PATRIMONIAL LIABILITY OF FORESTRY PERSONNEL IN LIGHT OF EMERGENCY ORDINANCE NO. 59/2000 REGARDING THE STATUS OF THE FORESTRY PERSONNEL AND THE JUDICIAL PRACTICE IN THE MATTER

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Abstract

The present article aims at carrying out a brief analysis of the patrimonial liability of the forestry personnel, regarding the payment of the value of illegally cut shrubs from the forest fund under their guard, taking into account both the jurisprudence in the matter and the provisions of Emergency Ordinance no. 59/2000 regarding the status of forestry personnel.

Keywords: *forestry personnel, liability, E.O. no. 59/2000, payment, illegal cuts, shrubs*

1. Introduction

The concept of patrimonial liability has been extensively analyzed, both by the doctrine, and by the courts, in the application of various legislation. However, in this article we are considering a patrimonial lisbility that is less common. This is because it represents a smaller percentage than the patrimonial liabilities that we have already been accustomed to. Therefore, the article attempts to deal with the way this concept is applied in reality to the forestry personnel managing districts.

2. Applicable law and forestry offenses.

The forestry personnel benefits from a special regulation, namely Government Emergency Ordinance no. 59 of May 26th 2000[1] on the Status of forestry personnel. The Ordinance is a normative act from which all actions directed against forestry personnel must be initiated. It is a special regulation, which, in certain situations, can be supplemented by other acts.

Thus, the Ordinance sends to the content of article 58 of Law no. 188/1999 on the Status of civil servants[2], the provisions of the latter act being applied to the extent that the emergency ordinance does not stipulate otherwise.

By the Decision of the High Court of Cassation and Justice no. 3/2014[3], pronounced by the panel regarding the referrals in the interests of the law, the court[4] established that "*the actions of patrimonial liability against forestry personnel responsible for forest protection and damages caused on the guarded forest districts, under the conditions of art. 1 lit. a) of the Government Emergency Ordinance no. 85/2006, are within the material competence of the labor courts*".

Such a judicial approach was necessary, in consideration of the fact that there were cases in which actions regarding the patrimonial liability of forestry personnel were dismissed as inadmissible. For instance, we are referring to Decision no. 697 of February 12th, 2013[5], pronounced by the High Court of Cassation and Justice, stating that: "the reparation of the damages caused by the civil liability of the civil servant to the public authority or institution, shall be set by issuing the head of the authority or the public institution with an order or provision of imputation within 30 days from the discovery of the damage". This particular decision was referring to an action engaged by the employer against a forester, regarding the concept of patrimonial liability.

Consequently, it was appreciated that since the forester also has the status of a civil servant, his liability could have been achieved only through a payment commitment. Thus, considering that there was no such payment commitment, which could have been challenged under the Law no. 554/2004 on administrative litigation[6], it was appreciated at that time that the employer does not have the possibility to follow the classical path of patrimonial liability.

Such an approach could not be tolerated indefinitely, because the forester is also an employee with an individual labor contract, so it is only natural that he should respond to the extent to which he causes damage to his employer regarding his work.

Any patrimonial liability against the forester will have to meet the classical conditions for engaging such

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[1] Hereinafter referred to as the Ordinance, normative act republished in Official Journal of Romania no. 238 of May 30th, 2000, as further amended and supplemented.

[2] Published in Official Journal of Romania no. 365 of May 29th, 2007, as further amended and supplemented.

[3] Published in Official Journal of Romania no. 445 of June 18th, 2014, as further amended and supplemented.

[4] The referrals in the interests of the law were initiated by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice and the Board of Management of the Bacau Court of Appeal.

[5] Available on the website www.scj.ro, accessed on March 18th, 2019.

[6] Published in Official Journal of Romania no. 1154 of December 7th, 2004, as further amended and supplemented.

an approach, namely: the forester must be an employee who caused the damage, the existence of an illicit deed committed by the person concerned, in connection with his work, the existence of an injury to the employer and the causality connection between the unlawful act committed and both the injury and the guilt of the employee. In the event that one of the conditions mentioned above is not fulfilled, it will not be possible to undertake the patrimonial liability against the forestry personnel.

As a consequence, following Decision no. 3/2014 issued by the High Court of Cassation and Justice, the concept of the liability of the forestry staff was clarified with the motivation that such actions were to be engaged on the field of labor law, as it is also stated in the Decision no. 5372 of November 11th, 2015, pronounced by the Craiova Court of Appeal[7].

However, it should be mentioned that, in relation to the patrimonial liability of the forestry personnel, the general labor law conditions will still have to be slightly adjusted, as the High Court of Cassation and Justice even stated by resolving the referral in the interest of the law, namely: "the existence of damage caused to forest vegetation by illegal tree cuts; the damage is detected and evaluated by the assigned forestry personnel; the guarding of the forest vegetation in respect of which the damage was caused is an attribution of the forestry personnel having the professional degree of forester, as stipulated in the individual labor contract; the damage found and evaluated occurred as a result of the failure to guard the forest vegetation; in order to recover the damages found and assessed the injured party will engage an action regarding the patrimonial liability against the guilty person (the person having guard duties), under art. 6 par. (1) of Government Emergency Ordinance no. 85/2006[8]".

Therefore, in order to successfully carry out a patrimonial action against a forester guarding a district, it is necessary that all the above conditions be met cumulatively.

In addition to the Ordinance, the provisions of the Government Decision no. 1076/2009 for the approval of the Forest Fund Guard Regulation[9], which details the organization of the guard duties and obligations of the forestry staff, should also be considered.

Given the issues already exposed, however, in reality we encounter another situation that can ultimately lead to the patrimonial liability of the forestry personnel, namely when a criminal case is opened when forestry offenses are encountered.

The related regulation is mainly found in the provisions of the Forestry Code - Law no. 46/2008[10], more precisely Title VI - Responsibilities and sanctions, art. 104 being more than clear regarding the purpose of this title, namely: the violation of the provisions of this Code attracts, as the case may be, disciplinary, material, civil, contraventional or criminal liability, according to the law.

In a relatively recent article, a difficulty in considering a certain deed either as a forestry contravention or as a forestry offense has been noticed. The whole situation was due to the lack of regulations regarding the value of cubic meters of wood. Thus, it was concluded that "*in the given situation, based on the special legislation in the matter, it is simply not possible to distinguish between criminal liability and contraventional liability*"[11]. Even the judicial bodies noted that there was a real problem regarding "*how to determine the damage caused following the marking, cutting and tree exploitation in unlawful conditions*"[12].

Thus, there are a number of regulated deeds, some of which sanctioned as forestry crimes and punished as such.

For example, reading art. 107 of the Forestry Code, we observe some of the deeds the legislators ruled against: "*cutting, breaking, destruction, degradation or removal of trees, saplings or undergrowths from the national forest fund and the forest vegetation outside it, without any right, regardless of the form of ownership*". These deeds are punished differentially, depending on the amount of damage caused.

Therefore, two situations can be encountered: either the damage is not at least 5 times the average price of one cubic meter of wood at the time of the offense, at which point we will not consider the deed as a forestry offense but a forestry contravention; either the damage exceeds the value at which it could be considered a contravention and thus turns into an offense.

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[7] The Decision of the Craiova Court of Appeal can be read on the website https://www.avocatura.com/speta/596919/actiune-in-raspundere-patrimoniala-curtea-de-apel-craiova.html#ixzz5dKIxRmbk, accessed on March 18th, 2019.

[8] on the establishment of ways of assessing damage to forest vegetation in and out of forests, published in Official Journal of Romania no. 926 of November 15th, 2006, as further amended and supplemented.

[9] Published in Official Journal of Romania no. 721 of October 26th, 2009, as further amended and supplemented. Hereinafter referred to as the Regulation.

[10] Published in Official Journal of Romania no. 238 of March 27th, 2008, as further amended and supplemented.

[11] See in this respect, Valerian CIOCLEI, „*Situația infracțiunilor de tăiere fără drept de arbori și furt de arbori din domeniul forestier național prevăzute de Codul silvic. Chestiune de drept*", article published on February 2nd, 2015, on the following website https://www.juridice.ro/362462/situatia-infractiunilor-de-taiere-fara-drept-de-arbori-si-furt-de-arbori-din-domeniul-forestier-national-prevazute-de-codul-silvic-chestiune-de-drept.html, accessed on March 18th, 2019.

[12] See in this respect, Augustin LAZĂR, Elena Giorgiana HOSU, „*Analiza cauzelor având ca obiect infracțiunile silvice, în care s-au pronunțat hotărâri judecătorești rămase definitive*", available on the website http://revistaprolege.ro/analiza-cauzelor-avand-ca-obiect-infractiunile-silvice-care-s-au-pronuntat-hotarari-judecatoresti-ramase-definitive/, accessed on march 18th, 2019. The study was published in the volume of the conference named „*Apărarea mediului și a fondului forestier prin dreptul penal*", by A. Lazăr (coordinator), M. Duțu (coordinator), E.G. Hosu, A. Duțu, Academia Romana Publishing House and Universul Juridic Publishing House, Bucharest, 2016, p. 105-221.

Punishments begin at 6 months and reach up to 7 years, with the indication that, in some cases[13], the special limits of the punishment increase by half when the act is committed:

a) by a person having a weapon or narcotic or paralytic substance on him;
b) during the night;
c) in the forest situated in natural areas, protected areas of national interest;
d) by forestry personnel.

This increase of the punishment is fully justified as it addresses situations that denote more dangerous behavior than just the regular illegal tree cutting activity, which can cause serious environmental consequences. For this reason, the legislator considered it an appropriate approach to increase by half the special limits of the punishment.

Therefore, if a deed fulfilling the conditions to be classified as a forestry offense is committed, the forester, having the status of a verifying organ, will record the event in a report and the competent bodies will be announced thereafter. There are also situations in which the perpetrators are surprised flagrantly, which makes the work of the judiciary bodies substantially clearer.

Thus, if the missing timber is reported by the forester, he will notify the competent police bodies to investigate and find the perpetrator. This can take a long time, depending on the extent of the damages and the presence or lack of evidence.

Once the competent bodies are legally notified of the situation, the prosecutor, along with the judiciary bodies, will most likely send a closing ordinance, mainly based on the "*in dubio pro reo*" principle. The employer, wishing to recover the damages, will probably complain to the first prosecutor against the closing ordinance, according to art. 339 par. (1) Criminal Procedure Code[14].

Assuming that the first prosecutor communicates to the employer unit an ordinance rejecting the complaint against the closing ordinance, we appreciate that the rational steps will be followed, namely the provisions of art. 340 Code of Criminal Procedure.

Consequently, the situation moves to the next procedural step, meaning the preliminary chamber court, that will analyze the complaint against the closing ordinance. Precisely at this moment, there are two possibilities that the court has: either reject the complaint of the employer or admit it.

In the first case, therefore, when the complaint is rejected, the employer unit gains the certainty that the perpetrator shown in the forester's report did not commit the forestry offense. In this particular situation, the employer can address the court with a patrimonial liability action against the forester.

In the second case, however, by admitting the complaint against the closing ordinance of the prosecutor, the case will be referred back to the prosecutor in order to continue the investigations in the case. Therefore, the entire procedural cycle described earlier will likely be resumed: the closing ordinance, the complaint of the employer to the First Prosecutor, the rejection ordinance and the employer's complaint to the preliminary chamber of the court.

We would like to draw attention to the fact that illegal cuts do not always relate to large amounts, but on the contrary. The perpetrators usually cut timber illegally in order to heat their own home, therefore for personal use. Consequently, the employer unit can end up spending more than it can actually be recovered, since for every closing ordinance the prosecutors give, additional costs can be added.

An act of particular importance is the Government Decision no. 1076/2009 for the approval of the Forest Protection Regulation, which brings more light to the notion of patrimonial liability, as a follow-up to the closing of a criminal case.

Consequently, in accordance with the provisions of the Regulation, the forester is responsible for the way in which he carries out the guarding activity of the district, one of his obligations being to defend "the integrity of the forest fund against the illegal occupation or use of land, illegal cutting of trees and the removal of wood or other forestry products, the destruction of buildings, installations, terminals, crops, degradation of trees, seedlings and undergrowths, as well as any illegal acts"[15].

Therefore, one could consider two situations:

On the one hand, when the persons who committed the forestry offenses are convicted, meaning that the recovery of the damages is left to their responsibility. Usually the forestry units are already a civil party in the dispute. From this perspective, the forester has no cause for concern, as the responsible persons will be held accountable accordingly.

On the other hand, there are complaints about forestry offenses that are not followed by a conviction, for a multitude of reasons. We are especially referring to the "*in dubio pro reo*" principle. The criminal case ends when the preliminary chamber court rejects the complaint against the prosecutor's closing ordinance.

Thus, in the second situation, the next step will be the introduction of a patrimonial liability action against the forester who has managed the forest area from which the trees were illegally cut.

It is an unusual situation, and maybe even unfair, for at least two reasons: a) Foresters are the ones who immediately announce the committing of forestry offenses, they also have the status of a verifying organ, drawing up a report in this respect; b) the fact that the persons mentioned in the report as those who committed the offense were not convicted, it does not automatically mean that the forester would have a fault

[13] Art. 107 par. (2) Forestry Code.
[14] Law no. 135/2010, published in Official Journal of Romania no. 486 of July 15th, 2010, as further amended and supplemented.
[15] According to art. 6 of the Regulation.

in this respect. Besides, the work schedule of a forester should fit within the 8 hours / day.

However, a request for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union by the Dâmboviţa County Court is particularly relevant. It states that "*under the applicable national rules, a forester has to carry out his duties 24 hours out of 24, seven days out of seven, without receiving any remuneration other than that of a working schedule of eight hours per day, and this is because his liability is permanently and continuously approached*"[16]. It is obvious that it's not possible for a single person to guard the whole forest fund, especially since the areas are hardly accessible and difficult.

On the other hand, the National Forestry Office - Romsilva, in paragraph 34 of the same preliminary ruling, held that "a forester such as the appellant in the main proceedings enjoys a flexible program and can therefore carry out his tasks during one day without exceeding eight working hours and not being held to a fixed schedule between 8 a.m. and 4 p.m.".

The Court of Justice of the European Union stated in paragraphs 54 to 55 that "*according to the information submitted to the Court, a flexible contract such as that at issue in the main proceedings seeks to allow, depending on the characteristics of the unit in which the worker is employed or on the work performed, a free distribution of working time, provided that it is respected for a normal period of 40 hours a week. Nontheless, in a situation such as that at issue in the main proceedings, it may also be relevant, as the Commission has rightly pointed out, the fact that the forester is the only one responsible for the guarding of a forest district, with no possibility of working in shifts and no other means of fulfilling the permanent security requirement*".

As it has already been mentioned above, the prosecutors usually give closing ordinances, incorporating the "*in dubio pro reo*" principle. Considering that the offenses we have in mind were committed on a surface of a forest fund, we reiterate that the roads are not easily accessible, which is why, when it comes to understand that a deed was comitted, it may have already passed a few days. As the Court has also emphasized, there is no practice of working in shifts, so that the permanent guarding of the forestry fund might actually benefit from a minimum chance of succeeding.

At this point, it is quite difficult for the judicial bodies to find the perpetrators, mainly because we are talking about offenses regarding timber, which is relatively easy to transport and transform, so that the traces may be lost in a short amount of time. Moreover, except the situations where the perpetrators are caught in flagrante circumstances, it is very likely that they will again be able to rely on the principle above, since the means of proof remaining at the disposal of the judicial authorities are, basically, the shrubs of the illegally cut trees. In consequence, having no access to audio-video samples nor to testimonies of other people, it is usually not possible to establish the certain guilt of a person.

3. Conclusions

In view of the above-mentioned issues, we appreciate that a change in legislation may be beneficial, maybe in the sense of explicitly regulating that illegal tree cuts that rise to a certain already established value will be passed on costs. Another possibility could be the exclusion of the patrimonial liability of the forester, if the personnel drafts the report and complies with all the legal conditions, but the judicial bodies, respectively the preliminary chamber, conclude that there is insufficient evidence to establish with certainty the guilt of a certain person, suspected of illegally cutting trees.

However, if the legislator withdraws the foresters from full responsibility, we might reach a point where they may even cause the criminal phenomenon. Thus, they could cut and sell the timber themselves, knowing they can cover simply by completing a report containing the so-called losses.

In any case, the Romanian legislator should find in the future a way in which neither the employer nor the foresters do not abuse such regulations. At the present moment, we find ourselves in the situation where foresters are fully responsible for all damages caused to a forest fund, if no other responsible persons are found, regardless of the fact that it is impossible for a forester to secure the complete guard of a forest fund, at any time, day or night.

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[16] Paragraph 35 of the Ordinance of the Court of Justice of the European Union (Sixth Chamber) from March 4th, 2011, available on the following website:http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30db0f7461975de84952935ae91661cb8f34.e34KaxiLc3qMb40Rch0SaxuLbhr0?doclang=RO&text=&pageIndex=0&part=1&mode=lst&docid=81756&occ=first&dir=&cid=393348, accessed on March 18th, 2019.

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