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OUT OF SCOPE EMPLOYEES IN TURKISH COLLECTIVE BARGAINING SYSTEM (*)

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Abstract:

Collective Bargaining is the process in which labor unions representing workers on the one hand and employers or employers' institutions on the other gather and come to the table in order to determine working rules and conditions of both parties and the process to conclude the collective agreement.

In Article 39 of 6356 numbered Law of Trade Unions and Collective Labor Agreement, issues about benefiting from a collective labor agreement are included. Out-of-scope employee concept in industrial relation application refers to people excluded from collective labor agreement regime even though they are able to be member of a labor union, and even they are, as a result of consensus of the parties of collective labor agreement, in other words those to whom collective labor agreement is not applied.

Exclusion of some workers such as directors, chiefs, engineers and even all office employees which are members or able to be a member of labor unions from the scope of the agreement is an encountered case in the application of collective labor agreements and this issue is regulated through scope articles included in collective labor agreements.

The circumstances of out of scope employees cause discussions.

Key Words:

Collective Bargaining, Personnel Out Of Scope, Labour Unions, Collective Labour Agreements

1. Development of Out of Scope Employee Conception in Turkish Law

Entrance of Collective Labor Agreement into the work life under the name of General Contract happened through 1926 dated Law of Obligations.

Law of Obligations regulated Collective Labor Agreement institution only in its two articles with liberal approach. According to Article 316 regarding conclusion of the agreement, employers or employer associations could conclude "general contracts" including the issues "concerning service" with labors or employer associations. Validity of the contract is stipulated to the condition of being written. Duration of the contract could be agreed by parties. However, if a consensus could not be reached upon this issue, the contract could be terminated anytime through a warning notified in a duration of six months after a year. As for Article 317, which regulates results of Collective Labor Agreement, it is stated that rules of Individual Labor Agreement conflicting with Collective Labor Agreement would be void and be replaced with the rules of collective labor agreement (Gülmez, 1983).

Collective Labor Agreement institution, which took place in Turkish work life a little bit earlier, could not developed further and find application area (Ekin, 1979).

Undoubtedly, there may be various economic, social and cultural reasons for that. However, one of the main reasons is the lack of unions to transmit individual level of Collective Labor Agreement bargains to a collective level. Likewise, Ottoman Strike Law was in force in 1926 and according to this, workers operating in workplaces serving to public were prohibited from establishing unions. Although there were not a definite prohibition regarding strikes; Law of Obligations could not lead to the birth of a common collective bargaining tradition because of lack of right

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to union, which is one of the elements that is meaningful only if they enjoy together, and regulation of collective bargaining issue, which is such a complicated issue, only in two articles, and hence rules were stuck in enactment texts (Işıklı, 1976). In this period, although Collective Labor Agreement had an existence in institutional respect, there was not any application of out of scope employee due to there was not any concluded Collective Labor Agreement, and hence to wait for the next period became necessary.

Article 46 of 1961 Constitution recognized right to trade unions, likewise Article 47 to right to collective agreement and strike, and 275 numbered Law of Collective Labor Agreement, Strike and Lock-out enacted in 1963 gave an institutional form to collective bargaining. In this institutional structure, autonomy of collective agreement was initially recognized through 1961 Constitution and became functional through 1963 dated laws and took its place in social life and legal structure.

With the beginning of collective bargaining application in our country in 1960s, it was seen that some provisions about to which workers these agreements shall be applied were included in Collective Labor Agreements and tasks and positions to be excluded from the scope started to be determined. In this sense, the year of 1963 can be accepted as the date on which application area of Collective Labor Agreements were narrowed with respect to individuals and out of scope employee applications were started (Can, 1995).

Since 1963, exclusion of a part of staff was requested by employer in Collective Labor Agreement discussions, and labor unions generally objected this request. However, in spite of these discussions, provisions regarding out of scope employees were included in the great amount of Collective Labor Agreements (İnce, 1985).

2. The Concept of Out of Scope Employee

Workers serving in production, management and supervision departments of enterprises, having membership of a trade union or not, generally having high level positions such as manager, assistant manager, chief, lead man, foreman etc. and excluded from benefiting Collective Labor Agreement through union membership or payment of solidarity contributions are called as out of scope employees in application.

Out of scope employees is a group of staff which cannot benefit from Collective Labor Agreement due to their position, task or titles even though they are members of a union (İnce, 1985).

Although it is accepted that out of scope employee application was kept narrowly with respect to position and a sufficient level was not fallen below with respect to wage and other social rights in the first years of shift to collective bargaining order (Şahlanan, 1992); it is a fact that number of workers excluded from the scope increased and a decline was observed with respect to wages and social rights in comparison with workers benefiting from Collective Labor Agreements in next years (Çelik, 1980).

2.1. Definition and Elements of Out of Scope Employees

2.1.1. Definition of Out of Scope Employees

Out of scope employee has been mentioned in collective bargaining law as a concept but any definition has not been made. Out of scope employee has only been approached in the sense of benefiting from Collective Labor Agreement and the problem has been dealt with in this scale (Reisoğlu, 1983).

On the other hand, there is not a legal provision about whether workers are going to be excluded from the scope or not. Whereas out of scope employee may be the member of signatory trade union in Collective Labor Agreement in principle, it may not be a member as well.

After this short explanation, out of scope employee can be defined as follows:
In a workplace or enterprise, exclusion of workers at a certain title or position regardless of they are members of signatory labor union of Collective Labor Agreement or not from the application sphere of Collective Labor

Agreement is called as exclusion from the scope; and workers to whom Collective Labor Agreement is not applied due to their position are called as out of scope employee (Reisoğlu, 1983; İnce, 1985)

Employer representatives to be deemed as employer can be determined as follows according to 6356 numbered Law of Trade Unions and Collective Labor Agreement with respect to collective bargaining law:
Those managing whole enterprise,
Those participating collective bargaining as an authorized representative although they do not have authority to manage whole enterprise.

Employer representatives other than those indicated above can become members of trade unions and benefit from Collective Labor Agreements regardless of their title. This suggestion caused much-discussed out of scope employee problem (İnce, 1985).

Although principle is inclusion of all workers who are serving in the workplace and members of the trade union in the sense of personal scope of collective labor agreement (Esener, 1978); in practice, exclusion of some workers such as directors, chiefs, engineers and even all office employees which are members or able to be a member of labor unions from the scope of the agreement is an encountered case in the application of collective labor agreements hence they are left to sphere of service contract (Çelik, 1980).

Therefore, collective labor agreement and adherence principle becomes invalid for a certain amount of members affiliated with that agreement (out of scope employees) as an exception and through the agreement of parties but valid for other (in-scope) members which constitutes a great majority. Parties narrow the scope in this manner.
A similar case is called as "Abstract" or "Potential" adherence in German Law (Çelik, 1980).

Although adherence maintains through collective labor agreement, this adherence is suspended through agreement power. In practice, it can be observed that in-scope and out of scope employees are discriminated in private sector.
For various reasons, employers in private enterprises request some employees serving at important administrative levels to be excluded from personal scope of collective labor agreements. Indeed, due to these workers serve under a service contract they also have the title of employee. However, most of the time, these are advisors, engineers, and individuals serving in personnel and accounting departments.

According to employers, such kind of individuals should fall out of personal scope of collective labor agreement because of secrets of enterprise that they learn while they do their works. Therefore, an out of scope employee group emerges in practice as a result of discussions and bargains carried out between parties and employer can assign their working conditions and wages outside of collective labor agreement. Out of scope works are written in the agreement.

Hence a kind of "staff", that falls out of the scope, emerges. That staff is not included in the scope of collective agreement whomever is assigned to this position. Then, those working at this out of scope position either do not become members of signatory unions or resign from membership if they are or they maintain their membership but they cannot benefit from collective agreement due to falling out of scope. In practice, trade unions contend, negotiate and bargain to include their workers who do not consent with being out of scope into the scope (Esener, 1978).

Moreover, an application to give similar rights to out of scope employees after conclusion of collective agreement is commonly observed. Such an application has arisen due to unwelcomed perception of administrative staff as close to employer and employer representative and their distance to participate unions.

In addition to that, it is known that this group, which is composed of white collars, does not lean toward unionization. However, after increasing labor force costs in recent years, retreats from giving the same level of rights to out of scope employees following collective bargaining have started. Therefore, it can be said that wage

differences between in scope and out of scope employees (especially for lower level administrative employees) increased (Koray, 1992).

2.1.2. Elements of Out of Scope Employees

Elements of out of scope employees can be listed as follows (İnce, 1985).

1. Out of scope employees are individuals who are able to become members of a union in principle.
2. The case of being out of scope arises from position, task or title of these individuals.
3. Exclusion of an employee from the scope should be indicated in Collective Labor Agreement.
4. This employee is out of Collective Labor Agreement regime and such kind of people cannot be applied Collective Labor Agreement in principle. Such kind of people is dependent upon a service contract or provisions of workplace internal regulation.

2.2. Legal Discussions on Out of Scope Employees

The circumstances of out of scope employees cause discussions (Esener, 1978).

Upon disputes that emerged about this issue, Supreme Court has decided that individuals excluded from the scope of Collective Labor Agreement cannot benefit from the collective agreement even though they are members of the union.[1]

Due to any further legal regulation has not been placed, court decisions concluded in previous practices and various scientific views maintain their importance (Çelik, 2015).

2.2.1. Legally Affirmative View on Out of Scope Employee Application

Devrim ULUCAN suggests following ideas in examination of decision of Supreme Court 9th Civil Chamber with 6.5.1974 date, 1973/24604 docket and 1974/8465 number (Ulucan, İHU, TSGLK. 6. No.1):

I. Article 47 of Constitution (A. 53 in 1982 Constitution) entitled collective labor agreements to workers as an individual right by putting forward the provision of "in their relation with their employers, workers are entitled to bargain collectively and to strike with a view to protecting or improving their economic and social status".
Option to exclude such worker who seems owner of right of collective labor agreement in the first view through a provision stipulated in the agreement by the parties can be interpreted as removal of right of collective labor agreement entitled by the Constitution to workers.

However, legal source of autonomy and power of collective labor agreement entitled to the parties of collective labor agreement is the Constitution as well.

A new kind of contract, which has an importance and special qualities so as to be protected at the level of Constitution, has been generated through right of collective labor agreement entitled to workers. The most distinct feature of this kind of contracts is "its collective character" and its superiority and priority in comparison with other individual contracts.

This superiority and priority arise from the fact that normative part of collective labor agreement is an autonomous legal source with objective quality and has the characteristics of a law in the material manner.

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[1] Supreme Court .9.C.C. 6.5.1974 d. d. 1973/2460, 1974/8465 no decision and Devrim Ulucan's examination, İHU 1975 TSGLK, 6 (No.1); 12.1.1976 d. d.1975/31395, 1976/1000 no decision of the same chamber, Journal of Supreme Court Decisions, April 1976, pp.490-49 l.; 16.2.1976 d.d. 1976/1704, 1976/5689 no decision and Münir Ekonomi's examination, İHU 1976; TSGLK, 37 (No.2); Supreme Court .9.C.C. 20.5.1985 d.d. 1985/2546, 1985/5437 no.II decision, Journal of Employers, July 1985, pp.17-19.; Supreme Court Assembly of Civil Chambers 25.4.1986 dated decision, Journal of Textile Employers, February 1987, p.22.

The intended result through entitling right of collective labor agreement is to provide a legal opportunity to the workers organizing in pursuant to the principle of self-help; to enable them to make agreements about their working conditions in their relation with their employers "to protecting or improving their economic and social status"; to transform presumed formal equality between labor and employer concluding individual contract into a real equality; and hence to break employer's superiority to a large extent.

As it is known, the fact on which the main principle of Labor Law is based is dependency of the worker to the employer. In order to remove actual superior position of employer and make the worker equal to it, recognition of freedom of association and establishment of protective organizations of workers are necessary. The Constitution has bestowed this facility to both workers and employers. While these organizations are regulating working conditions as the parties having equal rights, they set up autonomous legal rules. Normative part of a collective labor agreement, which is concluded under the principle of autonomy, must be compulsory with respect to minimum requirements and it must directly have the quality objective law to be able to make workers equal with employer as indicated above.

Regulation of third parties' legal relationships by the parties of a collective labor agreement, who are private law bodies, through establishing objective and general laws and their privilege to link individual contracts of the third parties to direct and compulsory rules and their "collective labor agreement power", "authority to establish rules" (like Legislative Organ of the State) take its legal validity from the Constitution. Due to the source of collective labor agreement power is the Constitution, lawmaker cannot make changes so as to touch the essence of this right and cannot completely remove this right.

Utilization of collective labor agreement power indicated in the Constitution has been restricted with an aim in the collective agreement autonomy. The aim to drive the parties having the collective agreement power is "to protecting or improving their economic and social status". The most influential way in achieving this aim with respect to self-help principle is organization of workers and to carry out collective labor agreements through these organizations.
The Constitution has recognized the freedom to establish trade unions and set up many provisions for the purpose of protection of workers. After the assignment of utilization of collective labor agreement right to the labor organizations due to it is necessary for the realization of this right and protection of workers, rights of the actual right owner workers would not be taken away; on the contrary, opportunity for effective utilization of the right would be provided. In this sense, regulation of the collective labor agreement through an additional specific law and determination of parties of collective labor agreement is not in conflict with the Constitution. Similarly, normative quality of collective labor agreement has been concretized through the law.

II. 275 numbered Law of Collective Labor Agreement, Strike and Lock-out (a.1) determined the parties and the subject of collective labor agreements through the provision of "labor agreement in the sense of this law is a contract concluded between labor organizations and employer organizations or employers so as to conclude service contract and regulate the issues regarding its content and termination".[2]

According to this provision, labor organization "representing majority of workers operating in a business line or one or more workplaces" has collective labor agreement power and is able to become collective labor agreement party so as to represent workers as indicated in Article 7.

[2] Parties and subject of a Collective Labor Agreement is included in 6356 numbered Law of Trade Unions and Collective Labor Agreement as follows: "Collective labor agreement refers to the agreement concluded between a workers' trade union and an employers' trade union, or an employer who is not a member of any union, in order to regulate the matters with regard to the conclusion, content and termination of the employment contracts."

The party of collective labor agreement power for employers is the organizations which are indicated in article 7 of the same law as well. However, a single employer may also be the party of a collective agreement under certain circumstances with respect to employers.[3]

In addition to the matters regulating mutual rights and obligations of the parties, application and supervision of the agreement and procedures to be applied for settlement of disputes; "regulation of the matters regarding conclusion, content and termination of service contract" is included in the scope of collective labor agreement power. Apart from these provisions indicating normative quality of collective labor agreement, the same law regulated normative quality of the collective labor agreement in details. According to Article 3 of the Law, "unless otherwise specified in the collective labor agreement, service contracts cannot be in conflict with the collective labor agreement. Provisions of the service contract conflicting with collective labor agreement would be replaced with the provisions of collective labor agreement. Issues not regulated in the service contract are regulated on the basis of collective labor agreement's provisions."[4]

Therefore, quality of normative part of a collective labor agreement, which is entitled in the Constitution, and its details are determined in Law of Collective Labor Agreement, Strike and Lock-out in a clearer manner.
III. Although collective labor agreement right is a basic right of workers, labor organizations, employer organizations and employers in some cases have the right to use this right.

However, it cannot be said that workers have no influence on the usage of this right, single workers underwhelm in the community and are absolutely determined by the organization. Utilization of the right is assigned to labor organization on behalf of right owner workers in pursuant to collective quality of the right and the intended aim to be achieved, which is "to protecting or improving their economic and social status".[5]

These labor unions must be in compliance with the conditions indicated in the Constitution in order to legally use their representation authorities; in other words, they must be established freely, be independent, operate in compliance with democratic principles and participant and resignation from membership must be free. A labour organization having these qualities naturally uses its collective agreement power in favor of workers. The worker who is member of the organization is considered that she/he has accepted collective labor power of the organization due to adopting membership with independent will. Moreover, the worker has the chance to exit from collective agreement power of the organization through resigning from the organization.

IV. Members of the organizations which are the parties of a collective labor agreement are affiliated with the collective labor agreement and are included in application sphere (scope) of the collective labor agreement in principle.

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3 6356 numbered Law of Trade Unions and Collective Labor Agreement defines labor and employer organizations having collective labor agreement power and being able to a party of a collective agreement as follows in Article 41 with the title of Competence: "1. The workers' trade union representing at least three percent of the workers engaged in a given branch of activity and more than half of the workers employed in the workplace and forty percent of the workers in the enterprise to be covered by the collective labor agreement shall be authorized to conclude a collective labor agreement covering the workplace or enterprise in question.
2. In the case of enterprise collective labor agreements, the workplaces shall be considered as a whole in the calculation of the forty percent majority.
3. If several trade unions have members of forty percent or more in the enterprise, the trade union having the largest number of members shall be authorized to conclude a collective labor agreement.
4. An employers' trade union shall have the power to conclude a collective labor agreement covering the workplace or workplaces owned by the employers belonging to the union. An employer who is not a member shall have the power to conclude a collective labor agreement covering the workplace or workplaces owned by him.

4 The same provisions are included in Article 36 of 6356 numbered Law of Trade Unions and Collective Labor Agreement.

5 Constitutional Court decision, 2.5.1969, D.1963/337, 1967/31 no, Lebib Yalkın Publisher, AA/ I. Item No. 15.

Due to the Law is about the members of both parties affiliated through and included in the scope of the collective agreement, it recognized direct and compulsory effect to normative provisions of the agreement. However, it is possible that a collective labor agreement may be valid for only a certain part of those affiliated through this agreement in general. For instances, exclusion of a part of workers from the scope of agreement in a workplace.

Workers affiliated with collective labor agreement should not be confused with those to whom provisions of the collective labor agreement are not applied, in other words out of scope employees. Authority to determine workers affiliated with collective labor agreement has not been given to the parties but these are determined by the law. However, the issue of who are going to be included or not into the scope of a collective labor agreement is in the scope of parties' competence and is an element of collective agreement power.

In practice, exclusion of some workers such as directors, chiefs, engineers and even all office employees which are affiliated with service contract and able to be a member of labor unions from the scope of the agreement is an encountered case in many collective labor agreements.
In compliance with the meaning of the concept, if we understand affiliation to a collective labor agreement from the term of affiliation, collective labor agreement in question must be concluded and entered into force for the birth of affiliation.

Individuals falling into the scope (application sphere) of the same collective labor agreement provisions are those who are affiliated to the collective labor agreement. Provisions of the collective labor agreement are not valid for those who are not affiliated. As an ordinary result of that, the case of affiliation to the collective agreement terminates through the termination of collective labor agreement in question. This can be called as "actual" or "concrete" affiliation to a collective labor agreement.

However, on the other hand, there may be some other (out of scope) workers or employers to whom provisions of the collective labor agreement are not applied although they are affiliated with collective labor agreement. In that case a "potential" or "abstract" affiliation is the matter, in spite of abstract affiliation worker or employer is out of the scope of collective labor agreement.

In conclusion, in pursuant to collective agreement power that parties have, provisions of the collective labor agreement are not applied to individuals that are marked as excluded from the scope of collective labor agreement even though they are members of the union that is a party of the collective labor agreement and hence affiliated with the collective labor agreement. Such individuals stay affiliated with legal provisions like those who are not member of the union.

Münir EKONOMİ gives following ideas in the examination of Supreme Court 9th Civil Chamber decision with 16.2.1976 date, Docket 1976/1704, 1976/5689 number (Ekonomi, İHU. TSGLK 37. No2).

Collective labor agreements, which have the quality of a private law contract, are primarily based on free agreements of the parties and composed through mutual and coherent declarations of intention.

After the shift to Collective Labor Agreement order in our country, in addition to provisions regarding collective agreements are going to be applied to which workers, it is observed that some provisions regarding that some workers, especially those taking role in the management of the work and workplace, employer representatives (manager, chief, foreman, lead man etc.) or those performing certain tasks (engineers, a part of office staff) are going to be excluded from the scope of the agreement are added into the provisions in collective labor agreements in practice. The issue of exclusion from the scope, which is decided by the parties after negotiations, was initially objected by trade unions, avail of agreements by union members was discussed and even it was claimed that exclusion from the scope is in conflict with Article 53 of the Constitution (A. 53 of 1982 Constitution). On the others hand, exclusion from the scope has not become a great problem in practice and provisions on this issue have

been included in most of concluded collective labor agreements. It should also be noted that, trade unions sometimes suggested exclusion of senior officials of employer representatives from the scope.

II. According to the view accepted by Supreme Court and dominant in the doctrine, parties of a collective labor agreement can decide upon exclusion of some workers from the scope of the agreement while determining application sphere of the agreement with respect to people and regulate it in the agreement.
Similar to the fact that lawmaker can make a restriction in the laws and exclude some people from the application area of the law for certain reasons; agreement parties, which establish autonomous rules of law through normative provisions of Collective Labor Agreement having the quality of a law in material respect, can exclude a part of workers from the scope of the agreement by acting in the same direction. They can freely decide which workers are going to be included and which ones to be excluded. Unless there exist some arbitrary discrimination among equals in the exclusion from the scope, there does not exist any conflict with principle of equality and law with respect to the laws that collective labor agreement determines.

According to Mustafa ÇENBERCİ, (Çenberci, 1979); "In out of scope employee application, there is a necessity and maybe even an obligation for both trade unions, i.e. labor organizations, and employers. By considering this point, there does not seem any conflict with the principle of constitutional equality."

Devrim ULUCAN reaches the conclusion of "If there is discrimination between workers from completely different statues and office staff is excluded from the scope, and then there is not any conflict with equal treatment principle. To deal with the issue only on the basis of principle of equality may be faulty. Exclusion of some individuals from the scope through collective labor agreement may be beneficial for them as well. In other words, individuals who are going to get wages more than that determined by collective labor agreement are generally excluded from the scope of the collective labor agreement. Moreover, while trade unions are excluding someone from the scope, they are under supervision with respect to internal democracy in any case. They cannot easily exclude from the scope, they exclude some individuals by considering that they have opportunity to take higher wages due to they are skilled labors. It should be considered as an authority entitled to the union with respect to its policy." in his approach to examine the issue with respect to equal treatment principle (Ulucan, 1979).

According to Seza REİSOGLU (Reisoğlu, 1986); "Collective labor agreement is a private law contract composed in the consequence of free will of the parties. Normative quality of majority of the provisions of the agreement does not matter with respect to consider the agreement as a private law contract. Just as the other private law contracts, parties are free to assign the scope of the agreement and to exclude some workers from the scope. Exclusion of workers operating at listed tasks from the scope is indeed a natural result of the bargaining between parties. Exclusion from the scope may be based on many different reasons. For instances, employer may insist on exclusion of some workers performing some certain tasks in order to provide more superior rights than collective agreement".
In Clause 2 of Article 14 of 274 numbered Trade Unions Law, the provision of "Professional associations established in accordance with this law have to comply with parity among their members" is included, and hence, whether some workers who are member of the union shall be excluded from the scope or not was discussed. Supreme Court clearly accepted that members of the signatory union can be excluded from the scope as well in the last period. According to supreme court, individuals excluded from the scope of collective labor agreement are subjected to provisions of law but not provisions of collective labor agreement in severance pay calculation (9.C.C. 6.5.1974, 24604/8465, Employer, October, 1974, p.21; 9.C.C. 16.2. 1976).

Supreme Court maintained the same view in a decision (9.C.C. 30.5.1985, 2546/5437) regarding exclusion of part-time employees from the collective agreement in the new period. Affiliation with collective labor agreement is determined by the law. Accordingly, each worker who is member of the signatory union is affiliated with the Collective Labor Agreement. However, who are going to be included in the scope of Collective Labor Agreement or not and who shall be excluded can be decided by the parties of the agreement. Even, provisions of the agreement are not applied these workers although they are legally affiliated with the agreement due to they are members of the signatory union.

On the other hand, if some members of the union reach the conclusion that they are not protected, they can resign from the membership while they can also make effort to change the management of the union. Moreover, 2821 numbered Trade Unions Law have concluded a new regulation in this sense and have not included a provision stipulating equality among members in article 32 for the activities of trade unions so as to include conclusion of a collective labor agreement. The Law accepted the clause of "unions and confederations have to comply with the equality among their members in enabling their activities" for the article 33 regulating social activities of unions and confederations.

While parties of the collective agreement accept out of scope articles, they can apply this procedure for only certain positions, and they cannot determine out of scope employees by listing their names. Normative provisions of this agreement which is binding for the workers are only suitable for the assignment of general provisions.
Some positions can be excluded from the scope and all workers operating at this position cannot benefit from the collective labor agreement regardless of they are the members of signatory union or not. Benefiting of out of scope employees from the agreement by paying solidarity contribution is not possible as well.

Supreme Court also agrees with the idea (9.C.C. 20.5.1985, 2547/5436). In an event devolved to the Supreme Court, "it was decided that less material benefit than provided for a certain part of positions and working conditions, union-member workers, through Collective Labor Agreement or less benefit than total amount corresponding these conditions cannot be entitled. Complainant trade union sued employer due to it does not cut solidarity contribution from that staff benefiting from the agreement.

Employer request the dismissal of the suit due to it does not have to cut solidarity contribution in pursuant to article 9 of 2822 numbered law and article 61 of 2821 numbered law. According to Supreme Court, the base determined by the Collective Labor Agreement for out of scope employees is a limit measure. Other rights are not mentioned and prices of those are determined in individual relationship. Due to these employees get their rights through individual agreements rather than Collective Labor Law relations, and hence cut of solidarity contributions from these workers is not compulsory, responsibility of the employer is not a matter.

Similarly, benefiting of out of scope union-member employees from the agreement by paying solidarity contribution and benefiting from the union cannot be accepted as well. Acceptance of benefiting of out of scope employees from the agreement by paying solidarity contribution means the rejection of such authority of the parties. On the other hand, parties cannot exclude only workers who are not members of the union. In that case, the provision of benefiting from the collective labor agreement by paying solidarity contribution without approval of the signatory union will be eliminated."
Münir EKONOMİ also defends compliance of out of scope employees with the law through the idea of "An autonomous sphere has been left to agreement parties to regulate working conditions through concluding a collective labor agreement right in the Conclusion. We call it as the collective labor agreement autonomy. While parties agree and determine working conditions within the borders of this autonomy, they establish objective legal rules, these rules that constitute normative part of the agreement bind third parties and has the quality of law in the material meaning. Within the current system, parties have the competence to exclude from the scope on the basis of collective labor agreement and power." (Ekonomi, 1979).

Erol AKI also agrees with the idea of that in the case of they are excluded from the scope upon the acceptance of labor organizations after the proposal of employer party to exclude from the scope of the collective labor agreement, individuals serving at high level management position (like manager and chief) as well as qualified technical staff (like engineer, foreman) cannot benefit from the collective labor agreement even though they are members of the union (Akı, 1975).

In the preamble of a decision (9. C.C. 20.05.1985, 1985/5437) of Supreme Court 9th Civil Chamber summarized as "Who are going to be included in the scope of Collective Labor Agreement or not and who shall be excluded can be

decided by the parties of the agreement. Even, provisions of the agreement are not applied these workers although they are legally affiliated with the agreement due to they are members of the signatory union.
Payment of different wages, premiums or payments of benefit by employer to the workers because of either objective or subjective qualities, position, importance of the task, working conditions is not in conflict with equal treatment principle", following ideas are included.

"In Article 53 of the Constitution, right of concluding collective labor agreement between workers and employers to regulate mutual economic and social conditions and working conditions; in article 54, right to strike of workers in the case of dispute while discussing on this agreement; and in Article 51, right to establish trade unions of workers and employers in order to protect and develop economic and social rights and benefits in labor relations are regulated.
Formation, utilization and protection of these rights and freedoms, which are determined in the Constitution in general terms, within the borders of general rules of the Constitution, scope, contents, conclusion of a collective labor agreement and conditions to benefit from them have been regulated in 6356 numbered Law of Trade Unions and Collective Labor Agreement in more concrete and detailed provisions.

Provisions in Article 25 of 6356 numbered law with the title of guarantee of freedom of trade union include a part of provisions taking its source from the Constitution and ensuring positive – negative trade union freedom.
Relevant proscriptive and protective rules in mentioned Article 25 of 6356 numbered law are included in clauses 3 and 4. Here, after determination of that employer cannot make any discrimination on account of his membership or non-membership in a trade union or membership in different trade unions during the labor relation as a general rule; it is emphasized that provisions of collective labor agreement on wages, premiums, bonuses and money regarding payments of benefits shall be kept secret.

However, some points should be emphasized in order to make clarifications in compliance with their essence. Affiliation with a collective labor agreement and assignment of the scope of the collective labor agreement should not be confused. Affiliation with collective labor agreement has been determined by the law. Accordingly, each worker who is member of the signatory trade union is affiliated with the collective labor agreement. On the other hand, who are going to be included in the scope of collective labor agreement or not and who shall be excluded can be decided by the parties of the agreement. Even, provisions of the agreement are not applied these workers although they are legally affiliated with the agreement due to they are members of the signatory union.

Another important point is that principle of "equal treatment" by employer is not absolutely perceived. It should be accepted that payment of different wages, premiums or payments of benefit by employer to the workers because of either objective or subjective qualities, position, importance of the task, working conditions is not in conflict with equal treatment principle.
Moreover, differences in the application should not aim to prevent or restrict freedom of trade union that the Constitution and the Law intends to protect. Prevention of the abuse of the right is also essential."
Again, according to the idea included in another decision of Supreme Court 9th Civil Chamber (20.05.1985, 1985/5436); "Out of scope employees get their rights through individual agreements and not Collective Labor Law relations."
Another Supreme Court decision summary on this issue includes following statements (9.C.C. 12.01.1976, 1975/31395).

"Before determination of whether defendants are included in the scope of the collective labor agreement on the basis of their positions and tasks, to decide upon their avail of collective labor agreement increase is not correct."
In a decision of Supreme Court Assembly of Civil Chambers (Y.H.G.K. 25.4.1986, E985/9-835, K.986/449), following ideas are included: "Although membership in a trade union constitutes affiliation principle to benefit from Collective Labor Agreement, exclusion from the scope through the provision in the agreement is the exception of benefiting and out of scope member cannot request the rights arising from the agreement."

Devrim ULUCAN refers to this decision of Supreme Court Assembly of Civil Chambers and defends the idea of "Although it is claimed that exclusion from the scope is in compliance with principle of equality, exclusion from the

scope of a part of employees due to their special positions and quality of the task they perform is generally accepted in compliance with the law." (Ulucan, 1988).

2.2.2. Legally Negatory View on Out of Scope Employee Application

In application of many collective labor agreements, it is observed that workers serving at certain positions are kept out of scope of the collective labor agreement. Whether they are the members of the union concluding the collective labor agreement does not matter.

According to Kemal OĞUZMAN; "It cannot be said that such kind of provision to exclude from the scope, which is claimed to be accepted with the presumption of that employer is going to provide rights better than those provided in the collective labor agreement to out of scope employees due to they are close to the employer thanks to the task they serve, is always beneficial for the workers in question.

These workers, who is accepted that they cannot benefit from the concluded collective labor agreement even though they are members of the union, neither can conclude a new collective labor agreement nor benefit from the concluded labor agreement by paying solidarity contribution. Therefore, the workers in question cannot benefit from the right to collective labor agreement under the guarantee of the Constitution and this arises out of their will" (Oğuzman, -).

After pointing out that most of the workers excluded from the scope is not the member of trade unions, OĞUZMAN indicates that "such kind of an out-of-scope provision abolish the opportunity of these workers to become members of the unions". As likely as not, the aim is that; to drive them not to be members of the unions but to cut the Constitution off at the same time. Constitution recognizes collective labor agreement to the workers and workers can benefit from this right only through unions under the system placed after the decision of Constitutional Court.

When a worker is excluded from the scope, and exempted from the right of concluding collective labor agreement by the union, how can she/he benefit from the right of collective labor agreement? How can she/he utilize the rights such as benefiting from the collective agreement during a collective labor agreement duration, benefit from the right of collective labor agreement which are under the guarantee of the Constitution? Then, all these rights become hindered.

In my opinion, exclusion from the scope in this frame as the main point, which is also interpreted as completely excluding from the collective agreement, becomes in conflict with the Constitution.
The case changes if and only if it is interpreted as they can benefit from the Collective Agreement, but regardless of the fact that benefit or not, their opportunity to get some extra rights from the employer thanks to their position and the task they perform are reserved. Then, it can be discussed that whether it is valid or not for some other cases."
OĞUZMAN also rejects the ideas of that exclusion from the scope takes its source from Collective Agreement Autonomy and Power and suggest that "There are some forefront ones in the system of Supreme Court with respect to exclusion from the scope and they are workers who are not members of a union. They are completely out of scope. However, if you pay attention being excluded from the scope or not is a fact left to the will of the worker in all given examples. On the other hand, when the union and employer gather and decides exclusion of some workers from the scope, then workers are excluded from the scope involuntarily. Accordingly, I agree with the fact that someone can keep itself out of the scope of a collective agreement with its own will or establishment of provisions to enable it by the law and it would not be in conflict with the Constitution. Then on the contrary, if a provision of law is established that a particular category of workers cannot benefit from collective agreement after a law, they are always out of scope without their will; I wonder whether it is in conflict with the Constitution. In my opinion such kind of a law is in conflict with the Constitution. In short, we have no doubt about that it is an extremely wrong attitude. Now I mean its quality for being normative provision and law does not eliminate its conflict with the Constitution. As such kind of a provision of a law becomes in conflict with the Constitution, so I keep the opinion of that exclusion of workers from the scope through normative provisions of a collective agreement may become in

conflict with the Constitution in the sense of that eliminates right of collective agreement recognized by the Constitution to the workers without their will." (Oğuzman, 1988).

According to Can TUNCAY; "If the person who is excluded from the scope does not approve that, so this cannot be claimed against this person (Tuncay, 1988).
Because, benefiting from the collective labor agreement is primarily a rule for members of the union. In principle, possessing collective agreement competence of workers in their relations with the employer is a Constitutional right. To exclude that becomes invalid. When can it become valid? Only if the worker is persuaded to be excluded from the scope. However, then we cannot mention equality here. Here, equality principle cannot be based on. Where does equality prevail? More precisely, we should perceive from the equality that the rule is that equal treatments to the equals, different treatment to the different ones. In other words, relative equality is the matter not absolute equality. A part of individuals, who are excluded from the scope, are the individuals close to the employer, in other words they have a different situation from the others. Therefore, different treatment for those is a matter of course.
Hence, to claim equality here as a reason, I mean to base the invalidity of exclusion from the scope on the principle of equal treatment is not much correct (Tuncay, 1982).

Here, the reason should be lack of approval. As for approval, it may be that the fact of some individuals are going to be excluded from the scope a collective agreement has been decided in the statue of the trade union. Then, the member shall be deemed to approve that while being a member of the union. Therefore, exclusion from the scope become valid or exclusion from the scope afterwards may be accepted by the worker openly or tacitly.
Regulations other than that constitute a conflict with a Constitutional right even it is indirect."

Nuri ÇELİK says; "Since beginning yeas of Collective Labor Agreement order, employers suggested exclusion of individuals that they assume closer to employers and whose mental work is superior to physical work from the scope and trade unions accepted exclusion of such people as long as these people are not their members. In the case of those excluded from the scope want to benefit from the collective labor agreement, it is observed that they are not availed of the agreement by the employer even though they are members of the union. Upon the disputes about this issue, Supreme Court concluded that individuals excluded from the scope of collective labor agreement cannot benefit from the collective agreement even though they are members of the union" (Çelik, 1988) about the issue and suggests following ideas:
No regulation has been made on validity of agreement provision excluding the worker requesting to benefit from the Collective Labor Agreement from the scope in 6356 numbered Law of Trade Unions and Collective Labor Agreement. However, such kind of a regulation should be deemed void because it would be in conflict with the basis to ensure equality in activities of the union among members (a.26/3) and article 53 of the Constitution which entitles all workers to benefit from the collective labor agreement. However, Supreme Court accepted that union members excluded from the scope of collective labor agreement cannot benefit from the agreement. View of that the issue of who are going to be included in the scope of collective labor agreement has been left to appreciation and authority of the parties and, as a result of collective labor autonomy recognized to the parties, those excluded from the scope cannot from the agreement like the workers who are not the union members even though they are members of the union and will only be affiliated to provision of the law have been suggested by the proponents of Supreme Court's idea.

The content and limits of autonomy entitled to collective agreement parties are indicated in the Constitution and laws. Due to application of principle of equality in Trade Unions Law is necessary on the issue that is not solved in the Law of Collective Labor Agreement, Strike and Lock-out, it should be concluded that exclusion of union members from the scope in in conflict with this article and the principle of that all workers under the same conditions can benefit from the collective labor agreement rights as stipulated in the constitution. Otherwise, some workers would not be able to benefit from the rights provided by the agreement through the consensus of collective labor agreement parties. Due to right to conclude a separate collective labor agreement has not been recognized in our collective agreement system for those excluded from the scope, these workers are debarred from the Constitutional rights through the exclusion from the scope (Çelik, 2015). Moreover, trade unions are made

autonomous in such a wider aspect to debar their members, who are actual right owners, from the right of collective agreement and a contradictory situation emerges.

Indeed, prevention of benefiting from the activity of some members by the union that concludes the collective agreement and provide this activity to its members would be contradictory to the legal regulation stipulating provision of equality in services among members by the union. In the doctrine, it is suggested that if there is discrimination between out of scope employees, there may be something in conflict with equal treatment principle, but if there is a discrimination between those from different statues and some certain statues are excluded from the scope, then there may not be conflict with equal treatment principle. However, it should be noted that whereas it is possible to classify members in certain groups through non-arbitrary criteria for trade unions and avail them of the activities in various manners, it cannot be understood that to completely debar some workers from any activities without any rightful reason and in spite of their wishes.

Collective agreement service is only one of the activities of trade unions among those listed in the law, trade unions have to comply with equality among members in availing of these activities.
Trade unions treat differently through this application and transgress equality rıles and exclude some workers from the scope" (Çelik, 1988).

As for Turhan ESENER, he asks the question of "There is also another point that I could not decide on my own: I wonder whether a trade union can say to a worker I do not accept you to the union although it is applied for membership?" and gives the answer of "if a trade union is able to say to the worker I am sorry brother but I do not like your face and I do not accept you to the union, then it can exclude the worker from the scope in the same manner" (Esener, 1988).

According to Turhan ESENER, generation of a system accepting that a worker excluded from the scope would also be deemed to resign from the signatory union will be beneficial. Because membership of a worker in the signatory union and not being able to benefit from the collective labor agreement at the same time is not in compliance with the collective agreement system (Esener, 1978).

Nuri ÇELİK suggest that; "Being inspired from German Law, due to the view of workers excluded from the scope cannot benefit from the collective agreement just as those who are not members of the trade union and become only affiliated with the provisions of the law as a result of that the issue of who are going to be included or excluded from the scope of collective agreement and is left to the authority of the parties and collective agreement authority recognized the parties, in other words authority to establish rules having the quality of law provisions is not in compliance with the basis and collective agreement types of our country, it does not have enlightening character for us (Çelik, 1976). Most probably in Germany, exclusion of a part of workers from the scope is not the matter for those working at the same statues and in addition to separation into worker and servant (Angestellte) of employees (Arbeitnehmer) of a workplace in compliance with the legal principles there, only workers or only servants are included in a separate collective agreement and others are excluded from that agreement but included into the scope of other agreements, and even another agreement is concluded for apprentices (Lehrlinge). Even in German Law, other restrictions can be determined in addition to the groups indicated above, for instances it can be decided that an agreement is only valid for male workers of the workplace.

On the other hand, in any cases, it should be added that, there, employees who are not included into the scope of an agreement can be included in another one and various agreements having different contents and levels can be concluded with respect to both working conditions (only wages and all working conditions) and application sphere in the sense of place (neighborhood, region, district, country). While the concept of worker to be included in the agreement is single in Turkey, types and application of the agreements are similarly quite different from Germen Law. An exact comparison between these two countries is not possible in this aspect for the reasons mentioned.
Due to another collective labor agreement right is not recognized to the out of scope employees (Çelik, 2015), in that case, some workers become prevented from the rights provided by the agreement although they become members of

the union in order to protect and improve their economic and social rights and benefits as stipulated in the Constitution (a.51 and 53) and hence become debarred from their Constitutional rights" (Çelik, 1976) in his another critique from a different aspect.

As it can be seen, legal discussions on out of scope employees include various analysis so as to verify the determination of Jakob BURCKHARDT that "*To each eye, world of ideas and mentality present a different picture*" and completely different results can be reached (Burckhardt 1943).

3. Conclusion

Points about benefiting from collective labor agreements have been regulated in Article 39 of 6356 numbered Law of Trade Unions and Collective Labor Agreements. However, exclusion of some workers such as directors, chiefs, engineers and even all office employees which are members or able to be a member of labor unions from the scope of the agreement is an encountered case in the application of and this issue is regulated through scope articles included in collective labor agreements.

The circumstances of out of scope employees cause discussions. On the one hand of this debate on the application; the view of that the issue of who are going to be included in the scope of a collective labor agreement has been left to appreciation and authority of the parties and as a result of collective agreement autonomy entitled to the parties cannot benefit from the agreement even though they are members of the union just like those not members of the union and they can only be affiliated with legal provisions is suggested. As the opponent view, it is suggested that due to the fact that 6356 numbered Law of Trade Unions and Collective Labor Agreement is in conflict with the principle to provide equality among the members by the union in its activities (a.26/3) and the Article 53 of the Constitution that entitles all workers to benefit from the collective labor agreement, application of out of scope employees is not justifiable and such kind of settlements should be considered void. According to those supporting this idea, the content and limits of the autonomy recognized to the parties of a collective agreement have been determined by the Constitution and laws. Otherwise, a part of workers would not be able to benefit from the rights provided by the agreement through the consensus of the parties of regarding collective labor agreement. Due to any rights to conclude another collective labor agreement has not been recognized for those excluded from the scope in our collective agreement system, such workers become debarred from their Constitutional rights by being excluded from the scope.
Labor and employer unions criticize or defend the application of out of scope employees for their own reasons.

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