

**Book review: Mark Elliott, Jack Williams, and Alison L Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart 2018, 318pp, ISBN 978-1-50991-640-5).**

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Whereas, in the EU law universe, one can think of several landmark rulings, focusing for the better part of 300 pages on a single case – as *The UK Constitution After Miller* does – is still an unusual task. The UK Supreme Court’s judgment in *R (Miller) v The Secretary of State for Exiting the European Union* [2017] UKSC 5 nevertheless justifies that focus.

*Miller* is a case of monumental importance for the UK constitution, marking the beginning of the end for a rich and, at least in my view, meaningful part of its constitutional history: that of EU membership. In *Miller*, the Supreme Court was asked to address not only the limits of executive action and the role of the Westminster Parliament in the UK constitution but, more broadly, issues such as the integration of EU law in the UK, the degree of choice allowed to the devolved territories about their EU membership, the legal value of constitutional conventions, the existence of hierarchically superior constitutional statutes including the European Communities Act 1972, and the fate of the acquired rights of individuals, to mention but a few. As such, while it is not an EU law case in the classical sense, *Miller* certainly is a case not only UK but also EU constitutional law students and scholars ought to read, both as a historic artefact of an unprecedented process of withdrawal from the European Union and as part of a broader discourse about the relationship between supranational law, state sovereignty, and individual rights – conversations which have been at the forefront of EU law for several decades. Aside from the significance of the ruling itself, the edited collection by Elliott, Williams, and Young also manages to sustain the reader’s interest. Through twelve carefully put together contributions by pre-eminent figures in the UK constitutional landscape, *The UK Constitution After Miller* effectively tackles all different facets of the judgment. Of these, I particularly enjoyed reading more about the territorial aspects of *Miller* (McHarg, pp. 155-180 and Anthony, pp. 181-202). I also found David Howarth’s analysis of retrospectivity and the protection of rights a very measured and convincing critique of the case (pp. 131-154), highlighting the substantive inequalities *Miller* tacitly allowed to operate following a date in the 2019 calendar, which still remains abstract and changeable at the time of writing.

Furthermore, the editors should be praised for seeking to offer a balanced perspective on *Miller* and for retaining a tight focus on the case, thus justifying the book’s title and avoiding the temporality of a general Brexit chat. There are, however, some aspects of the book that I would query. While the contributions are interesting and well-crafted, the technicalities of the case and especially questions around the separation of powers have already been extensively discussed. The book certainly offers some excellent debates about the UK constitution, including one between Mark Elliott (pp. 221-248) and Sir John Laws himself (pp. 203-220) on the merits of the divination of constitutional statutes in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) – a case with which EU lawyers are certainly familiar. Yet, I did wonder whether even more space for cross-fertilisation and dialogue could have been found within the volume and, indeed, whether broadening it to include some non-legal perspectives might have boosted its appeal to the well-read audience on Brexit.

More specifically, I thought it was unfortunate that the only contribution that grapples with *Miller* in its exceptional political context is the penultimate one, by Ekins and Gee (pp. 249 – 276). Ekins and Gee deplore the ruling for its technicality and for insisting upon wrongly construed legal authorities and not upon the political mandate of the 2016 referendum. For them, the ruling represents the ultimate expression of a constitution that rejects a ‘legitimate exercise in self-government’ (p. 250), thus succumbing to pressure by legal, academic, and judicial ‘elites’ – a term which they use no less than four times in their introduction alone. The Supreme Court ought to have seen *Miller* for what, in their view, it was: part of a ‘strategy that was seized on (and perhaps also concocted by) elites to delay or frustrate (or to delay in the hope of frustrating) the referendum result’ (p. 258). But, beyond a somewhat nostalgic defence of direct democracy and critique of other arguments as misunderstandings at best (see, especially pp. 259-264) or desperate manifestations of an ‘elite cry of rage’ at worst (p. 250ff.), what is it that the authors propose more positively – for instance, in respect of matters clearly ensuing

from the *Miller* litigation, such as respect for the rights of minorities? This was not clear to me from reading their contribution and yet it is a point on which the ruling's consequences are most divisive. Could it not be argued that the reasoning in *Miller* was underwhelming in its textualism not because it is yet another instance of judicial expansion into the public sphere but, rather, because its near-absolute reaffirmation of the principle of parliamentary sovereignty reduces the moral qualities of representation by failing to offer adequate safeguards during the deployment of the Brexit mandate, such as the entrenchment of individual rights (whether these individuals form part of 'elites' or otherwise)?

This is not the place to engage in detailed critique of a single contribution. In my view, though, the above controversy surrounding *Miller* was worthy of further, evidence-based analysis and exchange within the volume. In this regard, I thought that the stated focus of the book on 'the reasoning in the judgment and its longer-term consequences', as per its abstract, left something to be desired. After all, *Miller* is not predominantly a case about the debate between political or common law versions of UK constitutionalism; nor is it predominantly a case about constitutional statutes and constitutional conventions; it is not even, perhaps, just a case about the rights derived from EU law. As Ekins and Gee point out, *Miller* remains a largely context-specific case about Brexit, as a political decision that has thrown up all of the above tensions within the UK's constitutional order and its relationship with the Union. I therefore felt that the book would have benefitted from a closer engagement both with political and with institutional theory, as means of understanding more deeply not only the Court's decision, but also the merits of different versions of democratic governing and the responses the ruling received from other actors within the UK constitution, including Parliament.

Still, having set out what is perhaps an opportunity for future academic study, I thought that the book was overall very valuable, in that it collects in one place much of the legal commentary on *Miller* and is thus likely to become a useful reference point on one's bookshelf. It is also a book that offers a platform for different strands of UK constitutional discourse to be presented to a broader readership and will provoke reflection for anyone interested in the evolution of the UK constitutional settlement through Brexit and in the concerns about judicial power and popular authorship that characterise it.