

Summary Table of Contents

Introduction

- 1.- **Legality and Power: The Fundamental and Timeless Debate in Governing**
- 2.- **Historical Background: The Evolution of Scholarship**
- 3.- **Modern Background: Recent and Current Scholarship**
- 4.- **Historical Background: The Milestone Instruments**
- 5.- **Modern Background: Recent and Current Instruments**
- 6.- **The Modern Law, Policy and Politics Scene**
- 7.- **The Comprehensive Theory of Political Law**
- 8.- **The Practice of Political Law in the Legislative Branch**
- 9.- **The Practice of Political Law in the Judicial Branch**
- 10.- **The Professional Focus of Political Law: Accountability to Law**
- 11.- **The Accountability to Law of Heads of State and Government: Theory**
- 12.- **The Accountability to Law of Heads of State and Government: Practice**
- 13.- **Patterns of Scenarios in Political Law**
- 14.- **The Need for a Concept of Political Law**

Teaching Guide for Academics

Bibliography

Table of Contents

Dedication	iii
Forewords to the Second Edition	v
Foreword to the First Edition	ix
Preface	xi
Acknowledgments	xv
Introduction	xvii
Table of Cases	xliii
1.- Legality and Power: The Fundamental and Timeless Debate in Governing	1
- Introduction	1
- Awareness and Knowledge	2
- Reason and Restraint	4
- Semantics and Definition	6
- Avoiding Unwarranted Conclusions	8
2.- Historical Background: The Evolution of Scholarship	11
- Introductory Remarks	11
- Legality	12
- Imaging Legality	13
- The Great Scholars	14
- Machiavelli	15
- Locke	17
- Montesquieu	18
- Voltaire	21
- Sieyès	23
- Tocqueville	25
- Marx	27
- Bagehot	27
- Dicey	28
- Weber	30
- The Scholarship, not of “Law and Politics”, but of “Power, Discretion and Legality”	31
- Conclusion	31

3.-	Modern Background: Recent and Current Scholarship	39
-	Introduction	39
-	Twentieth Century Scholars	39
-	Hans Kelsen	39
-	Harold J. Laski	43
-	Jerome Hall	45
-	Niklas Luhmann	47
-	Sir Bernard Crick	49
-	Twenty-First Century Scholars	52
-	Lord Tom Bingham	52
-	Alan Dershowitz	57
-	Dick Howard	58
-	Martin Loughlin	60
-	Bogdan Iancu	63
-	Mauro Zambroni	65
-	Recent and Current Practitioners	67
-	Archibald Cox	67
-	Václav Havel	69
-	Bernard Kouchner	72
-	Irwin Cotler	73
-	Jacques Attali	75
-	Robert Reich	76
-	András Sajó	80
-	Paul Krugman	82
-	Laurent Cohen-Tanugi	85
-	Jeffrey Toobin	86
-	Continuation	87
4.-	Historical Background: The Milestone Instruments	89
-	Introduction	89
-	The <i>Codex Regius Gragas</i> of Iceland	90
-	The <i>Magna Carta Libertatum</i> of England	91
-	The <i>Golden Bull</i> of Hungary	98
-	The <i>Federal Charter</i> of Switzerland	99
-	The <i>Great Privilege</i> of The Netherlands	101
-	The <i>Édit de Nantes</i> of France	101
-	The <i>Bill of Rights</i> of Great Britain	102
-	The <i>Declaration of Independence</i> of the United States	104
-	The <i>Constitution</i> of the United States	104
-	The <i>Déclaration des Droits de l'Homme et du Citoyen</i> of France	106
-	The <i>Constitution Act, 1867</i> of Canada	109
-	The <i>Charter</i> of the United Nations	110
-	The <i>Universal Declaration of Human Rights, 1948</i>	112
-	The <i>European Convention on Human Rights, 1950</i>	116
-	The <i>International Covenant on Civil and Political Rights, 1966</i>	117

-	The <i>Constitution Act, 1982</i> of Canada	119
-	The <i>Rome Statute of the International Criminal Court, 1998</i>	120
-	A Proposed <i>Constitution for Québec, 1994</i>	122
-	Conclusion in Respect of the Major Instruments	124
-	Conclusion in Respect of the Role of Law	126
5. -	Modern Background: Recent and Current Instruments	129
-	Introduction	129
-	The <i>Charter of Paris for a New Europe of the Conference on Security and Co-Operation in Europe, 1990</i>	131
-	The <i>Universal Declaration on Democracy of the Inter-Parliamentary Union, 1997</i>	134
-	The <i>Déclaration De Bamako of La Francophonie, 2000</i>	136
-	The <i>Summit of the Americas Declaration and Plan of Action, 2001</i>	138
-	The <i>Commonwealth (Latimer House) Principles on the Three Branches of Government, 2003</i>	139
-	The <i>Treaty Establishing the Constitution for Europe, 2004; and the Treaty of Lisbon, 2007; and the Consolidated Reader-Friendly Edition of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as Amended by the Treaty of Lisbon, 2007 and Charter of Fundamental Rights and Freedoms of the European Union, 2010</i>	143
-	The <i>African Charter on Democracy, Elections and Governance, 2007</i>	147
-	The <i>European Commission for Democracy Through Law (Venice Commission) Report on the Rule of Law, 2011 and the Communication from the European Commission to the European Parliament and from the European Commission to the European Parliament and the Council: a New EU Framework to Strengthen the Rule of Law, 2014</i>	149
-	The <i>Declaration of The High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels of the United Nations, 2012 and the Annual Reports of the Secretary General of the United Nations to the General Assembly on Strengthening and Coordinating United Nations Rule of Law Activities</i>	158
-	The <i>Charter of the Commonwealth, 2013</i>	164
-	Instruments of Core Principles of the Legal Profession	165
-	Instruments Produced by Non-Governmental Organizations	170
-	Summary	172
-	- The Necessity for Modern Instruments	172
-	- The Content of the Instruments	174
-	- Societal Activity in Support of the Modern Instruments	175
6. -	The Modern Law, Policy and Politics Scene	181
-	An Intellectual Perspective on Democracy	181
-	Governing	182
-	Democracy	183

-	Fundamental Forces in Democracy	185
-	The Instruments of Governing: Evidence of the Fundamental Forces	187
-	Relationships Among the Fundamental Forces	188
-	Patterns of Relationships	191
-	Use of the Methodology	193
-	Use of the Analysis	194
-	A Short Word about Sources	194
7.-	The Comprehensive Theory of Political Law	199
-	Developing a General Theory	199
-	Definition of the Subject Matter	200
-	Compilation	203
-	Interaction	206
-	Influence and Impact	209
-	Accountability to Law	211
-	Uses	213
-	Illustration	214
8.-	The Practice of Political Law in the Legislative Branch	235
-	Purpose of the Chapter	235
-	The Extent of the Legislative Process	235
-	- The Requirement to Legislate	236
-	- The Optional Decision to Legislate	238
-	- The Limitation of Legislation	241
-	- The Essence of a Legislative Proposal	241
-	- Consultations	244
-	- Preparation of a Bill	245
-	- Cabinet Approval	247
-	- The Parliamentary Phase	251
-	- Distinct Rules Applicable to the Parliamentary Phase	255
-	- The Political Law Psychology of the Legislative Process	256
-	- Implementation	259
-	- The Life Cycle of Legislation	260
-	- Equilibrium in the Legislative Process	261
9.-	The Practice of Political Law in the Judicial Branch	263
-	Introduction	263
-	Justiciability	266
-	Need for a Broader Analytical Perspective	267
-	Elements of the Analytical Framework: Characterization of the Actions . .	269
-	- Purpose	270
-	- Subject Matter	272
-	- Parties	274
-	- Conduct of an Action	280
-	- Judgment	283

TABLE OF CONTENTS / xxxvii

- Impact	289
- Outcome of the Research	290
10.- The Professional Focus of Political Law: Accountability to Law	293
- Introduction	293
- The Elements of Democratic Governing Requiring Accountability to Law	295
- Systemic Factors	297
- The Constitution	297
- Statutes	298
- Jurisprudence	299
- Quasi-Legal Instruments	301
- Scholarly Instruments	303
- Professional Factors	305
- Elite Cohesion and Social Consensus	306
- Government and Opposition	306
- Nature of the Subject-Matter	306
- Controversiality and Urgency	307
- Public Opinion and Media	308
- Perceptual Factors	308
- Education	309
- Personal Views	309
- Social Circumstances	313
- Public Stances	314
- Health	315
- State of Mind	316
- Conclusion	320
- The Central Motivating Factor	320
- Overview	324
- Implementing Accountability to Law	325
11.- The Accountability to Law of Heads of State and Government: Theory	335
- Introductory Comments	335
- The Specificity of Heads of State and Government	336
- An Enumeration of Methods and Instruments	339
- Traditional Legal Liabilities for Execution of Duty on Behalf of the State: An Initial Reading	340
- Misfeasance in Public Office	342
- Misuse of Public Office	345
- Misconduct in Public Office	346
- Criminal Breach of Trust	347
- Modern Legal Liabilities for Execution of Duty on Behalf of the State: Inquiries	348
- Apologies Not Based on Legislation	351
- Apologies Based on Legislation — The Ontario Model	352

- Public Recognition of Wrongdoing by Civil Society	354
- Judicial Determination of Resignation	355
- Special Prosecutor Legislation — The British Columbia Model	359
- International Declarations — The Harare Commonwealth Declaration, 1991	363
- Truth and Reconciliation Commissions — The South Africa Model	364
- The Responsibility to Protect	369
- The Doctrine of Universal Jurisdiction	372
- The International Criminal Court	382
- The Theoretical Underpinning of the Accountability to Law of Heads of State and Government	387
- Alternatives to Accountability	390
12.- The Accountability to Law of Heads of State and Government: Practice	399
- Definition of the Issue	399
- The Stakes of Accountability to Law at this Level	401
- Categorization of the Evidence	404
- Survey of Historical Practice	407
- Category 1: Historical Cases of Interest	408
- The Prosecution of Louis XVI	408
- The Prosecution of Hideki Tojo	411
- Survey of Modern Practice	413
- Category 2: Legal Proceedings Based on Constitutional Conflict and Crimes against the State	414
- The Litigation against Jean Chrétien	415
- The Legal Proceedings Regarding Guergis' Allegations against Stephen Harper	416
- The Prosecution of Mohamed Nasheed	417
- The Litigation of the Refusal to Recommend Senators for Appointment Stephen Harper	421
- Category 3: Legal Proceedings Based on Matters of Election and Succession of Governments	426
- The Prosecution of Laurent Gbagbo	427
- Category 4: Legal Proceedings Based on Matters of Public Administration	430
- The Legal Proceedings Regarding Maurice Duplessis	430
- The Legal Proceedings Regarding Michael Harris	432
- Litigation Relating to the Correspondence of Prince Charles	433
- Category 5: Legal Proceedings Based on Maladministration	435
- The Prosecutions of Laurent Fabius	436
- The Litigation Regarding Geir Haarde	442
- Category 6: Legal Proceedings Based on Matters of Ethics and Corruption	454
- The Legal Proceedings Regarding Brian Mulroney	455
- The Prosecutions of Lise Thibault	464

- Addendum Resulting From the Panama Papers	471
- Addendum Relating to Dilma Rouseff	472
- Category 7: Prosecution of Genuine Criminal Offences	472
- Category 7 (A): Prosecution of Genuine Criminal Offences: Domestic	473
- Reports and Allegations on the Criminality of Hashim Thaçi	473
- Category 7 (B): Prosecution of Genuine Criminal Offences: Foreign, International	474
- The Prosecution of Manuel Noriega in the United States	474
- The Inquiry Implicating Vladimir Putin	476
- Category 8: Legal Proceedings Based on Crimes Against Humanity and Equivalent Offences	480
- Category 8 (A): Legal Proceedings Based on Crimes Against Humanity Equivalent Offences: Domestic	480
- The Prosecution of Ríos Montt	480
- Category 8 (B): Legal Proceedings Based on Crimes Against Humanity and Equivalent Offences: Foreign, Not International	485
- The Prosecutions of Augusto Pinochet	485
- The Prosecutions of Hissène Habré	491
- Category 8 (C): Legal Proceedings Based on Crimes Against Humanity and Equivalent Offences: International	497
- The Prosecution of Uhuru Muigai Kenyatta	497
- The Dzhugashvili Litigation	502
- The Litigation Relating to Robert Mugabe	503
- The Prosecution of Radovan Karadžić	505
- Category 9: Legal Proceedings Based on Alleged Crimes: Proceedings are in Fact Political Revenge or Retribution	508
- The Show-Trial of Nagy Imre	509
- The Impeachment of William Jefferson Clinton	510
- The Impeachment of Vaclav Klaus	515
- The Prosecutions of Yulia Tymoshenko	516
- The Prosecution of Mohamed Morsi	524
- Category 10: Inchoate and Symbolic Legal Proceedings	524
- The Attempt to Impeach Tony Blair	525
- Addendum Relating to The Chilcot Inquiry Involving Tony Blair	526
- The Attempt to Prosecute Omar al-Bashir	528
- The Threat of Prosecution of Nouri Al-Maliki	532
- The Significance of Currently Evolving Legal Proceedings	532
- Comprehensive Assessment of the Evidence	536
- The Body of Law Relating to Heads of State and Government	537
- Alternatives	541
- Linkage Between Theory and Practice	542
- General Conclusions	544
13.- Patterns of Scenarios in Political Law	593

-	Introduction	593
-	Mapping the Scenarios	595
-	- Non-Conflictual Scenarios	595
-	- Constitutional Dialogue Scenarios	596
-	- Conflictual Scenarios	597
	Introduction	597
-	- Democracy & the Rule of Law	598
	Introduction	598
	Canada: The G20 Summit of 2010	599
	United Kingdom: The 2003 Decision to Engage in the Iraq War	607
-	- Constitutionalism	610
	Hungary: Limitation of the Constitutional Court's Jurisdiction	610
-	- Federalism and Respect for Minorities	612
	Instruments Regarding Québec's Specificity	612
-	- Political Party and Electoral Matters	613
	Fixed-Date Elections	613
-	- Parliamentary Matters	619
	Redistribution	620
	Proportional Representation	620
	Change of Political Allegiance	621
	Parliamentary Institutions	621
	Audit of Parliament	622
-	- Statutory Matters	623
	The Kelowna Accord	623
-	- Institutional Matters	624
	The Public Appointments Commission	624
	The Parliamentary Budget Office	627
-	- Public Administration Matters	632
	Legal Advice	632
	Development of Policy	634
	Decision to Litigate and Appeal	638
-	- Litigation Matters	643
	Controversial Political Speech	643
-	- Judicial Matters	648
	Bilingual Comprehension on the Supreme Court of Canada	648
-	- International Relations	651
	Canadian Centre for Advancing Democracy	651
-	- General Conclusions	652
14.-	The Need for a Concept of Political Law	663
-	- Information and Knowledge	663
-	- Understanding and Participation	664
-	- Distinguishing Genuine Democracy	665
-	- Public Decision-Making	666
-	- Justice	667

TABLE OF CONTENTS / xli

- Democracy, Authoritarianism and Dictatorship	668
Teaching Guide for Academics: A Model Syllabus for a Course on Political Law . . .	669
Bibliography	693
Index	755