

## Ian Mitchell's Law-related BOOK RECOMMENDATIONS

31 – *Constitutional Law*  
(15 January 2019)

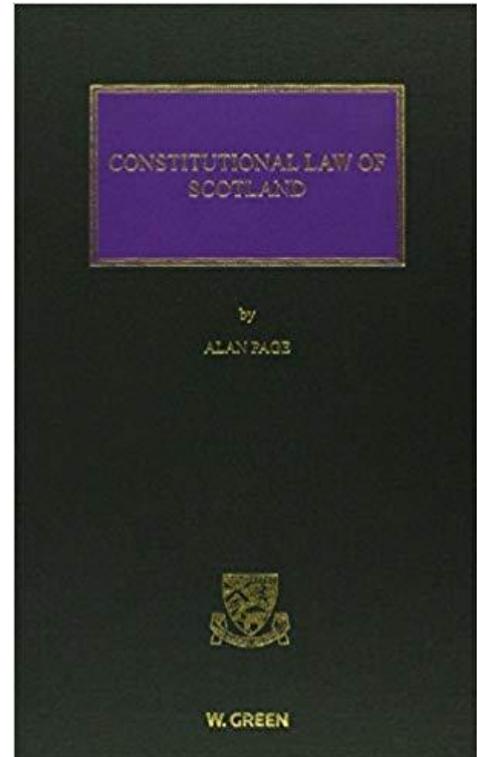
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### CONSTITUTIONAL LAW OF SCOTLAND

**Author:** Alan Page

**Publisher:** [Avizandum](#), 2015 hdbk  
(available on *Amazon*, [click on cover image for link](#))

**Descriptor:** Up-to-date and authoritative reference book on the constitutional law of post-devolution Scotland; contains measured but important warnings about abuses of power by Holyrood politicians, especially nationalist ones.



**RusRoL relevance:** *Risks to the rule of law in the “new” Scotland, where political institutions have been weakened by an administrative-political class which is unsympathetic to constitutional restraint and often seems to lack respect for the moral responsibilities of public office. Illustrates the danger to CONTRACTual government when a “nouveau” governing class becomes dizzy with pride in its newly exalted STATUS in a unicameral, and therefore bullyable, parliament.*

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**Reason to read:** Provides the most authoritative guide available today on the legal architecture of government in devolved Scotland. All countries need institutions capable of resisting elites which get above themselves, and Scotland is no exception. Our political and administrative class often needs to be reminded that they are required to live within the constraints of the **rule of law**. This book surveys the field as a whole; in doing so, it reveals where the greatest dangers lie. The biggest of them is the complacently exceptionalist claim to superiority over British institutions. Perhaps the key quote is this: “What is most striking about a Parliament that was meant to be ‘different’ [from Westminster] is that essentially the same rules seem to have been accepted without demur.” (p. 252)

#### ***Main talking points:***

1. **The Courts:** “Looking to the future, the more extensive the Scottish Parliament’s powers the more important the question of checks, including judicial checks, on those powers becomes... If there is a concern about the constitutional future it is not that the Scottish judiciary will be ‘over active’ or zealous in their defence of the rule of law, but that they will not be active enough; that conscious of the more exposed position in which they find themselves as a result of devolution... they will once again become—or remain—‘stars which loss ther light .. quhen the

sun shynes’. Were that to happen the prospects for limited government in Scotland would be bleak indeed.” (p. 268)

2. **Accountability:** Prof. Page is sceptical of Henry McLeish’s boast about the superior “accountability” of the Scottish government: “It is doubtful whether [the Scottish Government] is ‘much more accountable’ to Holyrood than the UK Government is to Westminster.” (p. 243) He notes that “apologies, more or less sincere, for misleading parliament have become not uncommon in recent years.” (p. 244) Yet we observe that ministers hardly ever take responsibility by resigning.
3. **Committees:** In part, accountability was to be achieved through close questioning of government ministers and officials in the vaunted Committee system, which was supposed to a substitute for a second chamber. However, “Parliament’s committees have fallen some considerable way short of initial expectations which it comes to the business of holding the government to account.” (p. 249)
4. **The chamber:** Debates in the parliament chamber are little better. “There has been persistent criticism of their relevance and quality. The Session 2 Procedures Committee agreed with concerns that Chamber time was too often used for debates on ‘relatively anodyne subjects’.” (p. 249) Discussing single-party government and the use of the civil service to make propaganda for that government, especially in the run-up to the independence referendum, Page says: “In contrast to Westminster, there have been few signs of willingness to acknowledge much less address the underlying tensions between sustaining the Scottish Government in power and holding it to account—to ensure that the Parliament gets its scrutiny as well as the Government its business.” (p. 252)
5. **Self-advertisement:** “Faced with an avalanche of criticism at the end of Session 3” (that is 2007-11, the first SNP government) one of the committees embarked on a review of the parliament’s performance. This is the depressing conclusion Prof. Page arrives at: “So far, the Conveners Group’s programme for change seems to have been more about securing favourable media coverage for the work of the committees than improving their effectiveness in holding the Scottish Government to account.” (p. 253)

**Incidental interest:** Much—including thoughts on judges and the dangers they face from our aggressively robotic politicians. **Judicial independence** is a direct threat to a governing class which gets above its constitutional status. Prof. Page quotes one of the greatest of recent Scottish judges, Lord Hope (see his [Memoirs](#)), on the dangers of what others have called “elective dictatorship”. In the course of a judgement in a House of Lords case, *R (Jackson) v Attorney General* (2006), Lord Hope said:

“We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether that is likely to happen is not the point. It is enough that it might conceivably do so. *The rule of law requires that judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.*” (p. 266, emphasis added)

No wonder, the local political elite was wary of the judges then, and is doubly so now.

Beyond this, Professor Page notes several specific abuses of power. One is the way the Scottish government has used its right of appeal against Information Tribunal decisions to delay consideration of politically embarrassing matters on which the public and the parliament have a right to be informed. Many of these appeals are abandoned without a final result being reached. Writing in 2015, he said: “The most recent [of these was] an appeal against the [Information] Commissioner’s decision requiring the Scottish Ministers to confirm whether they had taken legal advice on an independent Scotland’s membership of the EU.... The disadvantage of any appeals arrangement... is that it may be exploited by public authorities to delay the implementation of decisions... The Scottish Government’s use of the right of appeal to block access to its deliberations over local income tax or (non-existent) legal advice on an independent Scotland’s membership of the EU illustrates the risk.” (p. 293)

I read the EU point as saying that Alex Salmond lied. Perhaps that was why Michael Russell, the then Education Minister, responded so abusively in 2012 when this false claim was challenged by a forum consisting of some of the country’s most eminent experts in constitutional law—a group which included Professor Page, as well as the Dean of the Faculty of Advocates, the President of the Law Society of Scotland and a former judge in the European Court of Justice. Russell said the forum’s work was “farcical”; he criticised it for “masquerading as impartial” and called it a “kangaroo court”. (*Daily Telegraph*, 22 August 2012) Sadly, Russell is not alone in Holyrood in his lack of respect for legal expertise. But petulant sniping by politicians eventually undermines public respect for the **rule of law**.

***Thought(s) provoked:*** The new parliamentary system is dysfunctional, as increasing numbers of people are coming to realise. Scotland is not alone in that: the Russian political system under Vladimir Putin is in some important respects worse, and the EU little better. However, my feeling is that in Scotland the systemic defects are not the only, and in some ways not the main, issue. The root problem is the type of people that modern politics has attracted in Scotland. They come from what might be called the **multiple-choice generation**. They see life in digital rather than analogue terms and are unhappy with shades of meaning and open-ended questions. They are the products of an educational and administrative system which decided some time ago, for reasons of both cost and control, to reconfigure official human interaction in machine-readable form. This has coarsened debate and oversimplified many important issues, which are often reduced to a cartoonish caricature of polychromatic reality. Diversity and creativity are under threat. Many in our emerging boss class are uncomfortable with the post-Enlightenment etiquette which stressed “**measured disagreement**”. Mr Russell’s angry expostulation quoted above was an example of that.

Multiple-choice thinking is intellectually stultifying. It makes people stupid, quite literally so, for two main reasons. First, it forces the answerer to think in terms that the questioner dictates, because a freely-expressed response is not allowed. Consider, for example, the difference between asking what your political views are, which for most people is a complicated and sometime contradictory matter, and asking whether you are (a) Labour, (b) Conservative (c) Trotskyite (d) Green or (e) none of the foregoing. The first question opens a dialogue, or reveals a personality, whereas the latter is a mere classification exercise, with the categories decided by the questioner. It might be appropriate for commerce, social regimentation or machine politics but it does not encourage the answerer to formulate a clear view and try to communicate it to the questioner. You can’t have a measured interaction with five boxes on a page. Black-and-white, yes-or-no, tick-or-cross: all encourage a them-and-us, neo-tribal way

of thinking. Subtlety and paradox are replaced by simplistic labelling, the result of which is that people lose the habit of listening to each other. Humanity is defeated by the algorithm.

The second point flows from this. When you are forced to think in someone else's terms you lose the ability to think for yourself. My definition of intelligence, for what it is worth, is the ability to adapt to changing circumstances. That is what differentiated mammals from reptiles in the age of the dinosaurs. More recently, it separated autocracy from democracy and market economies from planned ones. When you have to think in other people's terms—as, for example, Soviet citizens did—your ability to change, grow and be creative atrophies. Politically speaking, it makes people stupid—or criminal, if they are bright and strong enough to resist moronification (as the modern Russian oligarchy illustrates).

This is what is happening in Scotland today as a result of the tramlining of public debate by an increasingly authoritarian government. “**Attitude management**” may sound like a cool idea in a marketing memo, but it is death to political life—*which is why it is so popular*. In order to maintain themselves in power, our new elite is fogging the nation's thinking about itself by means of endlessly repeated keywords and clichés—just as the Communist Party did in the Soviet Union. The ostensible aim is cuddly consensus, but the reality is a ruthless determination to stamp out effective opposition. The **rule of law** is under threat from an immature political class that seems incapable of distinguishing between its new role as the government of a country and its previous one as a campaigning organisation on behalf of an aggrieved minority. Again, Bolshevik parallels suggest themselves.

**Style:** Considering the subject matter, which is to put it mildly dry, this book is surprisingly readable. The only problem is that it is practically unaffordable. Perhaps Professor Page should consider writing an “idiots guide” to the constitutional landscape of devolutionary Scotland and the problems that are looming in the public sphere. He certainly has all the material needed to do so. I am sure it would be a best-seller. Anything that publicises the realities of law and politics in Scotland today would perform an important public service. It might help save the country from the intellectual Gulag to which our youngers and betters seem keen to consign us for their own benefit as members of the new, unchallengeable nomenklatura.

**Publishing quality:** Very high standard of production—as it should be, given the price!

**Author:** Alan Page has been Professor of Public Law at the University of Dundee since 1985. Until recently, he was Deputy Principal there, and also Dean of the School of Law.



**Link(s):** You can see Professor Page in the second half of this film about the legal and political aspects of Brexit talking about the Scottish position: <https://www.youtube.com/watch?v=3iuIAilGEiw>

**Overall recommendation level:** VERY HIGH, for all who value constitutional lawfulness

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**About the reviewer:** Ian Mitchell is the author of four books, including [\*Isles of the West\*](#) and [\*The Justice Factory\*](#). He is writing a comparative study of Russian and Western constitutional history to be called *Russia and the Rule of Law*—hence the “RusRoL Relevance” section at the top. He can be contacted at: [ianbookrec@gmail.com](mailto:ianbookrec@gmail.com). For other reviews in this series, see [Ian Mitchell’s Book Recommendations](#).