

DECISION OF THE CONSTITUTIONAL COURT
IN ITS PLENARY SITTING

Docket no : 2016/6 (Miscellaneous file)

Decision no : 2016/12

Date of judgment : 4/8/2016

I. SUBJECT

1. The present decision concerns an assessment as regards the legal status of two members of the Constitutional Court, Alparslan ALTAN and Erdal TERCAN, in accordance with Article 3 (1), which is entitled “*Measures related to the members of the judiciary and those considered as members of this profession*”, of the Decree Law no. 667 on Measures Taken within the Scope of State of Emergency.

II. PROCESS

2. It has been informed that two members of the Constitutional Court, Alparslan ALTAN and Erdal TERCAN, were taken into custody on 16 July 2016 on suspicion of being members of the Gülenist Terrorist Organization (FETÖ/PDY) in the scope of the investigation initiated by the Ankara Chief Public Prosecutor’s Office with regard to the offence of attempting to overthrow the constitutional order of the Republic of Turkey by use of coercion and violent means.

3. With the motion of the Presidency of the Constitutional Court dated 18 July 2016 (no. E.368/1645), it was decided that a preliminary examination be conducted in respect of the above-mentioned members under Article 16 *et seq.* of the Law on Establishment and Rules of Procedures of the Constitutional Court no. 6216 dated 30 March 2011 and Article 17 *et seq.* of the Internal Regulation of the Constitutional Court.

4. On the basis of disciplinary proceedings, information and documents about the investigation conducted in respect of the members concerned were requested from the Ankara Chief Public Prosecutor’s Office upon request of the Presidency of the Constitutional Court dated 20 July 2016 (no. 2016/15).

5. Meanwhile, it has been regulated by paragraph 1 of Article 3 of the Decree-Law no. 667 that *“Continuation in the profession of those who are considered to be a member of, affiliated with or have cohesion or connection or with terrorist organizations or structure/entities, organizations or groups established by the National Security Council as engaging in activities against the national security of the State, shall be found to be unsuitable and their dismissal from the profession shall be decided by the simple majority of the Plenary of the Constitutional Court in so far as the members of the Constitutional Court are concerned...”*

6. On 23 July 2016 the Ankara Chief Public Prosecutor’s Office submitted the relevant information and documents concerning the investigation to the Presidency of the Constitutional Court.

7. The preliminary examination report drawn up pursuant to paragraph 1(ç) of Article 17 of the Internal Regulation of the Constitutional Court was submitted on 24 July 2016 to the Presidency of the Constitutional Court.

8. The Plenary of the Constitutional Court convened on 26 July 2016 with a view to deliberating on the preliminary examination report and making assessments as regards the regulations recently introduced with the Decree-Law no. 667. Operative provisions of the decision of the Plenary (dated 26 July 2016 and Miscellaneous file no. 2016/5), which was rendered unanimously, read as follows:

It is decided that:

“1. an assessment is to be made pursuant to Article 3 of the Decree-Law no. 667 in respect of the members of the Constitutional Court, Alparslan ALTAN and Erdal TERCAN;

2. in order to be taken account of in the assessment in question;

a. the Ankara Chief Public Prosecutor’s Office is to be requested to communicate (as “classified”) in a swift manner the information and documents about the investigation conducted;

b. the members of the Constitutional Court, Alparslan ALTAN and Erdal TERCAN are to be invited to provide their written statements and a five-day time limit (until 1 August

2016) running from the date of notification is to be provided for them to submit their statements”.

9. On the same day, the written notification of the decision of the Plenary was provided to the Ankara Chief Public Prosecutor’s Office and the members concerned.

10. The members of the Constitutional Court, Alparslan ALTAN and Erdal TERCAN, submitted their written statement to the Presidency of the Constitutional Court on 28 July 2016 and on 31 July 2016, respectively.

11. With its letter of response of 2 August 2016 (docket no.2016/103606), the Ankara Chief Public Prosecutor’s Office informed that the information and documents with regard to the investigation conducted had been communicated on 23 July 2016 to the Presidency of the Constitutional Court.

III. THE FACTS

12. It is a known fact that an organization, which was established in 1960s by a person named Fetullah Gülen, which was described as a religious group until recently and which was referred by the names “Gülen Community”, “Hizmet Movement”, “the Community (*Cemaat*)” or “the Circle (*Camia*)”, extended and spread its activities over time in many areas, particularly including education and religion, and in more than a hundred countries.

13. The allegations that the real purpose of this organization was to take over the State, that to this end, members of this organization infiltrated into all public institutions and organizations, particularly in the Turkish Armed Forces (TAF), civil administration units, judiciary, law enforcement offices and educational institutions, and that members of this organization engaged in activities in line with the purposes of the organization rather than those of the State, have been matters of discussion among the public for a long time.

14. In the course of time, these allegations have gone beyond being matters of discussion among the public and have constituted the subject matters of numerous investigations and prosecutions. In those investigations and prosecutions, this organization was named as “the Fetullahist Terrorist Organization (FETÖ)” and/or as “the Parallel State Organization (PDY)”.

A. Structure and Activities of the FETÖ/PDY in General

15. In the scope of the investigations and prosecutions initiated, the following allegations were raised, in general, about the structure and activities of the FETÖ/PDY:

a. The organization has adopted an understanding that as a natural result of the divinity it attributed to itself, everything including country, State, nation, ethics, law and fundamental rights and freedoms, comes after the organization itself in terms of value.

b. The organization has strived attaining legitimacy in the society by means of its activities in the fields of education and religion.

c. The organization has created its cadres (*staff*) by way of upbringing youngsters it reached through the houses of heavenly light (*ışıkevleri*, i.e. student residents), schools, dormitories and private tutoring centres it owns.

d. The organization has a vertical hierarchal system which was created on the basis of obedience and compliance, and which consists of continent, country, state, province, district, quarter, neighbourhood and household imams (*leaders*) on the top of which stood Fetullah Gülen as “the İmam of the Universe”.

e. The fundamental structuring of the organization is in the form of chains connected to imams, each and every unit, except for the ruling class, has been organized as independent cells, thus it is ensured that each member of the organization only knows about immediate superior in charge and subordinate members of the organization.

f. The organization categorized all of its members in terms of their loyalty and fidelity, and members at the top category have been assigned as executives.

g. Within the organization, there is a separate structure, the members of which have been commissioned and known only by Fetullah Gülen himself, and those members supervise the inner functioning of the organization and report it to the leader.

h. The executives and members of the organization carry out their activities in confidentiality and have adopted communication methods that would ensure their confidentiality; a considerable number of its members use “alias”; its members are in an effort to show as if they belonged to different social groups with a view to preventing the disclosure of their identity to the structure, and it is therefore quite difficult to establish the link between the organization and its members.

- i. A certain proportion of its members' income is taken under the name of "benevolence (*himmel*)".
- j. Pressure is applied and several sanctions are imposed on those wishing to leave the organization.
- k. In accordance with the instruction of Fetullah Gülen, stating that "*You must be everywhere. If you are not everywhere, you are nowhere*", the organization has established an organizational structure within almost all public institutions and organizations, in particular the Turkish Armed Forces, the National Intelligence Organization, the National Police, judicial bodies, as well as civil organizations such as political parties, trade unions, foundations, associations and enterprises.
- l. The members of the organization, who serve as public officials, are more devoted to the organization than to the State.
- m. The organization has formed its own staff structure in public institutions in an unlawful manner by stealing the test questions for exams for employment and promotion in a position in public service and distributing them and enabled its members to be promoted to critical positions.
- n. Anonymous and unsigned tips have been submitted against the public officials who are not involved in the structure of the organization to undermine their reputation for the purpose of preventing their effectiveness (*promotion*) and broadcasts have been made through Internet or media for the same goal.
- o. Public officials in the public institutions who are involved in the organization have been encouraged to serve in strategic departments (personnel affairs, intelligence, informatics, private secretariat, accounting, etc.).
- p. A parallel structure to the existing administrative system has been established and this structure functions in a hierarchical order which provides for the designation of a responsible person (*abi*) for each institution and organization.
- r. Information pertaining to those who are not members of the organization has been recorded and the records have been archived.

s. Personal data and confidential information and documents of the State have been seized and archived through the public officials who are members of the organization in the judiciary.

t. The rate of the members of the organization serving in the public institutions and organizations is too high in comparison with its rate of the members in the society.

u. The organization has turned into a parallel State structure and formed a tutelage upon the State and the nation.

v. The organization aims to seize all the constitutional institutions of the State of the Republic of Turkey (legislative, executive and judicial powers) and then to govern the economic, social and political powers through a clan with oligarchic characteristics, by reshaping the State, society and individuals in accordance with its own ideology.

y. Political and economic alliances have been established at national and international level.

B. Investigations and Prosecutions against FETÖ/PDY

16. A great number of investigations and proceedings have so far been initiated in respect of the unlawful activities of FETÖ/PDY alleged to have formed an organizational structure as mentioned above. They include the following:

a. Criminal proceedings were initiated before the Martial Law Court against Fetullah Gülen for making propaganda in order to bring, albeit partly, the fundamental social, financial, political or legal systems of the State in line with the religious rules and beliefs in breach of the principle of secularism. As a result of the proceedings, Fetullah Gülen was convicted and his conviction was upheld by the Military Court of Cassation (decision no. 1973/146-272 of the Military Court of Cassation).

b. Criminal proceedings were initiated before the Ankara State Security Court No. 2 against Fetullah Gülen for establishing an organization in order to form a State-formation based on religious rules by changing the secular formation of the State. However, a decision on suspension of delivery of a judgment in this case was issued pursuant to the Law no. 4616 of 21 December 2000 on Conditional Release, Suspension of the Proceedings or the Execution of Sentences in respect of Offenses Committed before 23 April 1999 (decision of the Ankara State Security Court No. 2, with docket

no.2000/124 and decision no. 2003/20). According to the reports and letters sent by the Turkish General Staff and the gendarmerie and police departments within the scope of this case, Fetullah Gülen aims to establish an alternative system to the existing system of the State by forming an organizational structure compatible with the existing system and model of the State. In this connection, he has formed an alternative structure to the existing formation of the State in all areas by paying particular importance to establishing an organizational structure in all positions of the public sector, particularly in the fields of military, civil service, law and education. Moreover, he has established a system which functions under a chain of command in accordance with the military discipline rules.

c. Criminal proceedings were initiated against certain police officers alleged to be members of FETÖ/PDY for not preventing – in line with the aims of the organization– the murder of Hrant Dink, who was the chief editor of the magazine *Agos*, as a result of an armed assault in Istanbul on 19 January 2007 although they had prior knowledge of the incident (file with docket no. 2015/337 before the 14th Chamber of the Istanbul Assize Court).

d. Criminal proceedings were initiated against certain public officials alleged to be members of FETÖ/PDY for committing political and military espionage by intercepting the communications of the Prime Minister in his house and offices through technical devices (file with docket no. 2014/412 before the 7th Chamber of the Ankara Assize Court).

e. Investigation was initiated against certain public officials alleged to be members of FETÖ/PDY for eliminating the evidence (the deletion of user profiles relating to a project developed by the Intelligence Department of the Turkish National Police) in order to prevent the establishment of offences allegedly committed within the scope of the activities of the organization (investigation file no. 2014/74480 before the Ankara Chief Public Prosecutor's Office).

f. Criminal proceedings were initiated against certain public officials alleged to be members of FETÖ/PDY for wiretapping, for the purpose of espionage, the crypto phones produced by the Scientific and Technological Research Council of Turkey (TÜBİTAK) and provided to high-ranking State officials including the Speaker of the Grand National Assembly of Turkey (GNAT or the Turkish Parliament), the Prime

Minister, the Commander of the Turkish Armed Forces, the President of the Constitutional Court, the Deputy Prime Ministers, the Ministers and the Undersecretary of the National Intelligence Organization (file with docket no. 2015/202 before the 2nd Chamber of the Ankara Assize Court).

g. An investigation was initiated with the allegation that the confidential meeting held on 13 March 2014 in the Ministry of Foreign Affairs and attended by the Minister of Foreign Affairs, the Undersecretary of the Ministry of Foreign Affairs, the Undersecretary of the National Intelligence Organization and the Deputy Chief of the General Staff had been covertly audio recorded for purpose of political and military espionage and these recordings had been published on the internet (Investigation file no. 2014/47602 conducted by the Ankara Chief Public Prosecutor's Office). The alleged fact that this act had been carried out by the members of FETÖ/PDY was mentioned in the indictment docket no. 2016/24769 of 6 June 2016 issued by the Ankara Chief Public Prosecutor's.

h. A criminal case was initiated against the gendarmerie personnel (case file docket no. 2014/161 of the 7th Chamber of the Adana Assize Court) and judicial authorities (case file docket no. 2015/1 of the 16th Criminal Chamber of the Court of Cassation) concerned on the ground that a truck which contained loads that belonged to the National Intelligence Organization was unlawfully stopped and tried to be searched on 1 January 2014 and three trucks were stopped and searched in Adana and that an investigation was initiated against those members of the National Intelligence Organization. The alleged fact that these acts had been carried out by the members of FETÖ/PDY in accordance with the objectives of the said organization was mentioned in the indictment docket no. 2016/24769 of 6 June 2016 issued by the Ankara Chief Public Prosecutor's Office.

i. A criminal case was initiated against the alleged members of FETÖ/PDY on the ground that the investigation known as "Investigation into the Tawhid-Salam Organization" had been conducted in accordance with the objectives of FETÖ/PDY, and that telephone conversations of a large number of persons, including a number of high level public officials, journalists and scientists, had been unlawfully intercepted during the investigation in question (Investigation file no. 2014/41637 and indictment of the Istanbul Chief Public Prosecutor's Office).

j. An investigation was initiated against the public officials who were allegedly members of FETÖ/PDY on the ground that they had wiretapped the phones of high level public officials and obtained confidential political and military information (Investigation file no. 2016/80080 of the Ankara Chief Public Prosecutor's Office).

k. An investigation was initiated against the public officials who were allegedly members of FETÖ/PDY on the ground that the Branch of the Humanitarian Relief Foundation (IHH) in the Province of Kilis had been searched for purpose of espionage on 15 January 2014 (Investigation file no. 2015/4111 of the Van Chief Public Prosecutor's Office).

l. Allegations that persons who were allegedly members of FETÖ/PDY gave questions of the public service entrance exams or promotion exams to the members of the organization in advance were the subject of a large number of investigations (Investigation files nos. 2010/100074, 2015/26827, 2015/156193, 2015/79801, 2015/80510, 2015/80526, 2015/80534, 2015/18314, 2015/80555, 2015/80559, 2015/41561, 2016/3801, 2015/80539, 2015/80550, 2015/166002, 2015/98865, 2015/70581, 2015/37022, 2015/39600 conducted by the Ankara Chief Public Prosecutor's Office).

m. Criminal proceedings were initiated against two judges, who decided to release a number of suspects, who had been in detention within the scope of some investigations conducted in Istanbul and who had been allegedly members of FETÖ/PDY, on the ground that they allegedly rendered these decisions in accordance with the instructions of the same organization, of which they were members, even though they did not have such jurisdiction (Indictment of the Bakırköy Chief Public Prosecutor's Office dated 21 September 2015 and docket no. 2015/29385; see for the judgment of the Constitutional Court, *Mustafa Başer and Metin Özçelik*, application no. 2015/7908, 20 January 2016, in which the individual application lodged on the ground of alleged unlawful detention of judges in question was found inadmissible).

n. Criminal proceedings were initiated against seventy three executives of the organization, including the founder and leader of FETÖ/PDY, Fetullah Gülen, for founding and leading an armed terrorist organization, attempt of overthrowing the Government of the Republic of Turkey or preventing it from performing its duties, committing political and military espionage, embezzlement, aggravated fraud, forgery

of official documents, laundering of assets acquired as a result of an offence, and unlawful recording, acquisition or disclosure of personal data and delivering it to others (indictment of the Ankara Chief Public Prosecutor's Office, dated 6 June 2016 and docket no. 2016/24769).

C. Assessment of the National Security Council related to FETÖ/PDY

17. Within course of process, the National Security Council ("NSC") has adopted decisions to the effect that FETÖ/PDY poses a threat to the national security, that it is a terrorist organization and that it cooperates with other terrorist organizations.

18. In this context, relevant parts of the assessments of the General Secretariat of the NSC concerning FETÖ/PDY in the press announcements made related to the meetings of the Council are as follows:

a. Meeting held on 26 February 2014

"Issues and works being carried out concerning the security throughout the country has been assessed; in this regard, organizations and activities that pose a threat to the public peace and national security has been deliberated."

b. Meeting held on 30 April 2014

"Organizations that pose a threat to the national security and measures taken related to these organizations have been assessed."

c. Meeting held on 26 June 2014

"Information has been presented to the Council on the judicial and administrative activities carried out with respect to the illegal organizations within the State."

d. Meeting held on 30 October 2014

"It has been stressed that the fight against the parallel structures and illegal organizations, which pose a threat to the national security and disturb the public order and which carry out illegal activities under domestic and foreign legal disguise, will be resolutely maintained."

e. Meeting held on 30 December 2014

"The Council has been informed of the fight against the parallel State organization and illegal structures, and it has been stressed that the fight will be resolutely maintained."

f. Meeting held on 26 February 2014

“Information has been presented to the Council on the national and international works carried out against the parallel State organization and the illegal organizations under legal disguise.”

g. Meeting held on 29 April 2015

“Detailed information has been presented on the fight against the parallel State organization and the illegal structures, which pose a threat to the national security, and it has been stressed that the fight will be resolutely maintained.”

h. Meeting held on 29 June 2015

“It has been mentioned once again that the fight against all illegal organizations, notably the parallel State organization, which pose a threat to the national security, will be resolutely maintained.”

i. Meeting held on 2 September 2015

“It has been stated that the fight being carried out against the parallel State organization within and outside the country, including in terms of economy, will be resolutely maintained.”

j. Meeting held on 21 October 2015

“It has been reiterated that the resolute fight against the parallel State organization, which poses a threat to the national security and acts in cooperation with other terrorist organizations, will be maintained in a multidimensional way.”

k. Meeting held on 18 December 2015

“It has been reiterated that the fight being carried out against the parallel State organization within and outside the country will be resolutely maintained.”

l. Meeting held on 27 January 2016

“The fight being carried out within and outside the country against the internal and external threats to the national security (...) and against the parallel State organization has been assessed comprehensively...”

m. Meeting held on 24 March 2016

“Activities being carried out for the peace and security of our citizens and protection of public order have been discussed in detail. In this respect,(...) emphasis has been put on the application of measures taken against the parallel State organization.”

n. Meeting held on 26 May 2016

“The activities being carried out for the peace and security of our citizens and protection of public order, the stage reached in the fight against terror and terrorists, and the measures taken against the parallel State organization, which poses a threat to our national security and is a terrorist organization, have been deliberated.”

D. Structure and Activities of FETÖ/PDY in Judicial Bodies

19. The fact that FETÖ/PDY was organized particularly in specially authorized courts and prosecutor’s offices, which remained active until recently, that its members within the judiciary and security forces act in accordance with the instructions they receive from the organization’s imams and with the organization’s interests, and that they carry out practices containing serious legal issues in that regard have been discussed by the public for a long time.

20. In this context, in the indictment of 6 June 2016 issued by the Ankara Chief Public Prosecutor’s Office, it has been mentioned that a significant number of members of FETÖ/PDY continue to exist within the judiciary, that the organization has thousands of judges and prosecutors, who are in a position to render all kinds of unlawful decisions and use public power for the favour of the organization through jurisdiction when they wish. It has been also alleged in the indictment in question that prosecutions and investigations concerning a number of events followed closely by the public in the recent years were carried out by the members of FETÖ/PDY within the judicial organization and in accordance with the objectives of this organization and with the instructions given by the judiciary imams, and that unlawful practices were carried out consciously during these prosecutions and investigations. In this regard, it has been alleged that the organization used case files such as “Şemdinli”, “Ergenekon”, “Sledgehammer”, “Military Espionage”, “Revolutionary Headquarters”, “Oda TV” and “Match Fixing”, which led to intensive discussions in the public, in order to dismiss public officials, who were not members of the organization and worked in various State institutions and organizations, particularly the Turkish Armed Forces, and to neutralise individuals whom it considered as acting contrary to the organization’s interests within various civil environments.

21. In the cases mentioned, a considerable number of suspects on trial were acquitted, some proceedings were reopened and convictions were revoked. Judicial process in some cases is still ongoing. Alleged irregularity in some of these cases constituted the subject matter of violation judgments of the Constitutional Court (see *Sencer Başat and Others* [PS], App. No: 2013/7800, 18/6/2014; *Yavuz Pehlivan and Others* [PS], App. No: 2013/2312, 4/6/2015; *Yankı Bağcıoğlu and Others* [PS], App. No: 2014/253, 9/1/2015).

22. As regards the allegations mentioned above, disciplinary proceedings were conducted against some members of the judiciary, who were allegedly members of FETÖ/PDY, by the High Council of Judges and Prosecutors (HCJP) and they were dismissed from the profession; furthermore, prosecutions and investigations were conducted by the judicial authorities.

23. By the constitutional amendments of 2010, judges and prosecutors were given the opportunity to elect members to the HCJP among themselves. Accordingly, judges and prosecutors elect seven regular and four substitute members among civil judges and prosecutors; and three regular and two substitute members among administrative judges and prosecutors. Pursuant to the election system established, each voter is entitled to vote for eleven candidates in civil judiciary and for five candidates in administrative judiciary. In the elections held in 2014, the Association of Judges and Prosecutors (YARSAV) and the Platform for Unity in the Judiciary (YBP) declared the candidates they supported. Some candidates other than those supported by these two judiciary organizations stated that they run in the election as independent candidates (namely without acting together with other candidates). When the results of the election is examined, it is understood that ten candidates from civil judiciary, who stated that they would run in the election as independent candidates and who were alleged members of the organization in question or allegedly have connections with it according to the jurists, received block votes from thousands of judges and prosecutors, and two of these candidates were elected as substitute members of the HCJP; five candidates from administrative judiciary received block votes from hundreds of judges, and two of them were elected as regular members of the HCJP. This made the discussions spread in public concerning the fact that the organization of FETÖ/PDY is significant in the judicial bodies.

E. Organization and Activities of FETÖ/PDY within the Turkish Armed Forces

24. In order to increase the understanding of the coup attempt of 15 July 2016, it is appropriate to briefly mention the findings, assessments and predictions in the indictment of 6

June 2016 issued by the Ankara Chief Public Prosecutor's Office **shortly before the coup attempt**, which concerned the organization of FETÖ/PDY within the Turkish Armed Forces, its activities and the risks it poses to the security of the country. These findings, assessments and predictions can be summarized as follows:

- a. the Turkish Armed Forces is the institution to which FETÖ/PDY attach the greatest importance,
- b. The Turkish Armed Forces is the institution in which FETÖ/PDY has mostly employed its members and become dominant,
- c. Employment in the Turkish Armed Forces by FETÖ/PDY started a long time ago and the members of the organizations employed at the initial stage now have the rank of general or colonel,
- d. FETÖ/PDY specially trains its members who will become commissioned or non-commissioned officers,
- e. While approximately 400 personnel dismissed until 2003 for being a member of this organization, as from this date there is no personnel dismissed for the same reason,
- f. Personnel who are not members of this organization were discharged through certain investigations and proceedings, and instead of these personnel, the promotion of members of the organization is ensured,
- g. Air force pilots in particular, who are not members of this organization, were suspended from the institution in various ways,
- h. Significant portion of those, who have the rank of staff colonel, are members of this organization,
- i. FETÖ/PDY is a dominant power within the military justice and therefore investigations concerning the organization in question do not produce any results,
- j. This organization within the army has become so intense that it could impair the discipline in the army and cause weakness in the defence of the country,

- k. FETÖ/PDY has an armed organization, which is composed of its members in the commands of the armed forces, gendarmerie and police forces and contains almost ten thousand persons and which has a different hierarchical structure than the State,
- l. FETÖ/PDY is the largest, the most dangerous and the most organised terrorist organization that the State of the Republic of Turkey has ever faced throughout its history,
- m. FETÖ/PDY has gained armed strength, allowing it to change or overthrow the constitutional order, and it is the only organized power that could carry out a military coup,
- n. FETÖ/PDY makes the threats of military coup and civil war, relying on its effectiveness within the Turkish Armed Forces,
- o. There is a clear and imminent danger that FETÖ/PDY makes a coup attempt,
- p. Materialization of this danger leads to a widespread devastation for the State, the country might be driven into a civil war, millions of people might die and millions of refugees might arise, and the recovery of the State might not be possible,
- r. Elimination of FETÖ/PDY has now become a matter of survival of the state.

F. Coup Attempt dated 15 July 2016 and afterwards

25. On the night of 15 July 2016, in our country, a group organized in the Turkish Armed Forces, attempted to abolish the democratic constitutional order with the use of force and violence.

26. In the first statement made by the General Staff, it was indicated that 8.651 military personnel were involved in the mentioned attempt and 35 planes including fighter jets of the Turkish Armed Forces, 37 helicopters, 246 armoured vehicles including 74 tanks and approximately 4.000 light weapons were used.

27. With the use of planes and helicopters, bomb and armed attacks were made against many places such as the Turkish Parliament, Presidential Premises, Ankara Security Directorate, the Police Special Operation Forces of the General Directorate of Security, the National Intelligence Agency (MİT) during the attempt. An attempt to assassinate the President was made; the convoy travelling together with the Prime Minister's vehicle was shot with

firearms; many senior military officials including the Chief of Staff were taken hostage and numerous public institutions were occupied with the use of weapons or attempted to do so be occupied.

28. Civilians, who went out for protesting, and the security officials, who resisted against the coup attempt, were attacked with the use of planes, helicopters, tanks, the other armoured vehicles and light weapons. During these attacks, nearly 250 persons (including the police officers, soldiers and civilians) lost their lives and over 2.000 persons were injured.

29. The group which made the coup attempt, issued a declaration on behalf of the "Peace at Home Council" via the Turkish Radio and Television Association (TRT), which the group occupied. The declaration stated that the Turkish Armed Forces completely took over the administration of the country; the political power was elbowed out the administration of the State; the State's administration would be performed by the Peace at Home Council; it would be ensured that all individuals and institutions, which were traitors, would be tried before the courts; a martial law was proclaimed throughout the country, a curfew would be imposed until a second order and all kinds of measures would be taken until a new constitution would be prepared.

30. During the coup attempt, attacks were made against the relevant institutions and organizations for the purpose of interruption of television broadcasts and access to internet throughout the country and the buildings of some private television channels were occupied. The coup attempt was rejected by the constitutional bodies, including the President. Upon the call of the President, the public went out and reacted to the coup attempt. The coup attempt was resisted by the security forces complying with the orders and instructions of the legitimate State authorities. All political parties represented in the Turkish Parliament and the civil society organizations declared that they did not accept the coup attempt. Almost all of the mass media publications made broadcasts against the coup attempt. The chief public prosecutor offices launched investigations against the coup plotters across the country and ordered the security forces to arrest the coup plotters. Consequently, the coup attempt, which encountered with a comprehensive and strong resistance, was prevented.

31. Following the coup attempt, numerous military personnel, police officers and judicial officials, who were regarded as the members of the FETÖ/PDY, were taken into custody throughout the country. Besides, thousands of public officials including judicial officials were suspended.

32. The National Security Council made a recommendation to the Government to declare a state of emergency in accordance with Article 120 of the Constitution by the Recommendation no. 498, dated 20 July 2016. On 20 July 2016, the Council of Ministers, convened under the chairmanship of the President, decided to declare a state of emergency throughout the country for a period of ninety (90) days beginning from 21 July 2016, Thursday at 01.00. The said decision entered into force after it was published in the Official Gazette no. 29777, dated 21 July 2016.

33. The Decree-Law no. 667 on Measures Taken within the Scope of State of Emergency, which was deliberated by the Council of Ministers convened under the chairmanship of the President on 22 July 2016, entered into force following its publication in the Official Gazette no. 29779, dated 23 July 2016.

34. It was specified in the oral and written statements of the competent authorities and the general ground for the Decree-Law no. 667 that the members of the FETÖ/PYD performed the coup attempt. Within the scope of investigations launched just after the coup attempt, it was echoed publicly that some suspects allegedly involved in the coup attempt, made confessions regarding that both they and the mentioned attempt had connection with the FETÖ/PYD.

G. The Process of Criminal Investigations against the Members of the Constitutional Court

35. Within the scope of investigation file no. 2016/103606 launched by Ankara Chief Public Prosecutor's Office just after the coup attempt, the Public Prosecutor ordered to take Alparslan ALTAN and Erdal TERCAN, the members of the Constitutional Court, into custody, and issued search warrant for their houses, vehicles and offices, dated 16 July 2016, on the grounds that *"The offense of attempt to overthrow the Government and to abolish the constitutional order by force, still continues throughout Turkey and there is possibility that the members of the Fetullah(ist) Terrorist Organization, who commit this offense, could flee abroad and abscond"*.

36. By the decision of the 2nd Office of Ankara Magistrate's Judge dated 20 July 2016 and interrogation no. 2016/595, Alparslan ALTAN, the member of the Constitutional Court, was detained on remand together with some of judicial members for the offence of *"being a member of an armed terrorist organization"*. The relevant part of the decision on detention is as follows:

"It has been understood from the feature and nature of the offense imputed on the suspects, the current evidences, the decisions dated 17 July 2016 of the Court of Cassation and the Presidency Board of the Council of State, search and seizure minutes and all content of the case file that concrete evidences indicating strong criminal suspicion concerning that they committed the charged offense, existed; the charged offense was among catalogue offenses stipulated in Article 100 of the Criminal Procedure Code; the arrest decision was suitable considering the amount of penalty stipulated in the law; a conditional bail decision would be insufficient in the event that the suspects could flee and obfuscate the evidences. Thus, it was individually [decided] that the suspects shall be DETAINED ON REMAND in accordance with Article 100 and et seq. of the Criminal Procedure Code."

37. By the decision of the 5th Office of Ankara Magistrate's Judge dated 20/7/2016 and interrogation no. 2016/437, Erdal TERCAN, the member of the Constitutional Court, was detained on remand together with some of judicial members for the offence of "being a member of an armed terrorist organization". The relevant part of the decision on detention is as follows:

"It has been decided individually that, pursuant to Article 101 of the CCP, the suspects, (...) Erdal Tercan, (...) shall be DETAINED ON REMAND in proportion to the imputed offence, in line with the measure in question and within the scope of the legal arrangements pertaining to Article 100 of the CCP and the conditions for detention on remand set out in Article 5 of the ECHR on the grounds that there is concrete evidence in the case-file which indicates existence of strong suspicion that the suspects committed the offence of being a member of an armed terrorist organization; that there is still an immediate and actual threat in this respect; that the suspects may abscond or obfuscate the evidence and that the practice of conditional bail would accordingly remain insufficient and on the ground of the decision of the Presidency Board of the Council of State dated 17/07/2016 and no. 2016/27, the decision of the First Presidency Board of the Court of Cassation dated 17/07/2016 and 244/A and the decision of the High Council of Judges and Prosecutors on the suspects dated 17/07/2016."

38. On the other hand, by the decision of the 2nd Office of the Ankara Magistrate's Judge dated 1/8/2016 and Miscellaneous file no. 2016/4136, it has been decided that an injunction would be imposed on the Constitutional Court members, Alparslan ALTAN's and Erdal TERCAN's immovable properties; land, marine and air transportation vehicles; claims before the real and legal persons; negotiable instruments; if any, partnership interests in the companies and cooperatives of which they are a partner; safe-deposit box assets; all foreign exchange

holdings and foreign exchange accounts in banks and other financial institutions; term deposit accounts; other accounts even if having no fixed term other than the payroll accounts; and, as to their payroll accounts, the remaining amount following withdrawal of the sum of money amounting to their last salaries in each month for their monthly expenses.

IV. RELEVANT DOMESTIC LAW

39. The relevant parts of the Preamble of the Constitution are as follows:

“(…). The Constitution embodies(…)

The absolute supremacy of the will of the nation, the fact that sovereignty is vested fully and unconditionally in the Turkish nation, and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from liberal democracy and the legal system instituted according to its requirements;

(…)

That no protection shall be accorded to an activity contrary to Turkish national interests (…).

This Constitution, which is to be embraced with the IDEAS, BELIEFS, AND RESOLUTIONS it embodies below should be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit,

Is entrusted by the Turkish nation to the patriotism and nationalism of its democracy-loving sons and daughters.”

40. Article 2 of the Constitution entitled “*Characteristics of the Republic*” is as follows:

“The Republic of Turkey is a democratic, secular and social state governed by the rule of law; (…); respecting human rights; (…), and based on the fundamental tenets set forth in the Preamble.”

41. Article 5 of the Constitution entitled “*Fundamental Aims and Duties of the State*” is as follows:

“The fundamental aims and duties of the state are; to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace, and felicity of the individuals and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individuals in a manner incompatible with the principles of justice and of the social state governed by the rule of law; and to provide the conditions required for the development of the individual’s material and spiritual existence.”

42. Article 6 of the Constitution entitled “Sovereignty” is as follows:

“Sovereignty is vested fully and unconditionally in the Turkish nation.

The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution.

The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any state authority which does not emanate from the Constitution.”

43. Article 15 of the Constitution entitled “Suspension of the Exercise of Fundamental Rights and Freedoms” is as follows:

“In times of war, mobilization, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual’s right to life, and the integrity of his or her material and spiritual entity shall be inviolable except where death occurs through lawful act of warfare; no one may be compelled to reveal his or her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive, nor may anyone be announced guilty until so proven by a court judgment.”

44. Article 91 of the Constitution entitled “the Authorization to Enact Decree Law” of the Grand National Assembly of Turkey is as follows:

“The Grand National Assembly of Turkey may empower the Council of Ministers to issue decree laws. However, the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter cannot be regulated by decree laws except during periods of martial law and states of emergency.

The empowering law shall define the purpose, scope, principles, and operative period of the decree law, and whether more than one decree will be issued within the same period.

Resignation or fall of the Council of Ministers, or expiration of the legislative term shall not cause the termination of the power conferred for the given period.

When approving a decree law before the end of the prescribed period, the Grand National Assembly of Turkey shall also state whether the power has terminated or will continue until the expiry of the said period.

Provisions relating to the decree laws issued by the Council of Ministers convening under the chairmanship of the President of the Republic in time of martial law or states of emergency, are reserved.

Decree laws shall come into force on the day of their publication in the Official Gazette. However, a later date may be indicated in the decree law as the date of its entry into force.

Decree laws shall be submitted to the Grand National Assembly of Turkey on the day of their publication in the Official Gazette.

Empowering laws and decree laws which are based on the former shall be discussed in the committees and in the plenary sessions of the Grand National Assembly of Turkey with priority and urgency.

Decree laws not submitted to the Grand National Assembly of Turkey on the day of their publication shall cease to have effect on that day and decree laws rejected by the Grand National Assembly of Turkey shall cease to have effect on the day of publication of the decision in the Official Gazette. The amended provisions of the decree laws which are approved as amended shall enter into force on the day of their publication in the Official Gazette.”

45. Relevant parts of Article 104 of the Constitution entitled “*Duties and Powers*” of the President of the Republic are as follows:

“The President of the Republic is the Head of the state. In this capacity he shall represent the Republic of Turkey and the unity of the Turkish Nation; he shall ensure the implementation of the Constitution, and the regular and harmonious functioning of the organs of state.

To this end, the duties he shall perform, and the powers he shall exercise, in accordance with the conditions stipulated in the relevant articles of the Constitution are as follows:

(...)

b) Those relating to executive functions:

(...)

to proclaim martial law or state of emergency, and to issue decree laws in accordance with the decisions of the Council of Ministers under his chairmanship,

(...)”

46. Article 120 of the Constitution entitled “*the declaration of a State of Emergency on Account of Widespread Acts of Violence and Serious Disruption of Public Order*”, which is “*one of the administrative procedures of emergency*” is as follows:

“In the event of serious indications of widespread acts of violence aimed at destroying the free democratic order established by the Constitution or fundamental rights and freedoms,

or serious disruption of public order because of acts of violence, the Council of Ministers convening under the chairmanship of the President of the Republic may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months after receiving an opinion from the National Security Council.”

47. Article 121 of the Constitution entitled “*Procedure as to the State of Emergency*” is as follows:

“Where a state of emergency is declared in accordance with the provisions of Articles 119 and 120 of the Constitution, that decision shall be published in the Official Gazette and shall be submitted immediately to the Grand National Assembly of Turkey for approval. If the Grand National Assembly of Turkey is in recess, it shall be summoned to meet immediately. The Assembly may alter the duration of the state of emergency. Upon the request of the Council of Ministers, the Assembly may prolong the duration each time for a period not exceeding four months or may terminate the state of emergency.

The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of state of emergency in accordance with Article 119 and, applicable according to the nature of each kind of state of emergency, the procedure as to how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sort of powers shall be conferred on public servants, what kind of changes shall be made in the status of officials, and the procedure governing emergency rule, shall be regulated by the Law on State of Emergency.

During the state of emergency, the Council of Ministers convening under the chairmanship of the President of the Republic may issue decree laws on matters necessitated by the state of emergency. These decree laws shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Internal Regulation”.

48. Relevant parts of Article 125 of the Constitution entitled “*Judicial Remedies against All Actions and Acts of Administration*” are as follows:

“Recourse to judicial review shall be available against all actions and acts of administration...

(...)

If the implementation of an administrative act should result in damages which are difficult or impossible to be redressed, and at the same time this act is clearly unlawful, then a stay of execution may be decided upon stating the grounds thereof.

The law may restrict the issuing of stay of execution orders in cases of state of emergency, martial law, mobilisation and state of war, and for reasons of national security, public order and public health.

(...)”

49. First Paragraph of Article 148 of the Constitution entitled “*the Functions and Powers*” of the Constitutional Court is as follows:

“The Constitutional Court shall examine the constitutionality in respect of both procedure pursued and substance of laws, decree laws and the Internal Regulation of the Grand National Assembly of Turkey and (additional sentence: On 7/5/2010 and by Article 18 of the Law no. 5982) shall conclude the individual applications. The constitutional amendments shall be examined and verified only with regard to their procedure pursued. However, no action shall be brought before the Constitutional Court with the alleged unconstitutionality as to the procedure pursued or substance of decree laws issued during a state of emergency, martial law or in time of war.”

50. Relevant parts of Article 138 of the Constitution entitled “*Independence of the Courts*” are as follows:

“Judges shall be independent in the discharge of their duties and give decisions in accordance with the Constitution, legislations and law, and their conscientious conviction.

No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

(...)”

51. Article 139 of the Constitution entitled “*Security of Tenure of Judges and Public Prosecutors*” is as follows:

“Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post.

Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill-health condition and those determined as unsuitable to remain in the profession are reserved.

52. Articles 1, 2, 3 and 4 of the Law on the State of Emergency dated 25 October 1983 and no. 2935 read as follows:

Article 1 – Aim of this Law is to determine in what conditions a state of emergency may be declared and its procedure together with the principles to be applied in cases of a state of emergency in cases;

(...)

b) where serious indications of widespread acts of violence aimed at destroying the free democratic order established by the Constitution or fundamental rights and freedoms, or serious disruption of public order because of acts of violence.

Article 2 – This law includes provisions as to declaration of state of emergency, and for the purpose of determining provision for every kind of state of emergency, how fundamental rights and freedoms shall be restricted or suspended, how and by which means the measures required by the state of emergency shall be taken, the scope of the powers to be vested in the public officials, the changes to be made in the status of the officials and the administrative procedures of the emergency.

Article 3- The Council of Ministers convening under the chairmanship of the President of the Republic shall declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months,

(...)

b) After receiving the opinion of the National Security Council, in cases where serious indications of widespread acts of violence aimed at destroying the free democratic order established by the Constitution or fundamental rights and freedoms, or serious disruption of public order because of acts of violence.

The decisions of state of emergency shall be published in the Official Gazette and immediately submitted for approval of the Grand National Assembly of Turkey. If the Grand National Assembly of Turkey is in recess, it shall be summoned to meet immediately. The Assembly may alter the duration of the state of emergency. Upon the request from the Council of Ministers, the Assembly may prolong the duration each time for a period not exceeding four months or terminate the state of emergency.

The Council of Ministers, after declaring a state of emergency in accordance with provision (b) above, shall receive the opinion of the National Security Council before making a decision on questions related to the prolongation of the duration, alteration of the scope, or termination of the state of emergency.

The grounds for taking the decision of state of emergency, its duration and scope shall be announced on the Turkish radio and television and, if deemed necessary by the Council of Ministers, through other means.

Article 4 - During the state of emergency, the Council of Ministers convening under the chairmanship of the President of the Republic, may issue decree laws on matters necessitated by the state of emergency without being subject to the restrictions and procedures laid down in Article 91 of the Constitution. Such decree laws shall be published in the Official Gazette and submitted to the approval of the Grand National Assembly of Turkey.”

53. Relevant articles of the Decree-Law no. 667 are as follows:

“Article 1 – (1) The aim of this Decree Law is to establish measures that must necessarily be taken within the scope of attempted coup and fight against terrorism under the state of emergency declared throughout the country by the Decree Law of the Council of Ministers dated 20 July 2016 and numbered 2016/9064, and to determine procedures and principles relating to these measures.

Article 3 – (1) Continuation in the profession of those who are considered to be a member of, affiliated with or have cohesion or connection with terrorist organizations or structure, organizations or groups established by the National Security Council as engaging in activities against the national security of the State, shall be found to be unsuitable and their dismissal from the profession shall be decided by the simple majority of the Plenary of the Constitutional Court in so far as the members of the Constitutional Court are concerned; by the Board of the First Presidency of the Court of Cassation in so far as Presidents of Chambers of the Court of Cassation and its members are concerned; by the Board of Presidency of the Supreme Administrative Court in so far as the Presidents of Chambers of the Supreme Administrative Court and its members are concerned; by the Plenary of the High Council of Judges and Prosecutors in so far as judges and prosecutors are concerned; and by a commission, consisting of President of a Chamber and a member to be determined by the President and Vice Presidents of Court of Accounts under the chairmanship of the President of Court of Accounts in so far as members of profession of the Court of Accounts are concerned. Firearms licenses and special passports of those whose dismissal from the profession is decided shall be cancelled and they shall be evicted from publicly-owned houses or houses owned by a foundation in which they live within fifteen days.

(2) Those who hold office as candidates of judicial and administrative judge and prosecutor positions on the date on which this Decree Law enters into force may be appointed as a judge or prosecutor, regardless of duration of their candidacies, if they are admitted to the

profession by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice.

Article 4 – (1) Those who are considered to be a member of, affiliated with or have cohesion or connection with terrorist organizations or structure/entities, organizations or groups, established by the National Security Council as engaging in activities against the national security of the State shall be dismissed from public service;

a) upon the proposal of the Force Commander concerned, with the recommendation of the Chief of the General Staff and by the approval of the Minister of Defence in so far as the personnel who are subject to Law no. 926 on the Turkish Armed Forces Personnel (dated 27 July 1967) are concerned,

b) upon the proposal of the Commander of the Gendarmerie Forces and by the approval of the Minister of Interior in so far as the personnel who are subject to Law no. 2803 (dated 10 March 1983) on Organization, Duties and Powers of the Gendarmerie are concerned,

c) upon the proposal of Coast Guard Commander and by the approval of the Ministry of Interior in so far as the personnel who are subject to the Law no. 2692 (dated 9 July 1982) on Coast Guard Command are concerned,

ç) by the approval of the Minister of Defence in so far as the personnel who work for the Ministry of Defence are concerned,

d) upon the proposal of the President of the Council of Higher Education and by the decision of the Council of Higher Education in so far as the personnel who are subject to the Law no. 2914 on Higher Education (dated 11 October 1983) are concerned,

e) upon the proposal of a commission that is established by the governor and meets under the chairmanship of the governor and by the approval of the Minister of Interior in so far as the personnel of local administrations are concerned,

f) upon the proposal of the commission that is established by the relevant or related Minister and meets under the chairmanship of the highest administrator of the institution or organization concerned, and by the approval of the relevant Minister, in so far as the personnel, employed in all kinds of positions and status (including workers) who are subject to the Law no. 657 on Civil Servants (dated 14 July 1965) and other legislation except for those set out in Article 3 of this Decree-Law, are concerned,

g) upon the proposal of chief of the department and by the approval of the chief who is authorized to appoint in so far as the personnel employed in all kinds of positions and status

(including workers) in other institutions that are not under the authority of, or associated with a Ministry.

(2) Those dismissed from service under paragraph one shall not anymore be employed in public service, and they shall not, directly or indirectly, be assigned; all kinds of membership in a board of trustees, a board, a commission, a board of management, a supervisory board or a liquidation board under the responsibility of those dismissed from service and their other tasks shall be deemed to have ended. Provisions of this paragraph shall apply to those who perform a task set out in this paragraph but do not have the status of public official.

(3) Firearm licenses and pilot licenses of those dismissed from service under this Article shall be cancelled, and they shall be evicted from publicly-owned houses or houses owned by a foundation in which they live within fifteen days. These persons shall not be a founder, co-founder or personnel of private security companies.

(4) Appointment shall be made to the personnel cadres and positions of personnel, dismissed from service under this Article, in a number to be determined by the Council of Ministers without being subject to any restrictions imposed by the Law on Central Administration Budget and other legislation.

V. EXAMINATION AND REASONING

A. Assessment on Constitutionality of the Facts which led to Declaration of State of Emergency

54. In the preamble of the Constitution, emphasis is placed on the absolute supremacy of the nation's will, and it is, as a principle, stated that sovereignty is vested fully and unconditionally in the Turkish Nation, that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from the "liberal democracy" indicated in the Constitution and the "legal system instituted according to its requirements".

55. In Article 2 of the Constitution, "being based on the fundamental tenets set forth in the preamble" and "being a democratic state respecting human rights governed by rule of law" are set out among the fundamental characteristics of the Republic of Turkey.

56. The issues concerning sovereignty set out in the preamble of the Constitution as principles are laid down in Article 6 as provisions. According to the mentioned provision, sovereignty belongs to the Nation without any restriction or condition. The Turkish Nation shall exercise its sovereignty through the authorized organs, as prescribed by the principles set forth

in the Constitution. The exercise of sovereignty shall not be delegated by any means to any individual, group or class. No person or organ shall exercise any state authority that does not emanate from the Constitution.

57. Section 1 of the Constitution, which sets forth the basic principles and institutions of the democratic constitutional order, lays down the “general principles”, the relevant ones of which are mentioned above; Section 2 lays down the “fundamental rights and duties”; and Section 3 lays down the “fundamental organs of the Republic”.

58. In Section 3, fundamental organs of the Republic through which the nation shall exercise its sovereignty are set out as follows: the Grand National Assembly of Turkey as “legislative power” (Article 75 and et seq.), the President and the Council of Ministers as “executive power” (Article 101 and et seq.) and independent and impartial courts as “judicial power” (Article 138 and et seq.).

59. Considering the principles set forth in the preamble of the Constitution, characteristics of the State set out in Article 2, ownership of sovereignty and the way of its exercise and systematics of the Constitution as a whole; it is inferred that inseparable links have been forged among “sovereignty”, “way of exercise of sovereignty”, “nation’s will”, “democracy”, “rule of law” and “human rights”. As is the case with all civilized societies, the nation shall be the source of sovereignty, the sovereignty shall be exercised -directly or indirectly- through the organs authorized by the nation’s will, the nation’s will shall emerge in a democratic order, exercise of the sovereignty through authorized organs shall be accomplished in accordance with the principles of democracy, in particular the rule of law, and by respecting human rights.

60. A coup attempt amounts to an attempt of overthrowing or changing the constitutional order by force by a group which is not the source of sovereignty and which is not among the organs authorized by the nation to exercise the sovereignty. In the event that the coup attempt becomes successful, democratic constitutional order and supremacy of the nation’s will are overthrown, and a group of tyrants takes control of the sovereignty which belongs to the nation in the democratic order- and accordingly each individual forming it. In this case, democracy and rule of law are out of question. Accordingly, in such an order, there will not be any mechanism which guarantees fundamental rights and freedoms of the individuals.

61. For the reasons explained above, it is an indisputable truth that the coup attempts to constitute clear and serious attacks against the following principles set out in the Constitution, which are indispensable as regards democratic social order: “sovereignty belongs to the nation”, “sovereignty shall be exercised through authorized organs”, “the exercise of sovereignty shall not be delegated by any means to any individual, group or class”, “no person or organ shall exercise any state authority that does not emanate from the Constitution”, “democracy”, “rule of law” and “respect for human rights”. In this regard, one of the most dangerous threats against a democratic society -maybe the most dangerous one- are the coup attempts.

62. Many times, coups have been staged or coup attempts have been made in our country since the multi-party system was introduced. Our nation is the primary witness of the serious threat against the democratic constitutional order and human rights posed by the persons who take control of the nation’s will and sovereignty through coup attempts.

63. At the night of 15 July 2016, a group which was secretly organized within the Turkish Armed Forces attempted to overthrow the constitutional order, and this attempt was prevented thanks to resolute resistance of all legitimate elements of a democratic society. Particularly, our nation whose sovereignty was attempted to be taken control by force, the organs authorized to exercise the sovereignty on behalf of the nation (President, the Turkish Parliament, Council of Ministers and judicial institutions), all political parties which are indispensable elements of a democratic society, non-governmental organizations, media organs and security forces who received orders and instructions from the legitimate democratic authority all together displayed resistance of sovereignty and democracy. Indeed, by its statement declared in the first hours on the night of the coup attempt while conflicts were ongoing, the Constitutional Court also defined this attempt as “an anti-democratic attempt against the constitutional order” and explicitly rejected it.

64. The coup attempt concretely revealed the seriousness of the threats against democratic constitutional order and human rights posed by those who attempted to take control of the nation’s will and its sovereignty. During this attempt, attacks were carried out against the nation, which is the source of sovereignty without any restriction or condition, the organs which exercise the sovereignty on behalf of the nation, media organs which are indispensable elements of democracy and security forces who took action in line with the orders and instructions of the legitimate democratic authority. The unarmed persons who took to the streets in order to protect their sovereignty and will performed demonstrations against the coup and who enjoyed their

fundamental rights were slaughtered and injured with arms and bombs. In this way, their fundamental rights and freedoms, in particular their rights to life, were widely breached.

65. The Turkish Parliament, one of the basic institutions of the democratic public order and which represents directly the nation's will, was bombed by fighter aircrafts several times; the President, the head of the State, was attempted to be assassinated; the Prime Minister was harassed by use of arms; a raid was carried out in the Turkish Radio and Television Association, free broadcast streaming was interrupted and plotters had the coup statement read by use of force; a number of private television channels which broadcast across the country were attempted to be raided and their broadcast was attempted to be interrupted; a great number of police officers and military officers acting in line with the orders and instructions of the legitimate authority were martyred or wounded by way of either being targeted directly or in the course of the conflicts.

66. With regard to assessment of seriousness of the threat against democratic constitutional order, which was posed by the coup attempt at the night of 15 July 2016; it is not sufficient to take into account the concrete damages alone caused by the prevented attempt. The risks which might have occurred must also be assessed, if the coup attempt could not have been prevented within a short period of time and had become successful. If the nation, owner of the sovereignty, and all elements of the democratic constitutional order had not prevented the coup attempt with a resolute resistance within a short period of time, they would either have accepted the absolute supremacy of a group of tyrants and would have been subjected to their will, which cannot be controlled through democratic means, or they would have continued to resist. The former presumption would have amounted to death of a nation in terms of democracy. Only a small number of evil could that much humiliate a nation whose will and sovereignty was taken control by force. The latter presumption of continuance and proliferation of the conflicts would have caused the risk, as a close, serious and clear threat, that the state authority, even the state would be completely overthrown. The current situations of our neighboring countries can be witnessed by the entire world as the most painful examples of disorder and chaos where the most fundamental rights of the individuals are under attack every single day in an environment where state authority has been overthrown. They do not even live in a democratic order, as they wish to do. The fact that the coup attempt was carried out during the days when our country has been an open target for many terrorist organizations increased the severity of this risk.

67. It is inferred from all of these assessments as a whole that the coup attempt constitutes an existing and serious threat against not only the democratic constitutional order but also the “national security”, which has close relations with it. The national security has been regarded as a ground for restriction of fundamental rights and freedoms in the Constitution and international documents concerning protection of human rights. Striking the balance between liberty and security has become one of the most important aims of modern democracies. It is not possible to maintain democratic order and put into practice the freedoms in an insecure place.

68. For the reasons explained above, it must be concluded that 15 July coup attempt, which has gone down in the democratic history of Turkey as a dark mark, is one of the most serious attacks -maybe the most serious one- against the democratic constitutional order, fundamental rights and freedoms of the individuals and the national security.

B. The Measures Provided by the Decree-Law no. 667

69. The fundamental aims and duties of the State such as “protecting the Republic and democracy”, “ensuring the welfare, peace, and felicity of the individuals and society”, “striving for the removal of obstacles which restrict the fundamental rights and freedoms of the individual” and “providing the conditions required for the development of the individual’s material and spiritual existence” are embodied in Article 5 of the Constitution.

70. Although the coup attempt was *de facto* prevented; taking measures in order to eliminate the dangers against the democratic constitutional order, fundamental rights and freedoms, national security and to prevent future attempts is not only within the scope of the state’s authority, it is also a duty and responsibility towards individuals and society pursuant to Article 5 of the Constitution.

71. In some cases, it may not be possible for the state to eliminate the threats against democratic constitutional order, fundamental rights and freedoms and national security through ordinary administration procedures. Accordingly, it may be necessary to impose extraordinary administration procedures until these threats are eliminated. “Extraordinary administration procedures” are provided in the Constitution with a view to enabling it, and one of them is the “declaration of state of emergency” which is set out in Article 120 of the Constitution.

72. According to Article 120 of the Constitution, in the event of serious indications of widespread acts of violence aimed at the destruction of the “free democratic order established

by the Constitution” or of “fundamental rights and freedoms”, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.

73. Indeed, after the coup attempt was de facto prevented; the Council of Ministers meeting under the chairmanship of the President, after receiving consultation from the National Security Council, declared a state of emergency throughout the country for ninety (90) days, being effective as from 21 July 2016 at 01.00 a.m. This decision was approved by the General Board of the Turkish Parliament on the same day.

74. One of the opportunities provided in the Constitution for elimination of the threats against democratic constitutional order and fundamental rights and freedoms, during the state of emergency, is to grant the Council of Ministers, convening under the chairmanship of the President, the power to issue decree laws on “matters necessitated by the state of emergency” in accordance with Article 121/3 of the Constitution.

75. Within this scope, the Council of Ministers that convened under the chairmanship of the President issued the Decree-Law no. 667 which entered into force after being published in the Official Gazette no. 29779 of 23 July 2016. The reasoning of the Decree-Law is as follows:

“On 15 July 2016, a widespread terrorist activity was carried out across the country through a coup attempt against the Republic of Turkey by a group of traitors wearing military uniforms, who infiltrated into the Turkish Armed Forces, a number of public officers and civil elements taking actions together with them, all of whom are the members of the Fetullahist Terrorist Organization (FETÖ/PDY) which has also been determined as a terrorist organization by the decision of the National Security Council.

Through the coup attempt by the members of FETÖ/PDY, democratic legal order provided by the Constitution of the Republic of Turkey was attempted to be destroyed by use of force and violence and a totalitarian regime was attempted to be established instead; the Turkish Parliament was intended to be demolished and the Veteran Parliament of Turkey was intended to be prevented from performing its duties; the Government of the Republic of Turkey was attempted to be overthrown and it was attempted to be prevented from performing its duties; attempts were made on lives of innocent civilians, security forces and public officers carrying out their duties; and the President elected by public votes was attempted to be assassinated.

(...)

Taking a number of urgent measures has become necessary during the state of emergency with a view to protecting constitutional order, national will, rule of law, democracy and fundamental rights and freedoms, so as to completely terminate the last coup attempt experienced by our country and to prevent further coup attempts and to continue the fight against terrorism in a more effective manner. This decree law has been issued with a view to taking the measures in question, having also regard to the social consensus which has been arisen.”

76. The following points are understood from the general reasoning of the Decree-Law and the regulations included therein:

a. It was considered by the Council of Ministers convened under the chairmanship of the President that the coup attempt had been made by “members of the FETÖ/PDY secretly organized within the Turkish Armed Forces and by certain public officials and civilians acting together with them”.

b. It was aimed to put an ultimate end to the coup attempt which was considered to have been made by the FETÖ/PDY, to ensure that no similar coup attempt would ever be made again, to completely eliminate the danger posed by the FETÖ/PDY against the democratic constitutional order and fundamental rights and freedoms in general and to pursue the fight which is to be made in this regard more effectively.

c. In line with this purpose, the following measures were prescribed: closing down all the institutions and organizations such as the education institutions, health institutions, unions, foundations and associations whose membership, affiliation, cohesion or connection with the FETÖ/PDY was established; dismissing from profession or public service all the public officials including the members of the judiciary, who are considered to be a member of, affiliated with or have cohesion or connection with terrorist organizations or structures, organizations or groups which are established by the National Security Council as engaging in activities against the national security of the State; increasing the effectiveness of investigations and proceedings with respect to certain offences.

C. Measures prescribed in the Decree-Law no. 667 with respect to Members of the Judiciary and Other Public Officials

77. It was set out in Article 3 of the Decree-Law with respect to members of the judiciary and those considered as members of this profession and Article 4 of the Decree-Law with respect to all the public officials (including workers) other than members of the judiciary that a decision of dismissal from profession or public service shall be rendered in respect of all of those, who are considered to be a member of, affiliated with or have cohesion or connection with “terrorist organizations or structures, organizations or groups which are established by the National Security Council as engaging in activities against the national security of the State”. It was also stipulated in the Articles in question that those dismissed from office shall not be employed again and that they shall not, directly or indirectly, be assigned in a public service.

78. Having regard to both the issue which necessitates the state of emergency, the aim of the Decree-Law no. 667 and the scope and nature of the measures set out in Articles 3 and 4 of the Decree-Law, it is understood that through the measures taken, it is sought to obtain the result of dismissing from all public institutions and organizations the entirety of those, who are considered to be a member of, affiliated with or have cohesion or connection with terrorist organizations, particularly the FETÖ/PDY, or structures, organizations or groups which are established by the National Security Council as engaging in activities against the national security of the State.

79. Accordingly, dismissal from profession or from public service prescribed in Articles 3 and 4 of the Decree-Law is an “extraordinary measure” which is non-temporal, which entails final consequences and which, unlike the sanctions imposed for ordinary or disciplinary offences, aims to terminate the existence of terrorist organizations and other structures, which are regarded to be engaged in activities against the national security, in public institutions and organizations.

80. The facts that the FETÖ/PDY has been organized within nearly all the public institutions and that the concrete coup attempt stemmed from this structuring turned the potential (possible) danger into existent (present) danger and made it compulsory to take extraordinary measures in order to maintain the democratic constitutional order.

81. Dismissal from profession of members of the judiciary, who are considered as having any links with terrorist organizations, particularly the FETÖ/PDY, or structures, organization or groups engaging in activities against the national security, is of special importance for ensuring the reliability and honour of the judiciary which is one of the fundamental values of a democratic society. Indeed, the reasoning of the measure of dismissing

members of the judiciary from profession set out in Article 3 of the Decree-Law was stated as follows:

“While Article 139 of the Constitution regulates the tenure of judges and public prosecutors and stipulates that they cannot be dismissed, the same Article reserves the exceptions indicated in the law relating to those in respect of whom a decision of unsuitability to remain in the profession is rendered. A similar regulation is included in Article 44 of the Law no. 2802 on Judges and Prosecutors. Permitting the members of the judiciary, who are linked with the FETÖ/PDY which is responsible for the coup attempt and uprising of 15 July 2016, to remain in the profession is incompatible with particularly the principles of independence and impartiality of the judiciary. Pursuant to Article 138 of the Constitution, entry of members of the judiciary, who have the duty to adjudicate in accordance with the Constitution, statutes, the law and their own conscientious convictions, into organizations which are in no way compatible with the principles of independence and impartiality of members of the judiciary and their acting with the sentiment of ideological commitment within the hierarchy of an organization particularly harm the honour and reliability of the judiciary. The existence of members of the judiciary who obey the instructions of a different hierarchical structure which is outside the State organization poses a great obstacle against also citizens’ right to a fair trial which is guaranteed by the Constitution. For these reasons, by paying regard to the discretion conferred by Paragraph 2 of Article 139 of the Constitution, this regulation is made in order to eliminate the risks which will be posed if the members of the judiciary, who are considered as having the type of connections indicated above, remain in the profession.”

D. Conditions for Application of the Measure of Dismissal from Profession under the Decree-Law no. 667 in respect of Members of the Constitutional Court

82. “Members of the Constitutional Court” are among the members of the judiciary listed in Article 3 of the Decree-Law. Pursuant to the Article in question, the measure of dismissal from profession can be applied in respect of members of the Constitutional Court if:

- a. the member is considered to be a member of, affiliated with or have cohesion or connection with terrorist organizations, or structures, organizations or groups established by the National Security Council as engaging in activities against the national security of the State;
- b. this consideration/assessment is made by the simple majority of the Plenary of the Constitutional Court.

83. While Article 3 of the Decree-Law generally mentions “terrorist organizations or structures, organizations or groups, determined by the National Security Council as engaging in activities against the national security of the State”, it is understood that the FETÖ/PDY comes first among them when the reasoning of the Article is taken into account.

84. Establishing a link between members of the Constitutional Court and the terrorist organization, terrorist activities and the coup attempt was not necessarily sought for the application of the measure; it was considered sufficient to establish their link with “structures”, “organizations” or “groups” established by the National Security Council as engaging in activities against the national security of the State.

85. On the other hand, according to this Article, the link in question does not necessarily have to be in the form of “membership of” or “affiliation with” a structure, organization or group; it is sufficient for it to be in the form of “cohesion” or “connection” in order for the measure of dismissal from profession to be applied.

86. Lastly, establishing “certainty” between the members and the structures, organizations or groups determined by the National Security Council as engaging in activities against the national security of the State is not sought in the Article in question. “Assessment” of such link by the Plenary of the Constitutional Court is deemed sufficient. The assessment in question means a “conviction” formed by the simple majority of the Plenary. Undoubtedly, this conviction is solely an assessment on whether the person concerned is suitable to remain in the profession irrespective of whether there is criminal liability.

87. Article 3 of the Decree-Law prescribes no requirement to rely on a certain kind of evidence in order to reach this conviction. On the basis of which elements this conviction will be formed is a matter left to the discretion of the simple majority of the Plenary. What is important in this regard is to avoid arbitrariness while reaching a certain conviction.

88. Undoubtedly, while making an assessment as to whether the above-mentioned link exists, the reasons which would lead the competent boards to reach a certain conviction can vary depending on the characteristics of each case.

E. Assessment as to whether the Measure of Dismissal from Profession will be Applied in respect of the Members of the Constitutional Court Alparslan ALTAN and Erdal TERCAN

89. The competent authorities considered that the plotter and implementer of the attempted coup, which started in the evening of 15 July 2016 and lasted until a certain hour of the following day, was the FETÖ/PDY which was recently categorized by the National Security Council as a “terrorist organization threatening the national security” and which has been the subject-matter of investigations and proceedings for a long time.

90. In the aftermath of the coup attempt, country-wide investigations were initiated and custodial measures were taken in respect of a high number of military personnel, law enforcement officers and members of the judiciary who respectively serve in the Turkish Armed Forces, law enforcement agency and judicial institutions which come first among the institutions the FETÖ/PDY attaches the most importance in terms of its organization.

91. On 16 July 2016 the Members of the Constitutional Court Alparslan ALTAN and Erdal TERCAN were taken into custody for being “a member of the FETÖ/PDY” within the scope of the investigation launched by the Ankara Chief Public Prosecutor’s Office into the offence of overthrowing the Constitutional order by using force and violence.

92. Subsequent to the interrogation of the Members in question on 20 July 2016 by different Offices of Magistrate Judges in criminal matters, their detention was ordered for the offence of “being a member of an armed terrorist organization”. The Office of the Magistrate Judge imposed a precautionary injunction on the properties of the Members in question.

93. In their statements taken within the scope of the criminal investigation, the Members Alparslan ALTAN and Erdal TERCAN stated that they did not accept the offence imputed to them.

94. During this process, it was decided that an assessment be made by the Plenary of the Constitutional Court on the legal situations of the Members Alparslan ALTAN and Erdal TERCAN under Article 3 of the Law no. 667 which regulates the measures regarding the implementation of the state of emergency which was declared subsequent to the coup attempt.

95. Written statements of the Members Alparslan ALTAN and Erdal TERCAN were taken in order to be taken into account in the assessment which was to be made by the Plenary of the Constitutional Court. In their statements, the Members in question stated that they did not have any link with the FETÖ/PDY, they requested that they be provided with the opportunity to defend themselves again after the concrete information and documents regarding

the imputed offence are submitted to them and that certain witnesses whose names they provided be heard.

96. The assessment to be made under the Decree-Law no. 667 does not amount to investigating a concrete action which constitutes a criminal or disciplinary offence; rather, it amounts to a process in which a conviction will be formed as to whether the Members of the Constitutional Court have any links with a certain organization. Therefore, having regard to both the aim of the Decree-Law, the nature of the measure and the characteristics of the instant case, it was required to make an assessment in respect of the Members concerned on the basis of available information and documents.

97. The assessment to be made by the Plenary of the Constitutional Court in respect of the Members Alparslan ALTAN and Erdal TERCAN under Article 3 of the Decree-Law no. 667 concerns whether the members in question have any links with, as stated in the decisions of the National Security Council, the Parallel State Structure, which is among the structures, organizations or groups established by the National Security Council as engaging in activities against the national security of the State, in the form of “membership”, “affiliation”, “cohesion” or “connection” (see § 18). As it was indicated above, a “conviction” formed in respect of the Members in question by the simple majority of the Plenary is sufficient for such assessment.

98. Having regard to both the above-mentioned characteristics of the instant case, information from the social circle that they are connected with the organization in question and the common conviction formed by the Members of the Constitutional Court over time, it was considered that the Members Alparslan ALTAN and Erdal TERCAN have links with the organization in question which are incompatible with their remaining in the profession under Paragraph (1) of Article 3 of the Decree-Law.

99. It will clearly harm the reliability and honour of the judiciary if the members, whose situations are assessed as such, continue to serve in the Constitutional Court, the main duty of which is to protect the democratic Constitutional order and fundamental rights and freedoms.

100. For the reasons explained above, it has been unanimously decided that it is not appropriate for the Members Alparslan ALTAN and Erdal TERCAN to remain in profession and that they be dismissed from profession.

JUDGMENT

For these reasons; on 4 August 2016, it is UNANIMOUSLY decided that

A. Pursuant to Paragraph (1) of Article 3 of the Decree-Law no. 667,

1. It is not appropriate for the Member of the Constitutional Court Alparslan ALTAN to remain in profession and he be dismissed from profession,

2. It is not appropriate for the Member of the Constitutional Court Erdal TERCAN to remain in profession and he be dismissed from the profession,

B. The decision be notified to the concerned parties.

President	Deputy President	Deputy President
Zühtü ARSLAN	Burhan ÜSTÜN	Engin YILDIRIM
Member	Member	Member
Serdar ÖZGÜLDÜR	Serruh KALELİ	Osman Alifeyyaz PAKSÜT
Member	Member	Member
Recep KÖMÜRCÜ	Nuri NECİPOĞLU	Hicabi DURSUN
Member	Member	Member
Celal Mümtaz AKINCI	Muammer TOPAL	M. Emin KUZ
Member	Member	Member
Hasan Tahsin GÖKCAN	Kadir ÖZKAYA	Rıdvan GÜLEÇ