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The principle of responsible government in the Commonwealth Caribbean: prorogation and motions of no confidence

Derek O'Brien

School of Law, Oxford Brookes University, Oxford, UK

ABSTRACT

This article examines the operation of the principle of responsible government in the Commonwealth Caribbean both in relation to the prorogation of parliament and parliamentary motions of no confidence. It identifies several instances of prorogation that have occurred in the post-independence era which were incompatible with the principle of responsible government because they were intended to avoid the government being held to account by parliament. It also examines the ways in which an incumbent government might seek to frustrate motions of no confidence and how the courts and other key constitutional actors should respond in such circumstances.

KEYWORDS Responsible government; prorogations; motions of no-confidence; Commonwealth Caribbean

Introduction

It is a core convention of the Westminster model of democracy that the government must be able to command the confidence of the elected members of the legislature: the authority and legitimacy of the government depends upon it (Public Administration and Constitutional Affairs Committee, 2018). A Prime Minister who loses a motion of no confidence is expected to resign or call for the dissolution of Parliament. This is known as the principle of responsible government. This convention can, however, from time to time come into conflict with another core convention of the Westminster model; namely, that when exercising their power to prorogue Parliament the head of state acts in accordance with the advice of their ministers. This is because for the period that it is prorogued Parliament is unable to conduct its constitutional functions, including debating motions of no confidence. In such situations the convention that the head of state acts in accordance with the advice of the Prime Minister when proroguing Parliament may

CONTACT Derek O'Brien  d.obrien@brookes.ac.uk

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thus be exploited by Prime Ministers as a way of avoiding defeat on a motion of no confidence, thereby undermining the principle of responsible government. Following Horgan, I will classify such instances of the exercise of the power of prorogation as 'partisan-motivated prorogations' (Horgan, 2014) in order to distinguish them from the annual prorogation of parliament or the prorogation of parliament immediately prior to a dissolution, both of which are entirely uncontroversial.

As Ann Twomey has noted, there are a number of instances of such partisan-motivated prorogations in Commonwealth countries (2018); which has stimulated considerable attention from scholars keen to explore the extent to which a head of state is bound to act on the advice of a Prime Minister in such circumstances (Crommelin, 2015; Hicks, 2012; Horgan, 2014; Kumarsingham & Power, 2014; McWhinney, 2010; Miller, 2009; Twomey, 2018). By comparison, instances of partisan-motivated prorogations in the Commonwealth Caribbean, of which there have been several, have attracted relatively little attention from scholars, with the notable exception of Kate Quinn (2020). This is a significant gap in the literature because the region offers an important insight into the operation of partisan-motivated prorogations in the context of relatively small democracies that include some of the oldest (Barbados and The Bahamas have representative legislative assemblies that date back to the seventeenth and eighteenth centuries respectively) as well as some of the youngest democracies (Belize and St Kitts only became fully independent in 1981 and 1983 respectively) in the Commonwealth, and which comprise a variety of constitutional systems: nine constitutional monarchies (Antigua and Barbuda, The Bahamas, Barbados, Belize, Grenada, Jamaica, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines), two parliamentary republics (Dominica and Trinidad and Tobago) and, in the case of Guyana, a unique hybrid presidential/parliamentary system, which does not fit neatly within the familiar Westminster template. In addition to partisan-motivated prorogations, the region is also a valuable source of examples of Parliament's (in)ability to hold the government to account through motions of no confidence which, again, has not hitherto been explored in any great detail in the scholarly literature.

This article seeks to address these gaps in the literature and is in two parts. In Part I, I will first outline the provisions surrounding the power of prorogation that are enshrined in the region's constitutions. I will then proceed to examine four instances when the power of prorogation has been invoked by Caribbean political leaders in the post-independence era, locating each instance within its particular historical and political context. In so doing, I will distinguish between those instances where the power of prorogation was exercised by the head of state in accordance with the advice of the Prime Minister (once in Trinidad and Tobago and twice in Grenada) from the one instance of Guyana where the power of prorogation was exercised

by the President who was not required to act on anybody's advice. I will also identify those instances in which the prorogation of parliament clearly breached the principle of responsible government and consider how the other relevant constitutional actors – the head of state and/or the courts – might have responded to such a breach.

In Part II I will turn to examine the role of motions of no confidence more generally in upholding the principle of responsible government in the region. I will first set out the constitutional framework surrounding motions of no confidence before proceeding to examine the only two examples of no confidence motions that have resulted in the calling of general elections by the governing party in the post-independence era – in Barbados in 1994 and Guyana in 2018 – though the constitutional implications of the no confidence motion were different in each case. This will lead to a discussion of the role played by the courts in adjudicating disputes between the government and opposition parties regarding motions of no confidence in two controversial cases – in St Kitts and Nevis in 2013 and Guyana in 2020 – and the challenges confronting the courts when seeking to give practical effect to motions of no confidence.

Part I prorogation

Constitutional framework

All Commonwealth Caribbean constitutions make express provision for the prorogation of Parliament. Amongst those countries where the Queen remains the head of state, the power of prorogation is conferred upon the Governor General (Antigua and Barbuda, The Bahamas, Barbados, Belize, Grenada, Jamaica, St Lucia, St Kitts and Nevis, and St Vincent and the Grenadines), acting as the Queen's representative. In Dominica and Trinidad and Tobago, both of which have a quasi-ceremonial President serving as the head of state, the power of prorogation is conferred upon the President (s54(1) Constitution of Dominica and s68(1) Constitution of Trinidad and Tobago). In Guyana, which adopted a socialist republican constitution in 1980, based on a hybrid parliamentary/presidential model, the power of prorogation is conferred upon the President (Article 70(1) Constitution of Guyana, who is both the head of state and the head of government). All Commonwealth Caribbean constitutions also make provision for a time limit upon how long Parliament can be prorogued. In the majority of cases, it is six months (constitutions of: Antigua s59(1); Barbados s60(2); Belize s83(1); Dominica s53(2); Grenada s51(2); Guyana s69(1); Jamaica s63(1); St Vincent s47(1); and Trinidad and Tobago s67(2)). In St Kitts, the period is 180 days, Constitution s46(1). The longest period of time for which Parliament can be prorogued is 12 months (s65(2) Constitution of The Bahamas and s54(1) Constitution of St Lucia).

With the exception of Guyana, all of the other Commonwealth Caribbean constitutions provide that the head of state acts in accordance with the advice of the Prime Minister when exercising the power of prorogation. Whether or not the head of state is *bound* to act in accordance with the advice of the Prime Minister has never been conclusively determined by the courts. However, differences in the wording of the constitutional text suggests that in some countries the head of state is not always bound to act in accordance with the advice of the Prime Minister. For example, the Constitutions of Antigua and Barbuda, The Bahamas, Barbados, Dominica and Trinidad and Tobago provide that the Governor General (or President, in the case of Dominica, s54(1) of the Constitution and Trinidad and Tobago, s68 (1) of the Constitution), 'acting in accordance with the advice of the Prime Minister *may* prorogue ... Parliament'. This would suggest that the power of prorogation is a 'reserve' power in the sense that a Governor General (or President as the case may be) might refuse a Prime Minister's request for a prorogation. Elsewhere in the region (Belize, Grenada, Jamaica, St Kitts and Nevis, St Lucia, and St Vincent and the Grenadines), such a possibility appears to be ruled out by the requirement that when exercising their power of prorogation the Governor General *shall* act in accordance with the advice of the Cabinet (constitutions of: Belize, s34(1); Grenada, s62(1); Jamaica, s32(1); St Kitts, s56(1); St Vincent, s55(1); and St Lucia s64(1)). In the case of Guyana, the Constitution provides that the President is free to act in accordance with his or her own deliberate judgment when exercising the power to prorogue Parliament, so that there can be no question of it being a 'reserve' power (Article 70(1)).

In all of the above cases, with the obvious exception of Guyana, the courts are precluded from reviewing whether or not the head of state has, in fact, acted in accordance with the advice of the Prime Minister when exercising their power of prorogation by reason of the inclusion in each constitution of an *ouster* clause. Such clauses typically provide that whenever the head of state (whether a Governor General or President) is required to perform any function in accordance with the advice of, or after consultation with, any person or authority, the question whether they have so exercised that function shall not be enquired into by any court of law (constitutions of: Belize s34(4); Dominica s118(3); Grenada s108; Jamaica s32(4); St Kitts and Nevis s121(3); St Lucia, s121(3); St Vincent and the Grenadines s102(2); and Trinidad and Tobago s80(2)). It is arguable, however, based on the authority of the relatively recent decision of the UK Supreme Court in *R (on the application of Miller) v Prime Minister* (2019), that even if such ouster clauses prevent the courts from enquiring whether the head of state has acted in accordance with the advice of the Prime Minister, they do not preclude the courts from determining the logically prior question of whether or not the Prime Minister's advice is itself lawful. In the *Miller* case the Supreme Court

was concerned with the legality of the Prime Minister's advice to the Queen to prorogue parliament for an unusually protracted period of time (five weeks) when a significant constitutional change was being debated, namely the UK's withdrawal from the European Union. In reviewing the legality of the prorogation, the Supreme Court did not enquire whether the Queen had acted on her Prime Minister's advice, but instead focused on whether the Prime Minister's advice was lawful. Having found that the prorogation had the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and the body responsible for the supervision of the executive, the Supreme Court declared the Prime Minister's advice to be unlawful and ordered him to recall Parliament forthwith. Since the constitutional principle at the core of the Supreme Court's decision in *Miller* – the ability of Parliament to carry out its constitutional functions – applies with equal force in the Commonwealth Caribbean, it follows that should a Prime Minister advise the head of state to prorogue Parliament with the intention, without reasonable justification, of curtailing its ability to perform its constitutional functions, the courts could declare the Prime Minister's advice to be unlawful.

Exercise of the power of prorogation

In the sections that follow, I will first set out the political background leading up to the exercise of the power of prorogation in each of the four instances where it has occurred. I will then proceed to examine how each of these instances measure up against the principle of responsible government, taking due account of Guyana's exceptionalism; its governance being based not on the Westminster model but on its own unique hybrid parliamentary/presidential system.

Trinidad and Tobago

The general elections held in December 2001 resulted in a tie between the United National Congress (UNC), led by Basdeo Panday, and the People's National Movement (PNM), led by Patrick Manning (each party secured 18 of the 36 available seats in the House of Representatives). Panday and his supporters argued that, in accordance with the 'incumbency principle', where an election is tied the head of state ought in the first instance to offer the incumbent Prime Minister – in this case Panday – the opportunity to form a government (Ghany, 2006). The President, however, chose instead to appoint Patrick Manning, to be Prime Minister.

At the first session of the House of Representatives following the elections, on 5 April 2002, the first task of the House was to elect a Speaker; this being a necessary condition of conducting any other business. The House was, however, unable to elect a Speaker at this first session and failed again to

do so on the following day. As a result, the House could not conduct its business and Parliament as a whole could not function. One way out of this impasse might have been for the House to pass a motion of no confidence in order to force the dissolution of Parliament, but this was not possible until a Speaker had been elected and, in any event, it is unlikely there would have been a majority in favour of such a resolution. Instead, on 6 April 2002, in accordance with the advice of the Prime Minister, the President prorogued Parliament. A further attempt was made to elect a Speaker on 28 August 2002, but this also failed. On 30 August 2002 the President dissolved Parliament, acting on the advice of the Prime Minister and a general election was held on 7 October 2002 (the prorogation could not have continued beyond this point because the financial year was due to end on 30 September and the Constitution (s113) only provides for a thirty-day grace period (1–30 October) for the approval of supply by Parliament). At this election, the PNM won 20 seats in the House of Representatives and the UNC 16.

Grenada

There have been two instances of prorogation in the post-independence era in Grenada. The first occurred in August 1989 upon the advice of the then Prime Minister, Herbert Blaize.

Blaize was a political veteran who, as leader of the Grenada National Party (GNP), had been the first Premier of Grenada when it achieved Associated Statehood in 1967. Following the implosion of the 1979 revolution and the US led invasion of Grenada in 1983, Blaize had been chosen to lead the New National Party (NNP) (Grenade, 2013). This was an alliance of centrist parties including, in addition to the GNP, two new political parties: the National Democratic Party (NDP), led by George Brizan, and the Grenada Democratic Movement (GDM) led by Francis Alexis.

Though the NNP won 14 of the 15 parliamentary seats in the 1984 general elections, it was not a harmonious political alliance and fractures in its cohesiveness began to appear almost from the start. The first blow came, in 1986, with the resignation of Blaize's Executive Adviser, Nicholas Braithwaite, who was alarmed by the disproportionate amount of influence exerted by Blaize's former colleagues in the GNP. This was followed, in 1987, by the resignation from Cabinet of Brizan and Alexis, both now senior ministers who objected to Blaize's plan to reform the public sector by shedding 1800 public sector jobs. Blaize and Alexis were joined shortly thereafter by another Cabinet Minister, Tilman Thomas, and together they defected from the NNP to form a new political party, the National Democratic Congress (NDC) (Clarke, 1991).

Blaize's final year in office was punctuated by a series of political crises. In January 1989, at the NNP's annual convention, Keith Mitchell, a charismatic figure, who held a master's degree from Howard University and who had been captain of the Grenada cricket team, was elected to replace Blaize as

the NNP's political leader. Six months later, one of his fellow Caribbean Prime Ministers, speaking on behalf of the others, suggested to Blaize that he should resign immediately after the annual CARICOM Heads of Government Conference about to take place in Grenada (Scoon, 2003). Blaize, however, was in no mood to step down, even though he was gradually becoming 'a lame duck Prime Minister' (Scoon, 2003, p. 246). On 20 July 1989, he struck his first blow by relieving Keith Mitchell of his ministry. On the same day he announced the formation of a new political party, The National Party (TNP). In response Mitchell attempted to table a motion of no confidence at the next sitting of parliament scheduled for 4 August 1989. Though the Speaker refused to table the motion on the ground, *inter alia*, that notice of the motion had been served too late, the cracks in Blaize's Cabinet deepened further with the resignation of two more Cabinet Ministers, Daniel Williams and Grace Duncan, who declared their loyalty to the NNP over Blaize's TNP. Duncan also made it clear that she would support Mitchell's motion of no confidence against Blaize.

Though now leading a minority government, holding only six of the fifteen seats in the House of Representatives, and in failing health, Blaize never regarded the dissolution of Parliament as one of his options. He was intent on carrying on to the end of his five-year term at the end of December 1989. Nevertheless, he was acutely aware of the impending threat of Mitchell's motion of no confidence, rumours of which had swept the entire country, with no one expecting Blaize to survive the motion (Scoon, 2003, p. 255). He was, accordingly, in a highly receptive mood when the Governor General, Paul Scoon, to whom he had grown increasingly close during the ongoing political crisis, suggested an alternative option to dissolution. As the Governor General recounts in his memoirs (Scoon, 2003, p. 257):

I took the unusual step to advise the Prime Minister that the way to get out of his dilemma was to prorogue Parliament. His initial reaction was that he would have to think about it. Within a couple of days he informed me he would take that route.

The prorogation of Parliament not only enabled Blaize to remain in office, it also silenced his parliamentary colleagues, yet, remarkably, did not generate any particular controversy. Indeed, Paul Scoon recalls that it aroused no animosity and provoked no demonstrations: 'life in Grenada went on much as usual' (Scoon, 2003, p. 257). He suggests that this may have been because many journalists and political activists confused the prorogation of Parliament with the dissolution of Parliament, believing that the prorogation signalled the announcement of a date for the next elections (Scoon, 2003, p. 257). This was emphatically, however, not the case. The aim of the prorogation was to allow Blaize to remain in office until the end of his term, and he would have done so had he not died on 19 December, two days after being

elected as leader of the TNP. Though the TNP went on to fight the general election in March 1990, it won only two seats and the NDC, together with support from the Grenada United Labour Party members of the House of Representatives, formed the new government. In the subsequent elections, in 1995, the TNP did not win a single seat and, thereafter, withered on the vine.

The second instance of prorogation in Grenada occurred in September 2012 upon the advice of the then Prime Minister, Tillman Thomas. As noted above, Thomas had earlier quit the NNP to become one of the founding members of the NDC, which succeeded the NNP by winning the 2008 elections. Though the NDC appeared to have won a resounding victory, securing 11 of the 15 available seats, Thomas still found himself in a somewhat parlous position on two counts. Firstly, the NNP and its charismatic leader, Keith Mitchell, continued to enjoy widespread popular support, as reflected in the NNP's 47.68% share of the popular vote in the 2008 elections as against the NDC's share of 50.85%. Secondly, Thomas faced a threat from within his own party from his tourism minister and party general secretary, Peter David, who led a faction within the NDC that was strongly opposed to Thomas's leadership (David had formerly been a member of the revolutionary NJM and had been accepted into the NDC despite strong reservations by the NDC leadership leading the other faction).

In May 2012, Thomas survived a motion of no confidence by a margin of eight votes to five, but within a matter of months he faced the prospect of another no confidence motion. This time the motion had been filed by his former Foreign Minister, Karl Hood. Having resigned from Cabinet, Hood now accused the government of 'failing to fulfil its promise to implement programmes that were marketed to deliver economic and social development to the people of the State of Grenada' (Proroguing Parliament, 2012). He also claimed that 'dismal mismanagement of the economy' had resulted in joblessness rising to 'astronomical levels'. Hood and three other backbenchers, together with the four NNP members of the House of Representatives, were now pressing for Parliament to reconvene after the summer recess so that a motion of no confidence could be tabled for debate, believing that with the resignation or dismissal of a number of ministers there was a reasonable prospect of the motion succeeding. However, before the motion could be tabled for debate, on 10 September 2012, Thomas announced that he had requested the Governor General, Sir Carlyle Glean, to prorogue Parliament. Somewhat disingenuously, Thomas claimed that the prorogation had nothing to do with the impending no confidence motion (cited in Proroguing Parliament, 2012), but failed at the time to offer any other credible explanation. Subsequently, in the face of criticism of Thomas's actions by other Caribbean political leaders, he claimed that the prorogation was necessary in order to implement the

new voter registration system in preparation for the next elections (Address to the Nation, 2013).

The prorogation continued until 10 January 2013 when Thomas announced that he had advised the Governor General to dissolve parliament with a view to holding fresh elections on a date to be fixed within 90 days. In the elections which followed, in February 2013, the opposition NNP won all of the 15 parliamentary seats.

Guyana

Before discussing the exercise of the power of prorogation by President Donald Ramotar in November 2014, it will be helpful by way of background to say a little more about Guyana's unique hybrid presidential/parliamentary system, which was adopted in 1980 in place of the traditional Westminster model.

Under this new system each party wishing to contest the election puts forward a list of 65 names for the 65 seats in the National Assembly and one additional name as the presidential candidate for that party. All seats in the National Assembly are allocated according to the Hare method of proportional representation. The total votes for each list are then calculated and the person nominated as the presidential candidate on the list that receives the most votes is duly elected as President. In 2000, there was an addition to the Constitution which provided that, henceforth, the Cabinet, including the President, must resign if the Government is defeated by the vote of a majority of all the elected members of the National Assembly (Article 106(6)). As Hamid Ghany has observed, this amendment was a significant constitutional change because 'it would tilt the Guyanese hybrid towards the parliamentary side of the equation and away from the executive presidential side by giving the National Assembly a power that it did not previously have (2020)'. Moreover, this 'created a formula for instability by subjecting the presidency to a parliamentary force that was elected on proportional representation which does not guarantee security of tenure for a president who was elected on first past the post' (Ghany, 2020).

The instability of this new system soon became apparent with the outcome of the 2011 elections, which resulted in the incumbent People's Progressive Party (PPP), led by Donald Ramotar, winning 32 of the 65 seats, whilst the opposition parties – A Partnership for National Unity (APNU) and the Alliance for Change (AFC) – between them won the remaining 33 seats. Though the opposition parties had together won the majority of seats in the National Assembly, because they had not run as a single list it was Donald Ramotar who assumed the Presidency on the basis that the PPP was the single party with the largest numerical share of the votes. This meant that, whilst executive power was in the hands of one party, the PPP, legislative control was exercised by an alliance of opposition parties – the APNU and AFC. Unsurprisingly, this led to numerous clashes between the President and the opposition parties,

eventually requiring the courts to intervene in a dispute regarding the National Assembly's power to disapprove the estimates of annual expenditure presented by the government. Though the Court of Appeal determined that the National Assembly did, indeed, have the power to disapprove the annual estimates of expenditure presented to it (*Attorney General of Guyana v Trotman* [2016]), in June 2014 the Minister of Finance ignored this restriction on his financial powers and authorised \$4.5 billion of spending that had been specifically disapproved by the National Assembly. This proved to be the catalyst that provoked the AFC, supported by the APNU, to file a motion of no confidence on the 8 August 2014, the day before the summer recess (AFC Files, 2014). Subsequently, on the day that the motion was supposed to be debated, the 10 November 2014, the President announced that he was proroguing Parliament. According to the President, the decision to prorogue Parliament was taken: 'to allow the parties in Parliament additional opportunities to talk and hopefully resolve the pressing national issues that were confronting us' (Address to Nation, 2015). Unsurprisingly, this is not how it was seen by the opposition parties, which enjoyed a one seat majority in Parliament and which viewed the prorogation as a patent attempt to avoid a motion of no confidence which would have brought down the government and triggered fresh elections.

The prorogation was roundly condemned by the British High Commissioner to Guyana, Andrew Ayre, who warned that Guyana was 'on a dangerous path' and could be referred to the Commonwealth Ministerial Action Group for a 'clear breach' of the Commonwealth Charter and Guyana's Constitution. He also warned that the UK could follow the European Union's lead in suspending financial aid to Guyana (Sutherland, 2015):

Without a parliament, no laws can be passed, no scrutiny can be had. Against the background of our doubts about the process that's taking place here, there's a reluctance to send development funds. Of course there is. How could we justify that to our own taxpayers.

In the event, the prorogation, which lasted for three months before Parliament was finally dissolved on 28 February, did not prevent the PPP from losing the ensuing elections, which were held on 11 May 2015. Instead, the elections were won by the opposition APNU/AFC alliance, this time running on a single list, bringing to an end 23 years of PPP rule, and David Granger, leader of the APNU, assumed the Presidency.

Prorogation and the principle of responsible government

As Ann Twomey has argued, where a government prorogues parliament in order to avoid a vote of no confidence, a very strong case could be made that the head of state ought not to act on the advice of his ministers:

This is because ministers are likely to have ceased to be responsible and because such action is contrary to the principle of responsible government ... A government is not entitled to remain in office and continue governing simply because it can exercise procedural powers to avoid proof of loss of confidence in it. In such a case, refusal of ministerial advice by the head of state, would advance rather than defeat, the principle of responsible government by ensuring the government faced parliament and established its responsibility. (2018, p. 593)

This view is shared by a growing number of scholars in Canada and Australia, who have argued that in these countries the power to prorogue should be regarded as a 'reserve power'; meaning that that the head of state should be free to refuse to prorogue parliament if requested to do so by a Prime Minister that had lost the confidence of parliament (Crommelin, 2015 and Heard, 2009). Even in the UK where the power to prorogue has not traditionally been regarded as one of the monarch's reserve powers (Blackburn, 2004), the eminent constitutional scholar, Vernon Bogdanor, has observed that a 'wise constitutional monarch' would not prorogue at the request of a Prime Minister who no longer held the confidence of the lower House (Fixed Term Parliaments Bill, 2010).

Whilst a similar argument could be made for those countries in the Commonwealth Caribbean identified above (Antigua and Barbuda, The Bahamas, Barbados, Dominica and Trinidad and Tobago) where the constitutional text provides that the head of state may prorogue parliament acting in accordance with the advice of the Prime Minister, there are a number of other countries in the region where, as we have seen, the constitution makes it clear that the head of state has no discretion in the matter and is bound to act upon a Prime Minister's advice to prorogue (Belize, Grenada, Jamaica, St Kitts and Nevis, St Lucia and St Vincent). Thus, for example, in the case of Grenada, the Governor General, even if he had wanted to do otherwise, had no choice but to accede to the requests of both Herbert Blaize and Tilman Thomas, respectively, to prorogue parliament, though both had clearly lost the confidence of the House of Representatives. It is, nevertheless, arguable, based on the authority of the UK Supreme Court's judgment in *Miller* that were this to occur in the future the Prime Minister's advice to prorogue parliament could be declared by the courts to be unlawful if the purpose of the prorogation were to deny parliament, without reasonable justification, the opportunity to hold the executive to account.

In the case of Guyana, as we have seen, the Constitution expressly provides that the President may prorogue Parliament at any time (Article 70(1)) and that in so doing he can act in his own deliberate judgment (Article 111(1)). Nevertheless, it is clear that the prorogation of parliament by President Donald Ramotar, even if formally permissible under the terms of the Constitution, was incompatible with the principle of responsible government in so far as it denied the Guyanese parliament the opportunity to hold him to account

by debating the motion of no confidence. Based on the authority of *Miller*, it may also have been unlawful. Though *Miller* was concerned with the legality of the Prime Minister's advice to the Queen to prorogue Parliament, it is at least arguable that the principle which it established, namely that it is unlawful to prorogue Parliament if the intention is to frustrate Parliament's ability to hold the government to account, is equally applicable to the Guyanese President's power of prorogation. It may be trite to say, but in Public Law there is no such thing as 'an unfettered discretion' (Elliott, 2013). This conclusion is reinforced by Hamid Ghany's observation that the amendment to the Guyanese Constitution in 2000 tilted the balance of the hybrid system towards Parliament (2020). It is true that s182 of the Constitution of Guyana provides that

the President shall not be answerable to any court for the performance of the functions of his office or for any act done in the performance of those functions and no proceedings, whether criminal or civil, shall be instituted against [the President] in his personal capacity.

However, as the Court of Appeal of Guyana observed in *Baird (Michael) v Public Service Commission* (2001): 'It is the President who is immune from curial processes, not his acts'. Section 182 should not, therefore, be a bar to constitutional review of the legality of the exercise of the President's power of prorogation (see also *Attorney General of Trinidad and Tobago v Dumas* [2017] to similar effect with regard to the impact of the ouster clause contained in s38(1) of the Constitution of Trinidad and Tobago upon constitutional review of the President's actions).

Not all exercises of the power of prorogation are, however, incompatible with the principle of responsible government. Even if a Prime Minister does not command the confidence of Parliament, there may be a reasonable justification for the prorogation (Twomey, 2018). For example, in the case of Trinidad and Tobago, it is arguable that the prorogation by President Robinson was constitutionally justified even though Prime Minister Manning did not at the time enjoy the confidence of the House of Representatives. Whilst it was argued by opponents of the PNM that the prorogation was motivated by partisan political considerations and that the Prime Minister should instead have requested the dissolution of Parliament, it is equally arguable that the Prime Minister was entitled to exercise his informed political judgment on whether, at that stage, the public interest would be best served by a dissolution rather than a prorogation of Parliament. As the Judicial Committee of the Privy Council noted, when dismissing an application for a declaration that Patrick Manning's retention of the office of Prime Minister without fixing a date for elections was illegal, there were a number of wholly proper reasons for not dissolving Parliament. For example, the Prime Minister could reasonably have hoped that further negotiations might lead to a compromise, such as agreement on an independent non-member Speaker, or that a member of the UNC might defect. Alternatively,

the Prime Minister could have feared that a second election might yield the same result or that there were potential public disadvantages in holding another election so soon. As Lord Bingham pithily observed: 'Elections are a very important, but not the only, expression of democracy' (*Bobb v Manning* [2006]).

Part II motions of no confidence

Constitutional framework

Upon independence, the UK convention that the government must be able to command the confidence of the elected members of the legislature, and when that support is withdrawn must either resign or request a dissolution of Parliament, was transplanted and codified in all of the region's constitutions, albeit with some modifications. For example, in contrast to the position in the UK where, prior to the Fixed Term Parliaments Act 2011, there was no specific time limit within which the Queen had to act if a Prime Minister refused to resign or request a dissolution, Commonwealth Caribbean constitutions typically provide that, if the government is defeated on a motion of no confidence, the Governor-General may dissolve parliament within three days if the Prime Minister either refuses to resign or to advise a dissolution (s66(2) Constitution of Barbados). Additionally, in contrast to the position in the UK where a simple majority suffices (A Question of Confidence, 2019–2021), the majority required for a successful motion of no confidence in the Commonwealth Caribbean is a majority of *all* the elected members of Parliament (constitutions of: Antigua, s60(5); The Bahamas, s74; Barbados, s66(2); Belize, s37(4); Dominica, s59(6); Grenada, s52(4); Guyana, s106(6); Jamaica, s64(5); St Kitts, s52(6); St Lucia, s55(4); St Vincent, s48(5)(b); and Trinidad and Tobago, s77(1)). The importance of this distinction will become apparent below when we examine the implications of the motion of no confidence in Barbados in 1994.

Post-independence, as we have seen, the UK convention was also replicated in the amendment to Guyana's 1980 Constitution in 2000, albeit again with modifications. In this case while the Cabinet and the President, if defeated on a vote of no confidence (Article 106(6)), are constitutionally obliged to resign, the government continues in office until elections are held (Article 106(7)). The elections must be held within three months, or such longer period as the National Assembly shall determine by a resolution supported by not less than two thirds of all its elected members (Article 106(7)).

Motions of no confidence resulting in the calling of general elections by the governing party

While there have been numerous instances of opponents seeking to unseat an incumbent government through motions of no confidence in the post-

independence era there are only two examples of motions of no confidence which have actually resulted in the dissolution of parliament and the calling of general elections by the governing party – in Barbados in 1994, and in Guyana in 2018. There were, however, important differences in the constitutional implications of the no confidence motion in each case, which we will now proceed to examine.

Barbados

In the 1991 elections, the Democratic Labour Party (DLP), led by Erskine Sandiford, won a resounding victory, securing 18 of the 28 available seats, with the remainder being won by the Barbados Labour Party (BLP). Within two years, however, four key members of the Cabinet had resigned over the Prime Minister's controversial appointment of a Chief Executive Officer of the Barbados Tourism Authority. Even then, the Opposition did not immediately file a motion of no confidence. As the Leader of the Opposition, Owen Arthur, explained: 'Earlier, the only charge against Mr Sandiford was that people left his Cabinet complaining about his leadership style. In our judgement that didn't strike at the heart of his authority or diminish the prestige of his office' (as quoted in Brandford, 2014). The tipping point came, however, when the Prime Minister was alleged by his own ministers to have lied. As Owen Arthur observed: 'There is no precedent in our country where three former Cabinet Ministers have, in unison, accused the Prime Minister of telling untruths' (Brandford, 2014).

The motion of no confidence was heard in Parliament on 7 June 1994 and the government lost the motion by 14 votes to 12, after a number of DLP dissidents crossed the floor and sided with the BLP. Following the government's loss on the motion of no confidence there ensued a debate about its constitutional significance. On one side of the debate was Jeff Cumberbatch, a senior lecturer at the University of the West Indies (UWI), who argued that in accordance with s66(2) of the Constitution the Prime Minister was only required to resign upon the affirmative vote of a majority of *all* the members of the National Assembly (No-Confidence Motion, 2013). Since only 14 of the 28 members of the National Assembly had voted in support of the motion of no confidence this could not be regarded as a majority for the purposes of s66(2). On the other side of the debate was Simeon McIntosh, also a lecturer at UWI, who argued that since a majority of members of the House of Assembly in session voted in favour of the motion, the Prime Minister had no legitimate basis on which to remain in office. In the event a constitutional crisis was avoided when the Prime Minister followed through on his threat to call a general election if he was outvoted on the motion of no confidence. Accordingly, on 18 June, some 11 days after the holding of the motion of no confidence, the Prime Minister duly advised the Governor General, Dame Nita Barrow, to dissolve Parliament and to set

6 September as the date for the general elections, some 16 months before the elections were constitutionally due.

In the subsequent elections, the DLP suffered a heavy defeat, winning only eight of the 28 available seats, and remained in the political wilderness for over two decades until it returned to power in 2008.

Guyana

As noted above, the 2015 general elections, which followed the three month prorogation of Parliament by President Ramotar, resulted in the APNU/AFU alliance securing 33 of the 65 seats in the National Assembly and 50.3% of the votes. As a result of winning the largest share of the votes, its candidate, David Granger, assumed the Presidency. The PPP, led by Bharrat Jagdeo, which won 49.19% of the votes secured the remaining 32 seats. Three and a half years into the life of the new administration, however, President Granger's wafer-thin majority was put to the test as the PPP moved a motion of no confidence in the Government. All 65 members of the National Assembly were present and took part in the vote on the 21 December 2018. Unexpectedly, Charrandas Persaud, who was formerly a member of the APNU/AFU alliance, joined the PPP members in voting for the motion. The result was the narrowest of majorities in favour of the motion of no confidence: 33 votes to 32.

Defeat on the motion of no confidence meant that President Granger was constitutionally bound to hold an election within three months. He chose, however, to ignore this requirement and, instead applied to have the motion of no confidence declared invalid by the courts. As we will see below, his application, which was ultimately determined by the Caribbean Court of Justice (CCJ), which serves as Guyana's final appellate court, was unsuccessful (having initially been dismissed by the High Court of Guyana but upheld in part by the Court of Appeal of Guyana: *Ram v Attorney General of Guyana and Others* [2019]), but it secured him an additional four months in office pending the outcome of his application. His period in office was then extended still further pending the outcome of an equally futile attempt by his supporters to legally challenge the validity of the elections themselves. As a result, President Granger clung on to power for a total of 20 months after the passing of the motion of no confidence.

Motions of no confidence and the role of the courts

In this section we will examine two recent instances in which courts in the region have become involved in a dispute between the government and opposition parties regarding a motion of no confidence and its consequences. I have already alluded above to the involvement of the CCJ in the dispute regarding the motion of no confidence in President David Granger

in Guyana in 2018, and this is examined in more detail below, but first I will consider the involvement of the Eastern Caribbean Supreme Court (ECSC) in reviewing the failure of the Speaker of the House of Assembly in St Kitts and Nevis, in 2013, to table for debate a motion of no confidence filed by the opposition parties.

St Kitts and Nevis

For over 20 years, St Kitts and Nevis had been governed by the St Kitts and Nevis Labour Party (SKNLP), led by Denzil Douglas. However, by 2012, disenchantment with the direction in which the Prime Minister was taking the Government resulted in public expressions of disagreement and opposition from two senior Ministers, Sam Condor and Timothy Harris. In December 2012, encouraged by these public displays of lack of unity within the Government, and after consultation with the disaffected Ministers, the Leader of the Opposition, Mark Brantley, requested the Speaker of the National Assembly to table a motion of no confidence. However, five months went by during which the Speaker steadfastly refused to table the motion for hearing.

In the meantime, there were two important political developments. Firstly, Sam Condor and Timothy Harris defected from the Government and formed a new political party, the Peoples Labour Party (PLP). Secondly, the PLP together with two other political parties – the People's Action Movement and the Concerned Citizens Movement – joined forces to launch a coalition group called Team Unity. These new developments meant that if the motion of no confidence had been scheduled and debated it would most certainly have carried, since there were only 11 elected representatives in the National Assembly and six had indicated an intention to vote in favour of the motion. On 1 March 2013, Team Unity sent a letter to the Governor General calling upon him to advise the Prime Minister to respect the rule of law and insist that the motion be tabled for hearing. At the same time, members of civil society and the Bar Association became involved, calling upon both the Prime Minister and the Speaker to table the motion, but to no avail.

The refusal of the Speaker to table the motion of no confidence was widely seen as evidence that as between the government and opposition parties the Speaker was not neutral. Such a belief is not uncommon in Commonwealth Caribbean countries where the Speaker is elected by the members of Parliament (s32 Constitution of St Kitts), a majority of whom are members not only of the governing party, but also members of the Cabinet. Believing that in these circumstances there was no reasonable prospect of the motion of no confidence being tabled for debate in Parliament, Team Unity commenced proceedings before the ECSC on 3 April 2013 (*Brantley v Martin* [2013]). In these proceedings Team Unity sought, inter alia, declarations that as members of the National Assembly they were entitled as of right to bring a motion of no confidence in the government pursuant to s.52(6) of the

Constitution, and that the motion of no confidence must be scheduled for debate in the National Assembly as a matter of urgency. Upon the Attorney General's unsuccessful attempt to strike out these proceedings, which was followed by a further unsuccessful attempt before the Eastern Caribbean Court of Appeal (ECCA) to appeal against the refusal to strike out, Team Unity's claim was returned by the ECCA to the ECSC for a fresh hearing. Prior to this hearing Team Unity filed a second motion of no confidence, which was intended to take account of criticisms expressed by the Speaker regarding the wording of the first motion, but the Speaker again failed to schedule the motion for debate.

The ECSC's subsequent judgment in *Brantley v Martin* ([2014]), undoubtedly, represents an important affirmation of the principle of responsible government and the accountability of the executive to Parliament. In dismissing the Government's argument that by reviewing the Speaker's failure to table the motion of no confidence the Court was trespassing upon Parliament's privilege to control its own proceedings, the ECSC held that the principle of parliamentary privilege can be modified where this is necessary to ensure that the actions of the National Assembly are consistent with the Constitution.

The Court further declared that under the Constitution the members of the National Assembly had an implied right to lodge a motion of no confidence and that the Speaker was constitutionally obliged to table the motion of no confidence without undue delay. The importance of the judgment as a statement of principle was, however, somewhat diluted by the fact that it came three years after the proceedings were originally commenced and some two years and nine months after the general elections in St Kitts in February 2015, in which Team Unity secured 7 of the 11 seats in the National Assembly. Viewed from this perspective, the result of the proceedings could even be regarded as a tactical victory for the Prime Minister, Denzil Douglas. By declaring, that he was happy to await the outcome of the court proceedings, knowing there was no possibility of the proceedings being concluded prior to the elections, Douglas gained for himself and his party an extra two years in office. The disingenuousness of Douglas's position was highlighted by a number of other Caribbean political leaders. For example, Lester Bird, a former Prime Minister of Antigua and Barbuda, accused Douglas of undermining the democratic process in St Kitts and Nevis (St Kitts News and Information Service, 2019). The Prime Minister of St Vincent and the Grenadines, Ralph Gonsalves, was equally critical (Motion of No Confidence, 2013):

[A] motion (of no confidence) ought to be deliberately considered and determined by the legislature in the shortest time practicable ... *That is an established constitutional convention in parliamentary democracy* (emphasis added).

In St Kitts and Nevis at least, this convention has now been codified in the No Confidence Act, which was passed in September 2019. This provides that

where a question of no confidence in the Government is brought before the National Assembly, the question shall be determined by a resolution of the National Assembly within a period not exceeding 21 days.

Guyana

After President Granger's defeat on the motion of no confidence discussed above there followed an extraordinary and labyrinthine sequence of legal battles in which President Granger and the opposition parties turned to the courts for assistance: the former with a view to holding on to power, the latter with a view to forcing the President to give up power. To avoid getting lost in the weeds of this tangled and complex litigation I will focus in this section on two critical decisions of the CCJ which were instrumental in upholding the principle of responsible government.

The first decision concerned President Granger's application to have the motion of no confidence declared invalid on two grounds: firstly, that Charrandas Persaud's decisive vote on the motion was invalid because he had held dual citizenship at the time of the 2015 elections and was, therefore, disqualified by s115(1)(a) of the Constitution from voting; and, secondly, that the no confidence motion had not been validly passed because the formula for achieving an 'absolute majority' in the National Assembly was at least one half of the members plus one, meaning that 34 votes were required to pass the motion. Though President Granger's application had been granted by the Court of Appeal in Guyana, it was subsequently rejected by the CCJ in a judgment handed down on 18 June 2019 (*Ram v Attorney General Guyana and others* [2019] CCJ 10).

Having rejected President Granger's application, the CCJ was, however, still left with the practical problem of how to ensure the APNU/AFC alliance honoured its obligation under the Constitution to hold fresh elections. Lawyers for the Leader of the opposition PPP, Bharratt Jagdeo, were adamant that elections should be held as soon as possible, using the existing voters' list. The President, however, insisted that he wanted to create a new voters' list before holding elections. In this he was supported by the lawyers acting for Guyana's Electoral Commission (GECOM) who informed the CCJ that the new voters' list would not be ready until 25 December 2019. Such a prolonged delay made a nonsense of the constitutional requirement that elections be held within three months of the motion of no confidence, i.e. by 21 March 2019. The dilemma for the CCJ was, however, that if it acceded to the PPP's demands that the elections be held as soon as possible there was a danger that the elections could later be challenged on grounds of invalid voter registration. As the lawyers for GECOM argued (Chabrol, 2019):

The risk is that you might have an election that is not credible, and we might be back before you on other grounds ... fair, impartial and credible elections ... with a defective list we may have to come back to you on other grounds.

Rather than seek to reach a decision on this issue immediately, the CCJ adjourned the proceedings to enable the parties to make further representations as to the timing of the elections. However, by the time of the restored hearing on 12 July 2019 it was evident that the parties had still not reached any agreement about the date for the forthcoming elections. Confronted with this impasse, the CCJ did not consider it was in a position to establish a date on or by which the elections must be held or to lay down timelines and deadlines. In the CCJ's view, such matters were the preserve of the President and the National Assembly of Guyana (and, by implication, GECOM). In these circumstances the CCJ decided it had no choice but to assume that the relevant political actors would exercise their responsibilities with integrity and in accordance with the unambiguous provisions of the Constitution (*Ram v Attorney General Guyana and others* [2019] CCJ 14).

Unfortunately, the CCJ's faith in the integrity of the political actors involved was, sadly, misplaced, at least in so far as President Granger and his supporters both within and without GECOM were concerned. Not only were the elections not held until 2 March 2020, almost a year to the day that they were constitutionally due, but the announcement of the results was then postponed for a further five months. This was due to a combination of reasons. The first was the failure of the Returning Officer for Region 4 properly to tabulate the votes, which led to a recount of the votes in all of the regions, supervised by a high-level team (HLT) from CARICOM. The second was the refusal of Present Granger's supporters to accept the validity of the recount, which confirmed that the PPP had won the elections. Instead, President Granger's supporters commenced proceedings before the Guyana Court of Appeal seeking a declaration that the words 'more votes cast' in Article 177 (2) (b) of the Constitution should be interpreted to mean 'more *valid* votes cast'. Having obtained the declaration that they sought, President Granger's supporters relied upon this interpretation to claim that President Granger had won the election. Moreover, in direct contravention of an order by the Guyana Court of Appeal that no action should be taken by GECOM until the opposition party had had an opportunity to appeal its ruling to the CCJ, the Chief Elections Officer (CEO) submitted a report to GECOM, invalidating over 100,000 of the votes cast and declaring President Granger to be the winner of the election.

It was this controversial interpretation of Article 177(2) by the Guyana Court of Appeal which formed the subject matter of the second critical decision by the CCJ (*Ali and Jagdeo v Chief Elections Officer and others* [2020]). On this occasion the CCJ not only overturned the Court of Appeal's ruling on the ground that the latter had no jurisdiction to entertain the appeal regarding the interpretation of Art 177, but further ruled that any dispute regarding the validity of the votes cast in the March 2020 elections fell exclusively within the jurisdiction of the High Court of Guyana, pursuant

to Article 163 of the Constitution and the Validity Act. In its judgment the CCJ was also critical of the conduct of the CEO:

The idea that the [CEO] or GECOM could, in an unaccountable, non-transparent and seemingly arbitrary manner, without due processes and legal standards established in Article 163 and the Validation Act, disenfranchise scores of thousands of electors is entirely inconsistent with the constitutional framework.

Ronnie Yearwood and Cynthia Barrow-Giles (the latter a member of the HLT from CARICOM) have been equally critical of the actions of the CEO and the members of GECOM affiliated to the governing APNU/AFC. In their view, GECOM was 'clearly political in nature ... and defined by a high degree of dependency on the executive' (2020, p. 513) Furthermore:

It was clear that the recount process was deliberately orchestrated by the government in concert with APNU/AFC commissioners of GECOM and the [CEO] ... to cast doubt on the credibility of the poll (which had been deemed credible) by pushing a false narrative of irregularities based primarily on numerous unsubstantiated allegations of migrant and phantom voting mounted by the APNU/AFC. (2020, p. 519)

The CCJ's second decision removed the last obstacle to the announcement of the election results and, on 2 August 2020, almost 20 months after the government's loss on the motion of no confidence, the PPP were finally declared to be the winners, and their nominee, Irfaan Ali, assumed the presidency.

Though they were concerned with, superficially, different issues – the ECSC in the case of St Kitts being concerned with the Speaker's failure to table a motion of no confidence and the CCJ in the case of Guyana being concerned, initially, with a procedural question about the validity of the motion of no confidence and, subsequently, with a question about the validity of the recount – at the core of the decisions of both courts was the principle of responsible government.

Conclusion

While the exercise of the power of prorogation for partisan-motivated regions is not unique to the region, the experience of the Commonwealth Caribbean in the post-independence era demonstrates how important it is to find a way of curtailing such abuse of power. In those countries in the region where the constitutional text appears to permit the head of state a choice as to whether or not to prorogue parliament, acting in accordance with the advice of the Prime Minister, there is a compelling argument, based on the principle of responsible government, that a head of state would be constitutionally justified in rejecting a Prime Minister's advice to prorogue where it is clear that the latter has lost the confidence of Parliament. In those countries where the head of state has no choice but to accede to a Prime Minister's

request for a prorogation it may be that the principle established by the UK Supreme Court in *Miller*, namely that there are limits to the power of prorogation and that it cannot be used to prevent Parliament from performing its constitutional functions, offers a way of challenging the legality of the exercise of the power of prorogation. It may even be that the principle could be extended to Guyana where the President acting alone may prorogue parliament.

The experience of the Commonwealth Caribbean also confirms, however, that curtailing abuse of the power of prorogation is only half the battle. It is equally important that Prime Ministers and Presidents (in a hybrid system such as Guyana's) do not seek to frustrate the tabling of motions of no confidence by other means and respect the outcome of motions of no confidence when they go against them. Even if he was only making good on a threat made prior to the motion of no confidence, the decision of Erskine Sandiford in Barbados to dissolve Parliament two or so years earlier than he was constitutionally bound to do so, demonstrates some measure of respect for the principle of responsible government. By contrast, the behaviour of both Denzil Douglas and David Granger demonstrate a conspicuous lack of respect for the same principle.

In these relatively small democracies where a number of the key constitutional actors owe their appointment either directly or indirectly to the Prime Minister or President (as in the case of Guyana), we have seen that the ability of Parliament to hold the government to account can be all too easily undermined by the failure of the other key constitutional actors to cooperate in the process. In such circumstances the courts have a crucial role to play but, as we have also seen, the remedies the courts can offer are limited. For example, in the case of Guyana the CCJ was unable to fix the timetable for the holding of elections, allowing President Granger, with the support of GECOM, to remain in office long past the date fixed by the Constitution. In the case of St Kitts and Nevis the ECSC's declaration that the Speaker was constitutionally obliged to table the opposition's motion of no confidence came only after the government had already been voted out of office. The courts are thus a necessary but not always a sufficient corrective to abuses of the democratic process.

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