REGULATING LEGAL RELATION BETWEEN DIFFERENT EMPLOYER ENTITIES: A SATISFIED ANSWER TO OUTSOURCING ISSUES?

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(What follows is an outline of the argument that I hope to make in a final version of this paper. The current preliminary version is intended for discussion at Labour Law Research Network International Conference (Barcelona, 14-15 June 2013.)

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Introduction

The contract of employment constitutes the legal base of the relationship between employer and employee. The contractual liability has been for a long time served as a satisfied tool to protect employee's rights. The principle of the relative effect of the contracts determines and restricts the scope of those who are responsible for contractual obligations. Such a legal structure was coherent with the production method: The employee works for the benefit of the employer in the premises belonging to him/her; a fordist model production.

Last thirty years, the basic assumption that the employer produces with his/her own employees in his/her own factory is modified, because of the changing nature of the production. Although the product keeps the same nature, in its production, there exists many employers, therefore many employees with different contractual ties and even many sub-organisations belonging to different employers. Beforehand the contract has been served to explain responsibility without further needs to legitimisation, now it becomes possible to use the contract to avoid the legal responsibility[1].

The problem has too many aspects; to determine who the real employer is; to determine the responsible party against the employee; to decide which rights that we are talking about. Facing with different aspects of this phenomenon, labour lawyers try to develop new approaches: Networks, trust responsibility, co-employment. The legislative intervention may be perceived as the absolute solution. However, it is not always easy to motivate the legislator to take action. In addition, it is important to determine objectives and the legal tools, which will be used by the legislator. Otherwise, regulating the legal relation between two different legal entities may also cause problems. In this study, first of all, I will try to determine problems arising from subcontracting practices. Then, I will search for criteria that will justify and restrict the main employer's liability. At the second part, I'll present the deficits of a legal

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[1] H. Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration', (1990), *Modern Law Review,* 53, 731

intervention in respect of sub-contracting relations on the base of an example from Turkey.

I. Subcontractual Networks and Their Impacts on the Employment Law

By the industrial revolution, number of different enterprises in a vertically distinct organisation had been merged under single organisation. The assembly line of Henry Ford started with raw materials and ended up with T-model. However, starting from the 1980's, this single organisation has been disintegrated. Outsourcing subsidiary or specialised functions to external companies has become the rule rather than being the exception[2].

The organisational structure of an enterprise may be composed of different contractual relations. From economical point of view, it's a decision between making or buying. Nothing prevents that the main company organises its production process in a way that third companies undertake to produce certain components of product. The phenomenon is already analysed: Units of production within the employing enterprise are managed and accounted by distinct entities[3]. Cleaning, maintenance and catering services are the most common services provided by third parties in the enterprise. Not only subsidiary jobs of the organisation, but also parts of the main jobs may also be contracted out[4]. Subcontracting is especially prevalent in areas where complex projects are in question, like construction or information technologies. In these cases, there is a mixture of cooperation and collaboration between different partners of this organisation.

Each actor in this network may have different financial and organisational goals. However, in respect of the economic interests, both company, the main employing enterprise and the subcontractor shares the common interests. The labour costs of the sub-contracting company returns to the main/client company in terms of contracting out price. Therefore, the profit of the main company from lower labour costs of subcontractors is clear.

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2 As example see M. Tiraboschi, 'Outsourcing of Labour and Promotion of Human Capital: Two Irreconcialable Models? Reflections on the Italian Case', (2008), *Bulletin of Comparative Labor Relations 65, The Global Labour Market, From Globalisation to Flexicurity,* 187-209 ; About the rise of network organisations Linda Dickens, (2004), 'Problems of Fit: Changing Employment and Labour Regulation', *British Journal of Industrial Relations*, 42, 595; V. Doellgast/Greer, I., (2007), 'Vertical Disintegration and the Disorganization of German Industrial Relations', *British Journal of Industrial Relations*, 45, 55-76

3 Collins, (1990), 733-734; G. Williams/S. Davies/C. Chinguno, 'Subcontracting and Labour Standarts: Reassing the Potention of International Framework Agreements', (2013), *British Journal of Industrial Relations,* , DOI: 10.1111/ bjir.12011, 2-4

4 Tiraboschi, (2008), 196

This organisational structure may embody or exclude hierarchical features. In many subcontracting relations, a hierarchical organisation exists [5] : Under the main organisational unit, there exist different sub-organisations. Thus, vertical disintegration of the main organisation leads looser, but multi-employer structure than the one in single employing enterprise[6].

Considering many organisational advantages of networks, they challenge many fundamental concepts of employment. Such an organisational structure affects the way of employing the worker. The employee performs his work arising from the employment contract under several interpenetrated organisational entities belonging different employers. Collocation of different organisational entities causes trans-organisational problems. Typical example is health and security problems in the workplace. Collocation brings a reciprocal risk exposure. The employees of the main company may be exposed to the risks produced by the activity of the sub-contractor, as well as the employees of the sub-contractor, for example cleaning employees, may be exposed to risks produced in the main organisation[7].

The legal approach decomposes each part of the organisation into bipolar contractual relations. Different relations between different subcontractors, as well as the relations between employees bounded to different employing entities are not taken into account. Such a totally formalistic approach justifies the total immunity of the main company from subcontractor's employees. Conversely, from the outside, a working organisational entity keeps its existence.

Therefore, the singularity of the production unit/organisation opposes to the plurality of employers[8] . When many employing entities take part on the production process, the challenges to the unitary analysis of the employer becomes apparent[9]. Labour law struggles to avoid legal immunity of the main employer against employees working within this structure. To deal with this problem either piercing the corporate veil between different legal entities[10] or changing the concept of employer is one part of the solutions [11] . These approaches certainly require more effort to imply, but certainly provides more complete solutions. However, my aim is more modest. Facing with the above mentioned problems, I am trying to answer under which conditions we should pierce the veil between different employing entities and held the main employer responsible for sub-contractor's employees.

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5 P. Davies / M. Freedland, (2006), 'The Complexities of the Employing Enterprise', *Boundaries and Frontiers of Labour Law,* Ed. By G. Davidov et B. Langille, 288

6 Davies / Freedland, (2006), 285-286

7 About health and safety problems in sub-contracting networks see Promiting occupational safety and health through the supply chain, Literatur Review, https://osha.europa.eu/en/publications/literature_reviews/promoting-occupational-safety-and-health-through-the-supply-chain

8 L. Ratti, 'Agency Work and The Idea of DualEmployership: A Comparative Perspective', (2009), *Comparative Labor Law and Policy Journal,* 30, Summer 2009, 841-842

9 P. Davies / M. Freedland, (2006), 277 et seq.

10 Collins, (1990), 731 et seq.

11 P. Davies / M. Freedland, (2006), 273 et seq.; Simon Deakin, (2001), 'The Changing Concept of the 'Employer' in Labour Law', 30, 72-84.

II. Two Basic Problems : Besides Many Others

The most common forms of outsourcing strategies which disintegrate the inner structure of the enterprise may be recognized as agency work and subcontracting. Subcontracting may be generally defined as the practice of assigning tasks undertook by the main/client company to other parties, called subcontractor. The main idea is to assign certain works to others instead of making by your own employees.

From many aspects, if not all, agency work and subcontracting provide similar structural advantages[12]. The employer may have different aims in subcontracting certain jobs in his own organisation. Certainly expertise is one of the most quoted reasons. However, the aim of creating groups in the enterprise who do not benefit from trade union rights is also prevalent in general use[13]. To stay below the thresholds is also another legally critical aim of these practices[14]. In the most innocent forms, cost saving through different wage schedules may be observed. The host company improves its position in market by benefiting lower labour costs offered by sub-contracting companies.

The main difference, which causes divergence in legal approaches to agency work and subcontracting, lays on the working way of the agency/subcontractor's employees: Under agency contracts, the user employer benefits directly from the workforce of the employee. It's the user company who has right to give day-to-day orders and instructions to the employee. In subcontracting practices, the employee works, in principle, under orders and instructions of his/her own employer (subcontractor). In certain cases, the main/client company has also the right to give orders and instructions to the subcontractor's employees, however considering the density of control, it's hard to talk about subordination which characterizes the employment contract. If, the concerned employee of sub-contractor works mainly under orders and instructions of the main employer, such an active control relationship may lead to arguments towards dual[15] or joint[16] employment relationship or unity of employers.

However, if that's not the case, the responsibility of the main company against the subcontractor's employees becomes more controversial. For this study the problem may be exampled as follows: Company A, which produces automobiles, may operate all production by her own employees. However, if the cleaning service or the management of the cafeteria belonging to the Company A is given out by a contract, the employment law is interested in the protection of the employees of Company A, if there is transfer of business. In these cases, there is no doubt about who the employer is: it is the subcontractor. However, if the cleaning company does

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12 For a short summary see L. Ratti, (2009), 839-841

13 G. Davidov, (2004), 'Joint Employer Status in Triangular Employment Relationships', *British Journal of Industrial Relations,* 42, 730

14 G. Davidov, (2004), 731

15 L. Ratti, (2009), 866 et seq.

16 G. Davidov, (2004), 727 - 746

not pay wages or the cleaning employee suffers from an industrial accident in the workplace, a question arises: whether the Company A should also be held responsible against the employees of subcontractor? Certainly, bipolar contractual relation does not make easy to go for the responsibility of Company A.

Therefore, one part of the problem relates mostly to the guarantee of contractual rights belonging to the subcontractors' employees. There is no doubt about the responsibility of the subcontractor, who is the party to the contract of employment. The point is if the labour law could be satisfied by the sole responsibility of the subcontractor employer. If due to financial weakness of the subcontractor, the employee cannot receive his due wages, the main/client company's immunity could be explained by contractual relations. In addition in countries like Turkey, wherein unregistered employment practices is quite extended, social security rights of these employees constitute one part of the problem.

The problem becomes more complex, if the subcontractor company undertakes the main part of the production; like inner workings of the automobile, installation of electric wires or phares, or part of the assembly line. Thus, in these cases, not only the subcontractor's work organisation is covered by the main company's organisation, but also the employees of the main employer and those of the sub-contractor may be assigned for same tasks. Thus, another existing problem becomes apparent: since the employment relationship is concluded with different employing entities, inequality in respect of wages or other benefits is quite possible. To offset the social and economic inequalities within the employment contract is perceived for a long time within the presence of single employer. Such an organisational cooperation should constitute a base for the application of the principle of equality?

III. The Results of A Survey

Similar questions were already asked by the Green Paper on Modernising labour law to meet the challenges of the 21st century[17]: "Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?"

The similarity with temporary agency workers leads to certain conflicts in responses. A general review of the member states' responses[18] reveals that many countries do not have any specific regulation with regard to that issue. The problem is restricted with the identification of the responsible. Thus, UK government is satisfied with the clarity with regard the responsible of rights and obligations. On the other side, the main employer is held responsible either for certain rights or for all rights of the subcontractor's employees. Italian and French laws contain provisions on the

[17] Brussels, 22.11.2006, COM(2006) 708 final

[18] Only national comments written in English, French or German could be analysed. see http://ec.europa.eu/employment_social/labour_law/answers

responsibility both the main/client and sub-contractor. In Germany, the subsidiary liability for outsourcing is only prescribed to guarantee certain working conditions contained in collective agreement, adherence to which is prescribed by the Posted Workers Act (*Arbeitnehmer-Entsendegesetz*). However subsidiary liability is perceived as expedient where there is a need for social security.

The joint liability may be constructed on the sole fact that there is subcontracting relation, without further requirements. Or another option is to tie the responsibility of the main employer to the failures of certain legal duties related to the selection of the subcontractor . Under French law, the main company who, in certain conditions, has not made a certain number of checks when contracting with a service provider, can be held jointly responsible for the payment of sums due to the employee, the social insurance organisations and the tax authorities in the event of default, bankruptcy or disappearance of the enterprise that performs disguised work. The responsibility of the main employer in French law depends on the financial credibility of the subcontractor. Secondly, there must be a default of the subcontractor on the payment of his/her debts[19]. With regard to agency workers, the user company is charged with the implementation of working conditions, such as working times, health and security, night works, work on holidays. The conferral employees have right to access all collective facilities, such as transportation or restaurants under same conditions of the employers own workers. However in respect of subcontractor's employees, the principal employer is obliged to respect the provisions related to the regulation of work[20].

To guarantee labor rights of the subcontractor's employees, two approaches are possible, like in case of agency workers: either dividing responsibilities between the subcontractor and the main company, or placing all responsibilities on both of them jointly and severally[21]. I believe the latter approach brings more protection.

IV. Criteria to Restrain Joint Responsibility

Labour law is not alone facing with the deficiencies of contractual theory. Contractual network is one of the main approaches to explain such social and economic structures. Consumer protection, especially in construction and banking sectors and in franchising systems are discussed[22]. The collective character of networks, whether they operate as collective actors or only different network nodes is far beyond this

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19 M. Buy, 'Le régime juridique des opérations de fournutire de main d'oeuvre', (1995), *Les collaborateurs de l'entreprise: Salariés ou prestataires de services?,* Press Universitaire d'Aix Marseille, 97 -99

20 M. Buy, (1995), 92-93

21 For agency employees, G. Davidov, (2004), 733 -739

22 As example G. Teubner, 'Piercing the Contractual Veil? The Social Responsibility of Contractual Networks', in *Perspectives of Critical Contract Law,* T. Wilhelmson (ed.), 211-238; M. Amstutz, (2004), 'The Constitution of Contractual Networks' (The English translation of the 'Die Verfassung von Vertragsverbindungen'), in *Die vernetzte Wirtschaft: Netzwerke als Rechtsproblem*, Zürich 2004, 45 et seq.), http://www.unifr.ch/obligations/conference/documents/Constitution.pdf

research[23]. In this study, by network approach, I mean an approach which resists the „atomization" into individual contracts and forces to consider the whole entity[24]. Identification of social institutions relevant for contract and reconstructing them within the boundaries of the legal discourse is described as the main work to do[25].

The responsibility of the main employer against subcontractor's employees provides sufficient protection to guarantee their rights. Nevertheless, without a legislative intervention, it's not easy to charge the main employer with such responsibility. In addition, it's hard to claim that the owner of the final product should be responsible against all employees who join to the production process under different legal structures. Therefore, it is necessary to find criteria which justify, as well as restrict the responsibility of the main employer. On what bases, cooperation between different legal entities may result in joint responsibility of the main employer ?

1. Collocation of both employers : The control and managerial power of the main employer

Subcontractors are considered independent while leading their own inner organisations. Therefore, they not generally admitted as employees of the main/client employer[26]. Despite subcontracting relationship consists exclusively of bipolar contractual relationship, these relations are functionally correlated[27]. Ignoring sham employment contracts, the subcontractors fulfil their obligations in autonomy. The contractual structure between the main company and the sub-contractor requires only the responsibility of the subcontractor from the results of the undertaken work: the cleaning of the workplace, the maintenance services, cafeteria services etc. If the autonomy of the subcontractual organisation is more apparent in certain services, such as cafeteria or transportation, in cleaning services it's much more nested. Nevertheless, if the subcontractor undertakes a part of the main work, the cooperation between different firms becomes firmer. A firm which undertakes the painting department of a car factory the organisational borders are quite obscure.

The managerial powers used by others than the employer in the enterprise is explained legally by the theory of representation. Whenever both the one who gives orders and the one who obeys are bound to the same employer with a contract of employment, delegation of contractual powers and legal representation help to explain legal responsibility of the employer. Contracting out a task to a third party means to abandon daily managerial prerogatives over employees who perform

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23 G. Teubner, (1993), 'The Many-Headed Hydra: Networks as Higher-Order Collective Actors', in *Corporate Control and Accountability,* 41, Joseph McCahery et al. Eds., 41-60; G. Teubner, (2009), 'And if I by Beelzebub cast out Devils, ...': An Essay on the Diabolics of Network Failure', *Special Issue: The Law of the Network Society, A Tribute to Karl-Heinz Ladeur',* 409-413.

24 M. Amstutz, (2004), 11-12

25 *ibid*

26 Davies and Freedman consider that presemption as stereotype: P. Davies/M. Freedland, (2006), 284-285

27 The same observation for tenancy relationship, M. Amstutz, (2004), 8.

assigned tasks. Instead, the main company pre-determines the assigned task and leave the sub-contractor free while fulfilling his contractual duties. The subcontractor gives orders and instructions to his own employees, even in his own workplace. May be not physically, but legally the sub-organisation of the subcontractor is considered as a separate workplace, at least under Turkish law[28]. Therefore, in subcontracting issues, at least in certain cases, the employee works for his own employer/subcontractor in the premises organised by the employer. Nevertheless, that workplace is covered by the one of the main employer.

However, such legal structure should not avoid us not to see the physical contact between two employers. Under contract of employment, the employee works for the employer's benefit. As long as the employee works in the premises of the employer, who uses the managerial prerogatives and who receive the benefits of the work are same person: the employer, the other party to the contract. However, in subcontracting practices, if the main employer and the subcontractor company locate on different places, the employee has no contact with the indirect beneficiaries of his work. However, when both organisations are located at the same place, the employee works in the premises of the subcontractor, as well as the main employer .

A series of contract between subcontractor companies and the main company, contributes to form a higher order[29], the production of the main product or service. If the main company and subcontractors are working together, such borders may become indistinct depending on the degree of the subcontractor's expertise. If profiting the expertise of the subcontractor company is the main motivation in outsourcing, the independency of the subcontractor company increases. Such an expertise may be required both on the main production process, such as subcontractor who undertakes to install intelligent building systems in a construction site or on the auxiliary jobs, such as catering services. Nevertheless, even if the main employer has no direct relation with the work of the subcontractors' employees, due to organisational integrity, a firm collaboration and cooperation is required.

If the expertise degree is less dominant, even direct use of managerial powers by the main employer may be observed, while sub contractor's employees are working. As long as the organisational integrity increases, the direct relation between the main company and subcontractor's employees increases. For example, even if cleaning service is provided by a subcontractor company, the orders and instruction of the main employer to the employees of subcontractor is not exceptional. Therefore, even if hiring and firing powers as well as disciplinary powers are used exclusively by subcontractor, during work certain managerial powers are used by the main employer.

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[28] Article 3 of Act No. 4857 obliges the subcontractor to annonce his workplace to the labour administration, whenever he/she undertakes such a duty.

[29] M. Amstutz, (2004), 14

On the other hand, the organisational unity imposes many restrictions to that assumed independency of the subcontractor. A hierarchical structure requires a firm collaboration between different subcontractors and between sub-contractors and the main company. Although, legally, subcontractors are free while fulfilling their contractual obligations, in most cases the main company uses the similar hierarchical means that characterize the contract of employment over subcontractor companies through their employees.

The fulfilment of duties undertaken by subcontractors requires a well scheduled organisational cooperation. Different units of production should be in total coordination to be able to finalize the production. The main company, as the service supplier, leads all operations in a way to harmonise. Scheduling of different organisational jobs shows the hierarchical powers of the main company over subcontractors and indirectly over their employees.

Like agency work, the organisational cooperation is clear in subcontracting relations. On the agency work, tripartite work relation creates two distinct but connected organisations[30]. On subcontracting issues, two employing entity creates two distinct but connected organisation. Since the sub-organisational entity belongs to the sub-contractor, the employee has no right to oppose to work on this organisation. This is a point that cannot be ignored by the law.

I believe also that such contractual unity and hierarchical dominance of the main company should result in, at least, a joint responsibility against to the subcontractor's employees. The hierarchical dominance of the main/host company may be suggested as a starting point to explain its legal responsibility.

2. Workplace as borders of the organisational unity

Even the organisational unity and contractual networks may be regarded as a legitimate base for the liability of the main employer, the problem is still to define the borders of the organisational unity; who are inside and who are outside ?

Technological developments make organisational unity possible even different parts of the organisation are located in different places. Trying to bind legal responsibility to organisational unity the responsibility of the employer would have been too extended. When we consider a textile factory that certain products are embroidered by workers of another company, located in a different place. Even if the organisational cooperation is established, on what base the law could hold the main employer for the non-paid wages of these employees ? It should be bear in mind that the main employer has no direct personal contact with these employees, even the main employer has no idea whom are employees and has no legal opportunity to intervene into the relationship between the subcontractor employer and his own

[30] L. Ratti, (2009), 857

employees. A supply change responsibility through other methods may be suggested[31].

On the other hand, we should admit that 'organisation' as legal base for the responsibility has many disadvantageous. First of all, it's an unknown concept not only for jurists, but also for management theorists while it turns out necessary to border the frame of the concept. How to draw borders of an organisation? From the organisational theory, each department, each workplace or each undertaking composed of workplaces may be considered as an organisation.

I could therefore suggest that it's possible to discuss a joint responsibility of the main employer, if different sub-organisations are under the same workplace, the well-known concept of labour law. Workplace as a concept certainly carries lots of deficits. Nevertheless, it seems to me a practical criterion to define the organisational borders in respect to legal responsibility. Workplace is on the one hand extends the responsibility by piercing the veil among the different employers, on the other hand prevents the unlimited extension of the responsibility.

The organisational dominance of the employer, coming together with the use of lower degree of managerial powers, and the being the beneficiary of the labour may be regarded as the legitimisation for a joint responsibility from obligations of the subcontractor against his own employees. By this approach, we respect the employment relation between the subcontractor and his employees, but also we hold the main company responsible for labour rights. The fact of working under organisational rules of different employers, the employee benefits from an additional guarantee in respect of contractual labour rights.

3. Exclusive dedication

Another question arises: if is it justified to hold the main employer responsible for whoever works at his workplace. It should be bear in mind that under my assumption, the subcontractor keeps his rights to determine who will work at the workplace. Therefore, certain workers may just work for one or two days under the organisational entity of the main employer. If the whole month of wage is not paid, is it possible to hold the main employer who has a very limited contact with these employees. That issue reveals importance also in case of collective rights of employees. Whether to decide whether the employees of subcontractor should counted under the trespass of the employer, the exclusive dedication or working for different employers reveals importance[32].

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[31] G. Williams/S. Davies/C. Chinguno, (2013), 'Subcontracting and Labour Standarts: Reassing the Potention of International Framework Agreements', *British Journal of Industrial Relations*, DOI: 10.1111/ bjir.12011, 1-23

[32] A similar question is discussed in French law in Hepple decision: Boussard-Verrecchia, E., (2010), "Transporteurs sous-traitants: Cachez ces conducteurs que je ne saurais voir (à propos de de Soc. 14 Avril 2010, UD FO contre Heppner), *Droit ouvrier,* Juillet 2010, 341-346.

Another criterion may be suggested: the employee of the subcontractor should dedicate his work exclusively, certainly to the subcontractor as his employee, but at the workplace belonging to the main employer. The question is if a security guard working from morning till evening at the gate of the automobile producer Company A, if his wages, supplementary hours that have been performed on the demand of the Company A has not been paid, the Company A should also carry responsibility against him. The debt belongs to the subcontractor, there the main company may reimburse the debt from the subcontractor company. Although we don't think an economic justification is necessary, such a joint responsibility guarantees the labour rights of the subcontractor's employees without any effect of the economical nature of the relationship.

V. An Example from Turkish Legislation

To hold the joint responsibility, the legislative intervention is the most convenient way. In Turkish law, the legislator regulated the subject with a special legislation on the base of above mentioned criteria. The responsibility of the principal employer against employees of the subcontractor employers has been regulated by specific provisions, Article 2/6 of Act No. 4857. In cases wherein the subcontractor undertakes a service by his own employees in the workplace belonging to the principal employer, the later is held jointly liable vis-à-vis the sub-contractor's employees. The subcontractor must perform his activities in the workplace of the principal employer. Subcontracting activities performed at the workplace of the subcontractors out of the principal employee's workplaces do not fall under the cover of Article 2 paragraph 6[33]. Lastly, the employees of the subcontractor must exclusively work for the principal employer. This condition shows the legislator's approach to the problem: the principal employer is liable vis-à-vis the subcontractor's employees under condition that they work only in the workplace of the principal employer. However, if the subcontractor's employee performs activities in different enterprises, the relationship between the principal employer and the employee of the subcontractor is not firm enough to justify the joint liability of the principal employer.

If all these conditions are fulfilled, the principal employer is jointly liable for obligations of the subcontractor arising from the contract of employment and from obligations ensuing from the Labour Act[34]. The principal employer is responsible for obligations, such as wages, social benefits, over times, paid annual leaves; in case of dismissal notice period, the severance payment etc. that the employee is entitled against subcontractor in his capacity of being employer. In addition, in case of an industrial accident or occupational sickness, the subcontractor's employee may also

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[33] See as example, S. Süzek, (2012), *İş Hukuku,* 155; see also A. Güzel, "İş Yasasına Göre Alt İşveren Kavramı ve Asıl İşveren-Alt İşveren İlişkisinin Sınırları", (2004), *Çalışma ve Toplum*, 1, 39-40; S. Taşkent, "Alt İşveren", (2004) 2, *Legal-İSGHD*, 364; G. Alpagut, "4857 Sayılı İş Yasası ile Alt İşveren Kurumundaki Yeni Yapılanma", *Yeni İş Yasasının Alt İşveren Kurumuna Bakışı, Sorunların Değerlendirilmesi ve Çözümleri*, Ankara 2004, 17.

[34] See as example, Cour. Cass. 9th Ch., 11.4.2005, 20368/12913, *Legal-İSGHD*, (2005) 8, 1738-1739; Güzel, (2004) 1, *Çalışma ve Toplum*, 51-55; Taşkent, (2004) 2 *Legal-İSGHD*, 366; Süzek, (2012), 164-167.

sue principal employer for his material and immaterial damages. Moreover, where there exists a collective agreement covering subcontractor's employees, the principal employer is jointly responsible for rights arising from the collective agreement. Not only duties are ensuing from Labour Act, but also those arising from Social Insurance and General Health Insurance Act fall under the scope of joint liability. Therefore, the liability of the principal employer is regulated by mandatory rules to guarantee the rights of the sub-contractor's employees. The employee has right to recourse both his own employer and the principal employer. After the payment, the principal employer may ask to the sub-contractor for the withdrawal of payments.

II. The Problem of Equality and Subcontractor's Employees

Even if the principal employer is held jointly liable for subcontractor's obligations, this does not provide in equal working conditions for the employees of the principal employer and those of the subcontractor[35]. Thus, the difference of wages or social benefits continues to exist between two groups of employees. The principal employer generally prefers to recruit a core group of employees with better remuneration and social benefits, while the subcontractor's employees recruited with less attractive working conditions. In addition, the subcontractor's employees do not, in most cases, belong to the community of the employees working for the main company.

1. *To imply the principle of equality*

Collins considers the problem of providing equal working conditions to employees working in the same unity of production as capital boundary problem. He argues that workers of different employers who are working alongside each other and the network architecture should suffice to bring the workers under the comparative fairness test[36].

If the employees of the main company and subcontractors are working in the same workplace subjected to the same working conditions, under same organisational duties to prepare, nevertheless, as long as a subcontractor company exists as counter party to the employment relation, the courts are reluctant to hold contractual relations between the main company and the subcontractor's employees. As far as I see Turkish courts are not alone in this reluctance[37].

The Directive on Agency Work 2008/104/EC resolves a similar problem with regard to agency employees. It establishes the principle of equality between agency workers and the workers of the user company with regard to basic employment and working conditions, which consist of working time, overtime, breaks, rest periods, night works, holidays and public holidays and pay according to Article 3 § 1 (f) of the Directive. A similar problem is resolved by the Directive. The Directive makes possible to

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35 Güzel, (2004) 1, *Çalışma ve Toplum*, 51-55.
36 H. Collins, (2006), 317-336, 328
37 E. Boussard-Verrecchia, (2010), 342-343

implement the principle of equality without need for a suitable comparator[38]. Therefore, without having a legislative intervention, it's not easy to apply the principle of equal treatment, particularly in subcontracting issues wherein the jobs undertook by the main employer are totally different than those of the principal's employer.

However implementation of the principle of equality does not resolve problems related to collective labour rights. As long as the employee works for another employer, the employee does not get benefits from the collective agreement applicable to the main company. To tie subcontractor's employees to the main employer, Turkish legislator, by the lobbying of trade unions, preferred a short cut solution and adopted rules to determine which kind of jobs could be contracted out. If the object of the subcontracting relation falls out of the legislative scope, the subcontractor's employees are deemed to be the employees of the main employer.

2. *To Tie Subcontractor's Employees to the Main Employer*

If integration and control power of employees belongs to the main company that constitutes the legal base to construct the factual employment relationship with the main company. In sham subcontracting relations although the employee is counted under trespass of the subcontractor, the employee works under managerial control of the employer. The main employer decides on hiring and firing. Therefore, the factual employment relation is concluded with the main employer.

Envisaging malicious sub-contracting practices wherein the principal employer continues to conduct sub contractor's employees in his own workplace as if they were his own employees, the Court of Cassation qualified such subcontracting relations as invalid. This jurisprudence of Supreme Court was introduced to the Act No. 4857. The legislator brought a legal presumption that the opposite may be proven by the interested parties[39]. According to Article 2 Paragraph 7 of Labour Act, it is prohibited to deteriorate the rights of the employees by way of their engagement by sub-contractor. This was the most misused practice that the legislator aims to prevent. However, it is not prohibited that the sub-contractor recruits the employees of the principal employer. The Act restricts only the reduction of employees' rights by this way[40]. Secondly, it is prohibited to entrust certain activities to persons who worked before for the principal employer with a contract of employment. In all these cases and others wherein sub-contracting practice is based on sham awarding contracts, the employees of the sub-contractor shall be treated as the employees of the principal employer.

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[38] M. Schlachter, (2012), 'Transnational Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide ?', *The International Journal of Comparative Labour Law and Industrial Relations,* 28, (no. 2), 189.

[39] Eyrenci, (2004) 1, *Legal-İSGHD*, 22; Süzek, (2012), 173; contr. Ö. Ekmekçi, "26 Haziran 2002 Tarihli İş Kanunu Tasarısının Bazı Hükümleri Üzerine", *Çalışma Hayatımızda Yeni Dönem*, 25-29 Eylül 2002, 67; F. Şahlanan, "Genel Hükümler ve Temel Kavramlar", *Yeni İş Yasası Sempozyumu*, İstanbul 30-31 Mayıs 2003, 32; comp. Alpagut, (2004) 20-21.

[40] Ekmekçi, (2002), 66; Güzel, (2004) 1, *Çalışma ve Toplum*, 56-57; Taşkent, (2004) 2, *Legal-İSGHD*, 365; Süzek, (2012), 171-172.

Nothing is extra-ordinary in establishing the contractual relation between the main employer and the subcontractor's employee, if the factual relation exists between them. The interesting part of the legislation concerns the restriction brought to the assignement of main jobs. That's different than sham subcontracting relations. Altough there exist a real intention of the parties on the subcontracting, the legislator prohibits certain subcontracting relations.

Article 2/6 of Labour Act provides that the main jobs shall not be awarded to subcontractors, unless a work or business/operational necessity, or the expertise required by technological reasons calls for to do so on. There is no restriction for entrusting auxiliary jobs to subcontractors. Therefore, the legislator tries to restrain extended subcontracting practices, that the main reason is profiting lower labour costs offered by subcontractors. The sanction is that subcontractor's employees will be considered employees of the principal employer from the beginning.

Article 2/6 of Labour Act has caused many discussions: The debated issue concentrates on the main activity of the undertaking; under which conditions the employer may entrust main activities of the undertaking to different subcontractors ? Certain authors argue for a strict interpretation of the Act that only in cases wherein technological reasons AND work-related or operational necessities require such a subcontracting, the main activity may be awarded to third persons[41]. Others put forward that such a strict interpretation of the norm would result in prohibition of subcontracting, which is not the aim of the Act. Thus, either technological requirements OR business necessities may justify subcontracting of main activity. Even reducing labour costs may be assessed under business necessities[42]. A third group of authors argue that either the necessities of work or business or technological expertise may justify subcontracting. However, the sole reason to reduce labour costs or to increase profit is not be acceptable[43]. Following industrial accidents in naval docks and facing the deceased workers are all subcontractors employees, the Supreme Court took side of the strict construction, that only technological requirements may justify the contracting out of main jobs[44].

If the main employer contract out all auxiliary jobs without further requirement, with regard to main jobs, the technological expertise is required. Thus, labour judge should decide for each production process, which jobs are main jobs and which are auxiliary. The packaging of a fertilizer factory, putting in bags, makes part of the main jobs or auxiliary jobs? The packaging of chips could be assigned to third

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41 Güzel, (2004)1, *Çalışma ve Toplum*, 45-50; Taşkent, (2004)2, *Legal-İSGHD*, 364-365; Eyrenci/Taşkent/Ulucan, (2005), 37; E. Ünsal, "4857 Sayılı Yasaya Göre Asıl İşveren-Alt İşveren İlişkisinin Kurulması", *Legal-İSGHD*, (2005) 6, 543-544; M. Şakar, *İş Hukuku Uygulaması*, 6. Baskı, İstanbul 2005, 51.

42 F. Şahlanan, (2003), 70-71; Yeni İş Yasasının Alt İşveren Kurumuna Bakışı Sorunların Değerlendirilmesi ve Çözümleri, Panel, İNTES, Ankara 2004, 47-48; Tunçomağ/Centel, (2005), 57.

43 Süzek, (2012), 140-141; M. Ekonomi, (2008), 'Asıl İşveren-Alt İşveren İlişkisinin Kurulması ve Sona Ermesi', *Prof. Dr. Nuri Çelik'e Saygı, Türk İş Hukukunda Üçlü İlişkiler,* İstanbul, 45-46; Alpagut, (2004), 18-19.

44 As examples Court of Cass. 9. th Ch., 5.5.2008, 15362/11408; 6.5.2010, 10901/12451, www.kazanci.com

persons? Cleaning services are considered mainly as auxiliary jobs, is it also the case for a municipality?

If the aim of legislative intervention to prevent disintegration of the main product process unless a technological expertise is required, the main jobs should be perceived as all indispensable jobs to produce the concerned good or service. Thus, packaging is indispensable or not, the Supreme Court held that the moment of the delivery to customers should be taken into account[45]. If the final product is delivered without package, the packaging makes part of the auxiliary jobs. Therefore, the judge should examine the delivery method of the main product to decide on the nature of the job: if the biggest party of the production is delivered as bulk cement, the packaging jobs should be considered as auxiliary. The same result is valid for the fertilizer production. However, in case of chips, since the packaging is indispensable to deliver the product to customer, the same operation makes part of the main production process. In addition, the subcontracting is based on the technological expertise is a matter of discussion. The courts should decide for each assigned job requires a technological expertise. Certainly such requirement should be decided from the point of the main company.

Auxiliary jobs are those which are subjected to the main jobs and continue alongside the main production, however do not make direct part of the production process. Cleaning, security, gardening, maintenance services, fire departments may be given as examples[46]. Nevertheless, which is determinant is not the job, but the production organisation of the main employer. For example, wherein a municipality awarded cleaning works to a sub-contractor company, the Court of Cassation held that cleaning works constitute main part of services performed by municipalities[47]. On the base of this jurisprudence, the legislator excluded public employers from this restriction by a special Act no. 5538 adopted in 2006. Therefore, the public employer may outsource all kind of activities in the workplace.

By this regulation, labour law intervenes into the organisational details of the production process to avoid unacceptable consequences of subcontracting.

III. Deficits of Regulating Legal Relation Between Different Legal Entities

By the outsourcing practices, the work organisation opens its doors to other contractual relations. That phenomenon forces labour law to take into account the employer's contractual relations, out of an ordinary approach. The labour law regulates more and more often the legal consequences of civil law contracts in terms of working conditions. The transfer of enterprises is the typical example. Nothing surprising that labour law takes precaution against contractual relations which

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45 Cour. Cass., 9 th Ch., 26.6.2006, 13231/18825, www.kazanci.com

46 Cour. Cass., 9th Ch., 1.6.2005, 12985/20130, *Legal-İSGHD*, (2005) 8, 1705-1707; Alpagut, (2004), 17; Süzek, (2012), 156-157.

47 Cour. Cass., 9th Ch., 30.5.2005, 14383719766, *Legal-İSGHD*, (2005) 8, 1714-1715.

question its main principles. However, regulating this civil law contractual relation is more than this.

Nevertheless, whether such a radical approach provides sufficient protection to employees is a matter of discussion. First of all, it's quite difficult to determine which jobs may be assigned to subcontractors. The main/auxiliary jobs distinction varies according to the nature of the each organisational unit. Similarly, technological expertise depends on the technological infrastructure of the each company. Therefore, a considerable ambiguity persists in the conclusion of subcontracting agreement.

As a sanction, the employee of the subcontractor is considered as the employee of the main employer since the beginning. Such a legal solution is based on the presumption that to tie the subcontractor's employees to the main employer provides sufficient protection. The fundamental problem seems to me is that the intention of the concerned employee has no space in this solution. Also, in certain cases the employee may prefer to stay with the subcontractor. Particularly on project based works, for example in the shipbuilding industry the need for the employee's expertise may be for a short period of time. However, with a subcontractor employer, the employment relation keeps its validity for a longer period.

In addition, the parties to subcontracting agreement agree upon the assignment of a job, without taken into account of labour law regulations, sometimes just because of ignorance. In Turkish experience, it's observed that until the employee has claimed for his rights, the subcontracting relation kept its validity in practice. Whenever the labour court intervened into the relation, the unlawful nature of the subcontracting became evident. Therefore, legal prohibition was forced only in cases where an employee brings the issue in front of a court. Such claims brought before courts in most cases following the termination of the employment relation. The subcontracting relationship has maintained without any interruption, although the individual employees win legal case. Therefore, implementation of such a regulation has caused efficiency problems. The regulation of the legal relationship between the main employer and the subcontractor enables the subcontractor's employee to claim his rights due to the principle of equality. However, during the subcontracting relation continues, the employee does not sue the employers. The worker asked for the difference of monetary rights retroactively, after being dismissed.

The legislator responded rigorously such attitudes by adopting a new provision. According to Article 3 of Labour Act, the subcontractor employer shall notify his workplace when he/she undertakes a subcontracting job. The labour administration shall check whether subcontracting relation confirms with legislative conditions. If the main job is contracted out without technological expertise, the registry of the subcontractor's workplace is refuted. High amount of fines are executed to enforce parties to end the subcontracting relation. Lots of objection has been raised against the decisions of labour administration. Whether the number of such practices is decreased, there is no reliable information.

However, an increase in the agency work is expected. As long as the subcontractor undertakes the parts of main work, the differences between agency works and subcontracting blur. Like in many continental countries[48], in Turkish law, the Court of cassation has no sympathy to the intermediaries in the labour market[49]. However, since there is no pre-contractual administrative control in agency work, until the employee sues the main employer for his rights, the factual relation keeps its validity.

Conclusion

Subcontracting is one of the most extended outsourcing practices in Turkey. Under the frame of triangular relations, it carries particularities comparing to agency work. For this reason, it is more difficult to construct ties between the main employer and the subcontractor's employees. Nevertheless, that should not conceal the problems of subcontractor's employees. In terms of guaranteeing labour rights, the joint responsibility of the main employer provides a satisfying solution. However, in terms of the principle of equality, facing with the cumbersome results, the Turkish legislator has restricted assigning main jobs to subcontractors without technological expertise. Thus, by this legislation, the labour law has intervened into the civil law contracts. The problems have not been solved. The assigning main jobs to third parties have carried on. The subcontractor's employees sued for their rights retroactively, after being dismissed. The strong economic interest behind these practices pulled ahead the legal regulation. The legislator took more rigid attitude and regulated the conditions of subcontracting. More rigid rules have made agency work more attractive than before.

Therefore, the legal regulations about agency work and subcontracting relations should be consistent with each other. Otherwise, the restrictions brought on one of them open a road to the other. Secondly, to tie subcontractor's employees to the main employer does not provide equal working conditions, while the employee is working. A pre-administrative control is required to imply legal restrictions efficiently.

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48 For Italian law see Ratti, p. 844 et seq.

49 Cour. Cass., 9 th Ch., 4.4.2005, E. 2005/774, K. 2005/11838 by comments of G. Alpagut (2006*), Legal -İSGHD*, 10, 570.