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Aurélien ANTOINE

Droit constitutionnel britannique

3e édition

Préfaces de Lord MANCE
Avant-propos d'Anthony W. BRADLEY

LGDJ un savoir-faire de Lextenso

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Pour Bérénice, Augustine, Camille et Hortense

Sommaire

Foreword to the first edition

It is a privilege and pleasure to be asked, as a British judge, to write a foreword for Professor Aurélien Antoine's work on British Constitutional Law. The breadth and depth of his insights into the British constitutional scene, both contemporary and historical, are remarkable. They make rewarding reading for a British lawyer, and I am sure that they will do so for civilian lawyers as well as the more general readership they deserve.

As Professor Antoine makes clear, the United Kingdom has a constitution. But it is not a written Constitution interpreted by a Constitutional Court. It is a living and developing concept, resting on various foundations: the doctrine of supremacy of Parliament, various quasi-constitutional instruments, the common law concept of the rule of law, and numerous conventions.

Queen Victoria's favourite Prime Minister, Benjamin Disraeli, remarked that England was governed not by logic, but by Parliament. But a later Conservative politician and Lord Chancellor, Lord Hailsham, described the executive's dominance over Parliament as giving rise to "elective dictatorship". Professor Antoine identifies this as a major peril facing modern Britain, while noting, fairly, that the dominance has been alleviated by improved Parliamentary procedures to scrutinise governmental action. Other contributions towards alleviate the problem have been the revived activity and credibility of the House of Lords, since the removal from it of most hereditary peers in 1999, and the striking development by the courts of administrative law controls over secondary legislation and executive action. The latter has been so notable that in 1987 the Treasury Solicitor produced a guide for government entitled The Judge over Your Shoulder, since regularly updated.

As to quasi-constitutional instruments, the most famous start with Magna Carta 1215 (or perhaps more accurately 1225, though this year has seen celebrations which will surely not be repeated in 2025). They include the Petition of Right 1628, the Bill of Rights 1688-1689, the Act of Settlement 1701 and, more recently, the European Communities Act 1972, the Human Rights Act 1998, the devolution statutes (the Scotland, Northern Ireland Act and Wales Acts) and the Constitutional Reform Act 2005. The European Communities Act and the Human Rights Act both take effect (in British

constitutional theory) by Parliamentary enactment and could (in theory) be repealed tomorrow. But in practice they operate as strong additional controls over Parliamentary freedom of action, in important spheres; so much so, that they are treated as prevailing over any subsequent legislation, unless and until Parliament were ever expressly to provide the contrary.

There is no doubt that the European influence over domestic legislation, and the consequent sense of disempowerment at the domestic level, has proved frustrating for United Kingdom Parliamentarians and in some public discourse, although much good work is in fact done in the UK Parliament by way of scrutiny of European measures and representations to ministers at the stages when measures are proposed by the Commission and considered by the Council of Ministers and European Parliament. The need for a proper recognition of the importance of subsidiarity, or an appropriate margin of freedom at national levels, is a topical European theme. As Professor Antoine points out, it led to the Brighton Declaration of 2012 on the European Court and Convention of Human Rights, which has marked a new and positive relationship between the Convention and national systems over recent years. At the European Union level progress still needs to be made to give subsidiarity a real content. The European Court of Justice's jurisprudence in the area has been disappointingly limited.

Professor Antoine identifies the rule of law, and a legal culture making of the law one of the pillars of society, as a cardinal feature of British constitutional life. The common law with its need to base itself in social needs and to justify its legitimacy by clear reasoning, operates as a horizontal, or bottom-up, system, rather than a top-down statist system imposed from above. In recent decisions, the UK Supreme Court has emphasised that the common law has not been superseded in its relevance or development by the law of either the ECHR or the EU: see e.g. Kennedy v Charities Commission [2014] UKSC 20.

As to the relationship between the courts, Parliament and the executive, this was well-described by Lord Hope in the Hunting Act case (Jackson v Attorney General [2005] UKHL 56), which Professor Antoine mentions at several points. Lord Hope said that: "In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey .... likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the

other". In practice, mutual respect, backed by strong cultural traditions, prevents conflicts. On one occasion, in the relation to a particular governmental proposal in the 1990s, the then Lord Chief Justice, Lord Woolf had to make clear that if, for example, Parliament "did the unthinkable" and removed the courts power of judicial review he would consider it necessary to make "clear that ultimately there are even limits on the supremacy of Parliament which it is the courts'inalienable responsibility to identify and uphold.". But the proposal was withdrawn. The need to consider whether and how far Parliamentary supremacy is a "construct" of the courts which the courts could change or modify (as Lord Steyn suggested) has not arisen.

A highly topical issue identified by Professor Antoine concerns the internal relations within the United Kingdom of its constituent parts – arising in large measure from the preponderant weight of England and its population, the weakness of regionalism within England and the resulting difficulty of constructing a workable federal system within the United Kingdom. The current approach of devolving powers to Scotland, Northern Ireland and Wales does not yet appear to have achieved a stable equilibrium. However, the Scots recently voted by 55 % to 45 % to remain part of the United Kingdom, and many Britons, like the writer, have substantial Scots blood and Scottish relatives. As Disraeli also said (speaking on the Reform Bill of 1867): "In a progressive country, change is constant; change ... is inevitable". The writer is an optimist, and the history and development of the British constitution and institutions over the century, which Professor Antoine so well describes, give encouragement to optimism.

In summary, Professor Antoine's book is a real work of scholarship, valuable both for its description of what is and for its discussion of current trends, problems and issues. It deserves a wide readership among all who have any interest in the contemporary British scene and in British attitudes, both domestically and in relation to Europe. I warmly recommend it.

The Right Honourable the Lord Mance
Deputy President of the Supreme Court of the United Kingdom

Foreword to the third edition

It is a pleasure to write a foreword welcoming the third edition of Professor Antoine's work on British Constitutional Law. Since the second edition in 2018, Brexit has been "done and dusted". So have three Prime Ministers: Mrs May in 2019; Mr Boris Johnson, her successor and principal progenitor of Brexit, in September 2022; and his short-lived successor, Ms Liz Truss in October 2022. Any reader who formed the view that the United Kingdom has been experiencing a period of turbulence would be right. They would of course be wrong to say that Brexit was the only cause. Another, sad feature in times events has been an apparent fall-off in the observance of standards of propriety, while Ms Truss's fell in an attempt to defy the gravity of the markets. But Brexit has certainly been a large contributor to the United Kingdom's current malaise. Even under the calmer and more considered premiership of Mr Rishi Sunak, constitutional uncertainties continue. The compromises, which he had to make, probably as a matter of necessity, to form his government continue to ensure that one wing of thought of the governing Conservative party retains a powerful influence.

Among the drama of the last five years, lawyers would probably highlight the UK Supreme Court's decision in Miller 2[1] . The Court there held that the advice given by Mr Johnson as Prime Minister to Her Majesty, to prorogue Parliament without reason for five weeks in the middle of the heated Brexit debate, was invalid; and that, when Her Majesty's commissioners attended on Parliament carrying the Queen's instruction, it was "as if the Commissioners had walked into Parliament with a blank piece of paper".[2] The judgment reflected the fundamental role of Parliament. But it generated a good deal of indignation among some members of the Executive. The British Executive is generally accustomed to ruling through Parliament, rather than to having Parliament's ultimate supremacy over other branches of the State so strikingly underlined. Happily, polls indicate that the public has more confidence in the rule of law and the protection of rights as administered by the judiciary than it

1. R *(Miller) v The Prime Minister and Cherry v Advocate General for Scotland* ([2019] UKSC 41.
2. Ibid, para 69.

has in politicians on such matters.[3] In accordance with strong constitutional convention, the Monarch's role in actually issuing the (invalid) instructions through her Commissioners to Parliament was regarded as purely formal - she had no option but to accept her Prime Minister's advice. Hence, it was the Prime Minister's decision that was critical and could be judicially reviewed.

Another major constitutional event was Her Majesty the Queen's death two days after swearing in Ms Truss. The formal process of succession is intensely, if anachronistically, legalistic. The Queen's passing was deeply symbolic, marking the end of an era of unbroken continuity since the days when the United Kingdom was still a major world power. And it deprives Prime Ministers of the informal benefits of her extraordinary long experience. But « la Reine est morte, vive le Roi » ... Continuity was and is assured.

The current uncertainties include the present government's attempts to refashion a working relationship with the Europe Union. The current arrangements for Northern Ireland are particularly objectionable to Ulster Unionists, without whose cooperation self-government in the province cannot resume. Threats of unilateral abrogation of the Protocol, in breach of international law, have heightened the tension. At its heart lies the continuing role of the European Court of Justice. Courts do not usually attract such a degree of hostility. One can only hope that, with a modicum of goodwill on the parts of the EU and the UK, the conundrum is not as "inextricable" as Professor Antoine suggests.[4] Nor is the difficulty in relation to Northern Ireland the only such difficulty ; almost as problematic is the United Kingdom's relationship with Scotland. Though this is not, so far, afflicted by European legal considerations, it certainly would be if Scottish independence ever became a reality. The devolution fostered in the different territories of the United Kingdom over the last 25 years is thus unfinished business. Whether the solution lies in the current government's interest in expanding devolution within England is not obvious.

The present government has proposals for legislation on various themes, dear to some of its members, but viewed as problematic by many in both Houses of Parliament and in the country at large. The

3. See e.g. the Review conducted by YouGov for University College London - www.ucl.ac.uk/constitution-unit/news/2023/feb/preview-constitution-unit-findings-public-attitudes-role-judges?utm_source=substack&utm_medium=email
4. See page 173.

provocatively named Bill of Rights Bill[5] seeks in reality to qualify and diminish the judicial protection hitherto afforded by the Human Rights Act[6] , and so (it appears) to open up differences between the application of such rights in Strasbourg and the United Kingdom. The Bill also contains an astonishing provision, prohibiting any court from taking any account of any interim measure by the European Court of Human Rights. At least one member of the government would have liked to go further, and, by withdrawing from the Convention, put the United Kingdom in the company of Russia and Belarus.

Another contested measure is the Retained EU Law (Revocation and Reform) Bill, which would at the end of 2023 simply revoke all retained EU law which was before Brexit directly applicable in the UK as well as all EU-derived subordinate legislation, unless the same was meanwhile restated or a minister specified some later expiry date. Thousands of pieces of legislation would potentially be revoked, with consequent risks to both legal protection and coherence, in areas from, for example, employment to consumer protection and environmental standards. The legislation would, if passed, also give the executive extraordinarily wide "Henry VIII" powers, that is power for ministers to reform the law by delegated legislation, which it is notorious that Parliament cannot properly scrutinise.[7]

Other controversial areas include the wider powers conferred on police to restrict protests by the Police, Crime, Sentencing and Courts Act 2022 and the further governmental proposal for a Public Order Bill with provisions seen by many as potentially detrimental to the rights of freedom of expression and protest.

The sadness is the potential detriment that these proposals and recent political and economic turmoil may have inflicted on the United Kingdom's reputation internationally and as a safe haven for the conduct of business as well as the resolution of disputes. In the penultimate paragraph of his work, Professor Antoine comments cuttingly on the ambitions of Global Britain as being « passablement déconnectées de la réalité de ce qu'est aujourd'hui la place du

5. Polemically named, because it invokes the Bill of Rights 1688 by which liberties really were maintained. It has been suggested that the Bill of Rights Bill should have been named the Bill to remove or qualify Rights.
6. This 1998 Act gave domestic force from October 2020 to the rights contained in the European Convention on Human Rights.
7. Henry VIII powers are beloved of the executive, and Parliament cannot generally do more than approve or refuse delegated legislation, when put before it for consideration, rather than amend it. In practice, very few pieces of delegated legislation are rejected.

Royaume-Uni dans le concert des nations ». But, despite this, his final conclusion is that the United Kingdom's constitution and institutions have shown themselves resilient, even if some adjustments appear necessary.

It must also be borne in mind that, under the British first-past-the-post system of voting in General Elections, governments can change decisively. The Labour party is at the time of writing some 26 points ahead of the Conservatives. That would, if maintained, lead to an unprecedented Labour majority in the next General Election due by no later than 24th January 2025. Of course, it is quite likely that the gap will narrow as the Election approaches. But, assuming a change of government, the current snapshot, which Professor Antoine so closely portrays, may look very different. Meanwhile, the writer commends Professor Antoine's work to anyone interested in understanding both the general constitutional structure and operation of the United Kingdom and the recent vicissitudes by which it has, sadly, been afflicted, some of which the present writer has touched on above.

The Right Honourable Lord Mance[8]

8. Former Deputy President of the UK Supreme Court.

Avant-propos à la deuxième édition

Nous avons beau souhaiter que les choses soient différentes, chaque système constitutionnel semble être ancré dans un contexte culturel, social et historique spécifique. Et la comparaison entre ces systèmes souffre de la difficulté première de comprendre leurs termes et locutions idiomatiques. Cependant, l'interdépendance entre les gouvernements de chaque État et le renforcement des liens socio-économiques à travers le globe peuvent nous aider à comprendre qu'en dépit des dissemblances, des pays voisins ont plus de choses en commun que de sujets qui les opposent.

Au XVIII^e siècle, un jeune citoyen suisse de Genève exilé à Londres, Jean-Louis de Lolme, a écrit un ouvrage intitulé *Constitution de l'Angleterre*. Suivant le sillon creusé par Montesquieu, il a analysé la façon dont l'Angleterre est parvenue à assurer la stabilité de son gouvernement sur le long terme. Considérant qu'il s'agissait là d'un système unique dans lequel la liberté garantie par la Constitution dépendait de l'équilibre entre l'Exécutif et le Législatif, il a identifié pas moins de neuf avantages du gouvernement de l'Angleterre. Il a souligné en particulier les traits suivants :

1. Les diverses restrictions acceptées par l'autorité suprême (l'Exécutif) à ses prérogatives, et dont elle s'est privée, pour une large part, au profit des sujets.

2. La liberté d'expression et de publication.

3. Le droit de tous les sujets à prendre part aux débats d'intérêt public.

4. L'impartialité stricte de la Justice au profit de chacun.

5. Le principe de la loi pénale plus douce.

6. Le respect scrupuleux de la légalité par le pouvoir exécutif.

7. Et enfin, l'inutilité d'une armée pour maintenir les droits de la Couronne et, subséquemment, la soumission de la puissance militaire au pouvoir civil.

Nous pouvons douter que toutes ces affirmations aient été bien gravées dans les tables de l'Histoire au XVIII^e siècle. Mais de Lolme fut amené à préciser qu'il serait futile d'essayer d'établir de tels

avantages dans d'autres pays sans importer toutes les spécificités qui caractérisent le gouvernement de l'Angleterre.

Presque 250 ans après, le professeur Antoine attire notre attention sur « l'alchimie spéciale » entre l'Histoire, la politique et le droit qui procèdent du gouvernement britannique. Son étude clairvoyante du constitutionnalisme britannique n'aurait pu être écrite sans une connaissance étendue et précise de la structure et des pratiques du gouvernement de l'autre côté de la Manche. Elle mérite d'être lue par un large public. Nombre d'enseignements peuvent être retirés, par exemple, de son examen de l'État de droit, de la souveraineté du Parlement, de la séparation des pouvoirs, des aspects permanents de la Couronne et de la tendance actuelle à la formalisation des pratiques constitutionnelles non écrites (conventions).

La Constitution britannique est, en effet, historique et dynamique (le professeur Antoine se réfère à la logique « de la mutation constitutionnelle permanente »). Il n'y a certainement pas de moment précis dans le déroulement de l'Histoire s'apparentant à un « nouveau départ ». Les instants constitutionnels significatifs peuvent surgir à tout moment – en témoigne la décision originelle (contestée avec vigueur en 1972) de l'adhésion du Royaume-Uni aux Communautés européennes, l'émergence récente du référendum comme dispositif constitutionnel de décision, ou le problème épineux auquel est confronté le Parlement de Westminster en 2017 à l'issue inattendue du référendum du 23 juin 2016 relatif à l'Union européenne. Les résultats de ce dernier scrutin ouvrent-ils un chapitre complètement inédit de notre histoire constitutionnelle ou s'agit-il plus simplement d'un éclairage nouveau de réalités plus anciennes ?

Hormis dans ses propos relatifs à la justice pénale, peu d'enseignements contemporains peuvent être retirés de l'analyse de de Lolme quant à ce que nous désignons à l'heure actuelle par le rôle constitutionnel des juridictions. Il est désormais un moyen essentiel au Royaume-Uni qui garantit le maintien de l'équilibre entre les pouvoirs législatif et exécutif. Plusieurs exemples de décisions riches d'enseignements pour les autorités publiques témoignent de la façon dont notre système de *common law* aborde aujourd'hui les litiges relatifs aux pouvoirs constitutionnels. L'année 2017 aura été l'occasion de connaître deux illustrations notables de cette fonction.

En janvier, la Cour suprême du Royaume-Uni a considéré que le gouvernement ne disposait pas du pouvoir de donner une suite juridique au résultat du référendum de 2016 sur le Brexit sans l'autorisation du Parlement. Cette décision applique un principe fort ancien

à une situation nouvelle[1]. En juillet, à l'occasion d'un litige initié par un syndicat, la Cour a jugé que les modalités d'honoraires exigés des salariés dans le cadre des procédures mettant en cause leurs droits étaient illégales (en matière de licenciement abusif ou de traitement discriminatoire par exemple). Introduits par la voie de la législation déléguée en 2013, ces nouveaux honoraires avaient été imposés, en partie, pour payer les coûts des juridictions spécialisées du travail, mais également pour limiter le flux contentieux.

La Cour suprême a jugé, à l'unanimité, que « le droit constitutionnel de l'accès à un tribunal est inhérent à l'État de droit ». Sans accès à la justice, les « lois sont destinées à rester lettre morte, le travail effectué par le Parlement peut être vidé de sa substance, et les élections démocratiques des parlementaires pourraient devenir un véritable simulacre »[2]. De plus, l'accès à la justice ne saurait être conçu comme une valeur individuelle qui n'intéresserait que les parties au procès, mais doit être envisagé comme un principe fondamental de la société dans son ensemble.

Dans la conclusion de son ouvrage, le professeur Antoine souligne que « ce glorieux et emblématique acquis constitutionnel doit être sauvegardé » et il met en garde contre la menace grandissante de la rupture d'un équilibre dû aux divisions internes entre les nations britanniques. Il prévient aussi des dangers d'une assimilation superficielle du système britannique à un modèle européen ou du risque de tomber dans un isolement moribond qui serait préjudiciable aussi bien pour le Royaume-Uni que pour ses voisins. L'analyse opportune de l'auteur fondée sur une profonde connaissance de la Constitution britannique démontre qu'il n'y aura rien à gagner si celle-ci se coupe complètement du modèle européen de constitutionnalisme.

Anthony W. Bradley, QC †

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Université d'Édimbourg, ancien *Research Fellow* à l'Institut de Droits européen et comparé de l'Université d'Oxford, Coauteur, avec Keith Ewing, de l'ouvrage *Constitutional and Administrative Law* aux éditions Pearson

1. *R (Miller & Dos Santos) v Secretary of State* [2017] UKSC 5.
2. *R (on application of UNISON) v Lord Chancellor* [2017] UKSC 51, paras 66, 68.