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ARTICLE

The Emergence of the Established "By Law" Criterion for Reviewing European Judicial Appointments

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Abstract
The "established by law" criterion recently emerged as an independent element of Article 6 of the European Convention on Human Rights (ECHR), through the European Court of Human Rights' (ECtHR's) judgment in *Ástráðsson v. Iceland*. The criterion imposes the obligation on states to appoint judges in accordance with the respective legal framework. Its emergence occurred at a precarious moment in European intergovernmental politics, with illiberal governments in several European states exhibiting tactics aimed at softening obstacles to their governing powers, upheld by their respective judiciaries. Through a dialog between the European Free Trade Association (EFTA) Court, the Court of Justice of the European Union (CJEU), and the ECtHR, the "established by law" criterion has now emerged in the European constitutional repository for thwarting such tactics. In this article, the story of this development is told through highlights from the case law of the European supranational courts and through the Icelandic backstory of the *Ástráðsson* case. This story reveals important nuances in how the case law needs to be understood with regards to the constitutional forces at stake. The conceptual approach of the ECtHR in *Ástráðsson* is also analyzed in context with Lon Fuller's rule of law principle of congruence, which provides a framework for evaluating the merits of the Court's tactic.

Keywords: ECtHR; rule of law; established by law; Article 6 ECHR; Article 47 CFR

A. Introduction

The "established by law" criterion recently emerged as an independent element of Article 6 of the European Convention on Human Rights (ECHR), through the European Court of Human Rights' (ECtHR) judgment in *Ástráðsson v. Iceland*.[1] The judgement draws on recent judgments of other European supranational courts, such as the European Free Trade Association (EFTA) Court, the General Court of the EU, and the Court of Justice of the EU (CJEU). It develops the preceding case law in a subtle but important manner. By analogy, the judgment also concerns the interpretation of the "established by law" criterion in Article 47 of the EU's Charter of Fundamental Rights (CFR). The evolution of this case law reverberates current concerns about illiberal political developments in Eastern and Central Europe and the constitutional struggles being fought on many

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[1] Ástráðsson v. Iceland, App. No. 26374/18, ¶ 94 (Mar. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-191701; Ástráðsson v. Iceland, App. No. 26374/18, ¶ 231 (Dec. 1, 2020), https://hudoc.echr.coe.int/eng?i=001-206582.

legal and political fronts for the supremacy over the judicial branch of government in these states.[2] The focus of most legal actions aimed at thwarting these developments at the European level has been on the "judicial independence" criterion, which also derives its constitutional status from Articles 6 ECHR and 47 CFR.[3] Important factual events of key cases in the evolution of the "established by law" criterion concern the actions of the Icelandic and the Norwegian governments, which provided the supranational courts with an opportunity to develop a novel aspect of the fair trial ideal enshrined in the constitutional texts, without simultaneously risking an aggravation of ongoing political crisis between powerful players in intergovernmental European politics. Having developed this aspect of Article 6 ECHR in a case against Iceland, which by no means is a powerhouse in European political context, the ECtHR subsequently applied the result against the mightier Poland in the *Xero Flor* case.[4]

The focus of this article is on the *Ástráðsson* case, a key judgement in the ECtHR's 2020 case registry.[5] Its objective is twofold: firstly, to explain the broader legal and factual background of the case both from a domestic and European perspective; and secondly, to place the abstract conceptual problem of the case in context with a specific facet of the rule of law ideal in the legal theory literature. The first objective facilitates understanding of important details regarding the emergence of the "established by law" criterion, while the second objective facilitates assessment of the merits and weaknesses of the ECtHR's approach to the main conceptual problem of determining how the "established by law" criterion should be understood.

A fascinating aspect of the *Ástráðsson* case is how it simultaneously formed part of two different narratives. A domestic narrative, where the Icelandic political and judicial elites perceived the case as an event in a longstanding local struggle for supremacy over domestic judicial appointments. This aspect questions the current European dogma, described for example by Mitchel Lasser,[6] which emphasizes depoliticization of judicial appointments through the use of expert vetting panels under the influence of the judicial branch. The other narrative is a European one and addresses rule of law concerns linked to illiberal political developments in the continent's Eastern and Central parts. The ECtHR and an audience from European legal circles perceived the case as an event in a contemporary struggle against several European governments attempting to undermine the rule of law ideal, and thus it became a central communication in a judicial dialog between various actors within the European supranational judiciary, who were developing new tactics to neutralize such attempts. As we shall see, the domestic narrative would influence the details of how the ECtHR used the case to shape the evolution of the interpretation of the "established by law" criterion. A local curiosity thus henceforth forms a part of the European narrative.

The judicial dialog between the various actors prior to and during the judicial proceedings is yet another interesting aspect of the *Ástráðsson* case.[7] The literature on judicial dialog of the European supranational courts identified early on that they would use the intellectual strength of their comparative method to underscore their role in leading European legal innovations and that the ECtHR and the CJEU "could enhance each other's authority by referring to one another's

[2]*See, e.g.*, Wojciech Sadurski, Poland's Constitutional Breakdown (2019). *See also* András Sajó & Juha Tuovinen, *The Rule of Law and Legitimacy in Emerging Illiberal Democracies,* 64 Osteuropa Recht 475, 506 (2018).

[3]*See, e.g.*, Joined Cases 585, 624, & 625/18, A.K. v. Najwyższy, ECLI:EU:C:2019:982 (19 Nov. 2019), https://curia.europa.eu/juris/liste.jsf?num=C-585/18.

[4]Xero Flor w Polsce sp. z o.o. v. Poland, App. No. 4907/18, ¶¶ 209–10 (May 7, 2021), https://hudoc.echr.coe.int/eng?i=001-210065.

[5]Bureau of the European Court of Human Rights, *Key Cases 2020*, Eur. Ct. Hum. Rt., Apr. 2021, at 1, 6. https://www.echr.coe.int/Documents/Cases_list_2020_ENG.pdf.

[6]*See infra* Part B.I.

[7]A rich literature exists on the concept of judicial dialog. For a recent contribution, and an overview of the literature, see Evangelia Psychogiopoulou, *Judicial Dialogue in Social Media Cases in Europe: Exploring the Role of Peers in Judicial Adjudication*, 22 German L. J. 915, 918–21 (2021).

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decisions."[8] Following the elevation of the Charter of Fundamental rights to an EU treaty status in 2009, there were worries that the dialog would become one-sided, as an early study indicated that the CJEU's references to the ECtHR's jurisprudence were dropping.[9] The *Ástráðsson* case, however, shows that the dialog is alive and well, not only between the ECtHR and the CJEU, but also with the EFTA Court, which made an important early contribution to the dialog on the development of the "established by law" criterion. This could indicate that the courts find mutual strength and legitimacy in each other, especially when navigating new judicial waters in treacherous political circumstances, as suggested by the literature.[10]

B. The Domestic Context

The application of Mr. Ástráðsson to the ECtHR was about testing the compatibility of the procedure by which the Icelandic government established a new appellate court (the "Appellate Court"), an undertaking which was meant to address concerns about the Icelandic two-tier court system's compliance with international fair trial standards. Through the change, a new second court instance was established between the numerous first instance district courts and what became the third instance Supreme Court. Subliminally, the application also correlated with long-standing domestic debates over the design of the regular procedure for appointing Icelandic judges, and the role and influence of different branches of government in making such appointments.

I. The Struggle for Supremacy over Icelandic Judicial Appointments

The appointment of judges in Iceland has been a disputed matter ever since the establishment of the Supreme Court in 1920, when a conservative government appointed the first batch of judges and implemented an appointment system where incumbent judges could influence future appointments by vetoing new candidates. The appointment system was initially modelled on the system for appointing Danish Supreme Court judges, which made sense at a time when Iceland was gradually gaining full independence following centuries under the rule of Danish monarchs. The control mechanism meant that the responsible Minister could appoint new judges, who would subsequently only become permanently appointed after having passed a probationary period administered by the incumbent judges. Several attempts were made to reform this system in the 1920s and 1930s, before a semi-permanent balance between the competing interests of the executive and judicial branches of government was reached by legislative reforms in 1935.[11] The new balance meant that the veto power of incumbent judges was reduced to a duty of consultation. The Supreme Court henceforth would be consulted about the qualifications of the applicants for vacant positions at the court. This system worked well for several decades. The Supreme Court would recommend the most qualified candidate, and the responsible Minister would follow the recommendation in his or her appointment decision.[12]

The consensus on this procedure broke down in the early 2000s. Following several high-profile court defeats by the conservative-led coalition government in the late 1990s and early 2000s, their Ministers of Justice appointed two new Supreme Court judges against the advice of the Supreme

[8]Thijmen Koopmans, *The Birth of European Law at the CrossRoads of Legal Traditions* 39 AM. J. COMPAR. L. 493, 505 (1991); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication* 107 YALE L. J. 273, 323 (1997).

[9]Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMPAR. L. 168, 175–76 (2013).

[10]Amrei Müller, *Conclusions*, *in* JUDICIAL DIALOGUE AND HUMAN RIGHTS 504, 513 (Amrei Müller ed., 2018).

[11]*See* Icelandic Supreme Court Act of 1935, amending Supreme Court Act No. 22/1919.

[12]*See generally* Guðrún Erlendsdóttir, *Innri Starfsemi Hæstaréttar Íslands,* 45 TÍMARIT LÖGFRÆÐINGA 22 (1995) (describing early years of Icelandic Supreme Court).

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Court. The move was seen by many as an attempt to pack the court with loyalists of the conservative government, and thus was a departure from the consensus on a merit-based appointment system overseen by the Supreme Court.[13] Since then, political skirmishes about the proper design of the appointment process have re-occurred from time to time, which has eroded public trust in the appointment process and the courts. These recent clashes mirror debates about the same issue in the Icelandic Parliament in the 1920s and 1930s, where the worry on the one hand was the politicization of the judiciary, and on the other hand, the improper exercise of state power by an unelected judicial elite.[14]

The elements of accountability and trust complicate the choice between judicial appointment processes led by either the executive or the judicial branch of government. Often, public trust in politicians is precarious, but they can be held accountable for dubious acts relatively easily. The opposite is generally true with judges. Public trust in judges is essential for courts to exercise their institutional role of settling disputes, and judges are shielded from many accountability mechanisms applicable to other government officials.

The Icelandic experience shows that a merit-based evaluation of judicial candidates controlled by influential judges and lawyers in the top layer of the legal hierarchy—that is, the judicial elite—has been marred with similar controversies one would expect from a politically controlled process.[15] Repeatedly, the assessment of individual judicial candidates has caused public scandal, due to apparent favoritism with regards to certain candidates and apparent dislike for others. The logic of this favoritism often seems to have more to do with professional rivalry and simple cronyism, rather than typical political or ideological factionalism. The unprofessional appearance of the evaluation process has given the political elite a reason and a justification to interfere with the process of judicial appointments on several occasions. It has also created the public perception that the judicial elite cannot be entrusted with the task of vetting judicial candidates without an active political oversight. In Iceland, the question regarding design of the appointment procedure is thus not just about a simple allocation of power, but also about who can be trusted to exercise that power faithfully, and about appropriate power balancing and accountability mechanisms.

During the past two decades, several changes have been made to the Icelandic appointment procedure to accommodate for apparent flaws. Steps were taken to reduce executive influences on regular appointment decisions by granting more power to an independent panel tasked with assessing the professional qualifications of potential appointees to the judiciary.[16] After the change, the executive would need parliamentary approval in case it would want to disregard the suggestions of the evaluation panel. These recent changes to the judicial appointment procedure in Iceland echo parallel developments in many European states and European intergovernmental courts. In the decades since the collapse of the Eastern Bloc in 1989, they have been

[13]Svanur Kristjánsson, *Skipan Ólafs Barkar Þorvaldssonar í Hæstarétt,* Kjarninn (May 11, 2019), https://kjarninn.is/skodun/2019-05-09-skipan-olafs-barkar-thorvaldssonar-i-haestarett/; Svanur Kristjánsson, *Fullveldi Sjálfstæðisflokksins eða sjálfstæðir dómstólar?,* Kjarninn (Apr. 9, 2019), https://kjarninn.is/skodun/2019-04-07-fullveldi-sjalfstaedisflokksins-eda-sjalfstaedir-domstolar/; Arnþór Gunnarsson, Hæstiréttur í hundrað ár: Saga 389-404 (2021).

[14]Markús Sigurbjörnsson, *Hæstiréttur í aldarspegli,* Hæstiréttur Íslands (Feb. 16, 2020), https://www.haestirettur.is/haestirettur/100-ara-hatidarsamkoma/avarp/2020/02/16/Test-5/. See also Arnþór Gunnarsson, Hæstiréttur í hundrað ár: Saga 101–208 (2021).

[15]*See, e.g.*, Jón Steinar Gunnlaugsson, Veikburða Hæstiréttur (2013); Jón Steinar Gunnlaugsson, Í Krafti Sannfæringar: Saga Lögmanns og Dómara (2014); Jón Steinar Gunnlaugsson, Með Lognið í Fangið: Um Afglöp Hæstaréttar Eftir hrun (2017).

[16]These changes were in line with recommendations of the Council of Europe (CoE). *See* Eur. Consult. Ass., *Recommendation No. R (94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, 518th Meeting of the Ministers' Deputies (1994). *See also* Eur. Consult. Ass., *Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, 1098th Meeting of the Ministers' Deputies (2010), https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d.

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influenced by CoE's recommendations on judicial independence, as reported by Mitchel Lasser.[17]

Several elements of Lasser's analysis fit with the Icelandic development, in particular the legal transplant of tasking independent panels with vetting judicial candidates, which was explicitly based on CoE's recommendation. Curiously, the idea of using such panels to assess judicial candidates had been unsuccessfully suggested to the Icelandic legislature already in 1976, by then Minister of Justice and former law professor, Ólafur Jóhannesson.[18] But, the idea only became fully applicable to all judicial appointments in 2010.[19]

The establishment of the new Appellate Court in Iceland in 2018 happened within a context of an entrenched domestic struggle between different institutional actors for the supremacy over the appointment of judges, but at the same time, larger European questions lingered in the background relating to the reform trend of granting independent vetting panels with more power over the composition of the judicial branch of government.

II. The Appointment Procedure at Issue

The new Appellate Court, *Landsréttur*, was constituted through the Icelandic Judiciary Act of June 14, 2016.[20] The Act described, in a temporary provision, a procedure for initially appointing fifteen new judges for the court. The main features of this procedure included an initial call for applicants that would subsequently be assessed by the regular Evaluation Committee for assessing candidates for the judiciary. In its first paragraph, the temporary provision prohibits the responsible Minister —normally, the Minister of Justice—to appoint a candidate that is not deemed the most qualified by the Evaluation Committee. Exceptionally, the Minister could still appoint someone deemed less qualified, given that the respective candidate still fulfilled the minimum qualification criteria in the opinion of the Committee. In such cases, the Minister would additionally need Parliamentary approval of the appointment. The second paragraph of the temporary provision also required that, when the court was appointed for the first time, the responsible Minister would need to propose each candidate to the Parliament for approval.[21] This meant that, even if the Minister followed the advice of the Evaluation Committee as articulated in the first paragraph, she would nonetheless need to seek Parliamentary approval of her suggestion.

In February 2017, a call for applications for the fifteen vacant positions was published, which resulted in thirty-three valid applications that were assessed by the Evaluation Committee. The Committee submitted its evaluation of the candidates to the Minister in May 2017, concluding that all thirty-three candidates fulfilled the minimum criteria, but that exactly fifteen candidates were more qualified than the rest.[22] Of these top ranked candidates, there were five females and ten males. During the evaluation procedure, the Minister had communicated a suggestion to the Evaluation Committee that their assessment should conclude with a list of more names than the vacant positions, so that the Minister could have some leeway to choose candidates for her proposal to the Parliament. The chair of the Evaluation Committee explicitly rejected this proposal in a letter to the Minister, stating that there was a clear qualitative difference between persons ranked at the top, and the ones ranked below the top fifteen.[23]

The Minister presented her proposal of fifteen new judges on May 29, 2017. This proposal included eleven of the top fifteen ranked candidates, and candidates ranked at number seventeen,

[17]Mitchel Lasser, *European Judicial Appointment Reform: A Neo-Institutional Approach, in* Judicial Power: How Constitutional Courts Affect Political Transformations 91–92, 97–104 (Christine Landfried ed., 2019).

[18]*See* Frumvarp til Lögréttulaga, 97 Löggjafarþingi (1976), https://www.althingi.is/altext/97/s/pdf/0660.pdf.

[19]Law Amending the Law on Courts, no. 15/1998, 2010 (Act No. 45/2010) (Ice.), https://www.althingi.is/altext/138/s/1141.html.

[20]Judiciary Act, 2016 (Act No. 50/2016) (Ice.).

[21]Act Amending the Law on Courts, art. IV, ¶¶ 1–2 (Act No. 50/2016) (Ice.).

[22]*Ástráðsson,* App. No. 26374/18 ¶ 11.

[23]*Id.* ¶¶ 8, 15.

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eighteen, twenty-three and thirty. Candidates ranked at number seven, eleven, twelve and fourteen were not on the Minister's proposal. During the Parliamentary procedure, the Minister argued in a memorandum that the Evaluation Committee should have given more weight to judicial experience and that the gender balance was unacceptable in view of the Icelandic Equality Act.[24] In the end, the Minister's proposal was narrowly passed by the Parliament, following heated parliamentary and public discussions about the Minister's defiance of the Committee's evaluation result. The President subsequently confirmed the result of the parliamentary process by issuing the formal letters of appointment. Before doing so, it was noted in a correspondence between the Secretary of the President and the Secretary-General of the Parliament, that the voting on the Minister's proposal had not strictly followed the procedure envisioned by the temporary provision in the new Judiciary Act.[25] Instead of voting separately for each proposed candidate, a single proposal of fifteen names was voted for in a single vote.[26]

Following the appointment, the four candidates that had been ranked among the fifteen most qualified by the Evaluation Committee, but who were not among the eventual appointees, challenged the legality of the appointment procedure in court. These cases eventually reached the Icelandic Supreme Court, which decided that the appointments could not be annulled, but that the plaintiffs were entitled to non-pecuniary damages due to personal injury to their reputation by the Minister's action to disregard the results of the assessment of the Evaluation Committee.[27] Importantly, the Supreme Court found that the Minister's action to propose different names to the Parliament than suggested by the results of the assessment had constituted a violation of Article 10 of the Icelandic Administrative Act.[28] The Court found that, if the Minister wanted to depart from the suggestion of the Evaluation Committee, she would have to do so based on an adequate administrative investigation, equivalent to the one performed by the Committee. This she had failed to do, which constituted a breach of her obligations under the Administrative Act, and this failure had not been remedied during the subsequent parliamentary procedure.

The applicant in *Ástráðsson v. Iceland* had been indicted and found guilty by a district court for a breach against the Icelandic Traffic Act. The applicant appealed the judgment and requested the sentence be reduced; this case was referred to the new Court of Appeal. A hearing before the new court was scheduled in February 2018, just weeks after its inauguration. Upon learning that one of the four judges that had not been among those fifteen deemed most qualified was to be among the three judges that would hear the case, the applicant requested the judge to withdraw from the case. He cited the irregularities with her appointment, and the appointment of three other judges to the Court of Appeal, stating that they had not been appointed in accordance with law.

In support of his request, the applicant referred to Article 59 of the Icelandic Constitution and Article 6(1) ECHR, which both articulate the requirement that a prerequisite of a fair trial is that the trial is conducted by a court, or a tribunal previously established by law.[29] The applicant also referred to recent case law of the EFTA Court and the General Court of the EU.[30]

[24]*See* Act on Equal Status and Equal Rights of Women and Men, 2008 (Act No. 10/2008) (Ice.), https://www.ilo.org/dyn/travail/docs/1556/Act-on-equal-status-and-equal-rights-of-women-and-men_no-10-2008.pdf.

[25]Act Amending the Law on Courts, art. IV, ¶ 2 (Act No. 50/2016) (Ice.).

[26]*Ástráðsson,* App. No. 26374/18 ¶ 24.

[27]*See id.* ¶¶ 32–35 (English summary of Cases No. 591/2017 and 592/2017).

[28]Act on the Government Offices of Iceland, art. 10 (Act No. 130/2016), https://www.government.is/library/01-Ministries/Prime-Ministrers-Office/Act-on-the-Government-Offices-of-Iceland.pdf.

[29]Constitution of the Republic of Iceland, Jun. 17, 1944, art. 59; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950 [hereinafter ECHR], https://rm.coe.int/0900001680928ea8.

[30]Council Directive 87/344, Judgment of the Court of 27 October 2017 in Case E-21/16, Pascal Nobile v. DAS Rechtsschutz-Verischerungs AG, 2018 O.J. (C 422) 7 (EC), https://eftacourt.int/download/21-16-judgment-2/?wpdmdl=1419; Case T-639/16P, FV v. Council of the European Union, ECLI:EU:T:2018:22 (Jan. 23, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016TJ0639.

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The new Court of Appeal quickly rejected the motion of the applicant and subsequently confirmed the applicant's guilty verdict. In April 2018, the applicant was granted leave to appeal the verdict to the Supreme Court.

In its judgment of May 24, 2018, the Supreme Court rejected the applicant's claims and upheld the judgment of the Court of Appeals.[31] In its judgment, the Supreme Court framed the question of compatibility with the criterion of "established by law" found in the Constitution and the ECHR against a criterion from Icelandic administrative law that prescribes that a procedural flaw in administrative decision-making can lead to an annulment of a decision. The Supreme Court argued that the flaw in the voting procedure in the Parliament, where the fifteen supposed votes were merged into a single vote, did not amount to such a serious procedural flaw. The Court then moved on to the second criterion, about "an independent and impartial" court, found in Article 70 of the Constitution and Article 6(1) of the Convention.[32] During that assessment, the Court confirmed that the Minister was in breach of administrative act for insufficiently investigating the qualifications of her proposed candidates for the new court. The Supreme Court, however, concluded that this nonetheless did not affect the applicant's right to an independent and impartial tribunal. Notably, the Supreme Court did not explicitly state whether this clear breach of law in the appointment procedure had any influence on its assessment of compatibility with the "established by law" criterion if viewed separately from the independence and impartiality criteria. Incompatibility with the former was the applicant's main claim during the entire adjudicative process.

C. The European Context

The European context was a factor in the applicant's legal challenge from the beginning, and there was public knowledge at the time of recent European cases of relevance.[33] The Supreme Court was expected to participate in a judicial dialog, which had already begun to develop with the *Nobile* judgment of the EFTA Court and the Civil Service Tribunal (CST) judgment of the General Court, on whether the situation at hand was comparable to the issues discussed in this caselaw. The Supreme Court, however, opted to address the legal problem without engaging with the European dialog.

I. Case E-21/16 Nobile

In *Case E-21/16*, the Princely Court of Appeal of Liechtenstein had asked the EFTA Court for an advisory opinion regarding few issues with the Solvency II Directive.[34] The Princely Court also asked an unusual question. It asked whether the EFTA Court could be considered lawfully composed in a manner that ensured its independence and impartiality. The reason for this peculiar question was a recent decision to reappoint the Norwegian judge of the EFTA Court, one of the Court's three judges, for a three-year term, instead of the usual six-year term. In the official decision of the EFTA Surveillance Authority (ESA)/Court Committee to re-appoint the judge, it was revealed that the Norwegian Government decided to nominate the judge only for a three-year term, or until he reached the statutory seventy-year retirement age of Norwegian Supreme Court Judges.[35] There were, however, indications that this decision was politically motivated,

[31]*See Ástráðsson,* App. No. 26374/18 ¶ 50 (English summary of Case No. 10/2018).

[32]Constitution of the Republic of Iceland, Jun. 17, 1944, art. 70; ECHR art. 6(1).

[33]Skúli Magnússon, District Court Judge and now the Parliament's Ombudsman, was interviewed by the Icelandic National Broadcasting Service (RÚV) on February 1, 2018. He mentioned cases E-21/16 and T-639/16P in relation to the appointment issues of the New Appellate Court. *See* Milla Ósk Magnúsdóttir, *Illegal Appointment of Judges Could Invalidate Judgments*, RÚV (Feb. 1, 2018, 8:11 PM), https://www.ruv.is/frett/ologmaet-skipun-domara-gaeti-omerkt-doma.

[34]*See* Council Directive 2009/138, 2009 O.J. (L 335) 1 (EC).

[35]Council Directive 87/344, Decision of the Court in Case E-21/16, ¶¶ 2–4, 2018 O.J. (C 422) 7 (EC), https://eftacourt.int/wp-content/uploads/2019/01/21_16_Decision_of_the_Court.pdf.

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as would later be revealed in an interim Order of the President of the Court in the case: "There are indications that the nomination of Judge Christiansen for an abridged term by the Government of Norway was not free of political considerations."[36] The President of the EFTA Court at the time would later explain this statement in his memoirs, saying that, in "view of the blatant attack on the Court's integrity and on the independence of its judges," he had "used the opportunity to get a few things straight" in the cited paragraph of the order.[37]

Before the EFTA Court was able to give its advisory opinion on the issue, the ESA/Court Committee repealed its previous three-year appointment decision and decided to re-appoint the Norwegian judge for a normal six-year term. This happened just four days before the previous decision was to enter into force. The EFTA Court nonetheless proceeded with its intended ruling on the lawfulness of its composition.[38]

In the findings of its decision of February 14, 2017, the EFTA Court set out three factors it deemed important when assessing the lawfulness of the Court's composition.[39] The first factor is the principle of judicial independence, which it considered being reflected in Articles 2 and 15 of the Statute of the Court and Article 3 of the Court's Rules of Procedure.[40] The second factor is adherence to a version of the common maxim that justice should not only *be* done, but also must *appear to be* done, or in the words of the EFTA Court, "it is vital not only that judges are independent and fair, they must also appear to be so."[41] The third factor is a stringent criterion established by the Court, requiring that the rules for judicial appointment must be "strictly observed" for the purposes of maintaining judicial independence.[42] The Court concluded that, due to the revoking of the previous appointment decision stipulating a three-year term, and its replacement with a new decision stipulating a six-year term, there was no doubt that the term of the Norwegian judge was now compatible with the applicable rules. The Court, however, stressed that the previous appointment decision "did not address the grounds on which a term of three years could be reconciled with Article 30 [of the Surveillance and Court Agreement] SCA, which expressly provides for a term of six years, both for the appointment and the re-appointment of a Judge."[43]

The important aspect of this case for later development was the Court's insistence on its third criterion, regarding the necessity of strict observance of the appointment rules for judges. Notably, the EFTA Court links this criterion with the judicial independence criterion but is not entirely clear about whether it is a component of judicial independence, or an independent component that needs or can be considered separately.

[36]Council Directive 87/344, Order of the President in Case E-21/16, ¶ 22, 2018 O.J. (C 422) 7 (EC), https://eftacourt.int/download/21-16-order-of-the-president/?wpdmdl=1857.

[37]Carl Baudenbacher, Judicial Independence: Memoirs of a European Judge 385–86 (2019); *see also id.* at 393–409.

[38]The details of this new decision are described in the decision of the EFTA Court. *See* Council Directive 87/344, Decision of the Court in Case E-21/16, ¶¶ 12–15, 2018 O.J. (C 422) 7 (EC), https://eftacourt.int/wp-content/uploads/2019/01/21_16_Decision_of_the_Court.pdf.

[39]*Id.* ¶ 16.

[40]The EEA legal regime does not contain instruments such as the EU's Charter of Fundamental Rights; however, in previous cases, the EFTA Court has referred—indirectly—to the European Convention on Human Rights and stated that the provisions of the EEA Agreement should be interpreted in the light of fundamental rights. *See, e.g.*, Council Directive 2004/38, Judgment of the Court of 26 July 2016 in Case E-28/15, Yanuka Jabbi v. The Norweigean Government, ¶ 81, 2017 O.J. (C 90) 9 (EC); Council Directive 2004/38, Judgment of the Court of 26 July 2016 in Case E-28/15, https://eftacourt.int/download/28-15-judgment-of-the-court/?wpdmdl=1477.

[41]For information on the history of the maxim, see Raymond McKoski, *The Overarching Legal Fiction: Justice Must Satisfy the Appearance of Justice*, 4 Savannah L. Rev. 51, 51–52 (2017).

[42]The EFTA Court does not cite any source for this criterion, but it could be seen as reflecting the "established by law" criteria in Article 6 of the European Convention on Human Rights, and its equivalent criteria in Article 47 of EU's Charter of Fundamental Rights.

[43]Council Directive 87/344, Decision of the Court in Case E-21/16, ¶ 20, 2018 O.J. (C 422) 7 (EC).

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II. Case T-639/16 P Civil Service Tribunal

In *Case T-639/16 P*, the applicant argued that that the Chamber that heard her case in the first instance before the CST had been unlawfully constituted and should thus be set aside.[44] The case concerned a staff dispute between the Council of the EU and one of its former officials.

The circumstances of the case that gave rise to the applicant's plea were that it had been decided to reform the EU's judicial institutions, and that the CST would be merged with the General Court, taking effect from September 1, 2016. However, in March 2016, a decision was taken to appoint three judges to the CST for the period starting on April 14, 2016 and ending on August 31, 2016. Two of the positions concerned specific vacancies for which a public call for applications had been published in 2013, but for one of the positions, no specific public call had been published. Citing these special circumstances regarding the imminent closure of the CST, all three positions were filled according to a list of candidates that had been identified by a selection committee following the 2013 call for applications.[45]

The applicant's case was heard by the CST on May 12, 2016 and decided on June 28, 2016. The Judge, who had been appointed to fill a vacancy for which no call for applications had been published, sat in the Chamber deciding the case. The question thus became whether the decision to appoint a judge, without the prior publishing of a specific call for applications, affected the legality of the Chamber's composition. The Council, which made the appointment decision, maintained that it had the discretion to either draw candidates from a prior call for applications or to publish a new call.[46]

The General Court identified several flaws with the appointment procedure. Firstly, the 2013 call for applications was meant to fill two specific vacancies. By using this call to fill the third vacancy, the legal framework stemming from the call notice was not respected. Secondly, according to a provision in the Statute of the Court of Justice (CJEU), the shortlist of candidates should contain at least twice as many names as there are judges to be appointed.[47] This, the Court argued, implies that the vacancy notice must identify the vacant post. Due to requirements of geographical balance, some excellent candidates for the third vacancy may have withheld their application for the previous two posts due to their nationality. The approach to appoint from the initial list of candidates could thus not fully ensure the attainment of the objective to enable all eligible candidates to submit their application to eventually be able to appoint a candidate with the most suitable high-level experience, as required by the rules. This, the Court concluded, is incompatible with the procedural rules for appointing judges to the CST.[48] These flaws, the Court stated, mean that "it cannot be ruled out that the irregularities found may have had an effect on the decision to appoint the judge at issue."[49]

Having answered these initial questions in the affirmative, the Court moved on to answer whether these flaws influenced the legality of the CST's composition. With reference to Article 47 of the Charter of Fundamental Rights, the Court explained that the principle of the lawful judge should be interpreted as meaning that the composition of a court needs to be regulated beforehand by legal provisions. This would work towards the objective of guaranteeing the independence of the judiciary from the executive.[50] The Court noted that the principle of the lawful judge was also enshrined in Article 6(1) ECHR, as was evident from the case law of the ECtHR.[51] Moreover, that

[44]Case T-639/16P, FV v. Council of the European Union, ECLI:EU:T:2018:22 (Jan. 23, 2018), ¶¶ 1, 31, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016TJ0639.

[45]*Id.* ¶ 11.

[46]*Id.* ¶¶ 29–30.

[47]Consolidated Version of the Treaty on European Union Protocols: Protocol (No. 3) on the Statute of the Court of Justice of the European Union, Jan. 1, 1958, 2008 O.J. (C 115), Annex I, Art. 3(4), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E/PRO/03.

[48]*FV*, Case T-639/16P, ¶¶ 49–58.

[49]*Id.* ¶ 64.

[50]*Id.* ¶¶ 67–68.

[51]*Id.* ¶ 74 (citing ECtHR, Ilatovskiy v. Russia, CE:ECHR:2009:0709JUD000694504 (July 9, 2009), ¶¶ 40, 41).

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Court noted that "it is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so," citing and rephrasing Paragraph 16 from the judgment of the EFTA Court in *Case E-21/16 Nobile*.[52]

Finally, the Court concluded that the Council had deliberately disregarded the applicable legal framework. Due to the importance of compliance with rules for appointing judges for maintaining the appearance of independence and impartiality, the judge at issue could thus not be regarded as a lawful judge within the meaning of Article 47 CFR. The judgment under appeal was thus set aside.[53] On March 19, 2018, the Court of Justice decided to abstain from reviewing the judgment of the General Court, citing that the judgment did not "constitute a serious risk that the unity or consistency of EU law may be affected."[54]

Notably, the General Court set the bar high in the judgment with regards to strict observance of the relevant legal framework for appointing judges, in a similar way as the EFTA Court had done in the *Nobile* case. It also emphasized in a similar way the close link between the "established by law" criterion and the "independence" and "impartiality" criteria. The central issue in the *CST* case, regarding the lawful composition of the CST, later became a part of the Grand Chamber Judgment of the CJEU in Joined Cases C-542/18 RX-II and C-543/18 RX-II ("*Simpson v. Council* and *HG v. Commission*") decided on March 26, 2020. The Grand Chamber decision and Advocate General (AG) Sharpston's Opinion on the case drew on the ECtHR's first decision in the *Ástráðsson* case and will thus be revisited below, but as a preliminary point, the CJEU found that the General Court had erred in law with regards to the main issue.

D. *Ástráðsson v. Iceland*

The applicant lodged an application against Iceland with the ECtHR on May 31, 2018, complaining that his criminal charge had been determined by a court that was not established by law in violation of Article 6(1) ECHR. The factual point, alleged by the applicant, was that one of the judges that had decided his case in the Court of Appeals had not been appointed in accordance with domestic law. He relied in that regard on the previous findings of the Icelandic Supreme Court in two judgments from December 19, 2017.[55]

I. The Second Section Judgment in Ástráðsson

In the judgment of the Second Section of the ECtHR of March 12, 2019, the court started by clarifying the issue that it was asked to assess: Whether the Icelandic Supreme Court had, in its judgment of May 24, 2018, correctly determined whether the applicant's criminal charge had been decided by a "tribunal established by law" within the meaning of Article 6(1) ECHR.[56]

Next, the ECtHR laid out several principles that should govern how this factual scenario should be assessed, considering the requirements of Article 6(1) ECHR as previously established in the relevant case law. The court noted that a tribunal that is not established in conformity with the intentions of the legislature will lack the required legitimacy to execute its normal functions. The court confirmed that the phrase "established by law" in Article 6(1) solidifies a duty of compliance with the national legal provisions and the national processes governing appointment of judges. In support of this interpretation, the ECtHR referred to the decision of the EFTA Court in Case E-21/16 *(Nobile)* and the judgment of the General Court in Case T-639/16 P (*CST*). The court also

[52]*Id.* ¶ 75.

[53]*Id.* ¶¶ 77–80.

[54]Case C-141/18 RX, FV v. Council of the European Union, ECLI:EU:C:2018:218 (Mar. 19, 2018), ¶ 5, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CD0141.

[55]*See* Ástráðsson v. Iceland, App. No. 26374/18, ¶¶ 72–82 (Mar. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-191701 (summarizing applicant's position).

[56]*Ástráðsson*, App. No. 26374/18 ¶ 95.

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observed that the "established by law" criterion was intended to ensure that the organization of the judicial branch is not dependent on the discretion of the executive or the judicial authorities but should instead be regulated by the laws of the legislature.[57]

In applying these principles to the factual scenario, the ECtHR was quick to point out that the Icelandic Supreme Court had already in closely related proceedings established two separate breaches of domestic law during the process of appointing the judge at issue in the applicant's case. Thus, the only issue remaining was to determine whether these breaches amounted to being flagrant within the meaning of Article 6(1) ECHR and accordingly a breach of the applicant's rights under the Convention.[58]

The ECtHR decisively rejected all arguments of the Icelandic Government and mentioned five reasons supporting its ultimate finding of a breach of Article 6(1) ECHR.[59] Considering these five reasons, the ECtHR found that the procedural violations of domestic law, previously identified by the Icelandic Supreme Court, had amounted to a flagrant breach of the applicable rules.[60]

The grounds of this finding departed from the strict approach to the "established by law" criterion, previously laid out in the case law of the EFTA Court and the General Court. Instead of requiring strict observance of the applicable law regulating judicial appointments, the breach of such laws now needed to be "flagrant" to trigger a violation of Article 6(1) ECHR. The ECtHR also emphasized that the "established by law" criterion constituted an independent right that existed in parallel to, rather than as a component of, the "independence" and "impartiality" criteria. The ECtHR thus explicitly engaged in a dialog with the jurisprudence of the other supranational courts and used their findings as a basis for further developing its own interpretation of the fair trial concept enshrined in Article 6 ECHR.

After the ruling, the Icelandic Minister of Justice resigned from her post to avoid the collapse of the coalition government. The new Appellate Court decided to suspend all operations for one week while considering a response. Eventually it decided to relieve four of its fifteen members from their judicial duties, while waiting for the government's reaction. Ultimately, the response of the Icelandic government was to ask for a referral of the case to the Grand Chamber of the ECtHR. On September 9, 2019, the ECtHR accepted the referral request. The hiatus of the four judges was thus extended, although—as October 2022—all but one of them have since been appointed to the same court through new appointments due to new vacancies, with some of the initial judges retiring or being promoted to the Supreme Court.

II. The Grand Chamber of the CJEU Reopens the CST Problem

While the Grand Chamber of the ECtHR deliberated over the *Ástráðsson* case, the Grand Chamber of the CJEU reopened the problem concerning the lawfulness of the composition of the Civil Service Tribunal. In its judgment of March 26, 2020, the CJEU made a significant reference to the Second Section judgment of the ECtHR in the *Ástráðsson* case, and AG Sharpston discussed the case at length in her Opinion, delivered on September 12, 2019.[61]

AG Sharpston agreed with the finding of the General Court in *CST* case that the appointment procedure was vitiated by an irregularity, but she disagreed with the case's evaluation of the legal consequences of the irregularity. Her main argument was that the right to a tribunal established by

[57]*Id.* ¶¶ 97–102.
[58]*Id.* ¶¶ 105–108.
[59]*Id.* ¶¶ 112–122.
[60]*Id.* ¶ 123.
[61]Joined Cases 542 & 543/18 RX-II, Simpson v. Council of the European Union, ECLI:EU:C:2020:232 (26 March, 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0542; Joined Cases 542 & 543/18 RX-II, Simpson v. Council of the European Union, ¶¶ 69–87, 147 (Sep. 12, 2019) [herein after Opinion of Advocate General Sharpston].

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law needs to be reconciled with the principle of legal certainty and *res judicata*. She supported that argument with a reference to a view of the adjudicative process as a conflict solving mechanism.[62]

The Grand Chamber of the CJEU reached a similar conclusion but did not explicitly endorse AG Sharpston's idea about balancing a principle of legal certainty with the "established by law" criterion. The approach of the CJEU was to first reassess the factual conclusion of the General Court in Case T-639/16 P and find the irregularity to be less significant than the General Court had established.[63] The court then emphasized that the "established by law" criterion is meant to "ensure that the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislator."[64] This echoes corresponding remarks in paragraph ninety-nine of the *Ástráðsson* Second Section judgment. The CJEU then proceeded to applying this standard to the supposedly minor omission by the Council during the appointment of the three judges to the CST and found that scenario to be distinguishable in order of gravity from the situation in the EFTA Court's *Nobile* case.[65] Essentially, there were no grounds to consider that the Council had "made unjustified use of its powers" and thus undermined the "integrity of the outcome of the appointment process."[66] There should therefore not be any "reasonable doubt in the minds of individuals as to the independence and impartiality of the judge" at issue.[67] Thus, the irregularity was found not to be in breach of the obligations under the "established by law" criterion in Article 47 CFR, and the judgments of the General Court under review were accordingly set aside.[68]

With this, the Grand Chamber of the CJEU adjusted the General Court's approach in the *CST* case to the "established by law" criterion and embraced the suggestion of the ECtHR in the Section judgment in *Ástráðsson*: That a breach of a law regulating judicial appointments needed to reach a certain level of gravity before triggering a breach of the "established by law" constitutional requirement. Notably, the Grand Chamber emphasizes the link between the "independence" and "impartiality" criteria with the "established by law" criterion and seems to be suggesting that a breach to the latter criterion is dependent on the former also being compromised. In this regard, there is thus a discrepancy between the approach of the Grand Chamber of the CJEU and the Second Section judgment of the ECtHR in *Ástráðsson*.

III. The Grand Chamber Judgment in Ástráðsson

From the perspective of the Icelandic authorities, the Section judgment in the *Ástráðsson* case left an important question unanswered. In its grounds for finding a breach of Article 6(1) ECHR, the ECtHR had listed five issues that in combination amounted to a breach. It was however unclear if there would also be a breach if only some of the issues were applicable in a case of a related, but slightly different factual scenario. This was highly relevant as the factual situation of the fifteen new judges differed. Only four of them had not been deemed among the fifteen most qualified, but the remaining eleven were within that group. Thus, the gravity of the flaw in the appointment procedure differed between the two groups of judges, and it was unclear whether the Section judgment applied to all fifteen judges, or only the four who had been nominated by the Minister without having been deemed among the most qualified candidates.

The Grand Chamber was quick to point out in the opening paragraphs of its assessment that the case concerned one of the four judges who had not been considered among the most qualified

[62] *See* Opinion of Advocate General Sharpston, ¶ 91. *See also* MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 88, 97–146 (1986) (discussing adjudicative process aimed at solving conflicts).

[63] Opinion of Advocate General Sharpston, ¶¶ 62–68.

[64] *Id.* ¶ 73.

[65] *Id.* ¶ 80.

[66] *Id.* ¶ 79.

[67] *Id.*

[68] *Id.* ¶¶ 82–83.

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by the Evaluation Committee, and that the legality of remaining eleven judges was not at issue in the case.[69] Moreover, the Grand Chamber changed the tone with regard to the failure of the Parliament to vote separately on each of the fifteen candidates, and now noted that arguably, this failure "would not, on its own, have amounted to a violation of the right to a 'tribunal established by law.'"[70] Previously, in the Section judgment, the court had found that this element in the procedure "was meant to serve the important public interest of safeguarding judicial independence *vis-à-vis* the executive branch," and that the failure to adhere to this rule "amounted to a serious defect of the appointment procedure."[71] It thus seems that the Grand Chamber wanted to hint where it stood with regards to the eleven judges not at issue in the case, and this signaled a more tolerant position than could be inferred from the Section judgment. Having narrowed the scope of the Section finding, the Grand Chamber proceeded with confirming the main finding of the Second Section judgment of a violation of Article 6(1) ECHR with regards to the four judges subject to the circumstances of the application at issue.

The Grand Chamber used the opportunity to clarify in general terms its approach to the "established by law" criterion in connection with judicial appointments. It set out to answer, "whether any form of irregularity . . . , however minor or technical" and "regardless of when the breach may have taken place" would automatically contravene the right set out in Article 6(1) ECHR.[72] In other words, it asked if there should be a threshold of gravity before a flawed procedure would constitute a violation. It quickly answered in the affirmative; there should be such a threshold. The logic of that answer was explained in the abstract. The "established by law" criterion was said to be a rule of law principle who could in some circumstances come into competition with other rule of law principles. In such cases a balance must be struck. The other potentially competing principles were said to be legal certainty, *res judicata,* and the principle of irremovability of judges.[73] This approach is reminiscent of the suggestion of AG Sharpston in the *CST* cases, where she also argued that legal certainty and *res judicata* needed to be balanced against the requirements of the "established by law" criterion.[74]

In the Second Section judgment, the ECtHR had suggested that the threshold for breaching the "established by law" criterion should be a flagrant breach of the applicable legal framework. This meant that the gravity of breaches needed to be considerable before violating Article 6(1) ECHR. This concept of a "flagrant breach" had been misunderstood by many following the Section judgment, and rightfully so, as the concept was used in two different, incompatible meanings in the text of the judgment. The Grand Chamber acknowledged this ambiguity and thus suggested an alternative terminology—that is, a "manifest breach"—and a three-step test to determine if the threshold of gravity had been reached.[75] The three-step *threshold test* can be viewed as a suggestion on how similar balancing questions can be resolved in future cases.

The first step of the test dictates that the breach of domestic law with regards to appointment of judges and the "established by law" criterion needs, in most cases, to have been "manifest" and it will in general follow the interpretation of the domestic courts in that regard. In exceptional cases, the court however reserves the right to reassess the interpretation of domestic courts.[76]

The second step of the test defines the substantive threshold for finding a breach of the "established by law" criterion. It refers to the threshold described in the Second Section judgment and reaffirms it by stating that "breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold,"

[69]Ástráðsson v. Iceland, App. No. 26374/18, ¶ 209 (Dec. 1, 2020), https://hudoc.echr.coe.int/eng?i=001-206582.
[70]*Ástráðsson*, App. No. 26374/18 ¶ 270.
[71]*Id.* ¶¶ 121–22.
[72]*Id.* ¶ 235.
[73]*Id.* ¶¶ 237–40.
[74]Opinion of Advocate General Sharpston, ¶¶ 88–111.
[75]*Ástráðsson*, *App. No. 26374*/18 ¶¶ 241–42, 244–52.
[76]*Id.* ¶¶ 244–45.

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and that "only those breaches that relate to the fundamental rules of the procedure for appointing judges" are likely to result in a breach of the "established by law" criterion.[77] Indications of an illegal interference or undue use of discretion by some organs of government in the appointment procedure of judges is potentially significant in determining whether the threshold is reached in individual cases.[78] Usually, the executive branch would be prone to overstep its boundaries in this way, but by its wording, the judgment of the ECtHR does not exclude the possibility that other branches or organs of government might do the same.

The third step sets out the parameters of the subsidiarity and the margin of appreciation principles with regards to assessing how domestic courts have dealt with questions relating to the appointment of judges and the "established by law" criterion. The Grand Chamber notes that domestic courts need to be able to determine themselves whether a breach of law in an appointment procedure constitutes breach of Article 6(1) ECHR. If not, the right would not provide any real protection.[79] It also explains that the ECtHR has a supervisory role *vis-à-vis* the domestic courts in monitoring consistent application of the principles of the ECHR.[80] Once a domestic court has identified a breach of a rule in relation to a judicial appointment, it thus needs to assess that fact in relation to the standards of the ECHR and the case law of the ECtHR.[81] The domestic courts have discretion to balance competing interests during this assessment and the ECtHR will need "strong reasons to substitute its assessment for that of the national courts."[82] By this, the court is referring to the competing considerations relating to the other identified rule of law principles—that is, legal certainty, *res judicata,* and irremovability of judges. The court is also encouraging the national courts to engage actively in a judicial dialog with the jurisprudence of the ECtHR, which the Icelandic Supreme Court had failed to do in the case at issue.

The court was quick to conclude that there was no indication that the factual scenario subject to the application of *Ástráðsson* would pass any of its three steps. The threshold of seriousness was thus deemed to be breached with regards to the "established by law" criterion.[83] Following its previous finding in the Second Section judgment, the Grand Chamber restated more thoroughly its view that the "established by law" criterion in Article 6(1) ECHR constitutes a rights element that is not conceptually dependent on the judicial "independence" and "impartiality" criteria.[84] This distinguishes the ECtHR's view from the view expressed in the Grand Chamber judgment of the CJEU in the *CST* cases.

E. A Tale of Two Grand Narratives

The *Ástráðsson* saga—told through the caselaw examined above—is rich with issues that could be discussed at length from various aspects. It simultaneously forms part of two grand narratives. A local narrative about a struggle for supremacy over judicial appointments, which has been ongoing since the first quarter of the twentieth century, and a European narrative about the rule of law ideal that has been gaining momentum during the past several years following political developments in Central and Eastern Europe. An important aspect of the European rule of law narrative has evolved through a dialog between the supranational European courts and other European legal actors.

[77] *Id.* ¶¶ 245–46.
[78] *Id.* ¶¶ 246–47.
[79] *Id.* ¶ 249.
[80] *Id.* ¶ 250.
[81] *Id.*
[82] *Id.* ¶¶ 248–51.
[83] *Id.* ¶ 266.
[84] *Id.* ¶¶ 231–34.

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I. The Rule of Law Principle of Congruence

The rule of law ideal is widely referred to in a general way throughout the case law discussed above. Rule of law is however a vague concept, which serves as an umbrella over many distinct ideas. It is thus useful to examine the "established by law" criterion in context with more specific aspects of the ideal. Lon Fuller's *The Morality of Law*—one of the great texts of twentieth century legal theory—is a common starting point for discussing the rule of law ideal. In the second chapter of his book, he famously identifies eight ways in which law-making can fail and thus instigate the failure of the rule of law ideal.[85] Markedly, his representation was fiercely criticized by his contemporaries in the 1960s—especially by those on the opposite spectrum in the legal philosophy debate between the naturalists and the positivists.[86] In more recent times, Fuller's ideas are still bourgeoning in an academic climate where legal scholars are looking more and more towards interdisciplinary and contextual approaches to legal scholarship in the way Fuller advocated.[87]

Fuller's procedural approach is an interesting facet of the rule of law ideal. Laws and systems of laws become compatible with the moral ideal if their making and governance comply with his procedural ideals. Fuller distinguishes between morality of duty and morality of aspiration. There is a sliding scale between these two types of morality. This means that each procedural ideal can be performed in increments that can be measured on a moral scale. There is a moral duty to adhere to a certain minimum procedural standard, but there is also a moral aspiration of the perfect procedural performance. The line between a moral duty and a moral aspiration marks the boundary "below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it."[88]

The salient point of Fuller's list is that governments with illiberal tendencies will tend to make laws in disrespect of one or more of these eight principles. This tendency embodies their indifference or disdain for the moral principles of the liberal democratic state, which is governed towards the *desiderata* of the rule of law ideal.[89] It is to be expected that the rule of law ideal will be adhered to in differing degrees by individual states and governments, ranging from the wicked government that fundamentally fails its moral duty, over to the ideal government that perfectly fulfils the highest aspiration of the rule of law ideal.

Sajó and Tuovinen have recently argued that the current illiberal regimes in Eastern and Central Europe have systematically abused the forms of the rule of law for purposes contrary to the ideals of the rule of law. They deny the claim of other critics that the rule of law has been completely denied, instead the regimes are borderline cases, "a mixture of an abused rule of law and rule by law."[90] This analysis could be fitted within Fuller's framework about the boundary between moral duty and moral aspiration if the illiberal regime's controversial actions were considered compliant with the basic moral duty but were not in line with what many would morally aspire to.

The principle of congruence between official action and declared rule is among Fuller's eight principles of legality.[91] The main issues in the case law discussed in this Article can be measured against Fuller's principle of congruence. In the *Nobile* case, the Norwegian government, acting through the ESA/Court Committee, decided to reappoint a judge for a three-year term in

[85]Lon Fuller, The Morality of Law 33–94 (revised ed. 1969).

[86]For an important critique on Fuller's enterprise, see H.L.A. Hart, Essays in Jurisprudence and Philosophy 343–64 (1983). *See also* Ronald Dworkin, *Philosophy, Morality, and Law*, 113 U. Pa. L. Rev. 668 (1965); Joseph Raz, The Authority of Law 210–29 (2nd ed. 2009).

[87]*See, e.g.*, Cass R. Sunstein & Adrian Vermeule, Law & Leviathan: Redeeming the Administrative State (2020). *See also* Collen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & Phil. 239, 240 (2005).

[88]*See* Fuller, *supra* note 85, at 42.

[89]For Fuller, these principles of legality represented the inner morality of laws, thus linking his ideas to the natural law tradition in legal philosophy. *See generally id.*

[90]*See* Sajó & Tuovinen, *supra* note 2, at 521–22.

[91]*See* Fuller, *supra* note 85, at 81–91.

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contradiction to a normal understanding of the applicable rules that required a six-year term. In the *CST* cases, the Council decided to appoint a judge based on a public call for applications that was meant for different vacancies. This contradicted a normal understanding of the applicable legal framework, which required an open call for each vacancy. In the *Ástráðsson* case, the government acted based on its own understanding of the applicable legal framework for appointing fifteen new judges. This understanding was not congruent with a normal reading of this legal framework, as was subsequently confirmed by the Icelandic Supreme Court and the ECtHR.

Article 6(1) ECHR has many elements—one of which is the principle of congruence—that finds its expression in the "established by law" criterion. The declaration that one of the prerequisites of a fair trial is that the tribunal at issue should be established by law sets a requirement for how courts should be formed.[92] They should be established through the slow, but sophisticated, mechanism of law-making. This condition also strongly emphasizes congruence between the constitutive criteria as it appears in the legal framework and how the responsible officials enact that framework.[93] The scope for administrative discretion is thus limited by an explicit constitutional requirement that designates the imperative status of the congruence principle when establishing tribunals, and therefore, when appointing judges to such tribunals.

The case law of the three European supranational courts shows an evolution in how the principle of congruence has been perceived. In the *Nobile* case, the EFTA Court emphasized that the rules on the appointment of judges must be strictly observed to ensure the proper appearance of the Court's independence and impartiality toward the public.[94] The General Court took the same approach in the *CST* case, observing the rule of law principle of the lawful judge that should be established in accordance with the intentions of the legislature and that rules relating to the appointment of judges "must be strictly adhered to." Otherwise, public confidence in the courts would be in jeopardy.[95] The EctHR embraced the principle of congruence in the Second Section judgment in *Ástráðsson* when it noted that the concept of establishment in Article 6(1) ECHR must, considering the principle of the rule of law, be understood as requiring compliance with the relevant rules when judges are appointed.[96] But, it departed from the strict compliance approach by setting a threshold of a "flagrant breach" for triggering a violation to the ECHR. AG Sharpston, and the Grand Chamber of the CJEU, embraced this more conditional approach in the *CST* cases, and the Grand Chamber of the EctHR finally laid out its three-step *threshold test* for balancing the congruence principle against other potential considerations.

The ECtHR's idea about a moral right and a threshold of seriousness for triggering a violation fits well within the Fullerian moral framework. There is a moral aspiration to appoint judges in accordance with the law in the strict sense, but the moral duty to do so is not violated until a certain threshold of seriousness is reached. The hard question is where to draw the boundary between the aspiration and the duty, which the EctHR suggests can be done with its three-step *threshold test*. The different positions expressed in the case law of the European courts can accordingly be viewed as opinions about where the boundary between moral duty and moral aspiration ought to be in terms of the congruency principle and the "established by law" requirement. Are the authorities under a stringent moral duty to follow the law when appointing to the judiciary, or is the requirement in Article 6 ECHR and Article 47 CFR a mere moral aspiration subject to a level of discretion?

In laying out its principles for solving the balancing question in *Ástráðsson*, the Grand Chamber of the EctHR does not specify if more weight should be given to the congruence

[92]European Convention on Human Rights [ECHR], art. 6(1).

[93]If outcome *X* is not in accordance with law *Y*, outcome *X* cannot be established by law *Y*.

[94]Council Directive 87/344, Decision of the Court in Case E-21/16, ¶ 16, 2018 O.J. (C 422) 7 (EC).

[95]General Court, Case T-639/16P, FV v. Council of the European Union, ECLI:EU:T:2018:22, (Jan. 23, 2018), ¶¶ 71–75, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016TJ0639.

[96]*Ástráðsson*, App. No. 26374/18 ¶ 98.

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principle, which had an explicit constitutional basis of a high relevance for the factual scenario at issue, or to more general principles, which did not have a solid black letter basis of relevance. Arguably, this puts the threshold approach of the court on awkward doctrinal grounds—a problem which is not convincingly overcome by the judgment's articulation of the applicability of these alternative principles.[97] It could be asked how upholding an illegal judicial appointment facilitates legal certainty? Arguably, there would be greater legal certainty in requiring strict observance of the applicable law. It could also be asked why illegally appointed judges should be irremovable from their posts? Arguably, a judge should not be entitled to such job protection until he has been lawfully appointed. The answer to both questions hinges on whether the adjudicative process is perceived as a practical, conflict-solving mechanism or as a policy-implementing mechanism subject to strict logic and rational argumentation.[98]

AG Sharpston subscribed to the practical conflict solving view in her Opinion in the *CST* cases, and the EctHR seems to be following her in the *Ástráðsson* case. Given AG Sharpston's British background, it is unsurprising that she subscribes to an Anglo-American view of the adjudicative process, rather than the traditionally more logically-rigid continental European view. But it could be questioned whether the European Court of Human Rights should do the same. This perhaps reveals an inherent risk with applying the comparative method through judicial dialog between the European supranational courts. An argument made by a supranational judicial actor usually springs from a specific legal cultural context that relies on numerous, distinct normative presumptions. This makes it imperative—if the objective is to advance sound innovations in terms of legal theory—that an argument is carefully evaluated before it is picked up and applied by another supranational judicial body. The objective of the judicial dialog may, however, be less about legal theory and comparative methodology, and more about an urgent reaction to contemporary political developments—such as court packing attempts by illiberal European governments. In that case, the pedigree of the legal theory argument is understandably a secondary consideration, as the European judiciary turn their backs together in a scramble for decent arguments to fend off violations to the rule of law ideal.

II. Discretion of the Judicial Authorities

A subtle aspect of the EctHR's two judgments in the *Ástráðsson* case reflects on the long-standing Icelandic domestic debates about the design of the system of judicial appointments. It is an established European view that extensive executive discretion in judicial appointments can undermine judicial independence and thus the ideal of the fair trial. This is exemplified by the development described by Lasser, where panels independent of the executive have, in recent decades, at the behest of the Council of Europe, taken on a much more prominent role in the selection of judges to isolate the judicial branch from the intrusion of executive influences.[99] This is also emphasized in the CJEU's Grand Chamber judgment in the *CST* cases and in both *Ástráðsson* judgments.[100]

A curiosity with the Second Section judgment of the ECtHR in *Ástráðsson* was that, not only did it emphasize that the "established by law" criterion is meant to ensure that the organization of the judiciary is not subject to executive discretion, but also that "the organisation of the judicial system cannot be left to the discretion of the judicial authorities."[101] This aspect was not recited by the Grand Chamber of the CJEU in the subsequent *CST* cases, but this point was restated on a milder version in several separate paragraphs in the Grand Chamber judgment of the ECtHR in *Ástráðsson*. The emphasis on the risks associated with interference from within the judiciary on

[97]*Id.* ¶¶ 236–40.

[98]*See* DAMASKA, *supra* note 62, at 97–180.

[99]*See* Lasser, *supra* note 17, at 82–108.

[100]*Simpson,* Joined Cases 542 & 543/18 RX-II ¶ 73; *Ástráðsson,* App. No. 26374/18 ¶ 99; *Ástráðsson;* App. No. 26374/18 ¶¶ 226, 233, 247.

[101]*Ástráðsson,* App. No. 26374/18 ¶ 99.

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judicial appointments may seem peculiar in a case that was primarily about how the executive branch misapplied administrative discretion in the appointment of several judges. However, the reference to such a risk becomes more comprehensible when viewed in the wider domestic context of the case.

As explained in Section B of this article, the struggle between the judicial elite and the political elite in Iceland for supremacy over judicial appointments has a long history. It dates to the 1920s and 1930s and has been particularly strenuous during the first two decades of the 21st century. Remarks made by an influential Icelandic politician, Jónas frá Hriflu, in the explanatory notes of a legislative proposal from 1933 sum up the arguments persistently made in Iceland against the discretionary power of the judicial authorities over the appointment of new judges.[102]

Jónas argued that the Supreme Court should not be granted with a power to regenerate itself through selection of new members. He insinuated that, when the Supreme Court had been established in 1920, a conservative Minister had appointed the initial batch of judges, making sure that they shared his conservative ideological view on society. This batch of conservative judges then had the power to regenerate the court by admitting new members, who most likely would share their conservative political beliefs. Thus, a conservative Supreme Court with regenerative capabilities would be entrenched, irrespective of the political leanings of future political authorities and the public.[103]

The great influence incumbent judges had over judicial appointments in Iceland was somewhat curbed by legislative amendments in 1935 in favor of the political executive authorities. But, following controversial appointments in the 2000s and ensuing reforms to curb executive discretion by legislative reforms on the model of CoE's recommendations, the judicial elite once again regained decisive influence over new appointments in 2010. The *Ástráðsson* saga happened in this domestic context. It explains the motive of the Minister of Justice, when she decided to tweak the list of judicial candidates to the new Appellate Court suggested to her by the Evaluation Committee. Candidates with opposing political leanings were dropped from the list, and political and personal allies were added to the list. The historical opportunity to make an entire appellate judicial tier more conservative leaning, and thus transplanting more conservative members into the judicial elite, was deemed worth the political risk of going against the recommendation of the Evaluation Committee, although the risk would eventually materialize in the destruction of her ministerial reign.

In equal measures, the incumbent judicial elite sensed the urgency of the moment and acted pre-emptively through the Evaluation Committee by using the Committee's discretion to suggest precisely fifteen candidates to the fifteen vacancies, thus limiting the possibilities of the conservative Minister to infiltrate its ranks with a large batch of new senior members. It should be noted that the Evaluation Committee has, before and since this particular appointment, occasionally suggested more than one name for each vacancy and thus made use of its discretion to either tie the hands of the responsible Minister or give him or her the leeway of choosing from several suitable candidates.[104] The rationale for how the Committee uses its discretion is not transparent, however, which fuels the sentiment that favoritism and other unprofessional reasons may, at times, be decisive in how the discretion is applied. This discretionary power of the Committee was not necessarily foreseen by the legislature when the appointment system was reformed, but is consistent with the parallel development described by Lasser with regards to the self-empowerment of the panels established to evaluate judicial candidates to the CJEU and the ECtHR.[105]

[102]Frumvarp til laga um fimmtardóm (1933), https://www.althingi.is/altext/althingistidindi/L045/045_thing_1932_A_thingskjol.pdf.

[103]Jónas suggested that judges should be elected by the Parliament to ensure democratic legitimacy and the plurality of political opinions on the judicial bench. *See id.*

[104]Recently, on October 30, 2020, the Committee suggested six suitable candidates for two vacancies in the Icelandic Supreme Court.

[105]*See* Lasser, *supra* note 17, at 99–104.

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Having this backstory in mind, the remark of the ECtHR that "the organisation of the judicial system cannot be left to the discretion of the judicial authorities" becomes more appropriate and reflective of how the case simultaneously supplements a storied chronicle of local feuds and adds to a currently unfolding narrative about pressures on the rule of law ideal in Europe.[106] The Icelandic experience thus adds a nuance to the European dogma about the need for judicial independence. While independent judiciary is important, it does not necessarily follow that the judiciary should be in control of its own establishment, including who gets to be appointed as a judge. The "established by law" criterion is thus an independent element from the judicial independence criterion, both of which are composite elements of the fair trial ideal enshrined in Article 6 ECHR and Article 47 CFR.

F. The Emergence of a New Autonomous Element of a Fair Trial

Through the *Ástráðsson* case, the "established by law" criterion found in Article 6 ECHR and Article 47 CFR emerges as a self-standing element of the ideal of the fair trial. The citizen is entitled to have his case tried by a tribunal that is established in accordance with law, and this includes that the judges on the tribunal should also be appointed in accordance with law. The ECtHR emphasizes that this is a separate element from the judicial "independence" and "impartiality" criteria, which also serve the grand objective of facilitating the ideal of the fair trial enshrined in Article 6 ECHR and Article 47 CFR.[107] Notably, the Grand Chamber of the CJEU did not pick up this element in its dialog with the ECtHR, but it is difficult to determine if that signals an alternative position or simply a nuance that the CJEU has not yet addressed.[108] Regardless of this detail, the evolution of the "established by law" criterion is a good example of how the various actors within the European supranational judiciary have advanced a legal concept through judicial dialog, seeking legitimacy and support for their own findings by referring to each other's arguments and jurisprudence.

At an abstract level, the ideal of the fair trial is about the entitlement of the citizen that the legal and factual questions posed to a tribunal are adjudicated accurately and efficiently.[109] It is the responsibility of the legislature to design the adjudicative institution toward this normative objective. To ensure that its design is adequately realized, the principle of congruence, as expressed through the "established by law" criterion, needs to be respected by the implementing authorities. Any unintended discretion exercised by these authorities is liable to corrupt the carefully calibrated design of the legislature. The "established by law" criterion should not be understood as meaning that the power to appoint judges needs to be deferred to the judicial authorities with reference to the need to ensure the independence of the judicial branch of government. Independence of the judiciary is a composite element of a fair trial, but not a sufficient condition. The judiciary can simultaneously be independent and inept at its primary task of facilitating a fair trial. The domestic context of the *Ástráðsson* case highlights this aspect and shows how evaluation panels controlled by the judiciary may facilitate judicial independence but, at the same time, cultivate cronyism within the judiciary to the detriment of the quality of the judicial personnel and, thus, to the detriment of the normative purpose of the ideal of the fair trial.

A deferral of the power to appoint judges to expert panels under the influence of the judicial authorities thus needs to be rationalized with reference to the positive effect such deferral has on the ideal of the fair trial. In the *Ástráðsson* case, the distrust between the judicial elite and the

[106] *Ástráðsson,* App. No. 26374/18, ¶ 99.

[107] *Ástráðsson,* App. No. 26374/18 ¶¶ 231–34.

[108] *See generally* ECJ, Joined Cases 542 & 543/18 RX-II, Simpson v. Council of the European Union, ECLI:EU:C:2020:232 (26 Mar. 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0542.

[109] See a detailed argument for this conceptualization of a fair trial in Haukur Logi Karlsson, Conceptualising Procedural Fairness in EU Competition Law 20–45 (2020).

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political elite was a factor in how both acted during the appointment of the fifteen judges to the new Appellate Court in Iceland. Acting through the evaluation panel, the judicial elite used its discretion to impose its choice of candidates on the Minister of Justice, and the Minister responded by discarding the list and making her own assessment of the most suitable candidates. It can be assumed that the intention of the legislature was to establish a court that would be staffed by highly qualified judges, meaning that the most qualified judges would be in the best position to realize the ultimate institutional objective of any court: The fair trial ideal of adjudicating facts and law accurately and efficiently. The actions of the implementing authorities were liable to disrupt this legislative intent.

The question that lingers is whether the political elite or the judicial elite is better suited to identify the ideal judicial candidate. The ECtHR addressed this question, without providing a definite answer, by pointing out that, although the main risk for the integrity of judicial appointments may stem from the executive branch, other organs and branches of government may also compromise the process.[110] It is therefore for the legislature to decide on the institutional design and for other organs to execute that design faithfully with reference to the "established by law" criterion and, more generally, the rule of law principle of congruence between official action and declared rule. In a situation like the *Ástráðsson* case, where rival factions of government elites distrust each other to use their formal or informal discretionary powers, the institutional solution moving forward may thus require the legislature to reduce the discretion of each by prescribing in more detail how the most suitable judicial candidate for realizing the fair trial ideal should be identified and selected.

[110]In the United States, for example, top judges are often appointed with reference to the respective candidate's allegiance to specific legal and political ideologies. *See* Richard H. Fallon, Law and Legitimacy in the Supreme Court (2018).

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