

Employment contract and subordination: a truly human work regime? A few thoughts on ALAIN SUPIOT'S perspective

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I. INTRODUCTION

The concept of legal subordination in the employment contract, as provided by the Law of Obligations and Labour Law, branches of Private Law that respectively deal with contracts in general, and the employment contract in particular, and to what extent legal subordination is based on a concept of work that is truly human ^[1], are two interrelated aspects that I will analyse in this paper, based on ALAIN SUPIOT'S perspective.

[1] The expression is from ALAIN SUPIOT, *La Gouvernance para les nombres; Cours au Collège de France* (2012-2014), Fayard / Institut D'Études Avancées de Nantes, 2015, chapitres 12-13: *Un régime de travail réellement humain*. The author uses the expression

«régime de travail réellement humain», whose literal translation would be «really human work regime». I will also use in this essay the synonymous expression, “truly human work,” as I believe that the English adverb “truly” better describes ALAIN SUPIOT'S insight.

Also, NORBERT WIENER, *The Human Use of Human Beings: Cybernetics and Society*, 1950, cited by ALAIN SUPIOT, *La Gouvernance par les nombres*, cit., chapitre 12.: *Un régime de travail réellement humain I. De la mobilisation totale à la crise du fordisme*, p. 332, footnote 20.

What constitutes truly human work, «that respects the dignity to which all human beings are entitled, particularly those who rely solely on their labour as their only source of sustenance and fulfilment»^[2] is, I believe, one of the most critical aspects of the human condition, and its evolution, which goes far beyond the “shackles,” or objective framework, of the Law. Human work cannot be held captive by these limitations.

These are complex boundaries to navigate in our day, as subordinated work relationships encompass many faces and increasingly a wealth of innovative hybrid forms of human work, in constant (trans)mutation, currently comprised in the concept of the employment contract. Others, although excluded by the boundaries of Labour Law, are also genuine subordinated work relationships.

As ALAIN SUPIOT analyses throughout his work, and particularly in the two books chosen and mentioned below, the forms of work created by the inexhaustible human imagination are dictated by the need for survival, especially of workers, but also of employment providers, and the Law has not yet been able to encompass or even understand them. This owes to the fact that the states that legislate, and their judges who judge, have not yet been capable, or determined, to deal with them.

The Author is a jurist and philosopher of Law who studied human work and other interconnected concepts over several decades^[3].

[2] JOSÉ JOÃO ABRANTES, “Tribute text to Professor Jorge Leite”, *Questões Laborais (QL)*, 54, 2019, Coimbra: Almedina, p. 18: «[...] It is the respect for the dignity to which all human beings are entitled, especially those who only have their labour as the sole source of sustenance and fulfilment; therefore, this value, a founding principle of any decent society, cannot have its pursuit entrusted to the market, but

must be one of the main functions of the democratic state...»; and “Sobre a Constituição e a crise do *Favor Laboratoris* em Direito do Trabalho” (About the Constitution and the crisis of *Favor Laboratoris* in Labour Law), *Essays in honour of Professor Jorge Miranda*, Vol. II, Faculdade de Direito da Universidade de Lisboa, Coimbra: Coimbra Editora, 2012, pp. 269-284 (*maxime* p. 270) (translation by the author).

[3] *Justice at Work – Some Lessons from History* (original title: *La Justice au Travail – quelques leçons de l’histoire*), Éditions du Seuil, 2022, is currently the author’s latest book and, essentially, corresponds to a conference held on 08/10/2021: *Rendez-vous de l’Histoire de Blois*, dedicated to “Labour”.

I hereby propose a reflection on how ALAIN SUPIOT'S "truly human work" concept can help study legal subordination and whether the employment contract, which presupposes such subordination, reveals properties of a true contract^[4].

I will start with a brief informative summary contextualizing the Author's trajectory, for a less informed reader, and my methodology will be primarily based on an analysis of ALAIN SUPIOT'S insight expressed in two of his recent works, without prejudice to references to other works of his. I will seek to analyse his doctrinal concepts by sporadically comparing them with aspects of Portuguese and French labour law. The following books have been selected^[5]:

- ▷ *Le travail n'est pas une marchandise. Contenu et sens du travail au XXe siècle. (Leçon de clôture prononcée le 22 mai 2019)*, Paris: Editions du Collège de France, 2019^[6];

[4] I follow the concept of employment contract that is most familiar to me as set out in the *Portuguese Labour Code* (Law no. 7/2009, of February 12, and subsequent amendments), Article 11 of which reads: «[...]An employment contract is one by which an individual agrees, for remuneration, to provide their activity to another or other persons, within the scope of organization and under their authority [...]». Strictly speaking, Portuguese law has two notions in force: one, more recent, transcribed above, another, older, contained in Article 1152 of the *Portuguese Civil Code*: «[...] An employment contract is one by which a person agrees, for remuneration, to provide their intellectual or manual activity to another person, under the authority and direction of the latter [...]». I highlight the improvement of the statutory notion (in 2009) concerning the inclusion of the worker in an organized structure, which is also a way to expand the criterion of legal

subordination (main element of the employment contract), since it no longer results solely from the employer's orders or instructions but also from the worker's integration into a collective structure or organization. It is the idea of a hetero-organization instead of a hetero-direction. In this sense, but in the European Union Law and Court of Justice perspective, ALAIN SUPIOT et al. *Transformações do Trabalho e futuro do Direito do Trabalho na Europa* (Labor Transformations and the Future of Labor Law in Europe), Coimbra: Coimbra Editora, 2003, p. 32 (O alargamento do critério da subordinação jurídica / The broadening of the legal subordination criterion), *Les notions de contrat de travail et de relation de travail en Europe-Rapport pour la Commission des Communautés Européennes* (The notions of employment contract and employment relationship in Europe – Report for the Commission of the European Communities), Luxemburg: Office des publications

officielles des Communautés européennes, CATARINA DE OLIVEIRA CARVALHO, "O conceito de "trabalhador subordinado" na jurisprudência do Tribunal de Justiça (UE) – Primeiras reflexões" (The concept of "subordinate worker" in the case law of the EU Court of Justice) – Preliminary reflections), *Colecção Estudos Instituto do Conhecimento AB*, N.º 7 DESAFIOS LABORAIS, Coordenação CATARINA DE OLIVEIRA CARVALHO, CARMO SOUSA MACHADO, RICARDO COSTA, Coimbra: Almedina, 2018, p. 24.

[5] The books selected are written in French, hence the Author of this article takes full responsibility for the translation into English and the inclusion, in this paper, of excerpts duly identified, and from other works by ALAIN SUPIOT, also duly cited and referenced.

[6] *Labour is not a commodity. Content and meaning of work in the 21st century*,