



SOCIAL ENTERPRISES IN ITS LABYRINTH

Rui Namorado

Retired Professor of the Faculty of Economics of the University of Coimbra

1. Introduction
2. Integrating and Contextualising Trajectory
3. Social Enterprises and the Social Economy
4. Epilogue

1.

INTRODUCTION

1.1.

This text is a reflection on social enterprises and is closer to being a web of questions and hypotheses than a set of certainties.

The problem of social enterprises has been asserting itself as a theoretical and doctrinal space worthy of attention, of critical attention. In particular, it has had a special resonance in the European Union, even if in the framework of a relatively ambiguous approach, generating a doctrinal fog that induces confusion. Confusion that is even more undesirable when combined with an announced will to promote social enterprises, often seen as a manifestation of the increased importance of the social economy. This relevance does not always coexist with a minimally acceptable clarity in the way the relations between one and the other are considered.

The place occupied by social enterprises in each legal system varies; as well as, sometimes, the legal categories through which they are received there. Therefore, it would be very negative if the resonance, in the framework of the European Union, of the notion of social enterprise were to be a rigid, closed design, unsuited to a flexible and agile use. A design that could turn into a hegemony

of some version of this notion that induces the devitalisation of the social economy through its conversion into an artefact of capitalist logic in a neo-liberal tone.

On the contrary, the legal profile of social enterprises in each national legal system must have a clarifying context at European level that favours its strengthening and avoids any role that may limit the realities lived in each country. We expect stimulus and agility from the European Union, never a constraint induced by an ideological agenda, disguised or not, that contaminates the life of these entities and distorts them, in a more or less subtle and unacknowledged neo-liberal drift. The Union is expected to have theoretically consistent and doctrinally appropriate legal categories, inducing a secure, structuring and coherent conceptual architecture, with a socially active and politically open horizon.

We focus on the Portuguese case, not avoiding the resonance of other legal systems with which we have a closer connection in this field.

1.2.

In Portugal, there is no explicit legal recognition of social enterprises as an autonomous category with its own normative space. The rule lost in the law on public contracts with explicit reference to social enterprises is not the beginning of overcoming this absence. It is a simple legal precipitation, sneakily introduced in a legal diploma centred on another theme, revealing a solid ignorance and a profound systemic irresponsibility; or, perhaps, the echo of a clumsy lobbyist smuggling, in practice inconsequent.

On the other hand, in terms of doctrine, social enterprises have been the object of relevant attention, either in conjunction with the social economy problematic or autonomously. It should be emphasised that the most consistent research in this field has occurred in an academic context within the framework of international scientific cooperation, valuing the reflexes of the reality in other countries, which legal-political architecture is very different to that of Portugal.

In fact, these studies are often preparatory approaches for an autonomous legal consecration of social enterprises, not only for fear of being in dissonance with a European Union that values the notion of social enterprise but also for the intrinsic valorisation of the topic. However, it should be underlined that this often happens in the framework of the promotion of the social economy.

This will of systemic innovation deserves careful attention. It is up to it, naturally, to fulfil its own purposes and to materialise its ambitions, asserting itself as the sap of an ever more powerful life in an effective innovative dynamics. But it cannot ignore its irremovable roots in the process of transformation of Portuguese society, although without underestimating its European resonance. Roots that cannot be forgotten or underestimated, otherwise they would vitiate and sterilise the most profound identity of the phenomenon.

Therefore, the connections of this whole issue with the Portuguese legal system are very relevant, especially at a legal-constitutional level. In the same way, a full understanding of social enterprises, as an innovative phenomenon with an autonomous profile, requires a clear awareness of the conceptual trajectory of the concept of company itself, with emphasis on its legal dimension. In parallel, from another angle of approach, it is also necessary to articulate it with the social economy, both as a possible context and as a related or integrating space.

1.3.

The pressure of reality in a capitalist context is particularly relevant when it expresses the liberating impulses of the excluded, the exploited, the oppressed. This pressure is seen by the defenders of the capitalist order as a danger that must be neutralised or at least mitigated. But it is felt by the victims of the prevailing injustice as an impulse towards better days, which for this reason must be swollen and structured so that it can reach maximum effectiveness as transforming energy.

The social needs that generate the utility of the production or provision of new goods or services, i.e. the new social goods, are the result of capitalist predation and the collective consciousness of the victims.

For the historical movements of resistance to capitalism the response to these new social needs is part of a long tradition of political, social and economic struggle. The new responses, which the newness of reality can make necessary, can be translated into the demand for new energy in the way social movements protagonise their resistance to capitalism; greater authenticity, greater effectiveness, greater innovative impetus, but also new organisational models. And it should be noted that these novelties will only be truly so if their horizon is not the salvation of capitalism, but its overcoming.

On the contrary, for those who conceive the novelty in this field within the framework of the conservation of capitalism, all innovation has this limit and its aim is to help capitalism to conserve itself and not to bet on its overcoming.

Thus, social enterprises, at their most fundamental level, are essentially an attempt to respond to new social needs. Some want to respond to these needs in order to make the current order desirable, others want to respond to them out of solidarity with the victims, and this solidarity not only helps to alleviate the consequences of injustice but also to fight its causes, to stop the source.

But those who wish to stop this source will have difficulty in succeeding if they neglect the immediate combat against human suffering, which is directly at issue here. On the other hand, whoever combats this suffering by dispensing with any strategic design to stop its source will renounce the ethical and socially legitimising force of impulses, whether cooperative or in solidarity, as well as the capacity to systematically project political and social discredit on the predatory and anti-humanist logics that permeate capitalism.

It is in this context that it is understandable that some see social enterprises rooted in a notion of company corresponding only to capitalist companies owned by commercial companies. They thus want to solve problems generated by capitalism using a legal-economic instrument which improvement was one of the factors of capitalist expansion. This option fits the idea of alleviating the predatory consequences of capitalism without striking at its root; which leads to allowing it to endure. But it does not involve an attitude of resistance that targets its cause in conjunction with its consequences.

1.4.

It is therefore an ideological illusion to claim that over the last few decades there has been an invention of social enterprises as an absolute novelty. Associations, cooperatives, mutual associations and foundations have existed for a long time; even before the notion of social enterprise emerged and even before the concept of company had the nature and scope it has today.

Indeed, let us remember that the company started out as a category within the set of commercial companies. Today, the notion of company is broader than that of commercial company. The company in corporate form is only one of the types of companies, the paradigmatic form of private for-profit companies. It therefore makes no sense for companies which are neither public nor private

for-profit to be placed in a single category - that of social enterprises - merely as mirrors of new realities, totally ignoring their value as legal translations of pre-existing social realities.

In fact, the opening of social enterprises as a category to private for-profit companies as a reality is an instrumentalisation of the social by the economic profit-making, with the marginalisation of the substantial unity of the former and the consequent freezing, and perhaps worsening, of their subordinate status.

2.

INTEGRATING AND CONTEXTUALISING TRAJECTORY

2.1.

Social enterprises have long shared a logic of resistance to capitalism, projecting themselves along a path that transcends it with an ambition to be an alternative, or, more contrarily, aspiring only to play a balancing and compensatory role in the face of its predation, accepting its perennality. And this occurred as soon as, appearing on the stage of history, even before they were identified by that designation, they gave body to social movements that expressed them.

This is what happened, for example, with the cooperatives, which soon established themselves as a way for the workers' movement to express itself as an entrepreneur in the economic field, alongside trade union and political intervention. And this was not contradicted when cooperatives, as was the case in Portugal, for some time before the April revolution, legally assumed a corporate guise in order to pass through the filter of legitimisation and recognition with which the dominant socio-political forces sought to condition, hinder and control them.

In fact, in Portugal, the 1976 Constitution, without having represented the overcoming of capitalism, generated a mixed economy, rooted in a pluralism of corporate forms. Hence the valorisation of public companies as an autonomous corporate form and of the corporate nature of cooperatives; which implied that the notion of company, besides encompassing private for-profit entities under a corporate form, had also come to encompass public companies and cooperative companies.

Later, in the 1989 constitutional revision, the cooperative sector was joined by all the productive entities that until then constituted the non-statal public sector, i.e. self-managed companies and

community entities, mainly unoccupied ones. This new group of entities came to be known as the cooperative and social sector.

It can be said that, globally, one and the other, together with the cooperatives, can now be qualified as social enterprises; none of them under the corporate legal form. With the 1997 constitutional revision, as a solidarity subsector was included in the cooperative and social sector, the set of entities that can be considered social enterprises in Portugal became broader.

And, although it is possible to discuss whether all entities of a solidary and communitarian nature are companies or not, if they are seen as such they must necessarily be considered social enterprises. Thus, in Portugal, since at least the April democratic revolution, the business landscape is not only made up of private for-profit companies under a corporate form. It also includes public companies and social enterprises, within which the cooperative companies had a particularly clear presence. It is true that in the entrepreneurial field the dominant legal paradigm continues to be that of commercial companies, but being dominant is different from being unique.

2.2.

This context cannot be ignored in the name of an absolute random valorisation of other juridical-political traditions. In fact, that would mean trying to embed in the Portuguese legal-political system something close to an Anglo-Saxon prosthesis, which makes no sense. It would be like establishing an incongruity that would be more of a risk than a virtue, and could open a structural fracture in a sensitive area of our legal system.

Thus, it seems the most prudent and the most fruitful to assume, as a starting hypothesis, that social enterprises are the entities that integrate the social economy and only those. If there are initiatives, neither public nor private, which are driven by profit and which do not fit into this space, the apparently most fruitful path will be the institution of a new legal figure, susceptible of generating a corresponding legal-normative space that consubstantiates its nature, its characteristics and its objectives. Of course, this path will only make sense if the initiative in question cannot, in the light of the Portuguese legal system, be considered as belonging to the social economy or to the cooperative and social sector consecrated in the Constitution.

3.

SOCIAL ENTERPRISES IN THE SOCIAL ECONOMY

3.1.

Having a clear idea of what social enterprises are, enabling a notion that reflects them rigorously, depends a great deal on how we relate them to the social economy. And this has special force in the Portuguese case, due to our legal-constitutional system.

There are some questions we should start from. Can entities with no social purpose be considered as social enterprises?

All business activity has social repercussions. They may be predominantly negative or positive. If negative, they are socially penalising. If they are positive, they are socially qualifying.

Unlike social enterprises, for-profit companies, whose *raison d'être* is the pursuit of profit, second by their very nature the degree of predation or virtue of the practical consequences they induce. They aim at profit, without which they lose their *raison d'être*; and this alone is truly decisive for them.

By the nature of things, even commercial companies, a legal form intended to take over the ownership of companies based on profitability, cannot perform certain types of actions or produce certain types of effects. Therefore, in the light of the legal system, certain types of behaviour are illegal or even criminal, those which are the object of more intense devaluation. Therefore, they are qualified as crimes or, at least, as illicit acts.

There are, however, other activities which, although they give rise to socially negative externalities, are not illegal, since they are viewed positively on the basis of some of their other consequences. It is essential for for-profit companies to have a legal structure designed to generate and distribute profits, based on the hegemonic supremacy of the capital holders. If, in order to achieve this objective, they obtain socially useful results, the better; but this type of result does not imperatively mark their nature or their legal structure. To describe private for-profit companies as social because of the type of objectives they pursue is to overlook the essential.

3.2.

We may also ask whether it is possible for there to be entities belonging to the social economy that do not have a social purpose. This does not seem to me to be admissible.

In fact, since they are not for-profit, their results must be socially useful by nature. An essential utility, and not merely instrumental, which will necessarily become part of the day-to-day life of each organisation; although the scope of this social utility must naturally be wide-ranging.

It is in this sense that it can be said that, for example, cooperativeness is a socially useful quality.

And while the absence of a direct social utility does not hurt the core of private for-profit companies, it would be a serious structural defect in social economy enterprises. Social purpose as the central objective of an organisation is therefore a central characteristic of social enterprises. It can therefore be assumed that social economy enterprises are social enterprises. All of them. And only them? Let us try to clarify this question.

3.3.

Social enterprises are not the subject of an autonomous legal consideration in the LBES (Framework Law for the Social Economy) but this hypothesis was considered during the process of creating this law, concluded in 2013. There are those who view this negatively, as they believe that an opportunity to create an even more favourable environment for social enterprises was thus missed. They do not seem convincing to me.

In fact, the perspective that sees social enterprises as the materialisation of the social economy is dominant in Portugal.

This position is in line with the path taken by legal and political regulation since the April Revolution, as well as with the relative importance and profile assumed by the entities that can be considered as such.

From this perspective, in this case only a certain nomenclature, far from being unanimously preferred, has not been used.

3.4.

Some related questions should be analysed. One of them is whether there has been any relevant social dynamics towards the establishment of a new type of company, within or close to the social economy, that could be called social enterprise. There was not. The adherence to the materiality of these types of entities was scattered and not very significant, far from being considered as a social movement with its own relevance and light.

We can also question the existence of entities, neither public nor private, legally and autonomously recognised among us, which fit into the doctrinally dominant notion of social enterprise. It is easy to see that this is the case with almost all of those that fall within the social economy.

At the same time, it is also worth checking, from a perspective that opposes the coincidence between the concept of the social economy and that of the social enterprise, which entities can be included in the latter and not in the former? More clearly, at least generically, those which are headed by a commercial company.

These questions and the doubts that surround them may be doctrinally fruitful, but they have so far had only modest resonance in the practical world of their protagonists.

3.5.

In fact, this issue is in some ways an echo of the legislative process that generated the LBES in 2013.

In fact, in Draft Law no. 68/XII, of the PSD, Article 13 (*Legislative Development*) set a deadline of 180 days, from the beginning of the law, for the approval of a series of legislative diplomas, in materialisation of an alleged reform of the social economy. One of them concerned the “*creation of the legal regime of social enterprises, as entities that develop a commercial activity with primarily social purposes, and which surpluses are essentially mobilised for the development of those purposes or reinvested in the Community*”.

When the final version of the text of the LBES was set in March 2013 in the Portuguese Parliament, approved in detail, this article 13(c) was not included. This, despite having entered the Commission, in January 2013, an amendment proposal subscribed by the PSD and the CDS which stated: “*The legal regime of social enterprises is created based on the concept of social enterprise defined within*

the European Union.” However, the mention of the creation of a law on social enterprises was not included in the final version of the approved law.

It should also be noted that social enterprises, despite being the object of autonomous attention, were seen as something internal to the social economy, which was also congruent with the fact that the respective Framework Law was in force.

3.6.

Since then, there has been no significant public movement against the use of this term for this type of company. But that did not mean that any organisation that could be regarded as a social enterprise suffered irreparable *capitis diminutio*. It was just looked at from a different point of view.

In truth, the social economy galaxy has been maturing in a dynamic stimulated by its constellations. A maturing process in which no process of maturing the concept of social enterprise as an innovative and autonomous affirmation was relevant.

Everything has been going on as if the affirmation of the social economy as a set of social enterprises is an aspect of its issue that does not deserve to be highlighted.

The exception already mentioned, of the sudden and unusual appearance of a notion of social enterprise in the public procurement law, rather than a happy and inspiring legal innovation, seems more like a lobbyist externality, which nature was left uncovered; or simply something close to a simple legal-political nonsense.

Thus, it makes sense to reflect on the hypothesis of social enterprises being subject to legal regulation in Portugal that would give them their own statute, as well as to assess the appropriateness of including them within the perimeter of the social economy.

3.7.

Starting with this last issue, we must ask ourselves if there is any component of the social economy that is not a social enterprise and, conversely, if there is any social enterprise that does not belong to the social economy.

Let us try to answer by recalling our trajectory in this field. In the case of Portugal, the long historical trajectory that led us from the centrality of the commercial company in the protagonism of commercial activity to the company as a nuclear phenomenon of economic activity, suffered a decisive impact with the April Revolution and the legal changes it brought about.

With the 1976 Constitution, as we know, the legal-corporate space (the modes of production of social life) was structured into three major sectors: public, private and cooperative. As we have seen, alongside private for-profit companies, public and cooperative companies also came to play a structuring role.

In the 1989 constitutional revision, the cooperative sector was renamed the cooperative and social sector by including two new subsectors, the community and the self-managed. In the 1997 revision, a solidarity subsector was added without changing the name of the sector.

Thus, while in 1976 differentiated spaces had been established for private, public and cooperative companies, in 1989 the third sector came to include a social component; in other words, it came to comprise a legal-political space occupied by what can also be called social enterprises, which can be viewed alongside or include cooperatives.

In the 1997 revision, the emergence of the solidarity subsector, while not involving a change in nomenclature, involved however a deep alteration in its contents. Essentially, it started to include the social economy as a whole. And so, all the companies included in the three subsectors became social enterprises even though this terminology was not used intensively.

It was the congregation stimulated by the public authorities that sedimented various socially rooted organisational structures. Legal and constitutional developments reflected and stimulated this process.

Therefore, in the case of Portugal, social enterprises are essentially identified with the social economy, which in turn coincides almost completely with the cooperative and social sector, enshrined in the Constitution.

3.8.

From this perspective, the LBES is the legal regulation of social enterprises in Portugal and it remains to be seen whether the fact that this coincidence has not been formally and expressly assumed has left open any space of uncertainty that should be filled.

Perhaps the most fruitful approach to the issue would be a re-examination of the LBES, in order to introduce possible changes. Valuing the more structural issues, one could begin by revoking article 4(h), which opens the door to the case-by-case entry into the social economy of entities that are not mentioned in the other subparagraphs of the article [which has never been put into practice].

This subparagraph would be replaced by another one integrating in the Social Economy, through the LBES, all the commercial companies which social shares are totally held by any of the types of entities foreseen in any of the other subparagraphs of this precept.

This would be the only possibility for any type of commercial company to be recognised as social enterprises in Portugal. And thus the manoeuvres aiming at fully introducing the profit logic in social enterprises, and through them in the social economy, would be unambiguously frustrated.

3.9.

By seeking to overcome the ambiguities and uncertainties that have crystallised around a type of social enterprise that has not yet been fully integrated into our legal system in a balanced way, the issue of social insertion companies can be resolved in another way.

My proposal, which needs a more careful reflection, is to transform the social insertion companies into cooperative régies. They would still fit in the social enterprises' doctrine but taking on a legal form which would substantially link them to the public sphere without integrating them in it.

3.10.

Two brief concluding remarks should be made:

1st The legal component of this issue is determinant as a clarifying factor and as structuring protection.

2. The repeated attempt to hide the opening of the social economy to the private for-profit sector, using social enterprises as a “Trojan horse” full of seraphic intentions, has been a real doctrinal hypocrisy.

4.

EPILOGUE

Social enterprises can only truly hope to escape from this labyrinth if they are solidly anchored in the social economy and thus unambiguously conquer a place in the Portuguese constitutional order. From this, however, we cannot underestimate the innovative and fruitful nature of all the theoretical and doctrinal research work carried out on the basis of the valorisation of social enterprises as realities endowed with their own light.

Coimbra, 23 March 2023