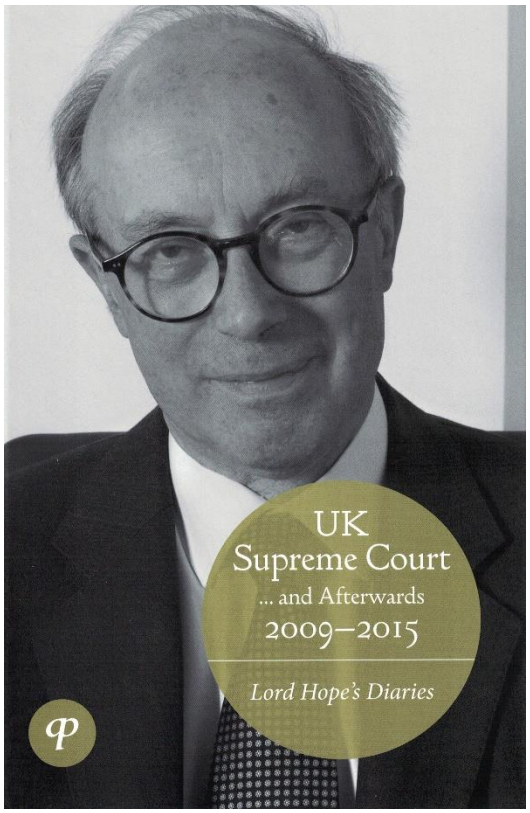
Ian Mitchell's Law-related
BOOK RECOMMENDATIONS

51 – UK Supreme Court
(25 March 2020)



LORD HOPE'S DIARIES: UK Supreme Court… and Afterwards 2009-2015

Author: David Hope

Publisher: Avizandum, 2019
(*available from Avizandum direct, click on cover image for link*)

Descriptor: Diary of the Deputy President of the UK Supreme Court in his years before and after retirement

RusRoL relevance: *Total: an illustration of one, distinguished aspect of the maintenance of the rule of law. Shows how the STATUS aspect of law can, in the right hands, harmonise fruitfully with judicial CONTRACT (i.e. the just application of laws promulgated by a popularly elected and dismissible government).*

"'That bloke was brilliant. He was ever so quiet, but he didn't half take them apart.'" (p. 297)

Reason to read: The whole series of Lord Hope's Diaries—five volumes, of which I have already reviewed the first—gives the non-judicial reader the best view of judging today that I am aware of, at least as far as the UK is concerned (US judges are different but also well worth studying). I will give an example which illustrates the subtle balance between law and life that lies at the heart of the best judicial thinking:

> "[14 July 2012] A lot of work over the weekend, including much reading up for a rather difficult Scottish planning case on Monday and Tuesday. This is *Walton v Scottish Ministers*. William Walton is objecting to a section of a very important peripheral road which has been planned around Aberdeen to relieve congestion in the city centre. His objection is based on an EU Directive which is concerned with the assessment of the environmental effects of the development. Resolving this objection has taken a long time, and the result has been much delay in the completion of this much needed bypass. It was hard to avoid feeling that he was just a troublemaker, as he does not reside locally and there is no indication that his property or other interests will be affected. That indeed is how it has been

> portrayed in the press. But we had, of course, to give his case a fair hearing. He was very well represented by Aidan O'Neill, who was able to pull together quite a tricky argument for us to consider based on recent developments in EU law on environmental assessments. The argument for the Scottish ministers was not as helpful as we would have wished, so we have quite a lot of sorting out to do. Robert Carnwath and Robert Reed agreed to write and do some more research. We hope to be able to find a convincing way of dismissing Walton's appeal, as he has no point of real substance to raise – only a technicality." (pp. 154-5)

There is so much in that passage that is worth noting. These are some of the main points:

1. The way EU law intrudes so easily into national law. It is written on the assumption of different legal principles—more general—and is easily used by nuisance objectors to trip up judges who are used to the British drafting tradition, which is much more detailed. Our law is based on the idea that everything not specifically forbidden is permitted, which is the opposite of a codified system in which the state lays down general rules of behaviour for most situations.
2. Aidan O'Neill is the advocate who started his speech against the Prime Minister in the "prorogation case" in front of Lady Hale last year with a reference to the Battle of Bannockburn, and ended it by talking aggressively about "the mother of parliaments being shut down by the father of lies."
3. The Scottish Executive lawyers were, not for the first time, shown to be less competent than they might have been. There are other examples in Lord Hope's five volumes.
4. Nonetheless, the judges did what they could to try to understand the case they imagined they were trying to make. They did so out of a conscientious attention to what they saw as their duty in a position of public trust. They were certainly not paid to do the government's research for it.
5. The phrase "much needed bypass" is revealing. "Much needed" is not an attribute recognised by law in the abstract, but it is a practical problem for the road system in that part of Scotland and a judge—i.e. not the law in general—must recognise it. That is law at work, weighing the arguments on both sides in the context of the importance of the matter at issue. Law in this sense is not like regulation: for example parking tickets, which are automatic given the facts. Litigation starts when public control of private behaviour has consequences that are not clear to all, and/or is contested. Legislation is usually far from perfect, but good law maintains a balance between competing ideas of what society wants as expressed by parliament. The courts are invoked when there is an arguable case for both sides of an important disagreement. Fine judgement is usually called for.
6. Most importantly, note the difference between the judicial reasoning and the way it is presented: "We hope to be able to find a *convincing* way of dismissing Walton's appeal". The word "convincing" lies at the heart of the rule of law. Justice must be *seen* to be done. What judges do has to be acceptable to the public if it is not to be seen to be tyrannical. Few people will read the *Walton* judgement, but it must be on the record, available to anyone who wishes to consult it. There can be no reciprocity between power and the people without the informed consent that is implied in publicly available law reports (as well as open courts, etc.).
7. The way judges deal with appeals like Mr Walton's is crucial. It reveals the *character* of the judiciary as a body. That is the main practical pillar of the rule of law. Most judges prefer not to have light shone into their life and thought as they want judging to be seen as an impersonal process. It is not entirely like that, which is why Lord Hope's approach is important. Not only was he the person who brought television into court in Scotland, he has also published these five volumes of diaries. We should be

grateful as a society that we have people who do not always follow the herd yet can still sit on the highest Bench in the land.

If you like reading this sort of material, interspersed with tales of extra-curricular life as a senior judge and leavened with observations about what I see as the slow degeneration of the Scottish political establishment in an insolently nationalist era, then this is the book for you.

Personally, I was also glad to read about a judge in the Supreme Court who plants, grows and howks his own potatoes at his dacha at Craighead in Perthshire. At the beginning of the legal year in the autumn, he lifts a load of them and takes them down to London to keep his strength up during the long winter at his *pied à terre* in Gray's Inn. This is reminiscent of the apocryphal Hielan' lad setting out from the family croft to walk through the hills to the University, with a sack of oatmeal on his back and the goal of one day becoming the Professor of Greek in the Athens of the North...

Main talking points: Since I agree with Lord Rodger that real lawyers love gossip, just as I agree with W.H. Auden that all real poetry is generalised gossip in another form—both reflect our interest in the problems and paradoxes of human existence—I will list some of Lord Hope's observations about four lawyers and a politician:

1. There is a great deal about his close friend and valued colleague, the same **Lord Rodger of Earlsferry**, a Glasgow man himself, who had a twinkle in his eye and would probably have appreciated the Greek professor analogy. Tragically, Alan Rodger died in early 2011. His immense contribution to the Supreme Court, along with his quirky but razor-sharp attitudes to the law and to Scottishness, was "extinguished" (p. 94) by a brain tumour. He was considered by experts to have been the most intellectually distinguished judge Britain has had for many decades.

   There is an important issue related to his rarefied academic distinction which is raised in this book (and I know others who share Lord Hope's concern). Few people in the legal establishment seem to think that Alan Rodger would have been appointed to the Bench after the reforms to judicial appointment introduced by New Labour. Tony Blair (to the fury of Derry Irvine, one gathers) felt under pressure from Europe to simulate compliance with the ECHR as far as the courts are concerned. The result was the Constitutional Reform Act of 2005. It abolished the office of the Lord Chancellor, converted the Appellate Committee of the House of Lords into the UK Supreme Court and altered the system of appointing judges from one based on professional esteem to one centred on a committee of "wise people". Scotland followed suit three years later, slavishly copying the third aspect of the English reform, even though it was not really needed.

   Under the banner of "openness and transparency", the Labour government created the Judicial Appointments Board to replace discrete off-the-record consultation by the Lord Advocate. The Minister who put her name to the White paper outlining the reforms, Cathy Jamieson, appeared to have no independent inspiration in the matter. She was an art therapist to trade and my impression from studying the progress of the Bill was that she did not really understand the implications of what she was doing. Certainly, the result was the opposite of open and transparent. The JAB is a closed, unaccountable, non-transparent committee dominated by non-expert, part-time, quango-hoppers who have no professional experience of

the law. The committee's deliberations are secret, and they do not publish reasoned judgements in the way judges do. It is just as "non-open" as the previous system, and far more vulnerable to either social manipulation or the curse of mediocrity due to its non-expert character.

One of the lay members of the Board is always in the Chair, perhaps to emphasise the amateur nature of the operation. Applicants have to apply to be interviewed, as if their merits in the law can be ascertained by the Board after judging their supplicatory essays and presentational skills. This approach encourages those who are good at being interviewed to come forward, rather than those whose peers respect their professional talents. It is easier for an immodest, half-educated, ego-stroker in any field to bamboozle non-expert critics than it is for most genuine experts to do so. Proven ability and personal salesmanship do not always go together, and probably would not have done in the case of Alan Rodger. His academic speciality was Roman Law, which is the aspect of Scots law that most distinguishes it from English law. It is also very important in that it is the basis of most continental European legal systems.

How, for example, would worthy public servants like the legendary "lady from the Post Office" be able to judge Lord Rodger's subtle view of conveyancing as expressed in his wittily erudite essay, "Roman Law Comes to Partick", or the more provocatively titled piece from the *Law Quarterly Review*, "A Very Good Reason for Buying a Slave Woman?"? Of course they could not, even if some of the non-lay interviewers might have an informed view. But they are not a majority (nor are men; nine of the twelve Board members currently are women). This is not a criticism of the individuals, but of the politicians who devised a system in which judges are selected by a group which today includes people like Neelam Bakshi, whose profession is described on the Board's website as "a freelance trainer, coach and consultant specialising in equality and diversity, public sector equality duties, and personal development." That is it; no mention of anything whatsoever to do with law, jurisprudence or even crime. But at £296 per day plus standard Scottish government expenses, I suppose it's nice work if you can get it.

One result of the amateurisation of judicial appointments in Scotland has been a dilution of the collective talent of the judiciary as part of a general march toward mediocrity, conformity and suburbanish dullness. That in turn degrades the collective character of the Bench, which is its most important asset. It would be like giving a committee of transgender truckers final authority in selecting the drivers for the Ferrari Formula 1 team, or having the Blue Peter crew judge the Tchaikovsky Piano Competition.

Another casualty, beyond quality, is love of the subject. Fun is off the table when excellence is subordinated to acceptability in the eyes of uninformed outsiders whose main interests are in vague, rubbery subjects like "public sector equality duties". Without fun, there can be no passion, and without passion there can be no leading-edge, Ferrari-level elan or Tchaikovsky-level beauty. Since the time of Viscount Stair and Mackenzie of Rosehaugh, there have been many Scots who have possessed that level of talent. Without their input, Scots law would not have survived as an independent (and highly respected) legal system. It will not survive much longer if the po-faced puritans in parliament are allowed to crash on unchecked, demolishing a tradition that has taken three centuries to develop. Lord Rodger *enjoyed* law and saw that it had its fun aspects, which is why he devoted almost every waking moment of his life to it. The nicest epigraph for him that I have read is actually Lord Hope's. It comes from his account of the Supreme Court's annual

dinner for the judges' judicial assistants—young tigers of the profession—held in July 2011, the month after Rodger died: "Alan Rodger was, of course, greatly missed. His determination to gather as many of the young around him with as much wine as possible, and to keep them talking until 3 a.m., has become a distant memory." (p. 98)

2. There is quite a bit about **Lady Hale**, of whom I have been deeply suspicious ever since she told a meeting in the Signet Library last year (the Macfadyen Lecture) that women would judge many sorts of cases differently from men, but who then played to the dutifully outraged gallery, most of whom seemed to be ambitious Edinburgh solicitors, when I suggested in the Q&A that this implied that justice was not blind. I pressed her in person after the meeting, but she behaved rudely, refusing to engage with the issue. Lord Hope is too polite to go beyond noting her words when justifying her application to be appointed Deputy President of the Supreme Court in succession to Hope himself. "I am world famous," declared the future spider-woman. (p. 190) "What has that got to do with judging?" would have been my response. Hope adds: "Brenda [Hale] is not easy to deal with, frightens some people and is so relentless in her pursuit of her agenda about women." As I was at the Macfadyen lecture, he too was given to understand that women in the law are not to be dealt with as equals. In one case about a woman's interpretation of a marriage contract, he notes "Brenda perhaps [had] a feeling that there were issues here that the rest of us did not understand." (p. 35) The "rest of us", you understand, being male….

3. **Lord Sumption** has interested me ever I saw him in court when he was acting for Roman Abramovich in his amazing case against Boris Berezovsky in 2010. His was the first appointment to the highest court direct from Bar since 1949 (footnote 84). It was objected to by some Appeal Court judges who felt they had been in the queue longer than Mr Sumption. It is said the appointment was delayed so that he could trouser a reputed £7 million fee from Abramovich. If true (though I doubt it), then well done, Jonathan! My opinion rose still further when I discovered he was the author of a five-volume history of the Hundred Years' War—i.e. he has serious interests outside the law. Finally and most importantly, I liked his Reith Lectures last year in which he argued that the law is becoming too political due to the malign influence of the European Court of Human Rights.

   The ECtHR wants to arbitrate on matters of policy which should, in a democracy, properly be decided by elected politicians. There is, of course, no real democracy in the European Union, which insists on compliance with the ECHR. Yet the EU parliament is a rubber-stamp body with few powers; legislative acts are, revealingly, called "Directives"; and the executive is self-appointing and cannot be dismissed. That is a fundamentally bureaucratic approach in which "wise ones" (like the JAB) decide what is good for the rest of us. There is an irreconcilable issue of governance at the back of this: either you believe in administration by "wise ones" who rule without meaningful public consultation or you believe that government should be in the gift of the people over whom that government, temporarily, rules. During the last couple of centuries, Britain has generally taken the latter position, and Europe the former.

   Perhaps that is to be expected on a continent in which most of the countries were either actively or passively totalitarian within living memory. But the ECHR was an instrument designed soon after the Second World War (by a Scotsman, Sir David Maxwell-Fyfe, later the

Lord Chancellor, as Lord Kilmuir[1]) to prevent the recrudescence of such approaches to politics. It was an excellent idea besmirched by the usual bureaucratic tendency to expand its own empire over time. Imperial expansion in that context requires the invention of work that the imperialists can argue needs doing by them and such as them. Today, as Lord Sumption pointed out, that work is the micro-management of civil society over the whole continent, as if parliament did not exist to legislate for legitimate reforms *desired by the electorate*. That may be fine for countries with only a few decades' experience with constitutional reciprocity, but it is offensive to the British tradition, which is far, far older than the ECHR—and indeed was the original inspiration for it. Lord Hope comments on Lord Sumption's unusual appointment (p. 68)—to which Brenda Hale objected as he was not a woman (p. 69)—and on his "Bench cred" a year in. "Sumption still retains too much the attitude of an advocate and has yet to learn the technique of the judge. Too self-confident, not sufficiently inscrutable, or reserved." (p. 135)

4. Finally on the lawyers: Brian Gill, or **Lord Gill**, the previous Lord President of the Court of Session. He had the Brenda Hale problem of a chip on the shoulder, though in a completely different form. Gill was a life-long, highly committed Catholic who felt that throughout his career he had been discriminated against by the "Protestant" legal establishment due to his lowly origins in the wrong end of Glasgow—perhaps with some justice, though it was probably more for snobbish than sectarian reasons. He was nonetheless a brilliant lawyer who was elevated to the Court of Session Bench in 1994. He became Lord Justice Clerk in 2001, but was passed over for the top job in 2005—at the expense, it has to be said, of yet another Protestant. That was Arthur Hamilton, who collapsed soon after being appointed, and was off "sick" for nearly six months, during which time Gill deputised for him.

   But Gill hung on until 2012, when he was finally appointed Lord President. However, he did not last long as he, rather irresponsibly, resigned in the middle of a legal term. There are many examples in this book of his apparent lack of a sense of public duty in office. Most revealingly, Robert Reed (now President of the Supreme Court) who served as an Outer House judge under Gill told Hope that Gill said he intended to serve as Lord Present only for a year and a half. "'Why are you taking the job on?' was the obvious question, to which his reply was 'For revenge.'" (p. 151) That of course is an entirely personal, rather than a public or professional, reason. It rather justifies Hope's earlier comment: "He has made enemies… I confess to have always felt uneasy about his personality." (p. 149) When Gill finally resigned, we read: "Professor Kenneth Reid remarked that this was typical of the man, and that he had given little leadership to the Court of Session. He sat only from time to time, when it suited him." (p. 317) The end result was that "I do not think that Brian Gill's legacy to the Scottish legal system will be one that we will wish to celebrate." (p. 318)

Incidental (political) interest – Part 1: There is also a lot about **Alex Salmond** (whom Hope calls "Alec"). It adds up to a pretty unpleasant picture. We first encountered him in vol. 4, *House of Lords*,

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[1] His swotty pallor combined with his legendary dullness at the Despatch Box—he was Home Secretary in the last Churchill government—gave rise to an amusing ditty:
"There's nowt so close to death in life
As David Patrick Maxwell-Fyfe."

when he was a newly-minted First Minister with a degree of humility due to the fact that he led a minority government. His administration looked "much brighter than the old Labour team." (p. 300) But power corrupts, as we heard in Court during his trial for inebriated sex-pesting recently.

In this volume, we first read about the touchy-feely uber-quaffer in connection with the famous *Cadder* case. That involved an arrest for assault and breach of the peace in Glasgow, after which the accused was interviewed by the police without a solicitor being present, as is now mandated by the Human Rights Act. That interview produced evidence which was relied on in the High Court, where he was convicted. The matter came before the Supreme Court as a *human rights* issue, but Salmond and his Justice Minister, **Kenny MacAskill**, pretended not to understand this. (If the Justice Minister did not in fact understand the distinction, that is even worse.) They claimed that this was a breach of the principle that the High Court of Justiciary is the final court of criminal appeal in Scotland. MacAskill even went further by making the fatuous, self-advertising proposal that Scotland should "withhold its share" of Supreme Court funding due to this apparent break with tradition. In fact, it was a "devolution issue", in that the Scottish courts had not applied the Human Rights Act (1997) in the way the Scotland Act (1998) says they should have. The matter was eminently justiciable in the Supreme Court. It was not a *criminal* appeal; the jurisdiction of the High Court was not infringed in any way. The only issue was tolerance of oppressive police practices. The SNP tried to extract political advantage by playing on the ignorance and prejudice of its Anglophobic supporters. The fact that Salmond brought the rule of law and the courts into disrepute was simply collateral damage. Lord Hope was at the epicentre of this storm as it was he who had presided over the case in the Supreme Court, and who wrote the judgement.

Salmond was interviewed on BBC Scotland, and Hope says he looked "uncomfortable". "'He who pays the piper plays [*sic*] the tune,' said Alec Salmond in a remarkable breach of his duty to respect judicial independence as First Minister." (p. 91) Salmond's words implied that the government should be in ultimate control of the courts. That would be the end of the separation of powers.

Salmond started talking elsewhere of "Lord Hope's Law", which was either a display of culpable ignorance or a deliberate attempt to be offensive to the tradition of judicial rectitude which has survived, with very few exceptions, since the Claim of Right in 1689. The story reminded me of the way in which Thomas Jefferson, when President, tried to destroy John Marshall, the inspirational Chief Justice of the United States from 1801-35. It was Marshall who made the government in the United States subject to the Constitution by inventing judicial review. Jefferson did not want to live under, as it were, "Marshall's Law" since the two men were on the opposite sides of the political fence, one a one a Federalist and the other a Republican; one an Anglophile and the other a Francophile. Fortunately for the rule of law, the President was foiled by Anglophile supporter of the common law and his fellow justices. But Salmond appears not to have learned any lessons from legal history, nor to respect judges who are sworn to act in their professional capacity on the basis of the law and good conscience. He seems to respect neither.

The nationalist leader then gave an interview to *Holyrood Magazine* in which, Hope says, "he launched into a vicious diatribe against me… The theme was we were standing up for the most despised members of society [is the law only for "good" people?], contrary to what he believes should be the role of Scots law [presumably to trash unpopular people]. He said that I was completely out of touch with political legal opinion in Scotland. At least he was elected, he said, which was more than could be said for me… The interview was laced with indications of real anger, and it gave an astonishing insight into what goes on in this man's head." That was not the end of it. "The diatribe against me was repeated time and again

by the media, not as an assault on me but to show how vicious, bigoted and uncontrolled Salmond has become." (p. 93) Given that judges are not allowed to answer back, this invocation of the ignorant prejudices of the "undespised" was an nasty example of political bullying.

Incidental (political) interest – Part 2: It gets worse—when it comes to the Scottish independence referendum in September 2014. On 26 August, Hope notes that "the independence referendum campaign in Scotland is becoming rather ugly... the impression one gets is that the separatists are much more prone to aggression in all its forms while the No side are remaining in the background as much as possible to avoid abuse or even worse." (p. 259) It is now clear that the SNP aspire to what might be called "the Winnie Mandela position", which is that it is not enough to be in government, you have to be in *power*. By that, she meant that government should be above the law. V.V. Putin has a similar concept of governance. It is appalling to think that any party in Scotland might seek that level of political control.

Hope gives some examples of nationalist behaviour during the referendum campaign. First there was verbal and physical abuse of Labour unionists, but these were "minor examples of a much more sinister phenomenon. For many months, people who depend on Scottish Government funding have been told that there will be 'consequences' if they speak out for the Union or criticise the SNP. So, too, with businessmen who look for planning permission or other necessary acts of administration in their favour. It is best to keep silent. It feels as if free speech and proper reasoned debate, so badly needed, are being drowned out…. How much Alec Salmond is to blame for this is hard to tell. But he is aggressive, and he gathers cronies around him who like his manner." Hope notes that, in the second of Salmond's two televised debates with Alastair Darling before the referendum, it was "alarming" to see the "faces of some of [Salmond's] supporters in the rather partisan audience – *nasty, brutal and rude*." (p. 259, emphasis added) Such people are rarely amenable to reasoned debate, not because they are stupid—though many are—but because of the "tribal" element in nationalism. To them, it is social treason to acknowledge the justice of "English Tory" opinion on most subjects. Hope asks an important question: "Do the Nationalists ever have anything to say other than to rubbish whatever is said against them?" (p. 260)

Incidental (political) interest – Part 3: A less extensively covered but even more important theme is the SNP approach to a new "constitution" for Scotland. Few details were given beyond the determination to abolish the House of Lords (though nothing was said about what should replace it).

An illustration of the SNP's hostility to compromise was given in January 2012 after **David Cameron** agreed to permit an independence referendum, but only on terms agreed with the UK government. Hope comments: "This led to a furious riposte by Salmond…. Point after point is being raised about what independence might lead to – what currency to use, what about defence, what about our economy and so on. Each point is met by an attack on the man, not the issue. 'I will not be bullied by Westminster,' is the stock reply, as is the epithet 'Tory' or 'Lib-Dem Peer' to disparage the messenger. It is pathetic, school-boy stuff, although no doubt attractive to the SNP's own supporters. But this is no way to deal with the serious issues that are at stake… The root of the problem is that the SNP, and Alec Salmond in particular, think and behave as if Scotland is already an independent country. *That mindset does not accept the rule of law*, which is to the contrary." (p. 129, emphasis added)

When the then Chancellor of the Exchequer, George Osborne, said a blunt "No" to the SNP idea that Scotland could use the British pound after independence, Salmond exploded again. He "accused

Osborne – a Conservative toff, it was pointed out – of bullying. This was absurd of course. No-one is more of a bully than Salmond himself." (p. 230)

Soon afterwards, the EU Commission President, **Jose Manuel Barroso**, blew another of the SNP's ships out of the water. When he "declared it would be 'very difficult, if not impossible' for Scotland to obtain the agreement of all EU member states to become a member of the EU after independence, this was declared by Nicola Sturgeon to be absurd nonsense and undemocratic." (p. 230) *Undemocratic???* Does Nicola Sturgeon not know that the basis of the EU, with its idea of rule by an appointed "Commission" rather than an elected parliament, and on the basis of Directives rather than laws, was deliberately designed to substitute transnational bureaucracy for intranational democracy? Europe, like Scotland, has a Potemkin parliament. Despite that, in June 2014, just three months before the referendum, the SNP published what Hope describes as "a very odd constitution for Scotland… as part of its campaign to show us what independence would mean." (p. 250) Apart from abolishing the House of Lords, one consistent refrain has been the desirability of Scotland remaining part of the European Union, with its ostentatiously managerial approach to government.

After they lost the referendum, the SNP did not accept appear to the result, and certainly not as far as the Supreme Court was concerned. Salmond and MacAskill had not forgotten *Cadder*. They "now say they want its jurisdiction in Scottish cases removed entirely – still pressing for independence in almost everything, with no regard to the No vote…" (p. 267) The result of the SNP's approach is that "with no effective opposition [in parliament], the SNP can control everything and turn it all to their advantage." (p. 267) That is how a unicameral parliament works, giving complete control to the party which wins a majority in it. That is a threat to the rule of law, which is based on the ideas that the majority rules and that the minority has its basic rights protected against a potentially vengeful majority.

In the United States that function is performed by the Supreme Court with reference to the Constitution (thanks to John Marshall), and in Britain by the ordinary courts now that they, too (since the 1960s), are equipped with the power of judicial review (though by the executive only, not the legislature). In an independent Scotland, I doubt whether an unpopular minority would be given any meaningful protection from the "nasty, brutal and rude" mob of tribal nationalists, especially if they are English. Salmond, after all, appears to think that law exists to protect respectable people from "the most despised members of society", when in fact it evolved in the later middle ages not as a method of monarchical control but as a way of defending "even the least of these my brethren" from oligarchs, psychopaths and clannish, authoritarian bullies like Salmond. If people like him (and, I suspect Sturgeon too) are allowed unchecked power, Scotland will end up like Putin's Russia or Yanukovich's Ukraine, where clannish, authoritarian bullying mutated quickly time into kleptocratic gangsterism. In that case, Scotland will be subject to either repression or revolution, neither of which is conducive to rational debate or to the freedom to differ.

Thought(s) provoked: Devolved Scotland is losing the talent that once bestrode the legal stage. The Church, as a form of cultural expression, has been dead for a century or so, and education has been politicised. Only the law is left of the three reserved areas in the Acts of Union to express Scottish social values. But even that is slowly ebbing away. Due to the JAB, the likes of Alan Rodger, James Mackay (Lord Mackay of Clashfern, who, as Lord Chancellor, tried to being plain, Scottish rationality to the sub-Dickensian baroque of the English Bar and courts) and even Hope himself will probably never be seen

again in the new world of bureaucratic mediocrity, gatekept by public sector equality experts and personal development trainers. Already the visitor to the Parliament House senses a reduced level of activity and electricity when compared with the 1990s. If this continues, Scots law will lose its distinctive intellectual tradition and decline into little more than a regional juridical oddity. That would truly be "ane end of ane auld sang".

Incidental points from the other volumes: From volume 2, *Dean of Faculty*: In 1988 Hope dined with the Queen and others in the Signet Library as a guest of the Writers to the Signet Society. "I was fascinated by her unmanicured, almost workmanlike, hands—for country living, it seemed—and simple hairstyle… Her handbag was suspended during dinner from the table by a clamp which she produced from the handbag when she sat down. It was an interesting device with a jewelled lozenge which rested on the tabletop… I was glad to see she ate a good supper, starting as soon as the plates were ready before her, and she was not abstemious with the excellent wines." (p. 102)

From volume 3, *Lord President*: In 1990, Hope attended the Commonwealth Law Conference in New Zealand which highlighted the importance of the rule of law as we understand it in the English-speaking world. "It was quite an eye-opener to see, hear and meet so many people from so many different backgrounds. It brought home the immense achievement, despite all the criticisms, for the British to have given birth to this unique family of nations, *held together by very little except the common language and respect for the common law*." (p. 31, emphasis added.) I would gloss that by saying that the spirit of the common law, as we know it, is inextricably bound up with the language. Trying to explain it to Russians has convinced me that, in the long run, law and language evolve together.

From volume 4, *House of Lords*: "Remarkably I found myself this weekend for the first time this year, and for as long as I can remember, with no judgements to write or revise over the weekend, no lectures or speeches to prepare, and no case of substance to read up for the coming week." (p. 145)

Style: Lord Hope writes quiet but smooth prose which seems to me entirely appropriate to his subject matter. It is grave and fact-laden but also with plenty of the right sort of gossip. This must have something to do with the law and law-people because the interest level slackens off perceptibly in the second half, following his retirement from the Court. There is much of interest beyond that, but somehow the sinew, or discipline, of the law no longer gives shape to the narrative. I think we underestimate the power of courts and judges to interest and amuse us, if treated in the right way. Lord Hope has that right way—or at least one of them. Alan Rodger had another, as I tried to show in my review of his book about the legal aspect of the nineteenth century split in the Church of Scotland. That is not a subject most people would imagine to be interesting, but he made it fascinating. It is a book which can, like its author, keep the reader up till 3 a.m., wine or no wine.

Publishing quality: Excellent, except for the machine-generated index. I noticed only one mistake in the entire text, which is astonishing (the A380 Airbus is referred to as the A800 on pp. 263, 265).

Smile(s): Lord Hope does not, as a rule, have an eye for the ridiculous sides of life. But he does give us one amusing scene to ponder. After his week as High Commissioner of the Church of Scotland in 2015—as the Queen's representative, he lived in the Palace of Holyroodhouse for a week, with full

Royal service—he had to report to Her Majesty and explain, amongst other matters, "the problem about whether the Church could agree to the calling of ministers who were married to gay partners. Neither she nor I expressed views about how we saw the issue, but she did say that when she was on a State Visit to Germany last week she had been introduced to someone and found herself shaking the hand of the man's husband by mistake. It was all very confusing, she added." (p. 323)

Author: David Hope, Baron Hope of Craighead, KT, PC, FRSE was the first Deputy President of the Supreme Court of the United Kingdom from 2009 until his retirement in 2013, having previously been Lord President of the Court of Session from 1989-96 and a Lord of Appeal in Ordinary in the House of Lords from 1996-2009.

Link(s): I repeat what I wrote in the review of the first volume of the *Diaries*:
There is a lot on Lord Hope on the internet as he has survived long enough to be recorded in the new but potentially infinite archive of YouTube. He appears quite a lot in this fascinating film about judging in the House of Lords: https://www.youtube.com/watch?v=PZtYENfNa7k&t=1998s Here is a very interesting, and more personal, discussion in his alma mater, Cambridge University: https://www.youtube.com/watch?v=JsnEMQBNQio Finally, may I recommend this debate with Michael Howard, Joshua Rosenberg and Charles Moore on the critically important subject of judicial accountability: https://www.youtube.com/watch?v=G5sLZ18RSOg

Overall recommendation level: VERY HIGH INDEED – if you are a judge-junkie

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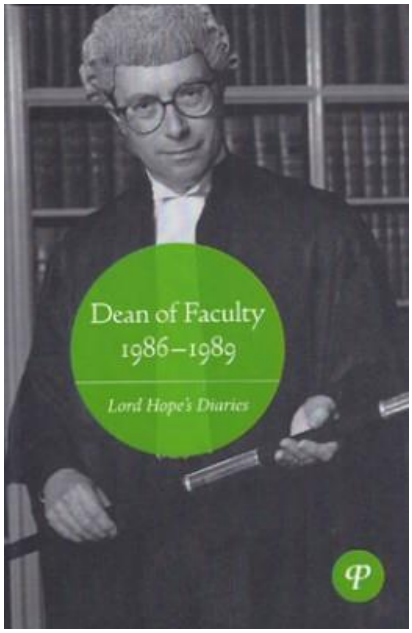
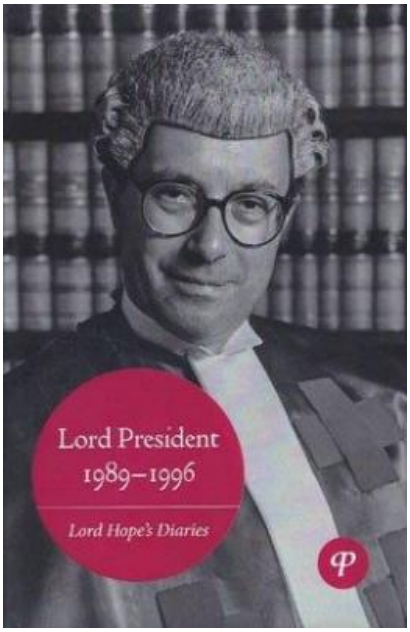
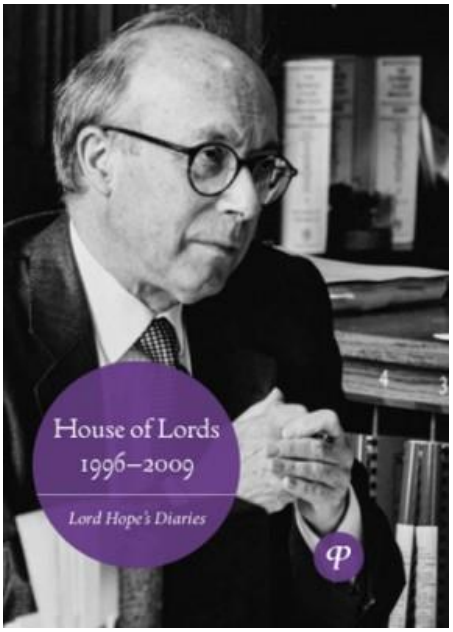
I also recommend the other three volumes in the series (see my review of the first one). Perhaps Avizandum should offer a discounted box set of "the hail five"?







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: ian@ianmitchellonline.co.uk.

For other reviews in this series, see Ian Mitchell's Book Recommendations.