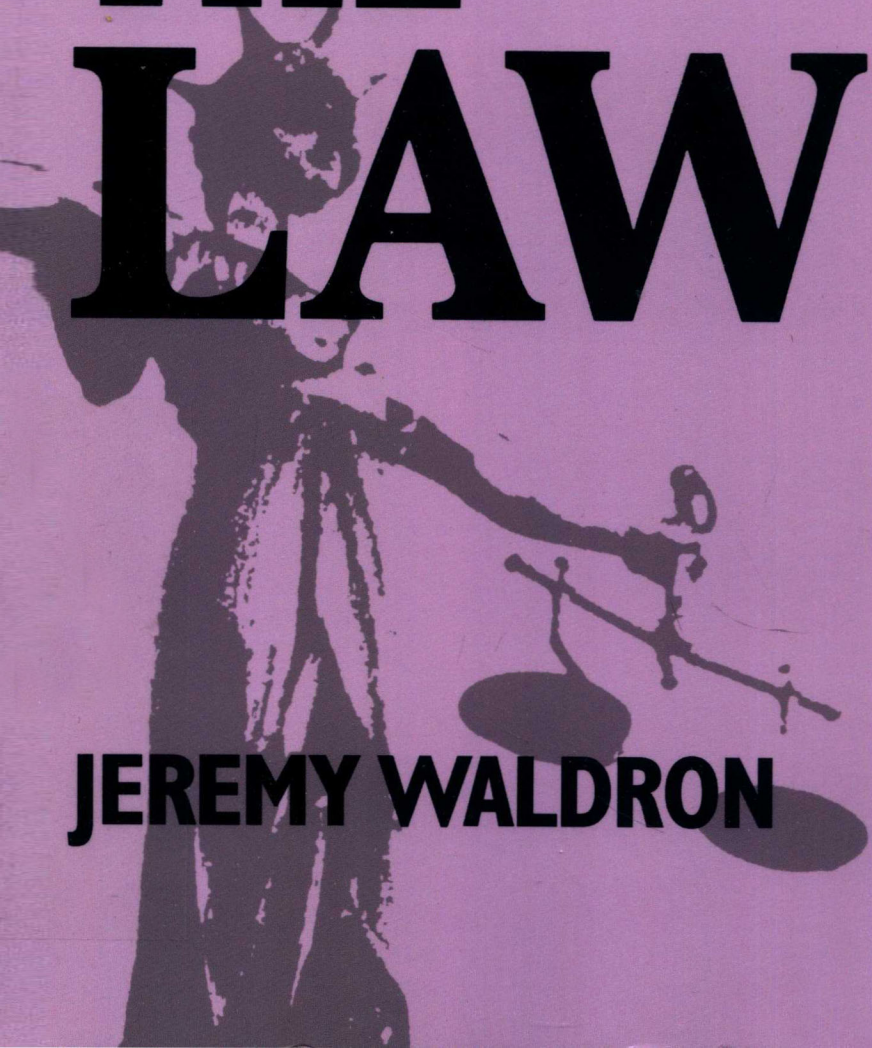
THEORY & PRACTICE IN BRITISH POLITICS

ROUTLEDGE

THE LAW



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The Law

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Theory and Practice in British Politics

Series editors: Desmond S. King and Jeremy Waldron

The Law

The Law brings issues of legal theory to life by relating them to real problems in British politics. Questions about human rights, the rule of law, the unwritten constitution, the role of judges, law and politics, and civil disobedience are often discussed as purely abstract issues. Jeremy Waldron, however, considers them in the context of events like the GLC's 'Fares Fair' case, the Clay Cross incident, the choice of Prime Minister, interrogation techniques in Northern Ireland, the 1984-5 Miners' Strike, and so on. He shows that the role of law is not a dry conceptual study but instead raises issues that lie at the very heart of British politics, and he points out that many political controversies in turn cannot be understood without looking at the issues of legal philosophy at stake.

This lively text is intended primarily for students of politics as well as law, but it will also be of interest to anyone who is concerned about the rule of law in Britain.

Theory and Practice in British Politics

This new series bridges the gap between political institutions and political theory as taught in introductory British politics courses. While teachers and students agree that there are important connections between theory and practice in British politics, few textbooks systematically explore these connections. Each book in this series takes a major area or institution and looks at the theoretical issues which it raises. Topics covered include the police, Northern Ireland, Parliament, electoral systems, the law, cities, central government, and many more. No other textbook series offers both a lively and clear introduction to key institutions and an understanding of how theoretical issues arise in the concrete and practical context of politics in Britain. These innovative texts will be essential reading for teachers and beginning students alike.

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Series editors' preface

Students of British politics are often given the impression that there are two quite distinct enterprises going on in political science departments. There is the empirical and historical study of political life and political institutions – voting systems, electoral dealignment, the committee structure of the House of Commons and so on. And there is the theoretical and philosophical study of concepts and values – democracy, justice, rights, representation and authority. They are studied by different people, taught by different lecturers, in different parts of the curriculum; indeed they are more or less different disciplines. Theory is theory, and institutions are institutions, and never the twain shall meet.

We are basing this series of books on the assumption that that is a sterile and uninteresting way to teach political science. Of course there has got to be some sort of academic division of labour. But the issues that theorists teach are called *political* theory because they arise out of politics and they concern politics. You simply do not understand debates about justice or democracy or authority unless you see their relevance to contemporary political conflict – indeed, unless you see that they are exactly the sort of things that are at stake in political conflict. If you see those debates as simply the anatomy of concepts, you will, quite understandably, find it difficult to see why anyone should be interested. And the same is true if you see them as simply an excuse for reading old books! The theory of democracy is not studied simply because John Stuart Mill wrote about it in *Considerations on Representative Government*; rather, Mill's book is read because it contains a fund of insight that may help us to address real issues in political life more consistently, more clear-headedly and with a more sensitive awareness of the variety of interests and principles at stake.

The books in this series each take a major area or institution of British politics and explore the political theoretical issues which it raises. The objective of each volume is to introduce the institution

under study but to do so in relation to a set of theoretical problems and political values. The books, therefore, do not supplant existing institutional analyses in their respective areas. Rather, they offer a distinct and unprecedented examination of the interaction of political institutions with political values in British politics from which the reader should learn a good deal about both. The reader should come away with a grasp of each institution and an appreciation of how dominant issues in political theory occur in all areas of politics. And their understanding of political theory should be the richer for this appreciation.

Desmond S. King
Jeremy Waldron

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Chapter one

Introduction

The law in Britain is not just of interest to lawyers. The legal system affects us all because it purports to regulate a lot of our behaviour and to provide a framework for much of our interaction in personal, social, and economic life. More than that, the law is also the deliberate and articulate expression of our political decision-making; the legal system is part of the political system. So we are interested in law, not only in a passive capacity as people affected by it, but also in our active capacity – as citizens, voters, agitators, and politicians – because it represents what has been done or resolved in our name and in the name of our community. It is not merely a law *for* us; if we are a democracy, it is also supposed to be *our law*.

Legal theory

My aim in this book is to introduce students of British politics to some of the main issues of legal theory. Hard-headed cynics should not be put off by the word 'theory'. I mean our general and rigorous thinking about the law, the sort of thinking we do when we are determined to work something out at a general level, and pay attention to all the complications, without being seduced by any of the easy conventional solutions. I hope to show in this book that that sort of general thinking can maintain its philosophical rigour while still being rooted in the concrete reality of the British political system.

We have stressed in our Introduction to the *Theory and Practice in British Politics* series that topics in political theory are best presented and most usefully thought about as issues that arise out of concrete problems generating concrete implications. We don't study political theory purely in order to do conceptual analysis, to distinguish 'power' from 'authority' or to catalogue the nineteen different meanings of 'democracy'. Nor do we do it purely to

resuscitate 'great books' like John Stuart Mill's *On Liberty* or Hobbes's *Leviathan*. We study it because the conceptual questions represent in abstract terms things that have actually mattered so much that real people have fought and died over them, and because the 'great books' represent some of the best efforts that have been made down the ages to address those issues honestly in the face of the conflict and the danger with which they were always fraught.

The same is true for the philosophy of law. We don't study jurisprudence because the definition of the word 'law' matters to us; what matters is that we have a clear sense of everything that is at stake when disputes break out about obedience and disobedience or about the proper framework within which to pursue some social policy. And we certainly don't study the philosophy of law just because we want to know what John Austin wrote in *The Province of Jurisprudence Determined* or what Ronald Dworkin said in *Law's Empire*. Rather we read and study those books because, again, we have reason to believe they contain a fund of insight that will help us to address and understand real issues about courts, constitutions, and social conflicts.

What I shall do in the chapters that follow is to give an indication of the way theoretical issues about the law arise out of the part law plays in the political life of the United Kingdom. The legal system is part and parcel of the political system, and questions about legality, judicial decision-making, and the respect and obedience that the law commands (if it does) are integral to the political life of this country. Certainly, it would be over-ambitious in a small book to try to explain the political importance of every single topic in jurisprudence. But I have taken seven of the main issues in the philosophy of law, and I will try to show that they are not just issues of abstraction and conceptual analysis, but that they concern us all in our understanding of what is actually going on.

Besides students of British politics, the other audience I want to address are those who teach and study jurisprudence in law schools. Here again, there is a traditional distinction between practice and theory: between 'black-letter' law – the study of the law as it is – and legal philosophy, which is put out as a different set of issues entirely. The one studies the validity of contracts, the formation of companies, and the defences to homicide; the other studies the concept of law and its relation to the concept of morality or the hundred and one different meanings that the word 'right' can have. As they are traditionally taught, the main debates in jurisprudence must seem completely mysterious to law students. How do you decide whether to be a legal positivist or a defender of natural law? Is it like registering in America as a Democrat or a Republican –

something you do as a matter of course when you come of age? Or – worse still – is it like picking sides for a friendly game of football – you join one team because you want to play the game, rather than playing the game because you care about one of the sides? Once again, what has to be done is to put some flesh on the theoretical bones of legal philosophy. We need to show why the issues matter, and to show that they matter is to show the difference they might make in the practical arenas where laws are crafted, judgements given, and obedience or disobedience counselled or procured.

The legal system

Before proceeding, it may be worth giving those who are unfamiliar with it a brief sketch of the main institutions of the legal system in Britain and of the sources of legal materials. (Law students can proceed directly now to Chapter two.)

Technically, there is not one legal system in the United Kingdom but two or (depending how you count) several. The Acts of Union, bringing England and Scotland together under one Parliament in 1707, guaranteed the independence of the Scottish courts and the preservation of Scots law, particularly in areas like tort, contracts or delict: areas in which people sue one another for damages. At the time, the legal system in Scotland differed from its English counterpart not only in substance but in ethos and tradition (it was much more heavily influenced by the tradition of Roman law), and many of these differences remain. There has also been a separate system for the administration of justice in Northern Ireland; indeed from 1921 till the introduction of 'direct rule' from Westminster in 1972, the Northern Ireland Parliament made laws for the Province under the auspices of its own constitution. From a political point of view, however, the legal system in the United Kingdom is unitary and the Parliament at Westminster remains the most powerful source of law, with authority to legislate for the whole realm or for Scotland and Northern Ireland separately if that is thought desirable. Britain as a whole is now subject also to European Community law, and that takes precedence over all British legislation.

Almost every aspect of law in Britain is governed both by statute and by judge-made law. Statutes are Acts of Parliament, passed by the House of Commons and the House of Lords and assented to by the Queen.[1] Unlike their counterparts in the United States, the courts in Britain have no authority to hold a statute 'unconstitutional'. Acts of Parliament prevail over all other sources of law, and (subject to the force of European Community law) where they conflict, the earlier statute gives way to the later. This is what

people mean (among other things) when they say Parliament is 'sovereign'.[2] Readers should not need to be told that for the most part Parliament is controlled in effect by the Cabinet, and most legislative proposals originate there. A collection of *Statutes in Force* can be found in any good library, usually ordered by subject matter. Statutes are organized into sections and sub-sections which lay down particular rules and definitions, and they are usually cited by what is called their short title and date, for example the Tumultuous Petitioning Act 1661, followed by the number of the section in question.

Specific statutes may authorize the making of regulations – sometimes referred to as subordinate legislation – by Ministers of the Crown, local councils, or other public bodies. These have the force of law, but they are governed strictly by the requirement that they must fall within the terms of reference which Parliament has laid down. If they go beyond this, they are *ultra vires* and have no legal validity. The Crown (in effect the Cabinet) also has authority to issue orders which have the force of law in areas governed by the royal prerogative (examples include the dissolution of a parliament or the declaration of war).

It is customary to say that the law is applied and interpreted in the courts. For the most part that is false. Law is interpreted and applied to particular situations by ordinary people and ordinary officials doing roughly what they think it says and ordering their relations in some kind of accordance with its provisions. The courts are involved only in the comparatively rare case where an official or a private individual wants to make an issue of someone else's behaviour so far as the law is concerned.

When someone raises such an issue, the courts will attempt to interpret and apply not only statute law but also earlier reported decisions of other courts in similar cases. The practice of following decisions in earlier cases is known as 'the doctrine of precedent' and is discussed in more detail in Chapter six. There is a hierarchy of courts; those lower in the hierarchy are expected slavishly to follow the decisions of those above them, and in most cases they are also expected to follow the decisions of other courts at the same level. Obviously, though, a certain amount of flexibility derives from the fact that no two cases are ever *exactly* alike and, even when they are, no two people will give exactly the same account of *how* they are alike.

In the judicial hierarchy the courts above hear appeals from the courts immediately beneath them. There is not always an automatic right of appeal: sometimes the aggrieved party has to have the approval of the court she is appealing from or the one she is

appealing to before she can proceed. Though occasionally serious issues of law are raised in Magistrates' Courts, and though serious criminal cases always originate in the Crown Courts, most of the *influential* cases in our law begin life in one of the divisions (Family, Chancery, or Queen's Bench) of what is called 'the High Court'. From a political point of view, the Queen's Bench Division of the High Court is the most interesting, for it has responsibility for reviewing the legality of governmental and administrative action. Appeals from the High Court are taken to the Court of Appeal. Above the Court of Appeal, the highest court in the land is Parliament, in the guise of the House of Lords. Appeals there are heard not by the whole House (earls, bishops, and all), but by a committee of senior judges called Lords of Appeal or Law Lords. They sit usually five at a time on each case and they decide by a majority.

Court decisions that are thought noteworthy are published in the *Law Reports*. A reported decision will begin with a summary of the facts and of what was decided, and it will then set out the full text of the judge's decision (often running to many pages) saying why this particular finding was given in this particular case. If there is more than one judge, then all the decisions will be printed. If they disagree, the side with the greater support wins (though the majority decision may still comprise several distinct speeches). Cases are referred to by the (often abbreviated) names of the parties – for example, *Swallow and Pearson v. Middlesex C.C.* – and the year and abbreviated title of the volume in which they appear.

The official Law Reports are published every month or so, and bound into one or more volumes corresponding to each year. When they first come out, they are called *The Weekly Law Reports* (WLR), but they are eventually organized into separate volumes corresponding to the different levels and areas of judicial decision-making. Thus, for example, '*Christie v. Leachinsky* [1947] AC 573' refers to the report of a decision of the House of Lords taken in the case of Christie against Leachinsky (or, as we say in the trade, 'Christie and Leachinsky'), published in the 1947 volume of the official Law Reports devoted to 'Appeal Cases', beginning on page 573. And '*R. v. Kulynycz* [1971] 1 QB 367' refers to a report of a criminal case – the Queen ('R.' or 'Regina') against Kulynycz – decided by a court a little lower down in the hierarchy and reported in the first volume of the 'Queen's Bench' reports for 1971, beginning at page 367. You get the idea. In a law library, you will find the volumes organized chronologically for each series: all the ACs are together from the earliest reported cases till the present, all the QBs (or, before 1953, KBs) are together in order,

and so on. (As well as these official reports, most law libraries also stock an excellent series of semi-official reports known as the *All England Reports* (All ER). These are published quite quickly, and they accumulate into two or three volumes for each year. Unlike the official reports, they do not divide the cases up by level of court or subject-matter.)

It is important to realize that, when they decide the cases and the appeals that come before them, judges are not only interpreting Acts of Parliament (saying what the various sections and subsections mean), nor are they merely following other judges' interpretations. They are also often following and developing principles of law which have no statutory basis at all, and which have grown up entirely in the courts. Thus, for example, the principle that if you are injured in a road accident you can sue the careless driver for negligence, and the various elaborations and qualifications to that, have been developed entirely in the courts, though it interlaces with and is modified by statute law in various respects. Much of our law is judge-made and not made by Parliament. Judge-made law, to the extent that it can be separated from the rest is referred to as 'common law', and a system like the English one in which this sort of law plays a significant role is called a 'common law' system.[3]

For the most part, the common law systems of the world represent a residue of English influence: apart from the United States of America, they are mainly the legal systems of the British Commonwealth (some of which still preserve a right of appeal to the House of Lords, known for that purpose as 'the Judicial Committee of the Privy Council'). Common law systems may be contrasted with 'civil law' systems. The difference is one of ethos and tradition: in civil law systems, such as France or Germany, the law tends to have been developed in a more systematic and abstract way. Nothing like the same emphasis is put on the role of the judge; the emphasis is on the logical structure of a code of laws developed from first principles. (As a matter of fact, judges do have to decide hard questions of interpretation just as their common law counterparts do, but in a civil law system this is not *advertised* as the primary vehicle for the development of the law, in the way that it is in England or America.)[4] The inspiration for the civil law systems was, of course, the great Roman Law code of Justinian and more recently the Code Napoleon. The differences between English and Scots law are to be explained in part by the much greater influence of civil law in Scotland.

So much for preliminaries and technicalities. Let's begin at the

beginning, in Chapter two, with the relation between law and politics.

Notes

1 But the House of Commons is dominant: see note 6 to Chapter two p.27.
2 The sovereignty of Parliament is discussed in Chapter four.
3 We discuss common law and judicial decision-making in much more detail in Chapter six.
4 There is an excellent discussion in J.H. Merryman, *The Civil Law Tradition* (Stanford, Calif.: Stanford University Press, 1969).

Chapter two

Law and politics

Clay Cross

I shall start each chapter of this book with a story, because I want to show how theoretical issues about law crop up naturally when we reflect on the practice and experience of British politics.

The incidents with which I begin happened between 1972 and 1975 and involved a clash between central government – first a Conservative administration, then a Labour one – and the local councillors of a Derbyshire town called Clay Cross.

Clay Cross was a Labour town. It had been a mining area, but as pits closed in the 1960s it became a centre of unemployment and deprivation in the region. When Labour gained control of the local council in 1963, it embarked on a programme of slum clearance and public housing. This, combined with a deliberate decision to keep council house rents low, placed considerable pressure on the local authority's finances. Their deficit grew to twice the Derbyshire average, and a number of residents argued that services like road maintenance were suffering so that local rates could be devoted to the subsidization of council rents. In 1970 complaints by ratepayers to the district auditor produced a slight increase in rents and some disquieting revelations about housing practices. But as the 1970s went on, Clay Cross, with 1,600 council houses in an electorate of 7,000, remained 'a government of the council house tenants, for the council house tenants, and, since all but one of the councillors live there, by the council house tenants'.[1]

In 1972 the Conservative government of Edward Heath passed a Housing (Finance) Act through Parliament to bring the activities of local councils like Clay Cross under control. Section 49 of the new law said the following:

> 49 (1) . . .it shall be the duty of every local authority and of every new town corporation to charge for each of their Housing