

THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE ROLE OF THE ROMANIAN LABOR INSPECTION (I)

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Abstract

The existence and protection of human rights is, today, a mandatory condition, even indispensable, for the development and evolution of the human society. Any society that has an ideal of justice must first and foremost consider the protection of human rights and freedoms to be a high principle.

The Labor Inspection authority is particularly active in preventing, detecting and sanctioning undeclared work by seeking to combat and reduce this phenomenon of undeclared work. However, as we are going to see, we can consider the Labor Inspection an institution which has the administrative authority to protect the employee's right by using administrative means in a wide area.

Keywords: *Labor Inspection, administrative actions, human rights*

JEL Classification: [K 22, K 23, K 31, K 32]

1. Introduction

The existence and the protection of the human rights is, today, a mandatory condition, we would say, even indispensable, for the development and evolution of the human society. Any society which has an ideal of justice must first and foremost consider the protection of the human rights and freedoms to be a high principle. However, it is not enough for these rights to be recognized. It is very easy to conceive a law and to impose its *erga omnes* mandatory character. What is difficult is that these recognized rights are respected in a real way, that monitoring and control mechanisms are being set in place to ensure respect & enforce for the rights both by the state and by others. Moreover, the mechanism for monitoring and controlling the observance of these rights and the prerogatives given by these rights and freedoms must be clear, simple and accessible, so that even a person who is not a legal specialist can understand what rights and freedoms does he/she has and the other members of the society.

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In a document developed under the aegis of UNESCO, it was emphasized that “human rights are no new morals, no secular religion; they are much more than a common language of all people. “ “There are exigencies that the human person needs to study and integrate in his own culture according to his own rules and methods, regardless of the diversity of his concerns” (Zlătescu-Moroianu, 2008, p. 5).

“Human rights are the foundation of the human existence and coexistence. Universal, indivisible and interdependent, they define humanity. They embody the principles that form the cornerstone of human dignity” the United Nations Secretary-General said in the inaugural message on the occasion of the 50th anniversary of the Universal Declaration of Human Rights.

As stated in the preamble to the Universal Declaration of Human Rights, all peoples and nations must strive for the common ideal proclaimed in this solemn document and strive to develop respect and respect for all the rights and freedoms of persons through education and education (Zlătescu-Moroianu, 2008, p. 7).

As a rule, the employee’s rights are being protected by the court of law. However, in this respect, the work carried out by the Romanian Labor Inspectorate has a particular importance.

Within the labor relations, in our opinion, the Labor Inspection is the most important authority of the state for designing, stimulating and contributing to the development of a culture of prevention, and among the issues falling within its competence, we mention: industrial relations, wages, general conditions of work, safety and health and safety at work and employment and social security issues (www.ilo.org, 2010).

At the European level, setting up a labor inspection was a consequence of the industrial revolution of the late eighteenth century. In this sense, the first initiative to set up a control body on labor relations had the British Parliament in 1802, which adopted a law on labor protection as well as on the protection of apprentices. This law has an increased applicability in the area of health and safety at work. However, the law enforcement mechanism was not effective. In 1833, the British Government appointed the first labor inspectors with supervisory and control duties, especially in the field of work and leisure time for adults and children (Ellis, 1998). In 1919, the Treaty of Versailles stressed that it was particularly important that “each state should establish an inspection system to ensure the implementation of directives, laws and regulations for the protection of employees” (Kenner, 2003, pp. 57-58).

2. Organization of the Labor Inspection in Romania

The foundation of the Labor Inspection is one of the consequences of the ratification by Romania of the Convention no. 81/1947 on Labor Inspection in

Industry and Trade as well as of Convention no. 129/1969 on labor inspection in agriculture. These conventions have been adopted by the International Labor Organization. Besides these normative acts, we also underline the provisions of art. 237 of the Labor Code stipulating that “the application of the general and special regulations in the field of labor relations, safety and health at work is subject to the control by the Labor Inspection, as a specialized body of the central public administration with legal personality, subordinated to the Ministry of Labor, Social Protection”. These normative acts have a general character, establishing principles and procedures.

Nowadays, the normative act regulating the foundation, organization and functioning of the Labor Inspection is the Law no. 108/1999 on the foundation and organization of the Labor Inspection. The Law no. 108/1999 establishes the general framework for the organization and functioning of the Labor Inspection, and the detailed rules for the enforcement of the law were initially laid down in G.D. 767/1999, and are currently provided for in G.D. no. 488/2017 regarding the approval of the Regulation for the organization and functioning of the Labor Inspection. The Labor Inspectorate is the specialized body of the central public administration, with legal personality, subordinated to the Ministry of Labor and Social Justice. The Labor Inspection fulfills the function of state authority, which ensures the exercise of control in the fields of labor relations, security and health at work (Roș, 2018, pp. 93-102) and the supervision of the product market in the field of competence.

In organizational terms, the Labor Inspection is a specialized body of the central administration with legal personality, having the character of a deconcentrated authority (Fodor, 2017) in the territory (Roș, 2016, pg. 178-187). The Labor Inspection management is provided by a State General Inspector which has two Deputy State General Inspectors. The State General Inspector is appointed by order of the Minister of Labor.

The territorial labor inspectorates are subordinated and reporting to the Labor Inspection. They have legal personality and are established at the level of each county and in Bucharest. The territorial inspectorates have a chief inspector appointed by the minister in charge at the proposal of the general state inspector and has under his supervision two deputy chief inspectors. The chief inspector and deputy chief inspectors have the status of labor inspectors.

In the light of the above, we will make brief observations on the procedural capacity to use and the representation in court of the territorial labor inspectorates.

In terms of procedural capacity (Tăbârcă, 2013, pp. 164-168)(Boroi, et al., 2013, pp. 147-152) of the territorial labor inspectorates, we observe that the proof of procedural capacity for use is made by order of the competent

minister, the order being the act of establishment by means of which the legal person is acquired.

As far as the legal representative of the territorial labor inspectorate is concerned, it is done through the chief inspector. As mentioned above, the chief inspector is appointed by order of the minister responsible. The appointment order being an administrative act of an individual character shall not be published in the Official Gazette of Romania.

Therefore, if the exception of the lack of procedural capacity of the territorial labor inspectorate or the lack of legal representative is argued, their proof will be made by presenting the order of the Minister, surely, the corresponding copy.

3. Functions and responsibilities of the Labor Inspection

The functions of the Labor Inspection are regulated by art. 5 of the Law 108/1999 and are the following:

“a) state authority, which ensures the control over the application of the legal provisions in its fields of competence;

b) communication, which ensures the exchange of information with the central and local public administration authorities as well as with the persons subject to the control activity, informing them and the citizens on the way the provisions of the legislation in the field of competence;

c) representation, which ensures, on behalf of the Romanian State and the Government of Romania, the internal and external representation in its fields of competence;

d) training, through which the professional training and professional development of the personnel is carried out, according to the law;

e) cooperation, which ensures joint actions, both internally and internationally, in the fields of competence;

f) administration, which ensures the management of the assets in the public or private domain of the state or, as the case may be, of the administrative-territorial units that it has in administration or in use, the funds allocated for the purpose of functioning under the law, as well and the organization and management of IT systems required for its own activities”¹.

As far as the tasks of the Labor Inspection are concerned, Law no. 108/1999 distinguishes between general tasks and specific tasks².

Thus, according to the provisions of art. 6 par. 1 of Law no. 108/1999, the Labor Inspection has the following general duties:

“a) controlling the application of the legal, general and special

¹ Art. 5 let. a)-f) from Law no. 108/1999.

² Art. 6 from Law no. 108/1999.

provisions in the fields of labor relations, health and safety at work and market surveillance;

b) providing information to employers and employees on the means of applying the legal provisions in the areas of competence;

c) informing the competent authorities about deficiencies or abuses related to the application of the legal provisions in force;

d) the provision of services specific to its field of activity;

e) to initiate proposals for improving the legislative framework in its fields of activity, which it submits to the Ministry of Labor, Family and Social Protection “.

We note that among the general attributions we also identify the obligation to “*provide information to employers and employees about the means of enforcing the legal provisions in the areas of competence*” (Roș, 2017, p. 374). The legislator did not detail this assignment, but as it turns out, it designates the task of offering/issuing guiding/guidelines by the labor inspectorate to the employees/employers. Regarding the practical application of the guidance function, from the administrative and procedural point of view, the territorial labor inspectorates organize periodically conferences, business guidance sessions on the application of the legal provisions in the field of work relations and labor protection.

Specific duties are provided in art. 6 par. 2 of the Law no. 108/1999 and, as we shall see, the legislator divided them into:

1. Specific attributions in the field of labor relations:

“a) controls the application of the legal, general and special regulations regarding the conclusion, execution, modification, suspension and termination of individual employment contracts;

b) controls the establishment and granting of rights to employees deriving from the law, from the applicable collective labor contract and from the individual labor contracts;

c) controls the implementation of gender mainstreaming measures;

d) ensures at national level the record of the work performed on the basis of the individual labor contracts, through the general register of employees, as well as the records of the day laborers and beneficiaries of their services;

e) controls the use of labor for the purpose of identifying undeclared work (Dimitriu, 2017, pp. 52-61);

f) receives and transmits in the computer system, through the territorial labor inspectorates, the data submitted by employers and beneficiaries regarding employees and day-laborers;

g) ensures the registration of collective labor agreements at the level of units and verifies their provisions, according to the procedure approved by the

general inspector of state, and conciliates the labor conflicts triggered at the employer's level"³;

2. Specific tasks in the field of health and safety at work and market surveillance:

“a) to control, coordinate and methodologically guide the application of the provisions regarding the safety and health at work, arising from the national and European legislation and from the conventions of the International Labor Organization;

b) investigates events according to their competencies, approves the research, establishes or confirms the character of accidents, cooperates with the institutions involved in the recording and reporting of accidents at work and occupational diseases;

c) controls the training, information and consultation of employees and provides information to improve it;

d) authorizes the operation of natural and legal persons from the point of view of safety and health at work and withdraws or may propose the withdrawal of the authorization, according to the law;

e) analyzes the activity of the external services of prevention and protection and proposes, as the case may be, the commission for authorization of the external services for prevention and protection and approval of the technical information and training documents in the field of security and health at work within the territorial inspectorates' work abstaining;

f) issue opinions and authorizations according to the competences established by the applicable normative acts;

g) orders the termination of the employer's activity or the decommissioning of the work equipment, if there is a serious and imminent danger of injury or professional illness, and shall notify, as the case may be, the prosecution bodies;

h) orders the employer to carry out measurements, determinations and expertise to prevent events or to determine the causes of the events produced, as well as to check, through competent bodies, the level of harmfulness within the admissible limits at the workplaces, the expenses being borne by the employer;

i) controls compliance with the legal provisions regarding the placing on the market of products for which it carries out market surveillance actions, according to its competencies;

j) restricts, through the legal measures established by the legislation in force, the marketing of non-compliant products and measures to eliminate the non-compliances found;

³ Art. 6, paragraph 2, point A, from Law no. 108/1999.

(k) take samples and perform tests to identify products suspected of non-compliance;

(l) cooperate with the customs authorities and other bodies responsible for border controls to exchange information on products presenting risks of use;

m) collaborates with national competent authorities and within the European Union on all market surveillance issues, including the notification of the safeguard clause for non-compliant products⁴.

The Labor Inspectorate carries out other duties set in its responsibility according to the legislation in force. According to the provisions of art. 6 par. 4 of the Law no. 108/1999, the central and local public administration authorities, as well as the institutions under their subordination, coordination or under their authority are obliged to provide the Labor Inspectorate and the territorial labor inspectorates at their request with the necessary information and documents, operative and free of charge, for the fulfillment of the duties established by law.

An important role of the Labor Inspectorate is in founding and preventing undeclared work (black work - *Author's Note*) (Dimitriu, 2017) (Radu, 2011, pp. 29-30). In this respect, by G.D. 1024/2010 it has been established that the Labor Inspection acts mainly for the prevention, detection and sanctioning of undeclared work, aiming by own means to combat and diminish this phenomenon⁵ undeclared work. In this respect, by G.D. 488/2017 is mentioned among the attributions of the Labor Inspection and the fact that it controls the employers' use of the labor force in order to identify the cases of undeclared work, and notifies, as the case may be, according to the legal provisions, the criminal prosecution bodies. In order to combat undeclared work, the control is carried out at the workplace where the persons performing the activity are identified, on the basis of the identification cards, the data in the general register of the employees sent to the labor inspectorate, as well as any other documents requested by the labor inspector⁶.

Undeclared work can be defined as the work done by a person for and under the authority of an employer for a sum of money or other benefits in kind but in the absence of an individual employment contract concluded in written form under the terms of the law. In our opinion, undeclared work has a negative impact on the economy and national competition is a true social parasite. The effects of undeclared work are seen both in the short and long term for the individual, society and the state budget. Failure to pay social contributions and taxes affects social security systems, and people who work

⁴ Art. 6 paragraph 2, point B, from Law no 108/1999.

⁵ Point. 2 paragraph 2.

⁶ Art 12 pct. B let. b) from G.D. 488/2017.

“on the black” do not benefit from any of the forms of social protection provided by legal rules (Roș, 2003, pp. 380-384). Moreover, the competition between economic operators must start from the premise that the economic activity is carried out legally, including by observing the legal provisions applicable to the labor relations and the protection of the employees' rights.

In this context, for example, the protection of employees' rights is also relevant in relation to the legislation governing the transactions carried out in the public procurement market. Specifically, through Community legislation - the 2014 generation of public procurement directives⁷ mechanisms are created to strengthen the role of labor relations in the procurement market. The Procurement Directives include in the preamble, in addition to the objectives of the direct contribution to the achievement of the Europe 2020 strategy, “a strategy for smart, sustainable and inclusive growth” (Directive 2014/24 / EU)⁸ (40) / Directive 2014/24 / EU and subparagraph (55) / Directive 2014/25 / EU) and objectives related to the promotion of adequate standards in labor relations⁹. Also, Directive 2014/23 / EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts distinguishes the same issues (paragraphs 3 and 58 respectively).

National procurement legislation¹⁰ has established mechanisms for compliance with applicable obligations, including in the field of work, pursuant to Article 18 (2) of Directive 2014/24 / EU and Article 36 (2) of Directive

⁷ Directive 2014/24 EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 / EC and Directive 2014/25 / EU of the European Parliament and of the Council of 26 February 2014 on procurement (Text with EEA relevance) THE COMMISSION OF THE EUROPEAN COMMUNITIES, Having regard to the Treaty establishing the European Community, Having regard to the Treaty establishing the European Community, Having regard to the Treaty establishing the European Community, Having regard to Directive 2004/17 /

⁸ “Public procurement plays a key role in the Europe 2020 strategy set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020 - A strategy for smart, sustainable and inclusive growth' (hereinafter the 'Europe 2020 strategy' for smart growth, environmentally friendly and inclusive), representing one of the market instruments to be used for smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. (...)”

⁹ “The enforcement of environmental, social and labor law provisions should be enforced at the relevant stages of the procurement procedure when applying the general principles governing the selection of participants and the award of contracts when applying the exclusion criteria and at the time application of the provisions on abnormally low tenders. The necessary verification for this purpose should be carried out in accordance with the relevant provisions of this Directive, in particular those governing evidence and declarations on their own responsibility.”

¹⁰ Law no. 98/2016 on public procurement, Law no. 99/2016 on sector acquisitions and Law no. 100/2016 on concessions of works and concessions of services, published in the Official Gazette no. 390 of 23 May 2016 - amended and completed later.

2014/25 / EU¹¹ taking into account each Annex as appropriate (Annex X / Directive 2014/24 / EU and Annex XIV / Directive 2014/25 / EU - List of international environmental and social conventions referred to in the Articles - with a number of 8 ILO conventions out of a total of 12 nominated international conventions and paragraph 37 of the preamble to Directive 2014/24 / EU and paragraph 52 of the preamble to Directive 2014/25 / EU¹², this approach is also reflected in paragraph (55) of the preamble to Directive 2014/23 / EU.

Thus, if an economic operator fails to comply with his obligations in relation to employment relationships, an authority or a contracting entity acting in the role of a buyer must:

a. exclude the economic operator from the procedure (taking into account and subject to the rehabilitation mechanism presented and a time limit), according to the provisions of art. 164-165 of Law 98/2016, of the provisions of art. 177-178 of Law 99/2016 or the provisions of art. 79-80 of Law 100/2016;

b. reject an offer that does not show compliance with labor law in accordance with art. 143 of GD 394/2016, art. 137 of GD 395/2016 or art. 89 of the HG. 867/2016.

c. reject an offer that has an unusually low price due to non-compliance with the obligations in the field of labor relations, by reference to what is to be executed, provided or rendered under the contract, according to art. 210 of Law 98/2016, art. 222 of Law 99/2016 or Art. 89 of Law 100/2016.

The current legislation in the field of public procurement also expressly establishes (Article 51 of Law 98/2016 and Article 64 of Law 99/2016, as subsequently amended and supplemented)¹³, the fact that a contracting

¹¹ "The Member States shall take appropriate measures to ensure that economic operators comply with the applicable environmental, social and labor law obligations laid down by Union law, national law, collective agreements or international law in the execution of public contracts environmental, social and labor domain listed in Annex (...)".

¹² "In order to adequately integrate environmental, social and labor requirements in public procurement procedures, it is of particular importance that Member States and contracting authorities take appropriate measures to ensure the fulfillment of their obligations under environmental, social and labor law of the work that applies in the place where the works are performed or the services are provided, and derives from laws, regulations, decrees and decisions, both at national and Union level, as well as from collective agreements, provided that these rules and their application comply with Union law. Similarly, obligations arising from international agreements ratified by all Member States and listed in Annex X should apply during the performance of the contract. On the other hand, this should not prejudice the application of more favorable working and employment conditions for workers."

¹³ "(1) The contracting authority shall specify in the awarding documentation the mandatory regulations in the fields of environment, social and labor relations established by legislation adopted at European Union level, national legislation, by collective agreements or by international treaties, conventions and agreements in these fields, to be observed during the

authority or a contracting entity has the obligation to specify in the awarding documents, from the outset, the labor relations regulations as applicable in the procedure, the participating economic operators being “kept to the applicable obligations (Article 38 of Law 100/2016)¹⁴. Moreover, in the implementing rules of Laws 98 and 99 (in Article 137 of GD 395/2016 and Article 143 of GD 394/2016)¹⁵, it is even established that the tender, which does not comply with the legal provisions established as mandatory, must be declared by the evaluation committee to be unacceptable and inappropriate as a result of non-compliance with Articles 51 of Laws 98/2016 and 64 of Law 99/2016 respectively. Also, in the implementing rules of Law 100/2016 (in Article 20, paragraph (1), letter f) of GD 867/2016)¹⁶, the legislator states that where the nature of the activities covered by the public procurement contract determines the need for certain special conditions, including labor protection, the contracting authority / entity is required to enter these conditions in the contract documents.

Thus, the contracting authority or entity establishes in a competition the obligation to demonstrate compliance with the rules in the field of employment relationships and for subcontractors or for economic operators that play the role of third-party supporters (in accordance with Article 55 of Law 98/2016, Article 68 of Law 99/2016 or Article 94 of Law 100/2016). Where economic operators acting as a subcontractor or a supportive third party do not demonstrate compliance with the rules on labor relations, the contracting authority or entity requires their replacement (Article 183 of Law 98/2016, Article 197 of Law 99/2016 or Article 78 of Law 100/2016)¹⁷, prior to awarding the contract. And,

execution of the public procurement contract or to indicate to the competent institutions from which the economic operators can obtain detailed information on the respective regulations. (2) In the case provided in par. (1), the contracting authority also has the obligation to require economic operators to indicate in the tender that they have taken into account relevant obligations in the fields of the environment, social and labor relations.”

¹⁴ *”In the execution of concession contracts, economic operators are compelled to comply with the applicable environmental, social and labor relations obligations established by legislation adopted at European Union level, by national law, by collective agreements or by international treaties, agreements and agreements these areas.”*

¹⁵ *“(…) does not ensure compliance with mandatory regulations on specific employment and labor protection conditions, when this requirement is formulated under (...) Law (...)”.*

¹⁶ *“(…) (1) The specification shall contain: (f) if any, the special conditions imposed by the nature of the activities to be covered by the concession contract, such as safety conditions in operation, occupational safety, the use and preservation of heritage or the protection and enhancement of the national heritage, the conditions for the protection of the state secret, the use of special-purpose materials, the special conditions imposed by the conventions and conventions to which Romania is a party (...)”.*

¹⁷ *”The relevant measures should be applied in accordance with the basic principles of Union law, in particular with a view to ensuring equal treatment. These relevant measures should be*

just as it could not otherwise have been, in the implementing rules of Law 100/2016, as approved by GD 867/2016, even the allocation of risks in the case of works concessions (Annex 1 to the GD), point 8 with “labor disputes / inadequately qualified personnel *“being mentioned as a risk that could have consequences in “delay in implementation and rising costs”*”.

Moreover, among other things, in the National Strategy for Public Procurement, approved by GD 901/2015, reference is made to the need to “professionalize” staff carrying out planning, running, public procurement management as one of the problems identified and analyzes it extensively, proposing appropriate remedies. It is clear that the approach to this problem must be kept in close connection with the regulations in the field of activity of the authorities with general and specific responsibilities in the control, monitoring, and working relations. Given this example of public procurement law, apparently unrelated to labor relations, health and safety at work, it is clear that the impact of the importance of compliance with labor law is essential and its scope be general and under the control of the competent authority.

Conclusions

From our point of view, Labor Inspection now plays a particularly important role in ensuring compliance with labor law legislation as well as occupational health and safety legislation. As we have shown, the Labor Inspectorate's functions and duties allow it to intervene with administrative measures, including coercion, to respect the rights of employees. Practically, Labor Inspection, on the basis of the competences established by law, carries out administrative justice in order to apply the legislation in concrete terms.

Also, the issues identified above in relation to transactions on the procurement market reflect the materialization of employee protection policies, which both contribute to strengthening the role of the Labor Inspectorate and to meeting the objectives set out in the Agenda 2030 for Sustainable Development established at the Summit the United Nations on September 2015, when Romania joined the leaders of the 193 UN member states in the global action program in the field of universal development and promoted the balance between the three dimensions of sustainable economic, environment.

applied in accordance with Directive 96/71 / EC of the European Parliament and of the Council (11), in a manner which ensures equal treatment and does not discriminate directly or indirectly against economic operators or workers from other Member States.”

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