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UPHOLDING RESPONSIBLE GOVERNMENT: LEGAL AND POLITICAL CONTROLS ON THE PROROGATION POWER IN SINGAPORE

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This article argues that judicial control of the prorogation power in Singapore should be confined to enforcing the Constitutional provisions that directly or indirectly regulate the power—the most important being the 6-month limit on the interval between sessions of Parliament. Beyond the Constitutional provisions, the Constitutional principle engaged in an exercise of the prorogation power is responsible government, which is turned on its head when Parliament is prorogued on the advice of a Prime Minister who does not command its confidence. Responsible government is secured not by legal controls but by political controls, *ie* the reserve power of the President to dismiss a Prime Minister who does not command confidence. This power can be operated to avoid, or to reverse, a prorogation advised by a Prime Minister who does not command the confidence of Parliament. There is no therefore need for judicial control of prorogation beyond enforcing the relevant Constitutional provisions.

I. INTRODUCTION

This article examines the power to prorogue Parliament in Singapore in the light of *R (Miller) v The Prime Minister*,[1] where a prorogation of the Parliament of the United Kingdom ("UK") was held to be unlawful because it frustrated, without any reasonable justification, the ability of that Parliament to legislate and to supervise the executive.

Part II summarises the facts and judgment in *Miller*.

Part III explains that, although *Miller* is obviously of interest to Singapore, there are some differences in the constitutional context that must be considered. First, the prorogation power in the UK is a prerogative power delimited by the common law. In Singapore, the prorogation power in Singapore is conferred and delimited by the *Constitution*[2] which, among other things provides that the interval between sessions of Parliament cannot exceed six months. Second, the *Miller* test was based on upholding the constitutional functions of the UK Parliament as a legislature and

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1 [2020] AC 373 [*Miller*].

2 *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Constitution*].

as the body responsible for the supervision of the executive. It did not address the constitutional requirement that the Prime Minister must command the confidence of Parliament, which underpins the Westminster model of responsible government and which is of paramount importance in the Singapore *Constitution*. Third, unlike the Queen in the UK, the President in Singapore has clear powers to uphold responsible government and deal with no-confidence situations.

Part IV argues that there are no difficulties with the courts enforcing the Constitutional provisions governing the prorogation power in Singapore, most significantly the requirement that there must not be more than six months between one session of Parliament and the next.

Part V argues that the courts should not intervene in an exercise of the prorogation power within the limits imposed by the Constitutional text. The legality principle is already satisfied by enforcing the Constitutional text and there are no judicially manageable standards of review of an exercise of the prorogation power within the confines of the text. The true constitutional principle at stake in an exercise of the prorogation power is responsible government, which is turned on its head when Parliament is prorogued on the advice of a Prime Minister who does not command its confidence. The question of confidence is inherently political and has nothing to do with whether objective standards of judicial review have been satisfied.

Part VI goes on to argue that, in addition, there are constitutional mechanisms for resolving questions of confidence, *ie* the reserve power of the President[3] to remove a Prime Minister who has ceased to command the confidence of Parliament. This power can be operated to avoid, or to reverse, a prorogation advised by a Prime Minister who does not command the confidence of Parliament. There is no need for judicial intervention.

Part VII compares the powers of dissolution and prorogation, and argues that the approach advocated for prorogation coheres with how dissolution is regulated by the Constitution and treated as non-justiciable by the courts.

Part VIII concludes.

II. *Miller*: Facts and Judgment

On 24 July 2019, Boris Johnson succeeded Theresa May as the leader of the Conservative party and the Prime Minister of the UK. At that time, the UK was poised, under domestic and international law, to leave the European Union ("EU") about three months later, on 31 October. Mr Johnson's central policy was to keep to that date, even if a withdrawal agreement could not be reached with the EU or failed to get the approval of the UK Parliament for a withdrawal agreement with the EU.[4]

On 28 August, it was announced that Mr Johnson had advised the Queen to prorogue Parliament for a period of about five weeks, starting sometime between 9 and 12 September and ending on 14 October. The reason given was that Mr Johnson's

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[3] This article uses the feminine pronoun for the President and the masculine pronoun for the Prime Minister.

[4] UK Government, Speech, "Boris Johnson's first speech as Prime Minister" (24 July 2019), online: Gov.UK <https://www.gov.uk/government/speeches/boris-johnsons-first-speech-as-prime-minister-24-july-2019>.

government wanted to launch a new agenda with a fresh session and a Queen's Speech.[5]

It is relevant to describe the confidence situation in the House of Commons at this time—this was part of the background against which *Miller* was decided and is also relevant to the arguments that will be made later. Mr Johnson inherited from Mrs May a minority government and a confidence-and-supply arrangement with the Democratic Unionist party; this gave Mr Johnson a working majority of one when he took office. This slender majority was soon lost. Among other things, the Conservative party sacked 21 of its Members of Parliament ("MPs") for supporting a cross-party procedural motion to take control of Commons business, so that legislation could be introduced to prevent the UK from leaving the EU without a withdrawal agreement on October 31 unless Parliament approved this outcome.[6] This was despite the government treating the procedural vote as "essentially a confidence matter".[7] The cross-party legislation went on to pass all its Commons stages on 4 September[8] and was enacted shortly after that.[9] This showed that a majority in the Commons opposed Mr Johnson's policy on withdrawing without an agreement. On the other hand, although Mr Johnson lost his majority and was defeated on his central policy, it was not clear that he would lose an explicit vote of confidence. This was because some opposition parties did not wish for Jeremy Corbyn, the Leader of the Opposition, to become Prime Minister.[10] Up to the time *Miller* was decided, the House of Commons was stuck in this limbo, with confidence in Mr Johnson neither formally established on his motion nor tested by the opposition.

Against this background, the prorogation advised by Mr Johnson was challenged both in England and Wales, and in Scotland. The litigation eventually ended up in the UK Supreme Court, where 11 Justices unanimously held that the prorogation was unlawful.

The Supreme Court rejected the government's argument that the prorogation power was not justiciable. It drew a distinction between the legal limits of a power and the exercise of the power within its legal limits. In determining the legal limits of a power, no question of justiciability can arise.[11] For a statutory power, the text determines the limits.[12] For a prerogative power, identifying the limits is less

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[5] UK Government, Press Release, "Queen's Speech: invest in NHS, attack violent crime, cut the cost of living" (28 August 2019), online: Gov.UK <https://www.gov.uk/government/news/prime-minister-announces-plans-to-bring-forward-new-bold-and-ambitious-legislative-agenda>.

[6] George Parker, James Blitz & Sebastian Payn, "Conservative rebels defeat Johnson's Brexit strategy" *Financial Times* (3 September 2019), online: Financial Times <https://www.ft.com/content/75f7a066-ce72-11e9-99a4-b5ded7a7fe3f>.

[7] Francis Elliot, "I'll kick you out of party, Boris Johnson tells Tory rebels" *The Times* (2 September 2019), online: The Times <https://www.thetimes.co.uk/article/ill-kick-you-out-of-party-boris-johnson-tells-tory-rebels-gd3rvhpzr> (quoting Mr Jacob Rees-Mogg, the Leader of the House of Commons).

[8] UK, HC, *Parliamentary Debates*, vol 664, col 251 (4 September 2019).

[9] *European Union (Withdrawal) (No. 2) Act 2019* (UK), c 26.

[10] Jon Craig, "Lib Dems block cross-party plan to install Corbyn as PM if Johnson defeated over no-deal" *Sky News* (30 September 2019), online: Sky News <https://news.sky.com/story/lib-dems-block-cross-party-plan-to-install-corbyn-as-pm-if-johnson-defeated-over-no-deal-11824055>.

[11] *Miller*, *supra* note 1 at para 36.

[12] *Ibid* at para 38.

straightforward but the power must be compatible with fundamental principles of the common law, including fundamental constitutional principles.[13]

In the case of prorogation, the relevant constitutional principles are parliamentary sovereignty and parliamentary accountability.[14] An unlimited power of prorogation would not be compatible with these principles; a prorogation would be unlawful:

> [I]f the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[15]

This test (the "*Miller* test") was justiciable as it governs the limits of the prorogation power and not the mode of its exercise within those limits.[16]

Applying the test, the Supreme Court found Mr Johnson's advice to prorogue to be unlawful.[17] It prevented Parliament from exercising its functions for five out of the eight weeks from the end of its summer recess to 31 October, when a fundamental constitutional change—leaving the EU—was due to take place. Parliament had a right to have a voice during this time, especially since it already demonstrated its opposition to Mr Johnson's policy on leaving the EU, which was a critical issue for his government. On the evidence before the Court, there was no reason given for why a five-week prorogation was needed—a former prime minister, Sir John Major, gave uncontroverted evidence that preparing for a Queen's Speech took no more than four to six days. There was also no evidence to show that Mr Johnson considered procedural alternatives to prorogation or accounted for the time needed for Parliament to legislate for leaving the EU.

The Supreme Court therefore held that the prorogation, based on the unlawful advice, was also unlawful, null and of no effect.[18] Parliament therefore remained in session, and the Speaker and Lord Speaker could arrange for their respective Houses to meet.[19] Parliamentary privilege did not prevent the court from reaching this conclusion because prorogation was not a proceeding of Parliament but an executive act imposed on Parliament.[20]

The Supreme Court declined to rule on the alternative argument that Mr Johnson acted for an improper purpose in advising the Queen to prorogue Parliament. It also declined to make any finding on what the Queen may or may not have been told when she was advised to prorogue Parliament.[21]

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13 *Ibid.*

14 *Ibid* at paras 41-48.

15 *Ibid* at para 50.

16 *Ibid* at para 52.

17 *Ibid at* paras 55-61.

18 *Ibid* at para 69.

19 *Ibid* at para 70.

20 *Ibid* at para 68.

21 *Ibid* at para 15.

III. THE CONSTITUTIONAL CONTEXT

Miller is obviously of interest to Singapore. It concerns the relationship between the legislature and the executive in a Westminster system of parliamentary democracy and responsible government, which Singapore inherited from the UK, albeit under a supreme written Constitution.

Prorogation also broadly has the same effect in both jurisdictions. With the exception of Bills that are in progress in Parliament or pending assent by the President,[22] prorogation wipes the parliamentary slate clean; all unfinished business—motions awaiting debate, questions awaiting answers, and so on—is cleared out from the order book. While Parliament is prorogued, it cannot meet or transact any business. The same goes for select committees of Parliament. But Members of Parliament continue to be Members, and the business of government can carry on to the extent that Parliamentary approval is not required.

At the same time, there are also important differences in the constitutional context to bear in mind.

First, the source and scope of the prorogation power are different in both jurisdictions. In the UK, prorogation is a prerogative power. There is no fixed maximum duration, whether in statute or at common law, for which Parliament can be prorogued. This remains the case under the *Miller* test, which looks to the effect and justification for a prorogation rather than its duration alone.

In Singapore, prorogation is a power conferred and regulated by the *Constitution*. The relevant provisions are mainly found in Articles 64 and 65; the most important provision is Article 64(1), which limits the interval between sessions of Parliament to six months. Article 65 also confers and regulates the related power of dissolution. The relevant provisions are set out below:

> **Sessions of Parliament**
> **64.**—(1) There shall be a session of Parliament once at least in every year and a period of 6 months shall not intervene between the last sitting of Parliament in any one session and the first sitting thereof in the next session.
> . . .
>
> **Prorogation and dissolution of Parliament**
> **65.**—(1) The President may, at any time, by Proclamation in the *Gazette*, prorogue Parliament.
> (2) If, at any time, the office of Prime Minister is vacant, the President shall, by Proclamation in the *Gazette*, dissolve Parliament as soon as he is satisfied, acting in his discretion, that a reasonable period has elapsed since that office was last vacated and that there is no Member of Parliament likely to command the confidence of a majority of the Members thereof.
> (3) The President may, at any time, by Proclamation in the *Gazette*, dissolve Parliament if he is advised by the Prime Minister to do so, but he shall not be obliged to act in this respect in accordance with the advice of the Prime Minister

[22] Standing Order 88 provides that Bills do not lapse upon prorogation.

> unless he is satisfied that, in tendering that advice, the Prime Minister commands the confidence of a majority of the Members of Parliament.
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> . . .

Interestingly, many other Commonwealth constitutions also stipulate that no more than six months can elapse between sessions of Parliament.[23] The six-month limit also roughly corresponds to the longest prorogation of the UK Parliament in the 20th century, which lasted for 185 days in 1906.[24]

The different sources of the prorogation power is a point on which *Miller* can immediately be distinguished. The *Miller* test was fashioned by the UK Supreme Court as a common law limit on a prerogative power. The Court held that this approach would not apply to a power conferred by legislation, whose limits would be determined by the text.[25] By that reasoning, the *Miller* test would not apply to the prorogation power in Singapore, which is conferred by the *Constitution* and whose limits are therefore determined by the Constitutional text and not by the common law. That said, it should be acknowledged that the Supreme Court was palpably disquieted by how prorogation was used in *Miller*; a complete analysis must examine whether that disquiet is founded on a constitutional concern that is also applicable to Singapore, and whether that means *Miller* should be adopted despite its distinguishable reasoning.

The second point of difference is the relative weight given to the constitutional principles that govern the relationship between Parliament and the government. The *Miller* test focused on protecting Parliament's ability to function as the legislature and as the body that supervises the government. These are also important functions performed by the Parliament in Singapore. However, the *Constitution* does not require that Parliament must always exercise these functions; otherwise there would be no power to prorogue at all, because any prorogation would necessarily prevent Parliament from exercising these functions.

More importantly, the *Miller* test does not address the fundamental principle that governs the relationship between Parliament and the government. This is the principle of responsible government, supported by the requirement that the Prime Minister must command the confidence of Parliament. The requirement of confidence is the defining characteristic of a parliamentary system, in contrast to systems where the legislature and the executive are cleanly separated. In Singapore at least, the requirement of confidence is of paramount importance. It is manifested in several Constitutional provisions. The President must appoint as Prime Minister an MP who in her judgment is likely to command the confidence of Parliament.[26] If the President judges that a Prime Minister has ceased to command confidence, she must remove him.[27] Finally, the President must dissolve Parliament if the office of Prime Minister has been vacant for what the President considers to be a reasonable period, and there

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[23] See Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge: Cambridge University Press, 2018) at 586, fn 13.

[24] Matthew Purvis, *Lengths of Prorogation since 1900*, Lords Research Briefing LLN-2019-0111 (3 October 2019), online: House of Lords Library <https://lordslibrary.parliament.uk/research-briefings/lln-2019-0111/>.

[25] *Miller*, *supra* note 1 at para 38.

[26] *Constitution, supra* note 2 at art 25(1).

[27] *Ibid* at art 26(1). There is the option of dissolving Parliament if the Prime Minister so requests.

is no MP who in the President's judgment is likely to command the confidence of Parliament.[28] Together, these provisions underline the centrality of the confidence requirement in the parliamentary system under the *Constitution*: it must be satisfied throughout the life of a Parliament and if it cannot be satisfied Parliament must be dissolved. It will be argued that prorogation without confidence was the true problem in *Miller*.

The third, related point of difference with the UK is that the Singapore *Constitution* confers on the President express powers, as just mentioned, to act in her discretion to support responsible government. It will be seen that these powers can be brought to bear when responsible government is threatened by a Prime Minister who attempts to prorogue Parliament even though he does not command its confidence. By contrast, the powers of the Queen in this area, if they exist at all, are poorly defined and certainly have not been tested in modern times.

IV. Enforcing the Constitutional Provisions on Prorogation

Having set out the constitutional context, we can now go into the details, starting with the Constitutional text. As mentioned, a number of formal and substantive Constitutional provisions directly govern the prorogation power in Singapore. The power is vested in the President.[29] It must be exercised by way of a Proclamation in the *Gazette*.[30] The President must, as she is generally required to,[31] act on the advice of the Cabinet or the responsible Minister (most likely the Prime Minister) in exercising the power. Most importantly, the power is subject to the requirement that not more than six months can intervene between one session of Parliament and the next.[32] In other words, Parliament cannot be continuously prorogued for more than 6 months.

There are also Constitutional provisions that indirectly limit the prorogation power in specific circumstances. The Supply Bill for a financial year must be introduced in Parliament, and the estimates of revenue and expenditure presented to Parliament, before the end of the previous financial year.[33] Until these duties are discharged, the flexibility to prorogue Parliament would diminish towards the end of a financial year and there will come a point where it would be impossible for the government to fulfil these duties, and secure supplies, if Parliament were prorogued. Separately, the President is required to summon Parliament as soon as practicable if it is not sitting when an Emergency is proclaimed.[34] This would supersede any subsisting prorogation.

There is generally no difficulty, and specifically no justiciability concerns, with the judicial enforcement of these Constitutional provisions. For instance, it would be entirely straightforward for a court to declare as unlawful a putative prorogation

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28 *Ibid* at art 65(2).
29 *Ibid* at art 65(1).
30 *Ibid*.
31 *Ibid* at art 21(1).
32 *Ibid* at art 64(1).
33 *Ibid* at art 147(1)-(4), 148(1); see also art 148(2) for the process for any supplementary or final Supply Bill. The financial year for the government ends on 31 March: *Ibid* at art 142(1).
34 *Ibid* at art 150(2).

that lasts for seven months, or is not made by a Proclamation in the *Gazette*, or is not made on the advice of the Cabinet or a responsible Minister. Similarly, although some measure of judgment is required, a court should well be able to say, at some point, that Parliament cannot be prorogued without making it impossible to introduce a Supply Bill in time, or that Parliament should be summoned in the aftermath of a Proclamation of Emergency.

To reach this conclusion, it is not necessary to rely on *Miller*'s questionable distinction between the legal limits of a power and the legal standards that control how the power is exercised within those limits, or on its assertion that the legal limits of a power are necessarily justiciable.[35] Even on a more conventional justiciability analysis, enforcing the Constitutional provisions governing prorogation merely requires the courts to decide fairly straightforward questions of fact that are well within their institutional competence.

V. Should the Courts Impose Additional Grounds of Judicial Review?

The next question is: beyond enforcing the Constitutional text, should the courts impose further grounds of review? If so, what should these grounds be?

Judicial review in Singapore is based on the principle of legality: "all legal powers . . . have legal limits[;] [t]he notion of a subjective or unfettered discretion is contrary to the rule of law".[36]

But the legality principle is not particularly helpful here. The prorogation power is not unfettered; the *Constitution* already imposes a six-month time limit, and there are specific restraints in relation to the Supply process and a Proclamation of Emergency. These constrain the President's power to prorogue Parliament and the Prime Minister's power to advise a prorogation. The question is whether there should be further, judicially-imposed limits. That question ultimately has to be decided based on the specific nature and scope of the power or duty under consideration. This can be seen from how the courts have approached other constitutional powers and duties.

Two cases serve to illustrate. In *Yong Vui Kong*,[37] although the Court of Appeal decided that the rule against bias applies to the clemency power in Article 22P, it also held that the rule cannot be applied in the same way as it is applied to judicial or quasi-judicial decision makers. It must instead take into account the constitutional role of Ministers; general statements of public policy by ministers therefore cannot amount to bias.[38] The Court also held that the *audi alteram partem* rule did not apply

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[35] *Miller*, *supra* note 1 at paras 35-37. It is not clear whether the distinction is one that makes a difference, or indeed whether the distinction can be intelligibly made. The traditional grounds of judicial review, for instance, can be categorised either way and are indeed have been described as legal limits in Singapore: see *eg Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at para 53 (CA) ("A decision-maker would have overstepped the limits of his power if he had, for instance, been influenced by irrelevant considerations …"). For a defence of the UK Supreme Court's approach, see Mark Elliott, "The Supreme Court's judgment in Cherry / Miller (No 2): A new approach to constitutional adjudication?" (24 September 2019), *Public Law For Everyone* (blog), online: <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/>.

[36] *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at para 149 (HC).

[37] *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 (CA).

[38] *Ibid* at paras 124, 125.

to the clemency power, because that would be inconsistent with the history of the power and the process laid down by Article 22P.[39] The second example is *Vellama*,[40] where the Court of Appeal held that Article 49 imposed a duty on the Prime Minister to call a by-election if a Parliamentary seat for a single-member constituency falls vacant. In the absence of a specific time limit in the *Constitution*, the Court of Appeal applied the *Interpretation Act*[41] and held that a by-election must therefore be held within a "reasonable time".[42] At the same time, the Court acknowledged that calling a by-election is essentially a "polycentric matter" and that "it is impossible to lay down the specific considerations or factors which would have a bearing on the question as to whether the Prime Minister has acted unreasonably or not". Therefore, "judicial intervention would only be warranted in an exceptional case".[43]

As for the prorogation power, there are a number of reasons why it should not be controlled using judicially-imposed standards.

The first point must again be that the Constitutional text already limits the prorogation power: a general limit of six months, as well as specific constraints in relation to the Supply process and a Proclamation of Emergency. The concerns in *Miller* about possible abuses of an unlimited prorogation power[44] therefore do not apply. *Vellama* can be similarly distinguished—its "reasonable time" requirement was aimed at reconciling the Constitutional command to hold a by-election with the absence of any explicit deadline by which the by-election had to be held.

Secondly, there appears to be no judicially manageable standard[45] by which the courts can decide whether a prorogation is unreasonable, irrational, improper, based on irrelevant considerations and so on, without also effectively deciding the political question of whether Parliament should be sitting. Some hypothetical variations to the facts in *Miller* serve to illustrate. What if the UK was about to leave not the European Union, but the United Nations, the North Atlantic Treaty Organisation, the World Trade Organisation, or any number of international treaties that are surely important to that country? Is it only fundamental constitutional change that would attract judicial intervention, or would social, political, economic and other circumstances be relevant as well? How fundamental would any relevant change have to be? What if the length of the prorogation is somewhere in between the four to six days that the Court found to be acceptable for preparing a Queen's Speech and the five weeks that the Court found unacceptable—at which point does the period cease to be acceptable? What if the prorogation was for four to six days, but fell immediately before exit day on 31 October? What if Mr Johnson offered a bare explanation for needing a five-week prorogation—say he wanted MPs to canvass the country before meeting again closer to exit day, or that he simply wanted to take longer to prepare a Queen's Speech—would the court review the adequacy of the explanation? Are there any proper purposes for a prorogation other than to launch or refresh a government's programme? *Miller* certainly does not offer an answer: its analysis was

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[39] *Ibid* at paras 113-115.
[40] *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 (CA) [*Vellama*].
[41] (Cap 1, 2002 Ed), s 52.
[42] *Vellama*, *supra* note 40 at paras 83, 84.
[43] *Ibid* at para 85.
[44] *Miller*, *supra* note 1 at paras 42, 44, 48.
[45] The concept of "manageable judicial standard" was mentioned by the Court of Appeal in *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] SGCA 37 at para 86.

entirely fact-specific and indeed the judgment begins with the caveat that the facts were a "one off".[46]

Further questions are also raised in the Singapore context: what, if anything, is to be made of the fact that Parliament in Singapore sits only for a few days a month even though it is formally in session?[47] A five-week prorogation might well result in no loss in actual sitting time. What about the fact that Parliament is not prorogued regularly, and prorogations have ranged from one to three months[48]—does this constrain future exercises of the prorogation power, even though the *Constitution* permits prorogations of up to six months?

It is true that, in some cases, there may be countervailing considerations that compel a court to enter an area that is not comfortably within its institutional competence. The UK Supreme Court in *Miller* was exercised by the consequences of an unfettered prorogation power, which could potentially upend the constitutional relationship between Parliament and the executive. Likewise, the Court of Appeal in *Vellama* felt constrained to give effect to the constitutional command to hold a by-election, even though it acknowledged that it was impossible to articulate in advance the factors that determine whether the Prime Minister should hold a by-election. But there are no comparable considerations when it comes to the prorogation power in Singapore. The power is not unlimited; the *Constitution* already imposes a hard six-month limit. There is no impetus for the courts to wade into judicially unmanageable territory.

Thirdly, and most fundamentally, even if judicially manageable standards can be found, applying them to control the prorogation power is incompatible with the nature of the constitutional relationship between Parliament and the government. That relationship is not based on external, objective standards of what is proper, rational and so on. Instead, it is founded on the confidence of Parliament in the Prime Minister, which is par excellence a political question. As Professor Anne Twomey puts it, even though "[a] prorogation might legitimately be deprecated or even 'improper' in the colloquial sense, but as long as it is done by a government which holds the confidence of [Parliament], it is done with the assumed support of a majority of the House to which that government is responsible."[49]

Twomey's point illumines the true constitutional stake: a prorogation becomes constitutionally fraught if, and only if, it is advised by a Prime Minister who does not command the confidence of Parliament. The requirement for the Prime Minister to command the confidence of Parliament is the cornerstone of responsible government. Responsible government would be turned on its head if Parliament were to be prorogued by a Prime Minister who did not command its confidence. This, it is submitted, was the real issue in *Miller*: confidence in Mr Johnson's government was in serious doubt when he attempted to prorogue Parliament, as exemplified by the Commons opposition to his central policy on exiting the EU, as well as his lack of

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[46] *Miller*, *supra* note 1 at para 1.

[47] Singapore, Parliament, "Votes and Proceedings", online: Parliament of Singapore <http://www.parliament.gov.sg/parliamentary-business/votes-and-proceedings>.

[48] Singapore, Parliament, "Sessions of Parliament", online: Parliament of Singapore <http://www.parliament.gov.sg/history/sessions-of-parliament>.

[49] Ros Taylor, "When is prorogation 'improper'?" (19 September 2019), *LSE Brexit* (blog), online: <https://blogs.lse.ac.uk/brexit/2019/09/19/when-is-prorogation-improper/>.

a majority. Had Mr Johnson clearly commanded the confidence of the Commons, it is difficult to see what constitutional purpose would be served by denying him the prorogation he sought. A bystander, and eventually the electorate, might well look askance at Parliament being prorogued at a critical juncture for the nation. But so long as the Prime Minister retains the confidence of Parliament, the integrity of the constitutional relationship between Parliament and the executive is not violated.

Indeed, the application of objective judicial standards may well lead to outcomes that are at odds with the confidence situation in Parliament. The courts might, for example, conclude that Parliament should sit even though a Prime Minister commanding confidence has decided it should prorogue. Or the courts may lend unwarranted legitimacy to a Prime Minister who has lost the confidence of Parliament, by concluding that he has met some objective judicial standard in deciding to prorogue Parliament.

Fourthly, even if judicial review were to focus on ensuring that Parliament can only be prorogued by a Prime Minister who commanded the confidence of Parliament, it would still be problematic, and would also be unnecessary in Singapore's context.

Such an approach to judicial review was advocated by Twomey. She argued that any judicial review on the ground of improper purpose ought to be limited "to only those purposes that involve a breach of constitutional principle, such as the exercise of prorogation when the government has lost of the confidence of the House".[50]

Twomey's approach would focus judicial review on the constitutional interest at stake, and avoid the problems that would arise from applying the usual standards of review. However, it would also put the court in the constitutionally awkward position of having to decide questions of confidence. The facts in *Miller* illustrate this. Although the confidence of the UK Parliament in Mr Johnson was in serious doubt, it was also unclear whether he would definitely lose a vote of no confidence, and no vote had yet been held. In this situation, it would be a step too far for a court to make a finding either way; the court would in effect be resolving the question of confidence for a hung Parliament. The UK Supreme Court seemed to be aware of this difficulty. Its judgment referred several times to Mr Johnson's lack of a majority and the Commons' opposition to his EU policy,[51] including in its analysis of the facts.[52] But the Court ultimately did not make a finding on confidence in Mr Johnson. Instead, it chose to review the attempted prorogation against an objective standard, which runs into the problems above.

Further, as the next Part will show, there is no need in Singapore for the courts to intervene against a prorogation advised by a Prime Minister who does not command the confidence of Parliament. The President has the power to address such a situation, and there is no need for judicial intervention.

VI. Political Controls Over Prorogation Without Confidence

Judicial review is an important check over the exercise of legal powers, but it is not the only check. The *Constitution* also creates political checks and balances, and in some cases these are the dominant controls. In these cases, the courts should let the

[50] *Ibid*.

[51] *Miller*, *supra* note at 1 at paras 10, 14, 57.

[52] *Ibid* at para 57.

political checks operate and the scope of judicial review should be correspondingly restricted. Take for instance the Prime Minister's power to advise a dissolution. The power is inherently political in nature and it is subject to political checks. First, the Prime Minister must command the confidence of Parliament in so advising; otherwise the President can refuse to grant the dissolution.[53] Once Parliament is dissolved, the Prime Minister must then submit to the judgment of the country; a general election must be held within three months after a dissolution.[54] It is difficult to see what judicial review of the dissolution power can usefully add without disturbing these political checks, and indeed the power has been held to be non-justiciable.[55]

A similar argument will be made for prorogation. It is true that, unlike some jurisdictions,[56] the President cannot directly refuse to act on advice to prorogue Parliament, even if the advice was tendered by a Prime Minister who does not command the confidence of Parliament. This is clear from a comparison of the prorogation power and the dissolution power, both of which are located in Article 65. It is only in the case of dissolution that the President is expressly authorised to refuse to act on the Prime Minister's advice. The necessary implication is that the default position applies in the case of prorogation: the President must act in accordance with the Cabinet's advice.[57]

However, as mentioned, the *Constitution* does confer on the President the discretionary power, and indeed the duty, to dismiss a Prime Minister who has ceased to command the confidence of Parliament.[58] As this Part will show, this power can be operated to reverse, or to avoid, a situation where Parliament is prorogued on the advice of a Prime Minister who does not command its confidence. This political check adequately addresses the problem of prorogation without confidence, and there is no need for judicial review.

Consider scenario A: the Prime Minister advises a prorogation despite the fact that confidence in him is in doubt or has been lost altogether. This engages two constitutional duties imposed on the President: her duty to ensure responsible government and dismiss a Prime Minister who has lost the confidence of Parliament, and her duty to act on the advice of the Prime Minister. It is submitted that the President's duty to ensure responsible government must come first. If confidence in the Prime Minister is in doubt, the President must ask the Prime Minister to clarify the situation, warning him of the prospect of dismissal if he cannot demonstrate confidence. If the Prime Minister can demonstrate confidence, well and good: the President can then go on to act on his advice to prorogue. However, if the Prime Minister has lost or failed to demonstrate confidence, the President's first duty must be to dismiss him if he does not choose to resign first. Although the point is untested, it is submitted that once the Prime Minister vacates office, his extant advice to prorogue would no longer be the advice of a Prime Minister and cannot therefore be acted on by the President. (The contrary position is untenable: it would mean that a Prime Minister can issue advice to be acted on by the President after he has left office.)

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[53] *Constitution*, *supra* note 2 at art 65(3).

[54] *Ibid* at art 66.

[55] *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at para 96 (HC) [*Lee Hsien Loong*].

[56] Twomey, *supra* note 23 at 592-604.

[57] *Constitution*, *supra* note 2 at art 21(1).

[58] *Ibid* at art 26(1)(*b*).

This approach relies on the fact that, although the President is bound to act in accordance with the Prime Minister's advice to prorogue Parliament, the *Constitution* does not require her to do so immediately or prescribe a deadline. Under the *Interpretation Act*,[59] the President can therefore act within a reasonable time. What is reasonable depends on the facts, and in a situation where confidence in the Prime Minister is in question, it would be entirely reasonable—indeed constitutionally necessary—for the President to take some time to clarify whether the Prime Minister still commands confidence and whether she needs to exercise her reserve powers. The President's obligation to act on the Prime Minister's advice would only bite if the Prime Minister demonstrates confidence and dismissal is no longer a prospect. Otherwise, the President's overriding duty must be to dismiss a Prime Minister who has lost the confidence of Parliament, and upon dismissal any extant advice by the Prime Minister would no longer bind the President.

The same approach also applies where the advice to prorogue is tendered not by a Prime Minister who has lost confidence, but by his Cabinet collectively or by another Cabinet Minister. By convention, a Cabinet should resign when the Prime Minister vacates office. Once the Cabinet resigns, any extant advice tendered by it would cease to bind the President. If the Cabinet chooses not to resign even though the Prime Minister has vacated office, the President's first duty must be to appoint a new Prime Minister so that responsible government can resume. Once a new Prime Minister is in place, he can decide whether to keep the old Cabinet and whether to countermand or ratify the advice to prorogue. So long as the new Prime Minister commands the confidence of Parliament, it will be constitutionally safe for the President to act on whichever course of action is advised by him or his Cabinet.

Next, consider scenario B: the President has prorogued Parliament and it subsequently emerges that confidence in the Prime Minister has been lost or is in doubt. Because Parliament is prorogued, a formal vote of no confidence would not be possible. But all is not lost. It is still possible for Members of Parliament to inform the President they have no confidence in the Prime Minister. In this regard, although it is commonplace and broadly correct to speak of the confidence of Parliament, what the *Constitution* actually requires is the "confidence of the majority of *Members of Parliament*".[60] There is no requirement for confidence to be demonstrated in any particular form: specifically there is no requirement for confidence to be demonstrated by a formal vote in Parliament—otherwise Parliament would have to be summoned before a Prime Minister can be appointed. Therefore, if the majority of MPs are prepared to withdraw confidence in the Prime Minister, whether for proroguing Parliament or for any other reason, they can make their position known. The MPs must be completely clear about their position since they are acting outside the formal procedures of Parliament, but the point is that it can in principle be done. Once the MPs have made their position clear, the Prime Minister would have to resign or face dismissal by the President. A new Prime Minister would then have to be appointed, and he can decide to continue with the prorogation or to summon Parliament. In making his decision, the new Prime Minister will no doubt consider whether Parliament's confidence in him is conditional on it being summoned to meet

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[59] *Interpretation Act*, *supra* note 41 at s 52.

[60] *Ibid* at arts 25(1), 26(1)(*b*), 65(2), 65(3).

again. Constitutionally, either course would be acceptable as long as the new Prime Minister retains the confidence of MPs.

The President's power to dismiss a Prime Minister who has lost confidence is another ground on which *Miller* can be distinguished. The parties in *Miller* proceeded on the premise that the Queen was conventionally bound to accept advice from the Prime Minister to prorogue, and the UK Supreme Court expressed no view on that matter.[61] *Miller* was therefore decided on the basis that there would be no control over the prorogation power in the absence of judicial intervention. But this is not the case in Singapore. As has been shown, the President can operate her reserve powers to avoid, or reverse, a situation where Parliament is prorogued by a Prime Minister who does not command its confidence. In fact, the President's intervention would be more effective than judicial intervention: the President can directly address the fundamental question of confidence in the Prime Minister, whereas the courts can only address the act of prorogation, which could be repeatedly attempted by a recalcitrant Prime Minister.

It should be added that it is entirely proper for a President to act in the manner outlined above. The reserve[62] powers of the President, comprising the power to appoint and dismiss the Prime Minister and the power to dissolve Parliament, have been described as "limited"[63] and in one sense this is true. The role of the President is purely formal if there is a stable majority in Parliament. Even where there is no stable majority, the President would not need to intervene if Parliament and the executive can conduct themselves according to the principle of responsible government. In such circumstances, the President can and should remain above politics. But, in an equally important sense, these reserve powers serve a vital constitutional purpose by enabling the President to act at critical junctures where responsible government is threatened, as is the case where there is an actual or attempted prorogation of Parliament by a Prime Minister who does not command confidence.

In addition to providing the President with these reserve powers, the *Constitution* also clothes the President with the moral authority to exercise them. From 1965 to 1991, the President was elected by Parliament. This manner of election obviously did not give the President a mandate to challenge the government of the day. But it did give the President a unique authority to act in support of Parliament and responsible government. In 1991, the *Constitution* was amended to make the office of President a popularly elected one. This was to give the President a democratic mandate for exercising veto powers over the nation's financial reserves and key public appointments. But being popularly elected also gives the President added authority to exercise her reserve powers in support of another elected branch of government.

This completes the case against judicial intervention in an exercise of the prorogation power. To summarise, there are no judicially manageable standards to review an exercise of the prorogation power. Judicial intervention could work at cross-purposes with the requirement of confidence that governs the relationship between Parliament and the executive. The problem of a prorogation advised by a Prime Minister who

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[61] *Miller*, *supra* note 1 at para 30.

[62] Not to be confused with the President's other powers in relation to safeguarding the financial reserves of the nation.

[63] Report of the Constitutional Commission 2016 at para 2.10.

does not command the confidence of Parliament is more appropriately and effectively addressed through the reserve powers of the President.

This is not to say that the courts have no role to play in controlling the prorogation power. As mentioned, the Constitutional provisions governing the prorogation power are entirely justiciable.[64] In addition, the courts can play a limited role in supporting the President in the exercise of her reserve powers. If the President is in the process of ascertaining confidence in the Prime Minister, the courts should support the President by temporarily staying any action to compel her to prorogue Parliament on the Prime Minister's advice.

VII. Prorogation and Dissolution

It is useful to now compare prorogation with dissolution: their effect, how they are regulated by the Constitutional text, how they are subject to political controls, and how they have been or should be treated by the courts. The comparison will show that the arguments made on the balance between legal and political controls on the prorogation power are analogous to that for dissolution.

Prorogation is similar to dissolution in that Parliament cannot function in either case, and indeed both powers are located in Article 65. But they are not identical in effect. In the case of prorogation, MPs remain MPs and Parliament must be summoned to meet again. Dissolution, on the other hand, brings a Parliament to an end and MPs cease to be MPs.[65]

The *Constitution* imposes hard time limits on both powers: a general election must be held within three months after a dissolution;[66] while a prorogation must not exceed six months at any one time.[67] These limits ensure that no government can carry on indefinitely without a functioning Parliament.

Responsible government would be undermined if Parliament was to be dissolved or prorogued by a Prime Minister who does not command its confidence. In the case of dissolution, the *Constitution* addresses this by giving the President the discretion to refuse a dissolution if she is not satisfied that the Prime Minister, in advising dissolution, commands the confidence of a majority of MPs.[68] By contrast, in the case of prorogation, the President has no discretion to refuse to act on advice. But this is not an aberration, nor does it imply that confidence is not relevant to the prorogation power. When Parliament is dissolved, MPs cease to be MPs[69] and because there are no more MPs, the question of confidence in the Prime Minister no longer applies.[70] In other words a dissolution is irreversible. It is therefore critical for the President to have the discretion to directly refuse a dissolution if the Prime Minister does not command confidence. In contrast, during a prorogation, MPs remain MPs and can still withdraw their confidence in the Prime Minister; and the President's general

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[64] Part IV above.

[65] *Constitution*, *supra* note 2 at art 46(1).

[66] *Ibid* at art 66.

[67] The six-month limit also serves as a deadline by which Parliament must be summoned after a general election. The clock starts running from the end of the last session of the dissolved Parliament.

[68] *Constitution*, *supra* note 2 at art 65(3).

[69] *Ibid* at art 46(1).

[70] The caretaker convention then takes over to restrict what the government can do.

power to dismiss a Prime Minister who has lost confidence still applies. As has been shown, this power can be operated to avoid or reverse a prorogation advised by a Prime Minister who does not command the confidence of Parliament. It is therefore not critical to give the President the discretion to directly refuse a prorogation.

Finally, the dissolution power has been recognised as non-justiciable[71] and it is argued that the prorogation power should be too.

VIII. Conclusion

The prorogation power in Singapore is subject to both legal and political controls. The dividing line is a clean one. The *Constitution* imposes a six-month time limit and certain specific constraints relating to the Supply process and the Proclamation of Emergencies; within these textual limits the power is effectively controlled by the overriding requirement that the Prime Minister must command the confidence of Parliament, which is ultimately enforced by the President's reserve powers. This is an example of how legal and political controls work in tandem to uphold the constitutional framework. The scope of judicial review should respect this constitutional division of labour, and not fall into the fallacy that because some judicial review is good, more judicial review must be better.

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[71] *Lee Hsien Loong*, *supra* note 55 at para 96; see also *Daniel de Costa Augustin v Attorney-General* [2020] SGCA 60 at para 5(a).