Summary

Objectives and structure of the book

The aim of this book is to present a comprehensive account of the concepts and theories that underlie Iceland's constitutional system and how they are manifested in the functioning of the three branches of the state: the legislature, the executive and the judiciary. The main focus is on the Constitution of the Republic of Iceland, No. 33/1944, its substance and interpretation; as well as the unwritten rules of Constitutional Law in particular the constitutional customs which, together with the constitution, form the body of Icelandic Constitutional Law. Comparison is made with constitutional evolution in other states, in particular in Denmark and Norway, whose constitutions are mostly closely related to Iceland's and share a common historical origin. A review of constitutional developments in other European states is given by way of comparison, with a discussion of aspects that follow similar, or dissimilar, lines and the reasons for this.

The book falls into two parts. Part I (Chapters 1 – 10) entitled *Iceland's constitutional system – foundations and features*, examines the main theories and concepts that underpin the governmental systems of western nations that evolved in the 18th and 19th centuries after the abolition of absolute monarchy. The role and status of Iceland's Constitution are analysed in terms of its historical origin, with an examination of how both the constitutional provisions and their interpretation have evolved. A detailed account is given of the influence on Icelandic law and constitutional structure of rapidly-growing international collaboration, particularly in the form of the Agreement on the European Economic Area and the European Convention on Human Rights. Part II (Chapters 11 – 27), entitled *The state powers, functions and limits* demonstrates how the ideological underpinning of the constitutional structure manifests itself in the exercise of the functions of the three branches of the state. The structure and functioning of the Icelandic Parliament, Althingi, the government and ministers is examined with particular focus on how the governmental system is characterised by a close association of the legislative and executive powers in Iceland's parliamentary democracy. An attempt is made to find out why the president's role in the constitutional system has changed and the president's political significance is now different from what it was intended to be at the foundation of the Republic in 1944. A detailed analysis is made of how state power is checked, with an account of the reasons why the Althingi has been given broader authorisation and measures to monitor the executive and also how the judiciary monitors the other branches of the state. Case-law is analysed and the reasons for the considerable expansion that has taken place in the supervisory role of the judiciary to enable it to check the powers of the other branches of the state are identified, particularly as regards its power to review legislation.

General remarks on the content

The main focus of the book is on the present Constitution of Iceland which requires a certain understanding of its origin. Iceland was under Danish rule since the 14th century. After absolute monarchy was abolished in Denmark in 1848, the first constitution (*Grundloven*) was adopted by a Danish Constitutional Convention on 5 June 1849, establishing a constitutional monarchy whereby legislative power was handed over to the parliament. Years of dispute followed regarding Iceland's demands for a constitution of its own, as Iceland did not acknowledge the Danish constitution as a legitimate constitution for the Icelandic nation. In 1874, King Christian IX presented his Icelandic subjects with a "Constitution on the Special Affairs of Iceland". This was based largely on the Danish constitution and restored the legislative power of the Icelandic parliament, the Althingi. In 1918, Iceland was granted sovereignty and recognition of its equal status in a union with Denmark under a joint monarchy. Icelanders adopted a new Constitution of the Kingdom of Iceland in 1920 under which supreme judicial powers were transferred from the Danish Supreme Court to Iceland by the establishment of the Supreme Court of Iceland. When Denmark was occupied by Germany in April 1940, the Althingi declared on the basis of unwritten principles of emergency, that the Icelandic government would temporarily assume the power of the monarch, who according to the constitution was head of state and the holder of supreme executive power together with the government. In 1944 Iceland decided to break off the union with the Kingdom of Denmark and establish a separate republic. Because

of the special circumstances that prevailed at the height of hostilities in the Second World War, only minimal amendments were made to the constitution with the purpose of giving effect to the transition from a constitutional monarchy to a republic with a directly elected president. The Constitution of the Republic took effect on 17 June 1944, following a referendum where it was approved with approximately 95% of the vote. In the same referendum the Icelanders decided to discontinue the union with Denmark.

A comprehensive revision of the constitution has not taken place. Since 1944, a number of initiatives have been made to reach that aim. The most recent one, which took place in the years 2011-2013, was a unique exercise in the sense that it aimed at detaching the writing of a new constitution entirely from the political forum and entrusting it to a specially elected Constitutional Assembly. This reflected attempts to come to terms with the consequences of the collapse of the Icelandic banks in 2008 and the severe economic crisis and widespread distrust towards the political parties in Iceland. The aim was to involve the citizenry in the making of a new constitution. However, under the constitution in force, any amendment, or the adoption of an entirely new constitution, would involve a procedure in which two parliaments approved a bill of amendment, with a general election taking place in the interim. There were some serious setbacks early in the process and most steps on the way were marked by controversy. Eventually, a bill on a new constitution was blocked in the Althingi in the spring of 2013.

Due to the repeated stalling of in attempts to revise the constitution, some important parts have remained almost unchanged since Iceland received its first constitution from the king of Denmark in 1874, with additions made in the second constitution of 1920. This applies especially to Chapter II as regards the executive and its relation to the Althingi, and the provisions on the judiciary in Chapter V. These provisions reflect neither current reality regarding the executive and the work of the government, nor the role of the Althingi in supervising the executive. Key concepts, such as 'democracy', 'nation', 'parliamentary rule' or even 'government' are not mentioned. However, eight amendments have been made to important parts of the constitution since 1944, for example the reorganisation of the Althingi in 1991, the revision of the human rights chapter in 1995 and changes in the electoral system in 1984 and 1999. Certain constitutional customs and unwritten rules have developed outside the constitutional text, where explicit provisions on some crucial elements are lacking, the most important being parliamentary rule and the principle of the authority of the courts to apply judicial review to legislation.

The book addresses the strong link between the present constitutional system in Iceland and the past. The text and its structure of the constitution can only be understood in the light of its historic roots in the Danish constitution. This was originally written in the concise and cautious style of the mid-19th century, a style that was also intended to preserve the status and dignity of the monarch. Both systems rest on several ideological pillars which can be traced back to ideas that took root in Europe and the United States of America in the late 18th and early 19th century and which are more clearly reflected in the constitutions of the United States of America (1776) and of Norway (1814). These include the idea of stressing the role of the people as the constituent power, Montesquieu's idea of the separation of powers and a recognition of the judiciary's power to review legislation, based on the fact that the constitution, as the supreme source of law, binds all branches of the state, including the democratically elected legislature.

Some important ideas and principles of the Icelandic constitutional system are underlying theme on which the constitution rests. The most important concepts examined here are *constitutionalism*, *constitutional democracy*, the *separation and distribution of powers* and the *rule of law*. On closer examination, it becomes clear how increased emphasis on these ideas, notably the rule of law, is manifested in practice and has to some extent altered the balance between the branches of the state.

The book addresses how Icelandic constitutional practice has, since the latter part of the 20th century, gradually deviated in many ways from theory, which is traditionally based on the doctrine of the supremacy of the legislature. The constitutional principle by which the Althingi has a higher standing than the executive neither truly reflects political reality nor describes the distinctive features of Iceland's governmental structure. The principle of parliamentary rule, which was an accepted feature of the constitutional system in Iceland at the beginning of the 20th century, has followed a line of development over the past few decades in which efforts are made to form governments which are backed by a strong parliamentary majority. In this respect, the trend in Iceland has been rather different from that elsewhere in the Nordic countries, and particularly in Denmark and Norway, where minority governments have held power for much of the time since the middle of the 20th century. As a result of this rather different

state of affairs, Icelandic politics are characterised by rather aggressive confrontation between governing and opposition parties, with limited consultation between governments and the opposition. In the other Nordic countries, more emphasis has been placed on consensus and consultation in politics, which therefore creates a more favourable climate for minority governments. A comparison between the political environments in these countries reveals that even though there are many similarities in the provisions of the Icelandic, Danish and Norwegian constitutions regarding the legal framework within which parliament and government operate, political traditions that are not bound to the letter of the constitution have followed contrary evolutionary paths and resulted in a situation where the political systems function very differently in practice. This state of affairs in Iceland has had a direct effect on the constitutional system, particularly because, in the absence of consultation between governing parties and the parliamentary minority, new methods of checking the majority power of the parliament and the government have evolved. An expansion of the role of the president and the judiciary in this process of checking is one of the consequences of these developments.

Main conclusions

The book traces how Iceland's constitutional system has undergone important changes in recent decades in the interplay between the supreme organs of the state: the Althingi, the executive and the judiciary. These changes have been rapid since 1990; it could be said that a transformation of the constitutional system has taken place, compared with what it was at the foundation of the Republic. The changes include an enhanced monitoring role of the judiciary vis-à-vis the Althingi and the executive; the nature and status of the office of president has undergone change and in ever more areas and Iceland is obliged to implement legislation under the EEA Agreement. Similarly, the interpretation of constitutional provisions has undergone change under the influence of international human rights conventions. Also, increasing demands have been voiced for direct participation by the people in government through referendums. More and more elements in Iceland's constitutional practice are becoming based on unwritten rules that live a life of their own outside the pages of the constitution itself. Here follow, in brief, some of the main conclusions of the examination.

1) International treaties have exerted great influence on the Icelandic legal system in the past two decades, both on domestic legislation and on the substantive provisions of the constitution. In spite of this, the provisions of the Icelandic constitution relating to treaties and international co-operation have remained unchanged for almost a century. Article 21 of the constitution addresses only a narrow scope of treaty-making powers which rest with the executive branch. An emphasis on national sovereignty and the dualistic approach to international law remains a characteristic of the constitutional order in Iceland. Accordingly the constitution does not provide for the authority to assign state power to international organisations. Unlike the situation in other European states, which revised their constitutions following the Second World War in their willingness to enhance international co-operation on common goals, it is still a highly sensitive political issue in Iceland to acknowledge the fact that transferring power to an international organisation does not necessarily pose a threat to the nation's sovereignty. The most important and extensive international treaty to which Iceland is a party is the Agreement on the European Economic Area, which came into force in 1993. Even though there is a fundamental difference between membership of the EEA and of the European Union from the standpoint of constitutional law, the impact of European legal integration on the EEA states, Iceland and Norway, is nevertheless great and is constantly growing. The point has now been reached where it is difficult to adapt the EEA Agreement to keep pace with developments in the EU's institutional system, where more and more state power is being transferred to special institutions within the Union in more and more spheres. What has now become a cause for concern in Iceland is that the EEA Agreement is increasingly developing in directions that go beyond the boundaries of the constitution.

2) Like other Nordic states, Iceland adheres to a dualistic relationship between domestic and international law. This means that the provisions of treaties ratified by Iceland do not automatically gain the status of domestic law, unless they are specifically incorporated into Icelandic law. However, domestic legislation is interpreted in the light of, and in accordance with, international obligations but the former will prevail in the event of a conflict between them. In the late 1980s this situation created problems with respect to international treaty obligations concerning human rights, particularly the European Convention on Human Rights. To respond to this, the European Convention on Human Rights was incorporated into Icelandic law by Act No. 62/1994. A year later, under the Constitutional

Amendment Act, No. 97/1995, a comprehensive revision was made of the human rights chapter in the Icelandic constitution. One of the principal objectives of the revision was to harmonise the human rights provisions of the constitution with those of the international human rights instruments to which Iceland had become a party. In this respect the European Convention on Human Rights is of great significance, as are the principal UN human rights treaties. The courts now work on the assumption that the substance of fundamental principles codified in the human rights provisions of the constitution is not determined exclusively by the text. Instead, account is taken of context and intent and, in particular, trends arising out of international obligations in the area in question. In this respect, the constitution has become 'dynamic' in the sense that it takes account of changing conditions as society evolves and prevailing ideas and public opinion change; account is also taken of the intent of human rights provisions. The explanatory report accompanying the constitutional amendment of 1995 encouraged this by stating that the provisions were based on certain fundamental values and should be interpreted in the light of international human rights commitments. In this respect the jurisprudence of the European Court of Human Rights is clearly of great significance.

3) The traditional constitutional theory that an unwritten principle exists in emergency situations where temporary derogations from the constitution may be justified in the light of recent has developed in the light of international obligations. The advantages and disadvantages of codifying such a rule in the constitution are assessed. It is argued how different requirements apply in the case of derogations from constitutionally protected human rights, when compared to derogations from provisions related to organisational issues, such as the competence of state institutions, as applied in the case of the decisions taken by the Althingi in 1940 and 1941 to assume the constitutional powers of the Danish crown during the Second World War. Furthermore, a comparison is made between the conditions for derogations from human rights on the basis of Article 15 of the European Convention on Human Rights and the application of permissible limitations on human rights provided for in the Convention and the constitution. An example of the latter are the measures taken on the basis of the "Emergency Act" adopted by the Althingi on the day of a general banking collapse in Iceland in October 2008. This restricted, *inter alia*, constitutionally protected property rights of foreign creditors of the Icelandic banks, which resulted in a number of court cases contesting its constitutionality. The judgments in these cases illustrate that an extraordinary and serious situation in the banking system justified extraordinary measures such as extensive limitations on the property rights of ordinary creditors. This was the conclusion of a weighing of the interests of the creditors against the vital interests of the nation, in which the principle of proportionality played a key role.

4) The status and role of the president of Iceland in the constitutional system is explored in the book, particularly in the light of recent developments. The sitting president, Ólafur Ragnar Grimsson, has on three occasions since 2004 refused to sign legislation passed by the Althingi. Under Article 26 of the Constitution, legislation vetoed by the president is to be put to a referendum. This provision had never before been invoked since its adoption in 1944, even though it was accepted in theory that the president had the authority to use it in extraordinary situations. It has now raised a new debate in constitutional law and political theory in Iceland on the role and powers of the president. The book argues that there is a need to redefine presidential authority in this respect, as this situation contains the potential for repetitions of the constitutional dilemma which has arisen on these occasions between the parliament and the president. The conclusions of the examination indicate three main factors which contribute to this development.

Firstly, Iceland's political tradition of having strong majority governments means that the minority in parliament lacks both a strong negotiating position and a constitutional means of restraining the government in controversial matters. As a result, greater pressure has been placed on the president to exercise this restraint; in other words, in controversial matters, the president checks the power of the parliamentary majority and the government, resulting in the final word being entrusted to the people.

Secondly, the growing demand for important issues affecting the national interest to be put to a referendum and increasing enthusiasm for direct democracy have contributed to a change in the interpretation of the role of the president under Article 26 of the constitution. Dwindling general interest in participation in political parties and the erosion of public confidence in politicians, particularly in the wake of the banking collapse and the beginning of the recession in 2008 have fuelled the demand for more frequent referendums. The only channel which the constitution provides for holding referendums

on controversial legislation is that prescribed in Article 26, and thus the power of decision in such cases rests solely with the president.

Thirdly, the provisions of the constitution on the president are both terse and unclear, and so offer leeway for interpretation. Thus, it can depend largely on the individual occupying the position of president at any given time whether he or she exploits this leeway. No material conditions are laid down for exercising the power of veto, and the framework in which it is set forth is unclear in other respects. When the president has a political background, the situation becomes even less predictable. In the absence of clearer definition in the constitution itself, a degree of uncertainty surrounds the function of the office of the president in the top level of government in Iceland. On the other hand, there is no political unanimity on how presidential power is to be defined. Political parties seem to be unwilling to relinquish the possibility of relying on the presidential veto when, in opposition, they find themselves faced with the possibility that the government will go ahead with unpopular moves.

5) The last part of the book explores constitutional theories concerning judicial monitoring of the other branches of government, examines it in practice and identifies the leading factors in changing the courts' willingness to exercise their powers. As regards the role of the judiciary in this respect, Article 60 of the constitution stipulates that judges are to resolve all disputes regarding the *competence of the authorities*. Thus, judicial control regarding *executive powers and administrative decisions* has from the outset had a clear basis in the constitution. Initially, and until the mid-20th century, the courts were reluctant to overturn administrative acts. This has changed radically. There is now a general consensus that the courts do in fact have the power not only to examine the legality of administrative decisions, but even to scrutinize such legality in the light of principles, such as those of proportionality and non-discrimination. This has been clearly confirmed in judicial practice, particularly since 1990.

When it comes to the legal basis of the courts' power to set aside legislation which is in conflict with the constitution, no provisions can be found on the issue in the constitution itself. The legitimacy of judicial review in Iceland, as in Denmark and Norway, must therefore be argued on the basis of other sources. Its legitimacy in the West-Nordic legal system has traditionally been based on an unwritten principle deriving from the underlying ideology of constitutional democracy and has formed a constitutional custom. This was acknowledged in Iceland and Denmark in the premises of court rulings since early in the 20th century, and even earlier in Norway. In the second half of the 20th century, constitutional review in all the Nordic countries, including Iceland, has undergone a transition in the direction of acknowledging the increased judicial review powers of the courts. This development can to a great extent be traced to the impact of the European Convention on Human Rights and the European Union Treaties (for those Nordic states that are members of the EU). The supervisory role of national courts relating to the obligations deriving from these treaties has expanded significantly and international courts increasingly scrutinise compliance by national authorities, including the legislature, with the obligations undertaken by their respective states.

Ever since 1943, the date of the first judgment by the Supreme Court in which legislation was set aside, the Icelandic courts have been relatively assertive with respect to their role of reviewing legislation and the issue of the legitimacy of judicial review has failed to arouse the heated discussion that one might expect. In Denmark, political and academic debate on the issue was more extensive, but up to the 1990s relatively little attention was given to the subject in Iceland, either in academic or political contexts. In the second half of the 20th century, justification for judicial review of the legislature in Iceland was based unequivocally on considerations of the rule of law, in the light of which the courts have a special role to play in defending human rights. This point of view has become established in all the states of Europe, and a large part has been played in this by the European Convention on Human Rights and the case-law of the European Court of Human Rights. Not only is it undisputed in Iceland's constitutional system that judicial review is based on the constitution as the supreme source of domestic law, but since 2000 the courts have also repeatedly pointed out that they are constitutionally bound to adopt a position on whether legislation is in breach of the principles of the constitution and that citizens are entitled to rulings as to whether legislation infringes their rights. An important factor explaining this approach is a new provision added in Article 70 of the Icelandic constitution in 1995 (similar to that of Article 6 ECHR) which stipulates that everyone shall be entitled to access to an independent and impartial court of law for the determination of his rights and obligations or in the event of a criminal charge against him.

An assessment is made of the case-law of the Icelandic courts with respect to their activity regarding the constitutionality of laws. Before 1995 the courts apparently applied traditional viewpoints of legal interpretation based on textual interpretation and the intent of the legislature. Between 1943 to 1995 there were 8 instances where legislative provisions were deemed unconstitutional and set aside (6 of these were related to property rights). Case-law since 1995 gives rise to the conclusion that the view of the Icelandic courts regarding their role in the review of legislation has broadened. They assess more clearly whether the legislature observed objective viewpoints, such as the principles of equality and proportionality, in its enactment of legislation. Moreover, the impact of international agreements on human rights has increased since the human rights provisions of the constitution are interpreted in the light of these obligations. Between 1995 and 2015 there were 12 incidents in which legislative provisions were deemed unconstitutional. These have touched upon a variety of human rights provisions such as the right of access to the courts (Article 70), the right to property (Article 72), freedom of expression (Article 73), freedom of association (Article 74), the right to employment (Article 75), prohibitions on retroactive taxation (Article 77) and, most controversially, the right to social benefits (Article 76). Case-law in this period regarding the constitutionality of laws reflects a change in several respects in the position of the Icelandic judiciary regarding its role in the review of legislation in comparison with earlier practice. It can be argued that this is a logical development, since the scope of constitutional protection was made broader than before the amendment, with new rights incorporated into the constitution. Furthermore, this trend was encouraged by relatively more detailed human rights provisions, particularly regarding conditions for limitations on human rights, accompanied by detailed debate in the Althingi, all of which was based on the premise of the legitimacy of judicial review. Comparison with practice elsewhere in the Nordic countries shows that most judgments in which legal provisions have been found substantively unconstitutional have been delivered in Iceland. Nevertheless this statistic is not necessarily a fully valid criterion of how active courts are in this respect. Vigilant monitoring of the legislature by the judiciary may also yield very few cases in which the courts actually set legislation aside, even though they may be asked to do so from time to time; instead, they may give detailed reasoning for endorsing existing laws. Moreover, the fact that legislation is seldom found to be unconstitutional may also reflect the efficacy of earlier activity by the courts that has led to more rigorous procedure by the legislature.

The final conclusion of this examination is that the supervisory role of the judiciary vis-à-vis the other branches of the state has grown in Iceland as it has in most other European states. Thus, practice unites the theoretical basis that underpins these state's commitment to constitutionalism, constitutional democracy and the rule of law with an additional emphasis on human rights protection. Nevertheless there are some limits to the powers of the judiciary to monitor the other branches of the state. These must above all be based on the premises of the doctrine of the separation of powers. Even though the aim of the judiciary's reviewing and monitoring function is to check, the courts, like the other branches of the state, are bound, under Article 2 of the constitution, to observe the limits of their own power and not to encroach on the provinces of the other branches of the state.