

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</i> ; and the <i>Treaty of Lisbon, 2007</i> ; and the <i>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</i> and <i>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</i> and the <i>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</i> and the <i>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