Jurčová M.

doc. JUDr., PhD., Department of Civil and Commercial Law Law Faculty, Trnava University, Slovakia

DONATION CONTRACT AND THE PRINCIPLES OF GRATUITOUS CONTRACTS IN THE SLOVAK PRIVATE LAW [1]

I Historical background and development of private law with respect to donation

II Present- day contract for donation

1 Legal regulation of donation

2 Object of donation

3 Form requirements

4 The donation contract and the transfer of ownership

5 Special cases

5.1 Donation mortis causa

5.2 Donation between spouses

6 Obligations and remedies in connection to liability

6.1 Defects

6.2 Default

6.3 Damage

6.4 Unjustified enrichment

7 Contesting

8 Termination of contract

8.1 Fundamental breach of good moral manners

8.1.1 Predominant view

8.1.2 Separate opinion

8.2 Termination based on the defects of the donation

9 Mixed contracts

9.1 Donation contract and the easement

10 De lege ferenda

III. Gratuitous contracts and employment contracts

1. Gratuitousness
2. Remuneration for work
3. Relationship between the Labour Code and the Civil Code

IV Conclusion

I. Historical background and development of private law with respect to donation

Historical development of the Slovak private law has been determined by the development of the Slovak nation and statehood. Original Slovak people whose tribes had moved to the area of present-day Slovakia, have already belonged to the family of Slavic legal culture. At the time of 5th -6th century AD the fundamentals of the Slovak private law had been modest but fully comparable to that of the other tribes in the area of Carpathian Mountains and the Danube--maybe Slovak tribes had been on a slightly higher stage of development [2]. Great Moravia was a Slavic empire existing in Central Europe between 833 and the early 10th century. At the times of this first Slovak state formation the key role in the private law belonged to the common law. Weakened by internal struggle and frequent wars, Great Moravia was ultimately overrun by Hungarian invaders in the early 10th century. For almost a thousand years Slovakia had become the part of the Ugrian Kingdom and the original Slavic common law was influenced by the German, Canonical and Roman law. From the 12th to 16th century Roman private law had the greatest impact on Slovak private law in spite of the fact that its general adoption had not been accomplished. After the creation of the Austro- Hungarian Empire under the rule of Habsburgs in 1526, private law in Hungary came under the influence of Austrian law. We can assume that the common law had been the main source of private law in Slovakia from ancient times to 1950. The end of World War I brought about the dissolution of the Austro-Hungarian monarchy. Slovakia became part of the Czechoslovak Republic. Newly founded state had preserved the continuity of private law at the substantial measure in the process of creating law system. The Act No 11/1918 Coll. had adopted foregoing civil law effective in Czech countries and in Slovakia; i.e. General Austrian Civil Code /ABGB/ had remained effective and applicable in Bohemia and Moravia (Czech lands) as well as Hungarian common law in Slovakia. This legal duality had been preserved up until 1950 [3].

The donation contract had been part of the Hungarian common law. Later, the draft of the Act on General Private Law (Civil Code) was prepared in the interwar Czechoslovak republic in 1938, which was not enacted due to rapid war events. The content and the standard of this draft had been fully conformed to the present- day regulation in the advanced countries [4]. On the other hand, this draft had been more acceptable for Czech part of Czechoslovakia. Philosophy of private law unification resulting in above mentioned draft had been based on a slight redaction(revision) of ABGBs ´ provisions approach [5]. The objections of Slovak lawyers, aimed at the preservation of the

specialties of Slovak law stemming from Hungarian law had not been very successfully pleaded [6].

The revolutionary changes in February 1948 caused the change of the political situation. The principles of civil law were distorted under the communist regime. In 1950 new Civil Code No.141/1950 Coll. was enacted, but its regulation of donation incorporated only fragments from the 1938 ´s draft (from §383 to §386). This brief and inadequate regulation of the donation contract has been taken over in Civil Code, Act no.40/1964 Coll. (hereinafter referred as "Civil Code") as well as in 1991´s ample amendment of its law of obligations in practically untouched version. At the birth of the independent Slovak republic in 1993; Civil Code and the other parts of the civil legislature became the part of the Slovak body of laws according to the Article 152 of the Constitution. Generally prevailing opinion of academics and legal practitioners considers contemporary civil law regulation to be only the provisional arrangement which is not maintainable in the long term. That is the reason for the work on the re-codification of the Slovak private law [7].

II. Present- day contract for donation

1. Legal regulation of donation

Civil Code is very brief in regulation of the donation contract (§628-630) in its 8th part, Law of obligations [8].

Donation is a contractual relationship based on a donation contract. By the contract for donation the donor renders or promises something gratuitously and the donee accepts this donation or promise. It means the donations could not have been performed by a unilateral juridical act, because the offer of the donor has to be accepted by the donee. It is impossible for the donor to force on the donee any kind of enrichment against his or her motion.

2. Object of donation:

Civil Code does not restrict the objects of donations only to the goods or things. According to the Slovak law things mean corporeal movable property and immovable [9]. The legislator has introduced as the object of donation the broad concept of " something". The objects of donation may be comprised of things; rights, provided that it is allowed by the nature of this right (assignment of rights); or other assets (e.g. substitution of a new debtor – donor). Object of donation could be doing work where donor undertakes to render to the donee a certain act or acts (work) resulting in the creation of goods, construction, design, etc [10]. Terminological inconsistence of donation contract regulation brings about discussion about its object. The legislator uses three terms: "something" (§628 Civil Code), "thing" (§629 Civil Code), "gift"(§630 Civil Code) [11]. It is important to distinguish donation contract from the other types

of specific contracts, whose objects are certain kinds of services as well and could have been performed gratuitously (Mandate contract § 730 Civil Code, Storage Contract §748Civil Code). Securities are the other group of assets possible to be the object of donation. According to §9 para 2 of Act 501/2001 Col. on securities and investment services, we should apply provisions of Civil Code on corporeal movable property to securities; otherwise such application has been excepted by special act.

3. Form requirements

According to the form requirements, we should distinguish between "real" and "consensual" donation contracts. In the case of the real contracts, the donor transfers things or other assets immediately to the donee and the donee takes them over at the time of donation [12]. The real contract does not have to be in writing. On the other hand, when the donor only promises to render something such consensual contract is valid only in writing. When delivery and acceptance of delivery are not made at the time when the donation contract has been concluded, stricter requirement of a written form applies. The form of the donation contract may be also ordered by its object. Law determines the written form of the contract provided object of donation is immovable or right and other asset (an assignment of right or a substitution of a new debtor). In the case of a contract on transfer of immovable, the parties' manifestations of intent (offer and acceptance) must be contained in the same document. Moreover, the signature of the donor (transferor) has to be officially verified (attested) by a notary or a local authority. The act on securities and investment services requires the donation contract to be concluded in writing.

4. The donation contract and the transfer of ownership

The donation contract belongs to the group of contracts establishing the obligation to transfer ownership of the property of movables or immovables. The donation contract constitutes a title at the first stage of the property acquisition- the "modus " at the second stage differs according to the object of contract. In Slovakia, the transfer of property is based on "causal" system, the obligation to transfer and transfer (disposition) are closely connected and dependent on each other. As the third condition, we should stress very strictly preserved principle "nemo plus iuris ad allium transferre potest quam ipse habet". The protection of ownership right is stronger than possibility of good faith acquisition in Slovakia legal environment. Where movables are transferred on the basis of the donation contract, ownership to such thing is acquired by handing over of the movable, unless statutory provisions regulate otherwise or unless parties have agreed differently [13].The donee shall acquire ownership to the immovable upon registering the ownership title in

the Real Estate Register (kataster) provided object of the donation contract is the immovable property. This is mandatory provision; parties of contract are not allowed to negotiate moment of the ownership acquisition to immovable differently.

Representatives of Slovak legal theory as well as the legislators have been avoiding the use of the term "ownership of securities" rather the term "proprietary rights" to securities has been preferred. This topic is closely connected to the above mentioned §9, 2 of Act on securities and investment services according to which we should apply provisions on corporeal movable things (property) to securities. In spite of this provision, according to the legal theory securities are not corporeal movable things. The acquisition of the proprietary right to securities by the donation contract presupposes differentiation between deposit-entry securities and paper securities. The proprietary right to deposit-entry securities is acquired by the donee upon registering in the Central Depositary on Securities in the Slovak republic. The paper securities are issued in various forms which are decisive for the way of their transfer (handover, endorsement, assignment of rights).

5. Special cases

5. 1 Donation mortis causa

The donation contract is void when the contract shall/should be performed after the donor's death. Slovak legal regulation does not allow donation mortis causa, because it enables the circumvention of some mandatory provisions of succession law.

5.2 Donation between spouses

The Civil Code does not expressly regulate donation between spouses but the basic rules could be deduced from the provisions on matrimonial property. Husband and wife are together owners of the matrimonial property with content regulated by the statutory provision or modified by their agreement written in the form of a notarial deed. Each of the spouses may be a separate owner or co-owner of property, which does not belong to the matrimonial property. This individual property of the spouses could involve the property acquired before the marriage or property acquired by donation or inheritance. Property which by its nature serves personal needs of one of the spouses or property which on the basis of the restitution legislation was restituted to one of the spouses who had owned it prior to the marriage, or was restituted to this spouse as the legal successor of its original owner also does not fall under the matrimonial property. Spouses must have fully independent right of disposal with their separate ownership. In the case in which the object of donation belongs to the matrimonial property, we should apply provisions on

matrimonial property. A special case is created in the situation when one of the spouses would like to donate an object of their matrimonial property to the other spouse. It will be qualified as the legal act circumventing (§39 Civil Code) mandatory provisions of Civil Code on content and existence (duration) of the matrimonial property [14].

6. Obligations and remedies in connection to liability

Regulation of donation contract parties' duties in Civil Code (as well as whole donation contract regulation) is extremely brief. The donor is obliged (a) to render an object of donation in the accordance with the terms of contract and (b) to inform the donee about the defects of which he is aware. Civil Code keeps silent about the duties of the donee. His duties could be generally deduced from the provisions regulating the creditor's (obligee's) duties. The creditor is obliged to take delivery (accept) of a properly rendered performance or co- operate when such co- operation is necessary for performance of the obligation .

6. 1 Defects

When the donor offers a gift, he is obliged to inform the donee about any defects of which he is aware. If the donation (gift) has defects about which the donor failed to inform the donee, the latter has the right to return it. The donee has this right regardless of the donor's previous awareness of the defects. General regulation of the liability for defects is not applied to gratuitous contracts such as the donation contract or contract on borrowing (gratuitous loan).

6.2 Damage

The donor is liable for the damage induced by breaching his legal obligation to inform the donee about the defects of donation according to the provisions of Civil Code on liability for damages (Article 420 CC etc). The donor will be relieved of its liability if he proves that he did not cause the damage (intentionally or negligently). The general conception of liability for damages is based on rebuttable presumption of infliction.

6.3 Default

Liability for default is regulated in the general provision of the Law of obligation in Civil Code and the general consequences of the default in the obligation relationship will resort in this case. The default may occur in the consensual donation contract. One may wonder whether it does not constitute breach of good morals to enforce the late payment interest payable under donation contract [15].

6.4 Unjustified enrichment

Any person who, to the detriment of somebody else, is unjustly enriched must return what he has acquired. Liability for damages and unjustified enrichment is regulated by the 6th part of Civil Code. This Law describes five grounds for unjustified enrichment besides its general concept: benefit acquired by a) performance of an act without legal reason, b) performance of an act based on a void act in law, c) performance in respect of a legal ground which has ceased to exist d) benefit acquired from dishonest sources and e) if someone else performed an act which in accordance in law the unjustified enriched person should have performed himself .In connection to the form requirements for the donation contract , we should point out, that obligation invalid (void) due to the defect in form, is not deemed to be unjust enrichment (§455). This provision stipulates exceptions from the legal reasons of the unjustified enrichment.

7. Contesting

There could occur cases of contestable relationships based on the donation contracts. Contesting (generally recognized as " actio pauliana")is regulated by Civil Code and by the act No 7/2005 Coll. on bankrupt and restructure. According to the Civil Code creditor may turn to the court to determine that his debtor's acts in law, if they curtail satisfaction of the creditor's enforceable claim, are legally ineffective against this debtor. The creditor has this right if his claim against debtor is enforceable with regard to the debtor's act being contested by the creditor or if his claim has already been satisfied.

It is possible to contest (i.e. to challenge) juridical acts undertaken by a debtor in the preceding three years with the intent of curtailing his creditors' right if this intent should to have been known to the other party. A second group of juridical acts which could be contested are the acts in law by which the rights of the debtor´ s creditors were curtailed in the preceding three years and which occurred between the debtor and persons close to him, or which debtor made in the said period in favor of such persons, except when the other party could not have been aware of the debtor's intention to curtail his creditors' rights, even with the exercise of all due care [16].

8. Termination of contract

Termination of donation contract is possible pursuant to general provisions of obligations law.

A contracting party may terminate the contract only if statutory provisions so provide, or if the parties have so agreed. A party having concluded a contract under duress on conspicuously disadvantageous terms has the right to terminate such contract (§49 Civil Code). According to court decisions , the character of donation contract - gratuitousness – excludes the possibility to examine

whether the contract has been concluded under duress on conspicuously disadvantageous terms [17]. Each of the parties to the contract may reserve the right of termination of the contract and agree on a compensation for termination (cancellation fee) to be paid in such an event. Once a party has at least in part performed the contract or accepted at least partial performance, the party is not allowed to terminate, not even if the cancellation fee is offered.

If the debtor (donor) fails perform the obligation even after a reasonable extension of the time limit granted to him by the creditor (donee), the creditor will have the right to repudiate the contract as the consequence of debtor's default.

The contract has been extinguished by such termination from its inception, unless some statutory provisions regulate otherwise or unless contracting parties have agreed differently. termination of a contract requires settlement pursuant to the provisions on unjustified enrichment.

Obligations based by donation contract may be possibly terminated by the other general ways of discharge of obligations, e.g. agreement on novation, impossibility of performance, death of debtor or creditor (only in exceptional cases), set-off, agreement of settlement of rights, etc.

Apart from these general contract law rules for termination, gratuitous nature of donation has been reflected by the specific rules for termination of the donation contract.

8.1 Fundamental breach of good moral manners

§630 of Civil Code is regulating legal consequences of the donee's ingratitude. The donor can ask the return of the donation if the donee's behaviour towards the donor or the members of his or her family fundamentally breaks good moral manners. This provision has been the most discussed one among those regulating the donation contract, because it is the single case in the present day's regulation establishing the donor's right to" revoke". The majority of court decisions deal with this way of the donation contract's termination. First, we would like to introduce the prevailing opinion of Slovak legal theory and praxis. And second , we can consider some voices from Czech legal theory. Czech regulation of the donation contract is literally consistent with the Slovak one, but as more than 10 years have passed since the dissolution of the Czechoslovak republic, not only the legislature but the interpretation, show-cases, and commentaries all have followed in slightly divergent ways.

8.1.1 Predominant view

The donor may claim the return of the donation by the unilateral juridical act addressed to the donee. Donor's demand pursuant to §630 Civil Code may not be identified with termination of a contract. Provision on termination

does not apply in this case. There is significant difference between the effects of donor's demand to return the donation and the termination. Termination has ex tunc effects , donor's demand has ex nunc effects. When the notice of this act reaches the donee, the donation contract is terminated. By donor ´s demand donation contract does not extinguish from the beginning. Court decisions mostly deal with the interpretation of two conditions for claiming the return of the donation: a) intensity of donee's behavior to be qualified as the fundamental breach of the good moral manners, b) the specification of the aggrieved family members

Ad a) Only a less considerable breach of good moral manners would not be enough for qualifying the donee's behavior as the fundamental breach of the good moral manners. The fundamental breach is given in the occurrence of the breach of the substantial intensity or in the case of the permanent breaking of good moral manners [18]. The donor's subjective feeling of the donee's ingratitude may not be the decisive factor in the court proceedings. The donee's ownership or other right based on the donation contract should have legal stability and could be interfered with only in extraordinary cases. ad b) Family members. § 116 of Civil Code is regulating the possible circle of the close persons. Court decisions stress that the provision on close persons may not be automatically identified with the term "family members". On the other hand, their interpretation is very similar and every case should be regarded and judged individually [19]. The donor may claim the return of the donation any time after the donation contract was concluded. The claim to ask the return of the donation arises after the fundamental breach of the good moral manners. The limitation period of three years shall run from the moment of the fundamental breach. The donor's claim will be discharged upon his death, unless before his death the donor validly terminated the contract by his notion. In this case, his heirs may enforce the right to demand the return of the donation.

The donee must return (give back) everything he has been rendered by the donor according to the Civil Code's provisions on unjustified enrichment. In the case of immovables, the problem of the entry of the ownership right to the real estate register is closely connected to the termination of contract by the addressed unilateral legal act of the donee demanding the return of the donation (because of the fundamental breach of good moral manners). Slovak legislature regulating entries to the "kataster "differentiates three types of entries to the real estate register: 1. subscription (vklad) for entering changes of the rights to immovable based on the contracts, 2. record (záznam) for entering changes based on the other legal grounds and 3. note (poznámka) [20].

When the notice of the donor reaches the donee, the relationship based on the donation contract terminates, and at that moment the donor becomes the owner of the donation. This interpretation of the § 630 of Civil Code requires subsequent entry to the real estate register in the form of record. This problem has been the field for discussion among representatives of legal theory and practitioners [21]. The problem lies in the protection of the legal stability and the reliability of the immovables' records as well as in the prevention of capricious abuse of the §630 provision by the subjective notions of the donors.

8.1.2 Separate opinion.

At this point we would like to introduce the different opinions of the Czech legal academics. However, we should point out that their opinions are not supported by the Czech court decisions whose interpretation of the §630 of Civil Code is same as it was above presented in Slovakia. Czech theory comes out of the presumption that once the donation contract was concluded and dully performed, it was consumed, there is no running legal relationship between the donor and the donee. Donee has full ownership right to the object of donation. That is the reason why it is impossible to determine the effect of the termination of contract by the moment when the notice of donor demanding the return of the donation reaches the donee. According to this concept, if the other conditions have been fulfilled (the fundamental breach of good moral manners in donee's behavior to the donor's family members) donor has to submit a claim to the court for returning the donation. This action may not be identified with the action due to § 126 of Civil Code (rei vindicatio) or due to § 457 (this provision relates to claims of the contract´s parties out of the invalid or terminated contract). The donor's claim is special, in that it has been wholly based on the exceptional regulation of the § 630 of Civil Code. The basic difference lies in the assumption that donor is not claimant as the owner, but he can originally acquire the ownership only on the basis of the positive court decision [22]. This interpretation is in complete contradiction to the court decision recommending and requiring in the case of the legal proceedings to the donor as claimant to claim surrender of a thing, in the case of immovable to clear out the immovable, so the donor should pass the action to the court in the position of the owner [23]. Seeing that return of donation would be almost always contradictory (in practice it will mostly presuppose the court decision ~ it must be really a rare case of a donee without delay and protest to give up his property), proposals of Czech academics may have been closer to follow the ratio legis. Pleading for their solution may also bring about the legal certainty in the relation to the real estate register [24].

8.2 Termination based on the defects of the donation

If the donation (gift) has defects about which the donor failed to inform the donee, the latter has the right to return it. In this case it is not significant whether the donor have known about these defects or whether he should have known.

9. Mixed contracts

Obligations may arise from the mixed contracts comprising the elements of the different types of contracts. The provisions of Civil Code governing obligations arising from the certain type of contract shall apply as appropriate to obligations arising from a mixed contract, unless the contract itself provides otherwise. Perhaps the most frequent types of a donation contract mixed with the another type of contract are the easement contract and the prudential contract. The prudential contract belongs to not specifically regulated contracts. The contracting parties may conclude an "innominate" contract provided that an object of such contract is sufficiently clarified and it does not contravene to the content or purpose of the Civil Code.

9.1 Donation contract and the easement

An easement places some restriction on the owner of immovable in favor of another person in such a way that the owner is obliged to tolerate something, to refrain from doing something or to perform something. The duties arising from the easements are always attached to ownership of a specific immovable asset. As for the rights, they may be attached to the specific immovable asset or pertain to a particular person. Easements may arise on a basis of a written contract. A written contract on establishment of an easement becomes effective only when easement is entered in the Real Estate Register. In connection to the donation contract, parties can agree that donor undertakes to transfer ownership to the plot of land or a house, but on the other hand the donee will establish an easement consisting in lifelong using right of these immovable for donor or other particular persons. As it is evident, such a contract gives rise to rights in personam. Duties and rights should have been accurately formulated in the easement contract. By mixing the donation contract with the easement, the donor acquires the legal certainty that irrespective of the change in the ownership of the e.g. house, his right will have been retained.

10 De lege ferenda

The current legal regulation of the donation contract in the Slovak Civil Code does not reflect the requirements of the legal praxis. The need to draft the new provision on donation has been expressed in the relevant literature. The flaws of the current regulation have been outlined in the numerous academic papers. There is a need to draft the envisaged regulation of donation on the basic principles of the gratuitous contracts based on the thorough analysis and the

comparative work. The donation contract is concluded on the basis of parties´ agreement on gratuitous enrichment of the donee out of the donor´s assets. The gratuitous character of the contract is the reason to ensure the higher level of the protection for the donor. The donor does not only give away assets without remuneration, he has also right to influence the future of the gifts provided, therefore donation sub modo should become regular part of donation contract regulation. The donation in the Slovak legal order is a contract and therefore parties have rights and obligation and they are bound by the valid contract. The loosening of the contract bond and the certain modification of this bond may be based only on the agreement of parties or on the law; the sole fact of gratuitousness may not loosen their bond. The donee is obliged to be grateful to donor and the breach of this obligation may; at some extent; give rise to the remedies. On the other hand, the remedies for non- performance must reflect the gratuitous nature of the contract and the non- conformity of the gifts and default of the donor does not entitle donee to employ the remedies in whole range, there are some restriction, but the standard of the conformity itself has not been modified. Finally, there is a need to support the social function of donation. New features in the legal regulation of donation should be represented by the modifications of contract formation and of the contract validity in relation to the mistake and the abuse of the donor´s disadvantageous position. The special attention must be paid to the revocation on the basis of the donee´s ingratitude and to the donor´s right to terminate the contract before his performance due to the change of circumstances and also to the impoverishment of the donor and its possible legal consequences [25].

III. Gratuitous contracts and employment contracts

1. Gratuitousness

As already said above, donation contract has been established on two conceptual features of gratuitousness, these principles may be regarded as the core stones of the gratuitous contracts generally. Firstly, undertaking of the donor is done without reward and with the intention to enrich the donee. The donor should not expect, nor should receive counter- performance of the proprietary value. The donee may accept obligation to perform a charge or undertake other kind of performance. Donation can depend on the suspensive or the resolute condition. This condition or counter performance, however, should not have been based on proprietary value. Generally, these conditions and charges have to be in accordance with the law and bona mores (good moral manners) according to § 39 Civil Code. The second conceptual feature of gratuitousness means that the donor acts voluntarily. The donor's undertaking is not gratuitous and voluntary if it is done by virtue of any obligation such

those arising from a contract or other juridical act, a court order or statutory provisions.

2. Remuneration for work

Remuneration for work is the basic performance for which the employee enters into labour law relationship to the employer. In the employment relationship counter performance is created by employee's human work (of course, such appreciation is simplified, since work could not be regarded as the commodity). These basic reasonable expectations are connected to the employment contract as strictly remunerative contract, but from 1 March 2015 the remuneration does not belong to the substantial features of dependent work according to § 1 para 2 of the Labour Code: "Dependent work is work carried out personally by the employee for the employer within a relationship of employer as superior and employee as subordinate, in accordance with the employer's instructions, in the employer's name, during working time determined by the employer." This change has been executed as the reaction to the unfair practice of some employers deliberately not negotiate remuneration between contracting parties. This practice forced the control authorities actively and with great problems look for the proof of the payment or another form of remuneration so that the situation can be assessed as the illegal employment and undeclared work.

New regulation effective from 2015 should not be interpreted that the employee does not receive remuneration for the work performed. In this respect, the explanatory report on the draft amendment to the Labour Code enacted under Act no. 14/2015 Coll. stated: "The deletion of the 'pay or remuneration' characteristic from the definition of dependent work comes as the reaction to the negative practice of illegal employment. Legal entity or natural a person who is an entrepreneur, on the one hand, and a natural person, on the other, claimed that they did not negotiate any remuneration for doing the work. Consequently, they argue that although other features of dependent work are fulfilled, as one of the characteristics of dependent work, which is wage or remuneration, is not fulfilled, dependent work does not exist in their relationship. The proposed amendment strengthens the position of the labour inspection authorities in the fight against the illegal employment and undeclared work. Labour inspection when examining the fulfillment of the signs of dependent work will not be obliged to ascertain the wage arrangement or remuneration in order to qualify the activity as dependent work. However, the deletion of the 'wage or remuneration' sign does not mean that dependent work should not be done for wages or remuneration, as the obligation to provide wages or remuneration for the work performed follows from Art. 36 para. a)

of the Constitution of the Slovak Republic, as well as from the provisions of § 43, § 47 and 118 Of the Labour Code." [26]. Toman provides overview of the relevant legislation establishing the right of the employee to require the payment for the dependent work and argues that apart from the above mentioned Art. 36 of the Constitution of the Slovak Republic "Employees have the right to fair and satisfying working conditions. The law mainly provides them (a) the right to remuneration for the work done, sufficient to enable them a decent standard of living,"; this right is explicitly articulated by the Article 3 of the Basic Principles of the Labour Code "Employees shall be entitled to a wage for the work carried out by them, to occupational health and safety assurance, and to rest and recover after work. Employers shall provide a wage to their employees and create working conditions which enable employees to achieve the best possible performance at work in accordance with their ability and knowledge, to develop creative initiative and enhance their qualifications» One may also refer to the numerous international documents and agreements that should serve as the safeguard and the guarantee of the right to remuneration of the employee [27]. This legal basis constitute the first argument that contrary to the definition of the dependent work explicitly omitting the prerequisite of the payment; the employment contract may not be classified as the gratuitous contract and therefore the principles of the gratuitous contracts should not be applied to this contractual relationship.

3. Relationship between the Labour Code and the Civil Code

The second argument against the application of the principles of the gratuitous contracts to the employment contract may be derived from the presently problematic relationship and the applicability of the Civil Code to the employment contract at all. Under Section 1 para 4 of Labour Code Unless this Act provides otherwise in Part One, the legal relationships under para 1 (employment relationships in connection with the carrying out by natural persons of dependent work for legal entities or natural persons, and collective employment relationships) shall be subject to the general provisions of the Civil Code. In the line with the successive legislative amendments of the Labour Code and based on the explanatory memorandum in spite of the apparent conceptual ambiguity, it can generally concluded that subsidiarity under this provisions applies only to the first part of the Civil Code, but not to the part regulating the obligations. It is desirable to add that such a conclusion is generally accepted, but not unconditionally. A number of opinions (directly or as a hint) perceive the subsidiarity of the Civil Code more broadly, and thus also in relation to the general provisions of the Law of Obligation. Absence of subsidiarity can be bridged by analogy in the justified cases [28]. Nevertheless,

the principles for the gratuitous contracts has been generally recognized or regulated neither in General Part of Civil Code (Part 1) nor in the General Part of Law of Obligation (Part 8). Discussion about the admissibility of their application and the interpretation of the employment contract supporting its alternatively gratuitous nature should not be enforced or supported. Moreover these principles has been widely recognized only by legal theory [29]. Under Section 3 para 3 of Labour Code the dependent work shall be carried out solely under employment or a similar labour relationship, or in exceptional cases under different employment arrangements, subject to the conditions set out in the Labour Code. Dependent work cannot be carried out in a contractual relationship under civil law or commercial law pursuant to special regulations. Relationship for dependent work should not be recognized as the mixed contract under Civil Code (e. g, contract for work mixed with gratuitous elements of the donation contract or gratuitous mandate contract). This conclusion has a great importance in relation to the protection of the weaker party, the employee. The protective function of labour law is particularly evident in the area of setting minimum standards remuneration [30].

IV Conclusion

It is generally recognized that the landscape of an employment status and working conditions has recently changed alongside various demands of the employers for more flexibility with regard to employment [31]. These changes may not lead to " forgetting" the reason and the aim of the deleting the word "for reward" from the definition of the dependent work in Slovakia. Protection of the weaker party is targeted on preventing the abuse of stronger contractual position of the stronger party- the employer. Right for the remuneration may not be circumvented by reference to the definition of dependent work in the Labour Code. No substantial, material argument has been raised to support application of gratuitous contracts principles to the dependent work and explicitly to the employment contract.

1 The paper has been prepared under project APVV-18-0443 Projections of Labour Law into other Private Law Disciplines (and vice versa).

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3Lazar ,J. et al. Občianske právo hmotné (The substantive civil law). Third amplified and arranged edition. 1.vol., Bratislava:, Iura Edition.2006, p.41.

4 Fekete, I. Právo na vrátenie daru (The right for the return of the donation (reflections de lege ferenda). Justičná revue. Ministry of Justice. Bratislava, 55, 2003, No.4, p.402

5 Laclavíková,M.:.Solving the problems of unification and codification of private law in interwar Czechoslovakia and Poland. In Schelle, K.(ed): The evolution of legal codifications. Masarykova univerzita v Brne, Brno, 2004, p.194.

6 Ferancová, M.: Unification and codification efforts in the area of private (civil) law in CSR (1918-1938).In Acta Universitatis Tyrnaviensis Iuridica I. Právnická fakulta Trnavskej univerzity v Trnave, 2003, p 169.

7 Lazar ,J. et al, cit. supra, p. 65.

8 The act No.162/1995 Coll. on real estate register and on entries of ownership and other rights in immovable as amended must be applied provided the donation (gift) is immovable. Securities are under the regulation of Act No. 501/2001 Coll. on securities and investment services as amended.

9 Immovable are plots of land and the buildings (structures) connected to the land by a solid foundation. A flat or some specific non- residential premises is also regarded as a separate immovable if it is an object of ownership.

10 It does not apply to the dependent work, see chapter III.

11 Grulich, P.. Questions about donation. In Právní rádce 8/2005. Praha, 2005, p.14 .

12 In the case, when donated thing has been sent by post as the parcel to the donee, as the acceptance of gift´ s offer can not be regarded taking delivery of the parcel, but acceptance could be based only on the decision of the donee to accept or reject donation made after unpacking the parcel. There must be reserved a reasonable time period for the donee to become familiar with the object of donation. R 26/1992 Decision of The Supreme Court of Slovak Republic.

13 They could agree that donee becomes owner sooner, e.g. at the time of the conclusion of the contract or later, e.g at the time of fulfillment of suspensive condition

14 The donation of e.g. the family house coming under the matrimonial property by one of the spouses to the other spouse must be regarded as the circumvention (§39 CC) of the mandatory provisions of the Civil Code on the content and the purpose of the matrimonial property. (Decision of the Supreme Court of the Slovak Socialist Republic on 27. 4. 1977, 1 Cz 42/77).

15 Section 3 para (1) of CC "Execution of rights and obligations arising from civil law relations must not interfere with the rights and legitimate interests of other persons without legal grounds and must not be in conflict with good morals."

16The law determines two categories of close persons in the §116 Civil Code a) persons who are close because of being relatives or husband or wife b)

persons who became close on the basis of their mutual existing relationship. Close persons under {a) are: descendants and ascendants without any restrictions (including foster children), siblings disregarding whether they have the same mother and father or not (i.e. including half brothers and half sisters, spouse as long said marriage lasts. Close persons under {b) are: other persons within family or similar relationship if a harm suffered by one of them is reasonably felt by other person as his own harm.

17 Jehlička, O., Švestka, J. Škárová, M., Spáčil, J. Občanskýy zákoník, komentár. 10th edition. C.H. Beck.: Praha, 2006 p. 998.

18 R 88/1998 The termination of the donation relationship according to § 630 of Civil Code is established by the unilateral juridical act of the donor addressed to the donee provided that the donee behaved toward the donee or toward his family members in the way that fundamentally breaches good moral manners. The fundamental breach of the good moral manners is the breach of the substantial intensity or in the case of the permanent breaking good moral manners. The family members should be regarded first of all his/her spouse, parents and children and normally other descendants and ascendants as well as siblings, and in exceptional cases other persons within family or similar relationship if a harm suffered by one of them is reasonably felt by the donor as his own harm. (Decision of the Supreme Court of the Slovak Republic on 21st of August 1997, No. 3 Cdo 191/96.)

R 31/1999 The donor's right to ask for the return of the donation is not given in the case of a simple ingratitude of the donee to the donor nor in the case of the less considerable breach of the good moral manners . The fundamental breach of the good moral manners could not be considered for example: purchase of the donated thing to the other person, not visiting of the donor on the occasion of his / her anniversaries (Decision of the Supreme Court of the Slovak Republic, January 30th 1998, No 2Cdo 81/97)

19 R 61/1997 As the family members according to the § 630 of The Civil Code should be regarded as natural persons who are in respect to all circumstances of the situation family or other related to the donor provided a harm suffered by one of them is reasonably felt by the donor as his/ her own harm. This provision regards as legally relevant only such donee's behavior which has been objectively manifested. The subjective feeling and opinion of the donor are not decisive. / The decision of the Supreme Court of The Slovak Republic November 11th, 1994, No. 3 Cdo 130/94)

20 The subscription has constitutive effect to the legal relationship, the record has declaratory effects and the note has mostly informative function.

21 Ficová, S. K nadobudnutiu vlastníckeho práva k nehnuteľnosti v dôsledku vrátanie daru. Justičná revue, Ministry of Justice. Bratislava ,57 2005, No.2, p.173-177.

22 Knappová, M., Švestka, J. et al. Občanské právo hmotné. Vol. II, the 3rd amplified edition. Aspi Publishing: Prague, 2002, p.203, Mikeš, M., Švestka, J.. On basic questions about the return of the donation by the donee. In Právní rozhledy, Praha, 2002, no. 4, p.155-200.

23 R38/1992 In the case of the return of the donation, the donor may pass claim to the dismantlement of the immovable by the defendant provided that the legal conditions for the return of the donation have been fulfilled. The district court in Tabor repelled the action of the plaintiff demanding the assignation of her ownership of the immovable – the plots of land in district B and in district M. The court adjudicated the plaintiff is bound to reimburse proceedings expenditure to defendants. (The decision of the provincial court in Českе Budejovice September 20th 1991 , No5 Co 1095/91).

24 The above cited academics have also presented separate opinion in the interpretation of the term "family members". They tend to interpret meaning of family members restrictively, so that it will include only spouses, children and parents. Their reasoning comes out of the historical interpretation with the reference to the draft of the Act on General Private Law (Civil Code) in 1938. This argument could serve as an impulse for discussion in Slovakia. According to the common law effective in Slovakia till 1950, ingratitude exclusively to the donor could be the legal ground to claim return of the donation.

25 Jurčová, M. Darovacia zmluva - návrh právnej úpravy. (Donation contract - draft of the legal regulation) Societas et iurisprudentia. Vol. 4, no. 1, 2016, p. 42-61. Available at http://sei.iuridica.truni.sk/archive/2016/01/SOCIETAS-ET-IURISPRUDENTIA-2016-01.pdf.

26 Toman, J. Individuálne pracovné právo, Pracovný čas, dovolenka, prekážky v práci a mzda. Friedrich Ebert Stiftung, zastúpenie v SR; Bratislava 2015, p-286-287

27 Toman J. cit supra, p. 287. See also Decent work, Available at http://www.ilo.org/global/topics/decent-work/lang--en/index.htm(retrieved on 30 October 2019).

28 Dolobáč, M. Započítanie vzájomných pohľadávok v pracovnom práve. In Právne nástroje odmeňovania v 21. storočí. Friedrich Ebert Stiftung, zastúpenie v SR, 2017, p.12.

29 Lazar, J. et al, cit. supra,, Jurčová, M. Darovacia zmluva : § 628-630 In: Občiansky zákonník. - Praha: C.H. Beck, 2015. pp. 2183-2221,

30 Olšovská, A., Laclavíková, M. Sociálna a motivačná funkcia mzdy, odmeňovanie ako nástroj motivácie Zamestnancov. In Právne nástroje odmeňovania v 21. storočí. Friedrich Ebert Stiftung, zastúpenie v SR, 2017, p.17.

For further arguments on the relationship between civil law and the labour law and on the restricted applicability of civil law principles on the labour law relations see also Štefko, M. Pracovní právo v kontextu občanského práva. Praha: Auditorium, 2012.

31 Mc Nahon, J. et al. Zero Hours Work and the Role of Law in Ireland. In Ahlberg, K, Brun, N. (eds) The New Foundations of Labour Law. Frankfurt an Mohan: Peter Lamg, 2017, p. 147.

Jurčová M. Donation Contract and the principles of gratuitous contracts in the Slovak private law

The paper has presented the historical background for the development of the private law in Slovakia. Outlined in- the- depth analysis of the donation contract serves as the basis for the further extraction of the principles applicable for the gratuitous contracts generally. Author argues that actual definition of the dependent work in the Labour Code that does not encompass the characteristic of remuneration may not create the starting point for the application of these principles for the employment contract. Applicability of gratuitous principles has been rejected. Remuneration for the work, specific characteristic of the dependent work and the relationship between Civil Code and Labour code belong to the main arguments supporting the conclusion that the protective function of the labour law may not be undermined or the circumvented by the formal interpretation of the provision on the dependent work.

Key words: donation contract, principles for gratuitous contract, dependent work, remuneration for work, protective function of the labour law.