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THE LEGAL REGIME OF THE WORKER COOPERATOR BOND – A MATTER OF OPTION?

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1. DELIMITATION OF THE THEME

Labour cooperatives are precursors of a phenomenon that has been asserting itself in the field of labour relations, characterised by a diversity of links in which there is a diffusion of the traditional figure of the employer, which even tends to be confused with the provider of the activity itself, giving rise to a multiplicity of levels of legal and social protection of the latter.

In fact, in recent years, the changes made at the economic and social level, using new technologies and richer and more complex organizational models of work, have challenged the traditional and rigid schemes of business integration and, consequently, significantly softened the visibility of the employer's power of direction (SUPIOT, 2003, pp. 30 et seq.). To all this is added an «incessant search for the stripping of the quality of employer» (REDINHA, 1995, pp. 79 et seq.), a phenomenon that we are witnessing today in an increasingly generalized way, and which is characterized by an unbridled attempt, on the part of the creditors of the services, to enjoy the advantages inherent in an employment relationship without the status of employer being formally recognized to them, masking true subordinate labour relations of apparent contracts for the provision of services, or even of other contractual figures, through increasingly rich and complex mechanisms, thus deviating from a regime that is, as is well known, more protective for the worker (VICENTE, 2008). Conversely, although less frequent, we are witnessing the camouflage of true service contracts in employment contracts, as a way for the activity provider to see his employment relationship qualified to benefit from the protection regime conferred by labour legislation to subordinate workers. All of this results in a variety of contractual ties through which someone provides an activity for the benefit of others, which the legislator has not yet been able to legally subsume into a typical framework, which places the parties (and, in particular, the provider) in a disturbing situation of legal unprotection.

In this context, and certain of this uncertainty, we will focus our study on the figure of the worker cooperator and, in particular, on the qualification of the bond that unites him to the so-called labour cooperative, an issue that, although not new in the doctrine, has been increasingly put to the appreciation of Portuguese jurisprudence. Next, we will analyse the possibility of the worker cooperator himself deciding which legal regime will be applicable to him in these situations.

2. THE LACK OF A LEGAL REGIME FOR THE WORKER COOPERATOR

2.1. Legal framework

In the Portuguese legal system, the branch of "labour cooperatives" has no legal expression. In fact, in the current state of cooperative legislation, the cooperative branches in which cooperative relations have as their main object the provision of work by the cooperators are the branches of worker production (Decree-Law No. 309/81, of 16 November), services, in the form of service producers (Decree-Law No. 323/81, of 4 December), craft (Decree-Law No. 303/85, of 12 November), fisheries (Decree-Law no. 312/81, of 18 November), education (Decree-Law no. 441-A/82, of 6 November) and culture (Decree-Law no. 313/81, of 19 November).

In these cooperatives, the acquisition and maintenance of this quality necessarily depends on the contribution of capital (through the subscription of equity securities) and labour (through the provision, according to rules defined by the statutes by the general assembly or by the management body, of the professional activity of the cooperator in the context of the cooperative).

The analysis of the Portuguese doctrine and jurisprudence produced on the issue of the legal nature of the bond that unites this worker cooperator and the cooperative, allows us to identify two currents: one position of the doctrine (GOMES, 2007, pp. 138-177; MARTINS, 2014, pp. 31-53) argues that the aforementioned legal relationship should be considered an individual employment contract (labour law thesis or contractualist thesis), while another (MEIRA, 2009, 235-239) considers that the bond that unites the worker cooperator and the cooperative is a mixed business called a "cooperative labour agreement" (monist thesis).

Of course, taking a position on this issue is of obvious practical relevance. If it is understood that there is an individual employment contract, the legislation regulating this relationship will be the Labour Code, whereas, if this qualification is rejected, the relevant rules will be, in view of the law in force, those contained in the Cooperative Code, in the complementary legislation, in the statutes of the cooperative, in the internal regulations and in the resolutions of the general assembly of the cooperative.

2.2. The worker cooperator: a subordinate worker?

The problem raised by the mode of operation of a labour cooperative is, above all, a complex problem of legal qualification, which calls for an approximation to the notion of employment contract, in order to assess the compatibility of the service performed by the worker cooperator with that legal type, as supported by the labour law thesis.

We recall in this context that the qualification requirement is the real will of the parties and not the declared will. It is the factual reality that determines the legal classification and not the other way around; that is, it is necessary to attend to the real will of the parties, evident in the way of execution of the contractual relationship, to the detriment of the will declared at the time of conclusion of the legal transaction (BAPTISTA, 1999, p. 38).

Let us recall, first of all, the legal notion of employment contract, as enshrined in article 11 of the Labour Code (CT):

'An employment contract is one by which a natural person undertakes, in return for remuneration, to provide his or her activity to another or other persons, within the framework of the organisation and under their authority'.

As AMADO (2022, pp. 46 et seq.) points out, three essential elements of the employment contract can be extracted from the aforementioned legal definition, which we will use in this interpretative task of qualifying the employment relationship of the worker cooperator.

The first is that of "provision of work". The object of this obligatory business consists of the provision of an activity, which translates into the expenditure of a set of physical and psychic energies that the employee makes available and for the benefit of others – the employer. This means that the work activity corresponds to an obligation of means, insofar as the worker undertakes to make his workforce available to the employer, regardless of whether or not the latter obtains the purpose that, through the workforce, he intended to pursue. Thus, "if the employee carries out the activity diligently, but for a reason that is not attributable to him, the purpose intended by the employer is not achieved, the remuneration continues to be due" (MARTINEZ, 2023, p. 293).

Now, in the context of the labour cooperative, the truth is that the worker cooperator is obliged to two main services: the provision of capital and the provision of work [arts. 83 and 85 of the Cooperative Code (CCoop) and art. 5 of Decree-Law no. 303/81, of 12 November, for craft cooperatives, art. 7 of Decree-Law no. 309/81, of 16 November, for worker production cooperatives, and art. 7, no. 1, of Decree-Law no. 323/81, of 4 December, for cooperatives of service producers]. In fact, in these cooperatives, the acquisition and maintenance of the quality of member of the cooperative will necessarily depend on his contribution to the cooperative with capital and

labour. In addition, the worker cooperator does not comply with his obligation if he performs only one of the services, namely, for what is of interest here, the provision of work. In fact, it is a cumulative or conjunctive obligation, since the obligation of the worker cooperator encompasses these two provisions — the capital provision and the work provision — and is only released through the joint performance of one and the other. Hence, in our opinion, the provisions due under the employment contract and in the relationship between the cooperator and the labour cooperative cannot be said to be identical and comparable.

The second element is "retribution". The work activity is necessarily remunerated, and its payment is the employer's main duty. The employment contract is thus presented as a necessarily onerous contract. Pursuant to the provisions of paragraph 1 of article 258 of the CT, "remuneration is considered to be the service that, under the terms of the contract, the rules governing it or the customs, the employee is entitled to in return for his work".

In the labour cooperative, as in the context of an employment contract, the worker cooperator receives a certain amount periodically. However, the fact that both — a worker and a non-member worker — receive a certain amount from time to time does not mean that their status is identical, even if the amount is of the same amount, since for the non-member worker that amount is remuneration and is consideration for the work performed, and for the worker that amount is part of the cooperative's annual income, which is provisionally anticipated and which will be accounted for at the end of the financial year, and there may be surpluses to be distributed among the cooperators, or losses to be borne by them. This is confirmed by the terminology used by the legislator to qualify such amounts, when it designates them as "withdrawals on account" of surpluses (Article 9 of Decree-Law No. 309/81 of 16 November).

The third element is that of "legal subordination". In order for an employment contract to exist, it is essential that, in the specific case, the worker performs his or her performance "within the framework of the organisation and under the authority" of the employer (art. 11 CT). Legal subordination «consists of the reverse of the employer's directive power (AMADO, 2022, p. 48), insofar as it legally emerges among us by reference to a power of direction that assists the employer and that allows him to conform, through orders and instructions, the way in which the work is performed by the worker. Under the terms of article 97 of the CT, "it is up to the employer to establish the terms under which the work must be performed, within the limits arising from the contract and the rules that govern it", and the worker is forced to comply with them, by virtue of the provisions of paragraph e) of n. 1 of article 128 of the same law.

This, then, will be the basic criterion for identifying an employment contract, and consequently demarcating it from situations in which we stand before an autonomous employment relationship. If the existence of legal subordination in the performance of the service is proven in the specific

case, we will be dealing with an employment contract. Otherwise, the negotiation figure in question will configure any other type of contract, which is more adjusted to the mode of execution of the activity.

«Only», as AMADO (2022, p. 52) teaches, «even so, the qualifying problems do not disappear. The richness and variety of life's situations reveal to us not few grey areas, difficult to demarcate (...)», and which tend to proliferate today, given the new and increasingly complex forms of organization and functioning of entities. This is made more difficult by the fact that legal subordination can reveal itself in different degrees, either in a very intense way or in a more tenuous way.

In view of the difficulty mentioned above, and in order to facilitate the task of the judge (and, to a certain extent, that of the worker), the legislator created an indicative method, consolidated in a presumption of labour, enshrined in article 12 of the Labour Code (LC), proceeding not to a subsumption to the legal type, but to an approximation to that same type.

Under paragraph 1 of this principle, as amended by the 2009 Labour Code, "the existence of an employment contract shall be presumed when, in the relationship between the person who provides an activity and another or others who benefit from it, some of the following characteristics are met: the activity is carried out in a place belonging to its beneficiary or determined by him; the equipment and work tools used belong to the beneficiary of the activity; the provider of the activity observes the start and end times of the service determined by the beneficiary of the same; a certain amount is paid, with a certain periodicity, to the provider of the activity, in return for it; and that the provider of the activity performs management or leadership functions in the organisational structure of the undertaking'.

As can be seen, the law selects a set of elements that help the interpreter in the detection of legal subordination, and it is enough to verify some of them (in principle, two) for the law to presume the existence of an employment contract, and it is up to the counterparty to prove the opposite. Thus, "if it is proved, for example, that the activity is carried out in a place belonging to the respective beneficiary and under the terms of a schedule determined by the latter, or if it is proven that the work instruments belong to the beneficiary of the activity, who pays a certain remuneration to the provider of the activity, then the law presumes the existence of an employment contract" (AMADO, 2002, p. 79). This does not mean, it should be noted, that the opposing party cannot, even so, demonstrate that the parties have not entered into any employment contract, since the presumption in question is rebuttable (or *juris tantum*), as is the rule under Article 350 of the Civil Code. The great advantage of establishing a presumption in this matter, especially from the employee's point of view, lies in the fact that, once sufficient evidence has been verified for its verification, it is legally presumed that there is an employment contract, with the counterparty

having the burden of proof, that is, the need to provide proof to the contrary. This means that, if the latter is unable to demonstrate that the existing relationship constitutes a genuine provision of autonomous work, the aforementioned presumption will prevail, with the consequent classification of the negotiation figure in question as an employment contract.

Even so, the possible verification of this crucial requirement seems to come up against the obvious circumstance that the activity carried out by the worker cooperators is based on a relationship of cooperation and not on an employment relationship, since the same person has antagonistic qualities that the subordinate employment contract separates: that of worker and that of employer. It is in this sense that it is possible to assert that the worker cooperator becomes an entrepreneur of himself. Thus, although the non-member worker and the worker cooperator perform the same activity and are directed by the same natural persons, they intervene in different legal capacities: for the former, as an employer, and for the latter, as the cooperator, who has functions of organization and distribution of work. Hence, in our opinion, it does not even make sense to consider the applicability of the indicative method (and the consequent presumption) enshrined in article 12 of the Labour Code, given that it is based on a presupposition – that the provider of the activity and the beneficiary of the same assume opposite and perfectly dissociable positions – which is not the case here. The very nature and raison d'être of the power of management presupposes that these two dimensions, that is, that of provider and that of beneficiary and commander of that same service, do not overlap, and it is at this point that this theory falls apart, in our opinion.

Having ruled out, in our opinion, the feasibility of the subsumption of this enigmatic contractual relationship to the figure of the employment contract, it is still necessary to question whether this link will eventually be compatible with an idea of para-subordination (of the worker cooperator).

In fact, the need to regulate the aforementioned "grey areas" of work, based on a compensatory function that is recognised in Labour Law (FERNANDES, 2023, p. 153), led the legislator to provide for a legal solution applicable to situations in which there is a provision of work that is performed with legal autonomy, even if in a manner that is economically dependent on the provider. Through this regime, instead of pronouncing on the legal classification of such bonds, the legislator proceeded to equate or assimilate the so-called parasubordinate work to the regime of the employment contract (or part of it).

Although some legal systems have advanced with the legal provision of the figure, the truth is that there is still no uniformity in the way in which each one has proceeded to the respective enshrinement. In this regard, although in theory it is often possible to subsume the figure of the worker cooperator to the figure of the parasubordinate worker, the relevance and usefulness of this

regime will ultimately depend on the way in which the equivalence regime has been legally enshrined.

In the Portuguese legal system, article 10 of the LC establishes that work performed under these conditions will be subject, not to the entire labour regime, but only to the rules relating to personality rights, equality and non-discrimination and safety and health at work, while article 4, n.1, c) of the Preambular Diploma of the Code also provides for the extension to this figure of the regime relating to accidents at work and occupational diseases. A solution that, although it shows a markedly positive evolution of the system, still leaves the provider very unprotected legally with regard to the rest of the legal-labour regime, which is still not considered applicable to him. In this regard, we believe that this is not the most appropriate legal solution for the protection of the worker cooperator, insofar as it does not safeguard his position with the desirable amplitude, ending up not adapting to the complexity of the bond.

In Portuguese jurisprudence, the labour law or contractualist thesis began to be the dominant one, with the Judgment of 6 June 1980 of the Supreme Court of Justice (SCJ) stating that "nothing prevents the member of a cooperative from being simultaneously its worker, with the legal relationships arising from these two qualities being distinct and autonomous and the exclusion of a member not necessarily involving the termination of the contract". In the same sense, it was decided in the Judgment of the Court of Appeal of Évora of 10 January 1989, in the Judgment of the Coimbra Court of Appeal of 30 March 1995, in the Judgment of the Coimbra Court of Appeal of 10 October 1996 and in the Judgment of the Coimbra Court of Appeal of 17 April 1997.

2.3. Cooperative Labour Agreement

According to another line of thinking, between the cooperative and the cooperator who provides its work to it, there will not be a subordinate employment contract, but rather a business of a distinct and specific nature, which this current calls a "cooperative employment agreement". Thus, in work cooperatives, members present themselves as 'autonomous producers' or 'entrepreneurs of themselves' and, for this reason, the dimensions of cooperator and worker are inseparable in this type of cooperatives. From this perspective, the position of this worker cooperator is complex, since the provision of the activity to which he is obliged has a content very close to that of employment, although its origin is based on a bond of an evident cooperative nature, formalized in the acceptance of the statutes.

This is, in fact, the understanding we follow (MEIRA & FERNANDES, 2022, pp. 231-249; MEIRA, MARTINS & FERNANDES, 2017, pp. 199-228), as it is the one that seems to us to best attend to the dual function – economic and social – of the bond that binds these cooperators to the

cooperative, and which is only achieved with the performance of a global service (which brings together, simultaneously, cooperative characteristics and those of a nature close to work). We therefore agree with the national doctrine that understands that "between the cooperative and the worker cooperator there are not two distinct and autonomous relationships, but a mixed legal business" and "it is not possible to claim the status of member of a work cooperative by refusing the corresponding contribution in work, just as it is not possible to maintain that quality by refusing the service, in the future, of the activity to which he had committed himself" (MEIRA, 2009, pp. 235-238). As stated above, the figure of the employment contract does not seem appropriate to qualify, by itself, this bond, since, while the legal-employment relationship is based on an idea of legal and economic subordination of the worker, the activity carried out by the cooperative worker presupposes a relationship of cooperation, distinct from the contractual logic that presides over the subordinate bond.

We therefore argue that between the cooperative and the worker cooperator there are not two distinct and autonomous legal relationships, or a double status, marked by two autonomous links with the cooperative (that of cooperator and that of subordinate worker). Consequently, the 'cooperative employment agreement' thesis is the one that is most apt to characterise correctly the complex relationship that exists between the cooperative and the cooperator, since, as stated above, classifying it as an employment contract (or even as a parasubordinate employment relationship) seems inappropriate in the light of the specific features of the cooperative. In any case, and recognising the need to define a more complete and protective legal regime for the worker cooperator, we defend the application of certain labour principles and rules to the 'cooperative labour agreement', in line, indeed, with the doctrine that identifies various types of reasons that recommend that the regime of the relationship between the cooperative and the worker cooperator, although it cannot be regulated by labour legislation, it must "in some respects, be tuned by principles and norms of a labour nature" that would function as "labour limits to cooperative rules" (LEITE, 1994, p. 105).

From the 90s, this became the understanding followed for Portuguese jurisprudence. In this regard, it is worth mentioning the important judgment of the Lisbon Court of Appeal of 12 June 1991, which decided that: "In worker production cooperatives, there is no employment relationship in which employer and worker are opposed, in relation to each of the cooperators that are part of it, since all cooperators function as worker-entrepreneurs". That view is reaffirmed in the judgments of the Porto Court of Appeal of 19 September 2011 and 27 February 2012, which held that the contractual relationship between an worker cooperator and a cooperative must be classified as a 'cooperative employment agreement', not attending to the position of the cooperator who claimed the existence of an individual employment contract with the cooperative and, as a result, the

payment of compensation by virtue of the termination of the employment relationship. More recently, in the Judgment of the Guimarães Court of Appeal, of 18 March 2021, it is reaffirmed that this provision of activity by the worker cooperator has its origin in a complex cooperative bond formalized in the voluntary adherence and acceptance of statutes and internal regulations. Since the cooperators approve the drafting and amendment of the statutes, which approve and amend the internal regulations, in particular in matters relating to the contribution through work to the cooperative, this implies that the cooperators act according to rules established by themselves, being 'entrepreneurs of themselves', which is incompatible with the legal subordination of the employment contract.

2.4. The possibility of choosing the applicable regime by the worker cooperator

Despite the above, the truth is that the Portuguese legal system has not yet definitively ruled on the legal nature of the bond that unites the worker cooperator to the cooperative, giving rise legal uncertainty and insecurity for both parties to this relationship.

From the brief analysis of Comparative Law carried out within the scope of this study, it appears that there are cases of true legislative intervention on the subject, as is the case in the Spanish and Italian legal systems, although enshrining different conceptions and using different legislative methods.

In Italy, the intervention was at the level of the legal structure of the work provided to the cooperative that would not be «carried out through the company contract, but through an adjunct and connected labour contract without separation from the corporate in a kind of complex legal transaction» (GANDÍA, 2006, 70; FICI, 2016, p. 86). In turn, the Spanish legislator chose to affirm the corporate relationship and introduce a procedure for extending Labour Law to cooperatives that safeguards the non-employment nature of the relationship but creates an employment statute for worker cooperators (JIMÉNEZ, 2016, pp. 293-314).

Even so, it will be up to us to question the possibility of the cooperator himself determining which legal regime is applicable to his relationship with the cooperative. It is, in fact, a regime that, in addition to recognizing the important role of the worker cooperator in a complex scenario of legal qualification that directly impacts him, seems to be aligned with the democratic spirit that characterizes the cooperative. This is, in fact, the most commonly adopted option in several of the countries where the law has already addressed this issue, such as England, Germany, Sweden, Denmark, the Netherlands, Belgium or Ireland (PÉREZ, 2014, p. 183). In all these cases, the law gives the worker cooperator the possibility of legally framing his relationship as a subordinate employment contract or other contractual figure, although each country ends up regulating this

possibility according to its historical and social specificities. By way of example, it should be noted that Danish law does not give the worker the right to strike, while in Sweden, the sector's collective regulation instruments cannot be applied to him, except in the case of voluntary adherence (ESPAGNE, 2007).

While acknowledging that this could effectively be a possible legislative solution, we warn of the risk of camouflaging true employment contracts in "cooperative labour agreements" as a way of reducing labour costs, an increased risk in times of greater financial constraints for organisations, such as the one we are going through. In fact, providing for the possibility of an option will certainly open the door to cases in which the worker cooperators may be pressured to assume the position of member, as a way of reducing the costs associated with an employment bond. In such cases, jurisprudence would have an important supervisory role, in the sense of being attentive to situations of simulation of "cooperative labour agreements", revealed either by the circumstances surrounding the formation of the bond with the cooperative, or by the absence of effective and real exercise of the various rights associated with the participation of the worker cooperator in the life of the cooperative (CARVALHO, 2012, p. 590), in cases where this lack of exercise derives from an impediment of the cooperative and not from the lack of initiative of the worker cooperator. Conversely, we also identified as a risk the possible camouflage of true "cooperative labour agreements" in employment contracts, as a way for the worker cooperator to have his relationship qualified as an employment bond to benefit from certain regimes applicable to subordinate workers.

Although the Portuguese legislator has not yet ruled on this issue, the truth is that, in the Code of Contributory Regimes of the Social Security System, it oscillates between the monist thesis and the labour law thesis, with two different levels of protection for the worker cooperator, and in a way ends up attributing to these cases the right to choose the applicable legal regime, even if this option is given to the cooperative and not to the worker cooperator.

In fact, in article 135 of the aforementioned law, it is allowed that the cooperative may choose to classify the worker cooperator in the category of self-employed workers in terms of social protection, thus recognizing the notorious similarity that we identify between both subjects. It should be remembered that the worker cooperator presents himself as an "autonomous producer", as an "entrepreneur of himself". In this sense, Article 135 provides, in paragraph 1, that "the production and service cooperatives may choose, in their statutes, to include their working members under the self-employed workers' regime, even during the periods in which they are part of the respective management bodies and provided that they are subject to the self-employed workers' tax regime". In turn, paragraph 2 of the same rule establishes that, "in the event that the right of option provided for in the previous paragraph is expressed, it shall be unalterable for a minimum period of five years".

Under the terms of article 141 of that law, the social protection conferred by the self-employed workers regime includes protection in the event of illness, parenthood, occupational diseases, disability, old age and death. In addition, there is the possibility, provided for in Decree-Law No. 12/2013, of 25 January, to benefit from a cease-of-activity allowance, due to self-employed workers who are economically dependent on a single contracting entity, to compensate for the loss of income resulting from the involuntary termination of the service provision contract with the contracting entity.

If there is no such statutory option, the provision of articles 110 to 112 of the Code, which are part of a section on workers employed by non-profit employers, applies. Article 111, g) considers cooperatives to be non-profit entities and, as employers, cooperatives will be entitled to a reduction of 33.3% in the overall contribution rate (Article 110, n.1), with 22.3% and 11%, respectively, for employers and employees (Article 112).

This disparity in the Code of Contributory Regimes is the best reflection of the division that still persists in Portuguese doctrine and jurisprudence, and which is still awaiting a position by the legislator.

3. CONCLUSIONS

Currently, the universe of activity providers is complex and heterogeneous, due to the growing dilution of the barrier that traditionally separates the figure of the worker from that of the employer. This scenario contributes to a multiplicity of levels of social protection of the provider, which often lacks an appropriate normative framework.

The problem of the classification of the legal relationship established between the worker cooperator and the cooperative has not yet been resolved in Portuguese legislation and it divides the doctrine and jurisprudence.

We consider that there is no subordinate employment contract between the cooperative and the cooperator who provides its work, but rather a business of a distinct and specific nature which is known as a 'cooperative employment agreement'. The position of the worker cooperator is complex, since the provision of the activity to which he is obliged has a content very close to that of employment, although its origin is based on a bond of an evident cooperative nature, formalized in the acceptance of the statutes. Although there is no legal dependence between the worker cooperator and his cooperative, there is a relationship of economic dependence between him and the cooperative, similar to that which normally occurs in the field of the employment contract.

One of the possible solutions to be adopted would be to grant the worker cooperator the right to choose the legal regime that will be applicable to him, as is already the case in several other legal

systems. In any case, we warn that such a regime may give rise to situations in which cooperative labour agreements are simulated, or in which the cooperator will feel under real pressure when exercising this right of option, ending up opting for a regime that favours interests other than those of the provider itself.

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