LAW AND LEGISLATION IN THE ICELANDIC COMMONWEALTH

BY

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I. INTRODUCTION

Iceland was settled in the period from about 870 to 930 A.D., mainly from Norway, Scotland and Ireland. About 930 the settlers introduced a legal order to the society that was being formed on the island. The most important government institution was the General Assembly – the *Alþingi* – at which the most powerful chieftains had the greatest influence. No provision was made for a leader with powers comparable to those of a King. The reason was no doubt that Iceland's remoteness rendered unnecessary the centralization of power dictated by military defence. This society, whose constitution remained in being until 1262 – 1264 when the Icelanders became subjects of the King of Norway under certain covenanted terms, is usually referred to as the Icelandic Commonwealth. As far as is known Iceland's settlement marks the point in time at which planned navigation across the North Atlantic began. Secondly, with Iceland's settlement migration took place to the north, which was unprecedented, and finally Europeans then took the first step in the direction of the New World. Thus the Icelandic Commonwealth can in some ways be regarded as a precursor to the colonies established in North America in the seventeenth century.

Icelandic society had to be built up from the very beginning. The settlers came from far and wide and were of different origins, and this was bound to loosen the influence exerted by tradition and usage. They therefore had to lay particular emphasis on the development of methods for solving disputes, including legislation and judicial resolution, and in so doing they had to strive for a better understanding of the nature of law and the purpose of government institutions than the people they left behind, who could resort to their traditional law to determine their conduct and did not have the same incentive for reflection.

Lively legislative activity took place in the Icelandic Commonwealth, and voluminous law books were compiled. The present essay will describe the ideas on the nature of law and legislation that can be inferred from them. It is hoped that this will serve to further our understanding of the ideas on law and government prevailing in medieval Europe, and even shed some light on modern ideas on the nature of law.

II. THE RELEVANT LAW TEXTS – DIFFERENCES OF OPINION ON THEIR INTERPRETATION

Much has been written on the law and legislation of the Icelandic Commonwealth. In the nineteenth century the largest contribution was made by professor Konrad Maurer and Vilhjálmur Finsen though with some disagreement, as we shall see.[1] Since that time scholars have not added much in the way of elucidation, being satisfied to refer to the views of these two and indicating their support of one or the other, or not committing themselves at all.

The ideas of Icelanders in the 12th and 13th centuries on law and legislation are fundamental to the understanding of the Commonwealth and its legal system and therefore warrant a review of this much-discussed subject.

Konrad Maurer and Vilhjálmur Finsen were both influenced by the prevalent ideas of legal positivism, whereby formally enacted laws were regarded as by far the most important. Rules derived from other sources such as custom and precedent were to be accorded far less attention. This viewpoint was paramount in their assessment of the laws of the Commonwealth.[2] More light will be shed on the subject, however, if the laws of the Icelanders and legislation of the Commonwealth are examined in the context of medieval thinking, which is in many respects unlike that of modern times.

[1] Konrad Maurer (1823–1902). German professor of law at the University of Munich. He has explained his views especially in the following articles and works: *Graagaas.* Allgemeine Encyklopädie der Wissenschaften und Künste – herausgegeben von J. S. Ersch und J. G. Gruber – 77. Theil, Leipzig 1864; *Island* von seiner ersten Entdeckung bis zum Untergange des Freistaats, München 1874, p. 172 ff.; *Die Rechtsrichtung des älteren isländischen Rechtes.* Festgabe zum Doctor-Jubiläum des Herrn Geheimen Raths und Professors Dr. Joh. Jul. Wilh. v. Planck, München 1887, pp. 119–49, esp. 132 ff. *Vorlesungen über altnordische Rechtsgeschichte,* Leipzig 1909, p. 342 ff.

Vilhjálmur Finsen (1823–92). Icelandic/Danish legal scholar and judge of the Supreme Court of Denmark. He has explained his views mainly in the essay *Om de islandske Love i Fristatstiden,* særskilt Aftryk af Aarbøger for nord. Oldk. og Hist. 1973 (reference is made to this edition here). See Aarbøger for nordisk Oldkyndighed og Historie 1873, pp. 101–250. Also see *Om den oprindelige Ordning af nogle af den islandske Fristats Institutioner,* Copenhagen 1888, p. 107 ff.

[2] Statute law became the most important element in the legislation of European states in the 19th century, the proportion of this being considerably greater than that of court precedents or expert doctrine. Among other marks of this is the attempt to compile systematic codes of law covering specific fields of legislation or even large parts of it. See Helmut Coing: *Allgemeine Züge der privatrechtlichen Gesetzgebung im 19. Jahrhundert.* Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, München 1982 III 1, p. 3 ff. – It is clear that this general attitude influenced Konrad Maurer and Vilhjálmur Finsen and their interpretation of *Grágás.*

In the *Konungsbók* (Codex regius) version of *Grágás*[3], one of the two main Commonwealth legal texts, detailed constitutional rules are laid down. Those which are of special relevance here concern the preservation of laws, legislation, and related subjects. They are found in the sections on the Lawspeaker and Law Council, and are as follows:

From the Lawspeaker's Section.

It is also prescribed that there shall always be some man in our country who is required to tell men the law, and he is called the Lawspeaker[4] [... Here the clauses concerning the election of the Lawspeaker are omitted]

It is also prescribed that the Lawspeaker is required to recite all the sections of the law over three summers and the assembly procedure every summer. The Lawspeaker has to announce all licenses for mitigation of penalty, at Lögberg[5], and at a time when most men are present if that can be done, and the calendar, and also if men are to come to the General

[3] *Grágás* (literally "grey goose"). The name covers all laws of the Icelandic Commonwealth 930–1262. Two large collections still exist in codexes written in the latter part of the 13th century: *Konungsbók* (Codex regius) and *Staðarhólsbók*. They are private collections and differ both in wording and content. *Staðarhólsbók* lacks inter alia The Lawspeaker's Section and the Law Council Section. On the other hand *Staðarhólsbók* is usally fuller and more detailed than *Konungsbók* in the parts they have in common. See also: *Laws of Early Iceland.* Grágás. The Codex regius of Grágás with Material from Other Manuscripts. Translated by Andrew Dennis, Peter Foote, Richard Perkins I. Winnipeg Canada [1980]. Quotations from Grágás are from this translation. Jón Jóhannesson: *Íslendinga saga I,* Rv. 1956, pp. 109–113. English translation: *A History of the Old Icelandic Commonwealth.* Íslendinga saga. Translated by Haraldur Bessason. University of Manitoba Icelandic Studies. Vol II, pp. 89–93. Jónas Kristjánsson: *Eddas and Sagas,* Rv. 1988, pp. 117–20.

Abbreviated titles of the Grágás-editions quoted in this treatise:

Grágás Ia, Ib. Islændernes Lovbog i Fristatens Tid udgivet efter det kongelige Bibliotheks Haandskrift [...] af Vilhjálmur Finsen for det nordiske Literatur-samfund. I-II. Copenhagen 1852.

Grágás II. Grágás efter det Arnamagnæanske Haandskrift Nr. 334 fol., Staðarhólsbók, udgivet af Kommissionen for det Arnamagnæanske Legat [by Vilhjálmur Finsen]. Copenhagen [...] 1879.

Grágás III. Stykker, som findes i det Arnamagnæanske Haandskrift Nr. 351 fol., Skálholtsbók og en Række andre Haandskrifter [...] udgivet af Kommissionen for det Arnamagnæanske Legat [by Vilhjálmur Finsen]. Copenhagen [...] 1883.

[4] Lawspeaker, Icelandic: *lögsögumaður.* He was elected by the Law Council for three years and could be reelected. He presided over the meetings of the Law Council and recited the laws with the prior aid of others if his memory failed. He should tell men what the law was about when asked and make official announcements. See *Laws of Early Iceland,* p. 249 and Jón Jóhannesson: *Íslendinga saga I,* pp. 66–68, cf. *A History of the Old Icelandic Commonwealth,* pp. 47–49.

[5] *Lögberg – Law-Rock.* The place in Þingvöllur where the lawspeaker sat. Publishing and summoning and various announcements and formal requests were made at *Lögberg;* law-recital could take place there. *Laws of Early Iceland,* p. 251. Jón Jóhannesson: *Íslendinga saga I,* p. 62, cf. *A History of the Old Icelandic Commonwealth,* pp. 43–44.

Assembly[6] before ten weeks of summer have passed, and rehearse the observance of Ember Days and the beginning of Lent, and he is to say all this at the close of the Assembly.

It is also prescribed that the Lawspeaker shall recite all the sections so extensively that no one knows them much more extensively. And if his knowledge does not stretch so far, then before reciting each section he is to arrange a meeting in the preceding twenty-four hours with five or more legal experts, those from whom he can learn most; and any man who intrudes on their talk without permission is fined three marks, and that case lies with the Lawspeaker [...][7].

From the Law Council Section.

The work of the Law Council.

[Of the Law Council[8] it is declared that] men are to frame their laws there and make new laws if they will. All licenses for mitigation of penalty and all licenses for settlements for which special leave must be asked and many other licenses as rehearsed in the laws are to be asked for there.

Granting licences.

Leave is to be deemed given in the Law Council for everything which no one with a seat on the Law Council refuses and for which no veto comes from outside the Law Council. Each man who has a seat on the Law Council must do one thing or the other about every license, consent or refuse, otherwise he is fined three marks. If men ask for licenses in the Law Council when the men who have seats on the Law Council have either not all come or not all left but there are four dozen men or more there nevertheless, the Lawspeaker can complete it by giving the empty seats of those who have places there to other men, and anyone who refuses is fined. When the middle bench is fully manned, the Lawspeaker is to name witnesses "to witness", he shall say, "that these sit in the Law Council on my direction and are qualified

[6] General Assembly – Icelandic: *Alþingi* – the assembly for the whole of Iceland – held in Þingvöllur, South Iceland from 930–1798. In the period of the Icelandic Commonwealth it consisted of the *Lögrétta* – the Law Council – and from the beginning of the 11th century of five courts: four Quarter Courts – Icelandic: *Fjórðungsdómur* – instituted about 960 – and the Fifth Court – Icelandic: Fimmtardómur – instituted between 1004 and 1030. The *Alþingi* was a public meeting of all free people and obligatorily attended by men acting in all the chieftaincies in the country. *Laws of Early Iceland,* p. 246. Jón Jóhannesson: *Íslendinga saga I,* pp. 53–68, cf. *A History of the Old Icelandic Commonwealth,* pp. 35–49.

[7] *Grágás* Ia, pp. 208–09, cf. *Laws of Early Iceland,* p. 187.

[8] Law Council – Icelandic: *Lögrétta.* Ultimate legal authority rested with the Law Council at the *Alþingi* – the General Assembly. At the beginning of the 11th century it consisted of 48 chieftains, each bringing two men to advise him, the *lögsögumaður* – the Lawspeaker – and the two bishops of the country. The word *lögrétta* – Law Council – is also used of the fixed place were this body met. The Law Council elected the lawspeaker, decided what was the law and what should be law (*að rétta lög* and *gera nýmæli)* and granted licences of various kinds, for instance mitigation of penalty, reprieve of outlaws. *Laws of Early Iceland,* p. 249. Jón Jóhannesson: *Íslendinga saga I,* pp. 82–85, cf. *A History of the Old Icelandic Commonwealth,* pp. 63–66.

to enact laws and licenses. I name these witnesses in accordance with law for the benefit of anyone who may need to use their witnessing." And all licenses shall then be as firmly enacted as if the chieftains were sitting there themselves, and it is only on their arrival that the men who were sitting there are to withdraw.

Authority of written law texts.

It is also prescribed that in this country what is found in books is to be law. And if books differ, then what is found in the books which the bishops own is to be accepted. If their books also differ, then that one is to prevail which says it at greater length in words that affect the case at issue. But if they say it at the same length but each in its own version, then the one which is in Skála[holt][9] is to prevail. Everything in the book which Hafliði[10] had made is to be accepted unless it has since been modified, but only those things in the accounts given by other legal experts which do not contradict it, though anything in them which supplies what is left out there or is clearer is to be accepted.

If books do not decide an article of law, the Law council meets.

If there is argument on an article of law and the books do not decide it, the Law Council must be cleared for a meeting on it. The procedure for that is to ask all the chieftains and the Lawspeaker at Lögberg before witnesses to go to the Law Council and take their seats to make plain this article of the law as it is to be henceforth. "I request with a legal request", the man who wants to test it is to say. If some of the men who have seats do not go to their places when they know the Law Council is to be cleared for a meeting, the penalty is lesser outlawry as for other kinds of assembly balking; and it is moreover lawful to claim that each such chieftain owes a three-mark fine and forfeits his chieftaincy. The penalty is the same for all men who have to take seats in the Law Council and do not do so at any Law Council meeting the law requires them to attend. After the chieftains have come into their seats, each of them is to give one man a place on the bench in front of him and another a place on the outer bench for discussion with him. Then those men who have matters in dispute are to rehearse the article of the law on which they differ and report what causes the rift between them.

Having heard the disputants, each chieftain says which he will support and why.

After that men must assess what they have said and make up their minds on the matter, and then all the Law Council men who sit on the middle bench are to be asked to explain what each of them wants accepted as law in the

[9] *Skálholt.* The episcopal seat of the bishopric *Skálholt* which was coterminous with the Eastern, Southern and Western Quarters of Iceland. From 1106 the bishopric of *Hólar* was coterminous with the Northern Quarter.

[10] *Hafliði Másson.* Icelandic chieftain (d. 1130). The laws were put into writing at his home – *Breiðabólsstaður* – in Nort Iceland during the winter of 1117-18. This is the first certain writing in Iceland. See the account from *Íslendingabók* – Book of the Icelanders – in ch. IV below.

case. Then each chieftain is to say what he will call law and whose side he will take in the matter, and it is decided by majority.

If votes are equal or if the Lawspeaker's side is the minority.

But if the Law Council men are in equal numbers with each group calling their version law, then those with the Lawspeaker among them are to prevail, but if there are more in the other group, they are to prevail. And each group is to swear a divided judgment oath on their version and make it hang on their oath that they think that the version they side with is law in the case and state why it is law.

If a member cannot be present or cannot act.

If any Law Council man is so sick or wounded that he cannot be out of doors, both groups are to fetch his vote from his booth, and tell him what the rift between them is, and he is to swear the same oath as the others and state whose side he will take. If a Law Council man has lost power of speech or is senseless or has died when these words are needed from him, then the man who would have the right to take up court nominations in case of his death is to speak instead of him.

Oaths if the minority is twelve or more.

If, when the Law Council men have expressed their opinions, there are twelve or more in the minority, then those who are fewer in number are to swear oaths on their version of the matter. Those in the majority are then also required to swear oaths on their version of the matter so that the number of them swearing is one more than the minority and at least two more if the Lawspeaker is in the minority group. If the majority all leave it to each other to swear the oaths, they are to draw lots among themselves unless they are all willing to swear. If the minority turn out to be fewer than twelve, they have no case to stand on, and no men from the majority are required to swear oaths in response to the oaths of a group with fewer than twelve in it.

If members balk proceedings.

If there are any Law Council men who say they will be on neither side or refuse other duties in such matters, that all incurs the same penalty as rehearsed before, and the cases lie with whichever of the men with matters in dispute is the more willing to prosecute to the limit of the law. If neither will prosecute, the case lies with anyone who will. The Lawspeaker is to give the places of those who do [not] do their legal duties to other men, and take some member of the same spring assembly as the balking comes from if that is possible, and the penalty for anyone who refuses is lesser outlawry. But if the Lawspeaker does not know anyone present from that part of the country, he is to ask the chieftains of the same assembly as the man who refuses his duties to provide someone instead so that the Law Council can be completed, and the penalty for a man who refuses that is the same as for the man who balked the assembly. If none of the chieftains from the same assembly will do his duties, men are to be asked for from another assembly and

> from a third if they get no one before that. Their words shall then count as much as those of other Law Council men.
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> Once decided, an article of law is to be rehearsed in the Law Council and announced at Lögberg.
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> It is also prescribed that one man is to rehearse with witnesses the article of the law for which there is a majority, but all the Law Council men are to give their assent to it. Afterwards it is to be announced at Lögberg.[11]

There has been no difference of opinion on the interpretation of the clauses dealing with the functions of the Lawspeaker. This is not the case, however, with the text of the section on the functions of the Law Council. It is described in general terms as being where men shall *frame their laws* (Icelandic: *rétta lög*) and *make new laws* (Icelandic: *gera nýmæli*); furthermore the Council is to give men *all licences for mitigation of penalty* and *all licenses for settlements* and *many other licenses* – in other words the Law Council is to provide licences and grant waivers.

After the description of this function, there follows an article on the procedure for granting a licence which need not be discussed here. After this the writer turns to the laws themselves, or more specifically on how to determine what laws are valid in Iceland. The principal rule is that *what is found in books is to be law.* This is followed by detailed clauses on how legal disputes are to be resolved if the books do not decide.

Let us first consider the words "*there* [i.e. in the Law Council] *men are to frame their laws and make new laws if they will.*" Konrad Maurer and Vilhjálmur Finsen disagree on the interpretation of these words.

Maurer believes that the text distinguishes between *framing their laws,* i.e. on the one hand answering the question what the operative law is when there is some doubt whether there are any rules on a specific subject, or whether it is a matter of opinion how they are to be interpreted, and on the other hand *making new laws,* i.e. introducing new rules where none exist, or modifying older ones.[12]

Vilhjálmur Finsen, however, questions Maurer's distinction between

[11] *Grágás* Ia pp. 212–16, cf. *Laws of Early Iceland,* pp. 190–92.

[12] Maurer: *Altnordische Rechtsgeschichte IV,* p. 342 ff.; *Graagaas,* p. 32; *Island,* p. 172; *Rechtsrichtung,* p. 132 ff. – Ólafur Lárusson supports this wiew, see *Yfirlit yfir íslenzka réttarsögu* (A Survey of Icelandic Legal History), Rv. 1932, p. 102; also Jón Jóhannesson, see *Íslendinga saga I,* pp. 83–84, cf. *A History of the Old Icelandic Commonwealth,* pp. 64–65.

framing laws and *making new laws*. The two concepts stand side by side in the text of the law book and in his opinion mean one and the same thing.[13]

III. MEDIAEVAL IDEAS ON LAW

The Grágás articles on the recital of the laws, the law books, the decision of legal disputes and the making of new laws can neither be understood nor explained unless we have a clear picture of the ideas on law, its making and preservation among men of the Middle Ages.

Scholars, especially German ones, dealing with mediaeval law, have pointed out that law and public justice were, in the eyes of the Germanic peoples, a common heritage akin to their language and religion. Rules of law were not to be interfered with by individual man; they were preserved in the minds of men and moulded customary conduct.

The German legal historian Fritz Kern has dealt most comprehensively with mediaeval laws and men's ideas about them in those centuries in Europe. He lays special emphasis on elements which he naturally traces in particular to the Germanic peoples.[14]

The laws were believed to be old. They were the ancient customs which had existed from time immemorial by the reckoning of the wisest and

[13] Vilhjálmur Finsen; *Om de isl. Love,* pp. 59–61; *Grágás III,* p. 644. – This opinion is supported by Bogi Th. Melsted, see *Íslendinga saga* (A History of the Icelanders) II, Kh. 1910, p. 33; Einar Arnórsson, see *Réttarsaga Alþingis* (The legal History of the Alþingi) Rv. 1945 (Saga Alþingis I), p. 59, cf. by the same author: *Réttarstaða Íslands* (The Legal Status of Iceland), Rv. 1913, p. 20 and Gizur Bergsteinsson, see the essay *Um réttarstöðu Grænlands* (On the Legal Status of Greenland) in the report of the committee appointed to examine Iceland's legal claims to Greenland, Rv. 1952, p. 52.

[14] Fritz Kern: *Recht und Verfassung im Mittelalter.* Libelli III, Darmstadt 1958, p. 11ff.; *Gottesgnadentum und Widerstandsrecht im früheren Mittelalter* (3rd edition), Darmstadt 1962, p. 123 and 128. – See also Wilhelm Ebel: *Geschichte der Gesetzgebung in Deutschland* (2nd edition), Göttingen 1958, p. 11ff. He says that the laws in the legislative history of the Germans appear in three basic forms: *Unwritten laws* in the shape of oral tradition (Weistum), but adapted to the concept of revision of law (or "lawframing"), *enacted laws* which legal representatives agree on, and finally *legal edicts.* ("Überblicken wir die Geschichte der deutschen Gesetzgebung, so treten drei Grundformen des Gesetzes in unser Blickfeld: Das ungesetzte Recht in Gestalt des Weistums (modifiziert durch den Begriff der Rechtsbesserung) – dann die von den Rechtsgenossen vereinbarte Satzung – und schliesslich das vom Herrscher oder der sonstigen Obrigkeit befohlene Recht, das Rechtsgebot.")

These three basic categories of law will be clearly seen in the legislative history of the Icelanders (see Ebel p. 11). Se also Ebel: *Um sögulegar undirstöður laganna* (On the historical foundations of the law). Tímarit lögfræðinga (Lawyers' Review) 14 (1964), p. 11 (Icelandic transl.: Sigurður Gizurarson).

most trustworthy men. Age was therefore one of their most important characteristics.

The laws were believed to be good. Age was not enough. Old customs could possibly have originated in injustice, cf. the word *abusus*.

Kern emphasizes the fact that the medieval concept of law (Recht) was a complex one. It involved not only the bare rules of behaviour imposed on the common folk by the powers that be, but also all those inherent in man's natural sense of justice, his reason and his conscience. It was much later that rules of law came to be distinguished particularly and differentiated among other things from moral rules.

According to this concept, the laws were permanent and not to be interfered with. They were static and not subject to deliberate changes. When a problem occurred men wise in the law were called upon to solve it. Their solution did not involve making new laws or regulations, but revealing the good old laws. By the nature of things laws were neither made nor recorded in writing. They were the spiritual legacy of generations.

A precept which was believed contrary to ancient, good and operative law was dismissed as illegal and perverted – *abusus*. If a rule produced evil consequences, it was assumed that the course of justice had taken a wrong turn. As a result, if there was a conflict, old laws were regarded as more applicable than new ones. The rule of *lex posterior,* whereby a later law takes precedence over an earlier one, was a later development, being linked with an effective legislative authority.

It might be supposed that this way of thinking would have hampered the adaption of laws to changed circumstances and their development to meet new needs, but there is less evidence of such than might be expected. This was above all due to the difficulty of preserving unwritten law, a major problem in the Middle Ages leading to a tiresome uncertainty that caused constant conflict and confusion. However, it carried the advantage that laws were remarkably flexible and men were continually making new rules when they *framed the laws.*[15]

The main consideration here is not so much whether it is plainly stated

[15] Kern: *Recht,* p. 41ff.; Ebel: *Geschichte,* p. 18ff. Medieval ideas on law and justice have often been discussed by scholars. Special attention may be drawn to R. W. and A. J. Carlyle: *A History of Mediæval Political Theory in the West I–IV,* Edinb. and London 1928–50, see especially the entry *law* and *legislation* in the index; George Sabine: *A History of Political Theory,* 3rd ed., London 1957, p. 178ff.; F. A. Hayek: *Law, Legislation and Liberty,* London 1977, p. 72ff.; *The Cambridge History of Medieval Political Thought,* Cambridge 1988, see especially the entry *law* and *lawmaking* in the index of subjects. All these works contain references to other works. See also Alexander Passerin d'Entréves: *The Notion of the State,* Oxford 1967, p. 82ff.

in mediaeval records – domestic or foreign – that a law is old and good, as whether it can be deduced from the context that it was viewed as such. With the qualifications that a closer study may bring to light, it is stated here that the word law is generally found in a context which suggests the idea of what is fixed and permanent, besides also being what is good and desirable. The concept of good old laws is fully justified when dealing with Icelandic law of the Commonwealth period.

Various criticisms have been made of Kern's description of mediaeval law, especially what he over-simplifies the subject. He makes too little of pragmatic legislation and underestimates the influence of Roman law, e. g. on the legislative activity of kings. However, he has given a correct account of one of the most important features in mediaeval legal thinking.[16]

But now let us return to *Grágás*.

IV. "THERE SHALL ALWAYS BE SOME MAN IN OUR COUNTRY WHO IS REQUIRED TO TELL MEN THE LAW"

The provisions concerning the Lawspeaker and the recital of the laws in the Lawspeaker's Section show clearly how an attempt is made to preserve unwritten laws and exercise some control over the development of justice, without any words that indicate the enactment of laws in the modern sense.

The section begins as follows:

> It is also prescribed that there shall always be some man in our country who is required to tell men the law, and he is called the Lawspeaker.
>
> The Lawspeaker is
>
> required to recite all the sections of the law over three summers and the assembly procedure every summer.
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> The Lawspeaker shall
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> recite all the sections so extensively that no one knows them much more extensively. And if his knowledge does not stretch so far, then before reciting each section he is to arrange a meeting in the preceding twenty-four hours with five or more legal experts, those from whom he can learn most; and any man who intrudes on their talk without permission is fined three marks and that case lies with the Lawspeaker.

[16] See G. Barraclough: *Law and Legislation in Medieval England.* Law Quarterly Review 56 (1940), p. 75ff. – Dieter Vyduckel: *Princeps Legibus Solutus,* Berlin 1979, p. 35ff.

In the Law Council Section it is stipulated that the Lawspeaker is to recite the laws either at *Lögberg* (the Law-rock) in the Law Council, or, weather not permitting, in the church. All members of the Law Council are obliged to be present during the recital.

The clauses on the Lawspeaker and his recital of the laws can be most easily understood in the light of the ideas on mediaeval law described above: that it is a common and ancient heritage preserved in the memory of the Lawspeaker and other legal experts. It should be particularly noted that there is no stipulation that the laws recited be formally enacted.

What really matters here is not where the origin of any particular rule is to be found, whether in a new law which has been agreed on at some time or other, through a decision resolving a legal dispute, or through a tradition. No distinction was made between particular sources of law whether enacted, customary, or precedent, as is now done.

The main consideration is, what ideas people had about the complex of rules that went under the single concept of law. Indeed there is no reason to suppose that the origin of each was known.

Before the "Age of Writing" the laws were unwritten – were in effect no more than the customs followed by men in their mutual intercourse. As will be stated in more detail later, memoranda on the laws were probably recorded at an early date (possibly with runic letters). Nevertheless most were unwritten, especially what was generally known and undisputed. It is natural to suppose that this was when the provision for the recital of the laws originated. Although the Lawspeaker and his assistant may have started early to rely on written memoranda or records for the recital of laws – and this to an increasing extent – it was the recital itself that confirmed what the law was; not a written record of it.[17] And the final decision regarding what was to be recited depended on the ideas of the men concerned. The Lawspeaker was to "recite all the sections so extens-

[17] This way of thinking still survives. In Act No. 75/1973 on the Supreme Court of Iceland, para. 1, article 55, there stands: "The judgement or decision of the Court shall be read aloud in court for all to hear. Finally it shall be stated whether there has been disagreement on the decision and the conclusion of the disputed article read aloud for all to hear in the same manner." – There was a corresponding clause in the 2nd paragraph of article 194 of Law No. 85/1936 on Civil Procedure, cf. now Act No. 91/1991 on Civil Procedure, 3rd paragraph of article 115, and para. 2 of article 167 of Act No. 74/1974 on Criminal Procedure, cf. now Act No. 19/1991 lacking a corresponding paragraph. – In the Supreme Court, judgement is generally announced at the meeting of the court in the judges' conference room. This was sèldom done in the courtroom and rarely was anyone present, apart from the judges and the secretary, but the judgement was not effective until this had been done. Now this is always done in the courtroom. The secretary records and then reads aloud what case is involved, after which the president of the Court formally reads out the judgement and conclusion of the disputed clause.

ively that no one knows them more extensively". It is clear that the decision was not so much subject to the enactment of laws as to what men considered they knew about them.

The recital of laws is evidence of an attempt to control and regulate their preservation and overcome the uncertainty as to retaining them in memories of varying reliability and records that were not always to be trusted, being perhaps distorted or even falsified. This will be referred to later.

The laws were the common property of all, not of a social elite. For this reason they were recited in the hearing of all so that everyone could follow. A special obligation was laid upon members of the Law Council, who could at least to a certain extent be considered representatives of the people.

No speculations concerning the procedural form used at the recital will be advanced here. It is somehow hard to imagine the Lawspeaker intoning all the laws of the land to members of the Law Council and others standing outside the area of the Law Council, partly by memory and partly by written records. Icelandic weather is seldom such as to recommend long periods outdoors without a break.

V. "WHAT IS FOUND IN BOOKS IS TO BE LAW"

The principal rule in *Grágás* on the laws in force is that they should be *those found in the books*. But the written records were many and conflicting, as may be deduced from the text of *Grágás* itself. The rule is therefore that,

> if their books differ, then what is found in the books which the bishops own is to be accepted. If their books also differ, then that one is to prevail which says it at greater length in words that affect the case at issue. But if they say it at the same length but each in its own version, then the one that is in Skála-[holt] is to prevail. Everything in the book which Hafliði had made is to be accepted unless it has since been modified, but only those things in the accounts given by other legal experts which do not contradict it, though anything in them which supplies what is left out there or is clearer is to be accepted.

The oldest source on the writing down of the law is the account in *Íslendingabók* – The Book of Icelanders – by Ari the Learned[18] of the meeting on the laws during the winter of 1117–18, where it says:

> The first summer when Bergþór was Lawspeaker, the innovation was made whereby our laws were written in a book at Hafliði Másson's the following

> winter, after the telling and with the oversight of Hafliði and Bergþór[19] and other wise men appointed for this purpose. They were to make new provisions in the law wherever they considered that such would make better laws than the old ones. The laws were to be recited the next summer in the Law Council and all to be held, if the greater part of men did not speak against them. And the outcome was that Vígslóði [The Manslaughter Section] and much else in the laws was written down and recited in the Law Council by clerks the following summer. And all liked this well, not a man speaking against it.[20]

Judging by general experience of the writing down of laws in earlier and later times, not all the laws of the land would have been recorded in the winter of 1117–18. *Vígslóði* was written down "and much else in the laws", says Ari the Learned, and his words indicate as much. This also accords with the clause in *Grágás* which assumes valid laws according to the accounts of other legal experts.

It may be taken as certain that laws were written down in Iceland both before and after 1117. The covenant with the King of Norway on the rights of Icelanders in Norway and the rights of the King and his subjects in Iceland was probably recorded in writing about the year 1082, and the tithe laws at the time when they were introduced in 1096–97. However, it is completely uncertain when the art of writing was taken into use, though it may be assumed that men started at a very early date to write memoranda and even records of law, possibly using runes, as previously suggested. The clause regarding what should be taken from the accounts given by other legal experts must surely refer, among other things, to such memoranda.[21] But laws were also preserved without being written

[18] *Íslendingabók* – The Book of Icelanders – written about 1120–30 by Ari Þorgilsson the Learned or Wise (1067–1148). A highly concentrated history of Iceland from the settlement until Ari's own time. G. Turville-Petre: Origins of Icelandic Literature, Oxford 1953, p. 88ff.; Jónas Kristjánsson: *Eddas and Sagas,* Rv. 1988, pp. 120–24.

[19] On *Hafliði Másson,* see note 10. Bergþór Hrafnsson (d. 1122) Icelandic chieftain and lawspeaker 1117–22.

[20] Íslendingabók (Book of the Icelanders), ch. 10.

[21] Jón Jóhannesson: *Íslendinga saga I,* p. 134ff., cf. *A History of the Old Icelandic Commonwealth,* p. 90ff. On the tithe laws, see Ólafur Lárusson: *Grágás.* Tidsskrift for Rettsvitenskap 66 (1953), p. 467; in Icelandic: *Lög og saga* (Law and History). Rv. 1958, p. 122. Jónas Kristjánsson: *Eddas and Sagas.* Rv. 1988, p. 118. On the other hand Jóhannesson thinks it doubtful that the tithe laws were written down from the start, see *Íslendinga saga I,* p. 109, cf. *A History of the Old Icelandic Commonwealth,* p. 90. The tithe laws consisted of a considerable body of innovations, many of which contained a radical change from the older laws and in various ways conflicted with the ancient legal traditions, although to the advantage of the secular chieftains no less than to the church. It was therefore essential to have clear evidence of their content. Considering that the church had the art of writing at its service, it is probable that these laws were written down at the time when they were introduced. – See also Einar Arnórsson: *Notkun rúnaleturs a Íslandi frá landnámsöld og fram á 12. öld* (The Use of Runic Letters from the Age of Settlement until the 12th Century). Saga, the journal

down and would have determined customary conduct. The word "accounts" (*fyrirsögn*) indicates especially oral preservation and in the beginning may have referred to unwritten laws, though later it came to be used mainly of books of law.

It may now be asked why these clauses were introduced and why in the form which they have. Professor Peter Foote has drawn attention to the the connexion of *Grágás* with the Roman "Law of Citations", the most important of which were promulgated by the emperors Theodosius and Valentinianus in 426 A.D.[22] The reason for their introcution was above all uncertainty regarding the validity of laws – one of many symptoms of the decline of the Roman Empire in that period. The proposed solution was to bind by law which writings of legal experts the Romans should refer to, and in what order.

Professor Foote quotes Gottfried Teipel, to the effect that there is a tendency to enact such laws when legislation in a particular society is unable to develop normally. When the legislative authority weakens, men are inclined to have recourse to the doctrines of known legal experts of the past to provide a basis for their legal relations. This happens by a kind of tacit consent, and the comments of the experts finally acquire an authority equal to that of formally enacted laws. "Laws of Citation" of this description are a symptom of a social malaise and the same time an acknowledgement of the superior legal wisdom of past generations. Behind them lies an impulse towards unity and conformity and an attempt to strengthen confidence in the law. These objectives may also

of the Sögufélag (Historical Society), I (1949–53), pp. 347–97, especially p. 370ff. He thinks it possible that runes were used early for recording articles of law. Jón Steffensen agrees. He believes that the laws of Úlfljótur – the first Icelandic code of law – were written in runes, see his essay *Upphaf ritaldar á Íslandi* (The Beginning of the "Age of Writing" in Iceland) in Árbók Hins íslenzka fornleifafélags (Yearbook of the Icelandic Archaeological Society) 1979, pp. 74–83, especially pp. 78–81. The secular chiefs were doubtless able to write runes, though they did not know the Roman alphabet. However, there are no runic manuscripts from the Nordic countries, apart from a few Danish examples, the earliest from about 1300, and there are no reliable authorities on any such manuscripts of an earlier date, cf. Peter Skautrup: *Runehåndskrifter.* Kulturhistorisk leksikon for nordisk middelalder XIV, col. 460. On the other hand runes were used for writing short communications and similar texts, and had been from ancient times, cf. Aslak Liestöl: *Runebrev,* in the same publication XIV, col. 459. Runic inscriptions on stone, wood and similar material are well known. From this it seems reasonable to assume that it is unlikely that a whole body of law would have been written in runes in Iceland, but that short memoranda might well have been recorded.

[22] Peter Foote: *Some lines in lögréttuþáttur.* Sjötíu ritgerðir helgaðar Jakobi Benediktssyni (Seventy Essays Dedicated to Jakob Benediktsson), Rv. 1977, pp. 198–207; Gottfried Teipel: *Zitiergesetze in der romanistischen Tradition.* Zeitschrift der Savigny Stiftung für Rechtsgeschichte 72, Romanistische Abteilung (1955), pp. 245–287. – Peter Foote (b. 1924). Professor Emeritus of Old Icelandic at University College, London. Gottfried Teipel. A German legal historian.

be achieved by radically revising the laws and imposing a legal code at the instigation of the ruling authorities.

Foote maintains that the clauses in *Grágás* on law books demonstrate a kindred urge to remove uncertainty about legal rules. In his opinion they may have this in common with the Law of Citations that they occurred at a time when the development of law had come to a standstill after a flourshing period. But he adds that there are many differences. The records of Icelandic law were quite different from those of Roman legal experts. The attitudes towards law and government were dissimilar from those behind the Roman laws. These had been preserved in written form for centuries, whereas Icelandic laws had only been recorded for a few decades. The occasion of the *Grágás* clauses must have been the disparity between articles recorded and the accounts of the experts on what the law in a particular instance was, not the result of legal disputations or the formulation of doctrines. The change from oral tradition to written records must have largely been the cause of the variety of authorities, which in its turn provided the incentive for the *Grágás* clauses on legal records.

This partial explanation may be acceptable, but the clauses can be understood and explained only in the light of the contemporary ideas on law, legislation and the preservation of laws.

To return to the immediate occasion for the writing down of the laws in 1117–18, the general object was to ensure their preservation and authenticity. But for this purpose recording did not suffice. In the early days of writing it was not usually the secular chiefs who were literate or kept clerks, it was the clergy. One may recall the statement of Ari the Learned, that the laws were recited at the Assembly of 1118 by clerks. The clerics of Iceland may well have taken advantage of their position to undermine the status of the secular chiefs. This would have provided strong motivation for recording the laws under the supervision of the principal chieftains and legal experts. This did not entirely solve the problem, however. The chieftains are sure to have had doubts about relying entirely on clerical scribes. There was always a danger of texts being disorted, wrongly copied, or even falsified. The forgery of documents was so common in the Middle Ages that no further comment is needed. Nor was such treatment confined to single documents. Whole codes of law were forged. It appears that there was little defence against this.

Hence it was the recital of the laws itself that confirmed their validity, including innovations, and not what had been written down. For the same reason, the written text gave way when it came in conflict with

precedence what was generally accepted as unwritten law.[23]

Icelandic sources confirm this. The laws which had been recorded during the winter of 1117–18 were recited *(sögð upp)* in the Law Council by clerks; while of Hafliði's Book the Law Council Section of *Grágás* says:

> Everything in the book which Hafliði had made is to be accepted unless it has since been modified, but only those things in the accounts given by other legal experts which do not contradict it, though anything in them which supplies what is left out there or is clearer is to be accepted.

The final words here mean that all shall be taken as law from the accounts of other legal experts if omitted by *Hafliði,* i.e. if his book contains no relevant clauses, or if their account is clearer, i.e. if the experts explain the clauses of the law more clearly than Hafliði's Book. There is scarcely any doubt that the word "accounts" applies to oral comments no less than written ones. The crux of the matter is this: written texts are to give way to better oral traditions – the legal sense of the experts is placed higher than the written word.

With the adoption of the rule in *Grágás* that the law of the land shall be *what is found in the books,* the *radical change* that *written texts* are preferred to *unwritten laws* has taken place, whereby the *dead letter* replaces the *ideas of the living.*

The passage on the law books in the Law Council Section of *Grágás* contains three precepts. The first is the general one that what is found in the books is to be law. The second is that, if the books differ, what is found in the bishops' books is to be accepted, as detailed more explicitly. The third is that everything in Hafliði's book is to be accepted, within the limits defined in the text.

Before going into greater detail on the content of this passage and the ideas expressed in it, a few words should be said on the relative chronology of the rules in question.

As for the first rule there are two possibilities: one, that it was introduced *before* Hafliði's book to take precedence over other existing records, apart from other considerations because its compilation was directed by men of influence. The other possibility is that the rule was introduced *after* the writing of Hafliði's book, when some works had been complied to supplement it from "the accounts given by other legal experts" but before contradictions between them created problems.

It is unlikely that texts which derived from casual records made before

[23] Ebel: Um Sögulegar undirstöður laganna (On the historical foundations of the law), p. 17; Paul Vinogradoff: Customary Law. The Legacy of the Middle Ages, Oxford 1951, p. 288; Kern: Recht, p. 32–343.

1117–18 were declared to be the law of the land without further comment. Bearing this in mind, and also the fact that it must have been a considerable step to raise written texts to a higher level than oral tradition, it is probable that this rule was introduced *after* the writing of Hafliði's book.

Páll Briem advanced the theory in 1885 that the provisions on Hafliði's book were earlier than those on the bishops' books. Hafliði's work would not have been a long one and it was therefore natural that men learned in the law might know more, though there was some doubt as to whether their accounts should be followed. Possibly there were differences of opinion; hence the introduction of the provisions. The rule regarding the bishops' books seems, on the other hand, to be much later. [24] In the main this theory could well be correct.

The development during the decades following the writing down of the laws in 1117–18 would thus have been on the following lines: differences of opinion on the status of Hafliði's book, which only contained a portion of the laws, would have arisen. To remove all ambiguity it was agreed that the book was always to be followed, and not what other legal experts *said* or what had been *recorded* from them, unless the precepts of the book had been modified, clauses were lacking, or if the other legal experts described the rules in greater detail. The descriptions of the legal experts in question could probably have been oral as well as written.

Such rules could hardly have been adopted until some time after Hafliði compiled his book, for it is unlikely that its precepts would have been modified very soon after its writing.

The books of law must now have multiplied until they became in effect the principal authority on the laws. The foundation would then have been laid for giving written texts validity above that of unwritten laws and thus for the declaration of the general rule that what is found in books is to be law. The church had increased men's belief in the written word. To the Icelanders, as to other nations, it gave the Book. Its canon law was written and all its teaching and ceremonial was closely linked to books. Without writing, it would have been impossible to ensure unity in faith, order and ritual.

But the legal books were contradictory. The difficulties this caused were dealt with by providing that in such cases what stood in the bishops' books was to be accepted. – However, the clauses on Hafliði's book still

[24] Páll Briem: *Um Grágás* (On Grágás). Tímarit Hins íslenzka bókmenntafélags (The Magazine of The Icelandic Literary Society) 6 (1885), p. 192 and 199. – Páll Briem (1856–1904). Icelandic legal scholar; chief administrative officer (amtmaður) in the North and East District of Iceland.

remained, though with less importance.

Thus the conclusion is as follows:

The earliest clauses are those on Hafliði's book. Next comes the general rule that what is found in books is to be law. Finally we have the clause about the bishops' books, probably shortly after – or possibly at the same time as – the general rule giving precedence to written law was adopted. The books of law may derive from Hafliði or from the recorded accounts of other legal experts, both earlier and later. Three points emerge:

The wording of the general rule that "in this country what is found in books is to be law" can only be understood in the sense that all records are regarded on an equal footing. A deviation from this rule is only made in cases of necessity. The books of the bishops and *Hafliði* are then ranked higher.

The law books were written from the accounts of men learned in the law, who are otherwise defined no further. No procedures were imposed by which the written prescriptions were to be formally enacted.

This indicates that law is regarded as common property which those learned in the law have the honour and obligation to preserve: there is no requirement that such laws be formally validated. All that matters is what the learned *consider* to be law. Behind the clauses on the law books there clearly lies the mediaeval view of law which has been described above.

With the writing down of this ancient system of rules, previously preserved in men's memories and transmitted orally from one generation to the next, together with the mandate that the law shall be what is found in books, uncertainty on particular points is removed. But this gain is bought at the price of a loss of flexibility. Individual precepts are now fixed in writing instead of being retained in fallible memories. And the disadvantages of lacking firm control of legal development appear most clearly when the written precepts conflict among themselves.[25]

[25] The Norwegian professor Fredrik Stang has pointed out that following the writing down of laws there is a great decline in legal thinking and all creative legislative activity; all thought being directed towards the letter of the written laws. The writing down of laws does not change their content so much as their form – it changes unwritten laws to the written form. Unwritten laws are linked to the idea; like it, they are flexible and more amenable to adaptation according to the nature and characteristics of the case. Unwritten law gives scope for the sense of justice, whereas written law is bound to words which are intended to apply to a specific whole and aim at an average, not taking account of individual instances. He who has to reach a decision on the basis of written laws has less scope to follow his sense of justice as a guiding light. – Unwritten law evolves in harmony with the circumstances shaped by life itself and adapts to them; written law is of a far more rigid nature. When need creates sufficient pressure it can be changed, but only at the instigation of legislative

Gottfried Teipel points out that, instead of a "law of citations" of this kind, legal development may be controlled by the agents of societal authority, thus providing a nation with a written code of law, Peter Foote, on the other hand, considers it unlikely that this could have happened in Iceland, except under specially favourable circumstances, on which he does not enlarge.

Professor Jón Jóhannesson thinks that it would have been natural for the office of Lawspeaker, under the surveillance of the Law Council, to carry with it the duty to record all changes in the law so that there should be no doubt about it. Instead "complex provisions on the validity of books of law" were introduced. Then he adds:

> The differences between law books were bound to have caused endless confusion in the laws of the land. It would scarcely have been within any man's competence to know what the law was at any time and although legal disputes could always be referred to the decision of the Law Council, this would have caused delays and other inconvenience. The laws would certainly have been in need of revision by the thirteenth century, but the Commonwealth did not last long enough for this to be done.[26]

Hence it may have been more natural and appropriate for a code of law preserving an authenticated text to be introduced. But was this in fact a realistic option?

There is no doubt of the great interest in law in Iceland during the 12th and 13th centuries, as elsewhere in Europe. Enthusiastic lawyers collected learned commentaries on the laws, organised them systematically and committed them to writing. Evidence of this activity is to be found in two of the principal law books of the Commonwealth period, *Konungsbók* (Codex regius) and *Staðarhólsbók*. Their compilers clearly intended to remove juridical uncertainty and promote legal order. But they were conditioned by old and deeply-rooted ideas of law, as the provisions on the law books show, and this finally led them up a blind alley. In spite of every effort men lost control of the development of law and disorder ensued, with known consequences for the community.

For the nation to obtain a code of law, people would have had to submit to *a much more effective and systematic legislative authority* than was consonant with the ancient ideas, and to acquire *a new understanding of*

authority. Written law is conservative and tends to preserve an existing order. Law books are concerned with regularity and conformity – unwritten law with evolution, the individual case and its resolution. These qualities stand in opposition to one and another and cannot be reconciled. (Fredrik Stang: *Norsk Formueret I*, Kristiania 1911, pp. 74–76.)

[26] Jón Jóhannesson: *Íslendinga saga I*, 113; cf. *A History of the Old Icelandic Commonwealth*, p. 93. – Jón Jóhannesson (1909–1957). Icelandic professor of history at the University of Iceland.

law. This would have involved a strengthening of centralized authority and an acknowledgement that law, at least in one aspect, was authoritative commands that must be obeyed. As it turned out, the initiative in introducing books of law in the 13th century came mainly from enterprising kings.

In the constitution of the Commonwealth such ideas and methods were repudiated. Many Norwegians had fled from the encroachments of royal power at the time when they settled Iceland at the end of the ninth and the beginning of the tenth centuries. However, when the Icelanders acknowledged the king of Norway by the *Gamli sáttmáli* (Old Covenant) of 1262–64, giving him a share in legislative power, they sacrificed, in part, the ancient constitutional ideas. In this they cleared the way for a more effective and systematic legislative authority and to some extent adopted a new conception of law, cf. the comment of *Hrafn Oddsson.*[27] Conditions were then ripe for the introduction of a book of law with an authenticated text. Nevertheless their distaste for centralization and edicts of authority still persisted. This was clearly displayed during the approval of *Jónsbók* in 1281,[28] and long after this when occasion arose.

The approved original of *Jónsbók* has not survived and texts of it soon began to show discrepancies, among other things on account of the addition of new legal clauses without adequate care for conformity or accuracy. The *Jónsbók* code did not solve all problems, therefore, though that story will not be told here.

[27] See ch. VII below. *Hrafn Oddsson* (1236–89), Icelandic chieftain, leader of the laymen in the struggle against the growing power of the church. Principal opponent of Bishop Árni Þorlákssonin the dispute over the ownership and administration of church property and estates, see note 49.

[28] *Jónsbók* was the law code of Iceland approved at the *Alþingi* (General Assembly) in 1281. It remained the main source of Icelandic law for many centuries. A few provisions are still in force and are occasionally applied by the courts. cf. Sigurður Líndal: *Helztu lagaverk Skarðsbókar. Jónsbók – Hirðskrá – Kristinréttur yngri*; English translation: *The Law Codes of Skarðsbók.* Skarðsbók. Codex Scardensis AM 350 fol. Íslenzk miðaldahandrit – Manuscripta Islandica Medii Aevi – I, Rv. 1981, pp. 27–28 and pp. 53–55. The same: *Lögfesting Jónsbókar 1281* (The Enactment of Jónsbók 1281). Tímarit lögfræðinga (Lawyers' Review) 32 (1982), p. 182, cf. *Om vedtagelsen af Jónsbók i 1281.* Rättsvetenskap och lagstiftning i Norden – Festskrift tillägnad Erik Anners, Sth. 1982, p. 91.

VI. "IF THERE IS ARGUMENT ON AN ARTICLE OF LAW AND THE BOOKS DO NOT DECIDE IT"

Not all the laws of the land were written down in the 12th and 13th centuries, and books of law did not remove all ambiguities, in spite of clauses referring to them. There is provision for this in Grágás with detailed instructions on how disputes are to be resolved if the books do not decide:

> If there is argument on an article of law and the books do not decide it, the Law Council must be cleared for a meeting on it.

Such legal disputes appear to have arisen in three ways.

In the first place because written accounts by legal experts held contradictory clauses which were found neither in Hafliði's book nor the bishops' books, so that these could provide no ruling.

In the second place, there were disputes on points of law written down from the accounts of legal experts which conflicted with unwritten laws.

In the third place, there were disputes on legal matters not found in any book.

But whatever the circumstances giving rise to the disputes, the basis on which they were resolved should be examined. Was the solution to introduce a new ruling in accordance with the free judgement and will of the members of the Law Council? – which would have been inevitable had the written laws been regarded as exhaustive – or was the dispute resolved in accordance with what the Council members considered to be valid law – i.e. with reference to unwritten laws?

There is some division of opinion on the answer. Konrad Maurer believed that disputes were resolved by the interpretation of older laws and established custom or simply by bearing witness to the law to be applied.[29] On the other hand Vilhjálmur Finsen thought that little reference was made to legal tradition, the dispute being settled by the Law Council passing laws introducing a new rule.[30]

The opening words of the paragraph: "If there is argument on an

[29] Konrad Maurer: *Graagaas*, p. 32ff., especially p. 39 and pp. 42–43; *Altnordische Rechtsgeschichte IV*, p. 342ff., especially pp. 348–51; *Yfirlit yfir lagasögu Islands* (A Survey of the Legal History of Iceland), Lögfræðingur. Tímarit um lögfræði, löggjafarmál og þjóðhagsfræði. Útg. Páll Briem. ("The Lawyer" – A periodical on Jurisprudence, Legislation and National Economics, ed by Páll Briem) 3 (1899), pp. 3–6; – *Die Rechtsrichtung*, pp. 145–146. Nowhere in his writing has Maurer dealt comprehensively with customary law and its part in the constitution of the commonwealth. See also Note 12 above.

[30] Vilhjálmur Finsen: *Om de islandske Love*, on customary law, see especially pp. 29–46, 107–16; on the enactment of laws, see especially pp. 59–68, 69–100, 105–06, but cf. especially pp. 97–100. See also Note 13 above.

article of law" indicate that the subject of dispute is what laws are in fact in force in the land, but not what rules should be introduced. And the sequel supports this interpretation where it says that those involved in the disagreement are to "rehearse the article of the law on which they differ and report what causes the rift between them".

After the Law Councillors have considered the matter, their decision is described in the following terms:

> Then each chieftain is to say what he will call law and whose side he will take in the matter, and it is decided by majority. But if the Law Council men are in equal numbers with each group calling their version law, then those with the Lawspeaker among them are to prevail, but if there are more in the other group, they are to prevail. And each group is to swear a divided judgement oath[31] on their version and make it hang on their oath that they think that the version they side with is law in the case and state why it is law.

Clearly, the Law Councillors are to declare what law they *consider to be valid*, and not what ruling they wish to introduce.

Since it is to be decided what the valid law is, it is thought important that all members of the Council take part in resolving the difference and all must give an opinion on the matter, a penalty being imposed for failure to carry out this obligation. It is also regarded as highly important that they consider their judgement carefully. If the Council is divided, the majority is to prevail, but both groups swear an oath on their decision as to what is law, if the minority consists of twelve members or more. By this insistence on oath-taking, not only is careful consideration urged, but also truthfulness.

When a difference of law has been resolved, the following procedure is for

> one man [...] to rehearse with witneses the article of law for which there is a majority, but all the Law Council men are to give their assent to it. Afterwards it is to be announced at *Lögberg* [The Law Rock].

This clause makes sense when the purpose is to demonstrate what is valid law. There cannot be more than one rule in question and to this fact the minority must defer.[32]

[31] For explanation of these words, see: Early Law of Iceland, p. 244.

[32] In the *Grágás* text dealing with resolution of disputes concerning points of law there is only one instance that appears to conflict with this interpretation. When those who dispute a point of law have described their differences, the procedure shall be as said here: "[...] After that men must assess what they have said and make up their minds on the

But what was the law to which the ruling was to apply? This has already been described: the good old unwritten law which the chieftains skilled in law retained in their memories. The law referred to must have been unwritten because the chieftains were not summoned to give their ruling *unless the books did not decide.* The men of the Law Council who resolved legal differences were in effect bearing witness to this law and at the same time *framing law* of which men did not possess full knowledge. The term to frame, *að rétta:* literally, "to make right", together with the name of the Law Council, *Lögrétta,* clearly indicate what men supposed they were doing.

Evidently this describes a way of thinking. In fact men were continually introducing new rules when they considered themselves to be simply finding new words for old ones, or *framing the law.* The distinction between the two was never distinct. But the idea behind the phrase *framing the law* was a persistent one. When the Icelanders granted the Norwegian king a share of legislative power in the Old Covenant of 1262–64, they worded the concession in the way that the king was to let them *obtain Icelandic law.* Nor is the idea by any means extinct to this day, though there is no occasion to discuss this further here.

VII. "MEN ARE TO MAKE NEW LAWS IF THEY WILL" – MAJORITY OR UNANIMITY

It was realised during the Commonwealth that ancient laws did not solve all doubtful points and that in an immature society such as the Icelandic one of the first centuries after the settlement, new measures were needed. For this reason *Grágás* provides that in the Law Council men shall "make new laws" – *gera nýmæli.*

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matter, and then all the Law Council men who sit on the middle bench are to be asked to explain what each of them wants accepted as law in the case." The word *wants* could perhaps be considered an indication that this is not simply a question of finding out the opinions of men as to what is law. – However, the text in this place appears to be defective, so that there may be some doubt about its interpretation.

Behind this lies the idea that men may direct legislation with deliberate intention. The clauses concerning Hafliði's book, where it is stated that its precepts are to be followed, *unless they have since been modified*, express the same idea. But further enquiry into how new laws were made in the Law Council will show that provisions are lacking.

Nineteenth-century scholars, especially Maurer and Finsen, thought that rules regarding the enactment of new laws would inevitably have found an expression in *Grágás*. They therefore concluded that when making new laws either the procedure for granting licences would have been followed, or that for resolving legal disputes.

On the granting of licences the main principle was that unanimous Law Council agreement was required, while anyone attending the Assembly could veto the granting of a licence. Such veto was nearest in character to legal injunction on some activity. Maurer believed that this procedure was followed in the making of new laws.[33]

However, for resolving a dispute of law, a majority of the Law Council sufficed, though the minority had to give their consenting vote. Finsen believed that this was the procedure in making new laws.[34] However both scholars agreed that neither procedure was entirely appropriate.

First let it be repeated that by no means all Icelandic laws appeared in books in the 12th and 13th centuries. In the second place it is clear that neither the article on the granting of licences nor that on the settlement of legal differences can reasonably be interpreted to apply to the passing of new laws.

[33] Konrad Maurer expresses his views on the making of new laws in *Altnordische Rechtsgeschichte IV*, p. 342ff.; see also *Graagaas*, p. 32; *Island*, P. 173; *Rechtsrichtung*, p. 136ff. – The following have agreed that unanimous consent was necessary for the making of new laws: Knud Berlin, cf. *Islands statsretlige Stilling*. Kbh. 1909, p. 21; Valtýr Guðmundsson, cf. *Island i Fristatstiden*, Kbh. 1924, p. 44; Jón Dúason, cf. *Réttarstaða Grænlands* (The Legal Status of Greenland), Rv. 1947, p. 189ff.; Wilhelm Ebel, cf. *Geschichte*, p. 23.

[34] Vilhjálmur Finsen: *Om de isl. Love*, pp. 61–64. – The following have adhered to the wiew that a majority sufficed for the approval of new laws: Jón Þorkelsson (rektor), see the newspaper *Víkverji* 1873, p. 98ff.; C. Rosenberg, see *Nordboernes Aandsliv II*. Kbh. 1878–85, p. 70; Páll Briem, see his essay *Um Grágás* (On Grágás) in Tímarit Hins íslenzka bókmenntafélags (The Magazine of the Icelandic Literary Society) 6 (1885), p. 133; Björn M. Ólsen, see his essay *Enn um upphaf konungsvalds á Íslandi* (Further Remarks on the Introduction of the Kingship in Iceland) in the magazine Andvari 34 (1909), p. 22; Einar Arnórsson, see the following works: *Réttarsaga Alþingis* (The Legal History of the Alþingi), p. 60ff., *Réttarstaða Íslands* (The Legal Status of Iceland), p. 20–21, *Söguágrip Alþingis hins forna* (A Survey of the History of the Old Icelandic Alþingi) in Alþingisbækur Íslands – Acta Comitiorum Generalium Islandiae – I, Rv. 1912–14, pp. XLVIII–XLIX, Ólafur Lárusson:, see *Yfirlit yfir íslenzka réttarsögu* (A Survey of Icelandic Legal History), p. 102; Gizur Bergsteinsson, see his essay *Um réttarstöðu Grænlands* (On the Legal Status of Greenland), p. 52ff. and Jón Jóhannesson, see *Íslendinga saga I*, 84, cf. *A History of the Old Icelandic Commonwealth*, p.65.

The most reasonable conclusion is that on the making of new laws *there are no precepts in Grágás other than that it is to be done in the Law Council.* This at least implies that Council members must have been able to agree to new measures when these were considered necessary. New laws approved in this way would then have bound only those who had given their consent. Those who were against them would have regarded themselves as unbound by them. On this showing, new laws would not have been binding on all unless they had received unanimous consent.

Considered generally, it is evident that within small communities, such as villages, rural districts and guilds, this was a feasible arrangement. Finding a solution to a dispute that was acceptable to the mass of fully qualified members was, under such circumstances, not an impossible proposition. But in larger communities such as a nation or a kingdom there were bound to be fewer persons involved in taking decisions, namely the chieftains or the leaders of the people. These would have enjoyed the support and following of less influential persons.

Among the leaders there was usually a yet smaller group that would deal with legal matters at general assemblies. The decisions of such a group would become effective only after they had been published to the assembly as a whole. With this publication the decision was, so to speak, put to the vote and the result decided by the general response. This method of taking decisions must, however, have placed obstacles in the way of reaching a clear-cut conclusion, and limiting the powers of the minority in some manner was one attempt to remove these. The men of the Icelandic Commonwealth would have had to deal with problems of this kind.

Among the Greeks and Romans the rule followed in the making of decisions by assemblies and courts was that the majority view prevailed. However, this rule was unknown among the Germanic peoples at the beginning of recorded history. Assemblies with them were somewhat random meetings of chieftains at which men discussed their affairs, but did not bind themselves to submit to the decisions of others. With knowledge of Roman and ecclesiastical law, the influence of majority rule began to spread in various areas of the European continent during the 12th and 13th centuries. The same may also be said of England and the Nordic countries, including Iceland.[35] But it is open to question whether

[35] The development of majority rule in northern Europe in the 13th century would be material for a long study, for the subject is complex and full of uncertainties. A few random examples show how varying the rules were. In the laws of the German-speaking nations majority rule was originally unknown. Unanimous consent was a condition for decisions of assemblies and in the election of a king, though with the provision that the minority should

the rule was applied to the making of new laws in Iceland, as was Finsen's view, which most others have since adopted.

In *Grágás* there are some instances in which the decision of a majority is mentioned as deciding an issue. Reference has already been made to the majority decision of Law Council members in cases of disputed law, where the minority was to give its agreement.

In all the general courts, the spring-assembly courts (*vorþingsdómur*)

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abandon its opinions and follow the majority. However, the majority rule gained ground at a rate that varied with different social institutions. In the election of kings it gained influence as early as in the 13th century and it was the fundamental rule in *Die Goldene Bulle* of 1356 which can be described as the written constitution of the Holy Roman Empire. See further *Mehrheitsprinzip*, Handwörterbuch zur deutschen Rechtsgeschichte III, col. 431.

In England a unanimous vote of the jury was required, cf. Pollock and Maitland: *The History of English Law II*, Cambridge 1923, p. 623 and Holdsworth: *History of English Law I*, London 1960, p. 318.

In the 61st article of Magna Carta, 1215, it is prescribed that a council of barons shall ensure that the king adhere to his pledges according to the charter, and take over the government should he fail, he being then removed from power. Note the early date at which majority rule is insisted on there, but that neverthless little notice has been taken of it, see Taswell-Langmead's *English Constitutional History*, 11th edition by Th. Plucknett, London 1960, p. 87, cf. Kern: *Gottesgnadentum*, p. 233.

In Denmark unanimous consent was probably required of jurors (*nævninger*) at the beginning, but majority rule was later prescribed by law, see J. Steenstrup: *Flertal og Mindretal*, Dansk Historisk Tidskrift 10 R II, p. 450ff. The oldest reliable example concerns juries, cf. Laws of Jutland II, 7, see also Ditlev Tamm and Jens Ulf Jörgensen: *Dansk retshistorie i hovedpunkter II*, Kbh. 1975, p. 139 and *Danmarks gamle love III*, Kbh. 1948, ved Erik Kroman og Stig Iuul, *Retshistorisk Indledning*, p. XVIII. At district assemblies in Denmark unanimous consent was required to make decisions lawful, see Poul Johs. Jörgensen: *Dansk Retshistorie*, Kbh. 1947, p. 250. If this could not be obtained, it was possible to appeal to the national assembly, but it is not clear what principle applied there.

In Norway the arrangement was that nothing might be settled at the *fjórðungsþing* (quarter-assembly) which was the lowest court of justice, unless all the members of the assembly agreed. From there the case could be taken to the *fylkisþing* (county assembly). If agreement could not be reached and the minority amounted to a quarter of the members the case could be referred to the *lögþing* (the elder laws of Gulaþing) ch. 35 (Norges gamle love I, p. 21), see Knut Robberstad: *Rettergang*. Kulturhistorisk leksikon for nordisk middelalder XIV, col. 136. There are differences of opinion, however, on how decisions were taken at law assemblies. Basically it is agreed that unanimity was required. Rudolf Keyser's view was that the majority decided, but that the decision was announced as that of the whole Law Council, see *Norges Stats og Retsforfatning i Middelalderen*, Chria 1867, p. 245; on the other hand T. H. Aschehoug thought that no formal vote took place, and those who were in the minority probably left the assembly. – He believed that the earliest example of majority rule in Norway was the introduction of rules for the election of the king at the state assembly of 1164. These are in the 2nd chapter of the *Gulaþingslög eldri* (Norges gamle love I, pp. 3–4) see *Statsforfatningen i Norge og Danmark indtil 1814*, Chria 1866, pp. 64–67.

In Canon law majority rule prevailed in the 11th and 12th centuries when electing officials, abbots, bishops and the pope to closed communities: monastic orders (conventus), cathedral chapters, and the college of cardinals. In 1179 the law was introduced that the pope should be elected with a two-thirds majority, see *Mehrheitsprinzip* in Handwörterbuch zur deutschen Rechtsgeschichte III, col. 431. The influence of this law brought about the acceptance of majority rule in secular institutions.

and Quarter Courts (*fjórðungsdómur*) unanimous agreement of the thirty-six judges was a condition for bringing a case to a final conclusion.[36]

In the special courts, the "outfield" courts[37] (*engidómur* "communal pasture" court[38] and *afréttardómur*) and also the local district courts[39] (*hraeppadómur*) however, a majority of the judges decided.

In the Fifth Court *fimmtardómur* established between 1004 and 1030, the majority of votes decided. The clauses on this date from the 13th century, but whether they have been preserved in their original form is not known[40].

The main forms of evidence specified in *Grágás* are: the *statements of witnesses* concerning facts of which they have had personal experience, and that of *juries*, whereby people, especially neighbours of the parties concerned, declared what they believed or supposed was right. In both instances the evidence of a majority of witnesses or jurymen was to decide, if they were not unanimous on the subject. The testimony of the majority, both jury and witnesses, was to be declared publicly, while those in the minority were to concede their agreement. They should, however, declare that their statement would have been different if they had been in the majority and state what evidence or judgment they would have offered, and then be guiltless of perjury or false judgment in case charges were brought forth.[41]

There is provision in *Grágás* for specified meetings of the men of each local district (*hreppur*). For resolutions made at such meetings, all new matters were to be decided by majority vote, but for traditional matters unanimous consent was required.[42]

The Lawspeaker was the chairman of the General Assembly and his duties included reciting the laws and chairing the meetings. When he was elected for the first time unanimity was generally required. If the members of the Law Council could not agree, lots were to be cast to decide from which Quarter the Lawspeaker should be. The Lawspeaker was then elected by the Council members of that Quarter, by majority if unanimity could not be reached. If the voting was even, the bishop in whose diocese the Quarter lay was to decide. After this, one man was to declare the result in the Law Council and the other members were to

[36] *Grágás* Ia, p. 75ff., 101, cf. *Laws of Early Iceland*, K. 41, p. 81ff., K. 58, p. 103.
[37] *Grágás* Ib, p. 86; II, p. 459.
[38] *Grágás* II, p. 493.
[39] *Grágás* Ib, p. 176.
[40] *Grágás* Ia, p. 83, cf. *Laws of Early Iceland*, K. 47, pp. 87–88.
[41] *Grágás* Ia, p. 64, 67 (jury), 57 (evidence), cf. *Laws of Early Iceland*, K. 35, p. 73, K. 36, p. 76 (jury), K. 32, p. 68 (testimony).
[42] *Grágás* II, p. 259–60.

concede their agreement. When a Lawspeaker was re-elected a majority vote appears to have decided.[43]

In several other passages in *Grágás*, majority of votes is mentioned as being used to decide various minor issues.[44]

There is no way to infer from these rules any general principle as to whether a majority vote sufficed for reaching a decision, or whether unanimous consent was required. It is clear, though, that the majority rule applied in quite a number of cases and was used especially when establishing facts; otherwise all those affected by the resolution had to be involved. However the clauses in *Grágás* suggest that the prevailing ideas were not as unequivocal as before.

Other sources give no definite indication whether a majority decision could be made binding on all. In the Sagas, in Sturlunga Saga, the Sagas of Bishops, and other sources, including annals, there are some accounts of the making of new laws, but rarely any reference to the method by which they were passed. There is often an account of the conflicts leading up to these measures, but rarely any mention of the numbers involved on each side. The number of votes cast is never referred to. These accounts suggest that there were no firm rules that applied to resolutions in general, including the enactment of new laws, but that unanimous consent was a condition for making a resolution universally binding. In accounts where churchmen exercised little restraint the emphasis on unanimity may sometimes be greater than strictly justified; the object then probably being to display the unifying force of the Christian faith.[45]

It is impossible to trace in detail all the accounts the sources offer on the making of new laws, but some examples will be given to indicate the procedures followed. The literal historical accuracy of these accounts may be open to question. What matters here is the attitude of mind and ideas that can be read from them.

According to the account of Ari the Learned in the *Íslendingabók* concerning the events when the Icelandic people adopted the Christian faith in the year 1000 (or 999), both parties, Christians and heathens, pursued their case with great fervour. In the book, believed to have been written about 1120–30, we find the following[46]:

[43] *Grágás* Ia, pp. 208–09, cf. *Laws of Early Iceland*, K. 116, p. 187.

[44] E.g. *Grágás* Ia, p. 60, 62, 138, 210, cf. *Laws of Early Iceland*, K. 33, p. 70, K. 35, p.72, K. 81, p. 133, K. 116, p. 188; Ib, p. 37, 40; II, p. 169.

[45] Readers should compare the account of Ari the learned in the 7th chapter of Íslendingabók on the introduction of Christianity with the account of the same events in *the greater Saga of Ólafur Tryggvason*, ch. 229, see the edition of this saga in Editiones Arnamagnæana A 2, Kh. 1961.

[46] *Íslendingabók* (Book of the Icelanders), ch. 7.

> And the outcome was that every man named witnesses and each party declared itself out of the law with the other, Christian and heathen [...].

Here we find a clear example of what happened to a new law when the Assembly was divided into two more or less equally powerful groups, with neither giving way. A compromise was then agreed whereby the principal heathen leader, *Þorgeir*, chieftain of the Ljósvetningar,[47] was deputed to settle the matter.

> "And now I think", said he, "that the best plan would be not to let those decide who would push matters to an extreme either way, but rather to find a middle way between them, so that each has something of his case and we all have one law and one belief [...]".

The compromise adopted is well known: Christianity was declared by law as the religion of the land, with some concessions towards heathen practice.

Another instance of compromise of this kind is found in Ari's account of the division of the country into four Quarters in about 960. It was ruled that the Quarter of the Northerners was to have four district or spring assemblies, whereas there were three in each of the other Quarters – "as this was the only arrangement they could agree on".[48]

The introduction of the Tithe Law was a momentous innovation and is described thus in *Íslendingabók:*

> On account of his [Bishop Gizur Ísleifsson's] popularity and the urging of Sæmundur with the guidance of Markús the Lawspeaker, it was made law that all men should count and value their possessions and swear their valuation to be true, whether of land or movable goods and then pay a tenth part thereof. It is a great miracle how obedient the people of the land were to this man when he proposed that all property in Iceland be valued on oath, and the land itself, and tithes paid on all, and made it a law that so should it be so long as Iceland is inhabited[49].

[47] *Þorgeir Þorkelsson.* Icelandic chieftain of the estate *Ljósavatn* in Northern Iceland. Lawspeaker 985–1001.

[48] *Íslendingabók (Book of the Icelanders)*, ch. 5.

[49] *Íslendingabók (Book of the Icelanders)*, ch. 10. *Gizur Ísleifsson* (ca 1042–1118) bishop of Skálholt 1081–1118. One of the most influential churchmen in Iceland. Laid the foundation the church as a dominating institution in the cultural and political life of the nation. *Markús Skeggjason* (d. 1107). Lawspeaker 1084–1107 and poet. In historical sources he is mentioned as the poet of the king *Ingi Steinkelsson* (d. 1111) king of the Swedes and *Knútur* the Saint (d. 1084) king of Denmark. Thirty strophes of a lay in memory of *Eiríkur ejegoqði* (1095–1104) king of Denmark and few fragments of other poems are preserved. *Sæmundur Sigfússon* (1056–1133) the Wise. Studied in France in his youth, most probably in the School of Notre Dame in Paris. An influential churchman in Iceland and famous for his learning. His main contribution to Icelandic literature was his influence on later historians, see G. Turville-Petre: *Origins of Icelandic Literature*, p. 81ff., 153ff.

Similar words are used in other sources.

We are not told precisely how this new law was approved, but the account can hardly be understood otherwise than as implying that consent was unanimous.

In the saga of Bishop Árni Þorlákssson written shortly after 1300, the bishop quotes the agreement of the General Assembly of 1253 that, if canon law and the law of the land be at variance, then canon law is to prevail. The bishop adds that this was made law over the whole land "with the good consent of all the people."[50] However, this consent appears to have been a dead letter, for other sources make it evident that powerful chieftains did not ride to the Assembly that year.[51] It may well be that consent was unanimous, but those who were absent did not consider themselves bound by it.

Something similar emerged with the Old Covenant of 1262–64 when the Icelanders swore allegiance to King *Hákon* of Norway. The Covenant seems to have been made in the Law Council of 1262, but according to the document itself the only parties to it were the farmers of the Northerners' and Southerners' Quarters.[52] It is evident from the oaths taken by the men of the Western Fjords at the *þverá* Assembly of the same year,

[50] *Árna saga biskups* (The Saga of Bishop Árni), Rv. 1972, ch. 63, cf. ch. 62. *Árni Þorlákssson* (1237–1298), bishop of Skálholt 1269–1298. An influential protagonist of the liberty of the church. The saga of the bishop deals in detail with the dispute between Bishop Árni and the secular chieftains under the leadership of *Hrafn Oddsson* (see note 27) over the ownership and administration of church property and estates. Jónas Kristjánsson: *Eddas and Sagas*, pp. 185–86.

[51] See the *Íslendinga saga* – Saga of the Icelanders – of Sturla Þórðarson, ch. 166, Sturlunga saga I, Rv. 1946, pp. 478–79.

[52] The opening words of the covenant are: "It is the agreement of the farmers of the north country and south country [...]". See *Saga Íslands* (History of Iceland) III, Rv. 1978, p. 34; Diplomatarium Islandicum I, p. 661ff. In the 198th chapter of Sturla Þórðarson's *Íslendinga saga* – Saga of the Icelanders – the following is said of the events of 1262: "At this assembly a tax was sworn to King Hákon for all the Northerners' Quarter and Southerners' Quarter west of [the river] Þjórsá. A tax was then also sworn for all the Westfirthers' Quarter.

Twelve men swore a tax in the Northerners' Quarter [...]"

Twelve men swore a tax in the Westfirthers' Quarter [...] "Sturlunga Saga I, Rv. 1946, p. 529.

In a synthesized chapter from *Króksfjarðarbók*, there is the following: "After that the Law Council was set and these farmers swore for the Northerners' Quarter [...] Also from the Southerners' Quarter beyond [the river] *Þjórsá* they swore to King Hákon land and liegemen and everlasting tax with such terms as are witnessed by the letter that was made thereafter." Sturlunga Saga II, Rv. 1946, p. 281.

The sources do not agree as to whether the Westfirthers took the oath in 1262. The covenant mentions also farmers from the south country, but history records only farmers from the Southerners' Quarter to the west of (beyond) the river Þjórsá. See further Jón Jóhannesson: *Íslendinga saga I*, p. 326ff., cf. *A History of the Old Icelandic Commonwealth*, p. 276ff.

and by other chieftains in the years 1263–64, that a man could only be considered bound by an oath which he himself had given.

Although the available texts indicate that new laws should receive unanimous consent, one source has a special status, namely the *Íslendingabók*. In its account of the recording of the laws in the winter of 1117–18 it states that all innovations which the recorders consider better than the old laws were to "be recited the following summer in the Law Council, and were to hold good if the greater part of the members do not speak against them".[53]

This can best be understood in the literal sense to mean that the majority rule applied in the making of new laws, and this in fact has been the general view. However, Konrad Maurer believed that the *Íslendingabók* account accorded with his view that new laws had to be approved unanimously. The task of the committee entrusted with the recording of the laws had been primarily to remove uncertainty on laws that were in force. Reform and new legislation were only mentioned by the way, as a supplement. Maurer maintained, therefore, that there was nothing unexpected in specifying the procedure generally required for confirming what was valid law, namely a majority agreement. He also pointed out that it is stated in plain words that all innovations were to hold good if the majority was not against them. This statement would have been unnecessary if there had been no doubt as to whether the legal compilation as a whole was to be agreed unanimously, or whether a simple majority would suffice. He also noted that Ari emphasized the unanimity of the final agreement.[54]

Maurer's arguments undoubtedly carry weight. Clearly the greater part of the work of the committee would have been the recording of laws that were already operative, although it was also authorized to make innovations which, in fact, must have been inevitable. The words that they are to be "recited the following summer [...]" etc. apply to the complete legal compilation, i.e. the laws that had been recorded as well as to possible innovations. There would therefore have been some doubt whether unanimous agreement was required or whether simple majority sufficed, for it would have been hard to distinguish between what were innovations and what was an improvement in the wording of older laws. Doubtless the view taken was that the greater part of the laws recorded were already in force, whereas what was new was merely a minor element. It would therefore be natural that the majority should prevail. On the

[53] *Íslendingabók* (Book of the Icelanders), ch. 10.
[54] Maurer: *Rechtsrichtung*, p. 135.

other hand the laws were finally approved unanimously.

Ari's account need not therefore refute the evidence from other sources that new laws had to be approved unanimously. Those other sources fully justify this interpretation of the account describing the recording of the laws.

To support the indication provided by the written sources that a unanimous vote by all parties concerned was a condition for a new law, the following may be noted:

The law was considered to be a common heritage in which all free and fully qualified members of the community had some share, as has already been shown. It was possible to submit to these good ancient laws without loss of liberty, and they might not be tampered with, least of all against the will of those interested. Any attempt to enforce change or innovation was called *tyranny* or *lawlessness*. The idea that the law was common property in this sense was bound to induce men to seek agreement about new laws rather than to try and impose them by force.

When people began to accept the notion that the decision of a particular group – or a single man – could bind those that were opposed to it, a *total change of outlook* was involved.[55] The laws were now no longer the common property of the people of the land, as before, but a kind of extraneous element, indicating that they had lost their freedom. When the Icelanders formed the Commonwealth they had rejected all centralized authority in setting up constitutional organs, and any self-respecting chieftain tried as hard as possible to preserve his own independence. In accordance with this there was no central executive authority, and with such a system it is difficult – if not impossible – to introduce new laws if chieftains of influence oppose them. Thus, all the conditions for the acceptance of the majority rule for making new laws were absent.

The fundamental principle that new laws were not considered binding on any except those who accepted them was regarded as *so self-evident that there was no need for it to be defined by law*. For this reason there are no clauses in Grágás covering the procedure for making new laws; it is merely prescribed that they are to be made in the Law Council.

Reference was made earlier to the fact that no firmly established rules existed on voting for the introduction of new laws. This will now be discussed a little further.

First, nothing equivalent to a national referendum took place. Approval was limited to the principal chieftains of the land. The account

[55] Bernhard Rehfeld: *Die Wurzeln des Rechts*, Berlin 1951, p. 67; see also *Gesetzgebung*, Handwörterbuch zur deutschen Rechtsgeschichte I, col. 1612.

in *Íslendingabók*, "Alþingi (the General Assembly) was established on the recommendation of Úlfljótur and of all the people of the land"[56], may thus not be taken so literally as to suppose that the vote of every individual Icelander was sought on the matter. The leading chieftains would have agreed and the people would mostly have followed the chieftains, or not opposed them.

When describing the unanimous or near-unanimous agreement of the chieftains, various expressions are used in the sources. A frequent phrase is that laws were introduced *at the recommendation of chieftains*, or *of the wisest of men.*

Before a vote was taken there would doubtless be an attempt to gain the widest possible agreement. Besides this, each member would declare his viewpoint and if agreement was reached the new law would be recited in the Law Council. The recital was undoubtedly intended to secure the approval of the entire Assembly, as well as to introduce the new law to the public. The Assembly would no doubt have indicated its opinion by approval or disapproval, and the ultimate fate of the new law would depend on the response. The clauses in *Grágás* on the recital of new laws may be understood in the sense that their validity was in the first place provisional and that they were not to be taken as operative laws until after some time had passed. Admittedly the provisions on this subject are not consistent or entirely clear, so no more will be added here on this point.[57] But in the light of the foregoing it seems most natural to deduce that they imply a trial period to estimate the response of those who had not expressed their approval. The final validity of the law would have depended on this response.

In addition it seems possible to assume that, despite the provision in *Grágás* for new laws to be proposed in the Law Council, they were in fact decided outside it. Various sources suggest that a number of important new measures were introduced in this way, for example, the Tithe Law of 1096–97 and the Old Covenant of 1262–64.

Weight of numbers, strength of arms and other factors, e.g. what factions emerged and how they interrelated, also determined whether the minority opposed to a new measure were able to achieve their

[56] *Íslendingabók (Book of the Icelanders)*, ch. 3. According to this and other historical sources *Úlfljótur* was the first "law-giver" of Iceland and the first Lawspeaker, but it is difficult to determine how far these sources are historically reliable, cf. Sigurður Líndal: *Sendiför Úlfljóts* (The Mission of Úlfljótur. Skírnir, Tímarit Hins íslenzka bókmenntafélags (Skírnir – The Magazine of The Icelandic Literary Society) 143 (1969), p. 5; Norwegian translation: *Opprinnelsen til de første islandske lover.* Tidsskrift for rettsvitenskap 82 (1969), p. 467.

[57] *Grágás* Ia, p. 37, cf. *Laws of Early Iceland* K. 19, p. 51.

purpose. If only a few, or men of little weight, disagreed, they were bound to defer to the majority. Unanimous consent did not in fact imply that the will of everybody coincided; rather that a substantial majority was involved in the matter, or an influential group to whom men were willing – or felt obliged – to give way.

On the other hand if powerful factions were at odds over a new measure, there were two possibilities: mediation until a compromise was arrived at, or that men declared themselves "out of the law" with each other and the community was divided, as may be seen from the narrative of the acceptance of the Christian faith in *Íslendingabók*. Compromise was one of the most fundamental factors in the organization of the Icelandic Commonwealth.

VIII. LAW INTRODUCED BY AUTHORITY

Finally a few words must be said about the third method of introducing laws, namely by an authority, especially a king, without the involvement of the subjects of the state. Behind this lies the idea of a power independent of the ancient legal traditions. In the political theory of the Middle Ages the principle is expressed in the words: *Princeps legibus solutus* (the prince is free of the laws) or, *Quod principi placuit legis habet vigorem* (what pleases the prince has the effect of law). According to this theory law is the command of authority, i.e. an edict.[58]

Originally the king was thought to be bound by the laws like his subjects, but this new attitude appeared in Europe in the early Middle Ages and as time went on came to prevail. The rapid social changes of the later Middle Ages demanded a more active legislative authority. This augmented the power of the king as a law-giver. However the development of this idea is beyond the scope of the present study.[59]

In *Grágás* there is no mention of the king's position in relation to the law. Indeed, there was no occasion for any; nor, therefore, for any allusion as to whether he was independent of the law – *legibus solutus*. However there is some evidence of the idea in other sources from the

[58] The king could of course give his subjects directions regarding certain forms of conduct which he considered in accordance with the laws. But legal precepts were often unclear, so that there might be ambiguity on the question whether royal edicts were according to the laws; one on which there were frequent disputes. See Ebel: *Geschichte*, p. 25. See also Vyduchel: *Princeps legibus solutus*, p. 48ff.

[59] Vyduchel: *Princeps legibus solutus*, p. 48ff.; Sten Gagnér: *Studien zur Ideengeschichte der Gesetzgebung*, Sth. 1960, p. 292ff.; Sabine: *History of Political Theory*, p. 142.

beginning of the royal period in Icelandic history, but sources on the Commonwealth period need to be examined more closely.

At the *Alþingi* of 1281, the king's emissary, *Loðinn leppur*[60], insisted that the king alone might make law. The spokesmen of the Icelanders made various comments on the code *Jónsbók* which was then put forward for approval. The emissary was enraged – "became at this very hot" as is said in the Saga of Bishop Árni –

> that peasants would be so high and mighty as to suppose they might order laws in the land where the king alone should rule. After this he demanded that the people accept the whole book without question.

And the Assembly replied in the spirit of the older way of thinking

> that this they would never do and thus lose the freedom of their land.[61]

At the Assembly of 1284 *Hrafn Oddsson* expressed an idea similar to that of *Loðinn* when he said:

> Thus we know that none in our land is to decide laws beside the king.

Note that these words were said during bitter dispute between the crown and the church. The chieftains in Iceland were in a precarious position and were looking to the royal power for support.[62]

But this kind of thinking did nor make much headway in Iceland at the time. For centuries Icelanders persisted in their opposition to the king's unilateral legislative authority. The basic idea in *Jónsbók* is that the king should keep to the ancient laws and only change them in consultation with the people of the country – in effect, the principal chieftains.[63] This was the arrangement that held good in Icelandic legislation in the centuries to follow: the king frequently had the initiative, while the General Assembly gave its approval. The outcome was therefore a compromise between the old and new ideas on legislative authority.

[60] *Loðinn leppur* (d. 1288/89). A Norwegian diplomat in service of king *Hákon Hákonarson* the Old (1220–63), *Magnús Hákonarson* the law-mender (1263–80) and *Eiríkur Magnússon* (1280–99).

[61] *Árna saga biskups* (The Saga of Bishop Árni), ch. 63.

[62] *Árna saga biskups* (The Saga of Bishop Árni), ch. 85. See also *Saga Íslands* (History of Iceland) III, p. 197, cf. 146.

[63] Sigurður Líndal: *Helztu lagaverk Skarðsbókar – The Law Codes of Skarðsbók*, p. 29 and 56; *Lögfesting Jónsbókar 1281* (The Enactment of Jónsbók 1281), 190ff, cf. *Om vedtagelsen af Jónsbók i 1281*, p. 98. See note 28 above.

IX. MAIN CONCLUSIONS – THE LAW ITSELF AS A CURB ON ARBITRARY POWER

Finally some of the main conclusions may be summarized.

1. Originally laws were unwritten. They were preserved in the memories of men and determined their customary conduct.

2. The first settlers of Iceland came from far and wide and it may be supposed that this had a disturbing effect on established legal traditions. It is most likely that in this new and developing society disputes on what the law was, were frequent. This problem was dealt with by detailed provisions on how to resolve such disputes, the determination of what was operative law being committed to legal experts enjoying public trust. The members of the Law Council were required to *give evidence* regarding the laws that applied and not make new ones: they *framed the laws.*

This procedure did not solve all the problems. In many fields new measures were required. Therefore there was also provision in *Grágás* for the *making of new laws,* though it was assumed that no man was bound by anything other than what he had agreed to. The consequence was that, if there was no agreement, men either declared themselves "out of the law" with one another, or there was a compromise.

3. In order to maintain some kind of control over the preservation of unwritten laws, there was provision for their recital by the Lawspeaker. When the art of writing reached Iceland the grounds for this arrangement were removed.

4. With the writing down of the laws in 1117–18 a new method of preserving them was adopted. It only partly solved the difficulty, however, for by no means all the laws were recorded. Much was still preserved in the minds and traditional behaviour of the people. To maintain stricter control over legal development centralized power was needed, but the conditions for such were lacking. The clauses on the books of law were then introduced.

5. Individuals collected and wrote down articles of law according to their own needs and interests. The legal texts now known under the collective name of *Grágás* may be traced to this activity. Attention has been drawn to their detailed formulation and the clear indications of written preservation. One reason for this is that there are close connexions between literary culture and substantial legislative activity, both in the formulation of laws and the making of new ones.

6. It is uncertain whether or how far *Grágás* contains precepts that were accepted as generally binding in word and practice. Many new legal provisions perhaps never received general acceptance and there was no

central executive authority to enforce them. The authorities in the Icelandic Commonwealth merely defined the law, they did not enforce it.

7. The clauses from the Lawspeaker's and Law Council Sections of *Grágás* discussed here bear unmistakable signs of the concept that good and ancient laws are the foundation of the community; that they are preserved in men's memories – especially those of the legal experts – and that they are a common, impersonal property of all, so that no distinction can be made between them and an ordinary sense of justice.

This description should not be taken to imply that the laws were considered perfect, in the sense that they were what each and every individual would have chosen. Doubtless there were divided opinions on their merits and they would hardly have suited all equally well. There is no reason to suppose that men would have abided by them in every detail without compulsion. Nevertheless it may be assumed that rules of law that had been formed over many years in the intercourse of generations would have suited the bulk of the population tolerably well and afforded the common people some sort of protection against the oppression of the powerful.

In this essay the opinion has been advanced that the idea behind the expression *to frame the laws* is retrospective: to bring to light the substance and content of those ancient laws. *In practice*, however, this was not by any means always done, but *new laws* were introduced. Nevertheless it is of paramount importance that the subject be approached with this idea in mind. Those who framed the laws were not free to make rules after their own will and inclination. They had to be guided by the accepted interests, traditional rights and deeply rooted ideas of the members of their community. This meant that *the law itself* – good ancient law – bound the hands of the lawgiver like a covenant, and thus acted as a curb on the arbitrary exercise of power.

In keeping with this, new laws were binding because of general agreement, not enforcement. This attitude promoted checks by one pressure-group on another, so that rules were shaped out of some kind of compromise. Although these were the rules of the game especially for the more powerful, they supported the general viewpoint that *power was limited*, which afforded the common folk some sort of protection against oppression.

Here lie the roots of mediaeval thinking on lawful government as expressed in the phrase *by law shall the land be built* and in the remark of Þorgeir, chieftain of the Ljósavatn district, reported by Ari the Learned: "*If we sever the law, we shall also sever the peace.*" This understanding of the

nature of law has been regarded as one of the most significant contributions of the Germanic peoples to Western political philosophy and one of the main conceptual supports of the constitutional state, best described in the English phrase: the rule of law.[64] The word *law* then means the rules that have been evolved in the above-mentioned way.

When men began to submit to the decisions of others regarding legislation, whether a majority or an individual, they gained by a more efficient system. But this put an end to the check which the old ideas had provided. *The law itself* was now no longer *the curb on arbitrary power* which it had formerly been. Instead it became *an instrument*, and at the same time the dangerous political device which it has been ever since. The word *law* had thus acquired a new meaning.

8. The Icelandic people held fast to the ancient way of thinking about law. The precepts of *Grágás* quoted above evince a deliberate attempt to adapt to new conditions – including active legislative work (cf. the clauses on the resolution of legal disputes) and the introduction of writing (cf. the clauses on the recording of the laws). Admittedly these provisions did not solve the problem, but instead they have provided one of the most explicit sources to be found anywhere on the subject of mediaeval thinking on law and legislation. Thus they are particularly well suited to shed light on this important element of Western political theory and at the same time on the evolution of the modern idea of the rule of law.

The Icelanders were obliged, however, to solve their constitutional problems in accordance with the generally accepted mediaeval view on proper political constitution involving extensive royal prerogatives. They did so by accepting the authority of the Norwegian king, but supposed that they could ensure their freedom under an absentee monarch whom they believed bound by the common laws of the land. They asserted this with the condition in the Old Covenant that the king should let them *obtain Icelandic law*, and to this they continued to refer for centuries.

[64] Alexander Passerin d'Entréves: *The Notion of the State*, Oxford 1969, p. 82ff., especially p. 85.