A. Definitions

1 Prorogation refers to a decision to suspend parliament’s activities. It originates in the United Kingdom (‘UK’), and constitutions that use the term today are, with one exception, to be found in jurisdictions with a strong Commonwealth influence. In some systems, it is a ceremonial relic; in others, it has live political significance, or potentially does.

2 Although the term most commonly denotes a power held by the executive, as distinct from a legislature’s power to adjourn its own proceedings, it has also been used as a synonym for adjournment. The 1848 French Constitution, which provided for the legislature’s power to ‘prorogue’ itself (s 32) while insisting that the President of the Republic had no power to do so (s 51), is an example. However, this usage is outdated and confusing, and this entry will be concerned with prorogation as an executive power.

3 Prorogation is also to be distinguished from dissolution. Dissolution terminates a parliament, and implies the need for new elections; prorogation does not, and simply places the existing parliament in stasis. It is a means to ‘achieve the continuance of the parliament from one session to another’ by putting off the ‘civil death’ of dissolution (Blackstone, Bk 1 Ch 2, 179–80). This is what links the modern word ‘prorogation’ to its origins in the Roman practice of *prorogatio imperii*, a device for extending the annual term of magistrates for convenience; it can be glossed, ‘with considerable compression’, as ‘in place of an election’ (Ando 922–24). Prorogation shares this etymological parent with the French legal term *proroger*, referring to an extension of a legally fixed period (eg Constitution of the French Republic: 28 September 1958 (as Amended to 23 July 2008) (Fr) s 36; Constitution of Guinea: 7 May 2010 (Guinea), s 90, on the extension of a stage of siege). *Proroger* is sometimes translated as ‘prorogation’, but since *proroger* does not refer specifically to parliamentary terms, this usage too is potentially confusing.

B. Comparative Survey

4 Today, legislative prorogation is referred to explicitly in the contemporary constitutions of forty-five countries, surveyed below. Most are parliamentary; given its background and purpose, prorogation is not usually a feature of presidential systems, but African exceptions are considered below. The practice was also adopted by the young United States as a part of its generally extensive borrowing from English legal practices (see Clough 194–96), and survives in the state constitutions of Massachusetts and New Hampshire. There, although the governor’s power of prorogation exists only at the request of the two houses of the legislature while they are sitting, it involves an independent discretion when they are not, and also when the two houses cannot agree on the date of prorogation. (Constitution of Massachusetts: 25 October 1780 (as Amended to 7 November 2000) Part 2, Ch.II, Section I, Art. V, VI; Constitution of the State of New Hampshire: 31 October 1783 (as Amended to 6 November 2018) s 43, 50).

5 Prorogation originates from Britain at a time when parliament met according to the will of the English monarch. It was a means for a monarch who did not currently wish to have a parliament in session to achieve this result without dissolving parliament and thus incurring the expense of a new election when she desired parliament to re-convene. This usage eroded along with the other powers of the monarchy, and today royal involvement in prorogation in the UK is purely ceremonial (Halsbury vol 78 s 1018; Erskine May 144, 145–46). Prorogation was also historically justified as providing a check on parliament sitting
indefinitely (Blackstone Bk 1 Ch 2, 180). This concern is much weaker today, given fixed parliamentary terms and regular election cycles.

6 The British practice was adopted by other European monarchies, and prorogation is found in historical texts such as the German Constitution of 1870 (s 12) and the French Constitution of 1814 (s 50); see also Boyron 11. Liechtenstein is the last extant example of this borrowing. Its anomalous status as the only country without strong Commonwealth links to have a constitutional prorogation power is thus explained by its now-unusual retention of royal powers. Outside Europe, prorogation also remains a royal power today in the constitutions of Jordan, Kuwait, Lesotho, Swaziland, and, in its most unfettered modern form, Brunei Darussalam (see below).

7 As a part of the royal prerogatives, prorogation was sometimes imported by British colonies as an unspecified part of the powers exercised by the crown’s representative. Thus in Papua New Guinea the constitution explicitly contemplates prorogation in s 104(3) without explicitly assigning the power to prorogue. It is instead implicitly included in the ‘privileges, powers, functions, duties and responsibilities’ of the Head of State (the British monarch), exercised by a governor-general (Constitution of the State of Papua New Guinea: 15 August 1975 (as Amended to 29 August 2016) (Papua NG) s 82). Canada (Constitution Act of 1867: 1 July 1867 (as Amended to September 2008) (Can) s 12, 47) and Bhutan (Constitution of Kingdom of Bhutan: 18 July 2008 (Bhutan) s 2(8), 13(3)) are also examples. The New Zealand Constitution, originally enacted in 1852, appears to have been the first to confer a power of prorogation on the governor-general explicitly (see now Constitution Act (No. 114 of 1986): 13 December 1986 (as Amended to 16 May 2005) (NZ) s 18). Section 6 of the Australian Constitution has, however, been much more influential in accompanying this power with an explicit provision that parliament must meet at least every 12 months, imposing an upper limit on how long the legislature may be prorogued (Commonwealth of Australia Constitution Act: 9 July 1900 (as Amended to 31 October 1986) (Austl) s 6). (This codified what was likely already a matter of convention; see Dicey 280, 283–84.) Such time limits represent the most common check on the prorogation of parliament explicit in the world’s constitutional texts.

8 In Oceania, the Australian model is also found in the texts of: Nauru (Constitution of the Republic of Nauru: 29 January 1968 (as Amended to 18 September 2015) (Nauru) s 40), Samoa (Constitution of the Independent State of Samoa: 28 October 1960 (as Amended to 1 January 2016) s 52) (Samoa), the Solomon Islands (Solomon Islands Independence Order (S.I. 1978/783) 31 May 1978 (as Amended to 7 September 2018) (Solom Is) s 72), and Tuvalu (Constitution of Tuvalu: 15 September 1986 (Tuvalu) s 116) and, with variations, elsewhere: in Fiji the time period is six months (Constitution (Amendment) Act 1997 (Act No. 13 of 1997) of the Republic of the Fiji Islands: 25 July 2997 (as Amended to 20 April 1998) (Fiji) s 68), and in Papua New Guinea parliament must meet for not less than 40 days in each twelve month period (s 124). Under the older constitutions of Australia (s 5) and New Zealand (s 3, 18) the prorogation power is textually vested in the governor-general alone. In Fiji, the power is exercised on the advice of the prime minister (s 58) and in Papua New Guinea, of the cabinet (s 86). Samoa’s constitution provides for such powers in general to be exercised on the advice of the prime minister, the cabinet, or the responsible minister (s 26), and the prorogation provision suggests the prime minister in that context (s 63). The other three systems in the region give the legislature greater textual control, to varying degrees. In Nauru, prorogation is a power of the speaker on the advice of the president (effectively a prime minister), but the speaker may not prorogue parliament in the seven days after a resolution to remove the president and cabinet is approved (s 41). In Tuvalu, prorogation is a power of the Head of State ‘in accordance with a resolution of Parliament’. The Head of State may also act on ‘advice of the Prime Minister’, but that too is ‘subject to any resolution of Parliament’ (s 117). In the Solomon Islands, the governor-general shall
prorogue Parliament ‘if at any time Parliament decides by resolution’ passed by a simple majority to do so (s 73).

9 In South and South-East Asia, the (Constitution of India reduced the maximum period between sittings of parliament from Australia’s twelve months to six (Constitution of the Republic of India: 26 January 1950 (as Amended to 16 September 2016) (India) s 85). This has become the most common period globally, but within these regions there is significant local variation. Malaysia (Constitution of Malaysia: 31 August 1957 (as Amended to 27 December 2007) (Malay) s 55), Nepal (Constitution of the Federal Democratic Republic of Nepal: 20 September 2015 (Nepal) s 93), and Singapore (Constitution of the Republic of Singapore: 9 August 1965 (as Amended to 28 November 2008) (Sing) s 65) also stipulate six months, but in Sri Lanka, the maximum is two months (Constitution of the Democratic Socialist Republic of Sri Lanka: 31 August 1978 (as Amended to 15 May 2015) (Sri Lanka) s 70); in Bangladesh 60 days (Constitution of the People’s Republic of Bangladesh: 16 December 1972 (as Amended to 30 June 2011) (Bangl) s 72); in Pakistan 120 days (and parliament must meet at least 130 days per year, Constitution of the Islamic Republic of Pakistan: 12 April 1973 (as Amended to 7 January 2015) (Pak) s 54); in Brunei twelve months ‘unless otherwise directed’ by the Sultan (Constitution of Brunei Darussalam: 29 September 1959 (as Amended to 21 February 2006) (Brunei) s 52); and in Bhutan parliament must assemble at least twice a year (s 12). The Sri Lankan text also provides that if a state of emergency is declared, parliament must meet within ten days notwithstanding prorogation (s 155). The position of governor-general does not survive in these regions, and the prorogation power is held by the president, except in the case of Brunei’s sultan. With the exception of Sri Lanka, constitutions in this region contemplate that the prorogation power will be exercised on the advice of the prime minister or, in Bhutan, India, and Malaysia, the cabinet. (See the constitutions of Bangladesh (s 72); Bhutan s 20(3); India (s 74(1), 85; Malaysia (s 40(1) and (1A), 55); Nepal s 66(2), 93; Pakistan (s 48(1), 55); Singapore (s 22, 65)). The Sri Lankan text contains no such provision in relation to the national executive, but at the state level governors must act on the advice of the chief minister, provided she or he commands majority support (s 154B(8); on this proviso see further below). Nepal’s text provides that while the house is prorogued, one quarter of its members may submit a ‘request stating that it is a desirable’ that the House should sit, and the President must then call such a sitting within a fortnight (s 93; see also Uganda and Liechtenstein herein).

10 Prorogation is a feature of post-independence Anglophone Caribbean Constitutions, beginning with Jamaica (Jamaica (Constitution) Order (S.I. 1962/1550): 23 July 1962 (as Amended to 1999) (Jam) and Barbados (Barbados Independence Order 1966 (S.I. 1966/1455): 22 November 1966 (as Amended to 4 June 2018) (Barb). All limit the period for which Parliament may be prorogued to six months, or 180 days in Saint Kitts and Nevis (Saint Christopher and Nevis Constitution Order (S.I. 1983/881): 22 June 1983 (St Kitts & Nevis) s 46), or twelve months in the Bahamas (Bahamas Independence Order 1973 (S.I. 1973/1080): 20 June 1973 (as Amended to 8 March 2002) (Bah) s 65) and Saint Lucia (Saint Lucia Constitution Order (S.I. 1978/1901): 20 December 1978 (St Lucia) s 54). The power is generally held by the governor-general, but Dominica, Guyana, and Trinidad and Tobago replace that office with a president operating in tandem with a prime minister. In some systems, it is explicitly to be exercised on the advice of the prime minister (Antigua and Barbuda Constitution Order 1981 (S.I. 1981/1106): 31 July 1981 (Ant & Barb) s 60; Bahamas Independence Order 1973, s 66; Constitution of the Republic of Trinidad and Tobago Act (Act No. 4 of 1976): 29 March 1976 (as Amended to 12 June 2007) Trin & Tobago) s 68; Jamaica (Constitution) Order, s 64). In others, it is part of a set of powers to be exercised on the advice of the prime minister (Barbados Independence Order, s 61) or the cabinet (Constitution of Belize: 20 September 1981 (as Amended to 25 October 2011) (Belize) s 34; Constitution of the Commonwealth of Dominica: 25 July 1978 (as Amended to
1984) (Dominica) s 63; Grenada Constitution Order (S.I. 1973/2155): 19 December 1973 (as Amended to 10 July 1992) (Gren) s 62; Saint Christopher and Nevis Constitution Order, s 53; Saint Lucia Constitution Order, s 64; Saint Vincent Constitution Order (S.I. 1979/916): 26 July 1979 (St Vincent) s 54)—unless the Constitution or other law requires otherwise. This qualifier raises some uncertainty. These texts generally specify that the governor-general or president has discretion only in the case of dissolution, but constitutional convention may be a source of discretionary powers in the context of prorogation (see below). The exception, Guyana, reverses the presumption by stipulating that the president should act in accordance with her own deliberate judgment unless the Constitution or other law requires otherwise, which the prorogation section there does not (Constitution of the Co-operative Republic of Guyana Act, 1980 (Act No. 2 of 1980): 14 February 1980 (as Amended to Act No. 22 of 2007) (Guy) s 70, 111).

11 Eleven African Constitutions provide for prorogation. Several require parliamentary meetings every twelve months—Constitution of the Kingdom of Lesotho: 2 April 1993 (as Amended to 10 June 2011) (Lesotho) s 82; Constitution of the Republic of Mauritius: 12 March 1968 (as Amended to 15 December 2016) (Mauritius) s 56; Constitution of the Republic of Uganda: 22 September 1995 (as Amended to 27 December 2017) (Uganda) s 95; Constitution of the Republic of Zambia: 2 August 1991 (as Amended to 28 May 1996) (Zam) s 88—or six months—Constitution of the Republic of Botswana: 20 September 1966 (as Amended to 2006) (Bots) s 90; Constitution of the Kingdom of Swaziland (Act No. 1 of 2005): 4 October 2004 (Swaz) s 133. Sierra Leone specifies twelve months but also, as in Pakistan, that Parliament must meet at least 120 days a year (Constitution of the Republic of Sierra Leone: 24 September 1991 (as Amended to 8 June 2016) (Sierra Leone) s 84, 86. Both the Constitution of the Republic of Namibia: 21 March 1990 (as Amended to 13 October 2014) (Namib) s 62, and Constitution of the Republic of Malawi: 16 May 1994 (as Amended to 2010) (Malawi) s 59 require two meetings of Parliament per year. Sudan (Interim National Constitution of the Republic of Sudan: 6 July 2005 (Sudan)) and South Sudan (Constitution of the Republic of South Sudan: 9 July 2011) are unusual in not specifying a time limit, meaning that, textually, parliament might be prorogable indefinitely. Together with Brunei’s waiveable requirement, these are the only extant constitutions passed, since Australia’s, not to include a fixed time limit on how long parliament may be prorogued. There is considerable variation within Africa in how the prorogation power is assigned. It is exercised, on the advice of the prime minister, by the president in Mauritius (s 57) and by the king in Lesotho (s 83). In Uganda, it is exercised by the speaker in consultation with the president, and if one third of members request a meeting of parliament the speaker must call one within 21 days (s 95). In Botswana, a parliamentary system, the power is exercised by the president alone (s 91), and in Swaziland, by the king apparently without checks; the Constitution of Swaziland stipulates that the king must act on the advice of the prime minister only in the case of dissolution (s 134). In Namibia, a hybrid system where the president is separately elected but the office falls vacant whenever parliament is dissolved, the prorogation power is held by the president ‘in consultation’ with the cabinet (s 27). Africa also contains the only examples of a prorogation power at the national level in presidential systems: in Malawi (s 59) and South Sudan (s 101), it is a power of the president in consultation with the speaker; in Sudan, of the president with the consent of the first vice president, who is appointed by the president (s 58); in Sierra Leone, implicitly of the president as the general holder of executive powers (s 53); and in Zambia explicitly of the president (s 88). In the latter two cases, however, parliament may meet to consider the impeachment of the president even if it is prorogued (Sierra Leone, s 50, 51; Zambia, s 37).
In Malta, the president holds the prorogation power on the advice of the prime minister, and parliament must meet at least once every twelve months (Constitution of the Republic of Malta: 2 September 1964 (as Amended to 2007) (Malta) s 75, 76). In Liechtenstein, the Prince Regnant may prorogue parliament for three months ‘on warrantable grounds … communicated to the assembled Diet’. If 1,000 citizens entitled to vote or the assemblies of three communes so request, the Diet must be re-convened (Constitution of the Principality of Liechtenstein: 5 October 1921 (as Amended to 2008) (Liech) s 48). In Jordan and Kuwait, prorogation is a power of the monarch, but parliament must meet in October each year and must sit for six months in Jordan and eight in Kuwait, where prorogation may furthermore only last one month and occur only once per session without legislative consent (Constitution of the Hashemite Kingdom of Jordan: 1 January 1952 (as Amended to 28 August 2014) (Jordan) s 34, 78; Constitution of the State of Kuwait: 11 November 1962 (Kuwait) s 85, 86, 89, 106).

C. Consequences of Prorogation

That prorogation suspends parliament is clear. Its implications for particular aspects of parliamentary business, however, can vary. The discussion here considers selected examples and issues.

The traditional approach in the UK (now partly altered; see below) was that prorogation terminates all outstanding parliamentary business. In some systems, this has become only a default rule: in Malawi, for example, all business lapses unless the Speaker or a majority decides otherwise (Malawi Parliament Standing Orders (adopted 22 May 2003) s 15). The default can also be the reverse: in India, pending motions, resolutions, and amendments do not lapse only for reason of prorogation, though most notices do (Rules of Procedure and Conduct of Business in Lok Sabha 15th ed (2014) s 335, 336; Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha) 18th ed (2013) s 225 on notices; there is no rule on other business except committee activity, considered below).

The consequences of prorogation for pending bills merit specific attention. Since prorogation does not involve a change in parliamentary membership, revival of bills after prorogation does not face the democratic concerns that revival after dissolution raises (Weill). However, historically prorogation terminated any (public) bills pending. This is still the rule in some systems, for example Mauritius (Standing Orders and Rules of the National Assembly, s 9). In others, it has become a default rule that parliament may choose to vary. For example, cases of parliaments reviving bills after prorogation have occurred in Canada since at least 1970 (Marceau and Montpetit, Ch 8 notes 108–13; Ch 16 notes 132–33 and accompanying text). In the UK, since 1997 it has been possible for a bill to be ‘carried over’ in this way if it has not left the house in which it originated (Erskine May 640–42).

A more substantial erosion of the traditional rule began in 19th century Australian state legislatures (Clough 194–96.) Several constitutions, including those of Bhutan, India, Malaysia, New Zealand, and Pakistan, now stipulate that pending bills do not lapse due to prorogation. A variation in some two-chamber systems qualifies this practice with rules to ensure that a bill may only proceed, post-prorogation, with the consent of both houses (eg Australian House of Representatives Standing Orders, s 174; Annotated Standing Orders of the Australian Senate, s 136; see also Western Australia v Commonwealth (1975) (Austl)). If bills are not automatically terminated by prorogation, this creates the possibility that the executive may sign a bill into law after prorogation if it was passed by parliament before it was prorogued, and this is indeed the position in Australia (Attorney-General (Western Australia) v Marquet (2003) (Austl), para 85; Congdon 287; see also to similar effect in analogous circumstances in India, Purushothaman v Kerala (1962) (India), concerning the consequences of dissolution but also making findings on prorogation; and in New Zealand,
Simpson v Attorney-General (1955) (NZ), concerning the consequences of expiration of a parliament’s term).

17 The effect of prorogation on the work of committees can also be of special importance since it is sometimes used by the executive as a means to avoid parliamentary scrutiny. If the status of committees is uncertain, so too become issues such as the rules of privilege governing testimony before them and their powers to subpoena witnesses, so prorogation can significantly affect committee work.

18 The traditional position is again that committee activity ceases on prorogation. This remains the case in the UK and, with minor exceptions, in Canada (Erskine May 145, 814, 835; Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, s 11.31, 11.32; Marceau and Montpetit, Ch 20 notes 120–25 and accompanying text). Whether a committee is merely suspended or ceases to exist depends on the nature of the committee. Though there are local variations, the rules in the Australian House of Representatives illustrate the basic logic. There, a committee created by statute may continue to operate during prorogation if the legislation so provides, as it usually does (thus breaking, to that extent, with the traditional approach). Committees created for the life of that particular parliament or by standing order continue to exist, since prorogation does not end that parliament, but may not operate, since that parliament is suspended. And committees created for a session are terminated, since prorogation ends a parliamentary session (Harris 226–27, 632–34).

19 This logic is not always followed. For example, in contrast to the House, the Australian Senate has long claimed the power to authorize many of its committees to sit notwithstanding prorogation and they have often done so, though on an uncertain legal basis. (Harris 634–35; Olivier 72–81, also discussing a state-level dispute over this issue that ended in stalemate.) In Uganda, parliamentary rules explicitly provide that business pending before a committee shall not lapse only for reason of prorogation (Rules of Procedure, 9th Parliament of Uganda (2012) s 220). Indian rules provide that committees and business pending before them continue notwithstanding prorogation (Rules of Procedure and Conduct of Business in Lok Sabha 15th ed (2014) s 284; Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha 18th ed (2013) s 226; see also In the Matter of Special Reference No. 1 of 2002 (2002) 52, distinguishing the UK position.)

D. Controversies

20 In systems where prorogation is a power exercised by an executive official ‘on the advice’ of the prime minister or cabinet, the question arises whether that official has any discretion, or must simply prograde parliament whenever so advised. This question arises particularly in systems that retain a governor-general (Halsbury vol. 13 s 718), an unelected position that is to some an anachronism, but one associated as a matter of constitutional convention with certain ‘reserve powers’ of potential utility in checking political leaders. These include the power to remove the prime minister in unusual cases such as where she loses the confidence of the house but declines to resign or is guilty of a fundamental illegality. Should a prime minister advise prorogation with the aim of avoiding a confidence vote or other serious parliamentary scrutiny, the reserve powers are potentially a basis on which to argue that the governor-general has some discretion, or even obligation, to refuse.
21 Canada is the most well-known recent site of such debates. Prorogation was advised by prime ministers in the context of embarrassing parliamentary scrutiny in 2002 and 2009, but most notable is the prorogation of 4 December 2008. Opposition parties had announced an alliance that would dislodge recently elected Prime Minister Harper’s minority government; in response, he advised prorogation. Governor-General Michaëlle Jean acceded, but only after two hours of consultation, a delay intended to signal that the matter merited deliberation. She also specified that parliament should reconvene soon and that when it did the government should offer a budget, and thus face a confidence vote. Most Canadian scholars accept the governor-general has some discretion in exceptional cases such as where confidence is at issue, but the details are debated. (Wheeldon surveys the large literature). Though no prime minister’s advice to prorogue has ever been rejected in Canada, this has occurred in two old Australian state-level cases. (See Twomey 343–47, 354–57).

22 As a general matter, prime ministerial advice to prorogue is unlikely to be rejected where the prime minister enjoys majority support (a rule explicitly incorporated in the Sri Lankan constitution at state level (s 154B(8)), as noted.) Controversy may arise where this is not obvious; should it be alleged that a prime minister is advising prorogation to avoid a confidence vote, the governor-general would need to judge whether the prime minister has lost parliamentary confidence in the absence of a formal vote testing this. A 1962 Privy Council decision on a dispute under an earlier Nigerian constitution, though concerning the reserve power to remove a prime minister rather than prorogation, offers some guidance. It held that a governor, in exercising the reserve power, could in principle properly rely on a letter signed by a majority of parliamentarians indicating that the prime minister did not have their support. The decision was, however, based heavily on the open-ended framing of the empowering provision (Adegbenro v Akintola (1963) (UK)). The issue has also arisen in Malaysia, where reliance on less formal evidence has usually been accepted, and in a more ambiguous Canadian state-level case (Twomey 344–47).

23 These debates concern unwritten reserve powers. Where constitutional texts speak expressly to this issue, they confine themselves to stipulating that discretion exists in response to requests to dissolve Parliament, leaving the position with respect to prorogation unspecified (Constitutions of Barbados, s 32; Belize s 84; Dominica s 54, 63; Grenada s 52; Lesotho s 83; Malaysia, s 40; Malta s 76; Mauritius s 57; Saint Kitts & Nevis s 47; Saint Lucia s 55; Saint Vincent s 48; Swaziland s 134). Though unwritten convention gives way to explicit text (emphasized in Adegbenro v Akintola, above), this uncertainty means the traditional approaches remain of interpretative importance.

24 An additional controversy arises when prorogation operates alongside executive law-making powers, and here India is the foremost example. The Indian President may legislate by ordinance except when ‘both Houses of Parliament are in session’ (Art 123 of the Indian Constitution). Since the President also has the power to prorogue Parliament, and such powers are really exercised by the cabinet, the government holds the power to trigger its own extra-parliamentary law-making powers. In principle, this would be subject to important legal limits, but judicial interpretation has significantly weakened these (see below). In 2006, a Congress government attempt to use this device was reversed after media backlash and it remains uncommon, suggesting that non-legal checks on its use, at least, are significant (Dam 621–22, 627–28, 635–45).
E. Judicial review

25 Though courts have ruled on legal questions relating to prorogation’s consequences, as the previously cited judgments reflect, the decision to prorogue or not themselves is more sensitive. Existing case law in this area is moreover very limited.

26 Traditionally, any discretion associated with the power to prorogue was seen as a matter of constitutional convention, as opposed to constitutional law, and thus not a matter for judicial review (Dicey 292–303; see further Walters and sources there cited). A number of jurisdictions have codified this approach in relation to reserve powers. Issues of what advice governors general receive and whether they enjoy discretion in response are explicitly non-justiciable under several texts, including those of Barbados (s 32), Belize (s 34), Sierra Leone (s 53), and Sri Lanka (s 154F).

27 Outside these jurisdictions, the question of judicial review potentially arises. The traditional non-justiciability rule has eroded in the UK, and while the purely ceremonial nature of prorogation makes it unlikely that courts there will face the specific issue, the broader legal changes are likely to be of importance should the issue arise in other jurisdictions. Prorogation, however, is at least an uncertain case for review even on the modern UK approach. Judicial review of prerogative powers has been exercised principally where it has seemed most intolerable that the ordinary protections of judicial review should be denied: in the context of administrative action, affecting the rights or legitimate expectations of individuals, that happens to be based on historical prerogative powers rather than statute. This approach emphasizes the subject matter to be reviewed rather than the prerogative source of the power. As a result, the approach remains cautious about subject matters traditionally attracting judicial deference. Such concerns pervade the key case of Council for Civil Service Unions v Minister of Civil Service (1985) (UK), and while foreign affairs and national security are the most mentioned areas, Lord Roskill also specifically mentions the dissolution of Parliament. (Prorogation is not mentioned specifically, but seems closely analogous to dissolution in this context). Subsequent cases have confirmed the reviewability of prerogative powers, but it remains to be seen how far English courts will go (see further Thomas & Elliot 511–14). It seems however likely that they will continue to treat powers such as prorogation with considerable deference.

28 Though UK law can be expected to be influential in this context, it may not mark the limits of judicial review, given the increasing expansiveness of modern constitutional review elsewhere. Few concrete cases, however, exist. Significant deference has been shown in the context of judicial review at the state level in Massachusetts (Corbett 332–43), but what appears to be the only substantial body of authority on the point is Indian, arising in the context of executive powers to legislate by ordinance when legislatures are prorogued as noted earlier.

29 Several earlier cases had held that the responsible executive official is the sole judge of whether there is an ‘emergency’ entitling him to exercise the power to legislate by ordinance. (Baghat Singh v Emperor (1931) (UK); Emperor v Benoari Lal Sarma (1945) (UK); Jnan Prosanna Das Gupta v West Bengal (1949) (India)). In a 1950 case where a state governor had first prorogued the state legislature in order to exercise these emergency powers, which he did not possess while the legislature was sitting, a state-level court held that the decision to prorogue was analogous to the judgement that an emergency existed. It did not see ‘anything wrong’ with the governor deciding to prorogue the legislature in order to enable himself to legislate by ordinance, should he be satisfied this was necessary, and followed the earlier cases in finding that ‘it is not open to the Court’ to review the grounds for this satisfaction. (In re Kalyanam Veerabhadrayya (1949) (India)). The currently prevailing authority, the Supreme Court decision in Punjab v Satya Pal Dang (1968) (India),
declined ‘to go as far as ... Kalyanam’ in cases where the governor’s prorogation interrupts ordinary legislative operations. It held that in such cases ‘the motives of the Governor may conceivably be questioned on the ground of an alleged want of good faith and abuse of constitutional powers.’ Satya Pal Dang itself, however, concerned unusual circumstances where the speaker had adjourned parliamentary business though a vital budget vote was pending. The governor had then used the prorogation power to override the speaker’s adjournment, as one of a set of steps to call a fresh session to take up the budget issue. The Supreme Court upheld this use of the prorogation power, but in the course of doing so conducted quite an extensive review of the governor’s motives and assessment of the constitutional situation, especially on democratic grounds. The importance of the case’s particular facts to its finding make the reach of that finding uncertain (see also Dam 622–24). But it is nevertheless an important (and rare) illustration of what judicial review of prorogation may look like where courts operate with more pervasive understandings of constitutionalism.

F. Conclusion

Prorogation has long been consigned to ceremonial purposes in its country of origin. In a majority of the states to which it has been exported, however, it remains available as a potential legalistic weapon in parliamentary warfare. Where that weapon has been deployed, its use by prime ministers seeking to avoid parliamentary scrutiny, especially in the high profile use in Canadian cases, can make it seem an inherently undemocratic doctrine. The Indian pairing of the prorogation power with powers of executive law-making similarly raises the spectre of undemocratic abuse, and such concerns only loom larger in systems where the power is subject to fewer constitutional or political checks. The facts of the Indian Supreme Court decision in Satya Pal Dang, discussed above, are a reminder that the prorogation power can be used for democratic good. But even such uses cause disquiet. Like other old and neglected legal doctrines whose original purpose has faded from view, prorogation matters little until it is used for substantive effect, when it cannot escape the sense that an anachronism is being excavated for political expedience.

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