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I am a Law academic at the University of Southampton Law School, specialising in the field of Constitutional Law. To assist the committee I will focus in my submission on one question.

The submission draws upon a research project that I am presently completing – entitled "Suspending Parliament" – which addresses the implications of the Supreme Court judgment in Cherry/Miller [2019] UKSC 41.

What are the constitutional implications for the prerogative power to prorogue Parliament as a result of the recent Supreme Court judgment in Cherry/Miller?

1. The Fixed-term Parliaments Act 2011 addresses dissolution but does not explicitly regulate prorogation, with s 6(1) providing that "[t]his Act does not affect Her Majesty's power to prorogue Parliament". We should remember that concerns about prorogation were raised during the legislation's passage. For example, several MPs – Chris Bryant, Jacob Rees-Mogg and Jack Straw – spoke about how prorogation might be deployed during the statutory no confidence process under s 2(3). In particular, they raised the worry that a government seeking to force an early election could table a no confidence motion in itself, and then immediately move to prorogue Parliament to disrupt the 14-day window during which an alternative administration could be appointed.

2. Concern persists about prorogation being weaponised by government for partisan reasons. Although this is blunted by the Cherry/Miller judgment to some degree, the judgment is not a panacea and further legislative reform of prorogation should be pursued.

3. The Supreme Court was asked to decide whether the Prime Minister's advice to the Queen to prorogue Parliament from between 9 and 12 September to 14 October 2019 was lawful. The court held that the question was justiciable by treating it as a scope-of-power question – namely, whether the purported prorogation fell outside the lawful limits or scope of the power of prorogation. The court then articulated the following legal standard delimiting the power (para 50):

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

4. Applying this effect-based test to the facts, the court held that the Prime Minister's advice was unlawful.

5. The court did not find it necessary to address a further question whether an *intra vires* exercise of the power (ie within its lawful limits) was "challengeable in the courts on the basis of one or more of the recognised grounds of judicial review" (para 35). Nor did the court deem it necessary to rule on an alternative ground of challenge – namely, the Prime Minister's alleged improper purpose in requesting the prorogation (para 53).

6. Cherry/Miller is not a panacea because it has a weak bite. Two key features of the court's approach – there are others – demonstrate how light-touch the review is.

7. First, the court's test proposes that it "will intervene if the effect is sufficiently serious to justify such an exceptional course" (para 50). The high threshold is illustrated by the court's assessment of whether the test was satisfied on the facts. The court described the prorogation as having "an extreme effect upon the fundamentals of our democracy" (para 58), in what it called "quite exceptional" circumstances (para 57). This language indicates how egregious the circumstances must be. The implication is that a decision on prorogation is lawful if it has the effect of *seriously* preventing Parliament from performing its constitutional functions – for this would not meet the high threshold of *sufficient* seriousness and bring it within the ambit of the court's test. Notably, in Cherry/Miller it was not just the duration but also the timing of the prorogation that meant that the court's high threshold was satisfied. Regarding the prorogation's five-week duration, the court stated (para 57):

    b. Such an interruption in the process of responsible government *might not matter in some circumstances*. But the circumstances here were … quite exceptional. A fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019 [emphasis added].

8. In other circumstances where the timing is not so sensitive, the court is indicating that a lengthy prorogation – five weeks or perhaps more – might not fall within the ambit of its test.

9. Second, the court's test (para 50) provides the government with an escape route – namely, a "reasonable justification" for its prorogation. Again, a light-touch approach is indicated (para 51):

    c. The Prime Minister's wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any

further justification might be necessary. Even in such a case, when considering the justification put forward, the court would have to bear in mind that the decision whether to advise the monarch to prorogue Parliament falls within the area of responsibility of the Prime Minister, and that it may in some circumstances involve a range of considerations, including matters of political judgment. *The court would therefore have to consider any justification that might be advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution*. [emphasis added]

10. The court also stresses this later in the judgment (para 58):

> d. The next question is whether there is a reasonable justification for taking action which had such an extreme effect upon the fundamentals of our democracy. *Of course, the Government must be accorded a great deal of latitude in making decisions of this nature*. [emphasis added]

11. Although it is true that no reasonable justification was found in Cherry/Miller, the circumstances were distinctive: the court held that *no reason* at all was adduced to explain why the five-week prorogation was sought (para 61). If the Prime Minister were to adduce a reason, the court would approach it with "sensitivity", "a corresponding degree of caution", and accord the Prime Minister "a great deal of latitude". Moreover, it remains unclear what the court would accept with regard to more unusual prorogation decisions. Suppose that the government claims that it is engaged in a sensitive diplomatic exchange – eg a matter relating to national security, or a complex treaty negotiation – whose smooth course would be threatened by intrusive and likely adversarial parliamentary scrutiny. Might this count as a reasonable justification for an extended prorogation period, perhaps lasting several weeks? If so, this should worry those who place importance on executive accountability to Parliament. But it is also concerning that we ultimately remain in the dark about exactly what the courts would tolerate.

12. There are other troubling possibilities. Suppose that the government loses a confidence motion under s 2(3) of the FTPA and then moves quickly to prorogue Parliament for 7 or 8 days in order to compress the 14-day window and restrict the formation or appointment of an alternative administration. In the early election that followed, the government would stay in office. And if a hung Parliament is delivered, the government would have the first chance to form a stable administration – with access to the levers of power to make this work (as in the case of the Conservative-DUP agreement in 2017). It might be argued that such a prorogation is permitted given the explicit wording of s 6(1) ("[t]his Act does not affect Her Majesty's power to prorogue Parliament"); it was also explicitly contemplated by MPs during the legislation's passage (as mentioned above). The better view is that the

power is at the very least limited by the common law as set out in Cherry/Miller – and that, given the centrality of the constitutional principle of parliamentary accountability in the Supreme Court's reasoning (paras 46-48 and 55-57), the courts will look dimly on a government moving to prorogue Parliament after losing a confidence vote. Still, the matter is not clear and the question may find itself in the courts.

13. It is also possible that prorogation is used by government to disrupt opposition plans to bring a no confidence vote – as happened in Canada in 2008 under Stephen Harper's premiership. Depending on the facts, it is possible that a lengthy prorogation would not be implicated by Cherry/Miller; regarding the UK government's 5-week prorogation, the Supreme Court indicated that "[s]uch an interruption in the process of responsible government might not matter in some circumstances" (para 57). The court made clear that it was concerned with both the duration and the particularly sensitive timing (namely, the period in the run-up to Exit Day on 31 October 2019).

14. The Supreme Court was only able to rule on the specific case before it and should not be expected to address various other eventualities without the benefit of proper argument. More generally, the courts can only fight fires that have already started.

15. This strengthens the case for legislative reform of prorogation. One category of legislative reform of prorogation is procedural – ie reforming the steps that must be taken to secure prorogation. One suggestion is that the FTPA should be amended such that the government may only seek prorogation if it tables a motion in the Commons, stipulating the proposed prorogation period, which is duly passed. This is presumably intended to transfer the power of prorogation to the Commons and away from the Prime Minister. Examples may be found in other jurisdictions. The 1978 Constitution of the Solomon Islands provides under s 73(1): "If at any time Parliament decides by resolution supported by the votes of an absolute majority of the members of Parliament that Parliament should be prorogued … the Governor-General shall forthwith prorogue". With this sort of procedural reform, much will depend on the detail – eg whether the motion may be amended to change the prorogation's specified start and end dates, or what the required majority is. For instance, a simple majority requirement would do little to confine a Prime Minister with a stable working majority. Other implications of such a statutory motion would need to be considered, including the fact that at present the specific day on which the prorogation ends can be revised on the government's advice so that the prorogation period is either extended or shortened (Erskine May, paras 8.10-8.11). It would need to be decided whether such governmental revision would continue to subsist; one option is to permit the government unilaterally to shorten (rather than extend) the prorogation period agreed by the Commons. Furthermore, care should be taken to assess whether this sort of

procedural reform – Commons approval of a proposed prorogation – would interfere with or overturn the judgment in Cherry/Miller.

16. Another procedural reform is to allow for Parliament to be summoned by MPs if it is prorogued. Again, examples may be found in other jurisdictions. The 1995 Constitution of Uganda provides under art 95(5): "at least one-third of all members of Parliament may, in writing signed by them, request a meeting of Parliament; and the Speaker shall summon Parliament to meet within twenty-one days".

17. A third procedural reform is to pass legislation that stipulates the number and length of sessions. For example, the Austrian Constitution provides under art 28(1) for annual sessions with the maximum length of each session set in law.

18. As well as procedural reforms, substantive reforms of prorogation are also available. For instance, prorogation's actual consequences could be changed. Comparisons may be drawn with other jurisdictions, such as India's lower house where prorogation does not terminate all parliamentary business or scrutiny of the government (eg rules 284 and 336 of the Rules of Procedure of the Lok Sabha). Furthermore, art 107(3) of the Indian Constitution provides that "[a] Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses". It is worth noting that, in the UK, reform of prorogation's substantive consequences may involve both legislative reform but also reform of parliamentary procedure in the Commons (through its Standing Orders) and Lords; certain consequences of prorogation are determined by existing procedural rules.

19. An alternative substantive reform is legislative abolition of the prerogative power of prorogation. This would require the signification of Queen's Consent. Although abolition is of course ultimately dependent on adequate political will, there are sound reasons in favour of abolition and a lack of compelling reasons to retain prorogation.

20. The sound reasons favouring abolition include, straightforwardly, avoidance of prorogation's present negative consequences. The Supreme Court noted in Cherry/Miller that two core activities of Parliament are to pass legislation and to hold the government to account. Prorogation disrupts both activities. Regarding Parliament's legislative functions, public bills not subject to "carry-over" orders fall. Other bills such as private bills also fall; private bill sponsors may move for the bill's suspension before the session terminates or, if this is not secured, revival in the new session, but neither option is guaranteed. The fall of a bill (of any sort) may well mean the loss of a considerable amount of effort and time. This would not sit well with the general expectation that Parliament make efficient use of its finite resources.

21. Prorogation also brings parliamentary scrutiny of government to an end – eg questions to Ministers or the work of parliamentary committees.

This is disruptive in itself and is also at odds with, for instance, other advances such as the Wright Committee reforms aiming (partly in light of the expenses scandal) to make visible improvements to the Commons' role. Moreover, it is possible that prorogation could be deliberately weaponised to suppress scrutiny at sensitive moments. One particularly sensitive period is the run-up to a general election. John Major was criticised for allegedly using prorogation to avoid political embarrassment in the last stages of his premiership. He sought an extended prorogation in advance of Parliament's dissolution in 1997, with the effect that a parliamentary committee was not able to publish its report into the "cash for questions" scandal prior to the 1997 election. The risk may seem small but it is serious. It may seem small because of timing; the likelihood of new and damaging information emerging from parliamentary processes immediately before an election may not be high. But however small, the risk is serious. Election periods are important and sensitive moments in the political system's life cycle, hence their regulation both by law and convention (eg purdah).

22. A further advantage of legislative abolition of prorogation is that this removes the need for further judicial monitoring following Cherry/Miller. It would neatly silence the criticisms that have been made about judicial activism or overreach, often raised as part of broader concerns about the judiciary's role.

23. If prorogation were abolished, the parliamentary term would instead be punctuated by adjournments that – unlike prorogation – would not terminate parliamentary business or cause bills to fall. Australia provides an interesting comparison. Although inheriting a power of prorogation – the Constitution of Australia confers upon the Governor-General the power to prorogue the Federal Parliament under s 5 – this power is essentially not in use. For decades the settled practice (aside from an exceptional episode in 2016 to force a double dissolution of Parliament) is that there is one continuous session for the life of the Parliament. New Zealand has taken a similar course. Although s 18(2) of New Zealand's Constitution Act 1986 empowers the Governor-General to prorogue Parliament, the New Zealand Parliament has been sitting for a single continuous session since the mid-1990s. As these experiences in other mature Westminster-based political systems suggest, the sky need not fall down were prorogation to end in the UK.

24. It is not clear what compelling reasons exist for retaining prorogation. Prorogation does not advantage Parliament; it advantages a government seeking to manage Parliament by suspending its work. If Parliament does not gain from prorogation, it is also unclear why we should consider procedural reform – eg Commons approval of prorogation – rather than abolition.

25. It might be argued that prorogation does offer certain advantages for Parliament, including the opposition. The termination of a session means that bills fall, which may suit the opposition in respect of government

bills that it has not managed to oppose successfully. This may also be thought to advantage Parliament whose legislative agenda is normally dominated by the government. The argument is not persuasive, however. The government can always decide to carry over (eligible) bills, it continues to dominate the legislative agenda, and furthermore it is preferable that bills are contested through an open political process. Another suggestion is that, in abolishing prorogation and sessions, MPs lose opportunities to vote on Queen's Speeches setting out the government's plans for the new session. On this view, MPs lose opportunities to determine whether the government commands the confidence of the Commons. But again this is not a strong argument. Currently the only method of bringing about an early election via a confidence motion is the statutory confidence process under s 2(3) of the FTPA. Other ways for MPs to demonstrate their lack of confidence in the government remain available, even absent a vote on a Queen's Speech, although such exercises will only have political resonance. Furthermore, doing away with regular Queen's Speeches – and the several days of debate that follow – will bring efficiency gains.

26. To the extent that the present landscape of British politics is multi-party, the risk of weak government or a hung Parliament increases. So too does the risk of government turning to prorogation as one device to manage an unruly Parliament. The better view, however, is that rather than permitting the government to deploy an old power to suspend the legislative assembly in order to overcome its difficulties, our political processes should evolve to accommodate a changing politics.

27. Cherry/Miller draws attention to the potential impact of prorogation on Parliament's core constitutional functions during what is a challenging and fractured era of British politics. Reform of prorogation is a step in the direction of strengthening Parliament and improving its relevance.

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