, producing states receive 22% royalties, and from the exploration on land, producing states receive 20% royalties. Non-producing areas receive payment of royalties for loading and unloading oil via the port area.

III. METHODOLOGY

The method used is bibliographic research based on doctrine and jurisprudence, through the analysis of books, magazine articles, and specialized journals on environmental law, ecological economics, oil royalties, constitutionality and unconstitutionality of oil royalties, the polluter pays principle, and environmental liabilities, which are the main thematic axes for the discussion of this article.

IV. THE ISSUE OF CONSTITUTIONALITY, ENVIRONMENTAL DAMAGE AND RISKS

The genesis of the concern and observance of constitutionality in the country's legal system was born in 1891, in the first two years of the Brazil Republic's creation.

Regarding the origins of the Federal Constitution's safeguard institution and its control of constitutionality, Silva (2017) states that:

> The constitutionality control (...) is an instrument whose primary purpose is to ensure the constitutional text's supremacy. It was inserted in the legal system from the 1891 Republican Constitution, being influenced by the United States law.

The Brazilian system of constitutionality control is similar to the United States system regarding the legal nature of the unconstitutionality of laws.

According to Gallotti (1987), “The United States system is based on the traditional doctrine of the supremacy of the Constitution and the consequent nullity of the unconstitutional legislative act, defended by Hamilton in The *federalistti* and established by Marshall in 1803.” In the Brazilian system, as in the United States system, the supremacy of the Federal Constitution is over other laws.

Marshall, 1803 as cited in Gallotti, 1987 advocates the supremacy of the Constitution over other ordinary laws:

> The Constitution is either a superior and predominant law - and an immutable law by ordinary forms - or is at the same level in conjunction with the legislature's ordinary resolutions, being changeable when the legislature wishes to modify it, like other resolutions.

Gallotti (1987) mentions that "Marshall affirms that the courts have the duty, in the face of a conflict between the Constitution and an ordinary law, to observe the first." For him, the Constitution's principle must be considered by the courts and the Judiciary and safeguard the Magna law to the detriment of the other ordinary laws.

"In Brazil, a diffuse constitutionality control system was established with the Republic, based on the classic Marshall doctrine, taught and disseminated among us by Rui Barbosa." Gallotti (1987).

The definition of constitutionality is presented by Amaral (2002), "But just as important for the rule of law - or even more important - is the principle of constitutionality. In other words, the legislator's duty to submit to the Constitution."

Regarding the violation of the constitution, Amaral (2002) emphasizes that "The legislator can violate the Constitution by action or inaction. By action, when it produces unconstitutional laws. By default, when it fails to produce laws expressly provided for in the Constitution."

"When the legislator violates the Constitution by action, the law produced by him is only eliminated from the legal system when revoked or constituted its unconstitutionality by an unappealable decision from the Supreme Federal Court," according to Amaral (2002). The SFC is the last legal instance to appeal legally and has the role of guardian of the Federal Constitution.

"At the Supreme Federal Court, the understanding that the unconstitutional act is null and void does not give rise to rights or obligations." Gallotti (1987).

Gallotti (1987), concludes "...that in the Brazilian legal system, despite the respectable opinions to the contrary, the unconstitutional norm is null *ab initio*, not obliging individuals or other powers." At any time, the unconstitutional rule may be revoked.

The Judiciary is responsible for giving the final word on the constitutionality of the laws, which does not exclude the performance of such control by the other authorities concerning their respective attributions, according to Gallotti (1987).

In Brazilian law, unconstitutionality is VICIO intrinsic to any rule contrary to the Constitution, resulting in the invalidity, *ab initio*, of the addicted rule. Gallotti (1987). Unconstitutionality is configured as a constitutional error.

Gallotti (1987) states that "The Supreme Federal Court's jurisprudence is peaceful on the subject. In his vote at Representation No. 933, Minister Xavier de Albuquerque said:

> The rules will be considered unconstitutional, with the result that there will be no rights of any kind based on them. If administrative acts have been performed, they may be undone, because they are based on a law declared unconstitutional. "13

In November 2019, the judgment of the division of oil royalties to the federated entities by the SFC was expected in terms of its constitutionality. One of the burdens that the oil-producing area is responsible for is the environmental damage caused by oil exploration.

Paulo Bessa Antunes as cited in Guimarães, 2002 "teaches that damage is the destruction (a negative change in the legal, material or moral situation) caused to someone by a third party who is obliged to be compensated."

Concerning the liability for environmental damage produced by economic activities, Wedy (2018) states that:

> The duty to repair environmental damage is taken from the constitutional text itself. As established in article 225, paragraph 2 of the Magna Carta, whoever "exploits mineral resources is obliged to recover the degraded environment, according to the technical solution required by the competent public agency, in accordance with the law."

Article 14, paragraph 1 of Law 6,938/81 established the strict liability regime for repairing and indemnifying damages caused to the environment and affected third parties, according to Wedy (2018). It is worth mentioning that art. 225 of the 1988 Constitution, which deals with the environment, received Article 14 of Law No. 6938/1981, the National Environment Policy - NEP.

Regarding the perception of royalties, as financial compensation for producing areas that suffer from environmental damage, the SFC minister, Sepúlveda Pudence as cited in Pires, 2012, addresses that:

> (...) the financial compensation is linked (...) not to the exploration itself, but to the problems it generates. (...) The exploration of mineral resources and electric energy potentials is an activity potentially generating a number of problems for public entities, especially environmental (...), social and economic, arising from population growth and the demand for public services."

Pires (2012) concludes that the allocation of the distribution of oil royalties falls to the producing areas, as recommended in the 1988 Constitution and by the analysis of legal scholars:

> Due to its indemnity nature, after analysis of legal experts and jurisprudence, it should be noted that the destination of royalties should be to the federal entities directly affected by the exploratory activity, which effectively support the damages and risks of the exploitation.

The environmental liability of the oil industry regarding its environmental responsibility in repairing the social and environmental damage caused by the exploitation of the risk of an environmental accident, such as the exploitation of an oil deposit, falls on the company and the referred damages to society and the nature of the producing areas.

Environmental liabilities are understood as contingencies formed over a long period and arise from the possession and use of a mine, a steel plant, a river, a sea, and a series of spaces that make up our environment," according to Tinoco and Kraemer (2004) cited by Carvalho, 2012 as cited in Antonovz, 2014. Environmental liabilities are a company's obligations and responsibility to the environment, such as fines.

For NCB TE XXX cited by Antonovz (2014), the environmental liability is the value of the exact and estimated obligations for the recovery of areas degraded by the entity, such as indemnities to third parties, fines ...". For example, an environmental oil accident with an oil spill caused by drilling a well, causing pollution of the sea, marine fauna, and flora. In a company's environmental liabilities, a possible environmental degradation caused by economic activity is expected.

According to Antonovz (2014), environmental liabilities provide for current liabilities through environmental provisions, environmental degradation, and environmental tax obligations to be paid, as well as environmental indemnities to be paid, the activities of companies that cause negative impacts to the environment

and have negative consequences for these people or entities. An example of this is the case of PETROBRÁS, which illustrates the situation of environmental indemnity for environmental accidents, fines for damage, and damage to the environment: PETROBRÁS' environmental penalties from January to October 2019, totalizing 274 million reais due to 316 notices applied by IBAMA, according to the Folha de São Paulo newspaper. (Rodrigues, 2019).

It is worth mentioning that Brazil's oil-producing areas assume the environmental risks and damages foreseen in their company's environmental liabilities. This environmental obligation to indemnify the damage generates an expense for companies in the oil-producing states: Rio de Janeiro, São Paulo, Espírito Santo, Amazonas, Paraná, Rio Grande do Norte, Bahia, Sergipe, Ceará, and Alagoas. The burden of the environmental fine falls on oil-producing states, but non-producing states do not have this financial burden. In the case of royalties' distribution to federated entities, non-producing areas receive financial compensation without participating in environmental compensation for damage, pollution, and environmental degradation generated by oil activities. The oil-producing areas participate in the bonus and onus generated by oil production, while the non-producing areas participate only in the bonus, the financial indemnity.

Fig. 1: PETROBRÁS oilplatform. (F. Rodrigues, 2019).

The pollution generated by the oil industry imposes liability and charges with environmental liabilities and environmental taxation for damage to the environment and society. These charges are part of the polluterpays principle, consisting of one of the leading constitutional principles underlying Environmental Law.

The polluterpays principle is a mechanism used for environmental protection. Through it, the entrepreneur who pollutes the environment will have to contribute to preserving the environment, even reducing, (...) part of his profit, according to Santana apud Santello (2017).

The relevance of the polluterpays constitutional principle to society, environmental taxation, and the environment is discussed by Santello (2017):

> A constitutional principle of considerable relevance in the study of environmental taxes and the taxation of water resources is that of the polluterpays, which consists of compelling the polluter to reimburse society financially for the environmental damage caused. The polluter must be financially burdened for misusing natural resources or destroying the environment. It demonstrates that the use of financial penalties and collection of taxes that focus on facts related to the pollution, deterioration, and destruction of the environment is effective in environmental preservation and follows environmental constitutional principles.

The polluter pays principle is applied in Europe, the United States, Brazil, Argentina, and other countries to redress society and nature for the damage caused. Neves (2014) mentions that “This principle undoubtedly gained strength after its introduction in the Declaration of Rio in 1992, in the form of the 16 that establishes:

> National authorities should seek to encourage the internalization of environmental costs and the use of economic instruments, taking into account the criterion that what contaminates should, in principle, bear the costs of contamination, taking due account of the public interest and without distorting international trade or investment. (UN, 1992).

The internalization of environmental costs "... means that the production process's costs must absorb the costs of negative impacts produced in nature. This burden cannot be shared with the community, considering that the profit from production belongs only to the industry, as Milaré teaches," according to Neves (2004). This internalization is assumed only by the oil-producing areas; however, it is not counted in the transfer to the federated non-producing entities in the division of royalties.

Petroleum activity poses a risk to society and the environment. The producing areas also assume this risk. However, what is the risk?

According to Kaercher (2016), the risk consists of:

> One or more conditions of a variable with the potential necessary to cause damage. These damages can be understood as injuries to people, damage to equipment or structures, loss of material in process, or reduced performance capacity.

Non-oil producing areas have an infinitely lower environmental risk than the producing area. To scale the risk, the explosion of an oil platform in a production area has no way of comparing the severity of environmental damage with non-producing areas, such as a small oil spill transported by trucks to the port. The extent of environmental risk and damage is disproportionate, assessed at a high degree of risk to moderate or low risk.

From the perspective of the constitutionality of oil royalties, oil-producing areas' perception of this financial compensation is legal. No provision in the 1988 Federal Constitution guarantees the receipt of royalties to non-oil producing areas.

As such, the royalty sharing law is unconstitutional and may be revoked at any time.

V. CONCLUSION

Based on the Federal Constitution of Brazil of 1988, the legal rules, the legal scholars, and the Supreme Federal Court, the allocation of royalties should be to the federal entities directly affected by the exploratory activity, which support the environmental-social-economic damages and risks of exploitation oil as environmental responsibility through the environmental liability of the producing company.

REFERENCES

[1] AMARAL, Antônio Carlos Cintra da. O princípio da constitucionalidade e o Estado de Direito. (2002, October 01).Retrieved from http://celc.com.br/pdf/comentarios/c2002/c69.pdf. 01 out. 2002.

[2] ANTONOVZ, Tatiane (2014). Contabilidade ambiental. Curitiba. Ed. Intersaberes.

[3] ANTUNES, Paulo de Bessa. (2000). Direito Ambiental. 4. ed. Rio de Janeiro: Lumen Juris.

[4] CONSTITUIÇÃO FEDERAL DA REPÚBLICA FEDERATIVA DO BRASIL DE 1988. (1988). Brasil. DF, Congresso Nacional.

[5] GALLOTTI, Maria Isabel. (1987, February 8). A declaração de inconstitucionalidade das leis e seus efeitos. Revista de Direito Administrativo. Rio de Janeiro, BR, pp.18-40. DOI: https://doi.org/10.12660/rda.v170.1987.45598.

[6] GUIMARÃES, Simone de AlmeidaBastos. (2002, August). O Danoambiental. Retrieved fromhttps://www.jus.com.br/artigos/3055/o-dano-ambiental.

[7] KAECHER, Adi Regina & LUZ, Daniel Fonseca da. (2016). Gerenciamento de riscos. Rio de Janeiro. Ed. Interciências.

[8] MATTOS, EmilianeRaddel. (2012, June 13). Royalties do petróleo e sua natureza jurídica. Retrieved fromhttp://conteudojuridico.com.br/consulta/Artigos/29520/royalties-do-petroleo-e-sua-natureza-juridica.

[9] MILARÉ, Édis. (2001). Direito do Ambiente. Doutrina – prática – jurisprudência – glossário.2. ed. São Paulo: RT, p. 427-428.

[10] NEVES, Marcelo G.; REIS, R. P; SCHMID, M. L. & VENERAL, D. C. (org.) (2014). Curitiba. Ed. Intersaberes. (Coleção Direito processual civil e Direito Ambiental).

[11] PIRES, Edson de Paula.(2012, June 13). Os Royalties do petróleo e sua destinação constitucional. Retrieved from.http://www.conteudojuridico.com.br/artigo,os-royalties-do-petroleo-e-sua-destinacao-constitucional,37506.html.

[12] POLÍTICA NACIONAL DO MEIO AMBIENTE. (1981). Lei nº 6938 de 1981. Planalto do Governo. Brasília, DF.

[13] RODRIGUES, Fernando. (2019, October. 27). Petrobras é recordista em multas ambientais aplicadas pelo Ibama, diz jornal. Retrieved from https://www.poder360.com.br/governo/petrobras-e-recordista-em-multas-ambientais-aplicadas-pelo-ibama-diz-jornal/.

[14] SILVA, Adriano Laurentino da. (2017,October 31). A evolução do controle de constitucionalidade no Brasil e suas espécies**.** ÂmbitoJurídico. Retrieved from https://ambitojuridico.com.br/cadernos/direito-constitucional/a-evolucao-do-controle-de-constitucionalidade-no-brasil-e-suas-especies/.

[15] WEDY,Gabriel.(2018, September 01). Breves considerações sobre a responsabilidade civil ambiental. Ambiente Jurídico. Retrieved from https://www.conjur.com.br/2018-set-01/ambiente-juridico-breves-consideracoes-responsabilidade-civil-ambiental.