

SUMMARY TABLE OF CONTENTS

- 1 Definition of the Basic Concepts of Political Law
- 2 Relation of, and Relative Influences Among, Law, Policy and Politics
- 3 Legal Elements of Democracy
- 4 Sovereignty, Legitimacy and Governance
- 5 Elections
- 6 Parties, Campaigning and Political Promises
- 7 Choice of the Appropriate Instrument for Governance
- 8 Integrity of the Legislative System
- 9 Legality in Governmental Management
- 10 Litigation of Political Law Issues
- 11 Accountability to Law
- 12 The Accountability to Law of Heads of State and Government
- 13 Democratic Government and Politics in the 21st Century

TABLE OF CONTENTS

Table of Cases	xiii
7 Choice of the Appropriate Instrument for Governance...	1
7.1 Constitutional Authority to Legislate.....	1
7.2 Issue: Constitutional Requirement to Legislate	3
7.3 Issue: Requirement to Use Legislation as the Proper Instrument.....	7
7.4 Issue: Appropriate Instances for the Use of Legislation as the Proper Instrument.....	14
7.5 Issue: Appropriate Instances for the Use of Policy as the Proper Instrument	21
7.6 Issue: Appropriate Instances for the Use of a Program as the Proper Instrument	24
7.7 Issue: Appropriate Instances for the Use of Politics as the Proper Instrument	26
8 Integrity of the Legislative System.....	29
8.1 Issue: Legal Personality, Status and Personality of Parliament.....	30
8.1.A Parliament as a Whole.....	30
8.1.B Senate.....	38
8.1.C House of Commons	53
8.1.D Senators and Members of Parliament	60
8.1.E Caucus.....	67
8.2 Issue: Protection of Legislative Institutions and Legislators.....	70
8.3 Issue: Membership in Parliamentary Bodies.....	93
8.4 Issue: Privilege: the Regime of Rules Applicable to Parliamentary Bodies and Parliamentarians ...	107
8.4.A Definition and Delimitation of Parliamentary Privilege.....	107
8.4.B Categories of Privilege	127

8.4.B.1	Management of Internal Affairs.....	127
8.4.B.2	Proceedings; Freedom of Expression in Parliament.....	127
8.4.B.3	Exclusion of Strangers	137
8.4.B.4	Management of Employees.....	137
8.4.B.5	Access to Parliament	146
8.4.B.6	Non-Use of Testimony in “Another Place”	150
8.4.B.7	Non-Compellability of Witnesses	161
8.4.B.8	Immunity From Prosecution / Immunity From Civil Action.....	181
8.4.C	Relying on Privilege	183
8.5	Issue: Work of the Legislative Branch	194
8.5.A	Work of Members and Senators	194
8.5.B	The Preparation of Legislation	226
8.5.C	The Legislative Process	240
8.5.D	Floor Crossing.....	258
8.5.E	Prorogation and Dissolution	265
8.6	Issue: Unfettered Nature of the Legislative Process From Policy and Politics	276
8.7	Issue: Validity Legislation	293
8.7.A	Validity of the Legislative Process	293
8.7.B	Maintaining Invalid Legislation for Public Policy Purposes	307
8.8	Issue: Royal Assent.....	310
8.9	Issue: Use of Legislation for Political and Partisan Purposes	316
8.10	Issue: Legal Support for the Work of Legislators.....	319
8.11	Issue: Employees of Parliament.....	325
9	Legality in Governmental Management.....	329
9.1	Issue: Legal Personality, Powers, Duties and Functions in the Executive Branch	330

Summary Table of Contents / vii

9.1.A	The Cabinet	330
9.1.B	Government Departments.....	335
9.2	Issue: Implementation of Government Policy Within Law.....	341
9.2.A	Legally Valid Management.....	341
9.2.B	Maladministration/Malfeasance/Misfeasance; Abuse of Power; Breach of Trust by Public Officials	363
9.3	Issue: Legality in the Management of the Machinery of Government	363
9.4	Issue: Political Interference in State Appointments and Dismissals	381
9.5	Political Interference in State Appointments	399
9.6	Issue: Legality in the Management of Social Policy	408
9.7	Issue: Legality in the Management of Economic Policy	411
9.7.A	Major Economic Issues	411
9.7.B	Government Contracting.....	446
9.8	Issue: Legality in the Management of Foreign Policy, Defence and Security.....	448
9.8.A	National Boundaries and the National Interest.....	448
9.8.B	Foreign Policy	451
9.8.C	National Defence, Peace-Keeping and War.....	469
9.8.D	Public Security	491
9.9	Issue: Legality in the Management of International Trade.....	491
9.9.A	Bilateral and Multilateral Trade	491
9.9.B	International Assistance and Assisted Export	497
9.10	Issue: Legality in the Management of the Financing of Government.....	497

10	Litigation of Political Law Issues	505
10.1	Issue: the Establishment of the Judiciary	505
10.2	Issue: the Nature of Litigation	509
10.3	Issue: the Litigation of Policy	511
10.4	Issue: the Politically Neutral Nature of Judicial Functions	513
10.4.A	Justiciability	513
10.4.B	The Political Questions Doctrine	517
10.5	Issue: the Decision Whether to Initiate Litigation in Political Matters	520
10.6	Issue: the Decision Whether to Defend Litigation in Political Matters	534
10.7	Issue: Litigation by Political Institutional Actors	541
10.7.A	Political Parties as Litigators	541
10.7.B	Parliamentarians as Litigators and Parties to Litigation	541
10.8	Issue: Judicial Notice of Political Facts, Parliamentary Speeches and Public Administration	542
10.9	Issue: Use of Litigation for Political and Partisan Motives	542
10.10	Issue: Litigation of Primarily Political and Partisan Issues	566
10.11	Issue: Reporting on Events and Figures in Political Life	603
10.12	Issue: Litigation of the Legislative Process	622
10.13	Issue: Political Trials	626
10.13.A	Definition of Political Trials	626
10.13.B	Criminal Prosecutions Alleging Politically Motivated Offences	645
10.13.C	Criminal Prosecutions Based on Politically Motivated Defences	657

10.14	Issue: Political Involvement in the Prosecution of Criminal Offences	665
10.15	Issue: Use of Prosecution for Political and Partisan Motives	674
10.16	Issue: Testimony by Political Figures in Litigation and in Trials	678
10.17	Issue: Relations Between Legal Systems in Policy and Political Matters	678
11	Accountability to Law	679
11.1	Issue: the Doctrine of Accountability to Law	680
11.1.A	The General Concept of Accountability to Law	680
11.1.B	Willingness to Abide by the Law	686
11.1.C	Wilful Desire to Respect and Apply the Law	688
11.2	Issue: Obligation of Public Servants to Observe Legal Norms.....	690
11.2.A	Subjection of Public Servants to Domestic Legal Norms.....	690
11.2.B	Subjection of Public Servants to Foreign Legal Norms.....	703
11.2.C	Subjection of Public Servants to Norms of International Law	707
11.2.D	Law as a Second Language for Non-Lawyer Public Servants	710
11.3	Issue: Professional Ethics of Public Servants	712
11.4	Issue: Obligation of Parliamentarians to Observe Legal Norms.....	715
11.5	Issue: Professional Ethics of Parliamentarians / Ethics Commissioners	722
11.6	Issue: Obligation of Members of the Executive Government to Observe Legal Norms.....	727

x / The Law of Democratic Governing

11.7	Issue: Professional Ethics of Members of the Executive Government.....	743
11.8	Issue: Obligation of Heads of State and Government to Observe Legal Norms.....	779
11.8.A	Subjection of Heads of State and Government to Domestic Law.....	779
11.8.B	Subjection of Heads of State and Government to Foreign Law	799
11.8.C	Subjection of Heads of State and Government to International Law	808
11.9	Issue: Professional Ethics of Heads of State and Government	821
11.10	Issue: Obligation of Government to Observe Legal Norms.....	848
11.10.A	Prevalence of Legal Norms Over Other Written Norms.....	848
11.10.B	Application of Legal Norms Even in the Absence of Texts: “Principes généraux du droit”	857
11.10.C	Prevalence of Legal Norms Over Political Interests.....	857
11.10.D	Application of Domestic Legal Writ to Foreign Governments.....	863
11.11	Issue: Difference Between Private Legal Obligation and Public Accountability to Law	863
11.12	Issue: Political Unpopularity of Legal Norms	865
11.13	Issue: Role of Lawyers in Government	875
11.14	Issue: State Support for Public Participation in the Political / Legal System	915
12	The Accountability to Law of Heads of State and Government	923
12.1	Historical Cases of Interest.....	923

12.2	Legal Proceedings Based on Constitutional Conflict and Crimes Against the State.....	923
12.3	Legal Proceedings Based on Matters of Elections and Succession of Governments	930
12.4	Legal Proceedings Based on Matters of Public Administration	935
12.5	Legal Proceedings Based on Maladministration.....	940
12.6	Legal Proceedings Based on Matters of Ethics and Corruption	966
12.7	Prosecution of Genuine Criminal Offences.....	979
12.7.A	Prosecution of Genuine Criminal Offences: Domestic	979
12.7.B	Prosecution of Genuine Criminal Offences: Foreign, Not International	979
12.8	Legal Proceedings Based on Crimes Against Humanity and Equivalent Offences	987
12.8.A	Legal Proceedings Based on Crimes Against Humanity and Equivalent Offences: Domestic	987
12.8.B	Legal Proceedings Based on Crimes Against Humanity and Equivalent Offences: Foreign, Not International	994
12.8.C	Legal Proceedings Based on Crimes Against Humanity and Equivalent Offences: International.....	1003
12.9	Legal Proceedings Based on Alleged Crimes: Proceedings That are in Fact Political Revenge or Retribution	1020
12.10	Inchoate and Symbolic Legal Proceedings	1032
13	Democratic Government and Politics in the 21st Century	1043
13.1	“Democracy”	1044

13.2	Defining Democratic Government and Governing	1055
13.3	Defining Democratic Politics and Rights	1063
13.4	Major Current Themes in Political Law	1073
13.4.A	Promotion of Legality in World Politics	1073
13.4.B	Protection of People From Arbitrary Power	1078
13.4.C	Protection of Minorities from Abuse	1095
13.4.D	Protection of the Environment Through Law.....	1102
13.4.E	Promotion of Politics Within Legal Frameworks	1125
13.4.F	Conflict Between Sovereignty and Self-Determination	1183
13.4.G	Democracy Versus Authoritarian Lawlessness.....	1189
13.5	The Right to Education About Democracy and the Rule of Law/State Obligation of Public Education About Democracy.....	1249
13.6	The Right to Democratic Government	1255
13.7	The Obligation of States to be Democratic	1256
<i>Index</i>		<i>1281</i>