Akdeniz University
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Seyfettin ÇABUK

Workers' Rights:
The Workers' Rights Analysis in Turkey within the Scope of the Subcontracting System

Joint Master's Programme European Studies Master Thesis

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Tez Başlığı : Türkiye'de Alt-İşverenlik Sistemi Kapsamında İşçi Hakları Analizi

Workers' Rights: The Workers' Rights Analysis in Turkey within the Scope of the Subcontracting System

Onay : Yukarıdaki imzaların, adı geçen öğretim üyelerine ait olduğunu onaylarım.

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LIST OF ABBREVIATIONS

BİS:	Birleşik İşçi Sendikası
CLS:	Core labor standards
ETUC:	European Trade Union Confederation
EU:	European Union
Eurofound:	The European Foundation for the Improvement of Living and Working Conditions
ILO:	International Labour Organization
LSSM:	Labour and Social Security Minister
OSCE:	Organization for Security and Co-operation
SGK:	Sosyal Güvenlik Kurumu (Social Security Institution-SSI)
SOEs:	The state-owned enterprises
TKİ:	Türkiye Kömür İşletmeleri
UNCTAD:	United Nations Conference on Trade and Development
UNIDO:	United Nations Industrial Development Organization

ÖZET

Türkiye'de Alt-İşverenlik Sistemi Kapsamında İşçi Hakları Analizi

Alt işverenlik uygulamaları Türkiye'de esnek bir istihdam modelinin ihtiyaç olarak görülmesi ve hissedilmesi neticesinde cumhuriyetin ilk yıllarından itibaren ve artarak piyasada kendine yer edinme imkanı bulmuştur. Alt işverenlik esnek yapısından dolayı özellikle kriz dönemlerinde daha sık tercih edilmektedir. Onun bu yapısı kriz dönemlerinde piyasaları istihdam açısından rahatlatmaktadır. Ancak bu dönemlerde karşılaşılan kanunsuz uygulamaların kriz sonrası dönemlerde de hem asıl işverenler hem de taşeronlar tarafından sıklıkla tekrar ettiği mahkemelere intikal eden davalardan, yazılı ve görsel basına yansıyan haberlerden, sendikaların bildirilerinden ve bazı akademik çalışmalardan anlaşılmaktadır. Yine aynı kaynaklardan yola çıkarak, kanuna aykırı uygulamaların dışında yasal boşlukların da hem aracı firmalar hem de asıl firmalar tarafından tespit edilip işçi hakları gözetilmeksizin kendi lehlerine kullanmakta oldukları anlaşılmaktadır.

Bu tezde özellikle Türkiye'de alt işveren işçilerinin bu usulsüz uygulamalar neticesinde mağdur olup olmadıklarını, yalnız bırakılıp bırakılmadıklarını ve haklarını savunurken bazı zorluklarla karşılaşıp karşılaşmadıklarını araştırmak amaçlanmıştır.

Anahtar Kelimeler: Türkiye'de Alt İşverenlik, Alt İşverenlikte İşçi Hakları, İşçi Mağduriyetleri, Yasalarda Alt İşverenlik, Uygulamada Alt İşverenlik.

SUMMARY

The Workers' Rights Analysis in Turkey within the Scope of the Subcontracting System

The subcontracting has got an opportunity to be implemented increasingly since the first years of the declaration of the republic after the flexible employment models had been seen and felt as a necessity. Although the subcontracting applications being preferred and used as a tool especially during the crisis ease the markets in terms of employment due to its flexible structure, it has been understood from the cases, written and visual media news stories, trade union declarations and some academic studies that the illegal implications encountered in times of the crisis have been continued by the principal employers and subcontractors after these periods. It is also understood from the same sources that, in addition to the unlawful practices, the legal gaps discovered by the principal employers and subcontractors have been used in their favour by not considering the rights of the workers.

It is aimed to investigate in this thesis whether the workers have become a victim and they have been left alone or not and whether they are faced with challenges while defending their rights after these unpleasant practices in Turkey.

Keywords: Subcontracting in Turkey, The Worker Rights in Subcontracting, Victimization of Workers, Subcontracting in Law, Subcontracting in Practice.

INTRODUCTION

Today, the rapid development and the changes coming with this development in business life, requires the assistance and specialization in works. As a result of these changes, new institutions and concepts have entered into the Labour Act and the subcontracting has become from one of them.

Regulations relating to the subcontracting are located in Labour Act. However, these regulations cannot define the subcontracting properly. Therefore, many problems have been encountered in practice. Moreover, even a concept unity has not been achieved in doctrine until today. The developments in the industry have left in a difficult position to the companies by increasing the variety of production of existing firms in working life. These developments also forced the companies to produce various products which generally require special expertises.[1]As a result, the traditional companies producing products and services with the workers who work with uncertain and full time work contracts have assigned some works which require expertise such as cleaning, maintenance and repair, service, office (data preparation) services and security or other auxiliary tasks. [2]

At first, the subcontracting was applied in transport, construction and textile industry but recently it has been started to be used almost in all goods and services industry. For example, at first times in the construction industry, the building contractors undertaking to build whole construction were giving the plaster work to other employer, the paint works to another employer, the electrical and plumbing work to another employer and woodwork works to another employer. Then, the subcontracting was applied in road and dam construction, textile and auto factories and finally it has been applied in auxiliary tasks such as maintenance, catering, cleaning, staff transporting, security and office services today. The subcontracting was required to be regulated in legislation therefore it found a wide range application area in a short period although the Labour Act supported that the employers need to complete the works by using its own workers and facilities and the subcontracting

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[1] Mehmet Anıl Arslanoğlu, ***İş Kanununda Esneklik Temelli Üçlü Sözleşmesel İlişkiler***, Legal Publishing, İstanbul, 2005, p. 93.

[2] Ercüment Özkaraca, ***İşyeri Devrinin İş Sözleşmelerine Etkisi ve İşverenlerin Hukuki Sorumluluğu***, Beta Publishing, İstanbul, 2008, pp. 81-82.

applications were just exceptional applications. The exceptions should not exceed primaries before making necessary regulations.[3]

Besides, the most important reason of necessity of regulations on subcontracting is that to protect to the subcontractor's workers because the subcontractors are economically weaker than the principal employers.[4] For this purpose, the subcontracting institution entered into the legislation as a concept with the Labour Act No. 3008 was enacted in 1936. Initially, the subcontracting institution had been used with good intents but later it has been started to be used to reduce the number of the permanent workers, avoid the obligations of Labour and Social Security Law, stay away from the syndication and collective bargaining rights of workers, reduce the workers' wages, prevent the increase of the wages and other similar purposes.[5] The subcontracting institution has not been regulated enough and detailed in legislation and because of this it has been misused many times. As a result of these misuses, the regulations related to the subcontracting institutions have been changed several times in the past[6] and a new one is on the agenda of AKP government.[7] The Labour Act No. 5518, 950 and 1475 and other regulations in force were enacted to prevent the misuses of the subcontracting applications during the years of 1950s and 1980s. However, all these laws and regulations were not enough to fill the legal gaps related to the subcontracting institution. The legal gaps were tried to be filled with Supreme Court (Yargıtay) jurisprudences during the Labour Act No. 1475.[8]

The Labour Act No. 4857 is the latest Labour Act and it has been in force since 2003. The regulations related to the subcontracting in the last Labour Act is made by taking into account the Supreme Court jurisprudences related to subcontracting and the collusive practices have been tried to be prevented by trying to fill legal gaps. With the enactment of Labour Act No. 4857, the concept unity has been provided. However, the sector and workers still continue to be encountered with many problems related to the subcontracting. The other

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[3] Aslıhan Özcan Kılıç, ***Alt İşveren İlişkisinden Doğan Asıl İşverenin Sorumluluğu***, Unpublished Master Thesis, Gazi University, Ankara, 2007, p. 27.

[4] Oya Necla Kurtaran, ***Türk İş Hukukunda Alt İşveren Uygulamasında Muvazaa***, Unpublished Master Thesis, Ankara, 2006, p. 26.

[5] M.Polat Soyer, ***4857 Sayılı İş Kanunu Açısından Asıl İşveren – Alt İşveren İlişkisinin Kurulması ve Sonuçları***, MESS Sicil Dergisi, No.1(March), 2006, p. 16.

[6] Engin Ünsal, ***4857 Sayılı Yasa'ya Göre Asıl İşveren – Alt İşveren İlişkisinin Kurulması***, Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, Vol.2, No.6, 2005, p. 536.

[7] http://www.akparti.org.tr/site/haberler/taseron-uygulamalariyla-ilgili-sorunlari-cozecegiz/36391, (last accessed: 02/01/2013).

[8] Fevzi Demir, ***4857 Sayılı İş Kanunu'nun Başlıca Yenilikleri ve Uygulamadaki Muhtemel Etkileri***, MESS Mercek Dergisi, 2003, p. 87.

main reason of these problems is that the legal regulations in collective and individual Labour Act are inadequate and insufficient. The Labour Act has clarified the relationship between subcontractor and principal employer by introducing this relationship with its components rather than changing the institution of subcontracting.[9] On the other hand, the regulations about subcontracting are not ended the discussions in doctrine. The subcontracting institution is continuous to be discussed in doctrine with its elements and insufficiencies.[10] The Labour Act No. 4857 includes regulations which are comprehensive to prevent the misuses of the subcontracting applications. But, the collective Labour Act does not even mention subcontracting institution[11] and this situation causes great legal gaps.

This study aims to discuss if the subcontracting is misused or not and other problems faced during the subcontracting applications in Turkey. Accordance with this purpose, the thesis will be divided into three main parts.

In the first chapter, firstly the historical background and theoretical framework of subcontracting and subcontractor and principal employer concepts will be examined. After investigating these concepts, the elements of the subcontracting will be clarified. The historical development of the subcontracting in Turkey will be one of the other important titles of the thesis. Under this title, the legislative changes in subcontracting will be explained chronically. There are some reasons that bringing out the subcontracting. This matter will be discussed under the next title, as well. Last part of this chapter will be devoted to collusion and responsibility which are two different important subjects of subcontracting.

In the second chapter, the legal rights of the subcontractors' workers and misuses of these rights will be discussed. The laws and regulations about subcontracting have become in years almost as how they have to be in Turkey. However, the subcontracting practices do not reflect the same positivity. So, how the workers of subcontractors have become a victim of the subcontracting practices and what kind of measures they have taken against these misuses will be analyzed in this chapter. The collective bargaining and trade union rights are very important rights for all workers because they guarantee and protect other rights of the worker. The subcontractors' workers have problems especially while demanding these basic rights. Thus, the big part of this chapter will be about these rights and how the subcontractors'

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[9] Osman Güven Çankaya and Şahin Çil, ***4857 Sayılı İş Kanunu'na Göre Asıl İşveren-Alt İşveren İlişkisi***,Sicil İş Hukuku Dergisi, Vol 3, 2006, p. 55.

[10] Soyer, 4857 Sayılı İş Kanunu Açısından Asıl İşveren**,** p. 16.

[11] 6356 Sayılı Sendikalar Ve Toplu İş Sözleşmesi Kanunu, 2012, ***http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6356.pdf***, (last accessed: 02/01/2013).

workers cannot take the advantage of these rights while they have right to have them legally. In brief, how the workers of subcontractors have been exploited for years illegally or directly by using the legal ways and gaps despite all improvements in regulations and laws will be deeply discussed in this chapter.

Lastly, the third chapter will approach to the subcontracting from the European Union (EU) perspective. In the first part of this chapter, a general assessment from past to present about the subcontracting in EU will be made. In the second part of this chapter, the related topics of Turkey progress reports prepared and published annually by the Commission of The European Communities will be summarized and discussed shortly. Albeit these reports have annoyed Turkey, they are the documents telling us to us by not making compromises to announce realities and truths. However, although the reports include detailed explanations and criticisms about different issues, it is worrying that the misuses of the subcontractor workers have not been mentioned enough.

Generally, the problems on the rights of the workers have been uttered in these reports. Moreover, this situation indicates that the EU does not care or ignores that the misusing problem of the subcontractor workers rights needs to a different way of solution because of its different status in the laws, regulations and even perceptions. Eventually, the EU knows and analysis Turkey maybe better than Turkish people[12] and because of this, it cannot be thought that the EU is not aware of this situation. However, although the expressing of the problems experienced in the trade union rights is a regrettable situation for Turkey, it is an important part of the reports that worth to be appreciated. The last part of this third and last chapter will clarify the notion of decent work and the situation in the EU will be examined in terms of decent work concept of International Labour Organization (ILO).

[12] http://haber.gazetevatan.com/0/37239/4/Haber, (last accessed: 03/01/2013).

CHAPTER 1
THE SUBCONTRACTING CONCEPTS

1.1 The Historical Background of Subcontracting

The subcontracting is an organizational model of capitalist production and its history goes back to ancient times. The development of trade after 12th century necessitated an alternative model of production to handicrafts. Actually, it is useful to examine the European continent before the industrial revolution to understand the history of subcontracting. During this period, the subcontracting was used extensively in manufacturing of some of the goods such as house-drawn carriage, toys, items made of gold and silver, silk goods, shoes, furniture, watches and scientific purposes utensils instruments.[13]

However, the subcontracting here was not only a cost-cutting factor, but also an important element of organizational flexibility. Forasmuch, the increasing luxury goods demands of affluent people and the more goods demands of other classes in main metropolitan areas of Europe such as London, Paris and Amsterdam were met through the use of increasing number of subcontractors.[14] But, it is possible to say that the subcontracting was used before the birth of the modern factories and the use of subcontractors increased rapidly in parallel with the increase in the number of persons belonging to the bourgeois class and their demands for goods. There are analyzes which show that the subcontracting was used since the end of the 17th century in the modern sense. After the emergence of the modern bourgeoisie, the mechanism of commodity production changed in a short period of time and a revolution was experienced in addition to these technological revolutions.[15]

Even if it cannot be showed by numbers, it is possible to say that the subcontracting applications could be seen on the streets of British metropolis in 18th century and even after the second half of the 16th century, it was possible to see a subcontracting working network which expanded to the provinces and hosting workers who worked for low wages in order to meet the growing consumer demands.[16]

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13 Ahmet Miraç Sönmez, ***Türkiye'de Kamu Personel Rejiminde Yardımcı Hizmetler Sınıfında Alt İşverenlik: Sağlık Bakanlığı Üzerine Bir Araştırma,*** , Unpublished Master Thesis, Ankara University, 2011, p. 13.

14 Giorgio Riello, ***Strategies and Boundaries: Subcontracting and the London Trades in the Long Eighteenth Century,*** 2008, p. 2. http://es.oxfordjournals.org/content/9/2/243 (last accessed: 11/10/2013).

15 Sönmez, ***Türkiye'de Kamu Personel Rejiminde Yardımcı Hizmetler Sınıfında Alt İşverenlik: Sağlık Bakanlığı Üzerine Bir Araştırma,*** p. 13.

16 Ibid., p. 14.

The reasons for preferring the mechanism of subcontracting during the concerned period were the providing flexibility possibilities of subcontractors in accordance with the demand of market and its advantages for principal employers while adapting to new situations and accessing all of the different specialties information that they did not have.[17] This indicates that the emergence of a different culture of production. This system was especially used extensively while the demand was increasing for luxury goods. Therefore, it can be said that the use of subcontracting became a rule with the industrial revolution while it was just an exception before this revolution.[18] At that time, it was not only concerned to benefit from expertise, but also it was aimed to get rid of the expenses of employing workers constantly by giving some part of the main work. Moreover, the principle employers were not hesitating to show the bank loans needed to be paid back as an excuse to use this system with above mentioned reasons.[19]

The author Charles Kingsley reflected the conditions of 1940s in textile sector in his book named as "Cheap Clothes and Nasty" by using the workers own words. According to this, if the workers were working in good companies, it means they were working for principle employer but if they were working in bad companies, it means they were working for subcontractors. Moreover, according to author, the number of the subcontractors was sometimes three or four and they were exploiting the workers utterly.[20]

The cruising followed by United States about subcontracting is positioned in a close date as 19th century as it was in United Kingdom. The subcontracting found a fairly common usage area in the large cities of United States such as New York, Chicago, Boston and Philadelphia. Especially in the textile sector, a lot of labourers employed in this way and low wages, long working hours, wages per piece, dangerous and difficult working conditions and other adverse situations like exploitation of child labor were seen so often in this country, just as in the UK.[21]

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[17] Maxine Berg***, Luxury and Pleasure in Eighteenth Century Britain***, Oxford Univ. Press, New York, 2005, p. 169.

[18] Ibid., p. 261.

[19] Ibid., p. 169.

[20] Sönmez, ***Türkiye'de Kamu Personel Rejiminde Yardımcı Hizmetler Sınıfında Alt İşverenlik: Sağlık Bakanlığı Üzerine Bir Araştırma,*** p. 15.

[21] Bruce Goldstein, Catherine K. Ruckelshaus, ***Lessons For Reforming 21st Century Labor Subcontracting: How 19th Century Reformers Attacked "The Sweating System",*** pp. 1-2, ***http://nelp.3cdn.net/541b69ad88a3a26317_7cm6bx6g4.pdf*** (last accessed: 11/11/2013).

In those years, this system was servicing to the advantage of principal employers and the high labor costs of companies were drawn down thanks to the cheap labor force organised by subcontractors. The principal employers were not concerned that where, by whom and under which conditions the work had been done and the subcontractors were continuously decreasing the price to get more job. Consequently, the workers were forced to work for a lower wages. If we look at the present days, it is possible to say there is a return to the past in terms of working conditions especially in developing countries. In those countries, the working models have been adopted which are similar to employment models seen during the industrial revolution.[22]

1.2 The Theoretical Framework of Subcontracting

Opening up the whole world to industrial capitalism after the Industrial Revolution has led to the fierce competition between countries in the process of industrialization and long term crisis at the beginning of twentieth century. While the world was encountering this kind of problems, the Keynesian Theory argued that the market mechanism could not solve the crisis and saw necessary the height of effective demand in order to achieve full employment and this theory revealed the need of institutional capacity building in order to add new functions to the state and solve the crisis faced by capitalism after World War II. The Keynesian theory has also created the theoretical infrastructure of transition of welfare state concept. This theory has created a solution to the continuous recession and unemployment and made possible the creation of market conditions required by Fordist production system thanks to the production function of demand enhancer policies given to the state.[23]

The globalization became the main discussion area of all societies during the transition process from 20th century to 21th century and its effects were seen in both social and economic life. The process of globalization has deeply affected the labor markets as well as in all areas. This change was not bearing a partial attribute. The developed and developing countries faced with new problems in parallel with the conjuncture they had and entered into the solution search processes. The capital in the labor market shifted its production to the low-cost regions and it caused an increase the demand for information and knowledge workers in developed countries and a contraction of employment in manufacturing industry and it has transformed the unemployment in structural character. The rapid increase in the use of production, communications and information technology, flexible production structuring and

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[22] Ibid., p. 7.

[23] Robin Murray, ***Fordizm ve Post Fordizm - Yeni Zamanlar***, Ayrıntı Yayınları, İstanbul, 1998, p. 48.

implementation of subcontracting caused the division of production processes and the labor share in this divided productions started to decline continuously. The attractive opportunities in underdeveloped or developing countries for foreign investment have led to the creation of negative pressure on the current employment conditions and wages in countries.[24]

As it is mentioned above, the globalization emerged after the structural crisis of capitalism. In this process, neoliberal economic policies contributed to the underdeveloped countries to have them open free-market economy with the contribution of IMF and the World Bank by giving priority to some goals such as the removal of price interventions in goods and factor markets, liberalization of foreign trade and financial markets, flexibilization of labor markets, dissemination of privatization of state-owned economic enterprises and the privatization of some public services like education and health.[25]

As can be understood from the above descriptions, the subcontracting is one of the consequences of rapid globalization and neoliberal policies and there are three different economic theories which can be used to explain the basics and logics of subcontracting; Transaction Cost Theory, Agency Theory and Theory of Comparative Advantage.[26]

Ronald Coase who propounded Transaction Cost Theory pointed out while explaining the concept of transaction costs that the cost of obtaining some goods and services through the market rather than providing these services by its own facilities in his *'Nature of the Firm'* book published in 1937.[27] According to this theory, everything about providing the production of goods and services within the company or outside brings a transaction costs. According to this, while the supply of goods or services outside increase the coordination costs, providing them from the company increases the production costs because of the causes such as increasing number of workers, the development of physical facilities and so on.

According to Williams who has made the most important contribution to the theory, if the transaction costs of using market tools are lower than producing with company's facilities, these services should be provided from outside. This argument has become a fundamental

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[24] Yücel Uyanık, ***Neoliberal Küreselleşme Sürecinde İşgücü Piyasaları,*** Gazi Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 10 / 2, 2008, p. 1.

[25] Robert.Went, ***Neo – Liberal İddialar, Radikal Cevaplar***, Yazın Yayıncılık, İstanbul. 2001, p. 7.

[26] Riello, ***Strategies and Boundaries: Subcontracting and the London Trades in the Long Eighteenth Century,*** pp. 3-6.

[27] Ronald Coase, ***Nature of the Firm,*** *Economica*, New Series, Vol. 4, No. 16. 1937. http://www.colorado.edu/ibs/eb/alston/econ4504/readings/The%20Nature%20of%20the%20Firm%20by%20Coase.pdf , (last accessed: 13/11/2013).

teaching explaining why the companies should provide some services and goods from outside.[28]

As we see from the arguments of the theory, it only has focused on the advantages that would be provided to the companies. No one can claim that this theory is not right, but I think it should have been made by considering the situation of the workers who are likely deeply and adversely affected from the consequences of this theory's assumptions.

As to Agency Theory, it has been developed to describe the differentiation between objectives of managers (proxy) in private sector and shareholders (principal) of the companies. According to this theory, while the managers concentrate on long-term growth and higher wages for themselves, the shareholders are focused on higher profits. At this point, the mandatory contractual relationship becomes the proposal of the theory in order to keep proxies at the same line with pleasure of the principals.[29] This theory is an approach that examines the issues emerging in the event of two different parties' solidarity process whose objectives and interests are different.

Essentially, this theory has begun to develop after the economists started to examine the cooperating parties' motivations, their control mechanisms and the flow of information between the parties. According to the economists' point of view, proxies are motivated by their personal interests, behave rational and avoid risks. The principal party can motivate their proxies with various incentives. If it does not work to direct the proxy, the conflicts start between them. According to the theory, generally while the scale of the companies grows, supply chain and employee interactions increase. The principal parties need to more workers who will work as a proxy in order to overcome the complexity of the organization.[30]

This theory contains a contractual relationship and it can be mentioned its positive results for companies because its' outsourcing inciting structure and cost cutting effects. However, this theory is criticized because of its complex assumptions and because it sees so simple the human behaviors. But, as the theory, these critics overlook how will be affected the workers after this theory is realized. Even today, it is still forgotten the working conditions of

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[28] Riello, ***Strategies and Boundaries: Subcontracting and the London Trades in the Long Eighteenth Century,*** p. 4

[29] Hilal Karabıyık, ***Türkiye'de Firma Büyüklüğü Ve Sahiplik Yapısını Etkileyen Sektöre Özgü Firma Belirleyicilerinin Analizi: İmkb'de Sektörel Karşılaştırma,*** Unpublished Master Thesis, Atılım University, 2011, pp. 18-19.

[30] Ibid., pp. 19-20.

the subcontractors' workers although they are human beings and they are the most important part of the producing of goods and services.

The other theory about subcontracting is Theory of Comparative Advantage. The notion of comparative advantage has been formulated and popularised by David Ricardo. At the international perspective, this theory focuses on the advantages of the countries against each other in the production of some goods and services. The theory can be assessed in the context of international outsourcing in accordance with international subcontracting practices described below. Accordingly, if a company (supplier) providing external outsourcing performs business activities more efficiently and cheaper than the main company (client), the main company had better to give these activities to the providing external outsourcing company. According to this theory, this may increase the motivation of the supplier to focus on the activity that he is responsible, and so this supplier will be more professional on this specific activity than the main company and its' competitors. Furthermore, the market will get a new service supplier who is more professional and can produce services and goods for a lower cost.[31]

This theory does not mention workers, their working conditions and what they will get by joining this system, as well. And it does not seem more merciful than other two theories. Because this theory focuses on who is better in producing services and goods and also who do it cheaper, the workers are seen as they have to consent to low wages and bad working conditions.

1.3 The Subcontracting, Subcontractor and Principal Employer

The subcontracting and subcontractor are defined in different ways. But, the most relevant ones will be explained in this study. Before explaining the subcontractor, the relationship between the subcontractor and principal employer will be explained to establish a link between concepts. Indeed, Article 2/6 of the Labour Act No. 4857 explains what the subcontractor and principal employer is while making the definition of the 'principal employer-subcontractor relationship', as well. In this article, the relationship is defined as;

> *'The connection between the subcontractor who undertakes to carry out work in auxiliary tasks related to the production of goods and services or in a certain section of the main activity due to operational requirements or for reasons of technological*

[31] Steven Suranovic, **International Trade Theory and Policy Analysis, 2007, chapter: 40-2-3, http://internationalecon.com/Trade/Tch40/T40-1.php** , (last accessed: 15/11/2013).

expertise in the establishment of the main employer (the principal employer) and who engages employees recruited for this purpose exclusively in the establishment of the main employer is called "the principal employer-subcontractor relationship". [32]

Article 3/a of the Regulation of Subcontracting defines the subcontractor as; the subcontractor refers to a real or corporate person or a non-corporate institution or organisation taking the auxiliary tasks related to the production of goods and services carried out in the enterprise or the works that requires expertise for technological reasons in a certain section of the main activity and employing the designated workers only in this establishment.[33]

In terms of the Social Security Act No. 5510, the definition of the subcontractor is as follows; a subcontractor is the third party taking a section or adds-on of a work related to the production of goods and services carried out in the establishment by other employer and employing designated assureds for this job.[34]

The Subcontractor according to the ILO:

International Labour Organization (ILO) usually evaluates the subcontractor in two different ways according to the purpose of its usage. ILO sees the subcontracting as a complementary form of commercial relationship between formal large enterprises and informal small enterprises in order to make formal to the informal sector.[35] The ILO Convention No. 94 approved and came into force by ILO in 1949. It has been arranged in this convention that how the wages and working conditions putting in the tender contracts about manufacturing, assembling or transporting of supplies and equipment at the works having done by the public authorities are determined. The convention has brought some provisions to be applied in the works taken by the contractors and subcontractors from public authorities. The countries accepting this convention shall regulate their internal legislations and regulations in accordance with this convention.[36] Turkey has been criticized many times by ILO because of violating this convention. Because of these criticisms, some decrees issued

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[32] Article 2/6 of 4857 Sayılı İş Kanunu ,2003, http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf , (last accessed: 04/01/2013).

[33] Article 3/a of Alt İşverenlik Yönetmeliği, 2008, http://www.mevzuat.adalet.gov.tr/html/27996.html , (last accessed: 04/01/2013).

[34] Article 12 of 5510 Sayılı Sosyal Sigortalar Ve Genel Sağlık Sigortası Kanunu, 2006, http://www.mevzuat.adalet.gov.tr/html/27054.html, (last accessed 05/01/2013).

[35] Nusret Ekin, ***Ekonomik ve Hukuksal Boyutlarıyla Alt İşveren***, İstanbul Ticaret Odası Publishing, No: 2002-34, İstanbul, 2002, p. 91.

[36] Ibid., p. 93.

and implemented. The provisions relating to the ILO Convention were not included in the Labour Act No. 3008 but it entered into law with arrangements made in Labour Acts No. 931 and 1475.[37]

The Subcontractor according to the UNIDO:

United Nations Industrial Development Organization (UNIDO) has been closely interested in the subject of subcontracting as a strategic factor in industrial development in recent years and has made many researches and publications on the issue. As a result of these researches, UNIDO has made this definition of the subcontracting;

> *'An economic relationship where one entity, the main contractor, requests another independent entity, the subcontractor or supplier, to undertake the production or carry out the processing of a material, component, part, subassembly or the provision of an industrial service in accordance with the main contractor's specifications.'*[38]

Of course, there are many different types of principal employer-subcontractor relationships in different EU countries. UNIDO emphasizes the manufacturing subcontracting or in other words the industry subcontracting with this definition. Thus, it can be said that the UNIDO made a limited definition of subcontracting.

The Subcontractor according to the UNCTAD:

United Nations Conference on Trade and Development (UNCTAD) makes the following definition of subcontracting;

> *'The international subcontracting implies that an agreement is reached between two production units, whereby one of the two units (the sub-contractor) supplies the other (the principal), on terms agreed between the two parties, with parts or components (or assemblies) which the principal uses to produce goods bearing its trade-mark or for which it assumes exclusive responsibility.'*[39]

As it is seen from all these definitions, although the different institutions and organizations describe the subcontracting from their point of view, there is a common point

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[37] Ayfer Sönmez**, Asıl İşveren – Alt İşveren İlişkisinde Muvazaa,** Unpublished Master Thesis, Dokuz Eylül University, 2009, p. 13.

[38] Jean-Louis Morcos**, *Industrial Subcontracting and Supply Chain Management***, Vienna, 2003, p.2., http://www.unido.org/fileadmin/import/18187_SPXversusDELOCinonedoc.pdf , (last accessed: 04/01/2013).

[39] Dimitri Germidis, ***International Subcontracting: A New Form Of Investment,*** OECD Publishing, Paris, 1980, p. 40.

about subcontracting as they have all emphasized: a contract, a principal employer and subcontractor. However, the difference and problems appear when it comes to the application.

As to the employer, it is defined in the Article 2/1 of the Labour Act No. 4857. This article has defined the employer as;

> '*the employer is a real or corporate person or a non-corporate institution or organisation employing employees.*'[40]

Principal employer is defined in the Article 3/ç of Regulation of Subcontracting as; the principal employer is a real or corporate person or a non-corporate institution or organisation giving the auxiliary tasks related to the production of goods and services or the works that requires expertise for technological reasons in a certain section of the main activity and employing its workers in main activity, as well.[41]

1.4 The Elements of the Subcontracting

According to the definition in law, the first condition to be able to mention subcontractor-principal employer relationship, the job shall be undertaken from an employer. So, the subcontractor must undertake a job from principal employer. Moreover, to establish the subcontracting relationship, the principal employer must employ its workers in the other part of the work and the job assigned to the subcontractor must be an activity that is;[42]

- related to the production of goods and services ,
- carried out in the establishment ,
- dependent on the actual work and,
- continued as long as the actual work is in progress.

The elements required to establish the relationship of subcontracting can be listed briefly by benefiting from the definition that has been made in Article 2 of the Labour Act No. 4857;

- the presence of a establishment and workers of principal employer,

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[40] Article 2/1 of 4857 Sayılı İş Kanunu ,2003,

http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf , (last accessed: 03/01/2013).

[41] Article 3 of Alt İşverenlik Yönetmeliği, 2008, http://www.mevzuat.adalet.gov.tr/html/27996.html, (last accessed: 03/01/2013).

[42] Tuğsan Yılmaz, ***İşveren ve Alt İşveren İlişkisinin İşçi Üzerindeki Etkisi,*** http://www.tugsanyilmaz.av.tr/is-hukuku/isveren-ve-alt-isveren-iliskisinin-isci-uzerindeki-etkisi, (last accessed: 05/01/2013).

- working in employer's establishment and employing the subcontractor's workers only in employer's establishment,
- technological requirement of the work done by subcontractor ,
- employing the workers by subcontractor in producing production or service in a part of the actual work or auxiliary tasks.
- The contract between principal employer and subcontractor must be made in writing.

1.5 The Historical Development of the Subcontracting in Turkey

The various forms of employment have begun to be seen in Turkish working life in particular with the development of industry. Besides, the form of production is diversified in parallel with economical and technological developments and as a result of this, the expertise required in some areas. In accordance with these changes and developments, the employers tend to assign certain works, which require expertise that they do not have, to other employers.[43] One of these kinds of working types is subcontracting as it was mentioned above.

The concept of subcontracting has entered to Turkish Labour Act in 1936 with the Labour Act No. 3008.[44] According to Article 1 of this act, even if the workers get a job through the third party rather than directly through the employer and make a contract with third party, the principal employer is liable for the contract. As it is seen, this article mentioned only the liability of principal employer and the condition of being at the establishment was not considered in this article. The liability of the principal employer is limited by the terms of the contract.[45] This situation caused some problems and the relevant provision of the law changed with the law no. 5518 in 1950.[46] According to the new form of the provision, if the workers hired through the third party (subcontractor) who undertakes to carry out a part of the same job was liable jointly with principal employer. The liability of the third parts and the same job condition were the most outstanding changes of this provision.[47]

On the other hand, The ILO Convention No. 94 adopted in 1949 has been approved by Turkey in 1960. It is regulated in this convention that the conditions putting into the contracts

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[43] Nahit Gürhan Aydın, ***Türk İş Hukukunda Asıl İşveren-Alt İşveren İlişkisi***, Unpublished Master Thesis, Selçuk University, 2006, p. 5.

[44] Ekin, ***Ekonomik ve Hukuksal Boyutlarıyla Alt İşveren***, pp. 55-56.

[45] Ünal Narmanlıoğlu, ***Türk İs Hukukunda Üçlü ilişkiler, Asıl İşveren - Alt İşveren İlişkisinden Doğan Sorumluluklar,*** Legal Publishing, Vefa Toplantıları III, İstanbul, 2008, p. 54.

[46] Çankaya and Çil, ***4857 Sayılı İş Kanunu'na Göre,*** p. 16.

[47] Narmanlıoğlu, ***Türk İs Hukukunda,*** p. 54.

for protecting the rights of the subcontractors' workers in case the public institutions or organisations assign a work to other employers in their establishment. On the basis of this convention, the Ministers of Council's decision published which called as the general principles about the working conditions of the workers working in the public institutions in 1988. However, the scope of the liability was narrowed in 1967 with the Labour Act No. 967. But, the Constitutional Court cancelled this act and the same regulation replaced with Labour Act No. 1475 again in 1971.[48]

The subcontracting had been widely started to be used for other reasons which were not proper for its own purposes especially from the mid-1980s and throughout the 1990s. So indeed, the employers used the subcontracting as a tool for some illegal purposes such as getting rid of some liabilities arising from the individual and collective law, preventing the trade union and collective bargaining rights of the workers through simulated transactions. The usage of subcontracting for illegal purposes resulted with not being able to use some basic rights of workers on paper. The issue frequently moved to the courts and it was tried be solved with a large number of cases and jurisprudence of the Supreme Court. The Supreme Court tried to cease these abuses and misuses with its decisions which were seen as successful and stable in general.[49] However, it was claimed that the jurisprudences were not sufficient to stop these misuses and a new legislation had become necessary.[50]

In this context, the provisions related to the subcontracting had been revised firstly by the commission prepared the Law Act No. 4857 and thereafter by government and as a result the provision has taken current form with amendments. However, these new arrangements caused so many debates and interpretation differences. Moreover, two new controversial paragraphs added to the Article 2 of the Labour Act with the Law No. 5538.[51] It is argued that these new provisions have brought privilege to the public institutions about the restrictions on subcontracting.[52]

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[48] ***Soru, Cevap ve Sorunlarıyla İş Hukukunda Alt İşveren,*** Türkiye İşveren Sendikaları Konfederasyonu, Matsa Publishing, No.318, Ankara, 2012, p. 7. http://tisk.org.tr/tr/e-yayinlar/soru_cevap_ve_sorunlariyla_is_hukukunda_alt_isveren/pdf_soru_cevap_ve_sorunlariyla_is_hukukunda_alt_isveren.pdf , (last accessed: 05/11/2013).

[49] Ercan Akyiğit, ***Alt İşverenlik ve Benzer İlişkilerden Farkı, TÜHİS İş Hukuku, ve İktisat Dergisi***, Vol. 22, No. 5(February), 2010, p. 3.

[50] Narmanlıoğlu, ***Türk İs Hukukunda,*** p. 55.

[51] Article 2 of 4857 Sayılı İş Kanunu , 2003, Additional paragraphs, http://www.turkishlaborlaw.com/content/view/27/77/, (last accessed: 07/01/2013).

[52] Hande Bahar Aykaç, ***İş Hukuku'nda Alt İşveren***, Beta Publishing, 1. Edition, İstanbul, 2011, p.28.

Lastly, the law that 'the Amendments on Labour Act and Other Laws No. 5763'called as employment package among the public includes some changes on subcontracting, as well. In accordance with this law, the obligation to notify the establishment is also regulated with two new paragraphs added to the Article 3.[53] This law known as the law aiming the increase of the employment has been criticized because of its strict rules which may cause an opposite effect against its aim.[54]

Finally, the Regulation of Subcontracting bringing very important arrangements about subcontracting is promulgated in 2008. Since coming into force it has been the target of the intense criticism.[55] It cannot be said that the purposes of this law to solve the problems occurred during the previous laws were enough to end them.

In a meeting, in 2012, of which the topic is "subcontracting, temporary employment relationship and remote working",[56] the Labour and Social Security Minister (LSSM) Faruk Çelik has already made a statement which confirms the continuing problems in subcontracting. In this meeting, the minister Çelik drew intention that they came together to analyse the subcontracting that causes problems for employers and workers in working life. The minister said that the subcontracting causes some important problems for subcontractor workers such as severance pay and working times. In this meeting, a report called as "subcontracting, temporary employment relationship and remote working" has been presented. This report was including actual numbers about subcontracting. According to this report, there are 585,788 workers in public sector and 419,466 workers in private sector. In total, there are 1,500,254 people working as a subcontractor worker.

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[53] Article 3 of 4857 Sayılı İş Kanunu , 2003, Additional paragraphs, http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf , (last accessed: 08/01/2013).

[54] Aykaç, ***İş Hukuku'nda Alt İşveren***, p. 29.

[55] Tankut Centel, ***Alt İşverene İlişkin İş Kanunu'ndaki Son Değişiklik,*** Sicil İş Hukuku Dergisi, No 10, 2008, pp. 6-7.

[56] http://www.csgb.gov.tr/csgbPortal/csgb.portal?page=haber&id=basin491 (last accessed: 27/01/2013).

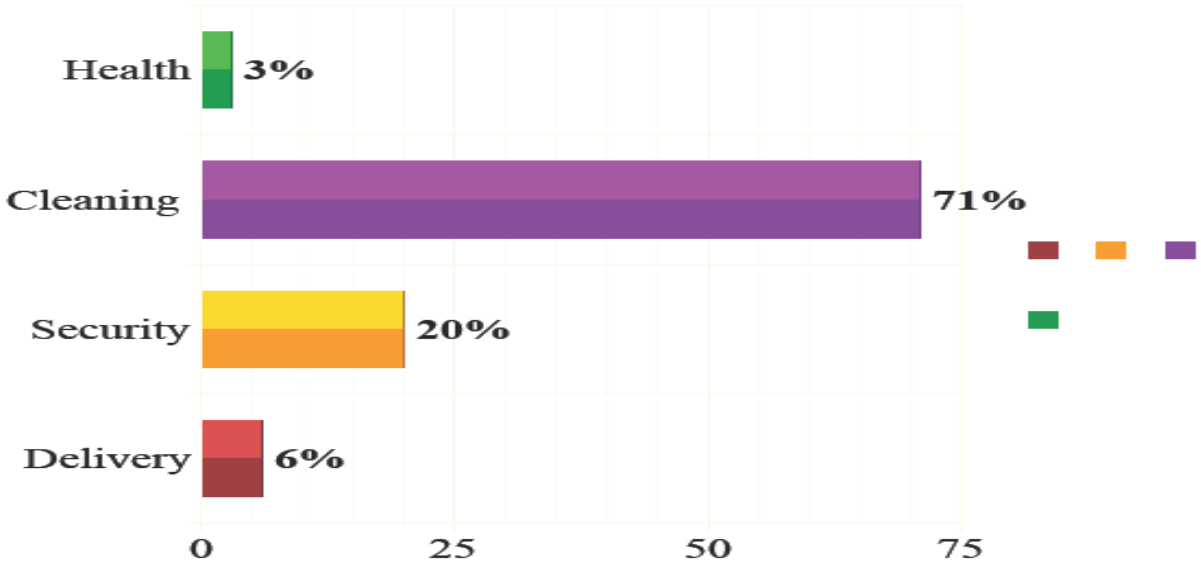

Figure 1.1 The Subcontractor Worker Rates in the Public Sector

Source: Datas retrieved from the internet site of the Ministry of Labour and Social Security (Çalışma ve Sosyal Güvenlik Bakanlığı) [57]

In the public sector, the most of the subcontractor workers work in the cleaning sector and there are 417,442 workers in this sector. The security sector follows cleaning sector with 117,541 workers. 34,621 workers work in delivery sector and 16184 workers have employed in health sector.

The most common sectors that benefit from the subcontracting services are the municipalities with 36 percent and the state-owned enterprises (SOEs) with 14 percent.

[57] Ibid.

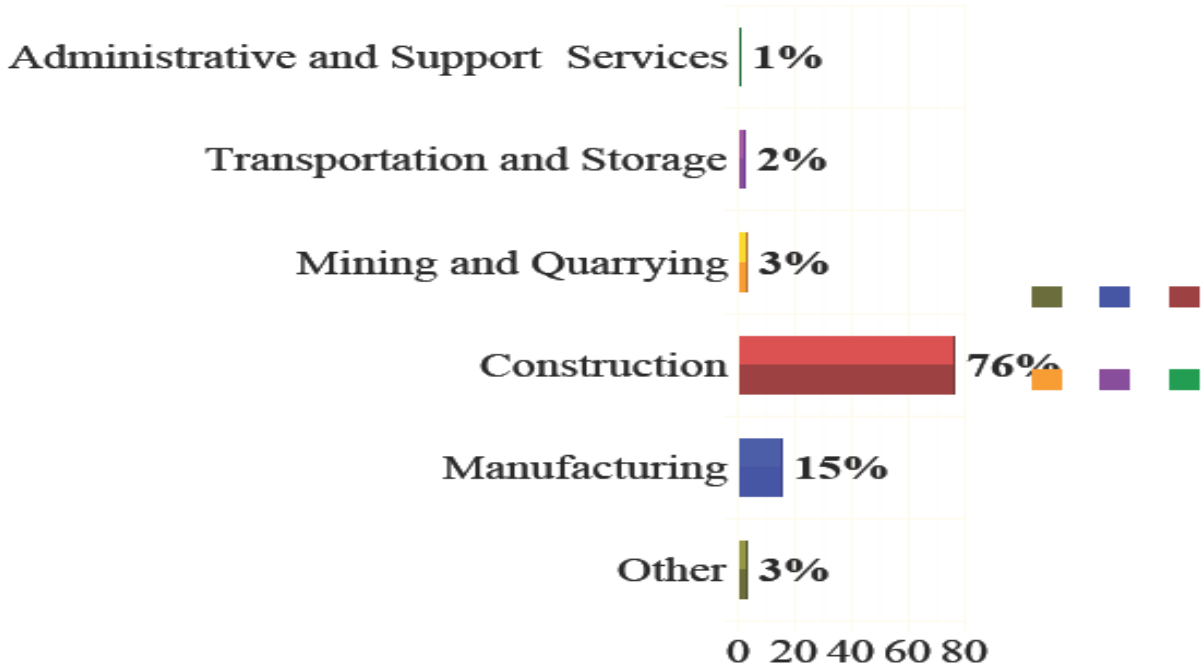

Figure 1.2 The Subcontractor Worker Rates in the Private Sector

Source: Datas retrieved from the internet site of the Ministry of Labour and Social Security [58]

As to private sector, the construction sector is the densest sector having subcontractor workers with 318,087 workers. The second densest sector is manufacturing sector with 63,849 subcontractor workers.

As it is mentioned before, the increasing competition in business has led to the development of working systems on the basis of the efficiency especially since 1970s. The enterprises has began to downsize their businesses to reduce costs and to avoid assignments arising from the social security and tax legislation. The subcontracting has become very popular between this kind of enterprises.[59]

This new model of production has led to curtail the economic and social rights of the workers while downsizing the workplace. This new model also has caused the increase of the numbers of the workers in informal sector. As we see from the figure 2, the subcontracting is very common in construction sector and the workers are not generally hired continuously in this sector. Thus, the number of unregistered workers are comparatively higher in this sector.[60] The informal employment occurs if the workers are never registered to the relevant

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[58] Ibid.
[59] Oğuz Karadeniz, ***Kayıtdışı İstihdam***, 2002, p.109.

[60] Sema Betul Azaklı, ***Turkiye'de Kayıtdısı İstihdam ve Ekonomik Boyutu*** , Unpublished Master Thesis 2009, p.32.

public institutions such as Social Security and tax authorities, etc. or, if their wages and workday information are given these institutions less than in reality.[61] This definition shows us the problems of workers in subcontracting as it is endless. The informal employment rates has showed important developments in last decade. However, informal sector is still in frightening sizes. The table 1 proves and summarizes us the seriousness of the situation.

Table 1.1 Turkey 2002-2012 Informal Employment Rate (%)

TURKEY INFORMAL EMPLOYMENT RATE (%)												
Year/ Month	January	February	March	April	May	June	July	August	September	October	November	December
Period	1. Quarter			2. Quarter			3. Quarter			4. Quarter		
2002	48,51			53,11			53,73			53,38		
2003	49,86			52,57			54,39			51,58		
2004	50,56			53,83			55,42			52,29		
2005	45,47	46,65	47,33	48,44	49,25	50,01	50,29	49,13	48,75	48,2	48	46,56
2006	45,48	44,47	45,34	46,38	47,7	48,56	48,93	48,93	48,41	47,2	47	45,63
2007	44,99	44,19	44,72	45,46	46,11	47,03	47,44	47,26	46,74	45,5	44	42,14
2008	40,66	41,3	41,96	43,48	43,98	44,89	45,31	45,31	44,63	44,3	44	41,77
2009	40,78	40,8	41,31	42,72	44,58	45,68	46,39	45,71	45,53	44,5	44	43
2010	42,29	41,73	42,06	43,32	43,61	44,78	45,06	44,76	43,97	43,5	43	41,99
2011	40,87	41,01	41,34	42,1	42,7	43,5	43,4	43,6	42,8	41,8	40,7	39,2
2012	38,4	37,5	37,5	38,8	39.9	40,4	40,2	40,1	40,1	39,7	38.5	37,4

Source: http://www.sgkrehberi.com/makale/266/

According to Turkstat(TUİK) figures, the numbers of the workers has been decreasing since 2002. According to datas of Turkstat, formal employment in 2012 came to 15 million 135 thousand and informal employment 9 million 686 thousand.[62] It means, about 2 of every 5 workers are not registered. When the poor working conditions of the registered workers is considered, the situations of the workers in informal sector is quite alarming.

1.6 The Reasons Bringing Out the Subcontracting

The subcontracting entering into the production system with Industrial Revolution has developed rapidly in time. The rapid development of the subcontracting has played an influential role in the process of decreasing cost and increasing the quality and variety of the industrial production.[63] So indeed, the developing economic and social conditions and technological changes have affected considerably the social life and working life. The

[61]Oğuz Karadeniz, ***T.C. Kalkınma Bakanlığı Onuncu Kalkınma Planı*** (2014-2018) Sosyal Güvenlik Sisteminin Sürdürülebilirliği, Özel İhtisas Komisyonu 1. Taslak Rapor. ,2012, p.19.

[62] Tepav, İstihdam İzleme Bülteni, No. 16, 2013, p. 14.

[63] Nusret Ekin, ***Çağdaş Kobilere Dönüşen Alt İşverenlik***, Tekstil İşveren Dergisi, No.278,(February), 2003, http://www.tekstilisveren.org.tr/dergi/2003/subat/38.html, (last accessed: 08/01/2013).

increasing international competition, dizzying advances in communication and globalization processes have accelerated these changes.

The changes in new technologies have caused to the structural transformations in enterprises, reformed to the structures of the production and employment and speeded up to the subcontracting applications. The sector that the subcontracting is seen most commonly is construction industry. But, especially in these days, the subcontracting applications are seen so often in all sectors. The subcontracting applications function as a part of the flexible manufacturing models. Flexible manufacturing technologies which is one of the main features of the flexible manufacturing provides the possibility of externalization, in other words, to make the works to the subcontractors by separating the production process to small parts. It can be said that the subcontracting becomes widespread with the spread of the various flexible manufacturing approaches by making use of the opportunities of developing technologies.[64]

The employers who need technical expertise in production processes generally assign these tasks to the subcontractors. Through these kinds of working types, the principal employers get the opportunity to use technologies that they need without investing a new capital. In addition, the subcontracting provides the functional flexibility to the employers, which is very important for enterprises in this competitive environment. The flexible manufacturing technologies have provided a suitable environment to the spread of small and medium-sized enterprises (SMEs) and it has become another reason of the increase in the subcontracting relationships between the large enterprises and SMEs.[65] In other words, the promoting of the SMEs with the purpose of accelerating the economic growth and reducing unemployment led to the proliferation of SMEs and the expansion of their subcontracting relationships with large enterprises.

In general, the enterprises compare the cost differences between when they complete the work themselves and when they assign a part of the work to a subcontractor. If the cost is lower than when they assign a part of the work to subcontractor, they prefer to leave this part of the work to a subcontractor.[66] In short, it can be said that the subcontracting is one of the most important methods used by the employers to benefit from the cheap and non-union work force against the pressure coming from the international completion created by globalization in the world and Turkey.

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[64] Sönmez, ***Asıl İşveren – Alt İşveren İlişkisinde Muvazaa***, pp. 23-24.

[65] Ekin, ***Çağdaş Kobilere Dönüşen Alt İşverenlik,*** p**.** 72.

[66] Sönmez, ***Asıl İşveren – Alt İşveren İlişkisinde Muvazaa,*** pp. 24-25.

1.7 The Collusion in the Subcontractor-Principal Employer Relationship

The collusion can be defined as a contract which is regulated to deceive third parties. The real purpose of the contract is disguised from third parties.[67] The subcontracting practices have begun to be seen so often especially after 1980s in Turkey and it has extended to all sectors in a short period. This increasing subcontracting relationship has caused some problems such as limiting the worker's rights arising from the individual and collective Labour Act.[68]

The primary purpose in subcontracting practices is to provide more economical workforce in terms of the employers. The subcontractors have discovered the fraudulent aspects of the subcontracting practices while trying to achieve this aim. The practices which are against the workers are ignored by the workers who are in a vulnerable situation because of the limited employment opportunities and prevalence of the subcontracting practices in sector. These collusive practices have caused to the unfair competition and so the victimization of the employers who conform to the rules in the same sector.[69] Therefore, the legislators need to make regulations on the issue and has tried to bring some measures to prevent the victimization of workers and conscientious employers. It is assumed that the collusion has four elements in doctrine and practice. These are the apparent transaction, collusion agreement, hidden transaction and purpose of deceiving third parties. The processes which are made by the parties to deceive third parties are called as apparent transaction. The parties make the legal process here just seemingly to be not effected from legal procedures.[70]

To mention the existence of the collusion, the parties need to make the apparent transaction in order to deceive third parties and they need to make an agreement to not be effected from this transaction. The collusion agreement is one of the founding contents of the collusion and it is a necessary condition for existing of collusion. The parties of the collusion are the parties of the apparent agreement, as well.[71] The parties can make these processes themselves but they can do it also through their representatives. The hidden transaction is possible only in the relative collusion which will be explained later in the topic. The parties

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[67] Çankaya and Çil, ***4857 Sayılı İş Kanunu'na Göre,*** p.60.

[68] Sarper, ***İş Hukuku,*** p.139.

[69] Sebahat Gençtarih, ***Asıl işveren - alt işveren ilişkisi ve alt işverenlik yönetmeliği ışığında uygulamadaki sorunlar,*** Unpublished Master Thesis, 2010, p. 64.

[70] Fikret Eren, ***"Borçlar Hukuku / Genel Hükümler",*** Beta Publishing, İstanbul,2002, p. 325.

[71] Turgut Uygur, ***Açıklamalı ve İçtihatlı Borçlar Kanunu / Sorumluluk ve Tazminat Hukuku***, Vol.1, Seçkin Publishing, Ankara, 2003, p.728.

sometimes may do a transaction in accordance with their will and they truly desire under the apparent collusive transaction. This transaction is called as hidden transaction.[72]

The purpose of the deception is another integral part of the collusion. The aim of the willful discrepancy between the will and declaration is to deceive third parties by creating a different appearance. There cannot be collusion without this purpose.[73]

There are two types of the collusion. One of them is absolute collusion and the other one is relative collusion. If the parties, which make an apparent legal transaction to deceive third parties, do not arrange a hidden transaction that fitting their actual will, the 'absolute collusion' is in question here. But, if the parties, which make an apparent collusive transaction to deceive third parties, want to hide a transaction behind this collusive transaction fitting their actual will, the 'relative collusion' is in question here. In other words, there is a distinct legal action matching to the actual wills of the parties in relative collusion. The provision in Article 18 of the Turkish Code of Obligations has regulated to the relative collusion. According to this provision, the actual and joint purposes of the parties must be examined instead of considering the transactions made by the parties mistakenly or to hide their actual purposes.[74]

The collusion is seen especially when the subcontractor workers are chosen and dismissed by the decisions of the principal employer and when the workers completely work under the orders and instructions of the principal workers. Besides, if the workers work at the tasks which are not stated in the contracts, the collusion is in question here, as well.[75]

1.8 The Liability in the Subcontracting

The liability of the principal workers in subcontracting relationships was enacted with Turkish Labour Act No. 3008 in 1936.[76] According to the Article 1 of the Labour Act No. 3008, even if the workers are employed directly by the third parties (subcontractor) and make a contract with third parties instead of the employers or its representatives, the principal employers are liable for the conditions of the contracts.[77]

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[72] Eraslan Özkaya***, İnançlı İşlem ve Muvazaa Davalar***, Seçkin Publishing, Ankara, 2004, p.172.

[73] Ibid., p.103.

[74] Safa Reisoğlu, **Borçlar Hukuku – Genel Hükümler**, Beta Publishing, İstanbul, 2000, pp.78-79.

[75] http://www.csgb.gov.tr/csgbPortal/csgb.portal?page=haber&id=basin491 , (last accessed: 14/01/2013).

[76] Sönmez, ***Asıl İşveren – Alt İşveren İlişkisinde Muvazaa***, p. 21.

[77] Article 1 of 3008 Sayılı İş Kanunu (15.06.1936), http://www.resmigazete.gov.tr/default.aspx, (last accessed: 17/01/2013).

The liability of the principal employer was emphasized here but the legal qualification of this liability was discussed for many years because the relationship between the principal employer and subcontractor was not mentioned in this law.[78] But, the same article was changed in 1950. According to this renewed article, even if the workers are employed directly by the third parties (subcontractor) and make a contract with third parties instead of the employers or its representatives, these third parties are jointly and severally liable with the principal employers from the contracts.[79] The Labour Act No. 931 which was enacted in 1967 was including some provisions on subcontracting and 'several liability' but the act was not long-lived and cancelled by the decision of the Constitutional Court in 1970 and the Labour Act No. 1475 was enacted.[80]

However, the Labour Act No. 1475 did not have very different provisions from the former Labour Act.[81] This new law's provisions on the subcontracting were more limited and unsubtle than the provisions of the current Labour Act. For example, taking a part of a certain work or its add-ons was sufficient to establish a subcontracting relationship according to Article 1 of the Labour Act No. 1475. This provision of the Labour Act caused many abuses in 1980s. Therefore, the subcontracting practices increased so fast in the period of this law in both the private and public sector and the subcontractor workers were more than principal employer workers in some companies and organizations. It can be said that the Labour Act No. 1475 tried to solve the problems by activating the several liability concept as it was at the last two Labour Acts instead of regulating the subcontracting and its elements.[82]

After this Labour Act, the Labour Act No. 4857 has been enacted on 10.06.2003 and it is still in force. This current Labour Act has been prepared by considering the problems experienced in the past and Supreme Court decisions and this law has made important changes on subcontracting.[83]

The subcontractors have had generally small capital and most of them have been generally weak in terms of their financial situation. Thus, the legislations have wanted to

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[78] Ayhan Keloğlu, TÜHİS İş Hukuku ve İktisat Dergisi, Vol. 23, No. 5-6, **"*Elektrik Dağıtım Sektöründe Alt İşveren (Taşeron) Sorunu*",** 2011, p. 23.

[79] Article 1 of 3008 Sayılı İş Kanunu (31.01.1950) , http://www.resmigazete.gov.tr/default.aspx, (last accessed: 17/01/2013).

[80] Tozlu and Eraslan, **"*Türkiye'de Alt İşverenlik Uygulaması*",** p. 51.

[81] Berna Gökçen Ayan, **"*Dış Kaynaklardan Yararlanma Yaklaşımı Olarak Türkiye'deki Kamu Kurumlarında Alt İşverenlik Uygulamaları*",** Unpublished Master Thesis, Adnan Menderes University, 2010, p. 38.

[82] Güven Çankaya and Şahin Çil, **"*4857 Sayılı İş Kanunu'na Göre Asıl İşveren-Alt İşveren İlişkisi***",Sicil İş Hukuku Dergisi, Vol 3, 2006, p. 54.

[83] Keloğlu, ***"Elektrik Dağıtım Sektöründe Alt İşveren (Taşeron) Sorunu",*** p. 24.

protect to the subcontractor workers by holding responsible to the principal employers with subcontractors.[84] According to the Article 2 of the Labour Act No. 4857, the principal employers are responsible with the subcontractor for the all obligations stated in the Labour Act and work contracts against to the subcontractor workers in subcontracting relationships. So, the subcontractors and principle employers are jointly liable for the obligations specified in the Labour Act and contracts.[85]

The legislations hold both the subcontractor and principle employer responsible because the subcontractor workers have been not safe enough as it was understood from the problems experienced in the past. The liability of the principal employer is limited with the liability of the subcontractor and with the period of time in which the workers continue to work in the establishment of the principal employer. The main liabilities of the subcontractor arising from the Labour Act are the wages, overtimes, weekend holidays, national and religious holidays, annual leave, bonuses, premiums, meal, transportation assistance, new job search permission and severance pay.[86]

The principle employers have the same liabilities but it is limited liability. For example, the principle employer is responsible with subcontractor for the severance pays of the subcontractor workers but their severance pay liability is limited with the subcontractor workers' working time in the establishment. The occupational health and safety measures are among the responsibilities, as well. The workers can demand their rights from both the principal employer and subcontractor or any of them. This liability is considered as public order and it does not give chance to the principal employer and subcontractor to avoid liabilities through any contract or agreement. If the principle employers make a payment to the workers of subcontractors because of the joint liability, they have the right to demand money back from the subcontractors by way of the recourse. The joint liability does not change that the subcontractor is the main employer of the workers in subcontracting relationships.[87]

On the other hand, the workers of the subcontractors are obliged to obey to the order of the establishment of the principal employers as long as they work there. If the workers do not respect this obligation, the measures such as warning, disciplinary action and fines are the

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[84] Dilek Baybora, ***İşletmelerde Asıl İşveren-Alt İşveren Uygulaması ve Ortaya Çıkan Sonuçlar,*** Vol.2, No.2, 2010, p.24.

[85] Aykaç, ***Kamu Kurum ve Kuruluşlarında,*** pp. 280-282.

[86] Ibid., pp. 284-287.

[87] Tozlu and Eraslan, ***Türkiye'de Alt İşverenlik Uygulaması,*** pp. 51-52.

obligation of the subcontractors. In the presence of such a violation, the principal employers need to make necessary notifications to the subcontractor and so the subcontractors can warn the workers or can take necessary measures. At this point, it should be remembered that the principal employer of the subcontractor's workers is subcontractor for these workers.[88]

[88] Hamdi Mollamahmutoğlu,, ***İş Hukuku***, Turhan Publishing, Ankara, 2004, p.7.

CHAPTER 2
THE SUBCONTRACTING AND WORKER RIGHTS

2.1 The Rights of the Subcontractor Workers in the Regulations and Laws

The rights of forming a trade union, being a member of it and leaving this membership are guaranteed by the Constitution. According to the first paragraph of the Article 51/1 of the Turkish Constitution;

> *'Employees and employers have the right to form labour unions employers' associations and higher organizations, without obtaining permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. No one shall be forced to become a member of a union or to withdraw from membership.'* [89]

According to the Article 6/1 of the Trade Unions Act No. 2821, the trade unions and confederations can be formed without getting preliminary permission.[90]

All workers have the rights to form trade union, be a member of it and leave it as a constitutional right. It means that the subcontractor workers have the same rights with the principal employers' workers as it is explained in the Constitution. So, the subcontractor workers can form a trade union or be member of a trade union and they can leave this membership whenever they want as a constitutional right.[91] Both the employers and workers have the right to form trade union without getting prior authorization. According to the Article 3 of the Trade Unions Act No. 2821, the worker and employer trade unions are formed on the basis of the business line.[92] Therefore, the workers and employers who want to form trade union can only form trade union to engage in the line of the work carried out in the establishment. The workers or the employers need to come together to form a trade union.

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[89] Article 51/1 of the TC. Anayasası, 1982, (amended: 17.10.2001), http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf , (last accessed: 19/01/2013).

[90] Article 6/1 of 2821 Sayılı Sendikalar Kanunu , 1983, http://www.ilo.org/public/turkish/region/eurpro/ankara/download/sendikalarkanunu.pdf, (last accessed: 19/01/2013).

[91] Kenan Tunçomağ and Tankut Centel, ***İş Hukukunun Esasları***, Beta Publishing, İstanbul, 2008, p.238.

[92] Article 3 of 2821 Sayılı Sendikalar Kanunu., 1983, http://www.ilo.org/public/turkish/region/eurpro/ankara/download/sendikalarkanunu.pdf, (last accessed: 19/01/2013).

The subcontractors are the employers of their workers and so they can form a trade union by coming together, as well.[93] For example, the subcontractors and employers working in the contraction sector can come together to form a trade union. After all, both the subcontractors and principal employers are employers according to the Labour Act and trade union act.[94] How the trade union membership is based on the principle of freedom and liberty, leaving this membership is based on the same principles. According to the Article 51 of the Constitution and Article 22 of the Trade Unions Act, no one can be forced to be a member of trade union and to leave this membership. Article 22/1 of the Trade Unions Act No. 2821 includes the provisions that; neither workers nor employers can be a member of more than one union at the same time and in the same business line. Otherwise, the first membership will protect its validity and others will be accepted as invalid. The subcontractors and their workers can be a member of trade union which is in the same business line with the establishment.[95]

If the sectors of the subcontractors and principal employers are different, the subcontractors and their workers can be a member of the trade union representing the activity field. If the workers of subcontractors work for different principal employers and if the business lines of these employers are different from each other, the establishment that the workers are connected will be valid to be a member of a trade union for workers of the subcontractors. In other words, the workers of subcontractors can be a member of a trade union that is from the same business line with the establishment seen on the payrolls of the workers.[96] On the other hand, the subcontractors and their workers can work at the establishments which are from different sectors. It means, the workers of subcontractors can be a member of a different trade union from the subcontractors which they work for, because the workers and employers are not allowed to be member more than one union at the same time according to the Constitution and Trade Unions Act No. 2821.[97] As we have seen from the laws and regulations, everything seems to be all right. However, the practices generally do not fit to the things on the paper.

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[93] Tunçomağ and Centel, ***İş Hukukunun Esasları***, p.253.

[94] Ibid., p. 259.

[95] Article 22/1 of 2821 Sayılı Sendikalar Kanunu, 1983, http://www.ilo.org/public/turkish/region/eurpro/ankara/download/sendikalarkanunu.pdf, (last accessed: 20/01/2013).

[96] Aydın Başbuğ, ***Alt İşveren İlişkisi ve Güncel Sorunlar***, Türkiye Şeker Sanayi İşçileri Sendikası, Ankara, 2010, pp. 53-55.

[97] Süzek, ***İş Hukuku,*** pp. 261-262.

2.2 Misuses of the Subcontractor Workers' Rights

The subcontractors are small enterprises and so their labour costs and unionisation rates are at a low level. The definition of subcontracting is made in the Article 2 of the Labour Act No. 4857 and Article 3 of the Regulation of Subcontracting. However, the providing cheap labour force feature of the subcontracting is composing the essence of the subcontracting practices by contrast with definition in the laws and regulations. Furthermore, the subcontracting weakens the power of organized labour force and makes ineffective the efforts of protecting and increasing their wages with an opposite purpose.[98] The manufacturing is carried out by the workers who are easygoing, non-unionized and do not object to the changes in work organizations because of the subcontracting. It is much easier for employers to manage these kinds of establishments. Besides, the subcontractors prevent the interventions of the trade unions in the management of the labour process.[99]

The works are separated as possible as and assigned to the different subcontractors through subcontracting practices. In this way, the labour costs are decreased by using non-unionized, uninsured workers or even sometimes through subcontractors who employ workers working under the minimum wages. According to the Article 2/2 of the Labour Act;

> '*All premises used by reason of the nature and execution of the work and organised under the same management, including all facilities annexed to the establishment such as rest rooms, day nurseries, dining rooms, dormitories, bathrooms, rooms for medical examination and nursing, places for physical and vocational training and courtyards as well as the vehicles are deemed to be part of the establishment.*
>
> *The establishment is an integrated organisational entity within the meaning of the annexed and adjunct facilities and vehicles*.'[100]

In this article, it has been mentioned the condition of being under the same management while mentioning the integrated places but these condition has been ignored while mentioning the annexed and adjunct facilities and vehicles. Accepting the subcontractors as a different or independent employer conflicts with definition of the employer in the law because the works done by the subcontractors are generally the auxiliary tasks carried out in the annexed and adjunct facilities and vehicles or a part of the main activities. The subcontractors must be

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[98] Sebahattin Şen, ***Taşeron İşçilik(Alt işveren) ve Düzensiz İstihdam***, Tes-İş Dergisi(May), 2008, p. 96.

[99] Ibid., p. 97.

[100] Article 2/2 of 4857 Sayılı İş Kanunu , 2003, http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf , (last accessed: 21/01/2013).

considered as a whole enterprise with the main enterprise and these enterprises should have been treated as a single company in terms of the Labour Act with the reasons mentioned above. However, the subcontractor is considered as an independent enterprise and it has prepared a proper legal basis to debates on the collusion.[101]

The Labour Act considers the subcontractor as a different enterprise and it clashes with purposes of the Trade Unions Act because, if the subcontractors are accepted as different establishment, the workers of the subcontractors might be organized at different trade unions and so the different collective agreements might be seen. For example, if a big company assigns it's some works to different 20 subcontractor, 20 collective agreements might be done in this company. This situation is inconsistent with the essence of the 'one trade union-one establishment' principle notified in the Trade Union Act No. 2821. The Labour Act No. 4857 does not include the job security and the preventions on trade union rights have been continuing during the period of this new law. So, the Labour Act 4857 is not a revolution contrary to the claims.[102]

Although the trade union and collective bargaining rights are from the basic constitutional rights, it has not been improved enough since 1963 in which the collective bargaining system has been established until today. The fragmented labour force has been faced with difficulties to be organized with the spread of the subcontracting practices. It can be said that the subcontracting system has been used for the cheap labour force who work without using trade union and collective bargaining rights in both the public sector and private sector after the 1980s.[103] Even the decisions of the Supreme Court on the subcontracting practices proves that the subcontracting is a very good system at preventing the collective bargaining procedures and it has been used for providing cheap and unsecured work force. These decisions also show that the subcontracting has become an effective tool used for frauds against the law even by the public sector.[104]

The Labour Act No. 1475 was not including any provision on preventions to assign all kind of works to the subcontractors in the principal employers' establishment. As a result of this, the employers were assigning the works without any limitation and by not considering whether they were main activity or auxiliary task. At last, the Labour Act No. 4857 has brought some conditions and limitations and it has accepted that the main activities can be

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[101] Şen, ***Taşeron İşçilik(Alt işveren),*** p. 105.

[102] Ibid., pp. 105-106.

[103] Ibid**,** p. 97.

[104] Murat Özveri, ***Taşeron İşçilik(Alt işveren) ve Düzensiz İstihdam***, Tes-İş Dergisi(May), 2008, p. 122.

assigned to the subcontractors but this is an exception, not a rule.[105] The expression of *'operational requirements or for reasons of technological expertise in the establishment of the main employer'* [106] is one of these limitations in the Article 2/6 of the Labour Act. However, it is open to interpretation that whether the usage of subcontractors is resulted from the operational requirements or for reasons of technological expertise and it is not even certain that who will make this interpretation. Furthermore, it is not clear that who will complaint to where and to whom in case of the illegal subcontracting practices, especially at the non-unionized enterprises. When it is considered that the vast majority of the workers are excluded from the job security, many workers are unable to stay away from thinking that the provisions of the laws and regulations will remain on the paper.[107]

The subcontracting has become a system that threat to labour peace in the enterprises. Although the workers work under the same working conditions and even on the same work, they usually have different rights. The main two reasons of this inequality are the subcontracting and principal employer. The workers of the subcontractors are generally employed with service agreements because they are deprived of collective bargaining rights in practice and the contents of these service agreements are determined by the principal employers. The workers of the subcontractors are employed with one-year individual service agreements. The workers of the subcontractors do not have the right to collective bargaining in practices. If they demand their legal rights, the subcontractors or principal employers will not accept it and suggest them to find another job. If the workers of the subcontractors become a member of a trade union, the principal employers prefer either forcing the subcontractors to send another worker group or terminating the contracts to agree with another subcontractor.[108]

Although the new Labour Act encumbers the job security of the subcontractor worker to the principal employers, it does not provide a sufficient guarantee because of the annual service agreements. The subcontractor workers generally work more than they have to, but they do not get wage for these overtimes. The discrimination against the workers of the subcontractors is extending day by day. The subcontractor workers have been treated as if

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[105] Necdet Okcan and Onur Bakır, ***İşletmenin ve İşin Gereği Taşeronlaştırma***, Çalışma ve Toplum Dergisi, 2010/4, 2010, p. 57.

[106] Article 2/6 of 4857 Sayılı İş Kanunu ,2003, http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf , (last accessed: 19/01/2013).

[107] Resul Limon, ***Taşeron İşçilik(Alt işveren) ve Düzensiz İstihdam***, Tes-İş Dergisi(May), 2008, p. 129.

[108] Ibid., p.130.

they are second-class workers in terms of the wages, meal and service conditions, holidays and they have been held in contempt because of their economic, social and cultural status.[109] Although the measures in the law and regulations, the subcontracting has been still used to decrease the number of the permanent workers, avoid the obligations of the Labour and Social Security Law, get out of the trade union and collective bargaining order, decrease the wages or prevent the increase of the wages.[110] Besides, it has become an important invention to bring difficulties in front of the workers to becloud their rights to organize. The subcontractor workers who do not have the job security and other basic rights have been having other adversities because these non-unionized working conditions.[111]

The workers of the subcontractors are faced with serious problems when they demand their basic rights such as trade union and collective bargaining rights and if they join a trade union, they do not have a chance to work for the same subcontractor or another one. The same situation is valid for subcontractors, as well. When the subcontractors permit of their workers to be a member of a trade union, the principal employers terminate the contract and look for another subcontractor to assign the work. The subcontracting allows the abuse of the law somehow. This situation do not cause problems only for the workers and trade unions. The employers are also affected by the subcontracting practices. The employers who respect for the workers' rights and employ unionized, insured and collective labour contracted workers are exposed to the unfair competition and so forced to use the subcontractors.[112]

The number of the subcontractor workers has been increasing rapidly in parallel with the increasing rates of the insecure works in these days. Accordingly, the number of the workers who cannot join to the trade unions, get the normal and overtime wages on time, use the annual holidays regularly, who are deprived of the severance pays and can be fired easily increases day by day. The majority of these unsecured workers are consisted of the subcontractor workers and they are employed in a system that is aiming to provide cheap and non-unionized worker groups to the private sector and public sector. The application area of the subcontracting has been expanding with the same purposes.[113] The principal employers try to avoid some liabilities and produce at a cheaper cost to the productions and services by giving some works to the subcontractors such as maintenance, catering, cleaning, staff

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[109] Ibid., p.131.

[110] M.Polat Soyer, ***4857 Sayılı İş Kanunu Açısından Asıl İşveren – Alt İşveren İlişkisinin Kurulması ve Sonuçları***, MESS Sicil Dergisi, No.1(March), 2006, p.16.

[111] Gülçin Taşkıran, ***Sınıf Örgütlenmesinde Yeni Deneyimler***, Çalışma ve Toplum Dergisi, 2011/4, 2011, p. 135.

[112] Limon, ***Taşeron İşçilik(Alt işveren),*** p. 122.

[113] Ibid., p. 156.

transporting, security, office services and other auxiliary tasks. The subcontracting has a potential to provide numerous advantages to the economies in theory and the laws. However, the practices have shown that the subcontracting has been used for some different purposes such as benefiting from the cheap labour forces in small companies, breaking up the trade union rights, getting rid of various obligations and liabilities.[114]

The trade unions have not created new organizing systems against this spreading exploiter subcontracting system and the workers of the subcontractors are becoming isolated and getting alone every passing day. The workers of the subcontractors have been deprived of being member of the trade unions somehow and it has obstructed the workers to benefit from the collective agreements and this has brought other serious loss of rights in terms of the wages, social rights and working conditions. As it is mentioned above that the trade unions have not been able to find an alternative way to organize the workers of the subcontractors. Thus, the subcontractor workers who have been threatened many times indirectly, sometimes directly to be fired and deprived of the receiving severance pay by getting fired and again employed (layoff) on the paper have begun to try new organizing methods.[115] The labour market in Turkey has a structure of which majority is filled with the non-unionized, low-paid, unorganized and unskilled workers. The unionized, registered and qualified workers are employed in the city centres but they are just a small segment of all workers. The subcontractor workers are in the majority group and the number of this group has been increasing every day.[116]

According to Article 2/7 of the Labor Law No. 4857;

The rights of the principal employer's employees shall not be restricted by way of their engagement by the subcontractor, and no principal employer – subcontractor relationship may be established between an employer and his ex- employee. Otherwise, based on the notion that the principal employer- subcontractor relationship was fraught with a simulated act, the employees of the subcontractor shall be treated as employees of the principal employer. The main activity shall not be

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[114] Özveri, ***Taşeron İşçilik,*** p. 127.

[115] Şen, ***Taşeron İşçilik(Alt işveren),*** p. 111.

[116] Urhan, Betül, ***Türkiye'de Sendikal Örgütlenmede Yaşanan Güven ve Dayanışma Sorunları***, Çalışma ve Toplum, 2005/1, 2005, p. 63.

divided and assigned to subcontractors, except for operational and work- related requirements or in jobs requiring expertise for technological reasons.[117]

However, in practice, especially in works assigned via tenders, it has been seen generally that same workers continue to work although the companies (unfortunately only the names of the companies) change. In this case, the workers have the right to demand severance pay because the employment agreement is terminated on the same date with the termination of the tender contract. However, the workers usually do not change although the subcontractors are replaced annually and the workers of the subcontractors are generally considered as a worker of principal employers.[118]

The worker of the subcontractor means that the cheap and non-unionized worker in the reality of Turkey. Although there is no legal obstacle to be organized for the subcontractor workers, they have big problems to be a member of trade unions because they are employed for short-term contracts and they are afraid of being fired because of some employer pressures.[119] The subcontracting has been used for some unpleasant purposes such as eliminating the rights and freedoms of the workers in the field of the trade union and collective bargaining law. Therefore, it can be said that the subcontracting has been used as an effective instrument for being non-unionized.[120]

As a result, it can be said that the subcontracting has created a new worker group who are exposed to poor working conditions, does not have job security, cannot organize, cannot get the wages on time, cannot have paid holidays or use it orderly, cannot get severance pays because of annual layoffs and cannot object to these injustices because of the lack of job guarantee.

The problems faced by the workers of the subcontractors can be summarized as;[121]

- The workers who work for subcontractor cannot get annual paid holiday because of the annual tenders and annual company changes.

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[117] Article 2/7 of 4857 Sayılı İş Kanunu , 2003, http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf , (last accessed: 20/01/2013).

[118] Müjdat Şakar, ***İş Hukuku Uygulaması***, Beta Publishing, 8. Edition, İstanbul, p.34.

[119] Adnan Mahiroğulları, , ***Türkiye'de Sendikalaşma Evreleri ve Sendikalaşmayı Etkileyen Unsurlar***, C.Ü. İktisadi ve İdari Bilimler Dergisi, Vol. 2, No. 1, 2001, p. 185.

[120] Can Şafak, ***Taşeron (Alt İşveren) Uygulamaları ve Bir Mücadele Aracı Olarak Sendika Politikaları: Türkiye'de Cam Sektörü Örneği***, Tes- İş Dergisi(May), 2008, p. 131.

[121] http://www.csgb.gov.tr/csgbPortal/csgb.portal?page=haber&id=basin491, , (last accessed: 22/01/2013).

- The workers of the subcontractors cannot get their wages on time, complete and regularly. The public authorities do not have a responsibility or obligation to control if the subcontractors pay the wages of the workers or not and the controlling responsibility of the private sector employers is optional.
- These workers are generally deprived of getting severance pays. According to the Sosyal Güvenlik Kurumu-SGK (Social Security Institution-SSI), approximately 12,5 million resignation documents were prepared in Turkey in 2011. According to these documents, only 10 percent of these documents were prepared properly to pay severance pays to the workers. The severance pays is a big problem for all workers in Turkey. But, the subcontracting is the best model for employers to avoid severance pays.
- The workers of the subcontractors cannot receive severance pays because the work contracts are arranged for less than 1 year or they can receive these severance pays after long judicial processes. In short, the subcontractors try everything to not pay these severance pays and it is seen from the statistics stated above that they are very good at it.
- The subcontracting is used to keep the number of the workers under 30 to prevent the workers to benefit from the job security provisions.
- There is no legislative obstacle in front of the subcontractor workers to be organized and make a collective working agreement with their employers (subcontractors). However, the subcontracting makes impossible to take advantage of being organized and making collective working agreement because of its nature and structural features.
- The subcontractors are economically weaker and so they wait from the principal employers to take occupational health and safety measures and they do not attach importance to preventive measures and educations for occupational diseases and accidents.

2.3 Misuses of the Subcontractor Workers' Rights in the Public Sector

The subcontractor expression and relationship between the subcontractor and principal employer have been discussed in detail first time with the Article 2 of the Labour Act No. 4857. It has been aimed with this law that to find a solution to the problems occurred during the Labour Act No. 1475 by bringing more precise and detailed statements.[122]

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[122] Ahmet Tozlu and Mehmet Tarık Eraslan, ***Türkiye'de Alt İşverenlik Uygulaması,*** Sayıştay Dergisi, No. 84(January-March), 2012, p. 52.

The new two additional paragraphs have been added to the relevant provisions of the Article 2 of Labour Act 4857. After these two new paragraphs, it is argued that some advantages are provided to the public institutions and organizations within the frame work of collusion and its results.[123] The sides having this argument even stated that these paragraphs violate the equality principle in the Article 10 of the Constitution.[124] The employer has been defined as "*real or corporate person or a non-corporate institution or organisation employing employees*" in Article 2 of the Labour Act.[125] It can be concluded from this definition that it does not matter if an employer is a corporate or non-corporate, has a real or corporate personality and other factors such as the nature of the work and the number of workers. In other words, there is no difference between being an employer of the public or private sector. However, the problems seen in the public sector in terms of the relationship between the subcontractor and principal contractor have very different features when they are compared with the problems experienced in the private sector on subcontracting relationships.

It can be said that the subcontracting applications have been seen quite common in public institutions and organizations especially because of the limitations in hiring new workers. Because of these kinds of limitations, the public sector assigns so many works and services to the subcontractors through tenders. But, some workers of the subcontractors sometimes have claimed that they are workers of the public institution or organization that they work for. Some arrangements have been made with the Article 18 of Law No. 5538 in Article 2 of the Labour Act No. 4857 in order to prevent these kinds of problems and issues in 2006.[126] According to these new changes;

> *In public institutions and organizations and in partnerships they directly or indirectly own at least fifty percent of the capital, within framework of provisions of 4734 no Public Tender Law or other laws, in pursuant to agreements made for purpose of service procurement, persons employed by means of a contractor may not gain a right;*

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[123] Ömer Ekmekçi, ***Kamu İşvereninin Özel Sektör İşvereni Karşısında Kayırılması ve Anayasa'nın Eşitlik İlkesinin Açık İhlali,*** Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, No:12, 2006, p. 1176

[124] Sarper Süzek, ***İş Hukuku***, Beta Publishing, İstanbul. 2008, p. 164.

[125] Article 2/1 of 4857 Sayılı İş Kanunu , 2003, http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf , (last accessed: 25/01/2013).

[126] Hande Bahar Aykaç, ***Kamu Kurum ve Kuruluşlarında İş Hukukunun Uygulanmasına İlişkin Bazı Sorunlar,*** İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, Legal Publishing, Vol. 7, No.25, İstanbul, 2010, pp. 105-107.

a) to be appointed to positions or staffing patterns that belong to these institutions, organizations and partnerships,

b) to benefit from all kinds of financial rights and social aids determined pursuant to provisions of collective work contracts, personnel laws or other related legislations for employees who work in positions or staffing patterns of these institutions, organizations and partnerships.[127]

The interpretation of the provision has led to two different opinions in doctrine. According to the dominant group supporting the idea of that this new regulation has given an advantage to the public employers, the collusive subcontracting practices can be considered as if they are legal after this new provision. In other words, it has been expressed that the public employers are exempted from the provisions forbidding collusive practices and the sanctions which are regulated to prevent collusions cannot be applied as long as the subcontractor workers are considered as workers of the principal contractors in case of the determination of collusive practice in subcontracting relationships. Moreover, it is emphasized that this provision can create an unfair competition between the public sector and private sector workers and it violates the principle of equality of Constitution, principles of being state of law and social state and ILO Convention No. 94 ratified by Turkey.[128]

The side claiming that this provision does not bring any advantage to the public employers emphasizes that the expression of 'other laws' in the provision gives same liability to the public and private sector employers. They argue that this expression includes the relevant provisions of the Labour Act, therefore the liabilities of the public employers do not disappear and it does not inhibit the sanctions applied in case of collusive subcontracting practices. It is also expressed that this new arrangement eventually will be applied for the valid and not collusive subcontracting relationships and it does not bring any novelty for advantage of any side. This side also emphasized that the judicial decisions show that the public employers have been not privileged after this new provision.[129]

The other arrangement which have been brought to the Article 2 of Labour Act with the Law No. 5538 is;

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[127] Article 2 of 4857 Sayılı İş Kanunu , 2003, Additional paragraph 1, http://www.turkishlaborlaw.com/content/view/27/77/ , (last accessed: 25/01/2013) and Article 18 of Law No. 5538, 2006, http://www.tbmm.gov.tr/kanunlar/k5538.html, (last accessed: 12/02/2014).

[128] Aykaç, ***Kamu Kurum ve Kuruluşlarında,*** pp. 107-109.

[129] Ibid., pp. 110-113.

The following provisions may not be added in contracts and specifications to be made depending on service procurement;

a) To give the authority of determining the persons to be employed and dismissing of them to the public institutions, organizations and partnerships,

b) To continue employment of persons who previously worked in the same work place as a provisional employee or within framework of service procurement contracts.[130]

There are different criticisms of this arrangement in doctrine. For example, it is stated that the determination of the provisions putting in the contracts about service procurement would have been more accurate with a regulatory process instead of determining it with the law.[131] Besides, it is emphasized that although the issues mentioned in the provisions can be considered among the criteria of collusion, the main important thing is that the true nature of the relationship between the parties. Indeed, the presence of the above-mentioned provisions in the contracts can be evaluated in collusion criteria but the judicial decisions prove that the actual relationships between the parties are decisive for courts rather than the provisions in the contracts.[132]

In fact, when the subcontracting practices in the public institutions and organizations are taken into account, it is mostly seen that the subcontractors are so often changed because the service procurement tenders are made for one year in accordance with law but the vast majority of workers or sometimes all of the workers continue to work as a worker of the new subcontractor. Moreover, it is sometimes seen that the workers are determined by the principal employer (contracting authority) and it is sometimes observed that the workers of the principal contractors and subcontractors work together for the same task. These issues show that the subcontracting practices in the public institutions and organizations are not compatible with the nature of the subcontracting relationship regulated in the Labour Act. The widespread use of the subcontracting in municipalities causes some discussions about what the main works and mission of the municipalities are and whether these works can be

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[130] Article 2 of 4857 Sayılı İş Kanunu , 2003, Additional paragraph 2, http://www.turkishlaborlaw.com/content/view/27/77/ , (last accessed: 21/01/2013).

[131] Gençtarih, ***'Asıl işveren - alt işveren ilişkisi'*** pp. 104-105.

[132] Ibid., p.106.

assigned to the subcontractors or not. Some of the issues that occurred because of this indistinctness are moved to the courts.[133]

Especially nowadays, the increasing subcontracting relationships in municipalities and their privileged status make these relationships controversial in terms of the collusion. The municipal service procurement tenders are renewed every year. However, the same subcontractors generally win these tenders only by changing the names of the companies. Furthermore, it has been seen many times in researches that the subcontractors which win the tenders over and over have political ties with municipalities and they are permitted to use the tools and equipments of municipalities with a lower cost. These researches also show that the municipalities prefer to assign some parts of the works to benefit from the non-unionized, precarious and cheap workforce.[134]

As it is mentioned before, 'the Amendments on Labour Act and Other Laws No. 5763'called as employment package among the public includes some changes on subcontracting. At this point, it can be said that this law brought an additional paragraph to the Article 3 of Labour Act 4857 to prevent these collusive practises. The expression of 'these registered documents which belongs to the establishment are examined by the inspectors when necessary' in this paragraph might be the result of the efforts of preventing collusions. However, the inspectors who are commissioned to make a judicial determination generally are not a jurist. Moreover, it is not important whether they have necessary formation for detection of collusion and the most of the establishments cannot be even inspected because of the limited number of the inspectors.[135]

The subcontracting has been used for commercial purposes such as cheap and non-unionized workforce in public sector and the subcontracting relationships have become so incompatible with its actual purposes. As a result, it can be said that the public employers have become privileged because of the collusive practices and connivances although they have the same rights and liabilities with private sector employers in terms of the relationship between the principal employer and subcontractor. Thus, the subcontracting relationships must be improved immediately.

Violation of Rights to Organise of Subcontractor Workers in Public Sector:

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[133] Engin Sezgin, ***"Belediye İstihdam Öyküleri:Belediye İstihdam Anketi Çalışma Gözlemleri",*** Emek Araştırma Dergisi (July), Genel-İş Publishing, Ankara, 2006, pp.88-90.

[134] Ibid., p. 91.

[135] Tankut Centel, ***"Alt İşverenlere Ait İşkolu Tespitleri"*** , TİSK Akademi Dergisi, Vol.1, No.2, Ankara,2006, p. 9.

ILO has given the rights to organise to all employees without making any discrimination between the workers and civil servants with Convention No. 87 called as 'Freedom of Association and Protection of the Right to Organise Convention' in 1948.[136] However, the different laws and regulations are determinative about the unionization of the workers and civil servants in Turkey. The civil servants did not have the rights to organize and establish a trade union until 2000s and they do not still have the right to strike. This is a serious violation of trade union rights of course. Furthermore, many civil servants cannot be a member of a trade union according to the Article 15 of the Law No. 4688.[137]

The rights to organize and strike are also important criterions for EU members and candidates. But, the EU does not decide on how and with which means these rights are implemented.[138] However, I strongly believe that it does not mean that the members and candidates of EU have the rights to violate these basic rights.

Although the provision that indicates the superiority of international agreements in Article 90 of the Constitution, Turkey still continues to not accept the trade union rights of some workers and its obstruction on strike rights of civil servants.[139]

2.4 Association and Organization Experiences of the Subcontractor Workers

The workers of the subcontracting system who have been used as an effective tool for non-unionizing are one of the worker groups which most need to be organized. The subcontractor workers, who have not given up forming labour unions although the all pressure on them, have some experiences of syndication. Although it is not enough, the trade unions have a few successful unionization experiences of subcontractor workers. 650 subcontractor workers who were working in an establishment belonging to the Türkiye Kömür İşletmeleri-TKİ (Turkey Mining Firms) became a member of Dev Maden-Sen (a trade union) thanks to the efforts of the same union in 1999. However, 170 workers of them was fired and about 40 workers who called as ringleader were taken to the blacklist and they were prevented to be employed as a result of the TKİ's pressures.[140]

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[136] http://www.ilocarib.org.tt/projects/cariblex/conventions_1.shtml , (last accessed: 22/01/2013).

[137] Gülçin Taşkıran, ***Taşeron İşçilerde Örgütlenme Sorunları: Sağlık İşçileri Üzerine Bir Araştırma,*** III. Sosyal Haklar Uluslararası Sempozyumu, Kocaeli, 2011, p. 3.

[138] Ibid., p.3.

[139] Aziz Çelik, ***Ücretli Olmayanların Sendikal Hakları ve Türkiye Uygulaması***, I. Uluslararası Sosyal Haklar Sempozyumu, Belediye-İş Publishing, Ankara, 2009, p.163.

[140] Fatma Ülkü Selçuk, ***Örgütsüzlerin Örgütlenmesi Enformal Sektörde İşçi Örgütleri***, Atölye Publishing, Ankara, p. 191.

Similarly, 380 workers of a subcontractor were fired who were working in an establishment belonging to the Niğde DİTAŞ. 370 workers of them were reemployed after struggles continuing along 8 months. In this example, the workers knew each other because the establishment was in a small settlement and this was an important factor reinforcing the struggle.[141]

In Turkey, there are extensive subcontracting possibilities and there are no difficulties on employing non-unionized workers, the compensation liability is not often fulfilled, the traditional trade unions are so awkward and weak in terms of bureaucracy. Birleşik İşçi Sendikası-(BİS) (Trade Union of United Workers) was founded against these negations in 2001. The BİS performed many activities on the issue and they notified many companies employing uninsured workers via the campaign of 'Sigortasız Çalışmaya Son' (Do not Work Uninsured). A lot of workers had become insured after these notices. However, this union was closed down while they were directing the struggles of the PTT workers in 2003.[142]

Haber-Sen is another trade union who gave judicial struggle against the subcontracting in PTT. This trade union applied to the court for the subcontractor workers who were dismissed while working for PTT and according to the decision of the case, the workers of the subcontractors would be considered as principal workers of the PTT. In another case, the workers of the subcontractors who were working for PTT joined a trade union because of the increasing violation of worker rights and deteriorating working conditions in the working environment. After they joined this trade union, their working contracts were terminated and they applied to the Izmir Labour Court for reinstatement. The court reached the same decision and considered them as the principal workers of the PTT. However, although the struggles given by the trade unions must be appreciated, it cannot be said that they have been sufficient to get satisfying results when the size of the sector is considered.[143]

The best way to reduce the cost of the labour is non-unionized workers in today's capitalist economy and the subcontracting is one of the most important and practical tool of achieving this purpose. The workers of the subcontractors have been having serious problems while trying to join a trade union and benefiting from the collective working agreement rights. These problems lead to serious right losses in terms of the working conditions and other

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[141] Ibid., p. 186.

[142] 1. Sınıf Çalışmaları Sempozyumu, ***İşçi Sınıfının Değişen Yapısı ve Sınıf Hareketinde Arayışlar Deneyimler Sempozyumu Bildiriler Kitabı,*** Sosyal Araştırmalar Vakfı- Türkiye Sınıf Araştırmaları Merkezi, 2005, pp. 324-329.

[143] Taşkıran, ***Sınıf Örgütlenmesinde Yeni Deneyimler,*** p. 146.

social rights. The workers of the subcontractors have lost their trusts to the trade unions and have been trying to come together by forming worker associations to be stronger. The number of these associations formed by the workers of the subcontractors has been increasing day by day and they aim to prevent inhuman working conditions and stop these unacceptable practices because of the inadequate efforts of the trade unions. Although these associations have been formed so amateurish, the number of members of these associations has been increasing with each passing day.[144]

The workers of the subcontractors have been forced to discover different ways and solutions to be organized against the poor working conditions of subcontracting while the subcontracting has been trying to provide non-unionized worker groups to the sectors. The inequalities which the workers of the subcontractor are exposed and have occurred in the wages, annual holidays, unpaid overtimes etc. can be accepted as the reasons of these different organizing efforts and quests. The worker associations were formed during the years that the trade unions were banned in Turkey, as well. But, although no ban on the trade unions today, the existence of the worker associations proves the insufficiency of the trade unions in Turkey.[145]

[144] Ibid., p. 147-149.

[145] Ibid., p.157.

CHAPTER 3
THE SUBCONTRACTING FROM THE EU PERSPECTIVE

3.1 The Subcontracting and EU

The European Union is one of the most important supra-natural actors in the world and it is a union which is able to make and apply policies in the fields of social policy and employment. Thus, the views of the EU on subcontracting are fairly important especially for Turkey which has been making association negotiations with the union.

France, Switzerland, Austria and especially Germany are the EU countries which prefer to use subcontracting practices so intensively. The big companies in these countries and other Western European countries have used the national or foreign small and medium-sized companies as a subcontractor. After globalization, China and India have started to offer cheap labour force to the world and the information and communication technologies have developed in a short period of time. These facts have become two important reasons of sudden increase in the subcontracting practices. It is known that the EU countries using intensive subcontracting practices start to get higher profits in a short period.[146] Especially the rapid developments in the information and communication technologies have facilitated the establishment of relationships with the foreign subcontractors for the EU countries. The EU countries have been benefiting from these relationships by having the chance of using cheaper labour forces from foreign countries. The subcontracting trade volume of EU has reached to 506 billion Euros and approximately 6.5 million workers have been employed in this sector in 2007.[147]

Germany and France are the biggest subcontractor countries of EU and Italy, Spain and United Kingdom follow them. These countries are occurring about 80 percent of the total turnover associated to manufacturing subcontractor activities in the EU-15 (see Table 1).

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[146] Karl Heinz Schmidt, ***Innovative Management in Subcontracting Business in Growing and Stagnating Economies***, Review of International Comparative Management, Vol. 11, No.1, 2011, p. 81-84.

[147] ***EU SMEs and subcontracting,*** Final Report***, 2009,*** p. 19.

Table 3.1 Importance of Subcontractor Activities in The Manufacturing Sector in The EU-15, 2006 and 2007

	Number of enterprises		Employment related to subcontractor activities		Turnover related to subcontractor activities (billion Euro)	
	2006	2007	2006	2007	2006	2007
Austria	4,113	4,173	98,776	100,822	12.18	12.88
Belgium	4,630	4,689	90,163	91,732	12.40	13.03
Denmark	2,652	2,691	61,796	63,088	6.74	7.13
Finland	4,719	4,724	50,118	49,828	8.72	9.30
France	32,753	32,576	588,436	536,101	75.02	78.22
Germany	39,716	40,219	853,042	867,826	125.72	132.09
Greece	10,657	10,686	87,755	87,535	5.14	5.50
Italy	46,071	46,574	513,848	520,966	51.77	54.03
Ireland	7,866	7,913	70,040	70,314	5.85	6.30
Luxembourg	344	346	7,338	7,34	0.96	1.03
The Netherlands	5,067	5,124	99,938	101,364	13.04	13.62
Portugal	12,556	12,423	145,174	140,977	8.63	8.99
Spain	52,860	53,192	655,571	658,613	41.05	44.24
Sweden	10,305	10,442	77,328	78,755	11.90	12.53
United Kingdom	31,187	31,599	424,757	432,551	41.16	43.33
Total EU-15	265,496	267,371	3,824,080	3,807,812	420,28	442.22

Source: *EU SMEs and subcontracting*, Final Report**,** 2009**,** p. 20.

The construction is the sector in which the subcontracting and contracting activities have reached to the highest levels. 36 percent of the subcontractors are active in this sector. The other sectors in which the subcontracting is mostly seen are the transportation and communication sectors (see Figure 3).

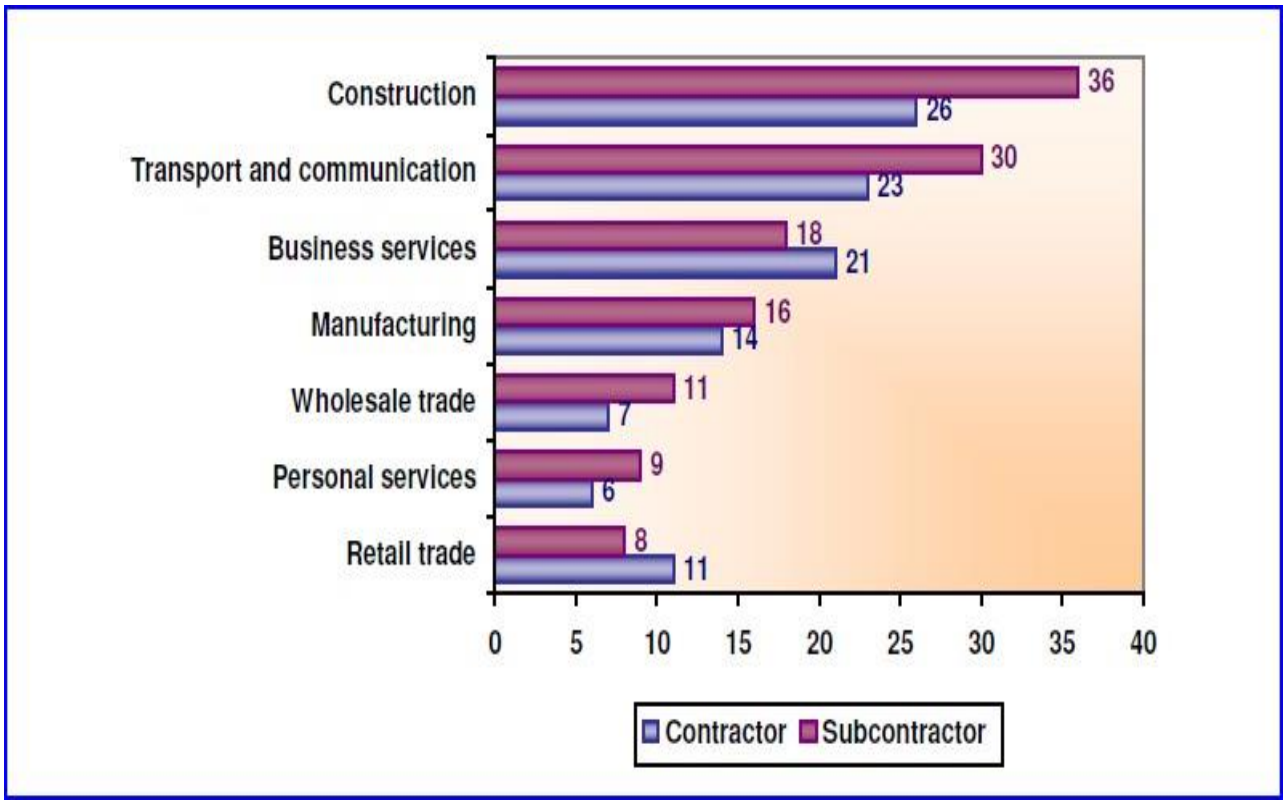

Figure 3.1 Presence of SME Subcontractors and Contractors By Sector (%), EU-27, 2009

Source: *EU SMEs and subcontracting,* Final Report**,** 2009**,** p. 20.

The advantages of the EU countries regarding the manufacturing has weaken with time because of the imbalance between the increasing costs in EU countries and decreasing costs in the developing countries.[148] The EU has taken some measures against the lost advantages with some policies and regulations. When it is looked at the recent policy documents on employment, the 'flexicurity'[149]concept is standing out.

The European Commission is based on some preliminary assumptions in the preparation of these policy documents[150]. These preliminary assumptions are; the economic, social and increasing political integration both in Europe and the international level, rapidly developing new information and communication technologies, the rapidly aging population of the Europe people, rising of the long-run unemployment rates and declining competition power.

[148] Ahmet Miraç Sönmez, ***Türkiye'de Kamu Personel Rejiminde Yardımcı Hizmetler Sınıfında Alt İşverenlik: Sağlık Bakanlığı Üzerine Bir Araştırma, ,*** Unpublished Master Thesis, Ankara University, 2011, p. 34.

[149] The European Commission defines flexicurity as 'an integrated strategy for enhancing, at the same time, flexibility and security in the labour market. It attempts to reconcile employers' need for a flexible workforce with workers' need for security – confidence that they will not face long periods of unemployment.' http://ec.europa.eu/social/main.jsp?catId=102&langId=en , (last accessed: 24/01/2013).

[150] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2007&nu_doc=359 (last accessed: 25/01/2013).

Furthermore, the Commission has stated that the 76 percent of the European citizens think that the lifelong employment model became old and the easiness of finding another job has become an important virtue and 72 percent of these European people think that the work contracts should have the flexibility to allow change in business. However, the left side of the European Parliament has criticized the flexicurity because they think it may create a new way for exploitations of labour system.[151] Sergio Gaetano COFFERATI, who is a social democrat, underlined that the crisis should not be an excuse for insecurity, flexibility and exploitation.[152]

It has been claimed that the flexicurity application guarantees the employment security. However, it only reduces the costs of the employment and dismissal procedures and transfers the burden of these costs from employers to the workers. It has been argued that the flexicurity process has already collapsed and started to turn flexploitation process.[153]

Ruud Muffels and Ruud Luijkx are two Dutch scholars working in the field of flexicurity have exercised a study and it has been stated in this study that the flexicurity is a preferable approach. These contributors have indicated that continental Europe regulating the employment issue has drawn a very poor economic and social performance but the Northern Europe (Nordic and Anglo-Saxon countries) deregulating the employment has shown a very good economic and social performance.[154]

Muffels and Luijkx reflected these security and flexibility states of the EU-15 countries to a matrix. In this matrix, it is pointed out that the example of Nordic countries is the closest example to the ideal type. 12 EU member states, which have become a member of the union after May 2004, are not included in this study (see Figure 4).

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[151] http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/FLEXICURITY.htm (last accessed: 27/01/2013).

[152] Sergio Gaetano Cofferati, http://www.socialistsanddemocrats.eu/gpes/public/detail.htm?id=134276&section=GRA&category=PLRE (last accessed: 27/01/2013).

[153] Sönmez, ***Türkiye'de Kamu Personel Rejiminde,*** p.36.

[154] Ruud Muffels and Ruud Luijkx, ***Labour market mobility and employment security of male employees in Europe: trade-off or flexicurity,*** *Work, Employment and Society*, Vol. 22(2), 2008, pp. 221-230.

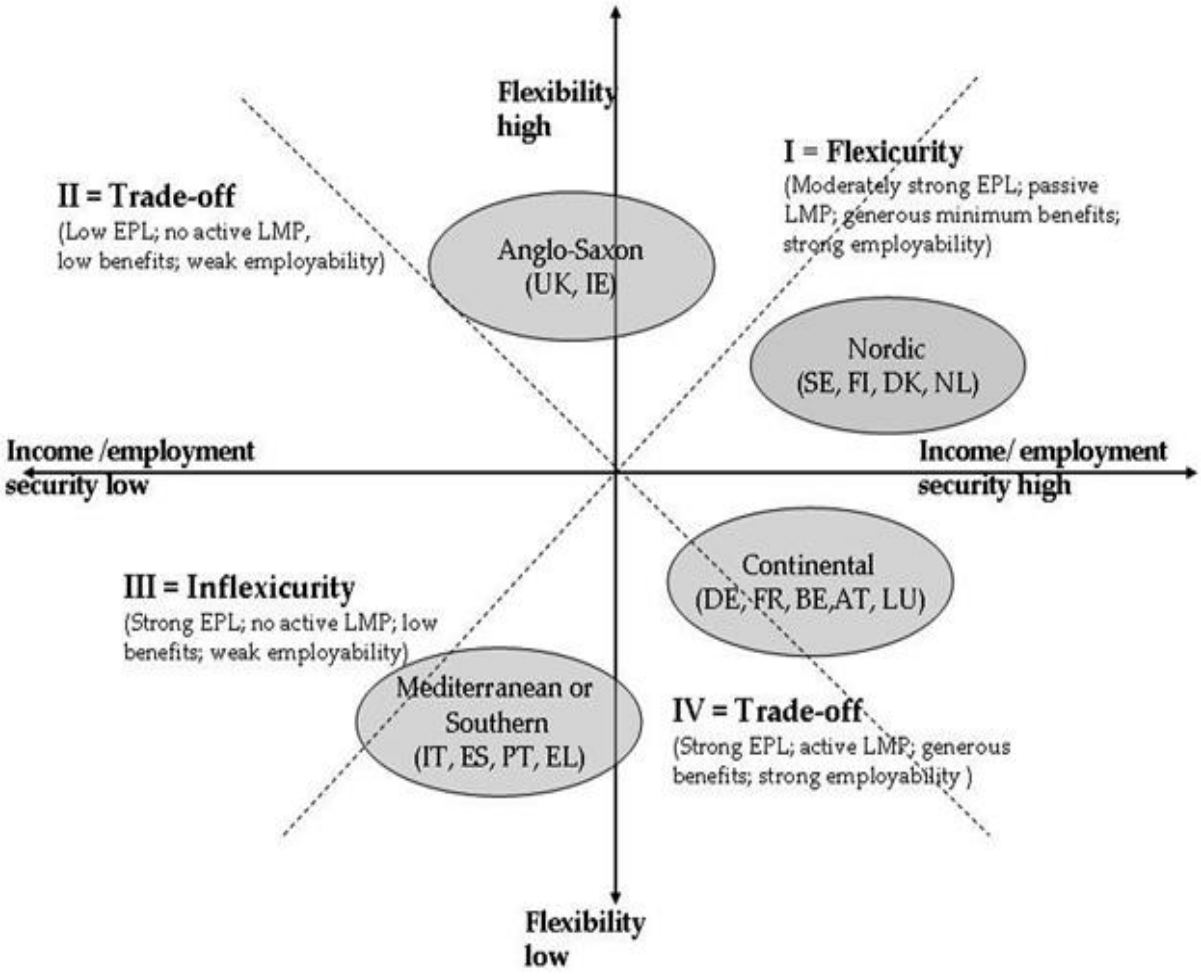

Figure 3.2 Matrix of Security and Flexibility

Source: http://www.sociologia.unimib.it/DATA/Insegnamenti/4_3100/materiale/muffels.pdf

AT: Austria DK: Danish IT: Italy FI: Finland PT: Portugal
BE: Belgium EL: Greece LU: Luxembourg FR: France SE: Sweden
DE: Germany ES: Spain IE: Ireland NL: The Netherlands
UK: United Kingdom

There are two axes in this matrix. The first of them is flexibility axis. The flexibility decreases towards the up and it decreases towards the down. The horizontal axis represents the assurance, income and employment. The right side of this horizontal axis shows increase and left side shows decrease.

If we interpret the matrix little more, a cluster among the countries is outstanding. The passive employment policies, generous compensations and employment protection legislations having an average sanction power are preferred by the Nordic countries. The high flexibility due to the weak employment protection legislations, low compensations and passive employment policies have become the prominent features of Anglo-Saxon countries.

The countries in this cluster make a trade-off between high flexibility and low security. The continental European countries are located in the other cluster. These countries are France, Luxembourg, Germany, Belgium and Austria. These countries make a trade-off between low flexibility and high security. The employment protection legislations and employment regulatory policies and high compensations are effective in these countries. The Mediterranean or Southern European countries are located in the last cluster and there are no flexibility and security in these countries. Therefore, the employment problems have been seen in these countries so often.

The recent developments on subcontracting in the EU shows that the lifelong employment security at the same job has been losing its validity and replaced with the thought of finding new job security. So, the EU citizens should be aware of that they may not work for life at the same company and they will be able find another job because of the flexibility policies.[155] However, no one can guarantee that they will continue to get the same wages.

The flexicurity concept includes the subcontracting and it is one of the most important tools of the flexicurity. The University of Bremen prepared a study by getting financial support from the European Commission. According to this report, the outsourcing has absolute negative effects on the health of the workers.[156]The subcontracting and outsourcing cause fears and anxieties on the workers of the principal employers. Similarly, the new manufacturing techniques such as 'just in time manufacturing'[157], flexible manufacturing and 'lean production'[158] may affect the psychological situations of the workers in a negative manner. After all, the workers of the subcontractors are one of the most important reasons for dismissal of the principal workers of the companies.[159]

In the following section, the progress reports will be examined which are very important documents in the context of Turkey-EU relationships and they reveal that Turkey is at what stage in the context of negotiations.

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[155] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2007&nu_doc=359 (last accessed: 29/01/2013).

[156]Thomas Kieselbach, ***Health in Restructuring: Innovative Approaches and Policy Recommendations (HIRES),*** Final Report, *HIRES Project - European Commission (Progress Programme)*, Bremen, 2009, p. 21.

[157] http://www.wisegeek.com/what-is-just-in-time-manufacturing.htm , (last accessed: 01/02/2013).

[158] http://www.tutor2u.net/business/production/introduction-to-lean-production.html , (last accessed: 02/02/2013).

[159] Kieselbach, ***Health in Restructuring,*** p.22.

3.2 The EU Progress Reports in terms of the Worker Rights

The European Commission prepares reports for each candidate country to assess their progresses achieved during the process of preparation for membership and Turkey is one of these countries. The Commission prepares the Progress Reports on the basis of the information presented by Turkish government, the decisions and reports of the European Parliament and some international institutions and organizations' assessments such as the Organization for Security and Co-operation (OSCE), Council of Europe, civil society organizations and international financial institutions. The first Progress Report about Turkey published in 1998. The other regular reports have followed the first one and have been published annually.[160]

When the Turkey Progress Reports are examined, it is seen that these reports have not paid enough attention to the misuses of the subcontractor workers' rights although the importance and sensitivity of the issue. However, the problems covering all worker rights like trade union and collective bargaining have been expressed so often in these reports. The probable conclusion here is that the European Commission either has wanted to deal with the issue under the general worker rights without putting it another category or have avoided touching on the issue because of different reasons.

3.3 Decent Work within the Cooperation of the European Union and ILO

Decent work is a conceptual framework referring to the employment and working rights, health and social protection conditions and opportunities and rights of self-expression through trade unions or other means of people.[161]

The notion of decent work has been raised first time in the report prepared by the International Labour Organization (ILO) General Director Juan Somavia and presented in 1999 at the International Labour Conference. The ILO has aimed that to provide 'decent work for all' with this concept. In this report, it is stated that the decent work concept includes ever each worker by not considering if they are woman or man, old or young, working at home or outside, registered or unregistered and organized or unorganized within the framework of equality and freedom. In the same report, it is also highlighted that the fundamental rights and principles such as occupational health and safety, social security opportunities and wages

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[160] http://www.avrupa.info.tr/en/eu-and-turkey/accession-negotioations/regular-reports-on-turkey.html , (last accessed: 04/02/2013).

[161] Dharam Ghai, **Decent work: Concept and indicators,** International Labour Review, No:2 Vol: 142, 2003, p.113, http://www.ilo.org/public/english/revue/download/pdf/ghai.pdf (last accessed: 10/11/2013).

should be guaranteed with compromise among governments, workers and employers and the forced labor and child labor should be terminated.[162]

It is provided a starting point to the countries by determining four main objectives;

1. The implementation of fundamental rights and principles at work,
2. Creating more opportunities for women and men to obtain suitable work and income,
3. Increasing the scope of the effectiveness of social protection for all,
4. Strengthening social dialogue and tripartite participation.[163]

The decent work agenda of ILO is also interested in some issues which are not included within the scope the EU acquis. Thus, this agenda of the ILO is supported by the European Union and union encourages all countries in signing conventions regarding core labor standards (CLS). Core labor standards can be summarized under four headings:

a. Trade union and collective bargaining freedom (ILO's 87 and 98 numbered conventions),
b. Preventing all kinds of forced labor (ILO's 29 and 105 numbered conventions),
c. Elimination of child labor (ILO's 138 and 182 numbered conventions),
d. Preventing discrimination in employment and working life (ILO's 100 and 111 numbered conventions).[164]

It is possible to evaluate the decent work performances of the countries by using 11 criteria recommended by the ILO experts. The topics of these criteria are;

1. Economic and social context for decent work
2. Employment opportunities
3. Adequate earnings and productive work
4. Decent working time
5. Combining work, family and personal life
6. Work that should be abolished
7. Stability and security of work
8. Equal opportunity and treatment in employment

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[162]Report of the Director-General: ***Decent Work,*** 87 th Session, International Labour Office, Geneva, June 1999, ISBN 92-2-110804-X, ISSN 0074-6681. http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm, (last accessed: 12/11/2013).

[163] Serap Palaz, ***Düzgün İş (Decent Work) Kavramı Ve Ölçümü: Türkiye Ve Oecd Ülkelerinin Bir Karşılaştırması,*** Sosyal Siyaset Konferansları Dergisi, No: 50, 2005, p. 482.

[164] http://www.abgs.gov.tr/files/SBYPB/Sosyal%20Politika%20ve%20İstihdam/duzgun_is_forumu.pdf (last accessed: 13/11/2013).

9. Safe work environment
10. Social security
11. Social dialogue, workers' and employers' representation[165]

As it is known the European Union countries have different economic features and development levels, although they have the same goals on many things as a union. Thus, it cannot be expected from them to have the same decent work performances.

Furthermore, according to claims of European Trade Union Confederation (ETUC), many workers in the EU do not have decent work. The confederation has emphasized that people have right to want decent work and they do. The European Foundation for the Improvement of Living and Working Conditions (Eurofound) has declared that job security is the most significant factor in detecting job satisfaction in its Fourth European Working Conditions Survey. The confederation also has stated that regular working hour is a very important factor for a qualified life and to balance family responsibilities but almost half of the workers are not satisfied with long hour working conditions.[166]

As it is stated on the web page of the Eurofound, 22% of 35 million European workers do not have standard contracts and the percentages reach to the highest points in Poland and Bulgaria. All over the Europe, about fifty percent of young people have temporary contracts and many of fixed-term contract workers have announced that they would rather have a permanent job, as 8 million workers of part-timers are not able to find a full-time work.[167]

However, as the ILO General-Director Guy Ryder pointed out, it can be said that the union works on promoting decent work with the ILO. According to Ryder, the European Union and the ILO have similar foundational values and the EU does not hesitate to be a big supporter of the ILO on decent work. The European Union actively joins debates and negotiations of ILO on labour standards, systems, actions and checking of these standards. The standards of ILO and the wider decent work agenda are supported by the union.[168]

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[165] ILO Manual, First version, ***Decent Work Indicators: Concepts and definitions***, 2012, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_229374.pdf, (last accessed: 15/11/2013).

[166] http://www.etuc.org/a/4311 (last accessed: 17/11/2013).

[167] Ibid.

[168] The ILO and the EU***, Partners for Decent Work and Social Justice, Impact of Ten Years of Cooperation***, 2012, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/genericdocument/wcms_195510.pdf (last accessed: 17/11/2013).

CONCLUSION

The rapid developments in the industry and the need to respond to these developments at the same speed have made inevitable to use flexible working systems. The subcontracting has become one of these working models and it has been highly demanded in recent years in Turkey and all over the world. The subcontracting has been used for some bona fide reasons such as specialization, increasing the costs and the emergence of the need for downsizing of enterprises but, unfortunately it has been started to be used to avoid some legislative obligations. The rapid increase in the subcontracting practices and problems caused by these practices have made necessary the legislative regulations on subcontracting.

The subcontractor and principal employer relationship had been established without any legislative regulation in Turkey until 1936. During this period, some malicious applications had been started to be seen and the first regulation on subcontracting was made in 1936. The problems and deficiencies arising during the implementations necessitated the rearrangements and replacements the legislations on subcontracting and it has been changed in the years of 1950, 1967, 1971 and finally in 2003. The regulations regarding the establishment conditions of subcontracting relationship, subcontracting contract, the collusion and liability in subcontracting have been made in the Labour Act No. 4857 that was adopted in 2003 and the Subcontracting Regulation that was adopted in 2008 within the process of harmonization with the European Union.

The Labour Act No. 4857 has preserved the main points of previous Labour Act No. 1475 but it can be said that some changes have been made in this new act in the controversial issues. The subcontractor term is used first time. Besides, the liability principles of the parties and restrictions of the relationship between the subcontractors and principal employers have been described in detail in this new labour act. Furthermore, the collusive subcontracting practices have been eliminated entirely with this new labour act. The economic situations of the subcontractors are generally weak and so the workers of the subcontractors sometimes have been faced with difficulties while getting the rewards of their efforts after these relationships. Of course, this not only because of the weak economic structure of the subcontractors, the intentional behaviour of some employers to not pay the wages of the subcontractor workers is another reason of these kind of issues. The purpose of protecting the rights of the workers has been accepted as basic principle while making legislative regulations of the last labour act. Indeed, when the Labour Act No. 4857, which is currently in force, is

compared with the previous Labour Act. No 1475, it is easily seen that the changes have been made to prevent collusive practices and to protect workers' rights.

Although some improvements has been provided with Labour Act No. 4857, this act does not guarantee the full protection of worker rights and has also some articles which can be misused. Article 7 of the Labour Act No. 4857[169] is the best sample of this situation. This article regulates the transfers of the workers from workplace to workplace. If the worker is transferred from one workplace to another which belong the same company, the worker can be appointed for a different work. This provision can be abused for different reasons. Because, if the worker cannot be as successful as the previous work, the employer will have the right to terminate contract by showing the capacity and success insufficiency of the worker.[170] Another negative aspect of this Act. is that the same article mentioned above can cause the reduction in employment opportunities by giving permission to the employers to transfer of the workers between workplaces. These issues show that this new Labour Act needs more improvements to provide what the workers have been deserving for years.

The subcontracting system is one of the most suitable working types which is wide open to abuse for employers in both private sector and public sector. When the problems which the workers are exposed as a result of the subcontracting practices are considered, it is easily understood that how important and essential these legal arrangements on subcontracting. During the study, the relationship between the subcontractors and principal employers have been discussed with its all details in terms of the legislative regulations and the attentions has been taken to the problems of subcontracting that has been experienced so far in this framework. Within the framework of principal employer-subcontractor relationship, the misuses of the subcontractor workers' rights have been expressed many times in the study. The hardships which the workers of the subcontractors are faced while trying to get trade union rights can be given as example to these misuses and victimizations. The severance pay is another important problematical issue that is generally used to misuse the rights of the subcontractor workers. Namely, at least one year working condition is required to benefit from the severance pays and it causes problems in terms of worker rights especially for the workers of the subcontractors whose contracts are mostly terminated or renewed before the end of 1 year. Moreover, these workers do not generally comprehend the aim of these

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[169] Article 7 of 4857 Sayılı İş Kanunu, 2003, http://www.ilo.org/public/english/region/eurpro/ankara/download/labouracturkey.pdf, (last accessed: 25/01/2013).

[170] Ömer Ekmekçi, ***4857 Sayılı İş Kanununda Geçici İş İlişkisinin Kurulması, Hükümleri ve Sona Ermesi, Legal İş Hukuku ve Sosyal Güvenlik Dergisi,*** C.1, 2004, p. 374.

applications or the lack of control mechanism facilitates the misuses of these worker rights even if they are aware of what happens.

The subcontractor workers, who work about 12 hours daily, who cannot get the overtime pays, who cannot use even permissions of public holidays and annual leaves and who are getting lose their trusts to trade unions, have sought new solutions to be organized as an alternative of trade unions. These workers who are afraid of joining a trade union because of hesitation to be dismissed lean towards to idea of forming labour associations. The weakening of the existing structures of the trade unions is another reason that causes difficulties for subcontractor workers about organizing. In addition, the trade unions, due to their crucial situations, try to protect only the workers who are already members and they do not endeavour for the workers of the subcontractors because of the same reasons.

As we see from the problems in subcontracting, the workers need more protection while the opportunities of investment is being facilitated and the incentives that paves the way for working environment. At this point, the flexicurity notion pops up as an inevitable alternative system to provide the rights as a lesser evil. Because Turkey is a developing and open country to the world trade, it cannot keep away from the developments in the world. The flexicurity is one of them. I think, the right thing that Turkey must do is to follow some countries' regulations and legislations as a map on the flexicurity which are fair and good at applying flexicurity. However, the fair applicability of flexibility cannot be provided only by adding some articles to the Labour Law. It is a matter of the mental transformation. To sum up, the flexicurity model should be regulated and adapted to the structure and reality of Turkey by considering the rights of the workers and ceasing the all kinds of worker victimizations. After completing the regulation process, the applications of flexicurity should be supervised by the competent authorities.

The subcontracting has become a very common application in the European Union in recent years, especially because of the global economic crisis. As it was mentioned in the study, the subcontracting has been used very efficiently in all EU countries, especially in Germany and France. These countries have used the national and foreign subcontractors. The subcontractors from China and India are mostly preferred by the EU countries. The concept of flexicurity has an important status in the current employment policies of the European Union. However, it can be said that the situations of the workers in EU countries is much better than the workers who work in Turkey thanks to the stronger and more functional structures of the trade unions in the EU. At the second part of the last chapter, the progress reports published by the European Commission on Turkey have been examined. The lack of subcontracting

problems of the reports has been criticized. One of the other important results of the study is that the restrictions on the trade union rights have been causing other great distresses and problems especially for the workers of the subcontractors who can be considered as unsecured worker group.

The decent work concept of the ILO was the last part of this study. As mentioned under the related part of the study, providing 'decent work for all' is the prior goal of the ILO with this concept. The decent work concept includes ever each worker by not considering their ages, sexes, if they work at home or outside, registered or unregistered and organized or unorganized within the framework of equality and freedom. Although the different decent work performance levels of the EU countries, they are willing to work on decent work with the ILO and they are eager to promote this concept all over the world.

This study is not prepared to find or determine a solution to the problems related to the subcontracting. However, a few suggestions can be given after these researches; the determination of the deficient regulations in terms of the individual and collective labour law can be the first step. If any problem can be determined in these regulations, they should be amended as soon as possible in accordance with the EU acquis and ILO Conventions. The second step should be the determination of the control mechanisms efficiency. In case of the determination of these mechanisms' deficiency, the necessary measures should be taken and the deficiencies must be remedied soon. There is no doubt that the effective controls are the most important measures to find out if the laws are obeyed or not. If it is remembered that the subcontracting has been used to avoid legislative obligations, the importance of the control mechanism can be understood easily especially for this working model.

As a result, the enterprises have used the subcontractors in parallel with globalization in order to be able to compete with other national and foreign rivals and the existence of the enterprises is one of the prerequisite for the employment. However, the protection of the worker rights is another prerequisite for a healthy employment and labour force. Therefore, in Turkey, the rights of the subcontractor workers must be provided and the misuses have to be terminated immediately.

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Sempozyum

1. Sınıf Çalışmaları Sempozyumu, **İşçi Sınıfının Değişen Yapısı ve Sınıf Hareketinde Arayışlar Deneyimler Sempozyumu Bildiriler Kitabı**, Sosyal Araştırmalar Vakfı-Türkiye Sınıf Araştırmaları Merkezi, 2005.

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DECLARATION OF AUTHORSHIP

I declare that this thesis and the work presented in it are my own and have been generated by me as the result of my oriqinal research.

None of the part of this thesis has previously been submitted for a degree of any other qualification at this University or any other institution

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Where I have quoted tom the wort of others, the source is always given within the reference part of my thesis.

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