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PACTUM DE QUOTA LITIS: A DEONTOLOGICAL ANALYSIS FROM BRAZIL AND PORTUGAL

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ABSTRACT: This article studies the pactum de quota litis, a type of contract that the receipt of the lawyer's payment is conditional on its performance. It is based on the legal systems of Brazil and Portugal, which, despite having an intimate historical connection, have chosen different paths in this aspect. It is verified whether such an agreement is detrimental to the lawyer's independence and if any effect on independence justifies the prohibition and restriction of private autonomy. The analysis is done through bibliographic review and documental analysis. The verification is done from a purely deontological perspective.

KEYWORDS: contingent fee, quota litis, deontology, private autonomy, duty.

RESUMO: Este artigo versa sobre o pactum de quota litis, um tipo de contrato em que o recebimento do pagamento do advogado é condicionado ao seu cumprimento. Baseia-se nos sistemas jurídicos do Brasil e de Portugal, que apesar de terem uma ligação histórica íntima, escolheram caminhos diferentes neste aspecto. Verifica-se se tal acordo é prejudicial à independência do advogado e se algum efeito sobre a independência justifica a proibição e restrição da autonomia privada. A análise é feita através de revisão bibliográfica e análise documental. A verificação é feita a partir de uma perspectiva puramente deontológica.

PALAVRAS-CHAVE: taxa contingente, quota litis, deontologia, autonomia privada, dever.

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1. INTRODUCTION

The pactum de quota litis, or contingent fee, is a type of agreement between the party and its lawyer by which a condition of success is established for the receipt of honorarium. The lawyer would be entitled to a "quota" on the outcome of the case so that the more successful the outcome, the greater the gain of the lawyer. The quota litis clauses have been the subject of discussions for a long time, and different conclusions have been reached in Roman-Germanic and Anglo-Saxon traditions. In this second, the provision is accepted, while in the first is sealed.

The Brazilian model is affiliated with an American tradition, which opposes the Portuguese, affiliated with a European tradition. These two models were chosen as a way of clipping the discussion, since their deontological statutes have chosen to go their separate ways on the *quota litis* clause, despite belonging to the same legal tradition, and even if it is observed that Brazilian and Portuguese laws have already had an intimate historical connection.

The issues that are usually pointed to the prohibition of this clause are related to the independence of the lawyer and the possibility of the lawyer not acting according to the best ethical standards when seeing his remuneration linked to the outcome of the demand. On the other hand, it is argued in favour of the permission of the contingent fee, besides private autonomy, the fact that this type of clause is a promoter of access to justice since the lawyer can take the risk of the demand at no cost to the party.

It is necessary to know whether the independence of the lawyer is put into check by a quota litis agreement. The analysis is proposed from an ethical perspective of deontological predictions in each of the legal systems.

2. THE BACKDROP FOR AN ALMOST PERENNIAL BAN

In Western law, says Susana Neto, that the history of the pactum de quota litis is confused with its prohibition. The lawyer points out that the first reference to the contingent fee dates back to the year 325, in the Constitution of Constantine (Neto, 2001:1122; Arnaut, 2011:155). However, the theoretical framework of the ban is even the Lex Cincia, 549, when lawyers were banned from receiving remuneration for their services (de Maddalena, 2014:55), although they were allowed to accept donations (Brickman, 1989:35) - including, this being the historical origin of the wording of the modern prohibition rules when it is forbidden to be established the remuneration before the closure of the case, which is interpreted as the possibility of subsequent remuneration agreements. The contingent fee ban went overtime remained perennial in most of the Western law, remaining prohibited in the countries of continental Europe and most countries from its former colonies.

English law, while it did not intend at one point to legitimise the contingent fee, removed the restrictions of agreements that carried the same effect by allowing the strict application of champerty laws (Brickman, 1989:36), a type of agreement that allows the participation of third parties (including the lawyer) in the economic benefits of the case. In American law, states varied in time in the form of acceptance of similar pacts. Moving from the idea of free-market to the ideal of access to justice, one by one, all American states allowed lawyers to establish contingent fee contracts (Brickman, 1989:39), even with specific regulatory variations applied to each of them (Muñiz, 2008:90).

3. QUOTA LITIS IN BRAZILIAN LAW

In Brazilian law, the lawyer's performance is regulated by the Statute of Lawyers, a law issued by parliament and promulgated by the President of the Republic, and by the Code of Ethics and Discipline of the Brazilian Bar Association, a deontological diploma issued by the association. Unlike in the United States, the association of lawyers is mandatory in Brazil. In the same way, as in Europe, all lawyers are bound by the bar association and submitted to the deontological rules in Brazil.

The Statute of Lawyers does not deal with the attorney's participation in the client's earnings. The Code of Ethics and Discipline, on the other hand, provided rules that limit the contingent fees, and therefore the adoption of this clause in the contract of attorney's mandate was expressly permitted.

The limit to the amount received by the lawyer for his work in percentage not exceeding that which the party received was already determined at the beginnings of the Glossators' School (Isotton, 2017:6). This is a limit in Brazilian law and is expressly provided for in Article 38 of the Code of Ethics and Discipline of the Brazilian Bar Association. This type of limitation is also found in U.S. law (Brickman, 1989:30).

It is essential to say that the Brazilian Code of Civil Procedure provides in paragraph 2, Article 85, succumbing fees paid by the unsuccessful party to the lawyer of the winning party as a form of remuneration. These fees, however, are due to the lawyer and not to the client, according to Article 22 of the Statute of Lawyers. In addition, they add to the contractual fees, and the party, the contractor of the lawyer, may not demand compensation. By the way, for a long

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time, the possibility of compensation of succumbing fees in cases of reciprocal succumbing was discussed in Brazil. This thesis resulted from the interpretation of the old Code and was widely criticised because it was a provision of the right of others. Currently, the Code of Civil Procedure has adopted the contrary thesis and reinforced the rule that the fees are the lawyer's and there can be no compensation in the case of reciprocal succumbing. It is up to each party to pay the fees to the opposing party's lawyer concerning the lost portion of the proceedings.

Knowing this helps to understand better the limitation imposed and why the Code of Ethics and Discipline chose to limit the lawyer's gain to a value not higher than that received by the client, rather than establishing a percentage rule, such as 50%. The calculation considers contractual fees and the succumbing fees, i.e. those owed by the loser to the winner's lawyer. That said, it is understood that the sum of the fees succumbed to the contractual fees cannot exceed the client's gain. This limit, in all cases, found in judicial decisions more extraordinary reflections, not being uncommon, in the face of contracts that reach 40% on the gains of the cause, judges determine the reduction of the percentage for values that they consider "reasonable" or "fair" [1]. The Brazilian Bar Association itself issued opinions at the request of lawyers. The circumstances in which it was justified to apply values greater than 20% on the economic benefit of the case were analysed [2].

Suppose the shareholding in the earnings reaches the client's private assets. In that case, this must be written in the contract and only if it is permitted to an exceptional extent, following the sole paragraph of Article 38 of the Code of Ethics and Discipline of the Brazilian Bar Association.

4. QUOTA LITIS IN PORTUGUESE LAW

The Code of Conduct for European Lawyers expressly provides, in its chapter on relations with clients, in paragraph 3.3., the prohibition of the pactum de quota litis, through the locution: "[a] lawyer shall not be entitled to make a pactum de quota litis".

This prediction did not come up in the 2006 version but dates back to the first one of the 1988 CCBE Code of Conduct for Lawyers in the European Union. At that time, as Laurel Terry noted, "an American reader might be equally surprised by" the finding that the lawyer is not allowed to perform contracts in which contingent fee is expected (Terry, 1993:32). The professor concluded that this had not been a topic of a great clash between the organisations involved in the associative diploma since, according to the Explanatory Memorandum and Commentary, it was a common position in all Member States[3].

The concern of the deontological committee was even the maintenance of the independence of the lawyer and, in this sense, avoid what Roberto Isotton would later call *per fas et nefas*, or something to be done by all possible means, regardless of whether ethical or unethical (Isotton 2017). The CCBE Code of Conduct provided an exception to the rule through a negative definition, that is, what would not be a quota litis pactum. By paragraph 3.3., it "does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer". This normative opening gives the Bar Associations of the Member States the prerogative to regulate, whether in respect of values or percentages; or concerning legal or contractual assumptions, when contingent fees are allowed or not, even if, to do so, they say that it is not a quota litis clause.

At the time of the first ban at a community level, the legal Portuguese already provided for the prohibition of contingent fees. In Decree-Law No. 84/84 of March 1984, Article 66 prohibited the lawyer, both(1) to require, by way of fees, a part of the object of the debt or other default, and (2) to establish that the right to fees would be dependent on the results of the case. Law No. 15/2005 of January 2005, which approved the Statute of the Bar Association and revoked Decree-Law No. 84/84 of March 1984, the legislature reproduced in article 101 paragraph 3.3 of the CCBE Code of Conduct in force. Thus, article 1(1) expressly prohibited the conclusion of quota litis pacts, while paragraph 2 defined what would be understood as a quota litis pact. The almost direct translation of this paragraph of the Article of the CCBE Code of Conduct may give a lack of impression that the legislator reproduced the rule but made a point of making a very striking amendment, that is, the inclusion of an "exclusively" in the text. Let us make a comparison:

> By «pactum de quota litis» is meant an agreement between a lawyer

[1] Brasil. Conselho Nacional de Justiça. 0005475-78.2011.2.00.0000, rel. José Lúcio Minhoz, jug. 04 de julho de 2012.

[2] In this sense, we mention the opinion E-4.753/2017 of the Court of Ethics and Discipline of the São Paulo Section of the Brazilian Bar Association, in which one of the votes was attributed exactly in order to disagree with restrictions imposed without provision in law and contrary to the contractual freedom of the party and the lawyer, despite the exception of the reasonableness of moderation.

[3] In verbis: "These provisions reflect the common position in all Member States that na unregulated agreement for contingency fees (Pactum de Quota Litis) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused. The provisions are not, however, intended to prevent the maintenance or introduction of arrangements under which lawyers are paid according to results or only if the action or matter is successful, provided that these arrangements are under sufficient regulation and control for the protection of the client and the proper administration of justice" (Terry, 1993:82)

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> and his client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter. (CCBE Code of Conduct, Paragraph 3.3.2.)
>
> By «pactum de quota litis» is meant an agreement between a lawyer and his client entered into prior to final conclusion of a matter to which the client is a party, *whereby the right to fees is exclusively dependent on the result obtained in the matter and* by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter[4]. (Statute of the Bar Association)

This teleological restriction to the standard enshrined in the CCBE Code of Conduct will find justification in n.º 3 on the same article, which establishes that it is not a pactum de quota litis a clause of increase of fees depending on the result obtained: establishing a success fee or pactum de palmario[5]. The permission for the success fee clause was an innovation of Law No. 15/2005 of January 2005, maintained by the wording of Law No. 145/2015 of September 9, the current text of the Statute of the Bar Association. Before the legislative amendment, the Supreme Court had restricted the application of any similar clause due to the ban on the success fee clause[6]. In 2009, the court had already considered the legislative amendment for years before, but not yet applicable to the case, whose contract dated from the period before the new legislation. After that, opinions have already been submitted within the Superior Council of the Bar Association positively to the pactum de palmario[7] and has also been the subject of reports in specialised journalism. On this occasion, the bar association's President expressed itself contrary to the contingent fee and favourably to the success fee (Pedreira 2020).

Notwithstanding this, part of the doctrine continues to argue that success fee remains prohibited by systemic interpretation of the Statute of the Bar Association since it was already prohibited since the RomanDigesto (Arnaut, 2012:126).

5. REASONS FOR PROHIBITION AND PERMISSION OF THE CONTINGENT FEE

5.1. INDEPENDENCE OF THE LAWYER

The independence of the lawyer is an essential value in the performance of this professional. It is precisely based on maintaining the lawyer's independence that the prohibition of the quota litis has historically been motivated (Carvalhas 2017). It should be considered that the other arguments contrary to the permission of this form of an agreement are constantly arising from the protection of the lawyer's independence.

This perception, as Lotario Dittrich well reflected, "it is an objection which, although greatly overrated, highlights one part of the truth, but neglects another, namely that the lawyer will have a much greater interest in not neglecting that cause, on whose positive outcome will ultimately depend, his fee"[8]. In any case, either position that states that the lawyer loses independence, or the one that says that the lawyer will have a greater interest in the cause because of possible linkage of his earnings to the success of the cause, to be valid, need to ignore that any deontological perspective begins from the idea of duty. The lawyer's duty is to defend the client's rights within the legal margin. It cannot be ignored that the link to the result is a more significant pressure in the exercise of the activity, a pressure that indeed does not exist when "it is paid". However, this is a pressure that the professional assumes for himself given the specific condition assumed under the terms of the contract for the provision of legal services. There is no deontological or even logical problem in assuming greater pressure, as long as this pressure does not intervene in the work negatively. In other words, the lawyer cannot fail to comply with his legal duties and follow the best ethical standards before the client, before the other actors in the case and before the case itself.

The lawyer may lose his independence if he gets emotionally involved with the case or defends clients through a thesis of great importance to his career. The

4 Original: "Por pacto de quota litis entende-se o acordo celebrado entre o advogado e o seu cliente, antes da conclusão definitiva da questão em que este é parte, pelo qual o direito a honorários fique exclusivamente dependente do resultado obtido na questão e em virtude do qual o constituinte se obrigue a pagar ao advogado parte do resultado que vier a obter, quer este consista numa quantia em dinheiro, quer em qualquer outro bem ou valor".

5 The President of the Bar Association, Luis Menezes Leitão, does not consider that the success fee (pacto palmarium) is an exception to the rule of the contingent fee ban (pactum de quota litis) (Pedreira 2020).

6 Portugal. Superior Tribunal de Justiça, 6º Secção. 6458/04.1TVLSB.S1, rel. Fonseca Ramos, 29 set 2009.

7 Portugal. Bar Association. Opinion of the Board of The Superior council of 25 August 2013, Proc.º No. 366/2012 - CS/L, Rapporteur; Dr. Nicolina Cabrita and Rapporteur - Adjunct: Dr. Nuno Belo.

8 Translated by: "È un 'obiezione che, seppure molto sopravvalutata, mette in luce una parte della verità, ma ne trascura un'altra, e cioè che l'avvocato avrà un interesse ben maggiore a non trascurare quella causa, dal cui esito positivo dipenderà, in definitiva, il suo compenso" (Dittrich, 2007:1153). In the same way: (Brickman, 1989:44).

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lawyer may still lose his independence if he fears he will not be hired again if he loses the cause. The lawyer's independence may be in question in several other situations, and it must be defended and guaranteed by the professional, and the conducts or conditions that orbit these situations in which the ability of the lawyer to respect the deontology of the profession is not prohibited. The defence of independence is essential for a lawyer to comply with his legal and deontological duties properly.

Any conduct of the market, the client or even the parties that may constrain the lawyer's independence must be punishable or repressed. This does not mean restricting private autonomy.

5.2. CONFLICT OF INTEREST

The premise that the lawyer would become a partner in the client's case and, therefore, would act, not in the client's interest but self-interest, leads to questioning the existence of a conflict of interest between the lawyer and his client. These conflicts could arise at the time of a settlement. In a given situation, the lawyer could be interested in a faster conclusion of the litigation, even with a more significant financial loss, in disagreement with the client. In the opposite direction, the client could be interested in ending the litigation quickly, even if to the detriment of financial gains, but this would reduce the earnings of the lawyer himself, who would work against the client's interests.

For the negative conclusion to be based, one must accept the premise and the consequent as true and ignore what it achieves to deontology: the lawyer's duty is to preserve the interests of the client. If a quota litis clause is chosen, the risk related to the exercise of the activity under these conditions is known.

The problem of conflict of interest is not in the conditionality of the lawyer's gains to the gain of the cause but the non-observance of the deontological principles of the profession. The proposed logical sequence is only sustained if the duties of the lawyer are abandoned. If we start from this premise, we have a range of possible conflicts of interest, including starting from the idea that the lawyer only wants to realise his own interests and maximise them. Thus, in any case, being guaranteed their fees from the beginning of the action, without any link to the result, would always work for quick agreements – maximising profits for the time saved – even if in the client's disinterest. In all cases, there must be, in addition to the principles, rules that help to balance relationships and prevent abuse. Brazil has chosen to ban the lawyers' acquittance of proprietary interest, making it an exception for cases where such terms would be acceptable. The United States has chosen to prohibit a lawyer from "require a client to give up his right to settle litigation or to fire his lawyer" (de Backere and de Lathauwer, 2013:110). These are random measures in this context, but internally, in the field of deontological codes, avoid abuses and imbalances.

What is important to say is that the fee contingent is a circumstance like the other ones that affect the relationship of the lawyer and the client, and their relationships of interest.

5.3. INCREASE IN THE NUMBER OF JUDICIAL DISPUTES

A recurring argument is that the lawyer's direct interest in the outcome of his client's case could increase litigation. This argument relates at the same time to the lawyer's independence and also to a possible conflict of interest based on interest, at first sight, in common between client and lawyer, but that, effectively, for personal reasons of the lawyer who, concerned with his earnings, would end up not making a good judgment of the best strategies for his client, privileging litigation when it is most advantageous to himself.

There are two primary problems in this argument and one structural problem. The first two are: (1) assume that the dispute is constantly or almost consistently more profitable for the party and/or the lawyer, when, effectively, a pre-judicial transaction can present a higher cost-benefit, as it would avoid a long time of courts, in which resources would be dismayed with the maintenance of the proceedings in court; and, (2) consider that the lawyer is a less ethical individual than the other when there is no empirical clue that could prove this fact – the lawyer acts in the interest of clients and therefore, deontologically must make the

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best decisions in the interest of clients when it is up to the lawyer to decide and should explain to the client the consequences of the possible choices when it is up to the client only to decide. The last one, the structural problem, is even to consider that problems of administration of justice are solved through restrictive rules of individual freedom of citizens – which, in the case of increased judicial fees to limit access to justice, are less severe because it presupposes direct intervention within the prerogatives of the judiciary itself, but which, by the prohibition of freedom to hire, are less democratic than related to a public policy to avoid litigation. These are, however, merely theoretical perspectives without empiricism. Against this argument, Hugh Gravelle and Michael Waterson (1993:1219) demonstrate that "the effects of contract changes on the number of potential suits and the likelihood that a suit will proceed to trial are offsetting"[9].

5.4. ACCESS TO JUSTICE

This discussion can take many forms, and, indeed, the economic analysis of the law would also have much to talk about. It is also sure that any analysis that focuses on the literature review, as is the case with this text, turns out to be a bit distant from the empirical survey of data or even the statistical and mathematical models to which Hugh Gravelle and Michael Waterson have resorted and through which we punctuate the previous topic. The perspective of access to justice is somehow as or more diffuse than the discussion of the lawyer's independence.

The very definition of access to justice and its dimensions are objects of entire books. It is inevitable that, in any case, there would be no easy definition. However, in general terms, we will start that access to justice serves two primary purposes, from the lesson of Mauro Cappelletti and Bryant G. Garth: "First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just" (Cappelletti and Garth, 1978:182).

If, on the one hand, the growth in the amount of litigation worries part of the specialised literature, the cost of litigation is a concern for directly affecting access to courts and effective means of resolving disputes. It is known that state courts, and even much of the alternative dispute resolution or alternative conflict management, such as arbitration, mediation or conciliation chambers, are pretty inaccessible financially to several citizens (Cappelletti and Garth, 1978:186-190).

Indeed, lawyers' access to courts and specialised care to the lower-earning class is currently a concern of many countries. Countries, such as Brazil, provide in law extensive rules for the exemption of judicial fees. The same country also serves as an example for providing a body of state lawyers who serve citizens who would have difficulty paying for a lawyer and still maintain their livelihood through the Public Defender's Office – and that, in the absence of this, judges may appoint ad hoc lawyers, whom the Public Administration will remunerate for each case. The European Union ensures that all Member States have a legal aid system, even if each of these countries has its functioning and philosophy in its systems. Although most countries establish rules and structures that can take care of part of the lower-income class, there is indeed a sum of citizens whose incomes are not so low that they justify the benefit of these instruments of access to justice, but which are also not sufficient to comfortably bear the cost of private lawyers without the dispute over a just issue and the fight for judicial protection not becoming a severe cost-benefit analysis.

For both situations, whether for the lower-income class who wishes to have access to private lawyers who meet their expectations without relying on state instruments of access to lawyers (public or private) or for the middle class who would not even have access to the aforementioned state instruments, it is possible to discuss the contingent fee as a substitute for free legal services (de Backere and de Lathauwer, 2013:126). On the other hand, if the idea of loss of independence is removed and the idea that contingent fees could be an effective means of access to justice is along with one, there could be a question in the context of the lack of fairness of possible agreements, doubts as to the contractual balance and the means of self-restraint of lawyers when making contracts with clients who need the service as the only form of access to justice. To this, however, we are responsible for the perspective of Eyal Zamir and Ilana Ritov, who see in large law firms and lawyers in general a concern not to carry out contracts whose perception of the average citizen is in the sense that it is not fair or morally acceptable (Zamir and Ritov, 2011:25-26). Moreover, in countries where quota litis pacts are legally accepted, there is in the law itself a limit for the realisation of these contracts, as is the case in Brazil, whose Code of Ethics and Discipline of the Bar Association limits the gains of lawyers in the cause not to be greater than the gains of clients. Even the judiciary has already expressed itself to reduce the percentage to values lower than those that, at first glance, by legal criteria, would be correct.

6. A DEONTOLOGICAL PROBLEM?

[9] The authors further explain that: "This has two implications. First, it is impossible to predict a priori whether there will be more or fewer trials. Second, the welfare consequences of changes in the number of trials are ambiguous. An increase in the number of costly trials could be compatible with an increase in welfare if it is achieved by a reduction in the number of accidents more than offsetting plaintiffs's reduced willingness to settle. It may be impossible to achieve both a reduction in the volume of litigation and in the number of accidents" (Gravelle and Waterson, 1993:1219).

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Eyal Zamir and Ilana Ritov analyse from the behaviour of people that the choice of quota litis clauses has much to do with risk aversion or risk reduction and that customers in general could benefit from this type of instrument; moreover, clients would be more likely to accept or even propose clauses of this nature, precisely to avoid the risk of a dispute (Zamir and Ritov, 2010:282-283). The demystification that would be more interesting for the lawyer than for the client this type of agreement is necessary and point again to the significant problem of the clauses that would limit the lawyer's payment to the success of the cause: the independence of the lawyer.

This economic perception, or rather, this perception of economic choices through behavioural analysis, does not come to answer the deontological question. Deontology is, first of all, in Jeremy Bentham's vision, the science of morality, which, in a classical sense, could be seen, "as an art, it is the doing what is fit to be done; as a science, the knowing what is fit to be done on every occasion" (Bentham and Bowring, 1834:21). As Alan Lacey explains, "for deontologists duty is prior to value, and at least some of our duties, such as promise-keeping, are independent of values" (Lacey, 1996:103). A deontological analysis seeks to know why someone wants or did something than effectively if someone who did something wanted to do it or not to do it. Moreover, the just answer would go in the sense that something was done because it was to be done – cause it was the duty – and not for any other interest.

Avoiding the deepening of philosophy, let us bring the discussion back to legal or associative duties – something that abandons the field of morals as an individual perspective and advances to the scope of ethics in a collective perspective. The reason why Bar Associations or even the legal systems of certain countries establish codes of conduct or class statutes is even so that the agenda of duties does not depend on an individual judgment, but that they follow a measure, as much as possible, unique – deontologically, the reason for binding on these rules would not even be any sanction envisaged, but the duty alone.

The pactum de quota litis, for example, is both allowed and prohibited depending on the legal system – in this case, Brazil allows such agreements, while Portugal prohibits them. In a system whose lawyers or even society is not reviewed in this type of agreement, the express prohibition guarantees some systemic coherence. However, the prohibition is even political – or rather, legal policy, but never merely legal based on the coherence of the legal system. Like every norm, it comes from the thought or worldview of a group of people and is transposed cogently to the whole collectivity.

However, this kind of ban actually has a reasonably accurate moralistic background – more than most rules of conduct. Perhaps that is why, when flexibility in its scope is discussed, it finds very effusive defences. António Arnault, a prominent jurist in Portuguese lawyers' deontology, after the flexibility to allow success fee, even called the norm immoral (Arnaut, 2011:157). The historical origin in Lex Cincia, which, at first, as addressed, forbade lawyers from being paid and must survive the gratitude of those who "helped", who could thank them through donations, remains in many lawyers' ideas. António Arnault himself after a disclaim in which he says he does not underestimate the importance of fees, advocates that "the deep compensation of the lawyer is the feeling of having fulfilled his duty and helped to do justice, it is worth saying, to have contributed to making the world better"[10].

To be founded on the idea of duty is to appeal to the most resounding idea of deontology. However, it turns out that the idea of duty is also argumentatively valid to legitimise the lawyer's freedom to agree to their fees freely. Since the lawyer is a morally and deontologically bound being, he will not lose his independence, which it is his duty to maintain because his payment is or is not bound to the success of the cause.

Deontologically, there is no a priori moral criterion that rejects the quota litis pactum. From the premise of duties, the lawyer must maintain his independence regardless of his own interests, as it is his duty to maintain independence, and the duty is prior to interests. From the premise of duties, there is no conflict of interest because it is the duty of the lawyer, in the exercise of his function, to act in the interest of his client, and the duty is prior to interests. The understanding of European ethical rules from a historical perspective explains very well the option taken, both by individual countries in their process of codification and construction of law, and by the bloc of countries that came to form the European Union and whose lawyers, associatively, chose to maintain this criterion.

This choice does not delegitimise Anglo-Saxon countries and not even Brazil, which have chosen, either legally or within the scope of its Bar Associations, to allow lawyers to make agreements in order for their remuneration to represent participation in the economic benefits of the case for which they advocate. The ethical duty and value of professionals are to maintain themselves to be faithful to legal ethics and professional ethics, maintain their independence, and act within the law's limits in the interest of their clients. The paternalistic option of establishing duties against certain agreements between client and lawyer is as valid as the option for autonomy. The law must ensure no abuses, but this already stems from several

[10] Translation of: "a profunda compensação do advogado é o sentimento de ter cumprido o seu dever e ajudado a fazer justiça, vale dizer, ter contribuído para tornar o mundo melhor" (Arnaut, 2011:158).

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other norms and principles and the basic ideas that underlie the lawyer's role.

7. A PORTUGUESE-BRAZILIAN SITUATION POINT

Currently, following what is also happening at the European Union, the Portuguese system prohibits the performance of contracts for the provision of legal services providing for a quota litis clause.

The historic prohibition has been relativised. Thus, despite the peaceful ban on the pactum de quota litis, since the previous Statute of the Bar Association, of Law No. 145/2015, it has already been foreseen not to be considered the success fee, or pactum palmario, a pactum of quota litis. This position, denounced by authors such as António Arnaut, tends to have prevalence within the scope of the deontological rules, having received support from the bar association's President itself. The sparks of discussions on the subject do not occur only in Portugal. In Spain, decisions within the autonomous communities end up bringing some systemic contradictions to the national level. Often, academia and jurisprudence present elements of relativisation of the supposed prohibition (Muñiz 2008). Although it is not the subject of a tremendous doctrinal discussion, the hypothesis of unconstitutionality of the prohibition has already been raised in the doctrine (Carvalhas 2017), but without significant repercussions as well. The legal transition and accepting a regime that accepts successes fees suggest that the Solomonic solution is a means of welcoming the pactum of quota litis in its non-absolute forms. In Brazil, on the other hand, this discussion is not on the agenda. On the contrary, the legislation in recent decades has only strengthened the pre-existing system. The quota litis pactum is not only allowed but is widely used. The exception of continuous performance contracts or contracts for the defence or reduction of damages, in autonomous contracts or contracts by case, it is widespread for lawyers to be preferred by this type of agreement – even in the form of palmario. Contractual freedom finds limits on reasonableness, with local courts and even Bar association several times limited to abusive collection of fees, particularly in cases where clauses are provided for in contracts whose client did not have equality.

8. CONCLUSION

There are rules laid down in class codes of conduct that serve to protect lawyers themselves, there are rules that serve to protect lawyers from their clients, and there are rules that serve to protect clients from their lawyers. The contingent fee ban incredibly succeeded in making arguments and discussions evoked for all these protections. Deontologically, to understand whether or not national legal systems and codes of ethics allow or not allow the quota litis agreement is even a political choice of each legal system or even of each association of lawyers if there is no legal definition. If historically the prohibition was outlined as a rule, precisely by the influence of a European perspective, whose influence on the law of its former colonies is evident, since the 19th century, the Anglo-Saxon systems have passed greater freedom of the lawyer and his client, especially in the context of availability of negotiations for the participation of the lawyer in the outcome of the client's case. Modernly, Brazilian law and Portuguese law have distanced themselves about the legal-political choice of permission for the parties involved in the legal service to conduct business that would allow the lawyer to take the risk of the case together with his client. Thus, despite the close connection of the legal codes of these two countries concerning the deontology of the lawyer, Portuguese law ended up being more influenced by the European school, of which it is part. In contrast, Brazilian law suffered more significant influence from the Anglo-Saxon school, specifically the American school, heir to that legal tradition. Allowing us to paraphrase Susana Neto, despite the various perspectives by which the matter can be discussed: in Portugal, it is evident the prohibition of the pactum de quota litis, while in Brazil, it is evident its permission. Both legal systems made their legal-political choice concerning prohibiting or not prohibiting (or even expressly allowing) the realisation of agreements like this. The historical reasons for the prohibition, as a rule, are related to moral judgments of the role of the lawyer in the context of his function and public office. Modern discussions start for data analysis, constitutionality judgments and parallel moral or structural debates such as access to justice and the conditions of administration of justice.

From a purely deontological perspective, not a prima impediment to the pactum de quota litis, and he is not aprioristically responsible for losing the lawyer's independence; at least, it is no more than any other elements involving the experience of the profession.

While systems in which the contingent fee or the success fee is not banned are concerned with preventing abuse by both parties in contracts providing for such clauses, systems whose prohibition has always been peaceful are now providing alternative clauses that perform a similar function, even if the formal and express prohibition of the litis quota pactum is maintained.

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