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A Closer Look at the Turkish Court of Cassation's Supervisory Power and Its Boundaries

> The Turkish Court of Cassation has been one of the most important authorities of the Turkish judicial system, which has been on duty since mid-1800s. Since the establishment of the Court of Cassation, it has served as the supreme court of our judicial justice system. But the recent decisions of the Court of Cassation made us question its supervisory power as the supreme court as well as the boundaries of this power.

Until the regional courts of appeal were established in 2016, only first instance courts and the Court of Cassation were operational. During this era, the Court of Cassation used its judicial power as a review of expediency by examining the merits of cases as well – in addition to the review of legitimacy – since this was the natural requirement of the binary judicial system which was in force at that time.

However, after the establishment of the regional courts of appeal in 2016, a triple judiciary system was adopted and in this system the regional court of appeal is an intermediary step between the first instance courts and the Court of Cassation. In this new period post-2016, the main duty assigned to the Court of Cassation is to act as a court of precedents. The Court of Cassation is not expected or entitled to conduct a review of expediency.

However, within the last two years, particularly in some reversing decisions rendered by the Court of Cassation in disputes related to the trademark and design law, the relevant chamber acted like inferior courts and examined the merits of the cases, carried out its own assessment by partially or fully ignoring the expert reports, as well as the initial considerations of inferior courts, mostly on technical matters related particularly to the merits of the case, such as:

- Comparison of trademarks;
- Comparison of the goods/services;
- Attentiveness of the relevant consumer group; and
- Well-known status of trademarks

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This has, therefore, exceeded the boundaries of its supervisory power.

Legislative regulations and the intended purpose of the system foresee that the appeal examination to be performed by the Court of Cassation is limited to a legitimacy examination.

For example, the decisions rendered by inferior courts (both first instance courts and regional courts of appeal) shall be examined solely in respect of its compliance with laws. This follows that a reversing decision to be issued by the Court of Cassation may not substitute the decisions of inferior courts and may not violate the discretionary power vested in specialised courts.

Performance of such examination by the Court of Cassation would mean annulment or disabling of the powers and duties assigned to the regional courts of appeal, which have jurisdiction to review the first instance courts' decisions in terms of both expediency and legitimacy.

If the Court of Cassation finds the inferior courts' decisions unlawful as a result of its legitimacy examination, it should render reversal decisions by not eliminating the discretion of the judges of inferior courts. For instance, the Court of Cassation may simply indicate which rule of law is incorrectly applied and – possibly – how it should have been applied.

Otherwise, if the Court of Cassation examines the merits of each case in a manner exceeding the scope of a legitimacy examination, the long years of examination and assessment performed by the judges of inferior courts based on their areas of special expertise, would become dysfunctional and vain.

Also, the workload of the Court of Cassation would not be reduced as intended by the transition into the triple justice system, on the contrary, it would increase, and the duties of the Court of Cassation as a court of precedents would be impeded as well.

It is hoped that the Court of Cassation will reconsider its supervisory power as well as the boundaries of this power and focus on its role to act as a court of precedents again, so that the case law of the Turkish courts may develop and flourish.