

PRESS RELEASE REGARDING THE REASONED DECISION ON THE DISMISSAL OF TWO MEMBERS OF THE CONSTITUTIONAL COURT, ALPARSLAN ALTAN AND ERDAL TERCAN FROM PROFESSION

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 the State of Emergency.

II. THE FACTS

2. 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.

3. 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.

4. With the use of planes and helicopters, bomb and armed attacks were made against many places such as the Turkish Parliament, Presidential Premises, the Ankara Security Directorate, the Police Special Operation Forces of the General Directorate of Security and the National Intelligence Agency during the attempt. An attempt to assassinate the President was made; the convoy among which the Prime Minister's vehicle existed, was shot with firearms; many senior military officials including the Chief of Staff were taken hostage and numerous public institutions were occupied or attempted to be occupied with the use of weapons.

5. 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, other armoured vehicles and light weapons. During these attacks, nearly 250 persons (including police officers, soldiers and civilians) lost their lives and over 2.000 persons were injured.

6. 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.

7. During the coup attempt, attacks were made against the relevant institutions and organizations for the purpose of interruption of television broadcasts and access to the 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.

8. Following the coup attempt, numerous military personnel, police officers and judicial officials, who were regarded as the members of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY), were taken into custody throughout the country. Besides, thousands of public officials including judicial officials were suspended.

9. 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.

10. 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.

11. 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.

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

12. Within the scope of the investigation file no. 2016/103606 launched by the 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 to issue a 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 Terrorist Organization, who commit this offense, could flee abroad and abscond".

13. By the decision of the 2nd Office of Ankara Magistrate's Judge dated 20 July 2016 and interrogation no. 2016/595, Alparslan ALTAN, member of the Constitutional Court; and by the decision of the 5th Office of Ankara Magistrate's Judge dated 20/7/2016 and interrogation no. 2016/437, Erdal TERCAN, also a member of the Constitutional Court, were detained on remand

together with some of the judicial members for the offence of “being a member of an armed terrorist organization”.

III. EXAMINATION AND REASONING

A. Constitutional Assessment of the Facts Which Led to Declaration of State of Emergency

14. 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.

15. 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.

16. 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 coup attempts.

17. 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.

18. 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, the 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 on-going, the Constitutional Court also defined this attempt as “an anti-democratic attempt against the constitutional order” and explicitly rejected it.

19. 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.

20. With regard to the assessment of seriousness of the threat against the 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, the owner of the sovereignty, and all elements of 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 the 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 and 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.

21. 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 the freedoms into practice in an insecure place.

22. 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

23. 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.

24. 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.

25. Indeed, after the coup attempt was de facto prevented; the Council of Ministers convening 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.

26. 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.

27. Within this scope, the Council of Ministers that came together 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.

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

28. 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.

29. 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.

30. 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 established as engaging in activities against the national security, in public institutions and organizations.

31. 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 danger into present danger and made it compulsory to take extraordinary measures in order to maintain the democratic constitutional order.

32. 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.

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

33. “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 decided by the simple majority of the Plenary of the Constitutional Court.

34. 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.

35. 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.

36. 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.

37. 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 eligible to remain in the profession irrespective of whether there is criminal liability.

38. 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.

39. 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

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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 determined 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". 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.

48. 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.

49. 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.

50. 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.