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JUDICIAL SYSTEMS IN THE UNITED STATES AND TURKEY

CONFERENCE ORGANIZED BY
ISTANBUL GEDIK UNIVERSITY LAW FACULTY

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24.04.2021
Youtube Broadcast

PREFACE

İstanbul Gedik University Faculty of Law, which was established in 2019, despite having a very short history, organized a significant activity for the first time between Turkish judges and distinguished justices and judges from the United States of America as speakers on 24.04.2021. Achieving this collaboration would be the beginning of new scientific research on national laws by a comparative multidimensional approach between different legal systems. The conference was held via YouTube broadcast.

Future expectations of the global world within the concept of law, in general, is to harmonize legal matters not only for national system bases but also bases having an international qualification. This project should take in hand rapidly because similar applications are undisputably necessary for human rights. As international relations between national governments increasingly multiply, it is inescapable from the occurrence of disputes among parties. Having similar legal norms and mutual understanding may easily solve the legal issues. At the same time, inevitable future changes in all areas, such as economic, technological, scientific, educational relations etc., will affect the legal systems where international harmonization is absolutely necessary.

This conference could be conceivable as the beginning of mutual relations between different legal organizations to obtain the aforementioned consideration.

It is worth mentioning that, as the conference was very well organized, seven thousand Turkish lawyers were accessed, and they were informed about Judicial Systems in the United States of America and Turkey in detail. This collaboration was created by Gedik University Faculty of Law academician Prof. Dr. Rona Aybay and Judge Pro Tem. Jill Malat.

The chosen topic was exceptional. Honourable Justices and Judges of the United States of America explained their judicial system within the concept of legal matters and detailed how to preserve the American democratic system, the importance of independent judiciary, and how

the elections done for free judges were emphasized briefly. Moreover, the speakers also explained the key elements in the public trust in the justice system and focused on the importance of accountability and judicial ethics. From a comparative perspective, Turkish judges also conveyed similar issues within the framework of Turkish law.

I believe that the book of the conference would be very helpful in understanding the philosophy of the American and Turkish judicial systems.

I would like to thank the distinguished speakers, Justice Debra L. Stephens, Justice Barbara A. Madsen, Judge (Ret.) Roger Rogoff and Judge Pro Tem. Jill Malat and Turkish judges Mahmut Erdemli and Dr Mücahit Aydın for their participation in this exceptional conference and exhibiting the keynotes of judicial systems according to their judiciary systems.

Prof. Dr. Berin Ergin

Chair of the Istanbul Gedik University
Human Rights Application and Research Center
April, 2021

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OPENING STATEMENT | Prof. Dr Rona Aybay

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Honorable guests, distinguished professors, dear participants. We would like to welcome you all to our conference on judicial systems in the US and Turkey organized by Istanbul Gedik University, Platform of Hukuk Alemi, Istanbul Gedik University Comparative Law Research and Application Center and Human Rights Research and Application Center.

Today, our conference will take place in two sessions. I kindly remind you that all participants can follow the English broadcast from Gedik University's official YouTube channel. The Turkish translation is currently being broadcasted from the official YouTube channel of the Platform of Hukuk Alemi. Our participants will direct their questions in English and Turkish to our honorable speakers through these channels.

Prof. Dr Rona Aybay, Head of Istanbul Gedik University's Law Faculty's Department of General Public Law, will deliver the opening statement in our first session. In this session, honorable Justices of the Washington Supreme Court Debra Stephens and Barbara Madsen and the retired Judge and currently the Senior Corporate Council of Microsoft, Roger Rogoff, will deliver their speeches on the US judicial system. This session will be moderated by the Children's Representation Program Manager, Judge Pro Tem Miss Jill Malat.

Now, not to make our participants wait for a longer time, I would like to respectfully invite our distinguished professor, Prof. Dr Rona Aybay, to the floor to deliver his opening statement.

Thank you, professor. The floor is yours!

Prof. Rona Aybay:
Thank you very much. I hope I can be heard. There's no problem with the sound system, okay then!

Good morning to honorable justices and distinguished colleagues from

Washington State, and good evening to dear colleagues and students from Turkey. It is my pleasure and honor to welcome you to this gathering of lawyers between whom there are 10 hours of time difference. However, whatever difference between us exists, we are all lawyers, and we are ready to participate in a legal discussion of high-level quality, I hope. I would like to express my gratitude to my old friend Jill Malat for arranging contacts between the Washington State Judiciary and Istanbul Gedik University, Faculty of Law.

Dear colleagues, what we have here today is, in my opinion, a historic meeting in the sense that this is a gathering where the Turkish lawyers will have direct access to the information of a particular state rather than the federal law of the United States. This, I think, is exceptional and probably the first of its kind.

Dear colleagues, beginning from the second part of the 1920s, many Turkish lawyers started to be interested in foreign legal systems because at that period, the young Turkish Republic under the leadership of our founding father, First President Ataturk, codes such as the civil code of Switzerland to replace Islamic legal texts and case law. However, their interests did not go any further than Western Europe. History tells us that there had been practically no direct contact between Turkish and US lawyers until the 1950s. I think one may say that US law was almost unknown to Turkish lawyers then. The first organized contacts between US and Turkish lawyers started in the late 1950s. The Law School of Columbia University played the leading part in organizing and funding the programs under which Turkish lawyers could visit the United States and get acquainted with the US law system.

However, it should be noted that these contacts covered only the Federal Law of the United States. I think that this meeting of ours today is the first example where US and Turkish lawyers are coming together to discuss the peculiarities of the law of a particular state, namely Washington State's legal system. Thank you and thanks once again, especially to Miss Malat, who made this meeting possible. I leave the floor, or should I say the microphone to the moderator. Thank you very much!

FIRST SESSION
THE U.S. JUDICIAL SYSTEM: A CONVERSATION ABOUT JUDICIAL INDEPENDENCE AND THE FAIR ADMINISTRATION OF JUSTICE

Justice Debra L. Stephens, Justice Barbara A. Madsen, Judge (Ret.) Roger Rogoff

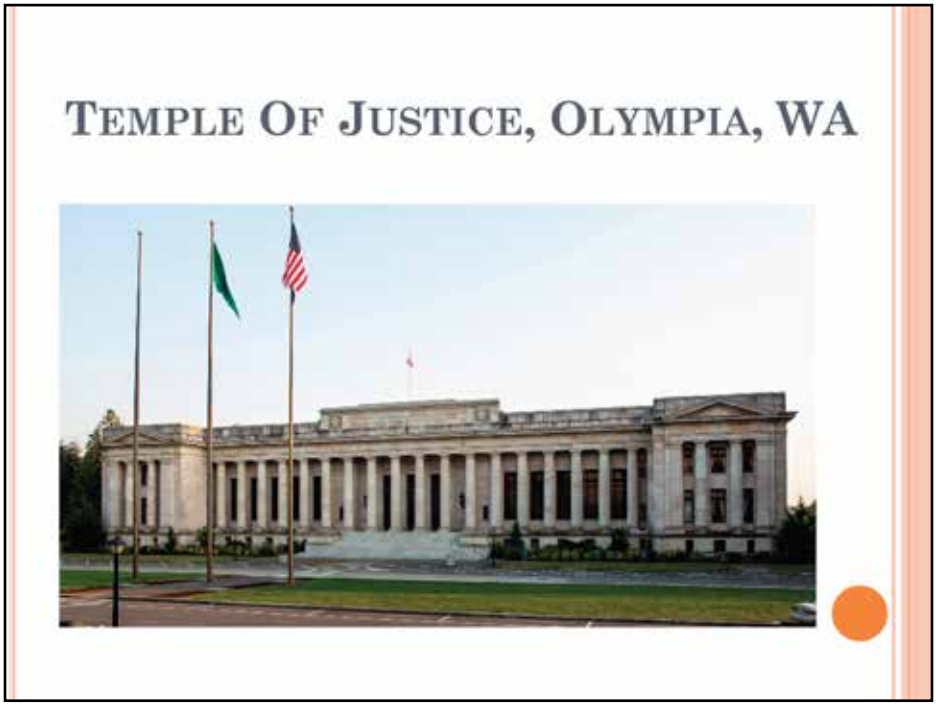
Jill Malat
Thank you very much, we are very excited to be here to have this conversation, and we are very honored to be invited to this. This is also a historic event for us, as we have never participated in such a thing, and we are very interested in learning about the Turkish system and sharing some ideas with all of you.

I will ask the presenters to proceed now, and I will introduce the first presenter, Justice Debra Stephens. She has been a member of the Washington State Supreme Court since January of 2008. She is a native of Spokane, Washington, and she practiced law and taught as an Adjunct Professor at Gonzaga University School of Law before taking the bench. She has appeared as counsel over 125 times in Washington State Supreme Court. She's deeply involved in advancing justice and improving the legal system in Washington State and beyond. A judicial and public education leader, she serves on the Washington Civic Learning Council, is a Founding Executive Committee Member of the National Courts and Science Institute and a Convener for Dividing the Waters. She has been a member and Co-chair of the Board of Judicial Administration and Co-chair of the Covid-19 Court Recovery Task Force. She is also active in the National International Association of Women Judges and Co-chairs in Judicial Intervention, excuse me, Independence. Internationally, she's worked with USAID to train foreign judges on issues of judicial independence in the rule of law. So, without further ado, I will turn it over to Justice Stephens.

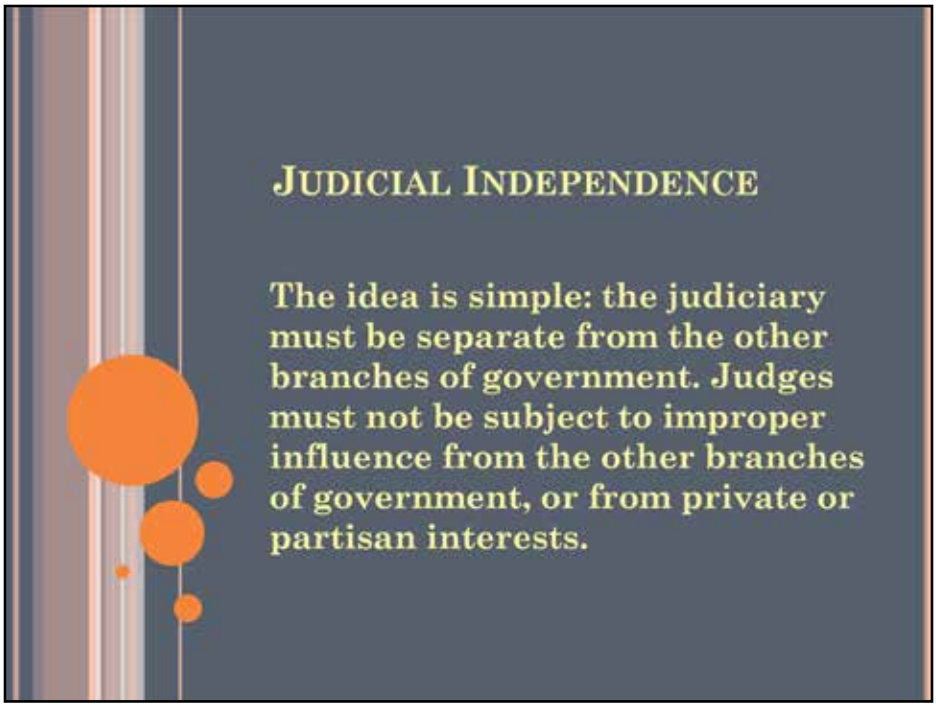
Justice Debra Stephens
Thank you, Miss Malat, to Prof. Aybay and our esteemed colleagues at the Istanbul Gedik University for putting together today's program. I am going to begin by giving some landscape, an overview of judicial indepen-

dence and the systems in American courts that secure judicial independence. As was noted by Professor Aybay, myself and my colleague Justice Madsen as well as Former Judge Rogoff, we come from the state court system. So we'll be talking about some of the differences between state and federal courts in terms of maintaining fair and open courts.

So, if you would advance my slide, the next slide to show you is a picture of our courthouse. This is The Temple of Justice, where the Washington State Supreme Court sits. Though these days, with the pandemic, we sit virtually, we have been hearing oral arguments through Zoom since last April, so just over a year. There are nine justices of the Washington Supreme Court, notably the current court. Seven of the nine justices are women judges, and it is the most diverse court in terms of racial and ethnic background and gender of any State Supreme Court in the United States.

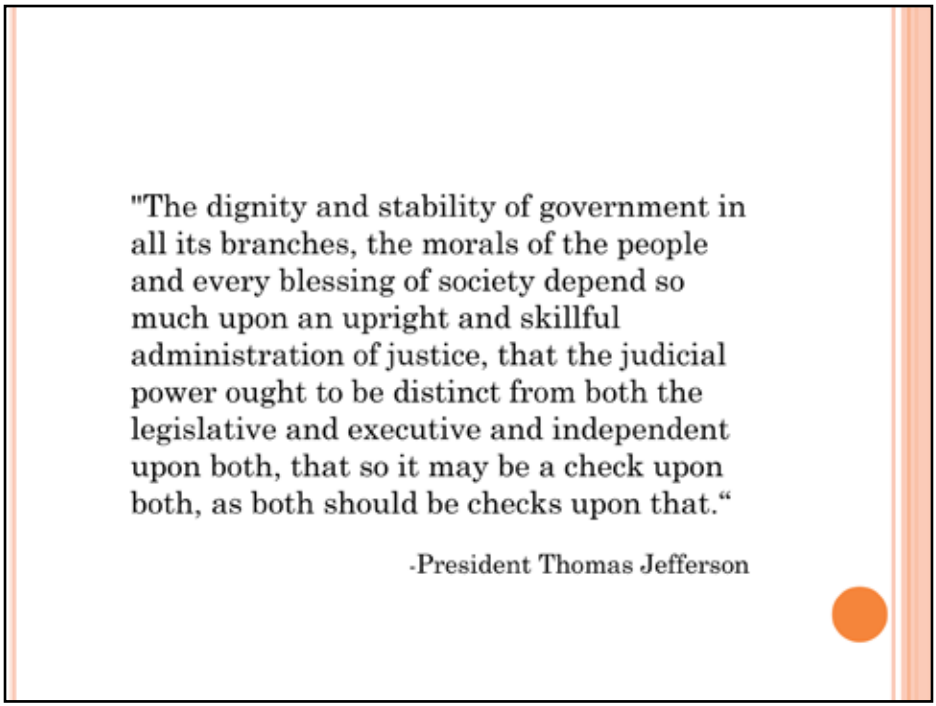


**Slides used in this section are presented by Justice Debra Stephens during the conference.

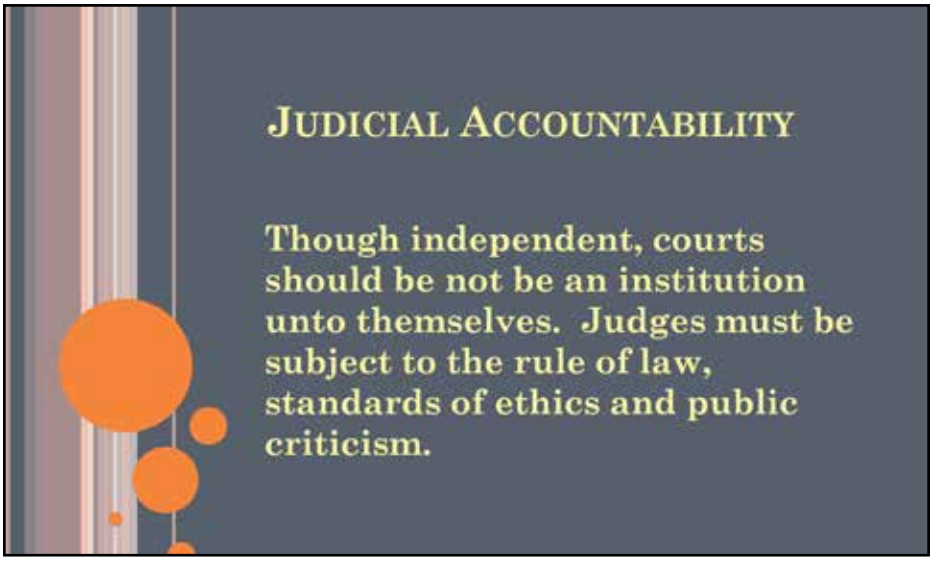


So, the idea of judicial independence, which is really core to our system, is that the judiciary must be separate from the other branches of government, namely the executive power, the executive branch and the legislative power; in Turkey, of course, your president and your national assembly. So, to maintain judicial independence, one of the structures built into the

Washington State system is that the judicial branch operates as an independent system of government, and we have state-level courts which include the Washington Supreme Court and the Court of Appeals, and then state judges who serve at the district are what we call county level, and Former Judge Rogoff was what we call a superior court judge, in one of those courts which are the general jurisdiction courts throughout the state. In addition to those state-level courts, we have county limited jurisdiction courts, we call those district courts, and we have municipal courts in some of the cities in the state. The jurisdiction of those courts is also limited.

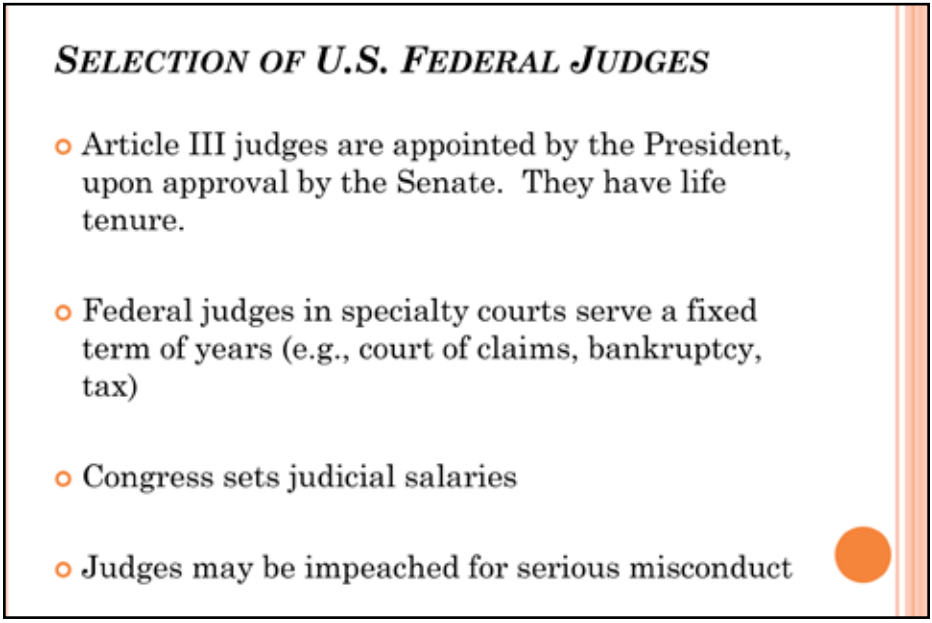


I wanted to share this quote from early United States President and Founder Thomas Jefferson. As the framers' intent that the institution of judicial independence was critical to the preservation of the American democracy, it underscores that it would be a check upon potential abuses of power by the other branches of government, and sometimes, you'll hear the judicial branch referred to as the non-majoritarian or non-democratic branch of government. Of course, it is integral to the democratic structure of the United States. Still, it is non-majoritarian in that the judicial branch adheres to the principles in the constitution and the country's laws without regard to popular opinion. Certainly, the administration of justice would not be put up to a vote.



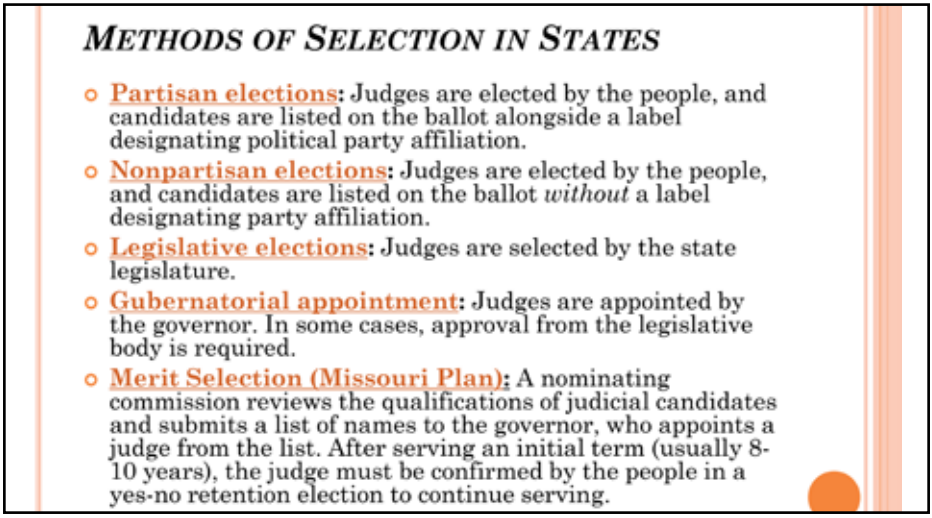
So, judicial accountability and independence go hand in hand because we want the courts to be independent. However, it's also critical that they be accountable to the rule of law as embraced in the constitution and the structure of our system of democracy. To ensure accountability, the judicial branch has instituted standards of ethics and transparency to help secure that value, and this is shown in the next slide.

So, as a brief overview, some of the structures for independence and accountability in our courts' system are the following. First, I am going to talk a bit more about this: the methods of selecting judges are really part of ensuring their independence and their accountability. Second, as mentioned, rules or canons of judicial ethics and the process for enforcing those standards when they are breached through judicial conduct commissions. A third structure that ensures independence and accountability is the confidentiality of judicial processes. As a simple example, when the Supreme Court of Washington deliberates on a case, the deliberations of the nine justices are not subject to public disclosures, so there can be open full, rich debate and dialogue. However, as a corollary to that is the 4th tenant, which is that the decisions of the court under our constitution, all decisions of the Supreme Court are required to be in writing and then the institution of judicial review. So, lower court decisions are subject to review by an appellate court. In our system, you may be familiar with cassation courts and some other European countries, but in the United States, judicial review is pure appellate review. So, the appeals courts accept as verities any unchallenged findings of fact made in the lower court either by the jury or the judge and review only on matters of law. We can talk about that if there are any questions later in the program.



Finally, I think often overlooked, but very critical to judicial independence and accountability is the secure tenure of judges and the security of judicial budgets. Because we've all seen examples in countries throughout the globe that the surest way to attack an independent judiciary is for the legislature to cut off their funding. So, budget security, of course, and the security of the tenure of judges is critical.

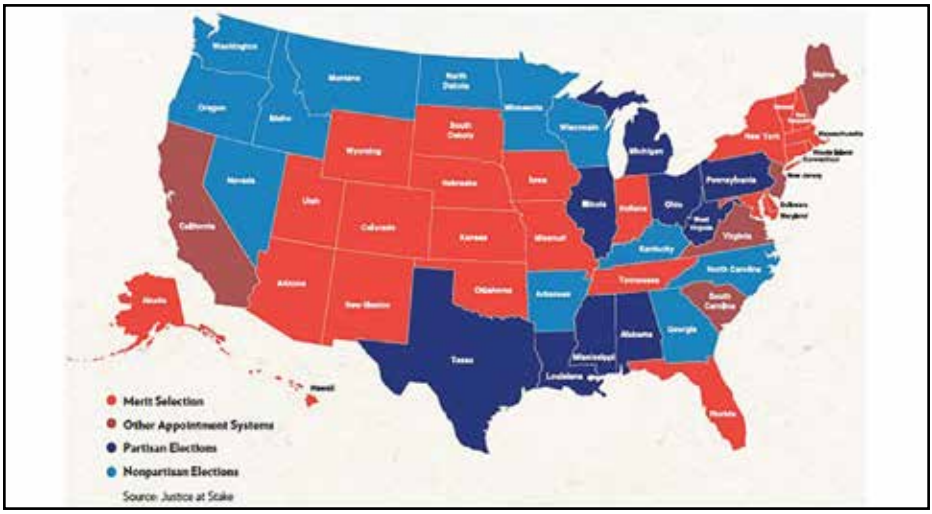
So, I want to contrast how judges are selected in the federal system, the courts of the United States, versus in state systems. The courts of the United States comprise really one system: it is the federal court system, and most of the judges in that system are what we call "Article III judges", set forth in Article III of the United States Constitution. They are appointed by the President upon approval of the Senate, and they have life tenure. So, once appointed, they cannot be removed other than for misconduct. Most of the judges in the federal system, there are specialty courts: the bankruptcy courts, the tax courts, what we call the court of claims for federal contract matters. Those judges do not serve life tenure; they are appointed for a fixed term of years and serve again subject only to removal for misconduct during that term of years. Congress sets judicial salaries, and as I mentioned, the judges remain subject to a code of ethics. As is also true in any state system, judges can be impeached for any serious misconduct. So, in a nutshell, that is the method of selection in the federal system.



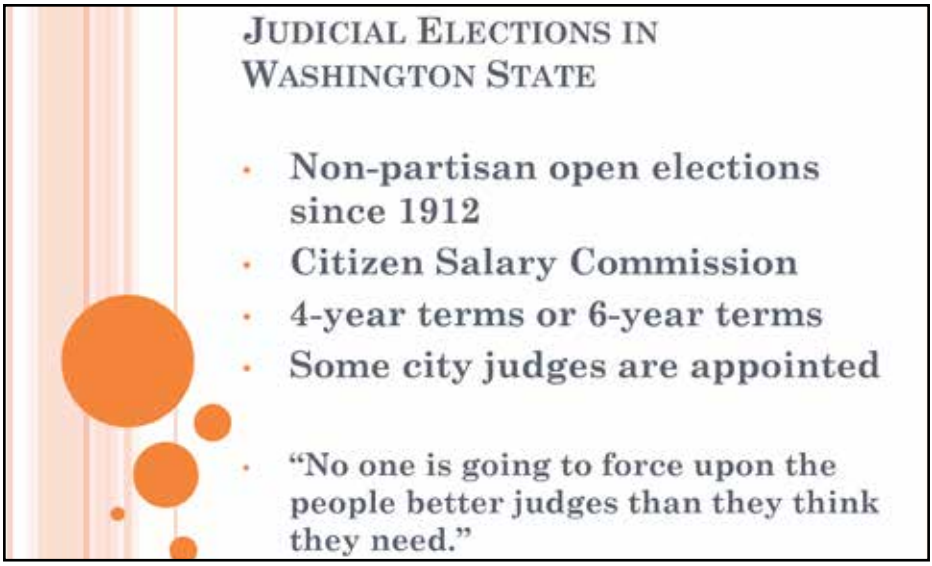
When we look at the 50 states of the United States, we see a wide variety of judicial selection methods. Just to briefly overview those methods, some states have partisan elections. The judges run for office as representatives or members of the party. Republican or Democratic or Libertarian or Independent. That is less common but still exists in several larger states, including the state of Texas. Many more courts have non-partisan elections; this is what we do in Washington. Judges do stand for elected office but cannot belong to a political party; they do not run as representatives of a political party, they run non-partisan.

A few states have a legislative selection of judges, and they may thereafter be subject to review, but that system is fairly uncommon. Other states have, and again, this is quite uncommon in the state system, the equivalent of a federal presidential appointment. They have a governor's appointment, a gubernatorial appointment, sometimes on consent, and in a couple of states, those judges so appointed do serve life tenure.

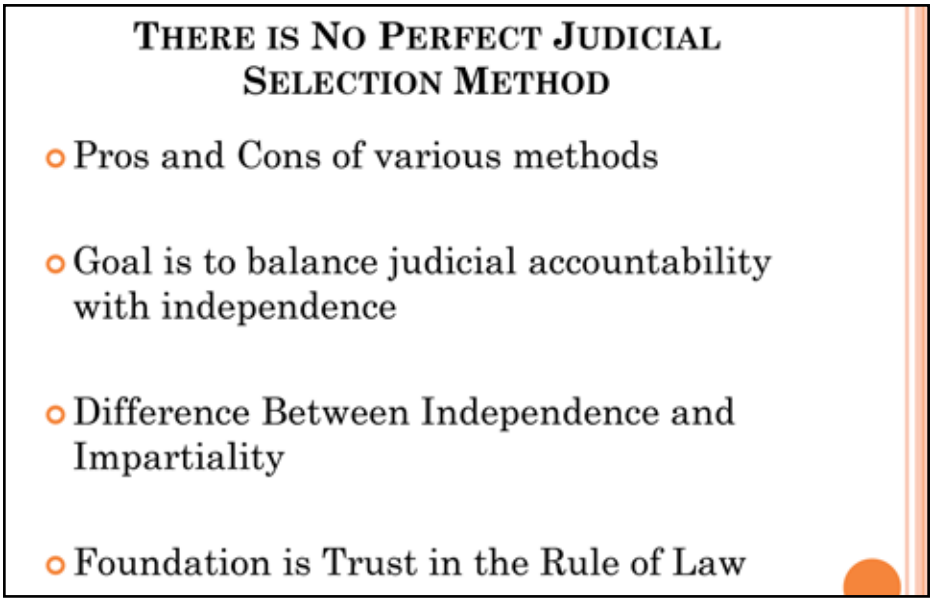
Then a system that was becoming increasingly popular until just recent years was the so-called merit selection or Missouri plan because the State of Missouri was one of the first to adopt this, and that's a system by which judges are initially appointed through a commission, a merit selection process. Then they stand unopposed for a yes or no vote; we call it a retention election, every eight or ten years is most common.



Here is a map, and I realize the writing may be small, I don't know the type of screen you're all using, but it shows you the variety of selection methods. Washington is the blue state up in the far that's our west corner with the northwest, and those blue states are the non-partisan open election states.

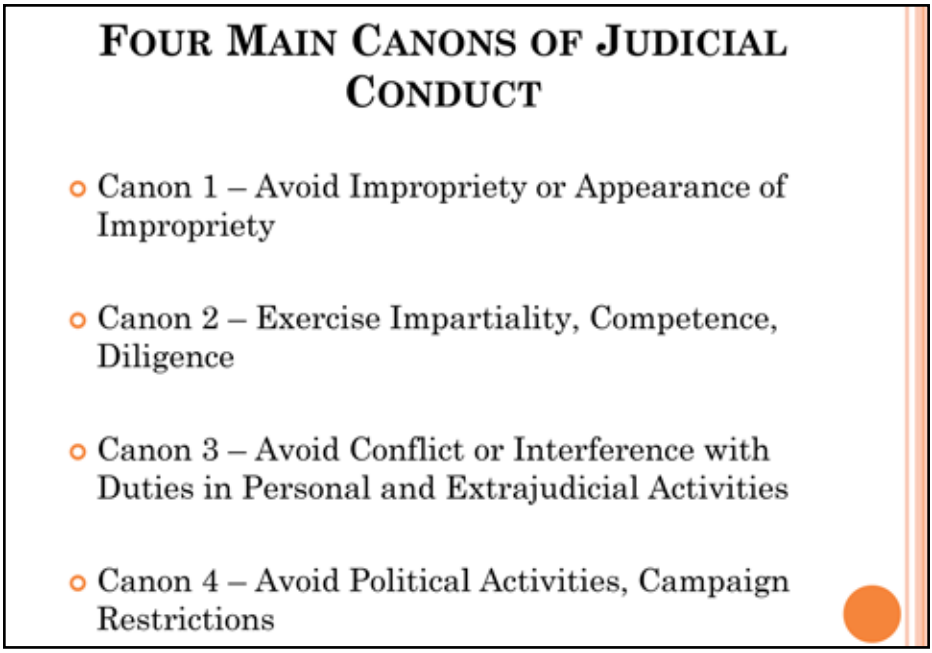


So, to highlight Washington, since 1912, our races have been non-partisan. Initially, Washington became a state in 1889, and we did initially have judges run for partisan office, but that went away in 1912. Importantly, we have an independent citizen salary commission that sets the salaries of all elected officials, not just judges, so they cannot be subject to legislative retaliation following unpopular decisions. Most judges at the trial court level serve four-year terms, but appellate judges in the Supreme Court and the Court of Appeals serve six-year terms. Some of our city judges, municipal judges are still appointed, but all state judges are elected, and I just wanted to share a quote from one of the framers of the Washington constitution. The method of selecting judges was hotly debated. There were those who advocated for an appointment with a lifetime tenure rather than for a popular election. Still, the view that won the day was this quote from a delegate, who said, "No one is going to force upon the people better judges than they think they need.". So, we have always elected our judges in Washington.

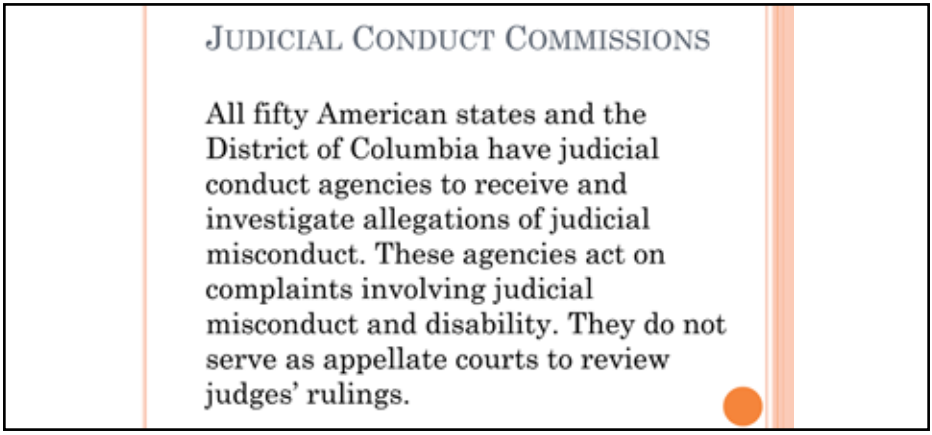


We're going to have a broader discussion about judges' independence and accountability, and I want to emphasize that the method of selection doesn't necessarily ensure those values better in one method than another. I think there are pros and cons to the various methods, and I think that in all of the states, there is a desire to balance accountability with independence. Certainly, the view in Washington was that being subject to the ballot would bring greater awareness on the part of judges to how the law plays out in society and would improve accountability.

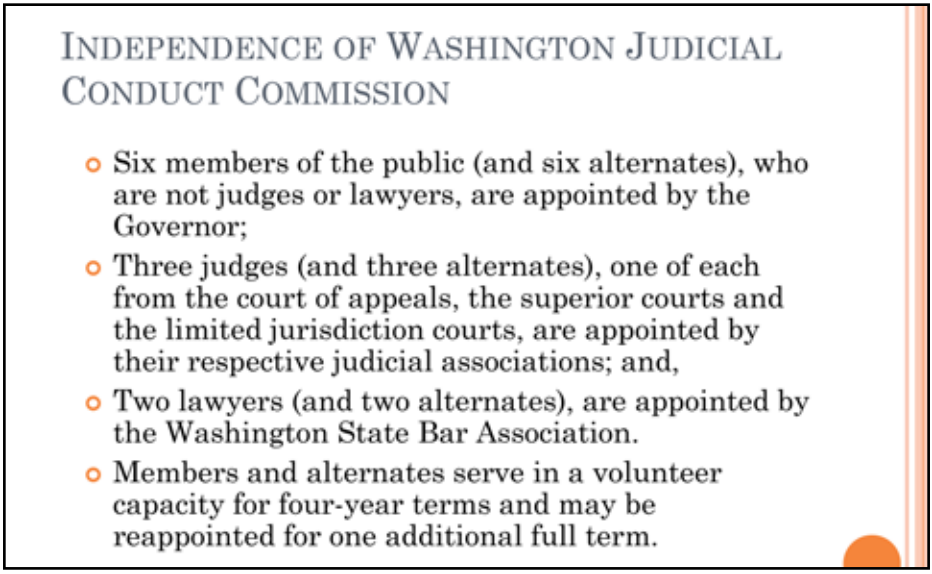
I also think it is important to emphasize the difference between independence and impartiality, though those things are related. I think securing the independence of the judiciary helps judges make impartial decisions, but when we speak of impartiality, we are really talking about the ability of the judge to fairly decide the case in front of her, on its merits without influence from any outside consideration. I think the foundation to independence and accountability, whatever the method of judicial selection might be, is trust in the rule of law. I think, in our democracy as in yours, the bare truth is that the system of government works because we are all willing to work for it and believe in it and trust in it and trust in the rule of law is really that foundation.



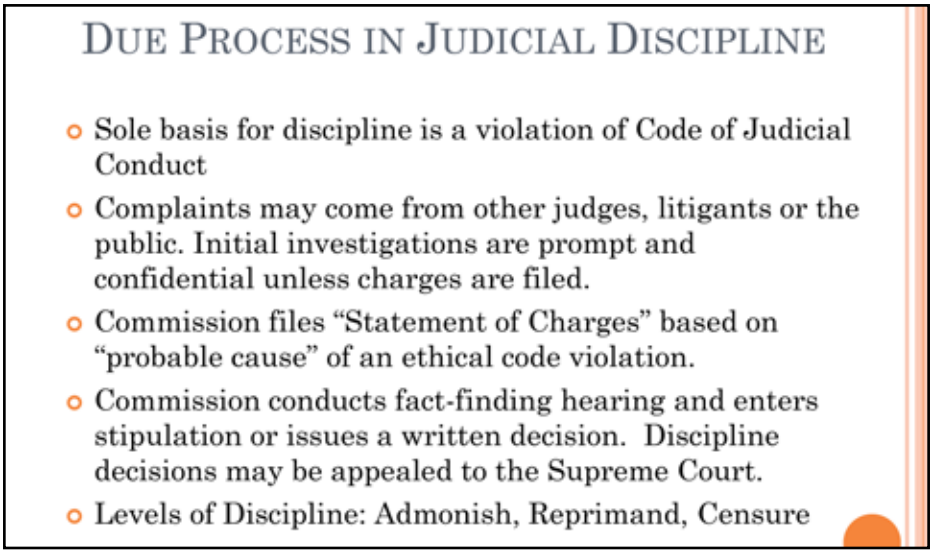
Let me just briefly talk about our system of judicial ethics and the judicial conduct commissions across the States. There are four main canons of judicial conduct that are common across jurisdictions in the United States. Canon 1 is to avoid impropriety or the appearance of impropriety. Canon 2 is impartiality, competence and diligence. Canon 3 avoids conflicts of interest and so curtails personal business extrajudicial affairs, and Canon 4 concerns avoiding politicking and keeping judges out of politics in their campaigning activities.



In our State, as in all states, there is a judicial conduct commission; it's an independent commission whose members oversee complaints against judges based on violating the canons, canons of ethics. These commissions act when a complaint is made. They do not on their own go out looking for complaints, and they do not have any jurisdiction to address a judge's rulings on a case in front of that judge. It is simply for the judge's behavior and compliance with the canons of ethics. So, unlike in some systems, I am aware of Eastern European countries where the commission could examine a judge's decision. That cannot occur in the United States.



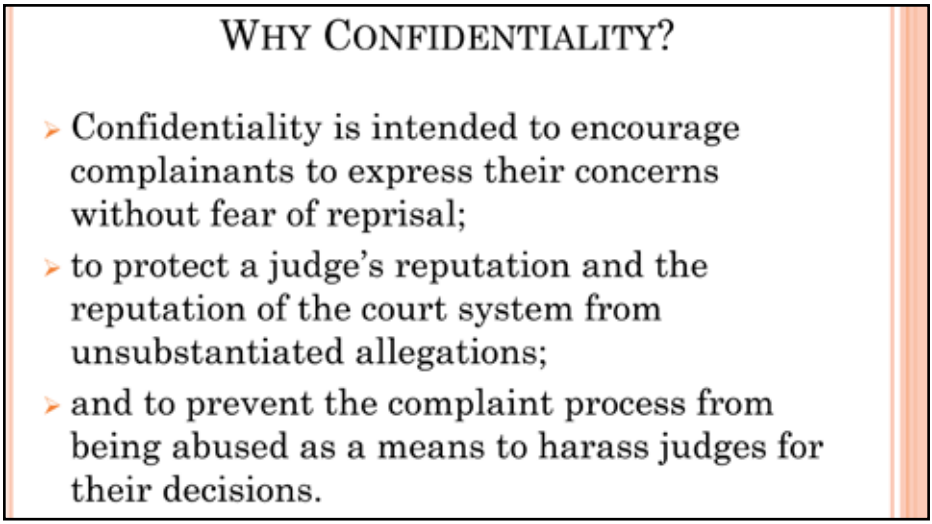
So, some highlights of the Washington judicial conduct commission: importantly, the commission is like the judicial branch, insulated structurally from outside influence. So, the members come from the public and the judiciary; they serve set terms, they are not made to report to any other branch of government, and I think that helps. You see in the slide the summary of how these are formed. I think that helps maintain the independence and integrity of the commission.

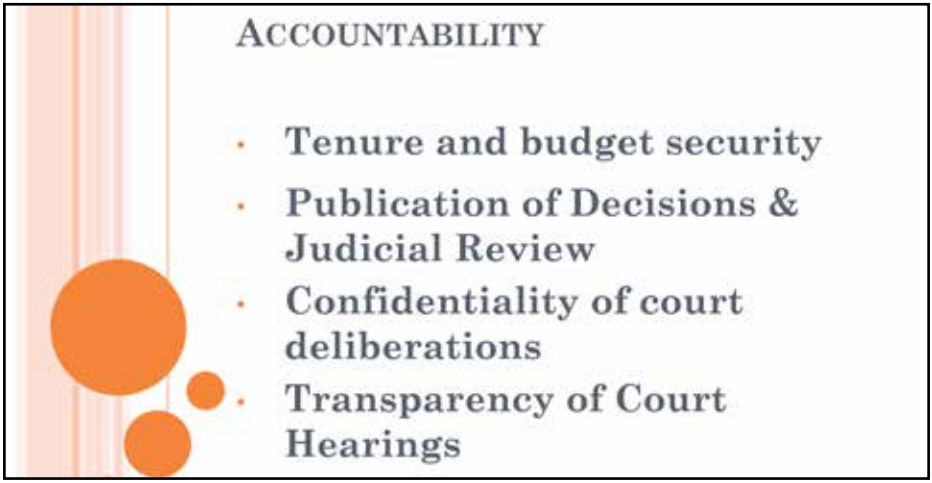


Equally important to trust and confidence in the judicial conduct commissions is the due process that is afforded to judges when they are subject to judicial discipline. So, of course, they have notice of what the canons require. They are given notice of the complaints and an opportunity to defend themselves, present evidence, and meet the claims against them. There are also levels of discipline from the least severe admonishment to a full censure that help regulate judicial ethics compliance without being unduly harsh on minor deviations from the code.

I should mention that independent of the judicial ethics system, judges in Washington under the constitution remain subject to impeachment as they do in the federal system. I'm not aware in Washington that we've ever had a judge impeached through that process that would start in the legislature, but that certainly remains a possibility for serious misconduct.

The process is confidential, and I think that's important as well to public trust and confidence in the judicial system and also to the ability of judges to participate in the system without fear of reprisal. It helps protect the reputation of the judge, especially when there are unsubstantiated allegations, and it also protects the integrity of the complaint process.





So, in addition to the selection methods we have reviewed and the judicial conduct commissions, let me briefly mention some other safeguards, and I will not go into these too much. I referenced upfront that tenure and budget security are important. Both Justice Madsen and I have served as the Chief Justice of Washington's Supreme Court, Justice Madsen, for a very long term. One of the Chief Justice's responsibilities is to oversee our engagement in the budget process because the legislature does set the budget for the entire state. So we have an obligation to advocate for our budget and work to adequately fund the courts. I do think that in most

American court systems, the struggle for sustainable, reliable, adequate funding is real. If people assume that that's not a concern or a risk to judicial independence in the United States, they would be wrong in assuming that. It's always a struggle and particularly in times of budget crisis.

Tenure is equally important. We serve six-year terms, and during our six-year term, you know, we cannot be challenged based on any decision that the court issues during that time.

I already mentioned the confidentiality of court deliberations, but the 4th point on this slide is what I want to turn to, which is the transparency of court processes and court hearings. Under our State Constitution Article 1, Section 10, we require that justice be administered openly and subject to public scrutiny. We also have a separate provision that requires the Supreme Court to state the reasons for any decision in writing. I think that transparency, where people can watch a court proceeding and read a court decision, is essential to maintaining trust and confidence in our legal process. I think that is wholly consistent with the confidentiality of the deliberation processes because people can see the evidence as it comes in, see the court hearing. However, of course, for example, the jury deliberates in confidence, in private or the judges in a court such as an appellate court that has multiple judges sitting on a single case. The jury deliberates in confidence so that the debate can be open and uninhibited. I think those two values of transparency of processes but confidentiality of deliberations do go hand in hand.

So that's the end of my summary. This was just a brief overview just underscoring that in all of the state courts and the federal courts in the United States, the twin aims of independence and accountability guide our work but that there are many different methods of organizing the courts that can conserve those values.

So, with that, I thank you for your time, and I know we will be taking questions later, so I will yield the floor back to Miss Malat to introduce our next speaker.

Jill Malat:
Thank you very much! Our next speaker is Justice Madsen, and Justice Madsen has a long list of accomplishments, but I will just name a few of them. Justice Madsen went to undergraduate at the University of Washington, and she earned her Juris Doctor degree (JD) from Gonzaga University School of Law. After completing law school, she worked as a public defender in King County in Snohomish County, Seattle is in King County. She developed a child abuse component of Seattle's family violence project. She was then appointed to the Seattle Municipal Court Bench, where she helped develop the Domestic Violence Coordinating Committee. She has always been committed to equal justice, and she continues to do so on the Supreme Court, where she has served since 1992. She, as Justice Stephens said, served as the Chief Justice of the Supreme Court. Among her many honors, Justice Madsen was the first recipient of the Annual Myra Bradwell Award, which honors outstanding alumni of her University School of Law, and she's twice received the Washington Women Lawyers Vanguard Award. I will now turn it over to Justice Madsen!

Justice Barbara Madsen:
Thank you, Jill! I appreciate your introduction. I've been on the Washington State Supreme Court since 1992, and prior to that, I was appointed to the Seattle Municipal Court in 1988, so I've been a judge for nearly two-thirds of my life.

I would like to begin where Justice Stephens' remarks ended—she mentioned transparency and the opportunity for the public to see their justice system in action. I joined the Supreme Court in 1992. One year later, we became the first court in the world to authorize television coverage of our Supreme Court hearings. Even to this day, people can tune in to watch gavel-to-gavel coverage of the hearings conducted in our Supreme Court. I believe that this has enhanced the trust and confidence of people in our state because they can see what issues are being considered by the court. They can hear the court's questions and then read the court's decision, which we publish when we have decided the case. I think this makes the judicial branch the most trusted branch of the three branches of government in the United States.

I also noted that Justice Stephens talked about the selection of judges in our state. We are elected, although initially, if there is a vacant seat, the governor can make an appointment to a vacant seat. However, most of our judges are elected, including me. That leads me to discuss one reason the court takes such an interest in the community and how the community responds to the judicial system. We stand for election, and that means we are accountable to the public. If the public is not satisfied, after our term is expired, they can replace us, and that does happen. Understanding the public's role in electing judges, we judges need to be in contact with the public, and we need to be accountable to the public. But we must also be very cautious in how we are accountable. Not only must judges be impartial, we must appear to be impartial.

Many judges take opportunities to speak to community organizations about the role of the courts and how they function. During an election year judges are permitted, under judicial ethics rules, to attend many community events. I recall when I was running for election, I went to county fairs, picnics, and parades; I had to campaign vigorously because I needed to reach 7+ million voters in my state. Essentially, judges need to be in touch with their communities, but must do so in ways that do not compromise impartiality.

> Canon 3.1 offical comment:
> Participation in both law- related and other extrajudicial activities help integrate judges into their communities. This furthers public understanding of and respect for courts and the judicaial system. To the extent that time permits and that judicial independence and impartiality are not compromised; judges are encouraged to engage in appropriate extrajudical activities

Another reason judges become involved in the community is because we have a responsibility to make our justice system fair, open, and accessible. Under our canons of judicial conduct, which Justice Stephens also mentioned, judges in our state are encouraged to be involved in issues relating to the administration of justice. Specifically, Canon 3.1 talks about judges being uniquely qualified to engage in the following: extrajudicial activities that concern the law, the legal system, and the administration of justice.

Canon 3.1 offical comment:
Judges are uniquely to engage in the following: extrajudicial activities that concern the law, the legal system, and the administration of justice. Some examples of these are by speaking, writing, teaching, or participating in scholarly research projects.

In addition, judges are permitted and encouraged to engage in the following: educational, religious, charitable, fraternal or civic extrajudicial activities not counducted for profit, even when the activities do not involve the law.

While our judicial conduct rules encourage our engagement, they also put limitations on the engagement opportunities that judges can pursue. When I first became a judge, there was great resistance on the part of many judges to become involved in issues facing our communities because of the fear that we might step over the line between advocating for improvements to the justice system and having our views interpreted as advocating for a legal position. It is a very fine line.

My topic today relates to the administrative role of our courts. Jill, if you could advance to my organization slide.

Overview of the Governance Structure of the Washington State Judiciary

WASHINGTON STATE SUPREME COURT

Board for Judicial Administration	Judicial Information System Committee	Interpreter Commission	Minority and Justice Commission	Gender and Justice Commission	Commission on Children in Foster Care

Other Boards, Commissions and Committees

Judicial Assistance Program	Guardian Certification Board	Ethics Advisory Committee	Bench Bar Press Committee
Court Management Council	Pattern Forms Committee	Pattern Jury Inst. Committee	Center for Court Research
Annual Conf. Planning Cmt.	BJA Budget & Funding Cmt.	BJA Legislative Committee	BJA Policy and Planning Cmt.
BJA Court Education Cmt.	AC-ECMS Steering Cmt.	SC-CMS Steering Committee	CLJ-CMS Steering Cmt.
EDE Steering Committee			

ADMINISTRATIVE OFFICE OF THE COURTS

COURT OF APPEALS	SUPERIOR COURT JUDGES' ASSOCIATION	DISTRICT & MUNICIPAL COURT JUDGES' ASSOCIATION
• Executive Committee • Budget Committee • Court Rules Committee • Education Committee • Library Committee • Personnel Committee	• Board of Trustees • Civil Law & Rules Committee • Criminal Law & Rules Committee • Equality and Fairness Committee • Family & Juvenile Law Committee • Guardianship & Probate Committee • Judicial Education Committee • Judicial Ethics Committee • Legislative Committee • Media Outreach Committee • Pension and Benefits Workgroup • Rural Courts Committee • Technology Committee • Therapeutic Courts Committee	• Board of Governors • Bylaws Committee • Conference Planning Committee • Diversity Committee • DOL Liaison Committee • Education Committee • Legislative Committee • Long Range Planning Committee • Nominating Committee • Reserves Committee • Rules Committee • Salary and Benefits Work Group • Special Fund Committee • Technology Committee

**Slides used in this section are presented by Justice Barbara Madsen during the conference.

This chart describes the organization of the Washington court system. However, courts differ across the country on how they administer their judicial systems. Every state has a Supreme Court. In some states, the Supreme Court takes a strong leadership role in making decisions about court rules, court procedures, court budgets and, indeed, all of the resources that the courts rely on. In other states, such as Washington, where we live, our courts are considered a decentralized court system. In a decentralized court system there is a great deal of local control over the resources that the courts are given to operate. For example, courts are authorized to adopt local court rules, which may differ from court to court. Although the local rules cannot contradict the general rules adopted by the Supreme Court, many local courts adopt their own local rules for conducting court business. Many courts also adopt their own local procedures and most rely heavily on local funding for many of their court programs, such as court probation programs and court advocacy programs. Unfortunately, funding court resources at the local level can lead to an unequal system of justice.

Our Supreme Court adopts general court rules and sets procedures, but our Supreme Court has much less control over the operation of the lower courts than states that have a unified court system. In order to ensure as much uniformity as possible in the quality of the justice that people receive across our state, our Supreme Court has instituted a series of commissions and boards. These boards and commissions work toward consensus around issues facing the courts.

You can see in this chart that the Washington Supreme Court has instituted several commissions, and below those commissions, there are a number of committees. I will be addressing the boards and commissions that we have created and describe their role in the administration of justice.

The first board that you see under the Supreme Court's control is the Board for Judicial Administration (BJA). The BJA is the successor of an attempt early in the 1960s to bring courts together from every level to collaborate on how to approach the legislature when court funding was at issue. To achieve anything, a decentralized court system relies on cooper-

ation among all levels of court. In 2001, our BJA was reorganized because relationships had deteriorated somewhat between the trial courts and the Supreme Court due to the attitudes emanating from our Supreme Court. Our current BJA is chaired by our chief justice, but it is now co-chaired by a trial level judge. For seven years, I chaired the board, and then Justice Stephens more recently chaired the board, as well. A major accomplishment of the BJA has been to bring all of our courts into the virtual world through technology, expanding access to the courts for many more people in our state.

Through the BJA we try to come to a consensus so that we can speak with one voice. That is the mantra of our BJA: speaking with one voice. It is important because even though our government is divided into three separate branches, legislative, executive and judicial, we are not hermetically sealed. We must interact with the other branches of government, including, the legislature which approves the budget for our resource needs. We have to ask the legislature for funding improvements that we are trying to institute in our courts. For this reason, speaking with one voice is very important, and it is also very challenging in a decentralized system where gaining consensus within the judiciary is difficult. The next board that is listed is the Judicial Information System Committee (JISC). Our courts were latecomers to technology. Private industry has been automated for so long, but it took the courts quite some time to catch up, in part, because of the lack of funding to finally build up our technology capacities. The JISC was an attempt in 2015 to bring court levels together and come to a consensus about data sharing, information sharing, and prioritizing the technology needs of our courts. I am sure it's true in your system as well, that you need to be able to communicate among all of your courts so that cases and information does not slide between the cracks, so to speak. The JISC attempts to gain cooperation and build consensus and uniformity in our system. As I said earlier, many local courts have local funding and have chosen to build their own technology systems. The JISC, which I now chair, makes a valiant effort to build uniformity among our reporting systems so that every court in the state has access to the documents and the records of every other court in our state.

Next is our Interpreter Commission. We were, I believe, the first state in the United States to initiate an interpreter program. The interpreter program is important because it requires a professional certification for interpreter services. In a country like the United States, where one in seven people do not speak English as a first language, it is so important that people understand the system they become involved with. It became clear to us that we needed to professionalize interpreter services. We now require interpreter services be delivered only by certified interpreters or registered interpreters. We cover, I believe, close to 50 languages in our ability to interpret, test and certify interpreters. Next is our Minority and Justice Commission. The Minority and Justice Commission was a result of a number of things that happened in our court system. In the 1980's, our Supreme Court began to understand the racial disparity in our justice system. It was quite late in my tenure as a judge in fact when we finally put our collective view about justice into practice by instituting a commission charged with maintaining a bias-free justice system. 1990 is the year that we instituted our Minority and Justice Commission. The commission has been very active in evaluating and addressing flaws in our justice system in the delivery of justice to communities of color. Through a great deal of research, we have learned that some of our procedures and court rules are racially biased in their impact. The Minority and Justice Commission is charged with finding those areas where change is needed and then educating our judges so that they understand where the bias points are in the system. After identifying areas for improvement, we provide education and training around those issues so that our judges can avoid the practices that lead to an unjust result based upon racial differences. Every year the Supreme Court, through the commission, sponsors a statewide summit addressing a major concern involving racial justice. The summit is broadcast on TV Washington (TVW), the station that covers the Supreme Court arguments.

Next is our Gender and Justice Commission, which was instituted in 1994 as a result of an 18-month study into practices in our courts that unequally impacted gender across our state. The commission began by studying laws concerning domestic violence against women and how our courts processed cases of domestic violence.

I was the chair of this commission for 20 years, and during that time we explored issues around gender and race and how gender and race are compounding biases in our system. The commission has addressed many issues, including child support, police perpetrated domestic violence, gay and lesbian rights, and the treatment of women in prison. We have worked to develop new practices, procedures, and court rules to reduce the trauma for victims of family violence and rape. We have given advice to the legislature on practical solutions to gender inequality in our courts, including in the area of family relations and making sure that we recognize the disparate impact that divorce has on women and children. The central focus of the commission is judicial education.

Finally, the Commission on Children in Foster Care (CCFC). This is our most recent Supreme Court commission. This commission was created in order to address practices in our foster care system that lead to increased childhood trauma. The foster care system involves state care for children whose parents are unable or unwilling to care for their children appropriately. The role of the CCFC is to ensure that children are provided with safe, permanent families in which their physical, emotional, intellectual, and social needs are met. This commission is co-chaired by the director of the Department of Children, Youth, and Families, which is the executive branch of the government that provides protection for these children. Ultimately, the court system determines whether or not children will be removed from their families or whether their families will be given the necessary and appropriate treatment opportunities to improve their parenting skills and allow for the return of these children to their families. I currently co-chair this commission, which is engaged in an effort to re-imagine the child welfare system to keep families intact.

Each of these commissions I have mentioned is chaired by a member of our Supreme Court to demonstrate the extreme importance of the work done by each of the commissions. In addition to our duty to decide cases, we also have the duty to administer justice through these commissions and committees that are active in our state and on which many of our justices either serve or have served in the past. We take our responsibility seriously, not only to decide cases, but to make sure that as we decide cases,

our judges are well informed about social science and about best practices that will take into account the trauma that many litigants have suffered in their lives. We want to make sure that going through our court system as a litigant, witness, or in any other capacity does not re-traumatize people who have either been treated unfairly or who have experienced trauma in their lives. Our Supreme Court has made a very strong commitment to the people who use our court system—that our system will be accessible and will treat them fairly.

Thank you! I will turn that back to Jill!

Jill Malat:
Thank you, Justice Madsen! And finally, we have Retired Judge Rogoff. Roger Rogoff served as a county prosecuting attorney after he graduated from Emory University and went to the University of Washington School of Law, where he received his JD in 1993. After leaving the King County Prosecuting Attorney's Office, a county prosecuting office, he went and was in private practice briefly and then worked as a US attorney. He was appointed to the King County Superior Court Bench in 2013. He recently left the King County Superior Court Bench, and he is now Corporate Counsel at Microsoft. I will now turn it over to Retired Judge Roger Rogoff.

Roger Rogoff:
Thanks, Jill! First of all, I want to thank everyone for allowing me to be on this panel. I particularly am humbled and honored to be on a panel with Justice Stephens and Justice Madsen, two really iconic figures in the legal world in the state of Washington. I think if I could just brag a little bit about the two of them: Justice Stephens before becoming a judge, which you have heard about and before becoming a justice on the Supreme Court was one of the most prolific and iconic civil litigators in the State of Washington, spent an incredible amount of time arguing cases in front of the Washington State Supreme Court on civil matters and is the representative on the Supreme Court from the eastern side of the state which creates some geographic diversity for our court.

In addition to what Jill described about her, Justice Madsen, I just want to make sure that folks understand the legal legacy that she provides in the state of Washington. I want to do that by just pointing to the photograph that started out with her presentation. You all should know that her husband Don, who was in that photograph, the blonde fellow, is or was (he retired recently) one of the most well-respected criminal defense attorneys in the state of Washington. As a prosecutor from King County, I spent an incredible amount of time early on in my career trying cases against Don, laughing with him and arguing with him.

Also, one of those girls in that photograph, Hillary Madsen, was recently elected to the Superior Court of the State of Washington and serves in King County Superior Court right now. So, in addition to her incredible work on her own, Justice Madsen has a legacy in the State of Washington that extends far beyond her.

I was asked to talk a little bit today about trials which is great because that is what I have done for the 27 years that I was a prosecutor, a defense attorney and then a judge in the superior court or the trial courts.

It is a great way to talk about independence and accountability, which were the two themes that Justice Stephens and Justice Madsen began discussing here because trials are the way that ordinary people and ordinary companies have the opportunity to have their disputes decided at the initial level of courts in the state of Washington are designed to be transparent, independent and accountable. They are accountable to the public because they are open courts. They are designed to be able to be seen by the public whenever and wherever they want to. If someone wants to come and see a trial in King County Superior Court, all they have to do is come to the courthouse and watch. With Covid and the beginning of using remote technology to help us be more transparent, most of our trials are also available via remote technology such as Zoom and other ways.

There is also accountability through the jury system. In the state of Washington, litigants have the right to a jury trial. So, it is not a single judge making decisions about the results of their cases, but a jury of 12 peo-

ple chosen from the community and are hopefully diverse and diverse in background, diverse in demographics enough to truly be a jury of the peers of the people who appear in court. I want to talk about a couple things regarding juries, and then I will be shorter hopefully than both of our Justices and then turn it over for questions on the rest of this panel.

First of all, trials in the state of Washington are rare. 95% of cases that begin in the state of Washington resolve prior to trial. In other words, the process of getting to a trial is difficult enough. It forces enough conversation that people are able to resolve their disputes and figure out a way to resolve their cases. This is done by a process called plea bargaining which we can talk about if folks want to, which is controversial, but I think, legally, it has been deemed necessary to resolve particularly criminal cases as well as civil cases.

Number II: I would say that trials are expensive, they are unwieldy, and they are complex. And I think they are designed that way. They are designed that way because by being unwieldy and complex, they are designed to protect the rights of those who are accused of crimes in the State of Washington. They are designed to protect the rights of litigants who have their cases heard in the trial courts in the state of Washington, and the procedures that are set up are designed so that jurors hear only the evidence that is necessary to make decisions about their cases and not evidence that is prejudicial, unnecessary or unfair.

However, they are unwieldy and expensive because here's what happens: we take a pool of potential jurors, 40 to 100 of them, bring them into a courtroom and whittle that number down to 12 or 13 jurors who will hear the cases. Lawyers, judges and staff oversee that process. The procedure then itself of the trial is designed to protect constitutional rights. People accused of crimes have the right to remain silent and don't have to say anything. They have the right to a lawyer whose job is to defend them and protect their constitutional rights. The process is designed to be procedurally fair with opportunities for the lawyer, for the accused in criminal cases to cross-examine all witnesses who testify against them. It is designed to be a fair trial substantively so that there is a review for deci-

sions that are clearly wrong or where the evidence was clearly insufficient. There is a presumption of innocence for those accused of crimes. There is a very high burden for the state to prove that somebody has committed a crime, and that burden is beyond a reasonable doubt. Then as I discussed earlier, there is transparency or open court so folks can see how these trials happen. In fact, we in the United States have spent the last 3 or 4 weeks most of us watching a trial in a state court in Minneapolis where a police officer was accused and then convicted of murdering a young black man in the city of Minneapolis. The transparency of that trial was such that folks were able to watch it all over the country at any time during the trial process, and we were able to see exactly what the lawyers did, what the judges did and how the witnesses answered questions and what the closing and opening statements were like during the course of that trial.

From my perspective as someone who has done trials and has put on cases and tried to convince juries of the correctness of my particular case; when trials are done right, I believe that they are the best way to figure out the facts and apply them to the law and make decisions about how a case should be decided. I can't think of a better way to do it. I would also say that without a strong judge, without the different players in the court system doing their jobs correctly and earnestly and in the right way, there can be incredible miscarriages of justice. There is an opportunity for failure. There's an opportunity for failure with unprepared defense attorneys, unprepared prosecutors, unethical prosecutors, weak judges and lack of resources. So, I think that one of the things that all of us who have been trial court judges strive for in our courtrooms is to be strong enough to make sure that all of the pieces play their parts correctly and persuasively, do it in the right way and ensure that all of the parties in the case are afforded the rights that they're entitled to.

I would say that in our system, almost every criminal case is tried by a jury. There are situations where a judge might make a decision about a case when a defendant or accused decides that is the way they want to handle their case, but almost always, cases are heard by the jury. In my experience over 27 years, I am convinced that 12 jurors with differing backgrounds and differing experiences are always smarter than any one

person, even the smartest judge in the state. They always get it right in one way or the other, and we can talk a little bit about that later.

I would also tell you that over time in the United States and certainly in the state of Washington, the art of trying a case is just that. It takes time, and it takes experience to be able to tell a story to 12 people you don't know in a way that is persuasive and interesting, in a way that allows them to make a good decision. It is something that folks have to learn to do, and the experience and the work that goes into that art is something that in the State of Washington, we have spent a lot of time trying to make sure we give to young lawyers and law students. Over the last 10 or 15 years, we have spent a lot of time and energy in our law schools, making sure that there are clinics available to law students so that they can learn how not just to understand what the law is and how to apply the law, but also how to try a case and how to talk to people and how to make sure that the folks who come in to make decisions as jurors can understand the arguments that you're making, the law that applies and the facts that you've provided them. And it is something that I have spent time teaching in law schools and am a very big advocate of continuing to do.

And I think that the last thing I want to just talk about in trials is an issue that we could spend four weeks discussing here and elsewhere, and that is the work that trial judges, particularly in the state of Washington, are doing and continue to do to increase diversity in jurors and to work with the biases that we all have and that we come to cases with. As Justice Madsen just described, there has been an incredible amount of work done to address bias in the jury system and address bias amongst lawyers and judges. It is incredibly hard in a trial court situation where the biases that we all have, that everyone in society has, are brought into the courtroom and have to be addressed by judges and juries and the process as we try these cases.

So, that is what I wanted to say about trying cases in the State of Washington and superior court trials. And with that, I will turn it over to Miss Malat.

QUESTIONS AND ANSWERS SESSION

Jill Malat:
Thank you very much! We have a number of questions both from the audience, Prof. Aybay had submitted some questions, and I have prepared some questions as well. So, I am going to first start with Prof. Aybay's questions that I believe weren't addressed, and these can go to any of the panelists that wish to answer them. The first is "Is there a minimum year of service requirement as an attorney at law to be a judge?"

Justice Madsen:
Yes and no! Interestingly enough, in our Washington Constitution, there is no requirement of prior experience in order to sit on our highest court, the Washington State Supreme Court. Anyone can seek a position on that court whether they just graduated from law school a week earlier or if they have been practicing law for 50 years. That is not true though, of the Court of Appeals, which is the next court level below the Supreme Court. There is a requirement of ten years, I believe, of experience before one can sit on the Court of Appeals. To sit in the superior court, I believe, five years of experience is required. However, I don't believe there are any experience requirements for the district or municipal courts, which resolve the bulk of the cases in our state. So, it is really quite mixed.

Jill Malat:
The next question is, "Judges are elected for a period of time. Is re-election precluded, and if not, how often are judges re-elected?"

Justice Debra Stephens:
I can answer that question.

So, it is interesting because periodically, including in this last legislative term, there are bills introduced to set term limits on the number of times judges might be able to run. Nevertheless, currently, there is no limit to the number of times a person could run for re-election as a judge, but we do have a mandatory retirement age which was an amendment to our constitution, sometime in the 1950s, I believe. So, for Superior Court and

Supreme Court judges, they must retire at the end of the year in which they turn 75 years of age.

If you look over the history of our state, most judges are re-elected after having been elected, barring some very public crisis in their service. So, it is really not incredibly common that a judge is tossed out midterm. However, it sort of varies with the high profile of the office, right? So, at the Supreme Court, only nine justices very high profile, most justices in recent years, at least I would say in the past 20 years, those seats are often challenged though and certainly whenever there's an open seat, there are numerous people who initially seek that seat. However, at least in my experience, I would be interested in Former Judge Rogoff and Justice Madsen's perspective. I think, at the trial court level when there is a re-election, many judges run without opposition, and when that occurs, really just for logistics, their name isn't even on the early ballot, I guess so.

I think the system is somewhat self-regulating in that sense and some of that, and there are many things to be said about that we haven't really talked about the cost of elections and the distraction of elections. And in Washington, we've only had a couple of instances in which a ton of money was thrown at some judicial races, but that's becoming a game-changer in a number of American elections, as you may be aware. With the Supreme Court decision of several years ago, in a case called "Citizens United", the Supreme Court declared unconstitutional certain spending limits on campaigns on the theory that spending money on a political campaign is a form of free speech protected under the first amendment. So, the risk of a high dollar race is certainly being felt in judicial elections as well. However, we haven't had a significant experience with that in Washington. We have had some experiences, but in certain states, North Carolina is a primary example in this past year in 2020. It was a democrat versus republican race. All of the democratic judges on the ballot, including the Chief Justice of the State, lost their election in multi-million-dollar judicial races. So, that is a really important conversation for us to have, but I will just stop there.

Jill Malat:
What is the average cost of a judicial race since you brought that up?

Justice Debra Stephens: I don't know; I think the average is going to be hard to see since I've been on the court, actually just before I came on the court. Was it 2016, Justice Madsen? When there was a lot of money thrown at 3 of the races? I think, including what we call independent expenditures, so the money spent by interest groups not directly by campaigns which were about 6 million dollars, was spent on two races. In my own experience, I think 40-50 thousand, and that's a statewide race. I was challenged once, and my opponent was a disbarred attorney who drove a Zamboni machine at a hockey game. So, it wasn't the kind of race that was going to bring a lot of money. So, I don't know that there's really an average. Some races, including at the Superior Court level, get very expensive.

Justice Madsen:
In 2016, I and two other justices ran for re-election. We had opponents because of two high profile cases that the court decided. The three of us who were up for re-election had participated in at least one, or both, of those cases. A large amount of independent money was spent to try to defeat us based on our decisions in those two cases. At the end of the day, though, the credentials of our opponents were not strong. I think the incumbents succeeded because the opponents were not particularly good quality candidates. However, such a large amount of money could have made the difference if the candidates who were solicited to run against us had been more qualified.

Jill Malat:
The next question is, "The number of judges, justices on the Supreme Court appears to be fixed. The legislative branch is empowered to increase the number of judges. How often does the legislature use this power?"

Justice Debra Stephens:
This is a very good question and a very timely question. Because if you followed the last presidential election, one of the issues which is now being explored by President Biden's Administration is increasing the size of

the United States Supreme Court, which is currently a court of 9.

And I think most people recognize that when there is an interest in increasing or decreasing the size of the court, there are political reasons for that. Increasing the size of the court gives a particular administration the opportunity to appoint new judges to balance out the number of judges that the administration did not appoint. Decreasing the size of the court might be seen as a retaliatory measure against court action.

In Washington, when the state was initially formed in 1889, there were 5. The court was created with five, and that's what's established under our constitution. The constitution allows the legislature to increase the size. It was initially increased in 1907-ish, I think, to 7. Really, during an era in American politics when there was an interest in greater populism, representation with the thought being that a bigger court would be more in touch with the populace. And then it was increased very shortly thereafter, just a couple of years later to 9 and at that time then made non-partisan.

We have had since I've been on the court in response to one of the decisions that Justice Madsen referenced a case in which I authored the opinion but we declared the system of funding public education in Washington to be unconstitutional under a specific provision of our constitution, a provision making education a paramount duty of the state and a bill was introduced the year after that in language that mimicked, language in the opinion saying that you know the legislature could no longer afford to pay for nine justices, that was just too expensive. So, they were going to reduce the court back to its constitutional minimum of 5, and they were going to make the justices stand on the steps of the Temple of Justice at high noon and draw straws to see who would draw the short straw and have to be removed from office. Clearly, that was more rhetoric than substance.

I think it actually has happened, but I couldn't tell you where of a state that has reduced the size of its court for administrative reasons. I believe that maybe did happen in one state that went to 9 and then quickly back to 7. Nevertheless, I will say that Washington's court of 9 distinguishes us somewhat. Most state courts, even very large populist states have a court

of 7, and some of the less populated states have courts of 5. However, we have had nine since the early part of the 20th century. Anything Justice Madsen or Judge Rogoff would like to add to that?

Roger Rogoff:
I would just say for trial courts in King County Superior Court, we currently have 53 judges. The legislature recently decided to increase that by one, but that is all based on workload and the amount of cases that each judge is carrying. There's actually a mathematical formula that helps the legislature make those decisions.

Justice Madsen:
During the years that I've sat on the court, there have been at least three genuine attempts to reduce the size of our court. They have all failed, but they all stemmed from political reasons. I point that out only to say that there is always tension among the three branches of government. This generally occurs when the court rules that a law passed by the legislature is unconstitutional. There are legislators who become quite incensed when the court declares a law unconstitutional. Sometimes even the governor becomes upset with the courts. There is always going to be tension among the three branches of government, and that is just an example of how the tensions can play out.

Jill Malat:
The next question is, "When a vacancy occurs in the office of judge, the governor appears to have the power to appoint a judge to fill the vacancy to serve until new judges are elected. Does the governor take the decision individually or seek the approval of the state legislature?"

Justice Debra Stephens:
I'll go ahead and jump in on this.

I was initially appointed to the court on January 1st of 2008, and the process is really the governor's. So, it is not directly parallel to the federal process where the president makes an appointment, but the Senate has to confirm. It's not like that. It is strictly the governor's appointment. How-

ever, as I always viewed it, the judge who will immediately stand for election in the next general election has one vote: the governor's. You still have to run for office. I was fortunate that the year I was appointed was also when the seat position seven on our court was up for election. So, I had to run immediately, but that was to retain for a six-year term. Others who are appointed including a couple of our colleagues on the Supreme Court had to immediately run to retain the seat but only for the remainder of the term. So, maybe a year and a half or two years and then had to run again, entirely.

I will say that our governor, Governor Inslee, just like the previous two governors for certain and I think it goes back farther than that, has a vetting process, and is very interested in hearing from the legal community and the community at large about candidates for judge. So there is a requirement under this governor's process as the previous governor who appointed me that the candidates be evaluated for their qualifications by different bars and different specialty and minority bar associations. There used to be a recommendation committee through the state, the integrated State Bar system, but I think those of us who have been appointed were evaluated by, as I know in my instance, it was at least seven committees of minority and specialty bars that we were ready to judge exceptionally well qualified, well qualified, qualified or unqualified. So, the governor definitely wants a thorough vetting process. Speaking just for myself, I can tell you that the application, the questionnaire that I filled out to be screened before vetting, took me about 50 hours to complete because they want to know all the cases you've tried and the names of opposing counsel and it's a tremendous amount of information which I think helps that screening process before an appointment is made.

Jill Malat:
Okay, I'm going to take some questions from the audience. We have about 20 more minutes, and then we're going to take a break.

The first question is, and this is to all the speakers. "When we look at the Washington Supreme Court justices, we realize that the number of women judges constitute the majority. Do you still think that there is room for

more development in this regard? Do you believe that the number-based positive discrimination is enough in this respect? This is an important point regarding gender equality and women empowerment. How do you evaluate the US experience and the empowerment of women judges?"

Justice Madsen:
I was elected, as I mentioned earlier, in 1992, and I was only the third woman to ever sit on our state supreme court. So, it was essentially a hundred years with no women, and then I became the third woman.

When I ran for election to the court, I did so because I believed that there was gender inequality in the legal profession in the State of Washington. I thought that we needed a woman's voice at the table where decisions were going to be made about the practice of law in Washington State. That is why I sought election. I was the first woman to actually run for the State Supreme Court and not to be appointed. It was what we called at that time "the year of the woman" because many, many women decided to run for public office. Clarence Thomas had been appointed to the United States Supreme Court, the highest court in the nation, despite evidence that he had sexually harassed women subordinates. The same year nine out of ten statewide offices were won by women. Women turned out to run and to vote in great numbers because our elected officials had paid so little attention to gender equity and women wanted a voice.

My goal in joining the court was not so much to decide the cases, to be very honest. It was to change the culture of the legal profession in our state. We have made a lot of progress, I believe. As you can see, seven of our nine justices now are women. However, what has become much more obvious to me in the last many years is that gender is not the only place where equality breaks down. There is inequity along racial and ethnic lines. Those voices also need to be heard as well. I think our court has done well in the last five to six years, adding minority voices to our court and addressing bias in our rules and practices.

Justice Stephens mentioned that we have one of, or I think, actually the most diverse Supreme Courts in the country. We have an African-Amer-

ican member, a Native American member, a Latinx member, an Asian member of our court, and we have a variety of religious backgrounds, including Jewish, Catholic, and Protestant members. We have achieved, I think, a great balance around the table of the Washington Supreme Court.

As far as the profession, there is still a great deal of work to be done in the courtrooms across our state. That is why, in the last 20 years, we have paid so much attention to judicial education. Our trial courts are under-resourced; our judges don't have the opportunities for education that we would like them to have. We know that there are bias issues in our trial courts, and also with the people who are serving as our jurors. We need to do much more work around gender, race, and culture. I believe those issues must be the central focus for our work.

Roger Rogoff:
I would just piggyback on that and add that this is one of the situations where I think that leadership in the state is pulling the rest of us in a very positive direction. In the trial court in King County, there are 53 judges, and the majority of those are now women with some significant diversity on that batch. As a judge, I would say that when you are sitting during trials and hearings, you see the continued unfairness that women and minority lawyers face as they participate in this profession. You see partners, who are mostly male in the large law firms, take credit and oral argument at hearings where it's clear that the non-partner, sometimes women, sometimes minorities, are the ones who wrote the briefs and did the work. It is something that judicial officers across the state need to be incredibly active with to ensure that we root out that prejudice and that bias.

Justice Debra Stephens:
May I just add something to this, too. Because I really completely agree with Judge Rogoff and Justice Madsen. I also just want to comment that I was in law school when Justice Madsen, at a very young age, was first elected to the Supreme Court and the role model that she has provided to so many women in the profession who could see a young woman, a mother of four, someone who was strong and embraced her role as both a judge

and a mother. That was huge for all of us and I started law school with a 6-week-old baby. So, I guess to me in particular; it was really inspiring to see that balance.

But that brings me to the thing I want to stress is, I think, that addressing the marginalization of women and minorities in the community requires us to look at the structure of how we do business, how we practice law and how the courts run. I was in academia too and famously a dean who said, "We don't have a women problem, we have a mommy problem." What are your priorities? That sort of thing. I think that this notion that we're going to maintain this patriarchal system of law practice or law and just bringing a few women and minorities in is just not a sustainable notion. So, I think there needs to be a constant effort to reimagine how the institutions operate to really bring in and include the experience and the voices of all. It makes obviously for a better justice system, right? It is a much more authentic, real justice system that is better meeting the needs of everyone. However, I think we know it's as if you take a couple steps forward and one step back. It really requires constant work and vigilance.

Jill Malat:
The next question is, "How does the procedure continue after the investigation of the commission regarding judicial misconduct? Who makes the decision on disciplinary punishment if a criminal charge is to be pressed as the commission send the file to the prosecutor?"

Justice Debra Stephens:
I will jump in. It's hard because if we were sitting on a, you know, a platform, a podium together, we'd look and say, "Oh, you take that one!" I'm sorry I will jump in again, and Justice Madsen has been on the Supreme Court for a long time and can speak about cases that will come to the Supreme Court for review.

In a nutshell, let me address the last piece first. There are instances, and there is a fairly high-profile case in Washington right now of a judge who did not run for re-election and so is no longer on the bench, but who has been facing for the last 18 months criminal sexual assault charges

and typically the conduct commission will hold in abeyance discipline premised on that same conduct while the criminal process plays out. Because, of course, there is the presumption of innocence until proven guilty in the criminal system, and there is an interest now, partly in light of that direct experience, in examining the options for temporarily having someone leave their office and have someone cover that office. I think a lot of the commissions, judicial conduct commissions across the country are looking at what the options are for that.

But typically, the discipline is imposed by the commission. This is a really high concept, but there are instances in which that could be subject to review by the Supreme Court. However, it typically is; it is the decision of the commission whether to admonish or reprimand or censure the judge.

Anything you would want to add to that Justice Madsen?

Justice Madsen:
Yes, I would say that if the judicial conduct commission decides there ought to be a suspension or removal of a judge, then it does have to be reviewed by the Washington Supreme Court. This became problematic when one of our own members was being investigated and ultimately was sanctioned by the commission. Our statute, which sets out the procedure for how these hearings are conducted, specifically provides that if one of the members of the Supreme Court is the subject of the investigation and then discipline, the the court shall impanel a substitute court comprised of Court of Appeals judges who make the decision about the sanctions. That did happen in our colleague's case. A group of Court of Appeals judges upheld a sanction against one of our own members. He was ultimately defeated at the polls, the citizens did not re-elect him, and it does require the Supreme Court to authorize the suspension or removal of a judge.

Roger Rogoff:
The only thing I would add is just with regard to the notion of criminal prosecution or criminal investigation. I just want to make clear that it would be a completely separate, completely unrelated process that the judge would go through. Although the police and the investigators on the

criminal case might use some of the information from any kind of judicial investigation, the two processes are completely separate and have nothing to do with one another.

Jill Malat:
I think we have time for one more question.

"Does the election of judges prevent their decisions from being objective? When the time comes to decide, do you feel the pressure between the will of the people and true justice?"

I realize that's a big question for six minutes.

Justice Madsen:
It is a big question, and it has a variety of answers, I think.

As a personal matter, I've run for re-election, I believe, six times, and almost always I've had opposition. Often it was because of a case that I wrote. What I realized is that you really cannot please everyone. What judges must do is to put out of your mind what might be popular because you will never know what is going to be popular. You make the decision based upon the law and the precedent that has been set by cases. You do the best that you can under the circumstances to deliver an unbiased and impartial decision in every single case. Now, that is aspirational, but I think most of us believe that we can do that. Unfortunately, there have been some studies about decision making in criminal cases in the year before and during the election of judges. There is some evidence that suggests that judges do decide cases differently during the year running up to their elections, and they tend to be tougher on crime during those years in terms of their decisions.

Again, I don't know the validity of such studies, but I can see how they make some sense. There is pressure; no system of selection of judges is perfect. In an appointment system that there's still the possibility of removal. Judges are conscious of what the reaction will be to their decisions by the authorities that can remove them. There might be other answers

from the other panelists, but to me, it's really a matter of personal integrity and personal ethics that you put the considerations of yourself aside, and you make the best decision you can under the law without regard to whether it's going to help or hurt you in your election.

Justice Debra Stephens:
I will jump in. I think it'd be great if we all just weigh in briefly on this one. I would love to hear from Former Judge Rogoff, too, because I feel like sometimes the pressures are greater in the trial courts, you know, because of just that greater community contact.

However, I do think I have only ever been an appellate judge. I was never a trial judge; I was briefly on the Court of Appeals for less than one year, and then I have been on the Supreme Court since 2008. And so, our jurisdiction is discretionary. We take only the most important cases, and our docket becomes more politicized as it is a politically charged term, but people talk about weaponizing the courts, right? Taking high profile social issues and turning them into cases, test cases. That sort of thing. We can't hide from those because that's the nature of our jurisdiction.

So, most of what I have seen is you are going to make controversial decisions in very high-profile cases. At the end of six years, you have probably impressed and annoyed everybody in the state, so I really think the kind of person who has drawn to doing the work just sees that comes with the territory. So, I think as an institutional point of pressure, it might be less so on Supreme Court justices than on trial courts.

I think the study that I am familiar with that Justice Madsen was referring to, which actually studied King County judges, looked at their sentencing decisions because judges have a great discretion within a range of the length of a sentence prison term or other aspects of the sentence to be imposed and did find that across the period studied that you could see a little uptick because it's generally regarded as, or at least had been up until that point. I'd be interested to see what the research would show now, in the last couple of years, especially with the increased focus on how America over-criminalizes and over-punishes poverty behaviour and how racially

biased it is. The trend may be different, but I think there's some greater direct pressure in those discretionary decisions. Which is why I was interested to hear Judge Rogoff's perspective on that because I have to say from a Supreme Court's perspective, we annoy everybody after six years; we make everybody happy after six years. So it is just kind of a non-issue, I think, at the Supreme Court or less of an issue, at least in my experience.

Roger Rogoff:
Well, thank you! From a trial court perspective, one of the nice things about our decisions is that typically they are not written, and they are not published. So, that helps ameliorate some of the pressures that we might feel from any one decision.

But I believe the science on the decision-making from that study. There is pressure there. I think it exists, and it makes decision-making more difficult.

I will also tell you that there is a study out there that says that judges, trial court judges sentence more harshly late in the day when the day is almost over, and they want to get through or just before lunch when they're hungry and they want to get out to eat. So, not to make light of it, but there are a lot of pressures that affect you as a court, and some of them are clear and you can address them head-on, and some of them you probably don't even realize and some of them have to do with your own biases and how you see the world. I think a lot of the Superior Court judges try to address those pressures by keeping track of what they do, and when I was a Superior Court judge, I did that with my sentences. I kept track of every sentence, grouped them by type of sentence, kept notes on the reason I made the decisions and kept notes on the demographics and the background of all the people that I had sentenced in an effort to try to be mindful of all of the biases that are going to impact me, including, you know, the fear of not being re-elected, including the unconscious biases that we all have with regard to race and background and so forth.

So, I don't think you can run away from the fact that pressure exists. I think judges have become very mindful of it and try very hard to find

ways to address it in their decision making.

Jill Malat:
Thank you! I believe that concludes our portion of this program. I just want to really thank Justice Madsen, Justice Stephens and Former Judge Rogoff. This has been really a learning experience for me and very inspiring.

So, thank you very much and also, of course, thank you to our Turkish hosts. I look forward to this program's second part, and I'm excited to learn about the Turkish system.

Presenter | Elif Naz Arıkan:
Thank you very much, Miss Malat!

Now, we are going to give a short break for 5 minutes.

SECOND SESSION

Presenter | Elif Naz Arıkan:
Honorable guests, distinguished professors, dear participants., we are now proceeding with the second part of our conference and this session will be moderated by Dr Ural Aküzum, Assistant Professor at Istanbul Gedik University's Administrative Law Department.

Our honorable guests, the Judge of 29th Criminal Court of the Istanbul Anatolian Side Courthouse, Judge Mahmut Erdemli and Reporter Judge of the Turkish Constitutional Court and Coordinator of the Constitutional Research Center, Dr Mucahit Aydın, will deliver their speeches concerning the judicial system in Turkey.

Now, I would like to yield the floor to Dr Ural Aküzüm as presenter and moderator.

Dr Ural Aküzüm:
Hello distinguished guests, professors and dear participants,

Once again, I would like to welcome you all to the Conference on Judicial Systems in the United States and Turkey. As we had a first session focusing on the judicial system in the United States, in this session, we aim to focus on the judicial system in Turkey from a similar framework to provide a comparative perspective. Today, in our session, we have our distinguished judges: Judge Mahmut Erdemli and the Reporter Judge Dr Mucahit Erdemli.

I would like to emphasize that it is such a great opportunity to be able to evaluate this topic with the judiciary members. In this session, we will particularly focus on the judicial organization in Turkey, judicial independence and the right to fair trial. These are extremely important topics concerning the Turkish judicial system. Discussing the questions arising from these concepts is crucial to tackle the structural problems in the judicial system.

Now, I would like to yield the floor to our first speaker, Judge Mahmut Erdemli, to enlighten us regarding Turkey's judicial organization and judicial independence.

JUDICIAL ORGANIZATION AND THE INDEPENDENCE OF JUDICIARY IN TURKEY

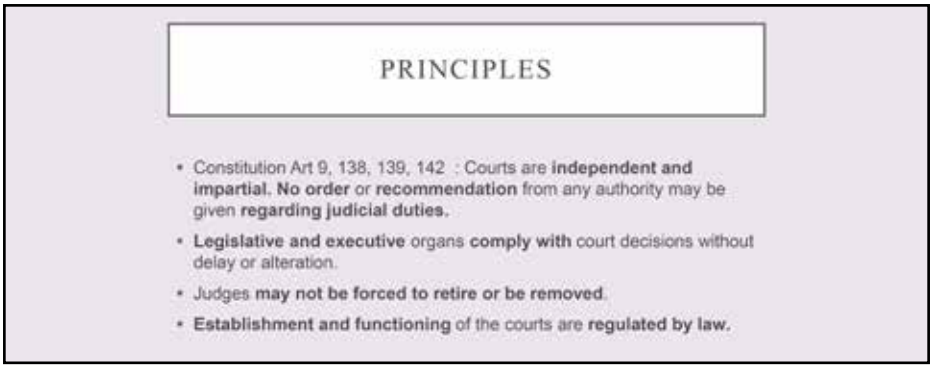
Judge Mahmut Erdemli

Mahmut Erdemli:
Okay, I'm preparing to see my PowerPoint presentation. I wonder if the participants and audience see my PowerPoint presentation. Can you confirm that?

Presenter:
Yes, your honor. We can see that!

Mahmut Erdemli:
Thank you.

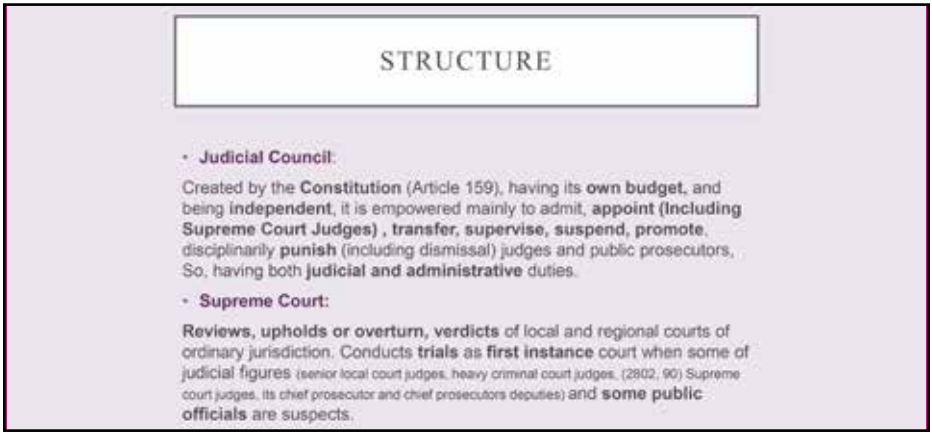
I would like to thank the organizer university, Gedik University and also the colleagues from the United States who dedicated their time and effort to prepare their presentations. Also, they spared time during their working time.
I also thank my colleague from the Constitutional Court for participating in this event.
I have been a criminal court judge in the first instance court for about 25 years. I spent the last 20 years in the criminal court of the first instance. So, I will be more competent to answer the questions at the end of the presentations when it is related to criminal justice and it is related to current criminal courts.



**Slides used in this section are presented by Judge Mahmut Erdemli during the conference.

When we look at the Constitution of the Republic of Turkey, it's not very different from any democratic country in the European Union. Article 9 of the Constitution stipulates that the courts are independent and impartial. As per Article 138/2 of the Constitution, the courts do not receive any recommendation regarding their judicial duties from any authority. The fourth paragraph of the same article stipulates that the legislative and executive organs comply with court decisions without delay or alteration. As per Article 139/1, the judges may not be forced to retire or be removed. It is also important to note that under Article 142/1 of the Constitution establishment and functioning of the courts are regulated by the law.

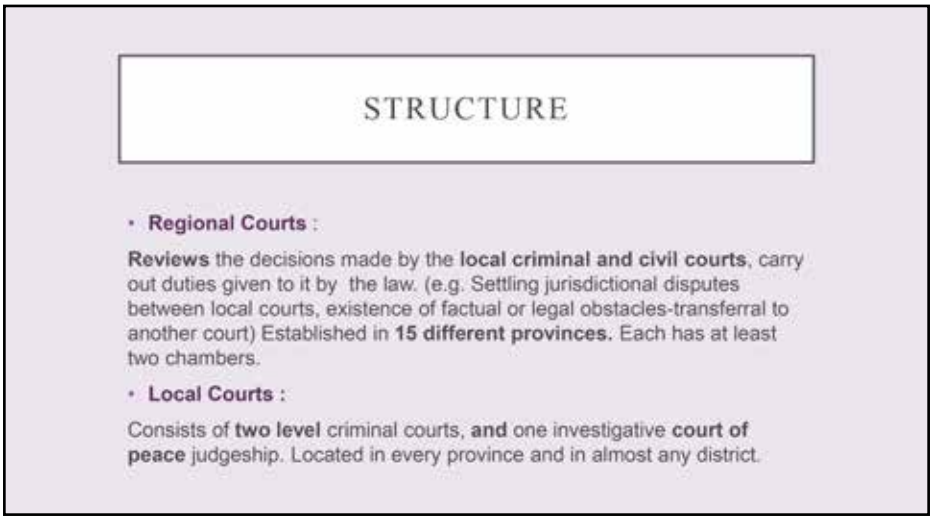
So, we will see the organization first, very briefly. After that, I will try to make an attempt to explain what kind of challenges exist in respect of independence in the judiciary.



I will start with the Judicial Council with extensive power to appoint judges, admit judges into the profession, transfer them, supervise, suspend and promote, and carry out a disciplinary investigation using its inspection board.

Under Article 154/2 of the Constitution, the Judicial Council is empowered not only to appoint the local court judges but also to appoint the Supreme Court as per Article 155/3, Council of State judges. By the way, the Council of State is the equivalent of the Supreme Court, which review the cases coming from administrative and regional administrative courts, while the Supreme Court reviews the cases coming from the courts of ordinary jurisdiction.

So, the Supreme Court reviews, upholds or overturns verdicts of local and regional courts of ordinary jurisdiction. Under Article 13 of the Code of Supreme Court, it also conducts trials when senior judges and when the judges of the Supreme Court are charged with criminal offences. In normal circumstances, the Supreme Court makes the final judgment for ordinary citizens, but when it acts as a first instance court while trying the individuals, including its own judges, it is appealable to the Plenary Board, which consists of judges from each chamber of the Supreme Court. As far as I remember, The Criminal Section of the Supreme Court has now about 12 chambers.



We also have regional courts; these courts have been established in the last few years. In the past, we had the local courts and the supreme courts. Regional courts are, right now, between the local courts and the supreme courts. The regional courts also release the decisions made by the local criminal, civil courts just like the Supreme Court, but its decisions are also appealable before the Supreme Court if the subject matter of the case exceeds a certain level of importance. As an example, under Article 286/2 (b) of the Criminal Procedural Code, if the local court, the Criminal Local Court punishes the suspect not more than five years in prison, then the regional court is empowered to make the final decision with no availability to go to the Supreme Court.

So, we have two types of local courts: criminal courts of general jurisdiction and criminal assize courts. Moreover, we have the court of peace judgeships, and these courts are located in every province; and Turkey has 81 provinces and almost any district. The Turkish Government closed the courts in some districts because there were not many cases flowing into these districts to use the courts and the judges more effectively.

At the local courts level, when a criminal court of general jurisdiction makes a judgment, it normally doesn't go to the criminal court. It goes to the criminal assize court, which is actually higher than the general jurisdiction court. However, some of the decisions by the criminal court of general jurisdiction goes to assize courts, such as arrest decisions and the decisions in which the punishment has been delayed. It's a kind of suspension of the punishment. So, this means that the assize court only reviews the decisions related to arrest and the decisions for unimportant punishments.

So, before evaluating the independence of the Turkish judiciary at each level that I have mentioned, we need to know the requirements of independence. What does it mean to be independent, and under what conditions the Turkish judiciary can be considered independent?

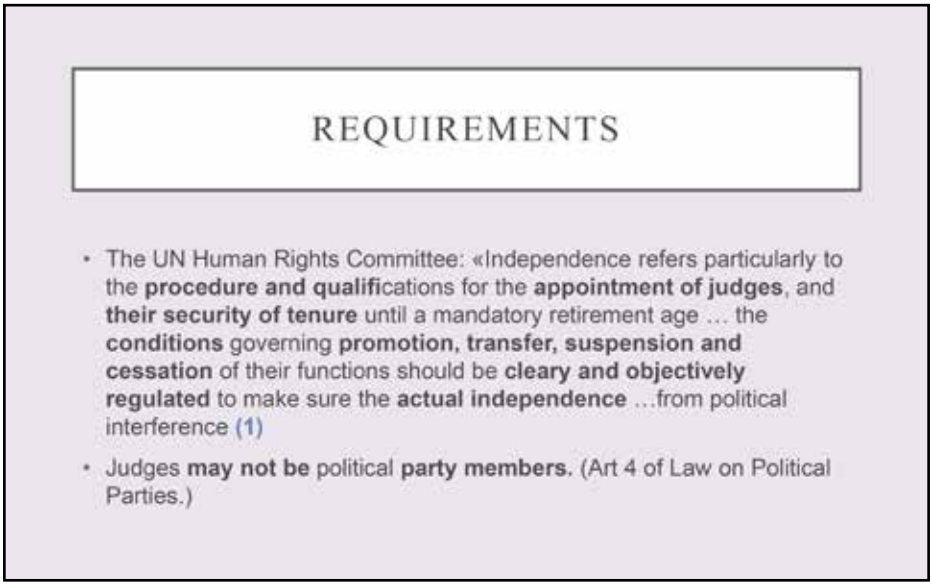
Turkey is a party to both human rights systems, namely European Human Rights System and the United Nations Human Rights mechanisms. And the Turkish constitution requires that human rights conventions take priority in case of conflict between the national and human rights laws.

Because we need to take into account the human rights conventions and the case-law of the supervisory bodies of these conventions, I will elaborate a little bit: what is required to be independent?

The European Court of Human Rights, in one of the judgments, stated that "for a court to be independent, the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body represents an appearance of independence" should be taken into account. This means that the necessities to be independent start from the beginning when the judges are appointed or admitted into the profession. The body admitting a judge should be independent and also judges should be, until the retirement, if there are no exceptional circumstances, should be able to stay in the same office, the same location if there is no will to change the location.

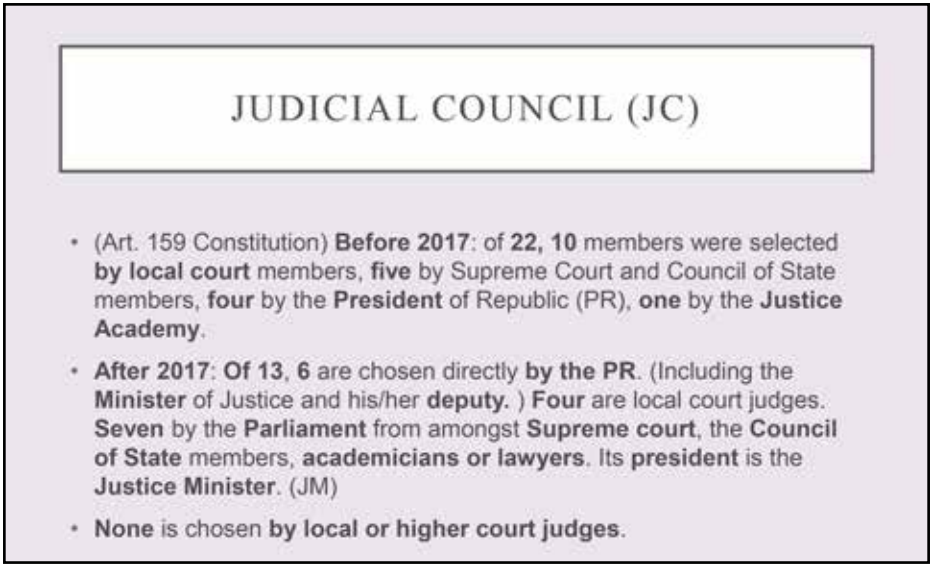
Also, outside pressures, whether from the executive body or other au-

thorities, should be prevented, and the judges should be protected. And any judicial body should appear independent for outsiders. Moreover, the Informal European Charter makes a specific comment regarding a judicial body who is empowered to decide the admission, recruitment, career process, and dismissal of judges. Such a judicial body must be chosen by the actors, by a group of people half of those are the peers of judges. I mean, half of the judges choosing such a judicial body must compose of judges than judges themselves. So, there will be a wide representation of judges in such a body. This is valid for the Judicial Council in Turkey.



Finally, the Human Rights Committee commented similar to the case of the – Court of Human Rights. So, it paid attention to the procedure and qualifications for the appointment of judges and the security of their tenure and the conditions for promotion, transfer, suspension and cessation. They should be clearly and objectively regulated so that no outside pressure plays a role in such decisions.

Also, we have a national law on political parties that prohibits judges from being a member of a political party. This means that Turkey and the European system is quite different from the United States system. Judges may not be affiliated with the political parties in any circumstances.

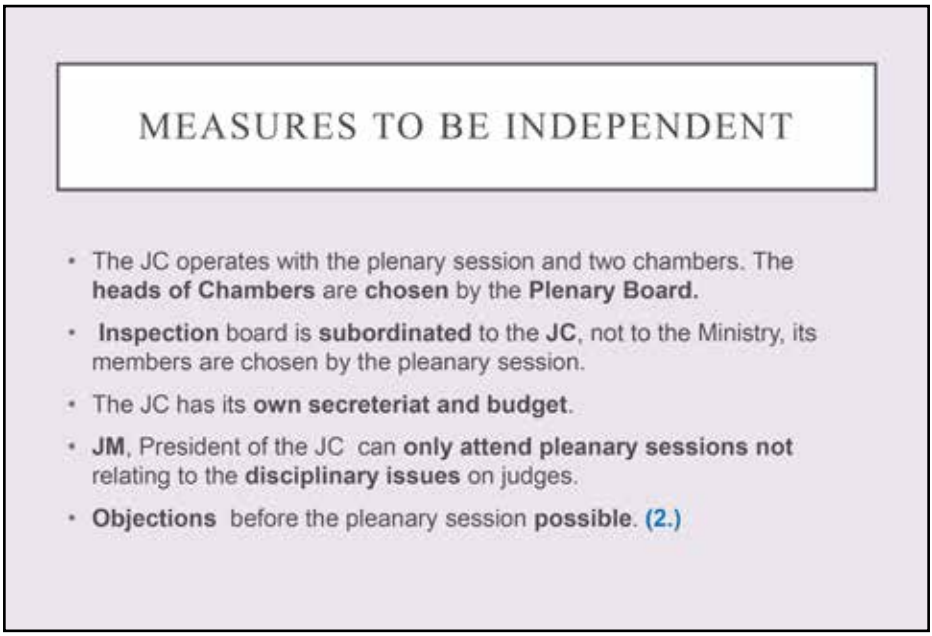


How is the Judicial Council composed? My focus will be on the Judicial Council because it is such an important body that is empowered to appoint judges, prosecute, interdisciplinary investigate them, suspend them, to relocate them, so the Council has a wide authority.

Before 2017, we had a comparably better and more democratic and more independent judicial body which consisted of 22 members, 10 of whom were selected by local court judges themselves and the five selected by the Supreme Court and the Council of State members and four by the President of Republic and one by the justice academy. So, apart from the 4 of them chosen by the President of the Republic, the others are all independent people or institutions. This means at least this body was seemingly more independent than what we have at the moment.

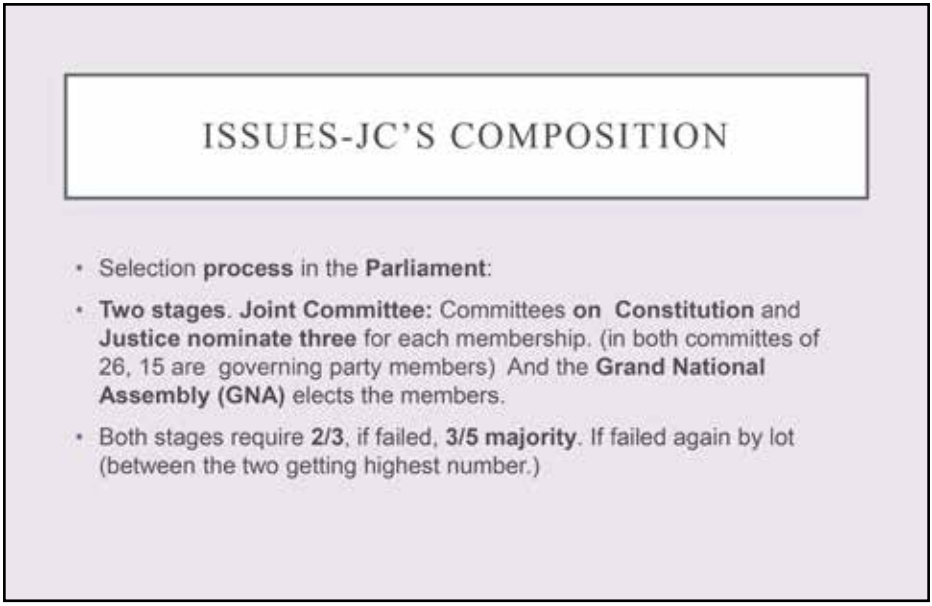
How does it happen? The Minister of Justice and its deputies are ex officio members of the Council. Currently, after 2017, of 13, 6 of the members of the Judicial Council are chosen directly by the President of the Republic. The other four are chosen from amongst local court judges by the President of the Republic. The parliament chooses seven from among Supreme Court, the Council of State, Academicians, Lawyers and the council's president is the Minister of Justice. So, no one, none of the judicial

council members, is chosen by higher court judges in this current system. During the voting process, the government is not fully determinative. The opposition parties also play a determinative role in the election of the members of the Judicial Council.



There are some measures in the independence of the Judicial Council. It operates with two chambers and one plenary session, an inspection board that consists of disciplinary investigation judges and prepares papers for judges that are important for their advancement in their career. The inspection board is subordinated to the Judicial Council, not to the Ministry of Justice, and its members are chosen by the plenary session.

The important part is that the Judicial Council has its secretariat and its budget. The Minister of Justice, President of the Judicial Council, can only attend plenary sessions when it is not related to disciplinary issues on judges. And any judge, any decision by the chambers, whether it is disciplinary nature or administrative nature, is objectionable before the plenary session of the Judicial Council. So, any judge has the second chance to be protected in the plenary court.



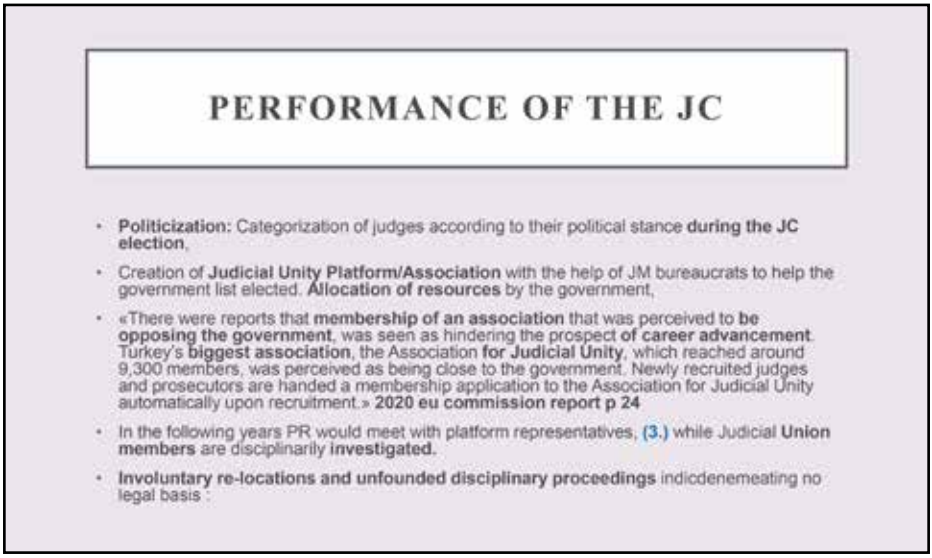
The important part of the composition of the Judicial Council is the selection process in the parliament. As we saw earlier, 7 of 13 judicial council members are elected by the parliament. How does it happen? There are two committees in the parliament. They are the Justice Committee and the Constitutional Committee. These committees nominate three judges for each membership. So, this means that they will nominate 21 judges for the Grand National Assembly to elect them. So, we have two stages: joint committee stages, i.e., the nomination and the Grand National Assembly election stage. In both stages, we have the same rules: the first, voting requires 2/3 majority, and if failed, 3/5 majority is needed, and if it fails again, two members obtaining the highest number are chosen by lot.
They are the judges from higher courts, academic institutions and lawyers. These are not chosen by their peers. These are chosen by the parliament amongst the applicants. As I stated earlier, the system before 2017 required that partly the Supreme Court, Council of State, make their nomination, and the members were chosen amongst them.

After seeing all the particularities of the selection and composition issue of the judicial council, I first want to explain what we experienced during the times when we were able to select the judicial members partly. I men-

tioned that 10 of 22 members, before 2017, were chosen by local court judges. What happened is important to understand the mentality of the executive body and also the judges, and it's important to understand what we have as a problem with regard to the independence of the judiciary.

During the selection process in 2014, there was a creation of the Judicial Unity Platform. After, this was transformed into a judicial association. The creation of this platform coincided with the election process into the Judicial Council. This platform was helped a lot by the Minister of Justice. There was a lot of logistical help, whereas the other parties entering the elections used their force and sources. They used their own money; they visited judges etc. They visited the other states, cities.

There was an allocation of resources by the government to this judicial association. What happened also was that many bureaucrats from the Ministry of Justice visited the judges before the election and requested to vote for the list of the candidates prepared by the executive body, the Ministry of Justice. Apart from this, the government also promised an increase in the salary of judges that would happen after the election. When all that is combined, the government succeeded to have its list to be chosen. Most of them, at least, not all of them, but most of the member candidates in the Ministry of Justice list were chosen to be the Judicial Council members.



So, one of the reports prepared by the 2020 European Union Commission states as follows: "delivery reports that membership, membership of an association that was perceived to be opposing the government was seen as hindering the prospect of career advancement, Turkey's biggest association, the Association of Judicial Unity which reached around 9300 members were perceived as being close to the government. Newly recruited judges and prosecutors are handed a membership application to the association for judicial unity automatically upon recruitment."

So, after the composition of the Judicial Council in this way, there were a lot of involuntary relocations of judges and unfounded disciplinary proceedings, which means the proceedings did not have any legal reasoning.

I will give certain examples that I collected mainly from the reports of non-governmental organizations. In 2017 and 2018, the 25th Assize Court judge in Istanbul and the 37th Assize Court judges in Istanbul were suspended. The other was demoted, the others demoted after releasing journalists and lawyers in a case. In Diyarbakir, the 8th Assize Court judge was demoted after releasing a Kurdish parliamentarian.

I personally know two judges who applied to the Constitutional Court to have Article 299 to be annulled. The article envisaged the punishment for insulting the President, and it required a specific and harsher punishment compared to insulting ordinary citizens. These two judges re-

lied on the European Court of Human Rights case law, which stated that envisioning such a punishment, harsher punishment for defamation of President compared to the defamation of ordinary citizens is a violation of free speech rights. What happened was that both judges were relocated and were sent to very far away cities compared to the cities where they were working before.

Another issue was that the Head of the Judicial Union was suspended after reminding the rights of a prisoner who is charged with terrorism. About three years ago, I learned that about 17 out of less than 100 members of the Judicial Union were relocated and subject to a disciplinary investigation. Some of them did not receive any legal reasoning. They were just told that "you did this act" and "tell me your defense." There was no judicial reasoning, legal reasoning on which disciplinary offence was committed. It is not known.

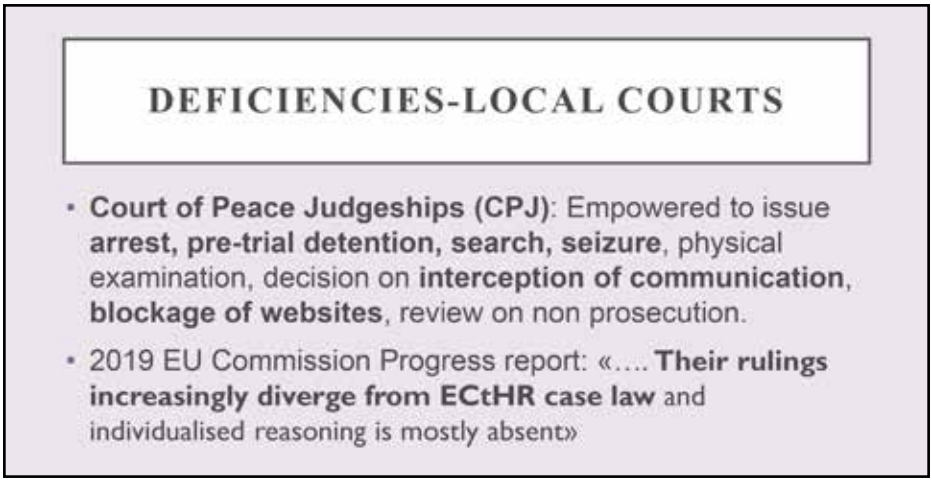
There are some other examples. In 2020 disciplinary investigation is treated judges of a 30th Istanbul Assize Court who acquitted the defendants in the Gezi Park trial. This examination was about the Judicial Council. We also have issues with the local courts. The courts were also criticized for their acts which put their independence, their independent appearance in jeopardy.

Let's take the examples of 2 journalists Erdem Gül and Can Dündar. The Constitutional Court found a violation of the right to liberty and free speech concerning their detention during a trial. After this decision on the violation, the Prime Minister back then declared that they would not abide by the court decision.

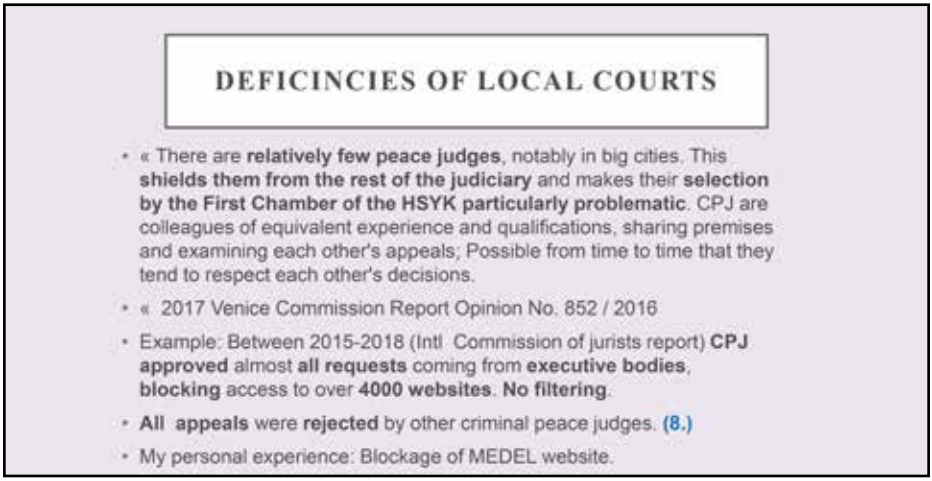
For example, another journalist Mehmet Altan was arrested in 2016, and he applied before the Constitutional Court that found a violation of the right to liberty and free speech in 2018. So, he was in custody for two years, and the 26th and 27th Assize Courts in Istanbul rejected free him. One of their reasoning for this decision was the lack of recent judgment of the Constitutional Court, whose web page actually contained it. In 2020 Constitutional Court found another violation for the same journalists, on violation of liberty rights again.

During those applications, the Minister of Justice back then said that the Constitutional Court exceeded its boundaries, and afterwards, the local court rejected the application for releasing the two journalists.

Finally, we can elaborate on the example of one opposition party deputy. He was being tried because of providing information to a newspaper, and he was arrested for this. The Constitutional Court found the violation of the right to liberty and his political rights, and the local court also rejected his release.



Finally, we will be touching upon the Criminal Peace Judgeships. These are not the courts trying the cases and making the judgment on the merits. They deal with only pre-trial matters, but they have extensive power from arrest to pretrial detention search, seizure and interception of communications. EU Commission Progress report in 2019 found out that their rulings increasingly diverge from the case-law of the European Court of Human Rights, and there is no individualized reasoning.

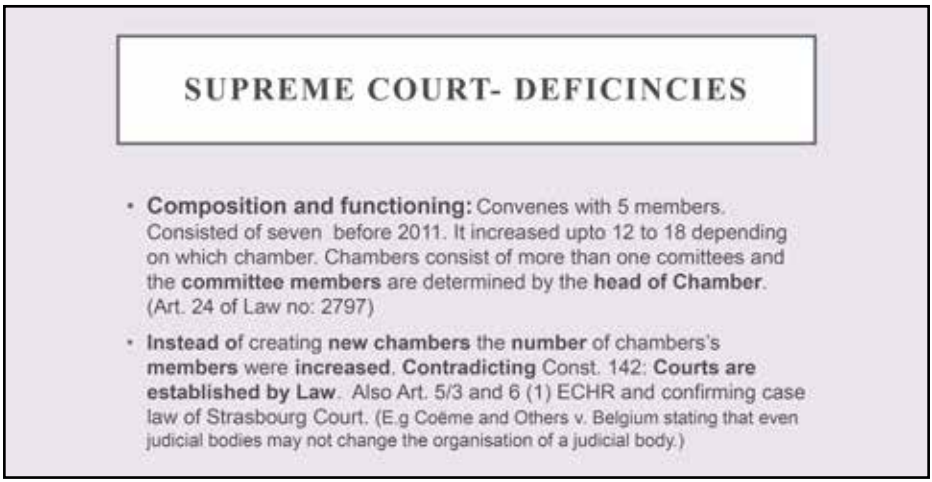


The report states the following: "There are relatively few peace judges, notably in big cities. This shields them from the rest of the judiciary and makes their selection by the First Chamber of the Judicial Council particularly problematic. Court of Peace Judges are colleagues of equivalent experience and qualifications, sharing premises and examining each other's appeals. It's possible from time to time that they tend to respect each other's decisions rather than dealing with the particularities of a case."

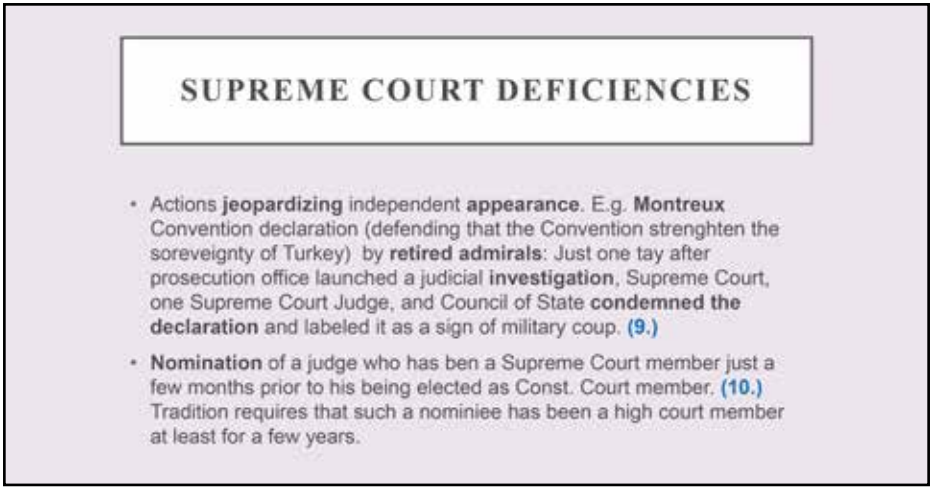
In another report, it was detected that between 2015 and 2018, these criminal peace court judges approved almost all requests coming from executive bodies blocking access to over 4000 websites. So, we can see no filtering and accepting all the requests from a non-judicial body, and another criminal judge rejected almost all appeals.

From my personal experience, I know that once the website of MEDEL (Magistrats Européens pour la Démocratie et les Libertés) was blocked.

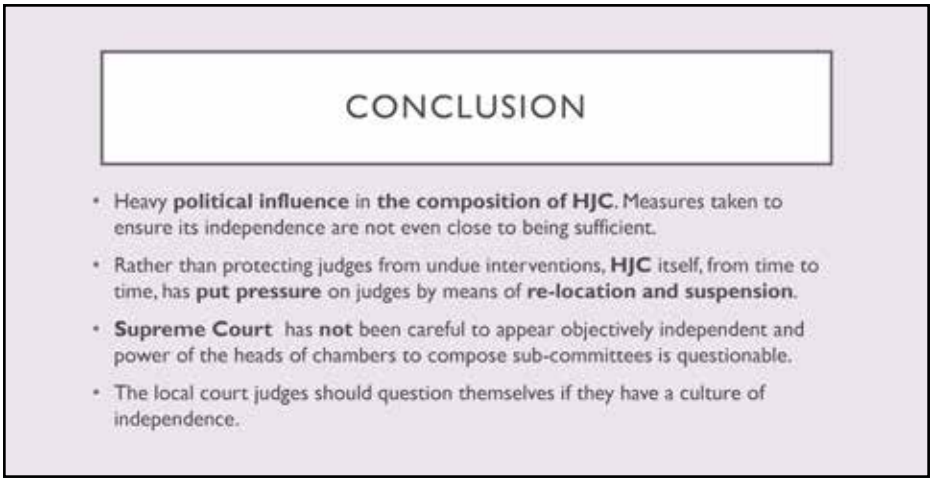
For those who don't know about MEDEL, MEDEL is a group of heads of national judicial associations. As I remember, 18 associations from different 18 European countries. They form now MEDEL, and it's a very respected institution that judicial bodies take their opinions into account. Even this website was blocked for a certain amount of time; then I noticed that it was opened again.



Finally, we came to the Supreme Court functioning and the deficiencies about the Supreme Court. Before 2011, the Supreme Court chambers consisted of about seven members and the chambers used to make decisions with the participation of five judges, not seven judges. So that if any judge goes on medical leave or a vacation, then it is still possible that the chamber could convene. However, the number increased in the following years up to 12 to 18 members depending on which chamber, and this enabled the Head of the Court Chamber to compose more than one committee. The Head of the Court Chamber was able to decide which members would conform to which committee. This may have us suspected that the Head of Chamber could form a group of judges in this particular chamber to obtain a particular result if there is an important, politically sensitive case. So, instead of creating new chambers with the new judges, the number of committees and subcommittees in the chambers increased. It is contrary to Article 142 of the Constitution and the European Court of Human Rights' case law that courts are established by law. Even judicial bodies cannot form a new court.



There was an explanation, a declaration by about 100 admirals. They are retired admirals, regarding a statement of a member of the government stating that we can withdraw from the Montreux and Bosphorus Convention, and these admirals were of the view that this convention is for the use of Turkey, it increases the sovereignty rights of Turkey. The government members strongly condemned and said that this constitutes a call for a military coup by these admirals. Without waiting more than 24 hours, one Supreme Court member and the Supreme Court itself made an official public declaration that this statement by admirals is not acceptable and that it requires condemnation, and that it connotates a call for a military coup.



What we see after we all examine the judicial bodies, there is a heavy political influence in the composition of the Judicial Council and the measures taken to ensure its independence are not even close to being sufficient. And rather than protecting judges occasionally, the Judicial Council puts pressure on judges to obtain certain outcomes from the cases, and there was a lot of re-location and suspension. And the Supreme Court has not been careful to appear objectively and independent, and the power of the heads of chambers to propose committees is questionable. At the local court level, judges should question themselves if they have a culture of independence.

Thank you very much for your patience; this is the end of my presentation. I am available for the questions.

THE RIGHT TO A FAIR TRIAL IN THE CONTEXT OF JUDICIAL INDEPENDENCE

Dr Mücahit Aydın

Mücahit Aydın:
Before touching on judicial independence and its relation to the right to a fair trial, I would like to briefly mention individual application to the Turkish Constitutional Court. This remedy was introduced fairly recently yet has become a major part of the judicial system. I believe it is fair to say today that the individual application is a significant step towards protecting human rights in Turkey. With the constitutional amendment of 2010, Article 148 was tailored to provide a legal remedy for violation of rights and freedoms under the joint protection of the Turkish Constitution and the European Convention of Human Rights. The Constitutional Court started receiving individual applications in 2012. Since then, it has assumed a direct and active role in protecting and enhancing the rule of law and human rights.

Let me explain some of the basic features of the individual application. It is almost identical to human rights adjudication before the European Court of Human Rights, but it is a domestic remedy that implicates cer-

tain characteristic differences between these two. First of all, as I just said, the subject matter of individual application may be a right or freedom, which is protected both by the Constitution and Convention. For example, social security right is covered in the Constitution, but it is not a part of the Convention. Therefore, no individual application may be made for this right.

The second point is that individual application is an exceptional remedy. It means that before filing an individual application, one has to exhaust all other existing ordinary legal remedies. In other words, legal claims have to be raised and discussed before the first instance and appeal courts prior to the Constitutional Court. For example, if you receive a disciplinary fine from the university and think that this violates your right to education. You must first take action against it before the administrative courts, then appeal at the Council of State. If you are still not satisfied, you may apply to the Constitutional Court to review your claims relating to the right to education.

Third, the Constitutional Court's jurisdiction is limited to examine whether a fundamental right or freedom is breached. In other words, the Court does not exercise an appeal review, and it does not consider whether lower courts' judgment is right or wrong, but it makes a constitutional examination for determining whether a right or freedom is violated. For example, suppose you claim that your right to a fair trial is violated. In that case, the Court mostly looks at whether the procedural guarantees are respected in the case, if witnesses are heard, or evidence are examined, and likewise. It does not engage in substantive review of the merits of the case or evaluate the evidence. If witnesses are not heard, or if some evidence that may affect the case is not examined, the Court then finds a violation of the right to a fair trial.

The last point is that the individual application is recognized as an effective remedy by the European Court of Human Rights. Therefore, before lodging an application at the European Court, one has first to apply to the Constitutional Court, and if not satisfied, then proceed to Strasbourg Court. Now let me talk about statistics on the individual application to

give you an idea of its scale. Since 2012, the Court received more than 300.000 applications and it concluded about 260.000 of them.[1] This number is very high compared to other countries having individual application, such as Germany. Currently, on average, the Constitutional Court receives around 40.000 applications a year, whereas this number in Germany is around 7.000.[2]

I must also note; however, the vast majority of these applications are rejected as inadmissible. The Court examined only 10% of those applications on merit and found a violation in about 4.5%. So, the Court found at least one violation in 15.000 applications. These violations vary from right to life to the freedom of expression or right to personal security and freedom.

The right to fair trial holds a significant place in violation judgments with a number of 9000. This number also includes violations found on the basis of the right to be tried in a reasonable time. But overall, the right to a fair trial comes first in violation judgments. That brings me to the second part of my presentation, which is the relation of the right to a fair trial to judicial independence.

Now let me first say a few words on judicial independence. As we know, it is not an absolute privilege; in other words, it does not grant a judge whatever he or she wishes to do. The reason for independence is to ensure that a judge act in accordance with the law, insulated from any external fear or influence. So, it is not independence from the rule of law, but it is independence to apply the rule of law.

The right to fair trial comes into play at this point, providing certain procedural guarantees to assure that an independent judge acts impartially and fairly under the rule of law.

The European Court of Human Rights laid out certain basic principles in this regard. The Court stated that it does not suffice a judge or a court is ac-

1 For detailed statistics see https://www.anayasa.gov.tr/media/7428/bb_istatics_2021_1_new_.pdf (access date 14.6.2021).

2 https://www.bundesverfassungsgericht.de/EN/Presse/jahresberichte/jahresberichte.html;jsessionid=6339F560171AD285A48EA0840F7D90CD.2_cid377 (access date 14.6.2021).

tually independent, but it must also look like or be perceived as independent in the eyes of outsiders. This is called objective independence. The Court rendered some violation judgments against Turkey on this point. In the past, in the state security courts or high military courts, there were members who were military personnel by profession, who were bound with the chain of command. In the case of Tanışma v. Turkey[3] , the Court considered that the existence of such military personnel in the court is at odds with judicial independence because they must obey the orders of their superiors. Accordingly, even though they may act independently in a given case, they cannot be considered to satisfy judicial independence objectively. However, Turkey abolished military courts altogether recently, so this problem remained in the past.

Another example of objective independence is if the same judge or tribunal serves both in the first instance and appeal courts. In the case of Fazlı Aslaner[4] , the European Court found a violation against Turkey because three judges of the Supreme Administrative Court attended both chamber and then general assembly sessions of the same case. The Turkish Constitutional Court found a violation in the similar case of Serkan Şeker [5] . The main point here is that a judge adjudicating a dispute or examining a request should not later be involved in the appeal process. That's because the appeal judge must be objective and if the same judge is involved in both proceedings, we cannot talk about objectivity.

Familial relations may also hinder the existence of objective independence. In Micallef v. Malta , the court consisted of three judges, and one judge was the uncle of the winning party's advocate. Not surprisingly, the European Court found a violation on the basis of lack of objective independence.

The second aspect of independence is subjective. If a judge exhibits personal bias against the accused or prefers one party over another, this will violate independence and, therefore, the right to a fair trial. I remember another case in which the Court found a violation against Ukraine.

3 European Court of Human Rights, Tanışma v. Turkey, App. No: 32219/05, 17/11/2015.
4 European Court of Human Rights, Fazlı Aslaner v. Turkey, App. No: 36073/04, 04/03/2014.
5 European Court of Human Rights, Micallef v. Malta, App. No: 17056/06, 15/10/2009.

In Sovtransavto Holding v Ukraine [6], there is a Russian company doing business in Ukraine through a concession agreement. Later on, a dispute arises between state authorities and the company, and it ends up with litigation. On several occasions, the Ukrainian President expresses his concerns over the case and urges that Ukrainian interests be safeguarded. The European Court pointed out that such intervention of the executive placed undue influence or pressure on the courts. It found a violation without examining if judges actually followed the President's instructions. It is a complicated case, and there are some other factors, but in the eye of the Court, "pressure exerted by the executive on courts during proceedings" stained objective independence and therefore led to a violation of the right to a fair trial (Article 6).[7]

The other two main elements of the right to a fair trial are adversarial proceedings and reasoned judgment. The Turkish Constitutional Court rendered countless judgments finding violations of these two sub-rights. The principle of adversarial proceedings, or equality of arms, ensures that a judge treats the parties fairly and equally. Each party must be given the opportunity to duly present or defend their case, the evidence of both parties must be considered, and the witnesses must be heard. That is simply a very basic requirement of judicial impartiality.

Another important aspect is the right to a reasoned judgment. A judge must spell out the reason for reaching a conclusion in the case. The reasoning should be sufficiently explaining the rationale behind the judgment and how legal provisions were applied to the facts. The valid claims of the parties must also be addressed in the judgment. In short, it should be convincing for both parties, and it should be suitable for public review. The Turkish Constitutional Court laid out basic tenets on this issue in Sencer Başat and Others[8] , in which the Court found a violation in favour of hundreds of applicants.

In short, judicial independence requires a judge to apply the law to the facts with a true mind and conscious, and that must be visible in the

6 European Court of Human Rights, Sovtransavto Holding v Ukraine, App. No: 48553/99, 25/07/2002.

7 Sovtransavto Holding, § 82.

8 Sencer Başat ve diğerleri [GK], App. No: 2013/7800, 18/06/2014.

judgment through the reasoning. If the reasoning of judgment is not adequate, that will raise questions on the independence and impartiality of the court.
Thank you all for your attention!

Moderator:
Thank you, thank you, Mr Aydın. Thank you for your presentation and also Mr Erdemli, thank you for your presentation.

And now, we are going to start to take questions if you're ready for the questions and answers part.

QUESTIONS AND ANSWERS SESSION

Moderator:
So, the first question is to Judge Erdemli; our attorney is asking: "Do you think that in order to become a judge in Turkey, a requirement for practice as a lawyer should be implemented? The judges start to do the practice at a very early age. So, do you think it's an advantage, or it's a disadvantage?"

Thank you!

Mahmut Erdemli:
Okay, the question is whether someone who wants to be a judge has to be a lawyer beforehand for some certain period. Is it the question?

Moderator:
Yes, and they're asking whether that would be an advantage or disadvantage?

Mahmut Erdemli:
I was a judge when I was 26 years old. In Turkey, just two years after graduation, two years of training is sufficient. Of course, if you are successful in 2 exams which are oral and written. Being a judge in your 20s, in your age of 26, of course, is it an advantage or disadvantage?

For a young person, to live your life according to how you feel, it's not good, it's not an advantage because, in the Turkish system, you are appointed first to a small place like with 5000 population for example. Everybody knows that you are a judge. So, you have to act and behave like a judge while you are a 26-year-old young person. In this regard, it's not an advantage, and in my opinion, of course, first practising lawyership or some other law practices and then becoming a judge would be much better to see both sides. When you are on the bench, you know that how this lawyer will think about some particular thing. Therefore, I would prefer that a certain level of professional experience is required before becoming a judge. According to my experience, even being a father and mother, having children, being quite experienced in the life, they are all great experience to individualize your decision. So your own life experience, your experience in the profession that you did before being a magistrate are very important.

Moderator:
Thank you.

The next question is to Mr Aydın. So, the question is: "While there are serious violations in our country, the violation decisions are seriously low. So, is it true that human rights though are so formal and so on?"

Mr Aydın:
Yes, well, I don't know if you follow our judgments, but we render very serious violation judgments as well. The point here is that the Constitutional Court alone cannot address every violation in the country; that's practically impossible. The court must employ certain formal requirements because I just talked about it: 300.000 applications in 9 years. It's about 40.000 each year; I mean six times higher than any average in Europe. So, we must employ certain measures to filter out the unduly applications and focus on those who deserve more attention.

Overall, I think I told during my presentation that the court gave 15.000 judgments finding a violation. Judge Erdemli just mentioned some of them, but many others relate to the right to live and, you know, the pro-

hibition of treatment and deportation of a foreigner. Profoundly serious matters the court handled, and it continues to handle those matters. Overall, we must understand that it's not only up to the Constitutional Court to protect human rights. However, it's up to the whole state apparatus and the whole judiciary, first instance courts, first and formal, then the appeal bodies, and then as a last resort to the Constitutional Court.

So, I recommend to these colleagues to follow our website. We publish press releases of our judgments, important judgments, and every week 5 or 6, even though in English and even in French, now we started to publish. They will see that the court makes the best effort to address those issues in this country.

Moderator:

Thank you.

The third question is also for you: "Which decision is taken as basis in case of conflict with the decision of the European Court of Human Rights and the Constitutional Court of Turkey. If the European Court of Human Rights decision is essential, are there any exceptions if it's not followed?"

Mr Aydın:

Well, as I just said during my presentation, the European Court of Human Rights recognizes the Constitutional Court as an effective remedy, the individual application system, right? So, one has to apply first to our court, and we examine the case, and then they have the right to go to the European Court of Human Rights. So, they are the last resort; the Strasbourg Court is the last one. So, if one is not satisfied with our judgment, they may just proceed to the Strasbourg Court, and the Strasbourg Court may find a violation, and there are examples of that. And that's very normal because as a national court, the court will decide, but the European Court takes it in a different context as an international education body.

So, I must also note that the Turkish Constitutional Court, to a great extent, follows the case-law of the European Court because they have been handling these matters for 50 years. They have a body of case law, a very well-developed case law. So, the Turkish Constitutional Court consid-

ers this case law while making decisions. There is only one instance of a disagreement between the Turkish Constitutional Court and the European Court. Eventually, the enforcement or the compliance with the judgments of the European Court is not an issue related to us; it's up to the government. Sometimes, it has some political implications. So, there is an enforcement mechanism within the Council of Ministers, within the European Council, but the point is that there is a convention, there is an international agreement, and they have the jurisdiction under this agreement, and when they make a decision, it's binding for Turkey, that's for sure. But its compliance is a matter of the government, not with us, as a court.

I hope this was a satisfactory answer.

Moderator:
The fourth question is also for you, Mr Aydın. It's more than a comment rather than a question. So, the statement is, "You shouldn't try to dissolve the applications quickly just because the application numbers are high. But as far as I understand that this is the way that you follow within the applications. I got this impression regarding your final decision. Is it true?"

Mr Aydın:
Well, it doesn't mean that we just filter out the applications, randomly refuse them. No, as I just said, we don't have a discretionary jurisdiction. We must address every application, and please, again, the European Court of Human Rights is there to exercise a review of our judgments, right? So, if one is not satisfied with our judgments, they can just apply to the European Court. So, we are not 100% review free. That's the first point.

The second point, there are thousands of, I mean, very unqualified applications—many of them. I tried to emphasize during the presentation that we are not an appeal body. We do not exercise appeal review. But most of the applicants or lawyers just apply to the court claiming that the lower court was wrong in their judgment; that's not our business. We are not an appeal court, and the constitution explicitly prohibits us from exercising

an appeal review. So, we must focus on fundamental rights and based on the Constitution. The Constitution sets out the framework for how we can examine them. I have just talked about the right to a fair trial, for example.

Moreover, we are taking into consideration the European case law in that regard. So, the court doesn't make up some criteria; we just sort out applications. There are set out principles, criteria, so we just apply them. And unfortunately, for example, in Germany, they require, I think, they require a represented application, I mean an application with a lawyer. So, qualified applications. That's why the number is low. I mean, if you compare our workload with Germany, it's not comparable at all.

So, here, this is very natural; it is not because you don't want to examine them but because the applications are unfortunately unqualified.

One last point, in Germany, very similarly to our court, their violation judgment ratio is about 3%, and our course is about 4%. The number is similar in Spain. So, wherever you go, it's more or less the same. So, it's not that the court doesn't take the applications seriously; we take them seriously, we examine all of them, but only the ones that deserve the managing will go forward.

Moderator:
The last question is also for you, Mr Aydın.
"Does the fact that so many decisions are brought before the Constitutional Court indicates a lack of judgment in the course of the first instance and appeal course?". So, they're wondering that the fact that you're dealing with so many cases is the lack of the appeal course?

Mr Aydın:
I didn't quite get the question but is it about the lack of reasoned judgments?

Moderator:
As far as I understand, the question purports that it's the failure and the

lack of appellate court and the fact that judges are dealing with so many cases. So, for this reason, most of the cases were brought to the Constitutional Court.

Mr Aydın:
So, there is an Appeal Court and the Court of Cassation, and they are also doing their job. I mean, there is no problem in this regard. But as I said, the individual application was adopted in 2012. So, it's the 9th year. So, the Constitutional Court addressed many chronicle human rights issues. The lower courts and the Court of Cassation just started to observe and digest our judgments, our legal criteria, and they started to apply them. So, it does not happen in one day; it takes time. So, it took some time for the court to render principle judgments, case law on some serious human rights issues. And then gradually, the judiciary, the first instance court and then the Court of Cassation, they follow our judgments, but that takes time.

We had a joint project with the Council of Europe regarding the individual application, supporting individual application to the Constitutional Court. It worked very well. We made workshops and conferences, symposiums with the other courts, lawyers, bar unions, and everything. Now, we have another project. It's about the implementation of the judgments of the Constitutional Court. And on this project, we will focus on the objective effect of the judgments of the Constitutional Court. What I mean by that is, it's not that if the court gives a violation judgment on a specific issue, the lower courts should consider this judgment in similar cases. Not every case has to come before us. Once we render the principal judgment, the case law, the others should follow accordingly, and we are working on that, but it takes time because it's just nine years. It is still a very short time to solve all problems related to human rights.

Moderator:
Thank you again.

GENERAL EVALUATION & COMMENTS & CLOSURE

Moderator:
We are still receiving questions, but we are running out of time. So, I want to conclude shortly and thank you for your answers. I also want to thank honorable Justice Madsen, honorable Justice Stephens, Attorney Roger Rogoff, and other panelists.

I will take now comments about the Turkish system or take closure speeches from each of you. Honorable Justice Madsen, we can start with you if you have any comments, and then we can continue.

Justice Madsen:
This has been such an interesting conference, particularly since we have such different systems but what strikes me is that our end goal is exactly the same: to have an independent judiciary where people who can rely on the independence and the fairness of the tribunal that will ultimately make such important decisions in their lives. And I think, what I saw as the commonality is that we all want those tribunals to be independent and free of government influence, unbiased. At the end of the day, we want the people that we serve to have confidence that they can turn to the court system when they have problems and issues that need to be resolved, and they don't need to engage in combat or take the problems on themselves with violence. And that's what everyone, I think, wants from a justice system, and it sounds to me from hearing about your system that you have made great strides in trying to enhance the public's confidence in your system, and that is what we are always trying to do as well. So, it's been really very interesting to hear from you and on your system, and I thank you for being so candid about the flaws in your system as well. Because that's how we can teach each other and learn from each other's problems and mistakes. So, thank you so much!

Moderator:
We thank you, and I was also admiring you and your story. And also, I totally, I want to add that I also totally agree with the honorable Justice Stephens when she said you're a role model, well for us, too. I'm really

glad to meet you and listen to your comments and everything.

Former Judge Rogoff may continue with the comments if you have any comments, sir?

Roger Rogoff:
I don't have much to add to Justice Madsen. I think she has said it all. I do like the discussion from one of the presenters on the appearance impropriety, as well as actual impropriety as a way of ensuring fairness in the courts in that. It is so important that the public have confidence and part of that confidence is openness and transparency and the appearance of fairness in all of our procedures. So, again, I am so honored to have been here. This panel has been terrific, and I look forward to working with you all in the future.

Jill Malat:
Justice Stephens apologizes she was not able to stay. So, that is why she's not here. She had an obligation, and she apologizes. Just that this was very, very informative and really wonderful, and I've learned a lot not only about our system but about obviously the Turkish system. I'm just so grateful and honored to be a part of this. So, thank you!

Moderator:
Thank you, it's the same for us. We're also so honored, and it was a perfect panel for all of us. Now it is closure time.

Honorable guests, distinguished professors and dear participants, It was such a great pleasure to listen to our panelists, and I believe that this was a very fruitful session that enabled us to analyze the Turkish judicial system in comparison to the United States' judicial system that was elaborated in the first session.

Before the closure, I would like to thank our distinguished panelists. I also would like to express our gratitude To the Chairman of the Board of Trustees, Ms Hülya Gedik, to the Rector of the University, Professor Dr Nihat Akkus. To our distinguished professor, Prof. Dr Berin Ergin. To the

Dean of our Faculty, Prof. Dr Kerim Atamer. and Prof. Dr Rona Aybay and Associate Professor Gulsun Ayhan Aygormez and the Platform of Hukuk Alemi for their support and contribution to this conference. I also would like to thank our research assistants Elif Naz Arıkan and Hazal Gül, for their support in the organization.

Honorable guests, dear participants, all our distinguished professors,

We were pleased to welcome you to our organization. Once again, we would like to thank all of our professors and all of our honorable justices, judges who contributed to this conference.

It was a pleasure to host you all. Thank you very much, and we are going to close the session now.