

UNLOCKING THE LAW

UNLOCKING CONSTITUTIONAL & ADMINISTRATIVE LAW

3rd edition

Mark Ryan

with contributions from
Steve Foster



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Mark Ryan

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Preface

The Unlocking the Law series is an entirely new style of undergraduate law textbook. Many student texts are very prose dense and have little in the way of interactive materials to help a student feel his or her way through the course of study on a given module.

The purpose of this series, then, is to try to make learning each subject area more accessible by focusing on actual learning needs, and by providing a range of different supporting materials and features.

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Note also that for all incidental references to 'he', 'him', 'his', we invoke the Interpretation Act 1978 and its provisions that 'he' includes 'she' etc.

[Chapters 1–15](#) and [18–21](#) were written by Mark Ryan, and [Chapters 16–17](#) were written by Steve Foster.

The law is stated as we believe it to be on 1 August 2013, although where space permits some material has been added after this date.

Mark Ryan
Steve Foster

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In the Unlocking the Law books all the essential elements that make up the law are clearly defined to bring the law alive and make it memorable. In addition, the books are enhanced with learning features to reinforce learning and test your knowledge as you study. Follow this guide to make sure you get the most from reading this book.

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1

Introductory concepts

AIMS AND OBJECTIVES

public law

the law regulating the powers of the institutions of the state, how they relate to each other and how they relate to individuals

private law

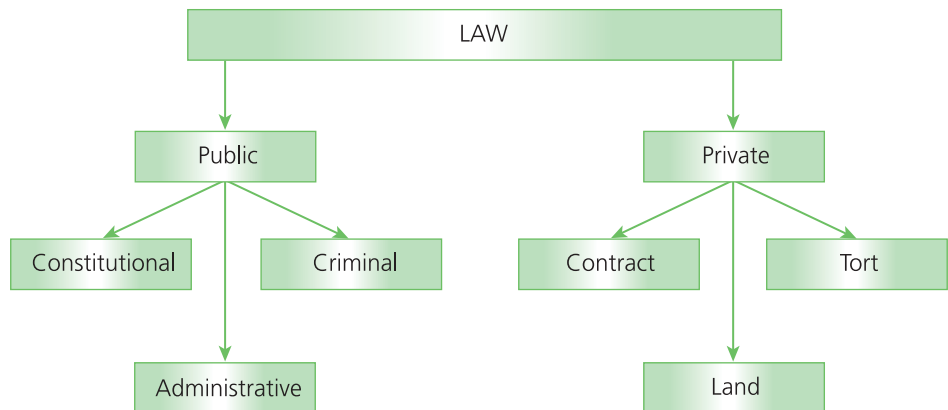
the law regulating the relationship between individuals

At the end of this chapter you should be able to:

- distinguish between **public law** and **private law**
- define and distinguish between constitutional and administrative law

1.1 The distinction between public law and private law

In general, the term 'law' can be broadly divided into two branches: public law and private law. Constitutional and administrative law form part of public law.



NB European Union law affects both public and private branches of law

Figure 1.1 The distinction between public law and private law

1.1.1 Private law

In essence, private law is that branch of the law that is concerned with the relationship that individuals have with one another. For example:

- An individual forms a legally binding contract with a work colleague when he agrees to purchase a three-piece suite from him (see further *Unlocking Contract Law*).
- An individual sues a neighbour in the law of defamation for making untrue slanderous accusations about his past (see further *Unlocking Torts*).
- Two adjoining land owners legally dispute the location of a boundary fence between their land (see further *Unlocking Land Law*).
- A pedestrian sues the driver of a car in the law of negligence after being badly injured in an accident caused by his careless driving (see further *Unlocking Torts*).

1.1.2 Private law involving other than private individuals

It is also worth noting at this point that it is possible for individuals to have private law transactions or legal relations with the state (in this context and for present purposes, the state means simply the government, public authorities, local authorities, etc). For example, an individual may form a legally binding contract with a local authority, or indeed may even sue that same body in the law of negligence if it has acted carelessly and caused harm. Although in one sense such relations would appear to form part of contract and tort law respectively (with the defendant in these cases being the state, rather than a private individual), such actions could also have a public law dimension. This is because as these actions in contract and negligence involve the state they will be governed by special rules and principles which have the effect of treating the state differently from an ordinary private individual defendant. This point serves to indicate at this early stage that in the United Kingdom the distinction between private and public law is not absolute and so it is not always easy to draw the line between them with complete precision. For example, in this context Lord Wilberforce in *Davy v Spelthorne Borough Council* [1984] 1 AC 262 commented:

JUDGMENT



'The expressions "private law" and "public law" have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution.'

For more on public law issues, see [section 19.5](#).

1.1.3 Public law

Public law (which subsumes both constitutional and administrative law – see [section 1.2](#)) is that branch of the law that focuses on the power of the state. In essence, public lawyers are concerned with the location of state power, how that power is exercised and controlled, and how it impacts on the individual. At a very basic level, public law is concerned with the following questions:

- Who and what bodies/institutions/individuals exercise state/public power?
- What is the nature and extent of these powers?

- Why do these bodies/institutions exercise power?
- How do these bodies relate to each other?
- How is power used?
- How is the use of power regulated?
- How are these bodies/institutions/individuals made accountable?
- What protection is given to the individual from the power of the state?

In other words, the study of public law is concerned with the identification of public power, the institutions that exercise it and how these institutions relate to one another and to the individual. Most importantly, it is concerned with how the use of public power is regulated and controlled. Thus, the constitutional principle of the accountability of the state (whether it be in a legal or political form), is a major theme that underpins the subject of public law and consequently, therefore, this text.

In summary, in contrast to private law which is concerned essentially with individual/private legal relations, public law focuses on the structure and organisation of the state and how the individual relates to the state.

.....
human rights

rights and freedoms to which every human being is entitled

.....
freedom of expression

a right set out in Article 10 of the European Convention on Human Rights and now part of UK law as a consequence of the Human Rights Act 1998

.....
constitutional convention

a binding political rule of the constitution

1.1.4 Public law and criminal law

At this point, it is pertinent to note that the broad term public law also technically embraces criminal law, as crimes are termed as offences against the state, and so punishable by it. Although criminal law clearly has a public law dimension, historically the substantive subject of criminal law (eg offences against the person, theft, etc) has nevertheless been taught as a separate subject (see further *Unlocking Criminal Law*). Notwithstanding this, certain aspects of criminal law (for example the breadth and extent of police powers for arresting and detaining individuals) will necessarily be subsumed within the field of public law as they raise issues concerning basic **human rights** and civil liberties. In particular, the substantive criminal law offences which involve restricting **freedom of expression**, for example the laws of obscenity and indecency, will be considered as part of [Chapter 18](#).

1.1.5 Public law and politics

Public law, more so than any other substantive law subject, is intimately and inextricably linked with the disciplines of political science and government. As a consequence, it is an advantage to have a background interest in, and awareness of, general British politics when studying public law as the subject necessarily draws upon some of these principles. In fact, as we will see in [Chapter 4](#), some of the sources of the British constitution are actually political practices (**constitutional conventions**).

For example, in the context of the government's relations with Parliament, government ministers are both collectively and individually responsible to Parliament for their actions and yet this accountability is not legal, but essentially political in nature, determined by predominately political factors. Furthermore, the connection and overlap between politics and constitutional law is evident in the context of civil liberties which involves the basic human rights and freedoms of the individual. These rights – which include, for example, the right to free speech – raise the issue of whether such rights should be enjoyed, and whether they are actually political/moral/religious questions which happen to be dressed up as legal questions which are determined by (unelected) judges in a courtroom (whether domestically or in Europe).

Administrative Court

that part of the High Court which processes judicial review cases

Public law is highly topical and an ever-changing and dynamic subject. In studying public law, therefore, it is advisable to keep abreast of recent developments through the daily broadsheet newspapers. Thus, every day there will be, invariably, something with a public law dimension and therefore of interest to public lawyers. Hypothetical examples could include the following:

- A government minister resigns over a scandal.
- A local authority acts illegally by abusing its powers.
- The European Court of Human Rights in Strasbourg makes a judgment against the United Kingdom for breaching the European Convention on Human Rights.
- The Queen approves the appointment of 10 new life peers to sit in the House of Lords.
- Parliament passes a law which restricts freedom of expression.
- The European Court of Justice in Luxembourg declares that the United Kingdom has failed to follow European Union law.
- The **Administrative Court** declares that the Home Secretary has breached the Human Rights Act 1998.

ACTIVITY



Applying the law

Read one week's issues of a national daily newspaper and try to identify articles which you think have relevance to the study of public law.

1.1.6 Public law and European Union law

As a result of the enactment of the European Communities Act 1972 (see [Chapter 15](#)), in recent decades both public law and private law have been significantly affected by, and subject to, European Union (EU) law. Although the main substantive subjects of **EU law** (eg the free movement of goods, workers, services, etc) are studied separately (see further *Unlocking EU Law*), certain aspects of it – such as the primacy of EU law – have had such a profound effect on the constitution of the United Kingdom that they have to be considered in any study of public law. In particular, the reception of EU law (which now has overriding legal effect) into the United Kingdom has resulted in, *inter alia*, the restriction of the power of the United Kingdom Parliament to pass any law that it chooses (see [Chapter 7](#) in conjunction with [section 15.6](#)).

EU law

law and legal practices emanating from the European Union

KEY FACTS



Public law embraces both constitutional and administrative law and is essentially concerned with the organs of the state, together with how they relate to each other and to individuals.

Public law is concerned with the use and regulation of public power.

1.2 The distinction between constitutional and administrative law

Although both constitutional and administrative law form part of the generic term public law, a distinction, albeit a fine one, can be made between them.

constitution

the rules which govern the government which can be found in either a codified or uncodified form

1.2.1 Constitutional law

At a very basic level constitutional law can be described simply as the law relating to the **constitution**. Although the term constitution will be considered in [Chapter 2](#), for present purposes a constitution represents a set of basic rules and principles which govern the government/state.

A more detailed definition is provided by Barnett who defined constitutional law in the following terms:

QUOTATION

'Constitutional law is concerned with the role and powers of the institutions within the state and with the relationship between the citizen and the state.'

H Barnett, *Constitutional and Administrative Law* (10th edn, Routledge/Taylor & Francis Group, 2013), p 4.

In other words, constitutional law concerns, among others, the following elements (all of which will be considered in this text):

parliament

composed of the House of Commons and the House of Lords

- The principal institutions of the state, *viz*, **Parliament** (see [Chapters 8 to 10](#)), the government (see [Chapter 11](#)), the courts (see [Chapter 13](#)) and devolved/decentralised state bodies (see [Chapter 14](#)).
- The specific roles and functions conferred on these institutions, together with the nature and extent of their powers (for example, see [Chapter 11](#) on the powers of the executive).
- The procedures and mechanisms used to oversee, regulate and check these powers (for example, see [Chapter 12](#) in relation to the parliamentary controls over the government and [Chapters 19 and 20](#) for legal controls).
- The ways in which these institutions relate to one another (for example, see [Chapter 10](#) on how the House of Lords and Commons relate to one another).
- The ways in which these institutions relate to the individual (for example, see [Chapter 9](#) on parliamentary elections).
- The basic and fundamental rights of the individual (for example, the right to life and free speech) and how – and to what extent – these rights and freedoms can be protected from infringement by the state (see [Chapters 16 and 17](#) on human rights and [Chapter 18](#) on freedom of speech).

1.2.2 Administrative law

In general terms, administrative law (in contrast to constitutional law above) is concerned with, simply, the law relating to the administration/government. Wade and Forsyth defined it in the following terms:

QUOTATION

'... administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities.'

H Wade and W Forsyth, *Administrative Law* (10th edn, Oxford University Press, 2009), p 5.

The government, its officers and agencies are invested with extensive powers to provide services (eg administering welfare benefits) and to carry out specific government functions (eg making regulations). Administrative law, therefore, is focused specifically on the various powers that the government exercises and

judicial review

the process whereby the courts review the legality of governmental actions

Ombudsman

an officer who investigates complaints of maladministration

how these powers are controlled and regulated to ensure that the administration acts strictly within its limits. This branch of the law is concerned with the control of the government through the mechanisms of **judicial review** (see [Chapters 19 and 20](#)), tribunals (see [Chapter 21](#)) and inquiries (see [Chapter 21](#)). In addition, it also embraces parliamentary/political controls in the form of the Parliamentary **Ombudsman** (see [Chapter 21](#)).

It is clear that in the United Kingdom the distinction between administrative law and constitutional law is not, necessarily, easy to draw. At a general level it could be said that whereas constitutional law tends to consider the whole apparatus of the state, administrative law, in contrast, is more specifically focused on how the executive/administration uses and misuses its powers. For practical purposes, this text considers each branch separately through a collection of various chapters: constitutional law is considered in [Chapters 1–14](#) and [16–18](#) while administrative law is detailed in [Chapters 19–21](#). In addition, a general introduction to European Union law is covered in [Chapter 15](#). As such, it will be plain that constitutional law will form the major component of this book.

KEY FACTS

Constitutional law is the law relating to the constitution, the state institutions, their powers, together with how they relate to the individual.

Administrative law is concerned specifically with the law relating to the administration/executive/government and its control.

ACTIVITY**Self-test question**

How can one define and recognise constitutional law?

2

Constitutions

AIMS AND OBJECTIVES

At the end of this chapter you should be able to:

- Define a constitution
 - Appreciate the nature and content of constitutions
 - Appreciate the purpose of constitutions
 - Distinguish between different types of constitution
 - Understand the concept of constitutionalism
-

2.1 Definition

All organisations – whether a university chess club or a state – have a constitution of some description, as society requires rules in order to function and ensure order. These rules are simply known as the constitution (constitutional rules). Bradley and Ewing have noted that a constitution can be defined in two ways: with a narrow or a wide meaning. In a narrow sense they have described a constitution as:

QUOTATION

‘... a document having a special legal status which sets out the framework and principal functions of the organs of government within the state and declares the principles or rules by which those organs must operate’.

A Bradley and K Ewing, *Constitutional and Administrative Law* (15th edn, Pearson/Longman, 2011), p 4.

In a broader sense of the term, they refer to, and quote, Wheare:

QUOTATION

‘it is used to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government’.

K Wheare, *Modern Constitutions* (2nd edn, Oxford University Press, 1966), p 1.

In its first report in July 2001, the House of Lords Select Committee on the Constitution recognised the difficulty in defining the term constitution and put forward the following definition:

QUOTATION

'Our working definition of a constitution is that it is the set of laws, rules and practices that create the basic institutions of the state and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.'

First Report of Session 2001–02 of the House of Lords Select Committee on the Constitution, *Reviewing the constitution: Terms of reference and method of working* HL Paper 11 (2001), p 16.

For present purposes, therefore, we may conclude that a constitution is simply a set of rules and principles that govern the organisation and structure of the state which the governing institutions must, or should, adhere to. As will be indicated below, these constitutional rules almost invariably will be found in a single written document entitled 'The Constitution', although sometimes – as in the United Kingdom – these rules are located other than in a specific constitutional document (see [Chapter 4](#) on the sources of the constitution of the United Kingdom).

ACTIVITY



Self-test question

Using the above definitions, how would you define a constitution in your own words?

2.2 The contents of a constitution

What will a constitution contain? The exact contents of a state constitution will differ from state to state. It must be remembered that constitutions exist in both democratic and non-democratic countries, although by their nature, democratic constitutions should follow the principles of **constitutionalism** (see [section 2.6.2](#)).

As an introduction or foreword, a preamble is found in many state constitutions. It tends to be declaratory in nature and identifies the people as the constituent (sovereign) power from which the moral authority of the constitution derives. For example, in the Irish constitution (1937) it is stated at the outset that:

ARTICLE

We the people . . . do hereby adopt, enact and give to ourselves this constitution.

In general, the main text of a constitution will contain the following elements.

2.2.1 The establishment of the institutions of government together with their roles, powers and functions

A constitution will set out the basic ground rules of the state which will include the establishment of its institutions (and so their legitimacy – see [section 2.4.2](#)). In short,

constitution- alism

the principle which requires a constitution to provide sufficient restraints on government/state power

.....
Cabinet

the collection of
the most senior
government
ministers
.....

it will locate and establish the principal institutions of the state together with their roles/functions:

- The law-making institution which passes legislation (Parliament/Congress/Assembly).
- The executive/government institution which enforces the law and makes policy decisions (Prime Minister/**Cabinet**/President).
- The judicial institution which interprets and declares the law (the courts/Constitutional Court/**Supreme Court**).

.....
Supreme Court

the highest
domestic court
.....

For example, the constitution of the United States of America (1789) states the following:

ARTICLE

- Art I, s 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
- Art II, s 1. The executive power shall be vested in a President of the United States of America.
- Art III, s 1. The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish.

In this way the constitution of the United States sets out the three key institutions of the state.

The constitution will also set out the specific powers of each institution. For example, again with reference to the constitution of the United States, Art II, s 2 states that the President shall have the power (with the consent of the Congress) to make Treaties and to nominate (also with congressional consent) the judges of the Supreme Court. Similarly, Art I, s 8 states that Congress shall have the power to lay and collect taxes and declare war. In short, a constitution will establish the key institutions of the state and allocate them constitutional roles and responsibilities and equip them with public powers.

2.2.2 The establishment of the relationship between the different institutions of the state

The constitution will also set out the constitutional relationship between the various institutions established under it. In a democracy this relationship will necessarily involve the principle of the system of checks and balances between the institutions (see [Chapter 5](#)). For example, as seen above, the constitution of the United States stipulates that Congress is the body responsible for passing legislation; however, Art I, s 7 states that before a Bill becomes law it must be presented to the President for approval. If the latter rejects the Bill, it can still become law providing that Congress reconsiders it and both congressional chambers pass the Bill with a two-thirds majority. This therefore sets out the constitutional relationship between the President and Congress in the context of the passage of legislation.

In the German constitution (1949), Art 67 states that the Bundestag (the lower House of the German Parliament) can express a lack of confidence in the Federal Chancellor by electing (with a majority of its members) a successor to replace them. Thus, a major theme of public law is how the state institutions relate to and complement one another, and most importantly, how these institutions check and balance one another.