Liability of Employers to Protect Workers (Responsibility for Occupational Health and Safety Measures) and The Binding Legal and Criminal Liabilities in Turkish Labour Law

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Özet: Türk İş Hukukunda İşverenin İşçiyi Koruma Borcu (İş Sağlığı ve Güvenliği Önlemleri Alma Yükümlülüğü) ve Bu Borçtan Doğan Hukuki ve Cezai Sorumluluğu

İşverenin işçiyi koruma borcu, kendisine bağımlılık ilişkisi içinde çalışan işçinin, işyerinde veya işverenin yönetimi altında bulunan başka bir yerde çalışmasından dolayı sağlığının, iş güvenliğinin ve kişilik haklarının korunmasını öngören bir borçtur. İşverenin işçiyi koruma borcu geniş kapsamlı olup işçinin sadakat borcunun karşılığını oluşturmaktadır. Dolayısıyla işveren iş ilişkisi içinde işçilerin bedensel, ruhsal, sosyal ve iyilik durumlarını en üst düzeye çıkartmakla yükümlüdür. Türk İş Hukukunda, işverenin işçiyi koruması her şeyden önce Anayasal bir yükümlülüktür. Tür İş Hukuku düzeninde, işverenin işçiyi koruma borcu ağırlıklı olarak 6331 sayılı İş Sağlığı ve Güvenliği Kanunu ile 6098 sayılı TBK'nın 417. maddelerinde düzenlenmiştir. Ayrıca, TBK'nın diğer ilgili hükümleri, TCK ve diğer birçok konunda işverenin işçiyi koruma borcu yer almaktadır. Türk hukukuna göre, İşveren bu yükümlülüğünü yerine getirmediği takdirde hukuki ve cezai sorumlulukla karşı karşıya kalmaktadır. Özellikle, işçinin kişiliğine, ruh ve beden bütünlüğüne yönelen risklerden dolayı işçiyi koruma borcunu mevzuata uygun yerine getirmediği takdirde işçi veya hak sahipleri; maddi, manevi ve destekten yoksun kalma tazminatını talep etme hakkına sahip olmaktadır. Bu çalışmada, işverenin işçiyi koruma borcunun kapsamı ve niteliği, önemi, hukuki dayanakları, hukuki sorumluluğu ve bu sorumluluktan doğan tazminatlar ile cezai sorumluluğu ele alınmaya çalışılmıştır.

Anahtar Kelimeler; İşverenin işçiyi koruma borcu, iş sağlığı iş güvenliği, işverenin hukuki ve cezai sorumluluğu, Türk İş Hukuku

Key Words: Liabilty of Employer to Protect Worker, Occupational Health and Safety, Legal and Criminal Liability of Employer, Tukish Labour Law

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Introduction

The responsibility of an employer regarding worker protection working under the employer in the workplace or any other place managed by the employer is a duty that prescribes the protection of health, occupational safety and personal rights of the employer. Hereby responsibility in question has a comprehensive framework, and constitutes a response to the duty of worker's loyalty. Therefore, the employer is liable for optimising the physical, mental, and social wellness of the worker during employer-employee relations. According to the Turkish Labour Law, the protection of worker by employer, first and foremost is, a Constitutional obligation. Employers' responsibility for worker protection in the Turkish Labour Law is mainly arranged under Occupational Health and Safety Code no. 6331 and article 417 of Turkish Code of Obligations (TCO) no. 6098. Moreover, other relevant provisions under the TCO, as well as the Turkish Criminal Code (TCC) and many other regulations deal with the duty of employers for worker protection. According to the current legislation, the employer is liable for ensuring life and physical integrity of the worker. In this respect, the employer has to eliminate the risks faced by the workers in the workplace, take any necessary measures, provide training, inform, supervise and improve the current situation by means of the latest technology. Should the liabilities fail to be fulfilled, employer is subject to legal and criminal liability. Especially when the employer fails to fulfil his liability to protect the worker against risks on the workers' personality, mental and physical integrity, the worker or beneficiaries have the right to claim material or moral indemnification. The current study has investigated the scope and nature of employer liability on worker protection, as well as the legal grounds and responsibilities and the binding compensations and criminal liabilities.

The Scope and Nature of Employers' Liability to Protect Workers

The duty of worker protection signifies liabilities in an attempt to ensure the protection of worker health and the occupational safety during the employer-employee relations. The duty of an employer to protection a worker constitutes a response to the duty of worker's loyalty. An employer has to protect the life, health and bodily integrity of his worker against the hazards at the workplace. In this respect, the employers' duty of worker protection is a comprehensive responsibility. It is impossible to immaturely restrict the scope of this duty. The foremost among them is to protect the personality of a worker. Besides, as a natural necessity under the duty of worker protection, the employer has to take the relevant measures in order to protect the life, health and bodily integrity of a worker, which are the intrinsic parts of the concept of personality. Moreover, the broader sense of the duty of protection comprises the provision of due

information of worker, guidance, timely notification to the competent authorities, and the permission to workers for analysing certain relevant documents about him. The provisions of current legislation, as well as the "rules of honesty and good faith" under article 2 of the Civil Code determine the scope of duty of the employer to protect the worker.[1]

The employer, throughout the employer-employee relations, is responsible for maximising the physical, mental and social wellness of the worker. According to the article 5 of ILO Convention no. 155, an employer must prevent any harm to a worker's health due to working conditions, protect a worker against health risks and create a vocational environment in line with physiological and biological condition of the worker[2]. Besides, the article 5 of ILO Convention no. 161 on Occupational Health Services states "Without prejudice to the responsibility of each employer for the health and safety of the workers in his employment, and with due regard to the necessity for the workers to participate in matters of occupational health and safety, occupational health services shall have such of the following functions as are adequate and appropriate to the occupational risks of the undertaking: 1.) identification and assessment of the risks from health hazards in the workplace, 2.) supervision of the factors in the working environment, 3.) the provision of an organisation in line with the occupational health and safety requirements, 4.) assessment of new equipment in sanitary terms and the provision of corrective practices, 5.) taking the necessary measures regarding the occupational health and safety in terms of hygiene, ergonomics, and individual and protective equipment, 6.) enabling the adaptation of a work to the worker and 7.) providing information, training and education to the workers in the fields of occupational health and safety.[3]

The protection of workers' health and safety during the employer-employee relations is a human right regarding the preservation of mental and bodily integrity of a person, as articulated in the Universal Declaration of Human Rights. The article 23 of the Universal Declaration of Human Rights indicates that "All employees have the right to work in a healthy and safe environment under working conditions in compliance with human dignity, for social benefit during which they can realize themselves," whereupon a direct relation is established between healthy and safe working conditions and human dignity.[4]

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[1] Sarper Süzek, İş Hukuku, 9. Baskı, İst., 2013, p.405. Also see; Hamdi Mollamahmutoğlu, İş Hukuku, 4. Baskı, Ank., 2011, p.626. Also see; Nuri Çelik, İş Hukuku Dersleri, 24. Baskı, İst., 2011, p.168. Also see ; Ercan Akyiğit, İş Hukuku, Ank., 2010, p.134-135.

[2] For ILO Occupational Safety and Health Convention no. 155 see: Tankut Centel, Türkiye'nin Onayladığı ILO Sözleşmeleri, MESS, İst., 2004, p.556. ;

[3] For ILO Occupational Health Services Convention no.161 see:Tankut Centel, (2004), op. cit., p. 595-596

[4] Savaş Taşkent, İnsan Haklarının Uluslararası Dayanakları, İst., 1995, p. 92-93.

Throughout the employer-employee relations, the employer has to protect and respect the personal rights of workers. The protection of personality of workers includes the preservation of his health, bodily and mental integrity, dignity and honour, occupational prestige, moral values, private life and the protection of his freedom in general. In this respect, the protection of personal rights includes prevention of sexual or psychological abuse against workers in the workplace, the maintenance of personal data about workers and respect in workers' private life.[5]

In the Turkish Law, the liability of an employer to ensure occupational health and safety is stipulated by the Constitution above all. In the Constitution, the article 12 that prescribes "every person has untouchable, non-assignable, inalienable rights and freedom", the article 17 that regulates "everyone has the right to protect and develop his/her material and moral assets", the article 19 that stipulates "everyone has personal freedom and safety", the article 20 on regulation of the right of privacy, the articles 24 and 25 on the freedom of conscience, religion, faith, thought and conviction are absolute imperative legal rules that secure personal rights. Besides, the article 23 and the other relevant articles of the Civil Code, as well as the article 58 of Code of Obligations, include regulations about protection of personality.[6]

In short, the employer's duty of worker protection primarily comprises the preservation of the personality, mental and physical integrity and occupational prestige of the worker. The general rules of honesty and good faith determine the content of this duty. For instance, the liabilities to fulfil within the scope of honesty and good faith rules on the duty of protection are to employ the worker in a healthy environment, to consider special cases of workers such as disease, birth, pregnancy etc., to take occupational health and safety measures, to maintain health and physical integrity of the worker, and to inform the worker about his work.[7]

The Significance of the Duty of Worker Protection (Occupational Health and Maintaining Safety) by the Employer

As the employment contract brings the worker an obligation of performance of a work with his material and mental existence, it is vital for the worker and his beneficiaries that the protection of mental and bodily integrity of the worker is protected and legally secured.[8] The protection of workers at the workplace against

[5] Saper Süzek, (2013), op. cit., p.406, also see; Ercan Akyiğit, İş Hukuku, 10. Baskı, Ank., 2013, p.190-200. op. cit. Haluk Hadi Sümer, İş Hukuku, 17. Baskı, Konya., 2013, p.79.
[6] Sarper Süzek, (2013), op. cit., p. 406-407
[7] Haluk Hadi Sümer, (2013), op. cit., p.79.
[8] Hamdi Mollamahmutoğlu, İş Hukuku, 2. Baskı, Ank., 2005, p.749.

work accidents and occupational diseases[9], the abolition or minimisation of unsafe acts and conditions that lead to work accidents or occupational diseases due to human behaviours[10], creation of a more comfortable and secure, healthy work environment, provision of the safety of equipment used by the worker, and protection of worker against possible chemical, physical and biological hazards do not only preserve the bodily integrity and mentality of the work, but such measures also ease the liabilities of employer pursuant to legislation. Consequently, thanks to the decrease in work accidents and occupational diseases, the loss of production, as well as the compensation expenses of the employer under employment contract is reduced.[11]

The work accidents and occupational diseases due to lack of occupational health and safety measures damage not only the worker, but also a wide group of people who are in need of his support. Therefore, occupational health and safety affect social life as well as the working life.[12] The imperative nature of occupational health and safety norms is based on this social spirit.[13]

Another aspect related with the importance of employers' responsibility regarding the worker protection is that the occupational health and safety measures are directly influential on the life quality of workers. As is commonly known, the worker who has a work accident or occupational disease is faced with various "damages" or "sufferings". First of all, the worker may undergo a long and painful medical treatment process in the wake of work accident or occupational disease. Moreover, such a process causes income loss and the pension for the incapacity paid in this period is lower than his regular wage. After the treatment, the worker may become permanently disabled and lose his capacity to work. He may have an incurable occupational disease. In both situations, the worker is in danger of losing his job. Besides, the worker, from then on, may have to live on the pension of incapacity. Therefore, the occupational health and safety measures, first and foremost, are responsibilities with some human, moral and social aspects.[14]

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[9] Ömer Ekmekçi, 4857 Sayılı Kanuna Göre İş Sağlığı ve Güvenliği Konusunda İşyeri Örgütlenmesi, İst., 2005, p.5.

[10] According to Herbert W. Heinrich'in Domino Theory; accidents constitute of %88 caused by human factor. also see for detail: Rüstem Keleş, "İş Güvenliği Sağlamada 5 S Yaklaşımı, İş Sağlığı ve Güvenliği Dergisi, Yıl:5, Sayı:25, Ankara, 2005, p.22.

[11] Can Tuncay, "Türk Hukuku'nun Avrupa Birliği Hukuku'na Uyumu, AB-Türkiye ve Endüstri İlişkileri (Der. Alpay Hekimler), İstanbul, 2004, p. 60-61.

[12] Sarper Süzek, İş Hukuku, İst., 2005, p. 662.

[13] Ömer Ekmekçi, (2005), op. cit.., p. 5.

[14] Sarper Süzek, (2005), op. cit., p. 662.

Legal Grounds of Employer Liability on Worker Protection

The liability of employer for worker protection is primarily regulated by virtue of the Occupational Health and Safety Code no. 6331 and TCO article 417, as well as through other relevant laws, primarily article 56 of Constitution.[15] As to this liability, the labour legislation on occupational health and safety measures at workplace imposes certain obligations on the employer regarding the protection of life, health and physical integrity of the worker.[16]

The Constitutional Regulation: While the clause 56/c.1 in the Constitution stipulates that everyone has the right to live in a healthy environment, whereas f.3 states that the State is responsible for ensuring a physically and mentally healthy life for all citizens. According to this provision, the State is liable for ensuring the fulfilment of necessary protective and risk preventing measures at workplaces regarding occupational health and safety.[17] Evidently, the State shall fulfil this responsibility through elaboration of protective norms and supervision activities.

Regulation in Occupational Health & Safety Code no. 6331: The most extensive liabilities of employer concerning worker protection are seen in the regulations regarding occupational health and safety. In this respect, the Occupational Health and Safety Code no. 6331, which came into effect on the 20.06.2012, is comprised of detailed regulations. Besides, it is the first Turkish law ever that directly arranges occupational health and safety. The code (OHSC) no. 6331 reorganises the liabilities of employers, in line with the articles 77 to 89 under the title "Occupational Health and Safety"[18] of the previous Labour Code no. 4857. Besides, as is clearly seen in the preamble, the code is inspired by the ILO Convention no. 155 on the Occupational Safety and Health at the Working Environment and Convention no. 161 on the Occupational Health and Safety Services, as well as EU Directive no. 89/391/EEC on the Measures to Encourage Improvements in the Safety and Health of Workers at Work. The current code is an integration and combination of the article 4 on general liabilities of employer, the article 77 under Code 4857, and the article 6 under directive no. 89/391/EEC.[19]

The preamble of OHSC no. 6331 explains the code is prepared in a reformative, preventive and protective approach in order to prevent pecuniary and

[15] Sarper Süzek, (2013), op. cit., p.412.
[16] Ömer Eyrenci, Savaş Taşkent, Devrim Ulucan, Bireysel İş Hukuku, İst., 2004, p.213.
[17] Ömer Ekmekçi, (2005), op. cit., p. 5.
[18] This section repealed with Article 37 of Law No. 6331
[19] Pir Ali Kaya, "6331 Sayılı Kanun'da İşveren ve İşçinin Yükümlülükleri, İş Sağlığı ve Güvenliği Alanındaki Son Yasal Yenilikler" (Tebliğ), 18 Temmuz 2012, BTSO, Bursa, 2012, p. 3-4.

intangible losses due to the work accidents and occupational diseases. According to the article 4 on the general liabilities of employers for ensuring the Occupational Health and Safety, "The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. In this respect, the employer shall take the measures necessary for the safety and health protection of workers, including the prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means, and shall ensure that these measures are adjusted taking account of the changing circumstances and aim to improve existing situations. The employer also checks and monitors whether occupational health and safety measures that have been taken in the workplace are followed and ensure that nonconforming situations are eliminated; carries out a risk assessment or gets one carried out. The employer takes into consideration the worker's capabilities with regards to health and safety where he entrusts tasks to a worker. He takes appropriate measures to ensure that workers other than those who have received adequate information and instructions are denied access to areas where there is life-threatening and special hazard"[20]; thus, the scope of legal liability of employer is articulated.

Even though the article 4 of the Code indicates the scope of legal liability of the employer, it does not include "*the responsibility of compensation for damage*" that is not indemnified by the social security system. Thereupon, regulations under the OHSC no. 6331 are "*General Protection Norms*". The sanctions in case of breach of the law are not stipulated in terms of the requirements of responsibility system. The code only incorporates administrative fines that are sanctions of public law. In case a loss is in question due to breach of article 4 and following provisions, this shall also lead to an indemnity obligation because of legal liability (contractual responsibility).[21]

OHSC no. 6331 also regulates protective and preventive liabilities of the employer regarding occupational health and safety. In this respect, 1) Employer should make a risk assessment (art.5 and 10); 2) Employer is responsible for providing occupational health and safety services (art. 6 and 7); 3) Employer should employ an occupational safety specialist, workplace physician and medical staff (art. 8); 4) Employer is responsible for fire fighting, first aid and emergency plans (art. 11 and 12), 5); Employer is responsible for recording work accidents and occupational diseases and notifying such occurrences to SSI (art. 14), 6); Employers are liable for overseeing employee health (art.15), 7); Employer is responsible for due information of the employees (art.16), 8); Employer is responsible for providing the employees with due training (art. 17), 9); Employer should ensure employee participation in the board regarding the occupational

[20] Haluk Hadi Sümer, (2013), op. cit., p.80.

[21] Sarper Süzek (2013), op. cit.., p.413etc.

health and safety issues (art.18), 10); Employer is responsible for establishing occupational health and safety committee (art. 22)[22].

Regulations in TCO no. 6098: According to the article 417 of the Turkish Code of Obligations no. 6098, "the employer has to protect and respect the personality of worker during service relation, maintain order in line with principles of honesty, and is responsible for taking necessary measures to prevent psychological and sexual abuse against workers and to minimise the effects of such abuse if any. –Employer is responsible for taking any measure whatsoever in order to ensure occupational health and safety in the workplace, for keeping all necessary tools and equipments, whereas the worker is liable for obeying any measure regarding the occupational health and safety. –The indemnification of losses such as death, loss of physical integrity or abuse of personal rights of worker due to the breach by an employer of any above-mentioned provisions, or relevant laws and contracts, are subject to provisions of liability arising from breach of contract."[23] It is worth noting that the article 417 of TCO no. 6098 stipulates the obligation of employer to take all necessary measures whatsoever in order to ensure occupational health and safety without any exception. The article 417 holds the employer liable for the present and possible hazards and damages on the health, body and personality of workers.[24]

Therefore, the employer shall be deemed faulty in case of any damage in the wake of any breach of TCO 417. The indemnity obligation may emerge depending on the causal link between the employment behaviour and damages.[25]

In the articles 418 and 419 of TCO, the protection of personality of worker is regulated regarding working in household organisation and the use of personal data, respectively. Thanks to latest regulations in TCO, the duty of worker protection of employer is handled in a broader sense than in the Code of Obligation no. 818. The article 418 reads "if the worker works in household organization together with the employer, then the employer is obliged to provide adequate food and a proper shelter. If the worker fails to fulfil the performance of the work without his default due to illness or accident, the employer is obliged to meet the care and treatment of the worker for two weeks if employed for up to

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[22] Pir Ali Kaya, İş Hukuku, Temel Yasalar, Ankara 2013, p.362-363

[23] Ünal Narmanlıoğlu, İş Hukuku Ferdi İlişkiler 1, 4. Baskı, İst., 2012, p.321-322

[24] Süzek (2013), op. cit., p.413also see; Ercan Akyiğit (2013), op. cit., p.189 also see; also see for justification of article 417, TBMM, Türk Borçlar Kanunu Tasarısı, Adalet Komisyonu'nun kabul ettiği metin, Esas No: 1/499, Karar No: 21, md. 417

[25] Ömer Ekmekçi, "Türk Borçlar Kanununun Tasarısı'nın İş Sözleşmesine İlişkin Belli Başlı Hükümleri", Sicil İş Hukuku Dergisi, Yıl:4, Sayı: 13, İst., 2009, p.27 also see ; İbrahim Aydınlı, "İşverenin Kişiliğinin Korunmasına Yönelik Düzenlemeler ve Borçlar Kanunu Tasarısının Konuyla İlgili Maddelerinin Değerlendirilmesi", TÜHİS İş Hukuku ve İktisat Dergisi, Cilt:19, Sayı: 6, Ankara, 2008, p.27 also see;
Sarper Süzek (2013), op. cit., p.413, also see; Haluk Hadi Sümer (2013), op. cit., p.80

one year and not entitled to benefit from social insurance supports. For every service year of the worker the period in question is increased by two days for each service year provided this term not to exceed four weeks. The employer is obliged to fulfil the same obligations in case of worker's pregnancy or giving birth", while the article 419 says, " The employer may use any personal data pertaining to the worker only to the extent related to his aptitude to work or necessary for performance of service contract. Special provisions of the law are reserved."[26]

Regulations in** the **Social Insurance and Universal Health Insurance Law no. 5510: The articles 13 and 14 under the Law no. 5510 organise work accidents and occupational diseases. According to the article 13, "Work accident is the incident which occurs when the insurance holder is at the workplace, due to the work carried out by the employer or by the insurance holder if he/she is working on behalf of his/her own name and account, for an insurance holder working under an employer, at times when he/she is not carrying out his/her main work due to the reason that he/she is sent on duty to another place out of the workplace, for a nursing female insurance holder under item (a) of paragraph one of the Article 4 of this Law, at times allocated for nursing her child as per labour legislation, during insurance holder's going to or coming from the place, where the work is carried out, on a vehicle provided by the employer, and which causes, immediate or delayed, physical or mental handicap in the insurance holder." The Article 14/c.1 says "An occupational disease refers to the temporary or permanent disease, physical or mental handicapped status, caused by a reason reiterated due to the quality of the work made or worked by the insurance holder or by the working conditions." According to art. 21, if a work accident or occupational disease has occurred due to employer's intention or insurance holder's action contrary to the legislation on protection of health and labour safety, then the sum of payments which are and will be made by the Institution to the insurance holder or right holders and the first advance capital value as of the starting date of granted income shall be collected by the Institution from the employer, limited with the amounts that the insurance holder or right holders may request from the employer.[27] The most important feature of the article 21 under Code no. 5510 is that employer is held responsible for present or possible damages of the institution regarding the employee insurance because of default by the employer regarding his duty of protection against the worker. Therefore, in case an employer does not fulfil his liabilities about occupational health and safety, he will be obliged to pay the compensations under contractual liability, as well as those accrued due to expenses of the institution.

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[26] Ünal Narmanlıoğlu (2012), op. cit., p.322, also see; Sarper Süzek (2013), op. cit., p.410

[27] Can Tuncay, Ömer Ekmekçi, "Sosyal Güvenlik Hukukunun Esasları, Legal, İstanbul, 2008, p.106 etc.

Legal Responsibility of the Employer due to the Duty of Worker Protection

Framework of Legal Responsibility

The legal responsibility of an employer in terms of his duty of protecting the worker means the pecuniary and non-pecuniary damages to be paid to the worker or – in case of death – to those who are deprived of his support, due to a work accident or occupational disease of worker because of default by the employer regarding the measures of occupational health and safety in the workplace[28]. In a decree on the calculation of indemnity, the Supreme Court has tried to set the limits of legal responsibility of the employer. According to this decree, "the issue of dispute is not the determination of pecuniary damage that cannot be met by the deduction of advance capital value of the income decided by the Social Security Institution pursuant to the nature of suit depending on the real pecuniary losses of claimants. The dispute is on whether the income, which is decided and paid by the SSI and that should be deducted from the pecuniary damage is equal to the first advance capital value at the date of endowment, or to the advance capital value that is calculated in consideration of latest increase to the judgment date under additional article 38 of the Code no. 506."[29] The TCO article 417/c.2 binds the employer with the responsibility of taking any necessary measure for ensuring occupational health and safety without any exception. Besides, under the article 4/c.1 of OHSC 6331, the employer is liable to "ensure the safety and health of workers in every aspect related to the work." In this respect, the indemnity obligation shall occur in case there is a causal link with the breach by the employer of rules about the occupational health and safety and emerging damage. The indemnity obligation of employer shall be determined within the scope of necessary measures stipulated by the Turkish Code of Obligations and Occupational Health and Safety Code. The employer cannot flee this responsibility by asserting the insufficiency of his economic and financial situation, lack of experience, or lack of knowledge about scientific and technical developments.[30] As

[28] Levent Akın, "Üçüncü Kişinin Uğradığı Kazada İşverenin Kusurunun (taksirinin) Kapsamı", TİSK Akademi, Cilt:4, Sayı:7 (2009/1), Ankara, 2009, p.55, also see; Sarper Süzek (2005), op. cit., p.315

[29] For Yargıtay 21 HD. 3.2.2009 E. 2008/8317, K. 2009/333 and Yargıtay 21. HD. 2.4.2009 E. 2009/2612, K.2009/4850 see: Süleyman Başterzi, İş İlişkilerinin Kurulması Hükümleri ile İşin Düzenlenmesi Açısından Yargıtay'ın 2009 Yılı Kararlarının Değerlendirilmesi" Yargıtay İş Hukuku ve Sosyal Güvenlik Hukuku Kararlarının Değerlendirilmesi (2009), Ankara, 2011, p.99etc., also see;. Z. Gönül Balkır "İş Sağlığı ve Güvenliği Hakkının Korunması: İşverenin İş Sağlığı ve Güvenliği Organizasyonu", Sosyal Güvenlik Dergisi, 2012/1, Ankara, 2012, p.33

[30] Sarper Süzek (2013), op. cit., p.413-414

is indicated in a judgment by the Supreme Court, the responsibility of employer for taking necessary measures includes the preventive efforts to eliminate the possible dangers in the nature of things, as well as the fulfilment of occupational safety rules. According to the Supreme Court, such measures should be the measures imposed on the employer via codes and rules regarding the content and fairness of the job; and there should be a "proper causality" beyond reasonable causal link between the lack of attention and the consequence.[31] In case of an occupational disease, the proper causality between the disease and working in workplace should have materialised.[32]

In this respect, the employer is not considered to fulfil his responsibility merely by taking the measures indicated in the occupational health and safety legislation. The employer also has to take other occupational health and safety measures that are not prescribed by the legislation but are necessitated due to scientific and technological developments. For the Supreme Court, "the important aspect on protection of body and mental health of the worker is not whether the employer is asked to take any measures within the limits of fairness, but it is whether the reason, science and technique require any such measures" (YH10HD 17190/4177).[33]

In case the employer intentionally or via gross negligence does not fulfil his liability to protect the worker through pursuant to limits prescribed by legal practice, and if, as a result, the worker suffers work accident or occupational disease, the worker or if he is dead, his beneficiaries, have the right to claim the "portion not paid by Social Security Institution" from the employer via compensation within the scope of general liability law. Besides, pursuant to the article 21 of Code no. 5510, the Social Security Institution has the right to recourse the present or future expenses for worker from the employer.[34]

Therefore, within the scope of legal liability, the employer, who does not fulfil his duty of protection towards worker, has to indemnify the damages (pecuniary and non-pecuniary) of worker or beneficiaries other than those paid by SSI, as well as the expenses by SSI under the same conditions by means of recourse suit.[35]

[31] Yargıtay HDK., 5.2.2009, E.2003/21-23, K.2003/56. , also see; Yargıtay 21. HD, 17.4.2003, E.2003/3774, K.2003/3517, also see; Nuri Çelik, İş Hukuku Dersleri, 26. Baskı, İstanbul, 2013, p.186

[32] Yargıtay 21. HD., 10.6.1999, K.1999/4119

[33] Sarper Süzek (2013), op. cit., p.414

[34] Müjdat Şakar, İş Hukuku Uygulaması, İstanbul, 2006, p.156-157, also see; Sarper Süzek (2005), op. cit., p.315-316

[35] Sarper Süzek (2005) op. cit., p.316 also see Hamdi Mollamahmutoğlu (2005), op. cit., p.749-750 also see Nuri Çelik (2013), op. cit., s.186

Nature of Legal Liability of the Employer

The doctrine reveals a split in opinion regarding the nature of legal liability of an employer arising from work accidents and occupational diseases. The views mainly gather around two opinions; namely, non-faulty and faulty liability. According to the defenders of non-faulty liability, the responsibility of fault does not comply with the liabilities of the employer and there is a gap in the law regarding the nature of responsibility; thus, the judge may fill this gap pursuant to the article 1 of the Civil Code and may accept the ground of non-faulty liability.[36]

Therefore, the judge shall fill the legal gap pursuant to the art.1/c.2 of the Civil Code by means of replacement of non-faulty liability principle based on risk (danger).[37] According to the defenders of faulty liability, the responsibility of an employer arising from work accident and occupational disease grounds on the bases of a fault. They argue that in the Code of Obligations, "what is essential is the liability based on the fault". This fault should be "especially foreseen in the law" like other non-faulty liability cases, for that hereby principle is replaced by the non-faulty liability rule. The OHSC art.4 (art. 77 of abolished Labour Code) does not impose any such liability; moreover, this provision is not of a nature establishing such a liability based on private law. Therefore, the attribution of employer responsibility to non-faulty liability principle is against the positive law.[38]

On the other hand, the article 71 of the Code of Obligations no. 6098 imposes the non-faulty (objective) liability principle for damages due to activities of undertakings that "pose serious danger". According to the TCO art.71/c.1, "in case damage arises from the activity of an undertaking that poses serious danger, the employer or – if any – exploiter shall be severally liable for such damage." The third clause under the same article reads "Special liability provisions that are prescribed for a given danger situation are reserved"; whereupon, the provisions of special law which imposes danger liability are reserved. The main element of responsibility of danger according to the article 71 of TCO is that the business activities actually pose notable danger.[39]

The Supreme Court has not always defended the same view in its judgments. In previous verdicts, Supreme Court accepted the responsibility of employer due to work accident as non-faulty liability based on risk[40]; in the more

[36] İlhan Gülel, "İşverenin İş Kazası ve Meslek Hastalığından Doğan Tazminat Sorumluluğu", Türkiye Adalet Akademisi Dergisi, Cilt:1, Yıl:2, Sayı:7, Ankara, 2011, p.13, also see; Nuri Çelik (2013), op. cit., p.196etc.

[37] Sarper Süzek (2013), op. cit., p.417, also see; Nuri Çelik (2013), op. cit., p.186-187

[38] Sarper Süzek (2013), op. cit., p.418, also see; Ahmet Sevimli, "Türk Borçlar Kanunu m.417 ve İş Sağlığı ve Güvenliği Kanunu Işığında Genel olarak İşçinin Kişiliğinin Korunması", Çalışma ve Toplum Dergisi, Cilt: 2013/1, sayı: 36, p.126-127

[39] Sarper Süzek (2013), op. cit., p.422-423

[40] Sarper Süzek (2013), op. cit., p.419etc.

recent judgments, however, the Court grounds on faulty liability following a change of view. According to a decision by General Council of Supreme Court in 2010, "The work accident must have occurred in the wake of behaviour or negligence against the responsibility of employer regarding the occupational safety measures and care for that the employer is held responsible for such an accident. In other words, as indicated in remittitur by the Special Office, the employer should have a fault for that he is responsible for the accident."[41] The future judgments will determine whether the practice will change within the scope of regulations under the art. 71 of the TCO no. 6098. In our opinion, the adoption of objective fault principle seems most compliant with our legal system.

Indemnities due to Legal Liability

A worker may claim the indemnification of physical damage due to work accident or occupational disease because of the behaviour of employer against his duty of protection towards a worker (TCO art.54-55). Likewise, when conditions are in place, the worker may claim non-pecuniary compensation from employer apart from above-mentioned indemnity (TCO art.56). Besides, in case of the death of a worker, the persons who are deprived of his support can claim the indemnification of their pecuniary and non-pecuniary damages (TCO art.53)[42].

Material Compensation: The Labour Act includes a regulation about material compensation that seeks to make up for the deficit in the assets of worker due to physical damages in the wake of work accident or occupational disease. Thereupon, the material compensation arising from work accident or occupational disease is subject to general provisions of the TCO that are in place for all liability circumstances which cause physical damage. According to article 49 of the TCO on the issue, "One who harms another with a faulty or illegal act is responsible for indemnifying such damage." The Article 54 of the TCO says "The material damages to be compensated by the employer following work accident or occupational disease include: 1. Treatment expenses, 2. Loss of income, 3. Losses due to reduction or loss of working capacity, 4. Losses due to unbalance of economic future."[43]

According to the established practice of Supreme Court, the amount of material compensation in lawsuits regarding work accident and occupational disease consists of the sum of earnings in the active and passive periods of the period, on the basis of his remaining lifetime as of report date. In other words, the gross income of worker is found, his earnings in the given period is calculated in

[41] For Yargıtay Hukuk Genel Kurulu, 3.2.2010, 21-36/67 Decision see: Sarper Süzek (2013), op. cit., p.420

[42] Sarper Süzek (2013), age., s.431-432, ayrıca bkz., İlhan Gülel (2011), age., s.9 vd., ayrıca bkz. Nuri Çelik (2013), op. cit., p.185etc.

[43] Sarper Süzek (2013), op. cit., p.432

consideration of present data without any discount or increase, while his earnings in the unknown period is increased by 10% per year for the period until the age of 60, then discounted by 10%; while the earnings in the remaining (passive) lifetime after 60 years of age are calculated every year without any average.[44] According to the Supreme Court, the material compensation should re-determined in consideration of recent data and increase in minimum wage, and the advance capital value put on by the Institution (SSI) to beneficiaries should be deducted from the detected damage.[45] In case of death upon work accident, the compensation should be calculated as follows: the increase in the income of beneficiaries is deducted from the compensation, which is determined in consideration of the most recent minimum wage rise as of judgment date, by means of latest coefficient.[46]

Compensation for Deprivation of Support: In case of death of a worker following a work accident or occupational disease due to behaviour of employer against his duty of protection towards worker, the persons who are deprived of the support of the worker may claim indemnification. According to the TCO art.53/c.3, in case of death, "it is necessary to make up for the relevant losses of those who are deprived of the support of the deceased person". Besides, pursuant to the TCO 417/c.3, the compensation of the damages of those who are deprived of the support of the worker because of his death upon breach of code and contract by employer is subject to the liability provisions arising from the breach of contract. By act of TCO 417/c.3, even though such persons do not have a contractual relation with the employer, they have the right to claim the compensation for deprivation of support, grounding on liability rules arising from employment contract.[47]

Pursuant to the established practice of Supreme Court, the compensation for deprivation of support is a material compensation which "…consists of the advance and in full payment to the deprived of the portion over the potential earnings of the dead in his possible lifetime that he would be able to allocate for aiding the claimants".[48] To be more precise, the compensation for deprivation is

[44] For Yargıtay Decision see: Yargıtay 21 HD. 03.05.2007, E.2007/2485, K.2007/7459, also see; Yargıtay 21. HD., 26.6.2008, E.2008/3448, K.2008/9986, also see; Yargıtay 21. HD., 03.05.2007, E.2006/18008, K.2007/7460

[45] For Yargıtay 21. HD., 22.1.1997, E.1996/7224, K.1996/187 Decision see: Nuri Çelik (2013), op. cit., p.187

[46] For Yargıtay Hukuk Genel Kurulu (HGK), 22.12.2004, E.2004/21-225, K.2004/751 Decision see:. Nuri Çelik (2013), op. cit., p.187 etc.

[47] Sarper Süzek (2013), op. cit., p.445

[48] Yargıtay 21 HD., 12.02.2009, E.2008/8348, K.2009/1968

advance and in full payment of the portion over the possible earnings of the deceased worker that he would be able to allocate to the deprived in his lifetime.[49]

Moral Indemnity: In case a worker is subject to a bodily or mental damage upon work accident or occupational disease, the employer may also pay moral indemnity apart from the material compensation depending on circumstances. Likewise, if the worker dies upon accident and certain conditions are in place, his relatives may claim such indemnification. The right to claim moral indemnity grounds on the provision "In case the bodily integrity of a person is harmed, a certain amount of moral indemnity may be decided for the sufferer in consideration of the aspects of the occurrence. In case of physical harm or death, the relatives of the damaged or dead are also paid a certain amount of moral indemnity".[50] The amount of moral indemnity is decided by the judge. In the traditional practice of the Supreme Court (referring to the Decision of Unification of Supreme Court Practice no. 7/7 on 26.06.1966), even though the judge is the competent authority to decide on the amount of moral indemnity, the judge has to take into consideration the economic conditions of the relevant country, social and economic condition of parties, the purchasing power of money, the level of fault of parties, the severity of the case and the date of occurrence. Besides, the compensation amount should be decided on the ground that it does lead to deterrence, in addition to create a feel of satisfaction pursuant to established legal approach.[51]

Criminal Liability Arising from Employers' Duty of Worker Protection

There are two aspects of the criminal liability of an employer. First of all, the employer is liable to pay an administrative fine for the occupational health and safety measures he did not take (Labour Act Art. 105). Or even, if any defects endangering the life or bodily integrity of employee in the workplace are to be found, the inspection system stops operation and closes the installations or arrangements (Labour Act Art.79).[52] The second and most important aspect is directly related with the penal law. This is the aspect to be understood regarding the criminal liability of employer in terms of occupational health and safety. The Turkish Criminal Code no. 5237 shall serve as a basis for whether the act, which harms the worker due to default of occupational health and safety measures, is deemed as a crime by employer. In this respect, if there is a crime pursuant to the

[49] Hamdi Mollamahmutoğlu (2005), op. cit., pp.773-774, also see; Sarper Süzek (2005), op. cit. pp.341-342

[50] Nuri Çelik (2013), op. cit., p.189 etc., also see; Sarper Süzek (2013), op. cit. p.452 etc.

[51] Yargıtay 21 HD. 02.03.2009, E.2008/2635 K.2009/2974, also see; Yargıtay 21. HD., 24.03.2009/1602, K.2009/4319

[52] Müjdat Şakar, (2006), op. cit., p.159.

Turkish Criminal Code no. 5237, criminal proceedings will be started against the employer.[53]

It is possible to concretise the criminal liability of employer with a more precise expression: In case a work accident or occupational disease has occurred in a workplace because the employer (main employer, sub-employer or temporary employer) or his deputy did not take necessary measures, such situation constitutes the crime of causing death or injury upon "negligence" through "imprudence and carelessness". Imprisonment or fine may be applied depending on the nature of crime.[54]

Pursuant to the Turkish Criminal Code no. 5237, the death or injury of worker in the wake of a work accident or occupational disease due to lack of necessary occupational health and safety measures by the employer constitutes a crime. According to the article 85 of the Code no. 5237, *"(1) Any person who causes death of a person by negligent conduct is punished with imprisonment from three years to six years. (2) If the act executed results with death or injury of more than one person, the offender is punished with imprisonment from three years to fifteen years."*[55]

The article 89 of the Code no. 5237 organises "negligent injury", saying *"-(1) Any person who gives corporal or spiritual injury to a person or cause deterioration of one's health or consciousness by negligence, is sentenced to imprisonment from three months to one year or punitive fine. -(2) If the negligent injury results with; a) Weakening of sensual or bodily functions of the victim, b) Break of bones, c) Continuous difficulty in speaking, d) Distinct facial mark, e) Risk of life, f) Premature birth of a child, then the punishment imposed according to first subsection is increased as much as one half.-(3)If the negligent injury results with; a) Incurable illness or causes vegetative existence of the victim, b) Loss of sensual or bodily functions, c) Loss of ability to speak and to give birth to a child, d) Distinct facial change, e) Abortion, if the offense is committed against a pregnant woman, then the punishment imposed according to first subsection is increased by one fold. (4) If the offense results with injury of more than one person, the offender is sentenced to imprisonment from six months to three years. -(5) (Amendment: 6/12/2006 – 5560/5 art.) Excluding the negligent act done with knowledge of essential facts and its legal consequences, commencement of investigation and prosecution for such offenses is bound to filing of a complaint."*[56]

The element of negligence in negligent murder and injury is defined in the article 22 of the code no. 5237. *"-(1) Offenses occasioned by negligent act are punished as expressly defined in the laws.-(2) Negligence is failure to take proper care or precaution during the*

[53] Levent Akın, (2009), op. cit., p. 55-56, also see: Levent Akın, "İş Sağlığı ve Güvenliğinde İşverenin Cezai Sorumluluğu", TİSK Akademi, cilt 3, sayı 5 (2008/1), Ank. 2008, pp. 213-214.

[54] Müjdat Şakar, (2006), op. cit., p. 159, also see: Levent Akın, (2008), op. cit., s.213, also see: Levent Akın, (2009), op. cit., p.56.

55 Levent Akın (2008), op. cit., p.213, also see; Hamdi Mollamahmutoğlu, (2005), op. cit., p.777.

[56] See: 5237 sayılı Türk Ceza Kanunu md. 89; Also see for Occupational Health and Safety of Employer's Criminal Responsibility dicussions in doctrine: Levent Akın (2009), op. cit., p.56, also see: Hamdi Mollamohmutoğlu, (2005), op. cit., p. 777.

performance of an act without being aware of legal consequences of the crime defined in the laws.-(3) Where an act of person creates the legal consequence defined in the laws beyond his will, this is considered as intentional negligence; in such case the punishment imposed for negligent act is increased from one third to one half.-(4) The punishment to be given due to negligent offense is determined according to the fault of the offender.-(5) In negligent offenses committed by more than one person, each one is blamed of his own fault. The punishment is assessed individually according to the fault of each offender.-(6) No punishment is given if the legal consequence of the negligent offense exclusively results with injury of the offender either in person, rights or reputation in such a way not to require imposition of punishment; in case of intentional negligence, the punishment to be imposed may be abated from one half to one sixth." As is clearly seen in the second clause under article 22, negligence means the actualisation of a crime due to failure of proper care or precaution, without being aware of its legal consequences.[57]

One of the principal elements to distinguish negligence from intention is that the first means an involuntary act, while the intention points out to a voluntary offense. Besides, for any negligence, there should be breach of any codes of conduct regarding the prevention of undesired harmful consequences.[58] In short, the criminal liability of the employer, that is, the death or injury of worker in the wake of a work accident or occupational disease due to failure of employer to take necessary occupational health and safety measures, constitutes a negligent "murder or injury" pursuant to the Turkish Criminal Code.[59]

On the other hand, in case the employer processes the personal data of the worker in an illegal manner, such conduct is included within crimes against the privacy of life in the art. 123 and contd. Of TCC, and requires imprisonment. Accordingly, the TCC foresees imprisonment for the persons who unlawfully records the personal data (art. 135/c.1); who records the political, philosophical or religious concepts of individuals, or personal information relating to their racial origins, ethical tendencies, health conditions or connections with trade unions (art.135/c.2); who unlawfully delivers data to another person, or publishes or acquires the same through illegal means (art.136); who does not destroy the data within a defined system despite expiry of legally prescribed period. Moreover, the commencement of investigation and prosecution for the offenses listed in this section is not bound to any complaint (TCC, art.139).[60]

Conclusion

The liability of an employer to protect a worker is an obligation indicated in international documents, above all the Universal Declaration of Human Rights. This duty imposes on the employer the responsibility to maintain the mental and

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[57] Levent Akın, (2009), op. cit., pp. 56-57.
[58] Levent Akın, (2009), op. cit., p. 57.
[59] Levent Akın, (2008), op. cit., p. 63.
[60] Hamdi Mollamahmutoğlu (2011), op. cit., p.638

physical integrity and personal rights of the worker with whom a contractual relation is settled. Within the scope of this liability, the employer has to take any measure regarding occupational health and safety in the workplace, protect workers against risks on their health and safety during the work, and create an occupational environment in compliance with the physiological and biological condition of workers. The Turkish Labour Law comprises legal regulations that directly organise the liability of employer regarding worker protection. In spite of legal ground, however, the employers do not fulfil such obligations. Employers mainly refrain from the fulfilment of this duty, since they traditionally consider all regulations about working life as an item of expenditure. In fact, both the current legislation and legal practices impose very severe legal and criminal liabilities in case of failure of such obligations. For one, the article 417 of the TCO enables claiming material and moral indemnification that may completely terminate the activities of a minor business. In this respect, the jurisdiction has a constant and consistent practice. Today, the relevant discussions in jurisdictions concentrate not on whether compensations have occurred, but rather on the detection of fault.

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