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VOLUNTARY WORK – LEGAL BARRIERS

CHAPTER I

INTRODUCTORY ISSUES

Voluntary, unpaid work based on good will is one of the most significant factors enabling the development of the sector of non-government organizations. In the case of some of them it constitutes an essential condition of their functioning, as such organisations either do not employ any full time staff, or such employment consists of only a few persons who are necessary to run the office, whereas most of the implemented tasks are taken charge of by volunteers.

Voluntary commitment as a phenomenon must have existed since the beginning of mankind, but only relatively recently has this phenomenon been given a name and efforts are being made to institutionalise it. In Poland the development of voluntary work in this latter sense dates back together with the growth of the sector of non-government organisations to the early nineteen-nineties. Organisations which based their activities on the performance of voluntary work have of course existed much earlier, but in the period of real socialism their operation in practice was characterized by far reaching peculiarity. Apart from organisations attached to the Catholic Church (although here also the authorities of these times attempted to intervene), other organizations were characterized by greater or lesser dependence on the state and party administration. In this situation it would be difficult to regard them as „non-government" organisations, which also had to exert an impact upon the nature of the then performed voluntary work. Such work was often a particular way of expressing loyalty with respect to the authorities, which assume the grotesque form of semi-forced "pro-social activities".

The recovery of independence and the change of the political system have cause that the sector of non-government organizations and the phenomenon of voluntary work began to grow in their authentic dimension. At the expense of giving up the fictitious mass coverage, the presently existing non-government organisations are a reflection of authentic social strivings and initiatives. A similar phenomenon concerns voluntary work. In the overwhelming majority of cases it is an expression of authentic needs of the individuals concerned, who express in this manner their strong social instincts.

A specific feature of voluntary work in the past decade is the fact, that to a large extent it concerns young people: high school and university students. This phenomenon can be explained by the stronger inclination to altruism, linked with age, and also greater availability of time that can be committed. The work of persons who are not yet legally mature as voluntaries involves, however, a number of detailed legal issues.

The development of voluntary work has not been followed so far by any new legal measures, in spite of the fact, that over the past decade a large part of the prevailing legal order in Poland has been reconstructed. Man acts of law have been issued that concern such areas of life, which hitherto were not regulated at all, or had been regulated only in a fragmentary manner. In many cases one might doubt, whether the respective regulation by an act of law has indeed enhanced any improvement of the non-legal reality, or whether the only effect consists of a specific „inflation" of legislative acts.

Among the representatives of non-government organisations there prevails a widespread conviction that the phenomenon of voluntary work requires to be comprehensively regulated, either in the form of a separate legislative act, or in the form of provisions in the drafted law on non-government organisations. A partial reflection of such expectations is found in the prepared draft law on the cooperation of the bodies of public administration with non-government organisations and amending a number of existing laws. It can be expected, however, that the provisions of the above indicated draft concerning the problems of voluntary work will not meet the expectations in terms of the degree of detailed regulations.

It seems that the expressed expectations do not find their reflection in real barriers of a legal nature, which the non-government organizations encounter in their practical experience of working with volunteers. In order to identify such barriers it would be necessary to undertake such practical activities, which are currently not being adopted due to legal obstacles, whether any such change could indeed lead to the facilitation (simplification) of the activities undertaken already today. Most representatives of non-government organizations asked about legal problems point at purely hypothetical threats, such as have never actually occurred in practice. In addition, most of these hypothetical situations could be satisfactorily solved on the basis of the already existing legislation.

The above described expectations of the representatives of non-government organizations can be linked to the enormous increase of significance of the law as a regulatory factor in social relations, which took place after 1990. One of its indications consists of the generally prevailing expectation that the law should separately regulate every kind of social relations. The above tendency may on the one hand be positively assessed, as the expression of departure from the practices prevailing under communist rule, when many issues were being resolved in an informal way, independently or even against the then existing and binding legislation, on the basis of authoritarian decisions of the organizational units of the party or according to various behavioural habits

stemming from not fully clear sources. On the other hand, however, the belief in the omnipotence of the law, as an instrument for shaping social relations, can be an expression of a phenomenon justifying the concerns about the phenomenon of the decline of social ties based on norms of a different nature.

The social expectations that an appropriate law should cover every area of life, are reflected in the adoption of legal acts, the provisions of which make the impression of describing the phenomena existing in reality, and not pronouncements of a normative nature. Such provisions, when subjected to legal interpretation by means of classical rules that are in force, will not provide for the facilitation of practical activities, but will only generate new barriers, which would most probably not have appeared at all if there was no such regulation.

I believe that the above observation should always be kept in mind, when thinking about the necessary legal changes concerning voluntary work. Otherwise it might turn out that only the introduced legislative changes will cause the emergence of legal barriers preventing the development of such a phenomenon.

CHAPTER II

THE BASIS FOR THE PERFORMANCE OF WORK BY A VOLUNTEER

The purpose of the deliberations contained in the present part of this paper is to determine the legal nature of work performed by a voluntary. It may be an employment relationship, or any of the civil law contracts to provide services, which in typical situations implies a [temporary] contract of mandate or a contract to perform a specific task. Additionally the problem will be considered, whether the contribution of work by a voluntary can be deemed to be a donation in the light of the regulations of the Civil Code.

I. EMPLOYMENT RELATIONSHIP

Pursuant to Article 22 § 1 of the Labour Code (L.C.) by contracting an employment relationship the employee commits to perform work of a specified kind for the employer and under his management, whereas the employer commits to employ the employee in return for consideration. Employment on such terms constitutes employment on the basis of an employment relationship, regardless of the name by which the contract concluded by the parties is called (Art. 22 § 1^1 L.C.). An employment relationship may be established based on an employment contract, nomination, appointment, or a co-operative contract of employment (Art. 2 L.C.).

It follows from the definition presented above that one of the essential elements defining an employment contract consists of the obligation of the employer to provide the payment of remuneration. The right of the employee to receive fair remuneration is one of the principles of the law on labour (Art. 13 L.C.).

The above indicated features of a labour relationship imply that it is unsuitable as a basis for the performance of work by a volunteer. It is worth adding that it would not be feasible to conclude an employment contract with a volunteer including the provision of remuneration, which would then be followed by the resignation on the part of the volunteer to collect its payment. According to Art. 84 L.C. an employee can neither renounce his rights to remuneration, nor can he transfer that entitlement to any other person. Any actions contradicting this regulation would be unconditionally invalid, and the employee concerned could demand the payment of his remuneration anyway.

The issues of the law on labour give rise the concerns expressed sometimes by representatives of non-government organisations, whether the labour protection organs performing the respective inspections might not question the work performed by volunteers and assume that the parties concerned are in fact bound by an employment relationship. Such action could have far reaching unfavourable consequences for the organisation employing a volunteer in the form of a fine for misdemeanour foreseen in the Art. 281 item 1 L.C., the necessity to pay up the implicit remuneration to the volunteer for all of his services performed, and also the necessity to pay social security contributions and to fulfil all the other obligations foreseen by the provisions of the law on labour.

A certain basis for such concerns may be provided by the fact that in practice the basic criterion applied by some labour inspectors and labour courts in order to qualify a given legal relationship consists of the relationship of subordination (work performed subject to „management") binding the person performing the service of work with the other party. In typical situations the volunteer does not undertake his activities completely independently, but should comply with the guidance provided by the other party, which organizes his work.

In spite of the above indicated feature of a volunteer's work, there can be no doubt that the activities performed by him are not contained by any employment relationship. The subordination alone is not sufficient to conclude that an employment relationship comes into play, and this criterion is most significant in the practice of the labour inspection organs only because of the fact, that the most frequent problem, resolved by these authorities consists of the definition of the legal nature of relationships based on remuneration. There should be no doubt that in the case of clear indication of the unpaid nature of the services provided by a volunteer, he is not bound with the other party by any employment relationship.

On the sideline it should be mentioned, that the use of the word "work" should not be questioned in relation to the services performed by a volunteer (as it is consistently applied in the present paper). This word may be used to have a broader

meaning than just the performance of duties under an employment relationship and it does not have any “magic” power causing the transformation of any given legal relationship into an employment relationship.

To substantiate the above stipulations it is worth mentioning that in spite of the concerns expressed by representatives of non-government organisations there has been no known of case in which the organs of labour inspection would formally question the nature of the services provided by a volunteer, and in consequence of any attempt to qualify a given legal relationship as being subject to the regulations of the law on labour.

The above conclusions do not mean, however, that in some cases the work of volunteers is not subject to the application of certain provisions of the Labour Code, and in particular the regulations concerning work safety and hygiene. A detailed review of this subject is presented in Chapter II section I of the present paper.

II. CONTRACT TO PERFORM A SPECIFIC WORK TASK

According to Art. 627 of the Civil Code, by a contract to perform a specific work task, the party accepting an order commits to produce a specified work, and the ordering party to pay consideration. In the doctrine it is stressed that as such a contract has the nature of agreement on the expected result. The party accepting the order ought to produce the respective work. It is not sufficient that he undertakes specific actions in order to perform it. The subject of controversy consists, however, of the very nature of the produced work. It can both consist of material objects and of intangible ones. In the second case, according to the overriding position, it is stressed that the work in any case should be preserved in a material object and in consequence any results of human work not contained in a tangible medium should be excluded from the scope of this notion.

The relationship between a volunteer and the party on behalf of which he performs his services, as a rule, does not foresee the necessity to arrive at a specified result. For the volunteer to meet his obligations it is usually enough that he has just undertaken certain actions. But one cannot completely rule out the situation when the volunteer should accomplish a specific result and that that result could be regarded as a work task performed in the meaning described above.

According to the above indicated definition, even in such a case the legal relationship between the volunteer and the party on behalf of which he performs work, cannot be regarded as a contract to perform a specific work task. The necessary elements of such a contract include the obligation to pay consideration. It is a mutual agreement. The legal relationship by virtue of which one of the parties assumes the obligation to perform a specific task without remuneration, cannot be regarded as contract to perform a specific task.

III. CONTRACT OF MANDATE

According to Art. 735 of the Civil Code (C.C.), by accepting a contract of mandate the party receiving the mandate assumes the obligation to performed a specified legal action for the party granting the mandate. Most cases of voluntary work could not fit in the above definition. The activities of a volunteer, as a rule, do not consist of performing legal actions. When a contract of mandate is mentioned in common parlance, and also in the language of many legal acts not pertaining to civil law, we have in mind the contract of the kind mentioned in Art. 750 C.C. According to that provision, contracts for the performance of services that are not regulated by any other legal provisions, are subject to the respective application of the provisions on the contract of mandate.

Such a contract seems to be a convenient instrument for the formulation of the rights and obligations of volunteers. First of all, it is worth stressing the fact that a necessary element of a contract of mandate does not consist of remuneration – a mandate may also be performed free of charge. A certain threat for the party employing the volunteer might consist of the content of Art. 735 § 1 C.C., according to which, if the contract or the circumstances do not indicate the implication, that the party accepting the mandate has assumed the obligation to perform it without remuneration, payment of remuneration is due for the performance of the mandate. In connection with this provision it should be recommended to clearly indicate during the first conversation with any volunteer, that he cannot expect to receive any remuneration. In order to produce suitable evidence in the event of litigation in court, it would be desirable to conclude the contract in writing. The simple formats of contracts with volunteers that function in practice should be regarded as meeting the basic legal requirements.

When evaluating the detailed consequences of the contract of mandate, they should be regarded as an institution providing an adequate legal framework for the functioning of volunteer work. It is stressed that the mutual relationship of parties to a mandate is based on confidence. It seems that a similar rule should prevail in the relationship between the volunteer and the party for which he performs work.

The principle of confidence prevailing between the parties to a contract of mandate is reflected in the possibility to entrust the mandate to a third party only if that is provided for by the respective contract, or stems from custom, or if the mandatory is forced to do so by the circumstances (Art. 738 § 1 C.C.). Without the mandator's consent the party accepting a mandate may renounce the method of performance of the mandate indicated to him if there is no possibility to obtain such consent, and yet there are justified reasons to believe that the mandator would have agreed to such change, if he knew about the existing state of affairs (Art. 737 C.C.). A particular expression of the role assigned by the legislator to the confidence prevailing between the parties consists of the principle, that either of them may give notice of termination of the mandate at any time whatsoever, and the respective contract cannot renounce in advance the option to apply the right of contract termination on important grounds

(Art. 746 C.C.). The application of this principle in relation to volunteer work seems particularly pertinent.

The legal provisions concerning contracts of mandate also resolve the issues connected with the expenses incurred by volunteers. According to Art. 742 C.C., the mandator should reimburse to the mandatory any expenses incurred by the latter in order to duly fulfil the mandate, together with statutory interest. The mandator should also release the mandatory from any liabilities that the latter has assumed for the same purpose in his own name. If the performance of the mandate requires expenses to be incurred, the mandator should provide the respective advance to the mandatory upon his request (Art. 743 C.C.).

The above regulations concerning the contract of mandate seem also to be adequate for the institution of voluntary work. Certain doubts might arise, however, in connection with the sometimes stressed feature of a mandate, which consists of the lack of subordination of the mandatory to the mandatory. This feature, according to the consensus of opinion among the competent scholars, constitutes the basic difference between the contract of mandate and the employment contract.

In most cases, the volunteer performing his work ought to apply the instructions given by representatives of the institution, on behalf of which he provides his services. In connection with the above the doubt arises, whether this kind of subordination may be contained in the framework of the contract of mandate.

I believe that the answer to this question should be a positive one. The contract of employment is not the only legal relationship, in the framework of which the person performing a service is obliged to apply the instructions of the other party. Such an obligation might also exist in the mandate relationship, as indirectly implied by Art. 737 C.C., which defines the cases in which the mandatory has the right to renounce the method of mandate performance indicated by the mandator. According to the position represented by the academic knowledge of the law, the indication of the method of performance of the mandate may take place both at the time when the contract is concluded, and in the course of its performance. Such instructions may be of a detailed and imperative nature.

Keeping the above comments in mind, it should be accepted that the contract of mandate provides the appropriate framework for the performance of work by a volunteer.

IV. CONTRACT OF DONATION

The explanation of the existing relations between voluntary work and a donation needs to be deemed as necessary owing to the stipulation contained in Art. 21 section 3 of the draft law on the co-operation of the bodies of public administration with non-government organizations and on the amendment of certain other laws. According to that provision the value of the work performed by a volunteer does not constitute any donation to the respective non-government organisation.

According to Art. 888 § 1 of the Civil Code, in a contract of donation the donor assumes the commitment to provide free of charge service to the beneficiary of the donation, at the expense of his own assets. The scope of the above definition is appended by the provisions of Art. 889 C.C. According to that provision the following free of charge benefits do not constitute donations:

1) if the obligation to provide a free of charge benefit is the consequence of a contract regulated by other provisions of the Code,

2) if someone renounces the right, which he has not yet obtained, or which he has obtained in such manner, that in the event of renouncement such right is regarded as not obtained.

The combination of the above indicated provisions allows to draw the conclusion that voluntary work is a phenomenon that is not contained by the definition of donation. Although the volunteer performs a free of charge service providing benefits, but this is not done at the expense of his assets. Moreover, in accordance with the former comments concerning the mandate, it should be recognized that the obligation to provide free of charge service results from a contract subject to regulation by other provisions of the respective Code.

Owing to the above analysis, the provision indicated above should be regarded as unnecessary.

CHAPTER III

DETAILED ISSUES

I. APPLICATION OF CERTAIN LABOUR LAW PROVISIONS

In some situations the volunteer provides services that could be fully replaced by work performed by employees. Frequently it is so, that the same activities under similar circumstances are performed for a given institution by both volunteers and workers on employment contracts. In connection with the above, some representatives of non-government organizations have been raising the postulate, that the work of volunteers should be subjected to at least some of the provisions of the Labour Code, e.g. with respect to the obligation of undergoing medical examinations, or the requirement to assure safe and hygienic working conditions.

The above issues are in part already regulated by the Labour Code, and this act provides additional possibilities of extending some of its provisions to apply also to other legal relationships.

According to Art. 304 § 1 L.C., the employer is obliged to assure safe and hygienic working conditions, which are mentioned in Art. 207 § 2 L.C., to physical persons performing work on a basis different from the employment relationship at the work place or at the location determined by the employer. The obligations specified in Art. 207 § 2 L.C. are applied accordingly to the entities that organise the work performed by physical persons on a basis other than the employment relationship, in the framework of socially beneficial works (Art. 304 § 3 L.C.).

The second of the indicated provisions seems to refer directly to the institution of volunteer work.

Art. 207 § 2 L.C., to which the formerly presented provisions refer, rules that the employer is obliged to protect the health and life of the employees by means of assuring safe and hygienic working conditions, applying accordingly the respective accomplishments of science and technology. In particular, the employer is obliged to:

1. organise the work in a manner assuring safe and hygienic working conditions,
2. assure the observation at the work place of the provisions and principles concerning safety and hygiene at work, to give instructions to remove any deficiencies in this respect, and to control the execution of such orders,
3. assure the execution of orders, interventions, decisions and instructions issued by the organs in charge of the inspection of working conditions,
4. assure the execution of the recommendations of the social labour inspector.

Specific duties related with work safety and hygiene will also apply to the volunteer. According to Art. 304^1 L.C., the duties mentioned in Art. 211 L.C., concern also the physical persons performing work on a basis other than the employment relationship. These duties encompass, i.a., the knowledge of the respective regulations, participation in the training sessions, performance of work in accordance with the work safety and hygiene principles and regulations, the application of the orders and guidance provided by the superiors in this regard, etc.

Infringement of the above obligations by the volunteer or by the institution employing him, might cause the civil liability of the party concerned, rather than responsibility according to the principles defined in the Labour Code.

According to the scholars views on the law, an employer, when entrusting the performance of some competencies to physical persons under a civil law contract (including volunteers), should assure them safe and hygienic working conditions, but has no duty to treat them as employees. He does not need to refer them to initial and periodical medical inspections, does not have to organise their training, etc.

The provision, which enables to extend further norms of the law on labour to cover the voluntary relationship consists of Art. 303 § 2 L.C. According to it, the Council of Ministers may specify in an ordinance the scope of application of the provisions of the labour law to persons permanently performing work on a different basis than the employment relationship or a contract to perform subcontracted work at home, together with the modifications resulting from the different conditions of performance of such work.

The above statutory delegation has not been utilised so far. If it were decided, that some of the provisions of the labour law should be extended to embrace the voluntary relationship, there is the possibility to make use of the above indicated simple course. Prior to taking the decision concerning such an issue, one should first consider whether the imposing of a number of often expensive duties upon the institution employing a volunteer shall not in practice hamper the implementation of the goals of volunteer commitment. On the other hand, utilization of the above indicated delegation could enable, for example, to account for the period of volunteer activity as part of the years of work service, on which the employee's rights depend.

II. TAX ISSUES

1. Voluntary Work as Income

Institutions, for which the volunteers perform their work, are as a rule legal entities or other bodies subject to taxation on the same principles as juridical persons. In connection with the above, the comments below are devoted to the issues related with corporate income tax.

According to Art. 12 section 1 item 2 of the Act of 15 February 1992 on corporate income tax (Official Journal - Dz.U. of 2000, No 54, item 654 with subsequent amendments) taxable income comprises, among other things, the value of benefits received free of charge. In the absence of any reservation allowing different treatment, the above formula should be regarded as embracing also the value of work performed by volunteers. It follows from the talks conducted, that in practice the tax office are not excessively rigorous in executing the above provision, although cases have also been noted of demands to asses the value of the work done by a volunteer.

Guidelines concerning the method of such assessment are contained in Art. 12 section 6 of the aforementioned law. According to it, the value of free of charge benefits in the form of provided services is determined in the following manner:

1) If the object of the benefits concerned consists of services that are part of business activities of the subject performing the services – in accordance with the prices applied to other parties;
2) If the object of benefits consists of services purchased – in accordance with purchase prices;
3) In any other cases – on the basis of market prices applied for the provision of services.

The fact that the value of a volunteer's work is, in principle, a form of income subject to corporate income taxation, does not constitute in practice a barrier to the development of voluntary work. Most of the parties for which such work is performed, enjoy various kinds of tax exemptions. One such exemption is foreseen by Art. 17 section 1 item 4 of the Act on corporate income tax. According to this provision, the income of taxpayers, whose purpose consists of scientific activities, research and technology development, education, including the education of students, cultural activity, that concerning physical culture and sports, environmental protection, supporting social initiatives to build roads, telecommunications networks in the rural

areas, water supply to rural settlements, professional and social rehabilitation of disabled persons, and religious worship, is exempt from taxation in the part devoted to the above listed ends.

In connection with the above, in practice, the work of volunteers should have any tax significance mainly for entities involved in commercial business activities. In such case there are no strong arguments in favour of the respective tax exemptions. In connection with the above, the maintenance of the current situation, in which the work of a volunteer is in principle taxed, but tax exemptions apply in connection with the nature of the conducted activities, seems to be acceptable from the axiological point of view.

2. Volunteer's Income Related with Work

A volunteer does not receive any remuneration for his work. In most cases, the institution that employed him, reimburses to the volunteer the expenses incurred on behalf of that institution. The above indicated situation does not give rise to doubts if only the directly incurred expenses are reimbursed. In such case we are not dealing with any income of the volunteer as construed by the Act on personal income tax of 26 July 1991 (official Journal - Dz.U. of 2000 No 14, item 176 with subsequent amendments). In the practice of non-government organisations the postulate arises, however, that a volunteer ought to be able to receive, without any necessity to pay tax, all the benefits that can currently be received by the employees without any tax consequences.

According to Art. 21 section 1 of the Act on personal income tax, the following items are tax exempt:

a) The value of service clothing (uniform), if wearing it is part of the employee's duties, or a money equivalent for such uniform;
b) The value of benefits in kind resulting from the regulations on work safety and hygiene, as well as equivalents for such benefits paid in accordance with the regulations issued by the Council of Ministers or by the competent minister, and also money equivalents for the use one's own clothing and shoes instead working clothing [provided by the employer];
c) The value of non-alcoholic drinks and meals issued to employees for consumption exclusively during the time at work, without any right to receive an equivalent on that account;
d) Money equivalents for the use by the employees for the performance of work of their own tools, materials or equipment, which are their own property;
e) The value of benefits of providing, at the employer's expense, of accommodation for the employees in worker hotels and private quarters rented for the purpose of collective accommodation, or making residential housing available to employees in the case of their employment away from their permanent place of residence – costing monthly up to the value not exceeding the triple minimum wage value as announced pursuant to separate legislation, for December of the previous tax year;

f) Amounts received by employees on the account of the costs of using motor cars for the purposes of the employer up to the values specified in separate regulations by the competent minister;
g) The value of the meals consumed at the company canteen maintained by the employer or another specialised organisational unit as subcontracted by the employer, with the exception of an equivalent for such meals;
h) The value of benefits granted by the employer to improve vocational qualifications and general education of the employee, in accordance with separate regulations.

The above indicated benefits (as well as others) are exempted from personal income tax provided that they were realised for the benefit of the employees concerned. Similar benefits performed for the volunteers still remain subject to taxation.

In connection with the above, among the representatives of the non-government organisations stipulations are arising, that the relationship of the volunteers should be subject to similar tax privileges as the employment relationship. The above postulate could be fulfilled, e.g. by the appropriate amendment of the law on personal income tax. The same direction has been taken by the draft provision of Art. 21 section 4 of the Act on the cooperation of public administration bodies with non-government organisations and on the amendment of certain other laws.

Noting the arguments in favour of the stipulated changes, one needs to indicate at the same time, that such a delicate area as the tax law, might be a difficult domain for the introduction of the respective amendments. The magnitude of the difficulties is indicated by the fact that similar tax allowances as for persons performing work on the basis of an employment contract, have been denied to the numerous category of people employed on the basis of civil law contracts.

III. SOCIAL AND HEALTH INSURANCE

1. Social Security

Social security should be regarded as consisting of retirement and pension, sickness and accident insurance. According to Art. 6 section 1 item 4 of the Act of 13 October 1998 on the social security system (Official-Journal - Dz.U. No 137, item 887 with subsequent amendments) compulsory retirement and pension insurance applies to physical persons performing work on the basis of an agency agreement or contract of mandate, or any other service agreement, to which, in accordance with the Civil Code, the regulations concerning the mandate apply. Such persons are not subject to mandatory retirement and pension insurance, if they are high-school or university students until the age of 26 years. (Art. 6 section 4). In accordance with Art. 9 section 1 of the above indicated law, such persons are also not covered by the mandatory retirement and pension insurance, if they are covered by such insurance on the account of entitlements mentioned there, among which the first and foremost is the employment relationship.

The stipulation that a volunteer and the institution for which he performs his services are tied by a mandate relationship (or rather the relationship to which the regulations concerning a contract of mandate are applied) causes that the above provisions also apply in this case. The act on the social insurance system does not differentiate the situation of the contracts of mandate, which are performed against remuneration, and contracts, in the case of which the performance is done free of charge. This conclusion gives rise to further consequences.

Mandatories may be subject to voluntary sickness insurance (Art. 11 section 2). According to Art. 12 section 1 they are mandatorily subject to accident insurance. The last principle is subject to the exception foreseen by Art. 12 section 3. According to these provisions the mandatory is not subject to accident insurance, if he is performing his work away from the headquarters or location where the mandatory conducts his business.

A problematic issue in the case of volunteer-mandatories is the issue of the basis for the calculation of social security contributions. In the case of the contract of mandate, such basis is determined by as many as two different regulations. According to Art. 18 section 3, if the contract of mandate determines the payment for its performance as a lump sum, an hourly rate or output related rate, or as a commission, that basis is provided by income. If it is not feasible to determine the base in the above indicated manner, the base is provided by a declared amount, but it cannot be less that the amount of the minimum wage (Art. 18 section 7).

In spite of the letter of the above regulations, in practice the volunteers are not reported to social security for insurance. This is partly justified by the fact that most of them are recruited among pupils or students, who are not subject to such insurance. Equally frequently the volunteers are subject to social insurance on the account of being in an employment relationship. The absence of the practice of reporting for social insurance purposes exists also in the situations, when according to the above presented regulations such reporting should be done.

Researching this issue I contacted many inspectors of the Social Security Institution (ZUS), and also the head office of the ZUS. These agencies were completely surprised by the problem raised, they quoted completely different interpretations of the above legal situation. It seems that according to the best thought out interpretation originating from the ZUS head office, volunteers should be reported to social insurance, they should be accounted for on the lists of the insured, but one should not pay the contributions for them, and on the respective forms one should write “0”. This would also imply, that the earlier indicated Art. 18 section 7 of the Act on social insurance, demanding to assume as basis for the calculation of the contributions the declared income, would not apply to volunteers.

The above experiences indicate that the law on the social insurance system is not adapted to the needs related with existence of voluntary work. Paradoxically, however, if the above presented interpretation were accepted, this could lead to extremely advantageous consequences for the volunteers. Without need to pay the

contributions they would be thus covered by accident insurance. Detailed consideration of the consequences of accidents, which might be suffered by volunteers are presented below.

In connection with the above comments one should ask the Social Insurance Institution (ZUS) to confirm in writing the above described interpretation of the regulations, and in the case of obtaining a positive result, to undertake efforts to arrive at the consistently uniform practice of the branch offices and inspectorates of the ZUS in the country.

An alternative to the above action would consist of undertaking efforts to cause the adoption of appropriate legislative changes, so as to obtain a clear position concerning the issue of the regulation of voluntary work in the provisions regulating social insurance. This solution ought to be regarded as more proper from the point of view of the requirements of the state as ruled by the legal order, but one can hardly suppose that it could result in solutions as favourable as the one implied by the above interpretation.

2. Health Insurance

According to Art. 8 item 1e of the Act of 6 February 1997 on the universal health insurance (Official Journal - Dz.U. No 28, item 153 with subsequent amendments) the obligation of health insurance covers, i.a., the persons subject to social insurance or the social insurance of farmers, who perform work on the basis of an agency agreement or a contract of mandate. In connection with the fact, that the necessary condition for being covered by health insurance on the above basis consists of the mandatory being covered by social insurance, the above presented comments apply also to this problem area. The recommended actions should also be of a similar nature.

IV ACCIDENTS OF VOLUNTEERS

In performing his duties a volunteer might suffer from an accident giving rise to various consequences for his health. Taking such situations into account some non-government organisations conclude accident insurance contracts for the benefit of their volunteers. In the prevailing legal system, however, there are no regulations anticipating the obligation to conclude such contracts, and the organisations that conclude them do it on the basis of purely moral motives.

In spite of the fact that the spirit of justice would demand to compensate a volunteer for any personal injury suffered in connection with the performance of his work, one should proceed with caution with respect to the possible introduction of mandatory insurance. Such an obligation could be a substantial burden for the institution, for which the work is performed, leading in consequence to the slow down of the development of voluntary work practices, or to the emergence of a situation, in which the binding norm foreseeing the above indicated duty would be generally violated.

An alternative to such a solution could consist of the adoption of the interpretation described under the item III.1. above. If that assumption is adopted, the volunteer, as the mandatory, could in some cases be subject to accident insurance. In such case, in accordance with Art. 6 item 5 of the Act of 19 December 1975 on social insurance of persons performing work on the basis of contracts of agency or contracts of mandate (Official Journal - Dz.U. of 1995 Nr 65, item 333 with subsequent amendments) a volunteer would be eligible to money benefits on the account of an accident suffered when performing to the contract. In connection with the possibility of such interpretation, it should recommended to address the Social Insurance Institution (ZUS) with a request for the official interpretation by the Social Security Institution (ZUS). In accordance with the comments presented under the item III.1. above, the alternative to such a move could consist of making an effort to initiate the introduction of appropriate legislative changes.

V. LIABILITY FOR DAMAGES PERPETRATED BY A VOLUNTEER

In the course of performing his duties a volunteer might cause damage to a third party. In such cases the liability of the institution on behalf of which he performs his work will come into play, pursuant to Art. 429 or 430 C.C. According to the first of these provisions, whoever entrusts the performance of given actions to another person, is responsible for any damage caused by the perpetrator when performing the activity entrusted to him, unless he is not at fault in terms of the choice made, or if the performance of the given action was entrusted to a person, enterprise or institution, which perform such actions as part of their professional activities. The above regulation concerns the situation, when between the volunteer and the given organisation there is no relationship of subordination, and the volunteer organises his work independently.

A much more frequent case is that when such subordination does occur. This issue is covered by Art. 430 C.C., according to which whoever on his own account entrusts the performance of an action to a person, who in performing such action is subordinated to his management and is obliged to follow his instructions, is the one responsible for any damage caused by the fault of that person in performing the entrusted activity. Art. 430 C.C. is combined, as a rule, with the employment relationship between the person entrusting an action and its executor. In spite of the above, I believe that there is no obstacle preventing its application to those cases of voluntary work, where the volunteer is not independent and is obliged to observe the instructions of his superior.

One of the grounds for liability on the basis of Art. 430 C.C. consists of the fault of the volunteer. If a volunteer causes damage to a third party owing to his own fault, his personal liability with respect to that party comes into play, on the basis of Art. 415 C.C. It should be stressed that Art. 120 § 1 of the Labour Code, according to which in case of damage being caused by an employee in the course of performance of his duties on the job to a third party, it is exclusively the employer that is liable to

provide the compensation for such damage, will not apply to a volunteer. The above norm might give rise to doubts, however, from the axiological point of view.

Summarising this passage of the present paper it should be noted that with regard to the liability of a volunteer and of the organisation employing him with respect to third parties, the general provisions of the Civil Code on tortuous liability should be applied. These regulations, as the fruit of thousands of years of experience, correctly allocate the burden of the incurred damages and any legislative interference whatsoever would not be justified here.

VI. VOLUNTARY WORK AT EDUCATIONAL ESTABLISHMENTS

Since the year 2000 voluntary work has become a term sanctioned by legislation. The term „volunteer" functions in Art. 33k section 8 of the Act of 29 November 1990 on social aid (Official Journal - Dz.U. of 1998 No 64 with subsequent amendments), introduced by the Act of 18 February 2000 on the amendment of the Act on social aid and the Act on pensions and retirement benefits from the Social Security Fund (FUS) (Official Journal - Dz.U. No 19, item. 238). According to this regulation, in the implementation of care and education at a guardianship care and educational institution, as well as in family substitute care, support may be provided by the work of volunteers.

The conditions of using the work of volunteers at guardianship and educational institutions have been regulated by the ordinance of the Minister of Labour and Social Policy of September 1, 2000, concerning the guardianship and educational institutions (Official Journal - Dz.U. No 80, item 900). This issue is covered by § 22 of that ordinance. It determines the purposes of a volunteer's work, the conditions that it must meet, and also the content of the contract concluded with a volunteer.

According to the above indicated ordinance, to become a volunteer, the given person must meet the following conditions:

a) be of full legal age, without criminal record,
b) must have been informed about the specific nature of educational work and the requirement to observe confidentiality concerning the affairs of the children in the custody of the given institution,
c) has been insured by the director against civil liability for damages arisen in the course of work.

A contract concluded with a volunteer should specify the following:

a) the scope of tasks, undertaken by the volunteer, and the duration of the cooperation,
b) the volunteer's commitment to act in agreement with the director or an educator designated by him,
c) the commitment to observe confidentiality concerning the matters of the children staying at the given institution.

The ordinance also foresees the issuance by the director of the institution of an opinion concerning the volunteer's work for that institution.

The above regulations are still quite new and therefore it is difficult to determine, whether they will stand the test of practice. In connection with the above, any legislative interference concerning this issue would have to be premature.

VII. PUBLIC FUND RAISING

One of the more frequent kinds of volunteer activities consists of participation in various kinds of fund raising and collection of contributions for charitable purposes. This issue is regulated by the Act, originating still from the period between the two world wars, of 15 March 1933 on public collections (Official Journal - Dz.U. No 22, item 162 with subsequent amendments) and the ordinance of the Minister of the Interior issued on its basis of 14 July 1934 on the methods of conducting public collections and the control to be exerted over such collections (Official Journal - Dz.U. No 69, item. 638).

According to Art. 7 of that law, public collections may be conducted only by members of the institution which has obtained the respective permission, or by members of institutions having similar objectives, or by persons invited by their name by such institutions. Persons organising or conducting the collection cannot receive any remuneration for their activities.

A serious barrier to the participation of volunteers in charitable collections consists of the provisions of the above indicated ordinance. According to them, in the arrangement and conduct of public collections children and youth up to the age of 18 years cannot participate, nor can school youth, with the exception of university students (§ 12). This provision remains in blatant contradiction with the existing practice, and its consistent execution would lead to serious difficulties for the functioning of many ventures, including first and foremost the Great Festive Aid Orchestra.

The current status, when the existing practice stands in outright contradiction with the regulations of the law, must unequivocally be negatively assessed. In connection with the above, one ought to recommend that complete resignation from the above provision or the alleviation of its requirements (e.g. by introducing a provision that minors may participate in collections under the supervision of adults, or that minors under the age of 16 may not participate in such collections).

The requirement foreseen by the above quoted ordinance is that the persons conducting a collection must be provided with appropriate identity cards. Such cards should be authenticated by an organ of public administration (§ 13).

CHAPTER IV

DANGERS OF COMPREHENSIVE REGULATION

The above deliberations may lead to the conclusion that the binding legal order requires correction only with regards to a few issues of a detailed nature, so as not to create barriers to the development of voluntary work. The voluntary relationship has been qualified among the existing legal institutions, which in their greater part have been functioning in reality for many years. In connection with the above, however, the legal regulations concerning the analysed issue are very dispersed, which causes many representatives of the non-government organisations to gather the provisions on voluntary work in the framework of a single, comprehensive regulation.

The advantage of such regulation would consist of it being easier to use in practice, especially for persons not disposing of a legal education. The status of the volunteer with respect of different areas of the law would be regulated, at least within its basic scope, in a single legal act.

In spite of the above argument, it seems that at the present moment the introduction of comprehensive regulation should not be recommended with respect to voluntary work. Such a measure would require the introduction of a definition of voluntary work. Such a step is always accompanied by very serious risks.

At the present time, in the binding legal order, such a definition does not exist even in the few legal acts, which clearly refer to voluntary work. „Voluntary work" does not even have any precisely established definition also in the common colloquial language. The Dictionary of the Polish Language (ed. M. Szymczak, Warszawa 1981, p. 750) indicates, that it is a „form of traineeship without remuneration in hospital by a medical doctor to obtain the specialist title". The quoted definition illustrates very well the novelty of this phenomenon, which did not exist in practice in the period of communist rule. In connection with that, however, the dictionary cannot provide any help at the present time. In the practice of the operation of non-government organisations, voluntary work is defined as „free of charge, conscious, voluntary activity for the benefit of others, extending beyond the ties of family, acquaintances or friendship" (according to the „Volunteer Work Centre"). This definition, in turn, seems to be too broad, as it would also include such phenomena, as assistance at mass by the altar-boys, or the activities of volunteers in election campaign teams.

Some features of voluntary work give rise to disputes in practice. For example, according to one view, a necessary feature of voluntary work is that the work performed in such framework could not by any means be replaced by work performed under an employment relationship. According to this position, a volunteer is a person who accepts to assume such tasks, which an employee would not or could not perform.

The above position seems to be isolated. In most cases the work of a volunteer could very well be replaced by work on the basis of regular employment. But views are much more divided on the issue of whether voluntary work may be regarded as the performance of tasks for the benefit of specific entities in the hope of gaining regular employment with them. It is worth noting, that such activities may not only be

performed for organisations of the „third sector", but also for commercial entities. If a sufficiently broad definition of voluntary work is adopted, professional traineeships by students might also not be completely excluded from being covered by it.

The above presented difficulties with the construction of the respective definition may serve as an argument against undertaking an attempt to regulate the issue of voluntary work in a comprehensive way in the Polish legislation. The definition adopted in an act of law would either have to be too broad, or too narrow.

The first solution would in consequence lead to the regulation embracing a number of different phenomena, which according to common sense have nothing in common with voluntary work (e.g. all kinds of traineeships with commercial entities in the hope of gaining employment there). In connection with the probability of privileges being granted to voluntary work in a future regulation, this would be likely to create a field for all sorts of abuses. Such a situation implies the distortion of the idea of voluntary work and the deterioration of its evaluation by the general public, which could in consequence lead to the decline of interest in that kind of activity in the situations, in which voluntary work does indeed play its definitely authentic and positive role.

The adoption of a too narrow definition gives rise, in turn, to the danger of emergence of the situation, in which certain kinds of activities would not be covered by it at all. This in turn, assuming the sometime justified method of *a contrario* interpretation, could lead to the situation, when legal conditions of some kinds of free of charge voluntary performance of work would substantially deteriorate. Such an effect may be obtained, as a future regulation concerning voluntary work would most certainly foresee significant privileges for the volunteer and for the entity for the benefit of which such work is preformed. Some of these privileges, however, would probably be completely new, although some of them can also be found by means of interpretation in the currently existing legislation. The laying down *expressis verbis* of the second type of privileges in the law, and the limitation of the scope of regulation only to some forms of voluntary work would lead in consequence to the situation, in which an orientation of interpretation would appear that would deny a similarly privileged position to those forms of activity, which are not contained in the adopted narrow definition of voluntary work.

A good illustration of the above indicated threat could be provided by the consequences of adoption in the wording as proposed in the draft of Art. 21 of the Act on co-operation of the organs of public administration with non-government organisations and the amendment of certain other laws.

According to Art. 21 section 1 sentence 1 of that draft, the work for the benefit of implementation of the statutory tasks of non-government organisations may also be performed on a voluntary basis and without remuneration. This provision concerns exclusively the work performed for the non-government organisations. Its interpretation *a contrario* causes, that one may question the acceptability of voluntary and free of charge performance of work for any other entities. The adoption of such

interpretation could threaten the practice of the performance of certain activities, e.g. directly for the benefit of hospitals, which are not non-government organisations.

Also the practical activities of existing Voluntary Work Centres would be at risk. One of the basic activities of these associations consists of brokering jobs for volunteers. Voluntary Work Centres collect and transmit data concerning persons wishing to work as volunteers and about institutions and persons wishing to make use of their assistance. A volunteer contacting such a Centre receives proposals to apply to a suitable institution wishing to employ him. Such institutions might consist of other non-government organisations, but also of other entities, such as hospitals, social welfare homes, etc. If the provision proposed in the draft law would be adopted, it seems that the work of a volunteer referred by the above kind of Centre to a hospital in order to provide care for the sick patients would not be covered by the content of Art. 21 section 1 sentence 1, as care for the sick is not the statutory task of the Voluntary Work Centre.

Negative consequences of the adoption of *a contrario* interpretation may also concern the other provisions of Art. 21 of this draft law. For example, according to Art. 21 sentence 1, persons who perform work in that manner for the benefit of a given organisation, may have the necessary related costs covered by that organisation. At present, the expenses incurred directly by volunteers are covered anyway (although some tax privileges applicable to employees are not available – see more extensive discussion of this issue in chapter III, section II.2.). The introduction of the discussed regulation as formulated in the present draft can give rise to doubts, whether the respective expenses may be covered by institutions other than non-government organisations.

According to Art. 21 section 3 of the draft law, the value of the work performed by a volunteer is not a donation for the benefit of the given organisation. This provision when interpreted *a contrario* might give rise to doubts, whether unpaid work performed for other entities should not be regarded as a donation. At present there can be no doubt that such work is not a donation (more about this issue in Chapter II, section IV).

When presenting the above doubts I do not claim that *a contrario* interpretation in the above described cases is the only correct one, and that by adopting appropriate methods of interpretation one could not defend the opposite position. But it should be stressed that the appearance of doubts as the ones depicted above may be regarded as a serious threat resulting from the adoption of the definition of voluntary work as contained in the proposed draft law.

At the present moment, in the situation of absence of any such definition, the issues that are relevant from the legal point of view, consist of determining, whether work performed voluntarily and without remuneration, is done on the basis of a contract of mandate, whether the party benefiting from such work is liable with respect to third parties on the basis of Art. 429 or 430 C.C., etc. From this point of view it is a neutral issue whether such performance is to be qualified as a case of voluntary work.

The current legal problems may be resolved on the basis of many years of practical experience and tradition. The introduction of a definition of voluntary work, most likely cutting across the traditional legal concepts, could lead to chaos with regard to this issue.

In consequence I believe that a comprehensive regulation of this phenomenon, whether in the form of a separate legislative act, or as a provision in the law on non-government organisations is undesirable. The necessity connected with such a step of adopting a legislative definition could lead to many threats to the dynamically developing phenomenon and deprive some forms of voluntary work of the privileges that they enjoy already at the present time.

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