POLITICAL REALITIES

LAW, JUSTICE AND POLITICS

Gavin Drewry

POWER OF THE PRIME MINISTER ELECTIONS THE COMMONWEALTH PUBLIC OPINION LOCAL GOVERNMENT LAW AND THE CITIZEN IDEAS AND IDEOLOGIES POLICY FORMATION [illegible]ATIONALISM PARTIES [illegible]ND PRESSURE GROUPS [illegible]EGIONS BUREAUCRACY REPRESENTATION ISSUES FOREIGN POLICY

SECOND EDITION

POLITICAL REALITIES
Edited on behalf of the Politics Association by
Bernard Crick and Derek Heater

Law, Justice and Politics

Second edition

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Figures and Tables

Political Realities: the nature of the series

A great need is felt for short books which can supplement or even replace textbooks and which can deal in an objective but realistic way with problems that arouse political controversy. The series aims to break from a purely descriptive and institutional approach to one that will show how and why there are different interpretations both of how things work and how they ought to work. Too often in the past "British Constitution" has been taught quite apart from any knowledge of the actual political conflicts which institutions strive to contain. So the Politics Association sponsors this new series because it believes that a specifically civic education is an essential part of any liberal or general education, but that respect for political rules and an active citizenship can only be encouraged by helping pupils, students and young voters to discover what are the main objects of political controversy, the varying views about the nature of the constitution – themselves often highly political – and what are the most widely canvassed alternative policies in their society. From such a realistic appreciation of differences and conflicts reasoning can then follow about the common processes of containing or resolving them peacefully.

The specific topics chosen are based on an analysis of the main elements in existing "A" level syllabuses, and the manner in which they are treated is based on the conviction of the editors that almost every examination board is moving, slowly but surely, away from a concentration on constitutional rules and towards a more difficult but important concept of a realistic political education or the enhancement of political literacy.

This approach has, of course, been common enough in the universities for many years. Quite apart from its civic importance,

the teaching of politics in schools has tended to lag behind university practice and expectations. So the editors have aimed to draw on the most up-to-date academic knowledge, with some of the books being written by university teachers, some by secondary or further education teachers, but both aware of the skills and knowledge of the other.

The Politics Association and the editors are conscious of the great importance of other levels of education, and are actively pursuing studies and projects of curriculum development in several directions, particularly towards CSE needs; but it was decided to begin with "A" level and new developments in sixth-form courses precisely because of the great overlap here between teaching in secondary school and further education colleges, whether specifically for examinations or not; indeed most of the books will be equally useful for general studies.

Bernard Crick
Derek Heater

Preface

This is a book, about aspects of law, intended primarily for politics students, though with the interests of those studying English law also borne in mind. It is not intended to be a legal reference book, though it has been necessary to include some descriptive matter for the sake of coherence.

Given the limited scope many interesting and potentially relevant things have had to be left out. There has been no room, for example, to discuss penal policy and sentencing; the politico-legal aspects of public order have only been touched upon. The author can only express his regret and refer the reader to the short bibliography and to the bibliographies in the works cited there.

One word of warning is necessary in using a work of this kind. The rights and wrongs of the arguments about legal reform are far from clearcut. Here they have been greatly simplified; some critics may feel that I have been too inconoclastic, others that I have been mealy-mouthed. I have cited research evidence where possible, but it should be pointed out that a great deal of work remains to be done. Not everyone, for example, unreservedly accepts the validity of the research carried out by the indefatigable Michael Zander, but most of his critics have yet to produce evidence (other than of a very impressionistic kind) to refute him.

I should like to thank all those who assisted in the preparation of this book, subject to the usual disclaimer that they are in no way to blame for its shortcomings. Mr Keith Eddey of Oxford Polytechnic generously gave time to rescue me from many pitfalls confronting a non-lawyer writing about law. Colleagues at Bedford College, Dr Ivor Burton, Louis Blom-Cooper, QC, and Mrs Jenny Brock, helpfully suggested improvements to the final draft, as did Professor Bernard Crick of Birkbeck College. Finally, my thanks to Miss Sally Adams who both typed and tidied the manuscript.

Gavin Drewry, Bedford College, May 1974

Preface to the second edition

The first edition of this book was written in 1974. A great deal has happened since then and a substantial revision has become necessary. I say "substantial" rather than "fundamental" because the subject-matter and its arrangement remains largely unchanged (and law, by its very nature, does not alter fundamentally in six years – or in sixty.)

Apart from updating facts and figures to do with judicial salaries, financial limits for legal aid, maximum penalties, etc., many parts of the text have had to be completely rewritten to take account of developments in such matters as local law centres, police complaints machinery, bail, recent judicial decisions in the field of administrative law, and pronouncements by the European Court of Justice. Continuing debate about such things as jury-vetting, telephone tapping, open government, and the need for a UK Bill of Rights has also been taken into account in this revision, though inevitably lack of space has meant that none of them has been given the fullness of treatment that it deserves. In some places, to avoid expensive re-setting, I have merely indicated a recent development or an up-to-date source of reference in an appropriate footnote. Two highly relevant Royal Commissions are dealt with as separate appendices; eventually, if and when their reports have been debated and implemented (or not), they will have to be assimilated into the text of a third edition of this book.

In undertaking this revision I have benefited greatly from the constructive comments of reviewers and teaching colleagues. Though intended mainly for students in sixth forms and Colleges of Further Education I have been gratified to find that the book has also been used fairly widely at degree level and by law students; with this in mind I have taken the opportunity to update and expand the bibliography.

Gavin Drewry
Bedford College, April 1980

Note: The information in this book takes account of events up to the end of April 1980, but some alterations have been made in the light of important occurrences in the summer and autumn of 1980. In November 1980, as this edition was about to go to press, the Government announced the renewal of the right of individual UK citizens to petition the European Commission on Human Rights, for a period of five years from January 1981. The legislative programme of the 1980–81 parliamentary session included government Bills to abolish the notorious "sus" law and to make extensive changes to the law on contempt of court.

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1 Law and Politics

> Where laws end, tyrannies begin.
>
> WILLIAM PITT on the Wilkes case

> When the state is most corrupt, then laws are most multiplied.
>
> TACITUS

Readers of this book may be forgiven for wondering what the study of politics has to do with law. Modern textbooks on British government tend to do no more than make very cursory reference to the structure of the courts and to the part played by judges in curbing administrative transgressions.

The answer is that law is an essential part of politics. When we stop to think what government is all about we very quickly come up against words like "power", "authority" and (in Bernard Crick's phrase) "adjustment to diversity".[1] The legal system supplies an orderly means for the settlement of disputes in the state; the criminal law sets minimum standards of conduct and provides legitimate machinery for dealing with those who offend against the wellbeing of their fellow citizens and against the state itself. The law is the means by which the violence which underpins the *power* of the state is sublimated into recognition of the legitimacy of the state's *authority*.

The existence of law is what distinguishes a stable, viable state from a situation of anarchy. The great seventeenth-century political philosopher, Thomas Hobbes, depicted the state as founded upon a social contract (itself a legal concept) in which men agree to accept the rule of an absolute sovereign rather than live in a "state of nature" where liberty means lawlessness and an ever-present fear of a knife in the back:

> The final cause, end, or design of men, who naturally love liberty, and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war, which is necessarily consequent . . . to the natural passions of men, when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants.[2]

At a more practical level, when political decisions come to be translated into legal rules, things do not come to a full stop when an Act of Parliament receives its royal assent; a policy can stand or fall by the approach adopted towards a new Act by the judges called upon to interpret and apply it. Every year the government brings in a Finance Bill, embodying its main economic and fiscal policies. When the Act is passed, there are myriads of taxpayers waiting in the wings, eager to reduce their own tax liability. Tax law is not just a matter of the government getting its Bill through Parliament, it is a constant running battle between the Inland Revenue on the one hand and the taxpayer on the other, with the courts continually arbitrating between the two sides and Parliament having to plug the holes in legislation exposed by the pronouncements of the judges.

Moreover, a great deal of political activity, particularly at a grass-roots level, serves to obscure still further the distinction between law and politics. Many community rights and civil rights pressure groups, for example, are anxious both to ensure that people receive their rights under existing law and to do everything they can to see that defects in that law are remedied. Thus advice is commonly given to tenants about their legal rights, while the people giving the advice are also waging a political war against the unfair practices of local landlords and the infirmity of existing legislation in the field of housing.

In December 1973 it was reported that Kensington and Chelsea Council had threatened to withdraw its financial support from the North Kensington Neighbourhood Law Centre because of the latter's involvement in local political campaigns. In matters like landlord and tenant law and "poverty law", involving chronically underprivileged sections of the community, many lawyers acknow-

ledge that it is impossible to draw a hard and fast distinction between a legalistic concern with what the law is and the political question of what it ought to be.

To sum up: it is wholly misleading to see the political process as something wholly separate from the legal process, there is constant interaction between the two. And "government" is a composite activity which embraces both.

Separation of powers

The supposed separateness of law and politics has been underlined by references in many books on constitutional law to the "separation of powers" which is said to characterise the institutional arrangements of British government. Such separation is alleged to be a good thing in so far as it prevents the overconcentration of power in any one institution. The proposition that British government is founded on a formal separation of the "legislative", "executive" and "judicial" aspects of government goes back to the writings of the French philosopher Montesquieu, and in particular to his *De l'esprit des Lois*, first published in 1748.

There is now a fairly general consensus that Montesquieu was guilty of oversimplification and that governmental functions cannot be compartmentalised in this way. Even in countries like the United States, with written constitutions containing provisions for separation of powers, things do not work out quite so neatly.

There is a substantial body of literature on the subject, much of it confused and contradictory. As Geoffrey Marshall says:

> The phrase "separation of powers" is . . . one of the most confusing in the vocabulary of political and constitutional thought. . . . It crops up . . . in discussions, for example, of judicial independence, delegation of legislative powers, executive responsibility to legislatures, judicial review [of administrative actions], and constitutionality of arbitral bodies exercising mixed functions [e.g. administrative tribunals and inquiries]. It is possible, indeed commonplace, for commentators to draw different conclusions both as to whether there is or is not a separation of powers in a given constitution and as to what particular conclusions of law or policy follow from the existence of a separation of powers, even where it is admitted to exist.[3]

It is not possible to undertake a detailed review of the arguments here. It has already been emphasised that the process of making legislation is interwoven with the judicial function of interpreting and applying that legislation. A living refutation of the doctrine of separation of powers can be found in the office of the Lord Chancellor: he is a Cabinet minister, he presides over the sittings of the House of Lords in its legislative and deliberative capacities, he can sit as a judge, he appoints other judges and he runs a government department.

The point is that there are some aspects of "separation of powers" which are eminently sensible. For example, it is probably a good idea to have a judiciary which is somewhat aloof from the rough and tumble of party politics. And words like "legislative", "executive" and "judicial" are a useful shorthand way of describing a lot of things that go on in government, provided we remember that the boundaries between them are indistinct and that they are all functionally interrelated.

Above all, it is important to avoid being mesmerised into believing that "separation of powers" has some mystical virtue as an iron law of the constitution and as a yardstick against which the merits of institutional arrangements can be measured. We have no written constitution, and British government is not based on immutable laws. Thus it is wholly misguided to suggest, as students sometimes do, that the growth of delegated legislation or the proliferation of administrative tribunals is to be deplored as being in breach of the "doctrine of separation of powers".

Legalism

Belief in a doctrine of separation of powers merely symptomises a common view that law and politics are two quite different things. Judith Shklar, a professor of politics at Harvard, stresses the existence of an ideology that she calls "legalism". This consists of a belief in the merits of rule-following and the pursuit of certainty which characterises the legal process. She continues:

> There appears to be a virtually unanimous agreement that law and politics must be kept apart as much as possible in theory no less than in practice. The divorce of law from politics is, to be sure, designed to prevent arbitrariness, and that is why there is so little

argument about its necessity. However, ideologically legalism does not stop there. Politics is regarded not only as something apart from law but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter is the uncontrolled child of competing interests and ideologies.[4]

The supposed superiority of "good clean law" over "bad dirty politics" manifests itself in all kinds of ways. There is, for example, a rather ill-defined area of law-cum-politics called administrative law (see chapter 5), which is concerned with defining and applying a framework of legal rules to the activities of administrators and policy-makers. In this context people seem sometimes to make the tacit assumption that making administrators subject to law will, by the very nature of law as something "above politics" (that is, above partisanship and intrigue), make the world a better place. In practice, as we shall see, the converse may be the case; the essential flexibility of the administrative process may well be damaged by the superimposition of lawyers' precedents and obsessions with due process at the expense of substantive justice.

Often when governments get into some kind of trouble or when there is a great national calamity, politicians set up a tribunal of inquiry presided over by a senior judge. The philosophy that lies behind this course of action is (*a*) that judges are professionally experienced in getting at the truth, and (*b*) that they are above suspicions of partisanship. The former proposition has some truth, though it is questionable whether the sort of experience that judges have is particularly relevant to discovering whether civil servants should have intervened earlier to prevent the collapse of a motor insurance company or whether the National Coal Board should have taken steps to prevent the calamitous collapse of a waste tip on a mountainside in Wales.[5]

The second proposition also has a good deal of truth, but is to some extent self-refuting. Once judges are brought into the political arena in this way they become more closely associated in the public mind with "politics", particularly if their findings tend to favour the government's position. The moral would seem to be that judicial inquiries play a useful part in calming public fears, but using them too frequently can only be self-defeating.

Even if "separation of powers" is only a half-truth, it is important to bear in mind that a degree of "separateness" is maintained by those actually involved in the various tasks of government. Thus the courts acknowledge the sovereignty of Parliament by accepting as binding every piece of legislation that is passed (though, as we shall see, there are devices by which judges can sometimes avoid aspects of legislation with which they disagree); in doing so they look only at the legislation itself and not at any supporting evidence of Parliament's intentions, such as the *Hansard* reports of debates on the original Bill.

In its turn, Parliament is bound by a self-imposed *sub judice* rule, which means that, with some exceptions, it cannot debate anything going on in the courts until legal proceedings are completed. There is considerable value in such a rule, but it tends in practice to operate too inflexibly.[6]

The rule of law

There is, as we have seen, a tendency to treat "separation of powers" as a doctrine which underpins good government; the same can be said of the phrase "rule of law". The latter is associated principally with the writings of the great constitutional lawyer A.V. Dicey, whose works were much in vogue at the beginning of this century and are still worth reading today. Dicey's concern was with equality before the law, with "the idea of legality or of the universal subjection of all classes to one law administered by the ordinary courts".[7] In particular, he wanted no distinction in law between the citizen and servants of the state, and viewed with dismay the prospect that English law might become contaminated by the systems of "administrative law" prevalent on the Continent, which seemed to him to place government officials in a privileged legal position.

In fact Dicey misunderstood the significance of these continental institutions. Certainly there are systems of administrative law (*droit administratif*) in countries like France, but, far from giving officials favoured treatment, they provide additional legal curbs on the government, over and above the ordinary law, and give the private citizen special legal rights and remedies vis-à-vis officialdom.

Dicey's exaggerated fears about administrative law (though he modified his views in later writings) account for some of the early hostility expressed by lawyers to such innovations as administrative