

Back Parliamentary Sovereignty; Back NC99

This short briefing has been prepared by the People's Challenge group who were interested parties in *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5 ('**Miller**'). It explains the importance of NC99, a proposed amendment to the European Union (Notification of Withdrawal) Bill ('**the Bill**') which is likely to be debated during the Bill's Commons committee stage which runs from the 6th to the 8th of February 2017. NC99 is currently backed by MPs from the Labour Party, the Liberal Democrats, Plaid Cymru MPs and the Green Party.

What is the thinking behind NC99?

NC99 is all about parliamentary sovereignty in action - ensuring that Parliament has a real voice on the terms of Brexit.

At page 12 of its Brexit White Paper, the Government says:

"The sovereignty of Parliament is a fundamental principle of the UK constitution..."

Leaving the EU will mean that our laws will be made in London... our legislatures and courts will be the final decision makers in our country."

But our Parliament will certainly not be the final decision maker on our laws if the Bill is passed in its present form. That is why an amendment like NC99 is vital. As the Supreme Court made clear in *Miller*, many of our laws will change fundamentally when the UK leaves the EU, but the nature and extent of the changes will depend on what is negotiated with other EU member states and, perhaps most importantly, whether an agreement actually is reached with them during the two year Article 50 timetable for withdrawal.

Negotiations with the EU are primarily the Government's responsibility. It is unrealistic to expect Parliament to micromanage the process. But final decisions on the changes to our laws and the rights they give UK nationals are Parliament's responsibility. Parliamentarians need to stand up for their right to have a final, meaningful say on whether what ends up being agreed between the Government and other EU states is acceptable or, if there is no agreement, what should happen then. Without that final say, the parliamentary sovereignty defended in *Miller* becomes meaningless.

How would NC99 embed parliamentary sovereignty within the Article 50 process?

NC99 is principled and clear. If it becomes part of the Bill there must be an Act of Parliament approving either:

- the arrangements for withdrawal and the future relationship between the United Kingdom, as agreed between the UK and EU;

or

- the UK's withdrawal without an agreement being reached between the UK and the EU.

In this way, NC99 embeds the role of Parliament as a 'constitutional requirement'. The EU would then be bound to respect this, under Article 50 itself (*"Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements"*).

Ironically, if the Bill is passed in its current form without NC99, MEPs will have more of a say about the terms of UK withdrawal than MPs in our Parliament, because the European Parliament must approve of any withdrawal agreement before the EU will sign it. NC99 gives MPs an equivalent say on any agreement. It makes sure that our Parliament will authorise the basis for the UK's withdrawal from the EU.

Is NC99 a wrecking amendment?

Absolutely not. Nothing in NC99 undermines or frustrates the Bill's purpose – to confer power on the Prime Minister to notify, under Article 50 the United Kingdom's intention to withdraw from the EU. The Prime Minister will still be able to exercise that power as soon as the Bill is passed. NC99 applies later on, when an agreement has been reached between the Government and the EU, or if it becomes clear there will be none.

Both the White Paper and the Prime Minister have promised MPs a vote on the 'final deal'. Why is that not enough?

First, NC99 requires an Act of Parliament, not a mere affirmative resolution or vote of both Houses before the UK agrees the terms of withdrawal. The promise of a 'vote' does not mean that Parliament will have legal control. Unless NC99 is passed, the Government could decide to ratify the terms of a withdrawal deal even if Parliament votes against it.

Secondly, in *Miller* the Supreme Court made it clear that an Act of Parliament is needed to make fundamental changes to the law of the kind that will follow Brexit. An Act guarantees proper scrutiny and debate of the kind that a decision of this magnitude demands.

Thirdly, there may be no final deal. Although the Prime Minister introduces the White Paper optimistically by saying "[w]e do not approach these negotiations expecting failure, but anticipating success", that can only come about through an agreement with 27 other countries each of which have their own legislatures. As it stands the Bill says nothing about parliamentary accountability if there is no deal. NC99 squarely confronts this risk.

Won't the Great Repeal Bill deal with the legal position after Brexit? So won't Parliament get a say that way?

No, this is not what the Great Repeal Bill is for. The Great Repeal Bill will not approve the terms of Brexit and cannot preserve any right or freedom that depends on EU membership

or an agreement with any other EU state. It will just preserve some EU laws that apply at a national level within the UK.

So, for example, the Great Repeal Bill cannot help in any way with:

- the situation of UK nationals living and working or studying, or who have retired, in other EU states;
- UK nationals' right to free healthcare throughout the EU;
- any future importing from or export to other EU countries;
- what happens at the post-Brexit borders between the Republic of Ireland and the Northern Ireland, or between Gibraltar and Spain;
- recognition of professional qualifications between EU states;
- licensing of medicines and other products;
- EU grants; or
- EU agricultural and fishing arrangements.

For more on the rights and freedoms that cannot be replicated by the Great Repeal Bill see: https://www.bindmans.com/uploads/files/documents/Article_50_written_case_4PM.pdf

International treaties are normally approved by Parliament under the Constitutional Reform and Governance Act 2010 ('CRAG'). Won't that give Parliament its final say?

CRAG is not good enough for three reasons.

First, it is not clear CRAG will apply to the EU withdrawal Treaty or any future trade treaty with the EU: the Government was unable to offer any guarantee of that during the *Miller* case.

Secondly, even when it applies, CRAG falls a long way short of requiring Parliamentary control. It only allows a short opportunity for a negative resolution by the House of Commons. It does not require a positive decision by Parliament to approve the terms of any treaty, and the Prime Minister can still ratify a treaty even if the House of Commons has rejected it, provided MPs have had a chance to comment.

Thirdly, there could well be no treaty or other form of agreement. CRAG is only concerned with Parliament's approval for ratification of treaties after they are agreed between the Government and other states. If the EU does not offer an acceptable deal, the Prime Minister could opt for 'hard Brexit' with no Parliamentary authority at all.

Back parliamentary sovereignty; back NC99

NC99 clearly asserts the national sovereignty of the UK itself, in the form of the Queen in Parliament, to decide when, and on what terms, the UK will leave the EU. It doesn't require any cooperation or consent on the part of the European Council, and doesn't require the Government to go back and beg for more time if no agreement is reached within two years.

NC99 genuinely gives our Parliament the final say on our future laws and the rights of UK nationals. Every MP that cares about parliamentary sovereignty should back it.