PROROGATION AND JUSTICIABILITY: THE CONSTITUTIONAL PRINCIPLES OF *MARBURY*, *MINERVA MILLS* AND *MILLER*

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Abstract

Each institution in a democracy must operate within a framework of self-regulation enabling it to exercise self-restraint. On September 24, 2019 the Supreme Court of United Kingdom pronounced a historic judgment in *R (Miller)* v. *The Prime Minister* declaring the prorogation of the UK Parliament unlawful. Besides, clarifying the law on an extremely pertinent issue, this pronouncement also impacts the Indian law. It is in this background that the President's power to prorogue the Houses of Parliament on the 'aid and advice' of the Council of Ministers in India attains significance. Taking a cue from the *Miller* judgment, this paper will focus on the 'justiciability' of the advice tendered to the executive head for prorogation and eventually deal with the legality of such advice. To establish the possibility of judicial review in the matter of prorogation in the Indian context, it will discuss the three significant judgments of *Marbury, Minerva Mills and Miller* of the three important constitutional courts.

I Introduction

STATE INSTITUTIONS have an extremely complicated and a two-edged relationship with democracy. They follow their basic objective of protecting democracy while circumscribing it by creating entrenched structures of formal power.The Constitution of India is the source, the propagator and the protector of democracy in the country. The Constitution expects the state to function authoritatively, divorced from entrenched interests and provide the basis of social transformation. Accordingly, the divide between the purpose and performance of the country's state institutions has to be reconciled.

Democracy pivots on regulation of power while the state enjoys the power of regulation. This existing paradox can be resolved by creating a subtle working balance based on the principle of checks and balances. Consequently, each institution must operate within a framework of self-regulation enabling it to exercise self-restraint; institutions must be amenable to mutual regulation and control which is perched on the system of checks and balances; and lastly the institutions should be subject to popular control *i.e.,* accountability and responsiveness.[1]

On September 24, 2019 the Supreme Court of United Kingdom pronounced a historic judgment in *R (Miller)* v. *The Prime Minister*[2] declaring the prorogation of the United

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1 Suhas Palshikar, *Indian Democracy* 21 (Oxford University Press, New Delhi, 2017).

2 *R (on the application of Miller)* v. *The Prime Minister* [2019] UKSC 41, *available at:* https://www.supremecourt.uk/cases/uksc-2019-0192.html (last visited on Feb. 20, 2020).

Kingdom (UK) Parliament unlawful. Besides, clarifying the law on an extremely pertinent issue, this pronouncement also impacts the Indian law. It is in this background that the President's power to prorogue the Houses of Parliament on the 'aid and advice' of the Council of Ministers in India attains significance. Taking a cue from the *Miller* judgment, this paper will focus on the 'justiciability' of the advice tendered to the executive head for prorogation and eventually deal with the legality of such advice. To establish the possibility of judicial review in the matter of prorogation in the Indian context, it will discuss the three significant judgments of *Marbury, Minerva Mills and Miller* of the three important constitutional courts. While ensuring separation of powers, it is essential not to ignore the constitutional checks and balances to secure rule of law in a democracy.

II Prorogation: The constitutional practice

The act of ending a session of the Parliament, performed by the head of state, creating a recess until the next session of Parliament commences or the dissolution of Parliament is prorogation. Originally, derived from the royal prerogative[3] under the British common law principles, it is now an express power conferred upon the head of state in most Constitutions.

In the United Kingdom, the enactment of the Fixed-Term Parliaments Act, 2011 placed in abeyance the sovereign's power to dissolve the Parliament. However, section 6 of the Act specifically reserves the power of prorogation of the monarch. Resultantly, prorogation is the Queen's prerogative and takes place after the Queen makes a proclamation approved by her Privy Council.[4] The Westminster Parliament is prorogued annually and may also be prorogued prior to its dissolution.[5]

Prorogation is different from dissolution. Whereas dissolution terminates a Parliament and prepares the stage for elections for a new government, prorogation simply places the existing Parliament in stasis. It is the means to 'achieve the continuance of the Parliament from one session to another' without resorting to dissolution or civil death.[6] The modern word 'prorogation' owes it origin to the Roman practice of *prorogation imperii*, a device for extending of the annual term of magistrates for convenience.[7]

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3 Malcolm Jack (ed.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 144 (LexisNexis, 24th edn., 2011).

4 UK Cabinet Office, *The Cabinet Manual* 9 (Cabinet Office, London, 1st edn., 2011) [1.16].

5 *Id.* at 16 [2.25].

6 W. Blackstone, *Commentaries on the Laws of England* 179-80 (Oxford, Clarendon, 1st edn., 1765-69) Ch 2.

7 C. Ando, 'The origins and import of Republican Constitutionalism' 34 *Cardozo L. Rev.* 922-24 (2012-13).

Prorogation shares this etymological parent with the French legal term *proroger*, referring to an extension of a legally fixed period.[8]

With prorogation any unfinished business of the Houses is quashed and the sessional orders or unexecuted orders are vacated. The legislative business comes to a standstill in UK, as the bills which were not passed by both Houses will ordinarily lapse upon prorogation,[9] with the exception that standing orders may permit them to be restored to their previous stage in parliamentary proceedings.[10]Prorogation also has the effect of terminating sessional parliamentary committees[11]and also prevents committees from sitting or continuing an enquiry during the period of prorogation.[12]

Under article 85(2) of the Constitution of India, the President may from time to time prorogue Houses or either House of Parliament. Termination of a session of the House by an order by the President under the above constitutional provision is called 'prorogation'. Prorogation normally follows the adjournment of the sitting of the House *sine die*. The time-lag between the adjournment of the House *sine die* and its prorogation is generally two to four days, although there are instances when the House was prorogued on the same day on which it was adjourned *sine die*.[13]

In India the bills do not lapse upon prorogation. Under article 107(3) and article 196(3) of the Indian Constitution,[14] a Bill pending in the Parliament or the Legislature of a state will not lapse by reason of the prorogation of the House or Houses thereof. This provision is a marked departure from the English convention in as much as the prorogation of the House or Houses does not affect the business pending before the

8 Constitution of the French Republic: Sep. 28, 1958 (as amended to July 23 2008) (Fr) s. 36; Constitution of Guinea: May, 7 2010 (Guinea), s. 90, on the extension of a stage of siege.

9 If a bill has passed both Houses in Australia, it may still proceed to receive assent after prorogation, because it is no longer a matter pending before the Houses at the time of prorogation: *Attorney-General (WA)* v. *Marquet* (2003) 217 CLR 545, [85] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 115-118 (Kirby J).

10 See, for example., United Kingdom Parliament, House of Commons, Standing Order No. 80A; Australia, House of Representatives, Standing Order No. 174.

11 *Supra* note 3 at 835.

12 In the United Kingdom, for example, select committees may not sit while Parliament is prorogued, *supra* note 3 at 814. The same view is taken in New Zealand and Canada: David McGee, *Parliamentary Practice in New Zealand* 109 (Dunmore Publishing, 3rd edn., 2005); Robert Marleau and Camille Montpetit (eds.), *House of Commons Procedure and Practice* 330 (McGraw-Hill, 2000).

13 See Ch. 3 "Summoning and Prorogation of both Houses of Parliament and Dissolution of Lok Sabha" 22-23 (Handbook on the Working of Ministry of Parliamentary Affairs).

14 Constitution of India, 1950 art. 107(3) reads: A Bill pending in the Parliament shall not lapse by reason of the prorogation of the Houses.

Art. 196(3) reads: A Bill pending in the Legislature of a State shall not lapse by reason of the prorogation of the House or Houses thereof.

legislature at the time of prorogation.The business pending maybe either in the Lok Sabha or the Rajya Sabha or in the Legislative Assembly or in the Legislative Council of the states or the bill may be awaiting the consent of the President or the Governor. It is amply clear from the provisions of the Constitution that whatever stage the bill may be pending, prorogation of the house or house will not result in the lapse of the bill.[15]

The general procedure followed for prorogation of the Indian Parliament is that when the houses are scheduled to adjourn *sine die* on the conclusion of their sessions, a note proposing prorogation is submitted to the Minister of Parliamentary Affairs for approval. Thereafter, the approval of the Cabinet Committee on Parliamentary Affairs/ Prime Minister is obtained. The Secretary, Ministry of Parliamentary Affairs, through a letter, communicates the decision of the government to the secretary-generals of the two Houses who then obtain the approval of the President. Thereafter, it is notified in the gazette extraordinary and in the Parliamentary Bulletin Part II of the respective Houses informing the members of the prorogation of the Houses.[16]

The *Miller* case

A brief journey of the *Miller* case is relevant to understand the judgment and its impact on prorogation jurisprudence. The people of UK voted in a referendum held on June 23, 2016, where the majority voted for leaving the European Union (hereinafter referred to as "EU"). The decision of the people was to be enforced and the government was since then involved with the task of implementing the decision of the majority. Under article 50 of the EU treaty,[17]for a member state to withdraw from the Union, it must notify the EU of its intention, and arrive at an agreement on the future relationship

15 Also see, *Purushothaman Nambudiri* v. *State of Kerala*, 1962 Supp (1) SCR 753: AIR 1962 SC 694, para 10.

16 *Id.* at 23.

17 The right of a member state to withdraw from the European Union was introduced for the first time with the Lisbon Treaty; the possibility of withdrawal was highly controversial before that. Art. 50 TEU does not set down any substantive conditions for a Member State to be able to exercise its right to withdraw, rather it includes only procedural requirements. It provides for the negotiation of a withdrawal agreement between the EU and the withdrawing state, defining in particular the latter's future relationship with the Union. If no agreement is concluded within two years, that state's membership ends automatically, unless the European Council and the Member State concerned decide jointly to extend this period. Briefing, "Article 50 TEU: Withdrawal of a Member State from the EU" (European Parliament, Feb 2016), *available at:* https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf. (last visited on Feb. 25, 2020).

between the member state and the EU. Accordingly, the EU (Withdrawal) Act, 2018[18] was passed by the UK Parliament in which the withdrawal agreement was to be approved by the House of Commons, and a legislation incorporating the provisions of the withdrawal agreement was to be passed. Following an extension to the mandatory two-year period that set into play after the article 50 notification, October 31, 2019 was decided to be the cut-off date for the UK to exit the EU.[19] This meant that irrespective of whether or not the UK Parliament was able to approve of a withdrawal agreement, the UK would have had to leave the EU on October 31.[20]

However, pending the decision of the House of Commons, an order was passed by the Queen that the UK Parliament would be prorogued from September 12, 2019 to October 14, 2019. This order of the Queen who is the Head of the state was passed on the aid and advice of the Prime Minister as is the convention. The prorogation of the Parliament which was then unable to discuss and debate the subject of Brexit, was challenged in the High Court of England and Wales, and was dismissed on the ground that the issue was non-justiciable. On appeal, the Supreme Court of United Kingdom (bench of 11 judges) held that the issue was justiciable, and declared the prorogation to be unlawful.[21]

III The power to prorogue: A non-discretionary power

The consequence of prorogation is that the parliamentary business gets suspended. In this situation, the question arises as to whether the power of the executive head to prorogue the legislature is only to be exercised on the advice of the ministers or does he/she possess any discretion in the matter. It is therefore, pertinent to understand

18 European Union (Withdrawal) Act, 2018, *available at:* http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted (last visited on Feb. 25, 2020). The European Union (Withdrawal) Act 2018 is an Act of the Parliament of the United Kingdom that provides both for repeal of the European Communities Act 1972, and for parliamentary approval to be required for any withdrawal agreement negotiated between HM Government and the European Union. The bill's passage through both Houses of Parliament was completed on 20 June 2018 and it became law by Royal Assent on June 26. The Act is to enable "cutting off the source of EU law in the UK ... and remove the competence of EU institutions to legislate for the UK".

19 The definition of 'exit day' was amended to mean October 31, 2019 at 11pm *via* the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No.2) Regulations 2019, *available at:* http://www.legislation.gov.uk/uksi/2019/859/made (last visited on Feb. 25, 2020).

20 On Oct. 30, 2019, the UK Government made the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019, *available at:* http://www.legislation.gov.uk/uksi/2019/1423/introduction/made (last visited on Feb. 25, 2020). The regulations amend the definition of "exit day" from Oct. 31, 2019 to Jan. 31, 2020, in order to reflect the most recent extension of the art.50 period by up to three months. Subsequently, legislation that would be triggered on exit day (*e.g.*, the repeal of the European Communities Act 1972 and aspects of retained EU law) is deferred until the revised date for the UK's withdrawal from the EU.

21 *Miller, supra* note 2.

under which category of powers of the head of the state, does the power of prorogation lie. In the UK, it is the Crown and not the courts which assesses the reasons for prorogation or dissolution. Usually, the Queen accedes to the ministerial advice. If the ministers mislead or deceive the Queen, the matter is simply between her and her advisers or at the most the Parliament. There is no binding statutory obligation imposed on the Crown to prorogue the Parliament on the advice of the Prime Minister, although there is a convention. As with the other powers of the monarchy, the royal power of prorogation eroded with time and today the monarch's involvement in prorogation is mainly ceremonial.[22]

The power to prorogue the houses of the legislature in India exists both at the national and state level. Articles 85(2) and 174(2) of the Indian Constitution deal with prorogation and generally provide that the President/Governor shall from time to time summon the House or Houses of the Legislature to meet at such time and place as he thinks fit, but six month shall not intervene between its last sitting in one session and the date appointed for their first sitting in the next session. These provisions do not indicate any restrictions on the power of the President/Governor to prorogue the legislature.[23] Whether the head of the country/state will be justified in doing this when the legislature is in session and in the midst of its legislative work, is a question that needs consideration. When that happens the motives of the President/Governor may conceivably be questioned on the ground of an alleged want of good faith and abuse of constitutional powers.

The position of the President and the Governor differ under the Indian Constitution, and their powers cannot be exactly equated. The President and Governor exercise three categories of powers, *i.e.* executive powers in accordance with the provisions of the Constitution; powers on the aid and advice of the council of ministers; and certain discretionary powers.[24] The discretionary powers of the Governor differ from those of the President, with those of the Governor exceeding the President's. The position of the President under the Indian Constitution is more in the nature of a nominal head. The discretionary powers of the President and the Governor are not clearly enumerated in the Constitution. The judiciary has attempted to enumerate these discretionary powers in different cases. In the case of *Samsher Singh* v. *State of Punjab,*[25] the Supreme Court held, "*We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance*

22 Halsbury's Laws of England vol.78 (Lexis Nexis 5th edn., 2010) s. 1018; Jack, *supra* note 3, at 144, 145–46.

23 *State of Punjab* v. *Satya Pal*, (1969) 1 SCR 478: AIR 1969 SC 903, para 12.

24 *S. Dharmalingam* v. *His Excellency Governor of the State of Tamil Nadu* 1988 SCC OnLine Mad 76: (1988) 2 LW 283: (1989) 1 Mad LJ 124: AIR 1989 Mad 48.

25 (1974) 2 SCC 831.

with the advice of their Ministers save in a few well - known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted through this choice is by paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory".[26]

The power to prorogue the houses has generally not been considered to be a discretionary power. The provisions of the Constitution and the procedure for prorogation do not indicate any discretion exercised by the President or the Governor in the matter of proroguing the Parliament. However, the Supreme Court in *Bijayananda Patnaik* v. *President of India*[27]gave some illustrative instances as to when the Governor can prorogue the legislature, without the aid and advice of the ministers:[28]

> (i) There is a motion of no-confidence pending discussion in the Assembly. The Chief Minister to get over the difficulty may ask the Governor, to prorogue the House. The Governor may not act upon such advice. He may refuse to prorogue so that the no-confidence motion may be discussed in the Assembly.
>
> (ii) The Government is in a minority in the Assembly. The Chief Minister may advise prorogation to perpetuate the continuance of the Ministry. The Governor, may not act upon such advice and may dismiss the ministry in exercise, of his pleasure under Article 164(1) of the Constitution.

This clearly establishes that in case the ministry enjoys a clear majority in the Lower Houses, the President or the Governor must accept their advice. *"It is a well-recognised principle that, so long as the Council of Ministers enjoy the confidence of the Assembly, its advice in these matters, - unless patently unconstitutional - must be deemed as binding on the Governor. It is only where such advice, if acted upon would lead to an infringement of a Constitutional provision, or where the Council of Ministers has ceased to enjoy the confidence of the Assembly, that the question arises whether the Governor may act in the exercise of his discretion*."[29]

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26 *Id.,* at 885, para 154; *Also see,* Nandish Vyas and Durgaprasad Sabnis, "The Governor's Power to Dissolve the Legislative Assembly-Judicial Review and other Facets" 2 *Law Rev. GLC* 35 at 38(2002-03).

27 *Bijayananda Patnaik* v. *President of India* 1973 SCC OnLineOri 192: AIR 1974 Ori 52.

28 *Id.,* at 63, para 77.

29 Nandish Vyas, *supra* note 26, at 39.

Justice Khehar speaking for himself, Ghose J. and Ramana J. in *Nabam Rebiaand Bamang Felix* v. *Dy. Speaker*,[30] relied upon the opinion of the authors, M.N Kaul and S.L. Shakdher in addition to the Constituent Assembly Debates. He observed, "…. *From the above exposition it emerges that the Chief Minister and his Council of Ministers lose their right to aid and advise the Governor, to summon or prorogue or dissolve the House, when the issue of the Government's support by a majority of the Members of the House, has been rendered debatable. We have no hesitation in endorsing the above view*".[31] Concurring with the view, Justice Madan B. Lokur clarified, "*The absence of any discretion in the President to summon or prorogue the House or dissolve the House of the People and the deletion of clause (3) in Article 153 of the Draft Constitution makes it quite clear that the President and the Governor can act under Article 85 of the Constitution and Article 174 of the Constitution respectively only on the aid and advice of the Council of Ministers. No independent authority is given either to the President or the Governor in this regard* ".[32] Consequently, the above said discussion makes it amply clear that the power to prorogue the house or houses of the legislature is primarily not a discretionary power. It is exercised by the President or the Governor on the aid and advice of the council of ministers headed by the Prime Minister. However, in the exceptional instance of the ministry having lost the confidence of the house, the power of prorogation would be exercised by the President or Governor, as the case maybe, upon his own discretion as he/she thinks is appropriate.

IV Extent of justiciability of the ministerial advice

Prorogation has been quintessentially perceived to be a political power which has been in most cases used for carrying out political ends. The British Parliament was prorogued several times by Charles II to prevent discussion on the Exclusion Bill.[33] The Canadian Parliament was prorogued in 2003 to delay the tabling of a report by the auditor general into a major sponsorship scandal.[34] In 2006, the Congress government in India attempted to use this tactic to prorogue the Parliament but the media backlash prevented it.[35]

30 *Nabam Rebiaand Bamang Felix* v. *Dy. Speaker, Arunachal Pradesh Legislative Assembly* (2016) 8 SCC 1: 2016 SCC OnLine SC 694.

31 *Id.,* at 164, para 165.

32 *Id.* at 211, para 269.

33 John Miller, "Charles II and his Parliaments" 32 *Transactions of the Royal Historical Society* 1-23(1982).

34 Duff Conacher, "Proroguing Parliament without Cause? Canadians want it Banned" *The Globe and Mail* (Aug. 23, 2013), *available at:* https://www.theglobeandmail.com/opinion/proroguing-parliament-without-cause-canadians-want-it-banned/article13935119/ (last visited on Feb. 24, 2020).

35 S. Dam, "An Institutional Alchemy: India's Two Parliaments in Comparative Context" 39 *Brooklyn Journal of International Law* 613 at 621-22(2014). There are numerous other examples of misuse of the power of prorogation, *see* Gerard Horgan, "Partisan-Motivated Prorogation and The Westminster Model" 52 *Commonwealth and Comparative Politics* 455-472(2014); Gerard W. Horgan "Prorogation as a Tool of the Executive in Intercameral Conflict" 29 *Australasian Parliamentary Review* 159-76 (2014).

It is generally accepted that ministerial advice on matters of appointing ministers, dissolution of parliaments, summoning and prorogation, is traditionally non-justiciable. This has been recognised by most constitutions modelled on the UK Constitution, *e.g.,* Constitution of Barbados, section 32(5); Belsize, section 34(4); Sri Lanka, section 154F; Jamaica, section 30 and 32(4); and the Constitution of India under arrticles 74(2) and 163(3). In the Indian context, Durga Das Basu opines that prorogation made pursuant to ministerial advice is non-justiciable.[36] That prorogation cannot be called into question on any ground, has been reiterated by other authors as well.[37] This viewpoint may be termed as an "orthodox" stand. More so, when the powers of prorogation and dissolution may be utilised for political manoeuvrings to stymie parliamentary debate/discussion or for furthering partisan advantages. Past precedents under parliamentary constitutions are witness to it.

One of the issues framed by the court, in the *Miller* case, was whether the Prime Minister's advice to the Queen was lawful and whether it was justiciable in the court of law. Whether the advice given to the Queen to prorogue the Parliament was justiciable or not, *i.e.,* whether the advice can be subjected to judicial scrutiny, is the first question which needs determination. The Hale Court in the *Miller* case has eroded the traditional rule of non-justiciability of prorogation, a power which was previously understood to be merely a ceremonial procedure. The momentousness of the issue before the UK Supreme Court was comparable to the US Supreme Court decision in *Marbury* v. *Madison*[38] and the Indian Supreme Court decision in *Minerva Mills* v. *Union of India.*[39] The Marshall court in 1803 in US established and confirmed the legal principle of judicial review, which was the ability of the Supreme Court to limit congressional power by declaring legislation unconstitutional. The basic premise in this watershed case was that if the acts of the government were in conflict with the Constitution, the courts would have a right to intervene and uphold the principles of the Constitution.[40] It is the first responsibility of the judiciary to always uphold the Constitution. *Marbury* set an abiding precedent of judicial review which was to be eventually followed by the democracies of the world. The Marshal Court claimed for the US Supreme Court a paramount position as an interpreter of the Constitution.

In the case of India, during the infamous internal emergency (1975-77), a politically authoritarian executive passed an extremely wide ranging 42nd Amendment to the Indian Constitution, which did not muster constitutional justification. The amendment virtually

36 Durga Das Basu, *Commentary on the Constitution of India* 267 (S.C. Sarkar, 4th edn., 1961).

37 NS Gehlot, *State Governors in India* 115 (Gitanjali, New Delhi, 1985).

38 *Marbury* v. *Madison,* 5 U.S. 137 (1803).

39 *Minerva Mills* v. *Union of India,* AIR (1981) SC 1789: 1981 SCR (1) 206.

40 By asserting the power to declare acts of Congress unconstitutional (which the court would not exercise again for more than half a century), Marshall claimed for the court a paramount position as interpreter of the Constitution.

eliminated the checks and balances on exercise of powers of the branches of the government. The Chandrachud Court in the *Minerva Mills* case relied upon the newly propounded doctrine of 'basic structure'(*Kesavnanda Bharati* case[41]) and invalidated parts of the 42nd amendment. Judicial review came to recognised as a basic feature of the Indian Constitution and could not be written off through parliamentary amendments to the Constitution. While describing the importance of judicial review, the court said, "*Our Constitution is founded on a nice balance of power among the three wings of the state namely the Legislature, the Executive & the Judiciary. It is the function of the Judges nay their duty to pronounce upon the validity of laws".* The court ruled that clause 5 of the 42ndamendment had the effect of changing the Constitution into a totalitarian constitution as per the political exigencies of the ruling political party. Additionally, the combined reading of clauses 4 and 5 of the amendment ensured that the actions of the legislature would be immune from challenge before the courts. The consequence of this amendment would have meant that the fundamental rights would have become rights without remedies. However, the court while examining the underlying principles, delved into the justiciability question, somewhat akin to *Miller* and *Marbury.* Chandrachud CJ observed, "*The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits".*The comparison between the jurisdictions of the courts and the cases is relevant as there exists no textual constitutional power in the Constitution of India or UK that empowers the judiciary to interpret the Constitution or protect it from political manoeuvrings. These are principles which are arecognition of the existing institutional functionality[42] and have been identified in *Marbury*, *Minerva Mills* and *Miller.*UpendraBaxi while analysing *Miller* opines, "*The judicial duty then lies in the discovery of the first principles of constitutional law, which regulate the application of constitutional discipline over the uses of political power. I do not think that the Indian Supreme Court's jurisprudence, and its demosprudential co-governance of the nation, is substantially different in result, though the contexts vary enormously*".[43]

41 *Kesavnanda Bharati* v. *State of Kerala,* AIR 1973 SC 1461. The case was decided on April 24, 1973 and propounded the doctrine of basic structure. This doctrine implies that though Parliament has the prerogative to amend the entire Constitution but subject to the condition that they cannot in any manner interfere with the features so fundamental to this Constitution that without them it would be spiritless.

42 Anurag Deb, "A Constitution of Principles: From Miller to Minerva Mills"*UK Con. L. Blog* (Oct. 1, 2019), *available at*: https://ukconstitutionallaw.org/2019/10/01/anurag-deb-a-constitution-of-principles-from-miller-to-minerva-mills/ (last visited on Feb. 24, 2020).

43 Upendra Baxi, "Lessons for India in UK apex court order that upholds democratic accountability of Parliament", *The Indian Express* (Sept. 26, 2019), *available at:* https://indianexpress.com/article/opinion/columns/house-is-sovereign-uk-supreme-court-6029122/ (last visited on Feb. 25, 2020).

The justiciability of the advice tendered to the Queen is clearly established on the basis of two grounds in the *Miller* case. Firstly, regardless of the political nature of the act or the exercise of prerogative powers, there are three grounds on which judicial review of the prorogation of the British Parliament is established. The decision was made for an erroneous purpose; the decision was irrational (no rational connection between the means *i.e.* proroguing the Parliament, and the end *i.e.,* the objective of the Prime Minister); and it was unreasonable (absence of any relevant conditions for proroguing the Parliament for five weeks at a crucial juncture). The second ground and the more important point being that no decision which involves the exercise of a legal power can be held to be non-justiciable. The Prime Minister by advising the Queen to prorogue to the Parliament exercised his legal power. Exercise of every legal power must be made within legal limits in a system based upon the rule of law.[44]

In the Indian context, the justiciability of the advice to prorogue the Parliament has to be determined with respect to the limitation on the justiciability of the advice, placed by article 74(2). The Supreme Court while examining the meaning and scope of article 74(2) in *State of Rajasthan* v. *Union of India*[45] struck down the exercise of power (the proclamation issued by the President) to be *mala fide* and based wholly on extraneous and/or irrelevant grounds. This judgment was relied upon by the court in *S.R. Bommai* v. *Union of India,*[46] while deciding the extent of the justiciability of the aid and advice of the council of ministers/ satisfaction of the President. The court clarified that the bar in article 74(2) (on the justiciability of aid and advice rendered) only excludes the questioning of whether there was advice given, and what advice was given. The court while interpreting article 74(2) and 142 harmoniously, held that the materials relied upon by the President for the use of his prerogative power shall be placed before it. It stated, "…*the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of mala fides takes in inter alia situations where the proclamation is found to be clear case of abuse of power, or what is sometimes called fraud on power- cases where this power is invoked for achieving oblique ends".*[47] Therefore, in India it is sufficient if the material is relevant to the prerogative act and not the reasoning in the material. This is a departure from the UK jurisprudence as seen in the *Miller* case wherein the UK Supreme Court held the advice tendered to the Queen by the Council of Ministers as unlawful.

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44 Yossi Nehushtan, "Prorogation and Justiciability" *UK Con. L. Blog* (Sept. 16, 2019), *available at:* https://ukconstitutionallaw.org/2019/09/16/yossi-nehushtan-prorogation-and-justiciability/ (last visited on Feb. 28, 2020).

45 *State of Rajasthan*v. *Union of India* (1977) 3 SCC 592: AIR 1977 SC 1361: (1978) 1 SCR 1.

46 *S.R. Bommai* v. *Union of India* (1994) 3 SCC 1.

More significantly, the Indian Supreme Court in *S.R. Bommai* clarified that the legitimacy of the inference drawn from such material can be questioned.[48] "…*What advice was tendered, whether it was required to be reconsidered, what advice was tendered after reconsideration, if any, what was the opinion of the President, whether the advice was changed pursuant to further discussion, if any, and how the ultimate decision was arrived at, are all matters between the President and his Council of Ministers. They are beyond the ken of the court. The court is not to go into it. It is enough that there is an order/act of the President in appropriate form. It will take it as the order/act of the President. It is concerned only with the validity of the order and legality of the proceeding or action taken by the President in exercise of his functions and not with what happened in the inner councils of the President and his Ministers*…"[49].Conclusively, the courts in India,without examining the question of the validity of the advice tendered to the President or the Governor, restrict themselves to the lawfulness of the action taken pursuant to the advice. And as established in *State of Rajasthan,* extraneous factors and *mala fides* were two grounds on which the court determined that an organ of the State would exceed the scope of otherwise non-justiciable powers.[50]

V Limiting the power of prorogation

The legal limits of the power of prorogation need to be defined and clarified, and in the eventuality of a limitation, what is the nature and extent of the limitation. The Supreme Court of UK while holding the advice tendered by the Prime Minister to be justiciable, placed a limitation on the power of prorogation saying that "*a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if 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.*"[51]

An unlimited power of prorogation is incompatible with the principle of parliamentary sovereignty.[52] Accordingly, the UK Supreme Court thought it pertinent to determine and place limits on the exercise of the power of prorogation. Parliamentary sovereignty, a foundational principle of the Constitution would be undermined if the executive could, through the use of this prerogative, prevent the Parliament from exercising its legislative authority for as long as it pleased. The power to prorogue the sessions of

47 *Id.* at 268, para 374.

48 Niveditha K., "Constitutional Functionaries, Constitutional Standards, and the Role of Courts: Lessons from the Miller" in Gautam Bhatia, *Indian Con. L. and P. Blog,* (Nov. 23, 2019)*available at:* https://indconlawphil.wordpress.com/author/gautambhatia1988/ (last visited on Feb. 23, 2020).

49 *Id.,* at 240, para 320.

50 *Supra* note 45.

51 *Miller, supra* note 2, para 50.

52 *Miller, supra* note 2, para 42.

the Parliament, therefore, cannot be unlimited. Although prorogation *per se* is not incompatible with parliamentary sovereignty, and Parliament does not remain in session permanently. It is prorogued from time to time and laws cannot be enacted whilst it is not in session. However, the limitation imposed on the power of prorogation must be such which makes it consistent with parliamentary sovereignty.

Another principle which is fundamental to theconstitutions of UK and India, is parliamentary accountability. Ministers are accountable to Parliament through different mechanisms. They have a duty to answer parliamentary questions and to appear before parliamentary committees, and are held answerable through parliamentary scrutiny of the delegated legislation made by them. Through these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are consequently, protected from the arbitrary exercise of executive power. As Lord Bingham of Cornhill said in the case of *Bobb* v. *Manning,*[53] "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy".

In India, this accountability gains more significance on account of the fact that the power of prorogation exists alongside the executive law-making power. The President of India can legislate by passing ordinances when both houses are not in session.[54] Similar power is available to the Governors.[55] Since both these powers of prorogation and law-making are possessed by the President, it needs to be subjected to legal limits. In fact, these powers are actually exercised by the council of ministers, who have the power to trigger their own law-making powers.[56] There may be a possibility of the President or the Governor using the power to prorogue the legislature, in order to enable him to exercise the law-making powers. Hence, the requirement for safeguards

53 *Bobb* v. *Manning* [2006] UKPC 22, para 13.

54 Constitution of India, 1950 art. 123 - Power of President to promulgate Ordinances during recess of Parliament.

(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

55 Constitution of India,1950 art. 213 - Power of Governor to promulgate Ordinances during recess of Legislature.

(1)If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require:

56 James Fowkes, "Prorogation of the Legislative Body" *Oxford Con. L.* (Jan. 2017), *available at*: https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e357 (last visited on Jan. 29, 2020).

against the misuse. The Supreme Court decision in *State of Punjab* v. *Satya Pal Dang*[57] is the currently prevailing authority on this subject. The case presented unusual circumstances when the speaker had adjourned the assembly while a vital budget vote was pending and the Governor used his power of prorogation to override the speaker's adjournment. This was done so as to enable him to summon a new session of the assembly to decide the budget. The Hidayatullah court held, "*the motives of the Governor may conceivably be questioned on the ground of an alleged want of good faith and abuse of constitutional powers*".[58] The court while upholding the use of the prorogation power in this particular matter, extensively examined the Governor's motives and assessment of the constitutional situation focussing specifically on democratic grounds. Although in *Satya Pal Dang,* the power of prorogation was used for the democratic good, it is a reminder forthe necessity of imposing limitations on the power of prorogation. It is a rare illustration of judicial review of the power of prorogation in India.

VI Conclusion

The Hale Court has established that the decision to prorogue a Parliament is justiciable although they did so without going into the reasons for the same. I have tried to examine the reasons and have reached a conclusion as to why and how the prorogation of the Parliament in India should be made justiciable, should the matter arise. The three important cases, *Marbury, Minerva Mills* and *Miller* rely on the application and understanding of the constitutional principles rather than the written word. It is the application of these principles which assumes relevance in situations of ambiguity. If the decision to prorogue the parliament is made for an improper purpose on mala fide grounds, it is irrational and unreasonable and therefore illegal. It is through the fearless appreciation and application of constitutional principles, that the judiciary would be able to uphold the rule of law.The power of prorogation has the potential to be deployed as a weapon to avoid parliamentary scrutiny, which can turn it into an inherently undemocratic doctrine. Therefore, the Indian jurisprudence should operate on the lines of the *Miller* case to prevent the occurrence of any illegality. After all, "the King hath no prerogative, but that which the law of the land allows him".[59]

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57 *State of Punjab* v. *Satya Pal* (1969) 1 SCR 478: AIR 1969 SC 903.

58 *Id.,* para 12.

59 *Case of Proclamations* [1610] EWHC KB J22. This case from the reign of King James I (1603–1625), defined certain limitations on the Royal Prerogative. Also see, Ruma Mandal, "In Judging Prorogation, UK Supreme Court Marks Evolution, not Revolution, in Law" Chatham House – The Royal Institute of International Affairs, 3rd Oct. 2019, *available at:* https://www.chathamhouse.org/expert/comment/judging-prorogation-uk-supreme-court-marks-evolution-not-revolution-law (last visited on Jan. 30, 2020).