

LEGAL BOUNDARIES AND SANCTIONS IN SUBCONTRACTING

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ABSTRACT

Purpose- The main purpose of this study is to scrutinize the problems caused by the subcontractor business model that has been spreading in our country and in the world since the beginning of 1980s and the legal regulations to overcome the said problems.

Methodology- The legal legislation regulating subcontracting and the related literature were scanned, and provisions that aim to prevent excessive contracting were examined.

Findings- It was found that subcontracting has a strong tendency to exceed its purpose and related legal regulation does not meet the expectations of either employees or employers.

Conclusion- Regulations that do not ignore obligations originating from global competition, aims to protect the most basic rights and values of the modern society and reinforces working peace will contribute greatly to solving this problem.

Keywords: Primary employer, subcontractor, over-subcontracting, auxiliary business

JEL Codes: L23, L24, L29

1. INTRODUCTION

The increase in production diversity and flexibility generating activities and the attempts of businesses to carry out these activities with high quality and the least cost resulted in giving jobs other than those that businesses focus on, invest in and employ to other employers specialized in them and the concept of subcontractor emerged. As in other countries, the practice of businesses to give some of their jobs to employers called subcontractor has spread in our country. Subcontracting practices have continued in traditional practice fields for a long time and stayed limited to construction, transportation and businesses that require less quality in general. Since the 1980s, the subcontracting practice has started to gain widespread popularity with municipalities giving cleaning jobs to subcontractor companies and rapidly spread to private sector workplaces. Today, the subcontracting practice has spread to all branches of business, and to all the manufacturing and service sector. This spread has also led to the practice of eliminating workers' rights. With this phenomenon called subcontracting, which is one of the most complained about issues by the workers and unions, work in a workplace is divided as much as it can be and given to the separate subcontractors; and subcontractors that employ non-union workers without any social security and even under the legal minimum wage decrease the labor cost and unionization and collective contract becomes almost impossible (Şakar, 2010). What is essential in Business Law is that the employer manufacture with his/her own employees. However, it can be seen that the businesses start to follow strategies coherent with the competition conditions in the global market and externalize production and employment as a flexibility tool as a result of the economic and technological developments that come with the globalization process. The subcontracting practice, in which employers realize their goods and/or services production through other employers and his/her employees they otherwise do with their own employers, is a typical example of externalizing goods or services production in a workplace (Güzel, 2010). In this context, as employer organizations incline towards a more flexible subcontracting system and legal regulations that will enable it, workers' organizations advocate for a more restricted subcontracting practice. Thus, intense differences of opinion and interest conflicts arise between workers' organizations and employers. In this study, legal boundaries towards preventing excessiveness in the subcontracting practice and enforcements to be imposed when the practice is abused.

3. CONCEPTS AND DEFINITIONS

The most debate-causing provisions of Labor Law No. 4857 are the sixth and seventh paragraphs of Article 2, in which primary employer-subcontractor relations and their limitations are regulated (Güzel, 2004). According to Article 2/VI of the law, "The relationship between the employer and the employer who receives a job from an employer, in auxiliary work related to the production of goods or services carried out in the workplace, or in some part of the actual work, in which the business and its workers employed for that job are employed only in the workplace is called primary employer-subcontractor relation." The type of employer called "sub-employer" in the law is called "subcontractor" in practice. The fact that employers give certain jobs to other employers were originally based on justifiable reasons. For example, employers' giving certain jobs such as that an employer that constructs buildings gives the tasks of installing electricity wiring or attaching woodwork to subcontractors, operating a dining hall in a factor, carrying workers by service vehicles was considered reasonable.

However, since the 1980s, subcontracting practice has started to gain widespread popularity with municipalities giving cleaning jobs to subcontractor companies and rapidly spread to private sector workplaces. This phenomenon called "subcontracting" causes unfair competition for workplaces that respect workers' rights, are unionized and fulfill their social security obligations and employ workers with labor agreements and forces them towards subcontracting.

4. MEASURES AGAINST OVER-SUBCONTRACTING

The excesses seen in subcontracting since 1980s have reached alarming levels in terms of workers' rights. In order to eliminate these excesses, certain measures were tried to be taken with Labor Law No. 4857 (Şakar, 2008; Şen, 2006).

These measures may be listed as:

- Primary job-auxiliary job¹ difference was made, and while there are no restrictions on the use of subcontractor in auxiliary jobs, use of subcontractors in primary jobs is accepted to be possible only in jobs that require specialization for technological reasons necessitated by the business and the job.
- It was foreseen that the primary employer cannot restrict the rights of workers by getting them employed by a subcontractor.
- It was ensured in the Law that anyone that had worked in that business cannot establish a subcontractor relation.

Otherwise and generally, in situations where the primary employer-contractor relation is determined to be based on fictitious transaction, the employees of the subcontractor will be regarded as the employee of the primary employer since the beginning. Labor Law No. 4857 foresaw these measures but the measures in question were inadequate and ineffective thanks to the lack of penal sanction. This deficiency was tried to be filled with Law No. 5763 and Ministry of Labor, and Social Security was given an important task of inspection on this issue.

According to the Additional paragraph of the Article 3 of Labor Law No. 4857 with Law No. 5763: "*... subcontractor is obliged to make notification according to the first paragraph provision with a written subcontracting agreement and necessary documents obtained from the primary employer for the registration of his/her working place. These documents belonging to the said workplace that are registered by the regional manager are examined by labor inspectors when necessary. In the event that fictitious transaction is determined after the examination, justifiable inspector report will be communicated to the employers. Employers may object to the authorized labor court for this report within thirty working days from the date of notification. The case to be settled on objections is concluded within four months according to the petty court procedures. In the case of an appealing decision by the court, the Supreme Court will render a final verdict within six months. It is obligatory that Public Administrations will object to the authorized labor courts for these reports and apply to other legal remedies against court decisions. If the report is not objected to within thirty working days or the court approved of the determination of fictitious transaction, the registration process will be cancelled, and the employees of the subcontractor will be accepted as the employees of the primary employer.*

Subcontracting Regulation³ was published on the codes of practices of the regulation. In addition, administrative fine obligations have been imposed on employers or employer representatives who violate the obligation to make notifications. Separate administrative fine provisions have been introduced to the primary employer, subcontractor and their

¹ Primary Work refers to the work that constitutes the basis of goods and services production (Subcontracting Regulation, a.3/c). Auxiliary Business refers to businesses that are related to the goods or services production carried out in the workplace but not directly in the production organization and that is not a compulsory factor of production but continues as long as the primary business does... (Subcontracting Regulation, a.3/ğ).

² Simulation refers to giving primary jobs that do not require specialization in goods and services production to subcontractors (Subcontracting Regulation, a.3/g).

³ RG. 27.09.2008-27010.

representatives who notify their workplace fictitiously. These legal measures were severely criticized by employers (Aktekin, 2008) and requests for changes were expressed⁴. The measures foreseen by the law were rendered de facto unenforceable due to the employer reactions. In the additional paragraph to the Article 3 of the Labor Law, it was mentioned that as the inspection should be done "when necessary", it is not usually carried out in practice and inspection practices are subordinated to the economic crisis and unemployment reasons (Şakar, 2010).

5. PROBLEMS CAUSED BY OVER-SUBCONTRACTING

Despite the views that place the start of the subcontracting practice in our country within the Code of Obligations no. 818 dated 1926, the most common view regarding the start of the practice is with the Labor Law no. 3008 dated 1936 (Narmanlıoğlu, 2008). The subcontracting venture is subject to intense and heated discussions for working relations and contains many complex factors within it. It also displays an extremely regular increase in practice as it reinforces the impression that it will be a constant and inseparable part of our legal system. Along with the unfair practices seen in subcontracting, the increase in the work-related accidents among subcontracting employees has caused the institution of subcontracting as an instrument for rasping workers' rights. Unfortunately, the need for legal regulations towards solving these problems has not been properly met (Koç, 2018). Especially the fact that the number of subcontracted workers is so much higher compared to other problematic employment models such as on-call working, part-time working, temporary working relationship, indentured working increases the intensity of the problems and significance of the issue. Looking at other atypical employment models, it can be said that the practice that pits the employers against employees the most is subcontracting, because situations such as the detection of fictitious transaction or the legal validity of the contract arise in subcontracting relationship the most (Durmaz and Özdemir, 2019). Over-subcontracting leads to important problems related to working life. Essential problems will be focused on below.

5.1. Subcontractor Employees' Establishing and Becoming a Member of Unions

Law of Trade Unions and Collective Bargaining Agreement No. 6356 does not either contain a regulation on subcontractors or bring a limitation to subcontractors or their employees on unionization or becoming a member of unions. As a natural result of this, the subcontractor has the right to establish an employer union or become a member of such union within the framework of the principles set out in the Law. The same is valid for the employees of the subcontractor. According to the views of subcontractor employers considering the workplace they work in completely different than their primary employer; the employers of subcontractors will have the right to be a member of a union for whichever profession they enter. If the workplace of the primary employer is in the same line of business as the subcontractor, the employees of the subcontractor will have the right to become a member of a union in that same line of business. If the lines of business are different, the employees of the subcontractor can only be a member of a union that is in the same line of business with their workplace (Canbolat, 1992; Tuncay, 1991; Ekonomi, 1991). However, according to the view that considers the workplace of the primary employer to be the same as the workplace of the subcontractor; subcontractor employees can be members of a union in the line of business of the primary employer (Kutal, 1990). Beyond these different views, when the divided and minimized organizational structures of subcontractor employees are taken into consideration, the fact that they are deprived of inner interaction and strength to be a member of unions is one of the most important obstacles to their unionization. Subcontracting practices lead to important problems in terms of union rights. It can even be said that fundamental principles on which these rights are based have disappeared. Because the existence and use of fundamental social rights recognized to employees depend on the existence of an employee community that works in a similar status at the workplace, business or even line of business. The establishment of unions to protect the joint interests of those who have solidarity requires the existence of a particular community of employees. However, subcontracting practices have lost these characteristics; they consist of employees in different statuses that have no joint interest or a particular solidarity. This sociological phenomenon makes unionization impossible or remains weak. In cases where the main purpose of subcontracting is de-unionization of workers, this phenomenon that we try to explain gains even more remarkable sense. For example, 98% of workers that work in petroleum, chemistry, plastic lines of business work without unions (Güzel, 1993).

5.2. Problems Reflected in the Individual Rights of Employees

It is unquestionably clear that the excessive spread of subcontracting lead to negative consequences of subcontractor employees. First of all, inequality arises among employees working in the same workplace. Employees in two different statuses are in the same economic body. One group (employees of the primary employer) forms a privileged group compared to the other group (subcontractor employees) due to the rights and assurances they have. The group's rights such as union membership, collective agreement and strikes deepen this inequality. Again, there is a major imbalance between employees

⁴ http://www.tusiad.org.tr/FileArchive/2009.07.23-Esneklik_TISKTOBBTUSIAD Ortak GorusRevizeMetin.pdf; TISK, TOBB ve TÜSİAD'ın Esneklik Konusundaki Ortak Görüş ve Önerileri (Gözden Geçirilmiş Metin)

of subcontractors and primary employers in terms of wages and other social benefits. Subcontractor employees are often employed at very low wages. Their inability to benefit from collective bargaining increases the wage imbalance further. The same is true for rights in terms of the employee's seniority in the workplace. Subcontractor employees are generally employed for short periods of times, leading to their deprivation of rights such as annual paid leave and severance pay. There are also significant differences between the two groups of employees in terms of working conditions. It is observed that subcontractor employees are employed in heavier conditions and their resting periods also vary (Kutal, 1990). On the other hand, subcontractor employees are not exactly benefiting from the right to Social Security. The vast majority of them are employed uninsured-unregistered. In addition, the insured subcontractor employees are not fully entitled to Social Security rights. It should be noted that benefiting from these rights requires not paying a premium for a certain period of time; it can be clearly seen that many subcontractor employers are far from fulfilling this condition considering that they are employed for very short periods. In all these aspects, the problems of the workers employed by the subcontractors gain broad and complex dimensions, and there is a danger of labor becoming a commercial commodity again (Güzel, 1993).

5.3 Over Spread of Subcontracting Practices in terms of Employers

Subcontracting practices provide a wide range of economic opportunities for employers in the short term. Because they have the opportunity to reduce labor costs and put businesses in a more flexible and profitable position. Furthermore, subcontracting practice significantly removes employers from the obligations stipulated by individual and collective labor law. For example, issues such as dismissal and related severance pay, wage increases resulting from collective agreements, pressure of strike in collective labor disputes are just a few of the issues employers complain about. In spite of these advantages, it is also necessary to keep in mind the effects of excessive subcontracting on long-term working peace and social peace, and increasingly reducing productivity (Okcan and Bakır, 2010).

5.4. Inadequacy of the Current Legal System

As in other countries, Turkish Labor Law has been formed and developed according to a specific employment model. This model can be described in its simplest terms as follows: employer hires workers to employ them in their own workplace and with their own means of production. All staff employed within the same manufacturing unit (workplace) have the same and only employer. Certain rights (assurances against layoffs, notice periods, severance pay, annual paid leave etc.) and protective peremptory regulations (occupational health and safety, working times etc.) are generally provided for workers that work for an indefinite time according to their length of service in the workplace. All these are the mainstays of contemporary labor law. The concepts and institutions of this branch of law are shaped according to the employment model, which is reminiscent of the basic lines. Here, subcontractor practices and other new forms of employment have radically changed this model and have not been successful in comprehending the new model. The basic concepts of labor law, such as *workplace* and *employer*, are largely inadequate in giving what is expected. The fact that the primary employer and the subcontractor meet in the same unit of production leads to the emergence of two separate employers according to the current regulation. In these workplaces, there is a community of workers who are connected to more than one employer with different status. Two different employment models are together. One is the Employment Market, which Labor Law grasps and contains norms according to it; the other is the *Externalized or Fragmented* Employment Market. There is a legal loophole in terms of the latter. In other words, a Parallel employment market like "Parallel Economy", that is not fully comprehended by the legal order next to the Employment Market recognized by the legal order, therefore open to non-legal practices have emerged (Güzel, 1993; Güzel, 2010). Contrary to hopes and expectations that a new and contemporary Labor Law will minimize the debates, the most debate causing provisions of Labor Law No. 4857 are the sixth and seventh paragraphs of the article 2 in which primary employer and subcontractor relations and their limitations are regulated. Arguments witnessed during the legislative process also exist after the enactment of the law⁵ (Güzel, 2004). Unfortunately, neither the employers or the employees are satisfied with legal regulations. Turkish Confederation of Employer Associations (TİSK) expresses the following views in a publication on the subject (TİSK, 2012);

"Since 2003, when the Labor Law No. 4857 was published The amendments to the law and the subsequent secondary legislation have been amended by ignoring that primary employer-subcontractor relation is an indispensable mechanism of the economic and working life and prepared the deadlock experienced today."

Legal loopholes and inadequacies are sought to be partially remedied by provisions and judicial decisions laid down in collective bargaining agreements. The Supreme Court ruled in 2016 that the employer's authority to provide work to subcontractors could be limited by provisions set out in the collective bargaining agreement. According to the Supreme Court,

⁵ For an extensive literature review on this topic, see.: Güzel: 2004: 31.

“Some of the provisions on the mutual rights and debts of the parties are provisions for the parties to perform duties in good faith in collective bargaining agreements. The most important of them is "peace debt (protecting working peace)". Each collective bargaining agreement includes peace debt, even if it is not explicitly included among the provisions governing the mutual rights and debts of the parties (Sur, 2011). It has the protective feature of peace of work with this aspect. The records for the implementation and supervision of the collective bargaining agreement are in the category of debt relation provisions.

In the event that one of the parties of the Collective Agreement does not claim and prove that declaration of intention for the collective agreement enterprise is flawed, in other words, the declaration is made as a result of faults and tricks, collective agreement provisions are valid for the employer, the union and union member worker.⁶

In this case, with this provision of collective bargaining agreement, it is limited that the employer goes to the practice of subcontracting in continuous and certain term jobs.

The provision of the contract that the employer cannot apply to the practice of the subcontracting with the Collective Bargaining Agreement is a debt-bearing provision. This provision is valid because it provides that the employer does continuous work with his or her own workers and prohibits the application of the exception. It cannot be thought that this provision completely eliminates the employer's freedom of interference. As stated, the main thing in the workplace, whether it is the primary work or the auxiliary work, is that it performs these jobs with its own workers. The employer must comply with this debt-bearing provision.

As a result, since the Collective Agreement between parties covers the subcontracting practice, it should be interpreted in this direction... in the event that defendant employer is confirmed to give jobs to the subcontractor all the time in contracts regarding the subcontractor, this discrepancy should be decided to be eliminated in the scope of livelihood debt, and keeping working peace.⁷

As can be seen, the Supreme Court accepted the collective bargaining agreement provision regarding not giving the principal work and auxiliary work to the subcontractor as the debt-bearing provision and found it to be in accordance with the law. According to the High Court, the provision also does not completely eliminate the employer's freedom of interference (Sümer, 2018). The right to regulate the conduct of work and worker behaviors with orders and instructions on condition that the employer complies with the law, collective agreement and labor contract is called the employer's right to govern (Süzek, 2017; Mollamahmutoğlu, et al. 2017). The employer may issue orders and instructions to the workers based on this right. The employer's right to management may be restricted by collective bargaining agreements. Collective bargaining is above the employer's management right in the ranking of resources. Therefore, the employer cannot exercise the right of management in violation of collective bargaining agreements (Süzek, 2017).

The employer may make various operational decisions based on the right to management. The subcontracting of a part of the auxiliary work or the primary work in the workplace is also among the operational decisions that the employer can take. A limit can also be imposed on the operational decisions taken by the employer by collective bargaining (Sümer, 2018).

5.5. Recent Legal Regulations Regarding the Subject

Labor Law no. 4857 has been amended many times since it came into force in 2003, but the articles that regulate the primary employer-subcontractor relationship in the law no. 4857 have been maintained despite the fact that the huge demand from employers and their demand for more flexibility have not been met in the legal regulation. This attitude of the legislator can be said to be caused by work-related accidents seen among subcontracted employers. In fact, Subcontractor Regulation that contains regulations in favor of workers came into force in 2008 and stayed in force without any amendments to this day. In other words, the public pressure caused by the constant death of workers has persuaded political authorities to make regulations in favor of employees (Odman, 2008). Similarly, after the mining accident in Soma in 2014 that resulted in the loss of 301 mining workers, law no. 6522 was made, and many amendments have been made to the Labor Law no. 4857. These amendments include three regulations that directly affect the subcontractor relationship. The fifth paragraph of the Article 36 of Labor Law no. 4857 has been amended to be, “In the event that employers give work to the subcontractor, they are obliged to control ex officio whether the payments of the employees are made on workers’ demand or monthly and deposit the unpaid money into the workers’ bank account by cutting from the deserved money,” through law no. 6552. It is possible to assess this amendment as reinforcing the existing responsibility of the primary employer and thus as a regulation in favor of the worker. Again with the same law, a new paragraph was added to the article 56 of the Labor Law and in the event that the subcontractor is changed, in calculating the annual paid leave right of the subcontracted worker that continue

⁶ Y9HD. T. 29.03.1991, E. 1991/6488, K. 1991/ 6704.

⁷ Y9HD. T. 31.05.2016, E. 2016/16706 K. 2016/12873.

to work in the same workplace the total seniority of the worker will be taken as a basis. With law no. 6552, extensions were made to the article 112 of Labor Law no. 4857 and detailed regulations were made on the severance pay rights of subcontracted workers that are employed in public workplaces (Durmaz and Özdemir, 2019).

6. CONCLUSION

The subcontracting relation in Turkey has been observed to become widespread in practice since the 1980s (Şafak, 2004). Indeed, the high-speed change based on technology in the world economy and the Turkish economic structure has brought the subcontracting practice to a position where it is sought after persistently and made it an important part of the new business relations (Tozlu and Eraslan, 2012). As a result of the transformations in the dynamics of the economy, subcontracting continued its prevalence with reasons such as it contributes to decreasing production costs due to dividing the job and it is a flexible working form (Tozlu and Eraslan, 2012). It is possible to predict that this development will inevitably continue in the face of the international aspect and pace of the competition. Subcontracting is an important option for companies in that it enables them to increase their employment capacity by using the expert workforce flexibly, in other words, to provide businesses with the opportunity to "focus on the job they are most successful in". It is also possible to meet sudden demand increases quickly by using subcontractor facilities. For SMEs, the opportunities offered by subcontractor practices are of greater importance and contribute to the retention of these businesses by sharing financial and organizational risks. However, the fact that the primary employer and the subcontractor share the same business environment and are part of the same supply chain leads to various problems. The problems encountered in the primary employer and subcontractor practices in our country are the source of serious disputes for public and private sector workplaces and constitute one of the main areas of discussion of working life. After subcontracting practices have gained a rapid currency, practices for restricting the worker rights in collective bargaining law and other observed troubles have led to continuous solution-seeking in the legal area, detailed regulations have been made, but misconduct methods against the changing legal norms achieved to change and continue with proficiency (Güller, 2015). When considering the practice examples especially in recent years, subcontracting practices have eluded from the qualification that jobs that require specialization other than the primary job should be given to the organization of another employer and turned into a common employment model that cause the labor market to break apart and even put unions out of action (Özveri, 2008). These problems also have disruptive effects on the fundamental balances of the Industrial Relations System. The problems caused by these disruptive effects actually affect employers as closely as they do workers. Deteriorating social balances can also lead to damage in working peace. The widespread use of subcontracting to enforce legal limits risks labor becoming a commercial commodity and exploitation again. The aim of protecting the most fundamental rights and values of the contemporary society, together with economic and technological imperatives, should be observed simultaneously.

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