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Tarunabh Khaitan: On Coups, Constitutional Shamelessness, and Lingchi



The decision of the Boris Johnson government to prorogue Parliament with the motive of frustrating the latter's attempts to outlaw a no-deal Brexit was described by some as a 'coup'. Much debate has since ensued about whether this characterisation is accurate. Whether the government's actions in relation to Parliament's prorogation amount to a coup or not is the wrong, and somewhat anachronistic, question to ask. Whether or not a coup, I will argue that what this government has undeniably done (and what the Theresa May government did not do in its pursuit of Brexit) is to take the first few steps towards a very 21st century style autocracy. Whether the government continues down this road remains to be seen, but this move deserves very serious attention from anyone interested in the fate of British democracy.

As I argued in this review essay, 21st century autocrats share some key similarities in terms of their *modus operandi*. Unlike their 20th century counterparts, these leaders do not order tanks on the streets of the capital or the storming of the broadcasting tower. The key objective in this current day autocratic blueprint is to achieve what Nancy Bermeo calls '*executive aggrandisement*'. As I argue in my

essay, what we are witnessing in many established democracies is “a crisis of executive accountability. There is a gradual erosion of all three forms of accountability-seeking mechanisms: (i) electoral or vertical accountability to the people, (ii) horizontal or institutional accountability to the political opposition, judiciary, and fourth branch institutions, and (iii) diagonal or discursive accountability to the academy, media, and civil society.” This pursuit of executive aggrandizement has the following common features:

First, authoritarianism in the 21st century is usually triggered by *political*—rather than military—leaders elected to office through free and fair elections, at least in the first instance of their taking office. Perhaps even more importantly, these democrats have primarily employed that lubricant of democracy—the political party—to corrode it instead. Powerful leaders have sought to undo the separation of the party and the state by packing unelected state institutions with party cadre. Latter day autocratic leaders tend to first root out all opposition within their own party, and then turn on the political opposition.

Second, unlike their twentieth-century counterparts, these autocratic democrats have usually not felt the need to invoke extraordinary emergency powers that most democratic constitutions grant the executive. The crisis of executive accountability has been achieved under rules governing normal political circumstances. At least in its initial phase, executive aggrandizement appears to have been furthered by reliance on constitutional change achieved by *incremental* means rather than through a comprehensive formal constitutional reform package. These measures are not necessarily illegal, but they are *constitutionally shameless*, in that they breach generally accepted conventional norms of civility and comity in political life. Because incrementalism admits to degrees, it is hard to say when some red line has been crossed. Note, however, that incrementalism only implies the movement toward a goal through multiple small steps. It does not mean gradualism.

Third, following from the two previous features, these democratic autocrats have sought to legitimize their assault on accountability mechanisms by attacking their institutional enforcers as corrupt, partisan, ineffective, liberal, elitist, treasonous, and even anti-democratic limbs of what they term the ‘establishment’. Often, unpopular ethnocultural minorities and immigrants have been targeted to mobilize the ‘real’ people of the demos. They pay a normative lip-service to democracy even as they undermine democratic institutions. When both sides claim to be defending democracy, moral clarity is the casualty. The consequent normative muddle makes it difficult to call out a breach, making democratic mobilization to defend executive accountability mechanisms very hard. Thus, the assault on the mechanisms of executive accountability has been defended by strategic (and disingenuous) deployment of the democratic norm itself.

Finally, it seems that the end goal of these leaders—in Albert’s and Pal’s words—is ‘the hollowing out of democracy from within, rather than attempts to replace it outright’. The attempt is not to tinker with a few aspects of executive accountability mechanisms here and there. The incremental assaults are typically *systemic*, launched simultaneously on multiple fronts. Executive aggrandizement is therefore geared toward a systemic weakening of democracy by ensuring ruling party capture of accountability mechanisms, while retaining a bare minimum procedural commitment to electoral democracy that can continue to legitimize the regime.

The systemic use of multiple micro-assaults makes it especially challenging for the judiciary to act as an effective check on this mode of executive aggrandizement. Judges are good at checking isolated, particularly egregious, acts. They are less effective at preventing systemic challenges composed of numerous micro-assaults, each of which may have a precedent (within the jurisdiction or in other liberal democracies) and does not look particularly damaging when examined in isolation. The threat is posed by the accumulation of many such simultaneous assaults—something that the political opposition and fourth-branch institutions are often better at calling out than the judiciary.

These features suggest that 21st century autocrats kill democracy by a thousand cuts (*‘lingchi’*)—incrementally to avoid the noise and mess of big guns—but systemically. These features underscore both the strength as well as the weakness of democracy. Strength, because the near-universal acceptance of the democratic norm makes it very costly to be seen to be breaching it too blatantly—democracy alone is powerful enough to slay democracy. Weakness, because they expose the fragility and vulnerability of democratic institutions, which can be weakened or captured so easily. One way to make sense of this apparent contradiction is to view the crisis of executive accountability as entailing a claim by the current political executive to be the sole repository of democracy, to the exclusion or subservience of future executives and all other state institutions—whether elected, selected, or appointed. This winner-takes-all claim to the democratic mandate, and therefore to democratic legitimacy, is central to their ability to undermine democracy using the rhetoric of democracy itself.

It is in this comparative context that we should understand Prime Minister Johnson’s actions. His long-term political objectives remain mysterious, but some operational similarities with the aforementioned mechanism can be noted. Johnson satisfies the first feature: he acquired political office legitimately under existing norms. The prorogation of Parliament, at least partially motivated to frustrate its attempts to prevent a no-deal Brexit, is a classic anti-Opposition move. His decision to expel 21 MPs who rebelled against his policy is also similar to other autocratic leaders who have shown zero tolerance to opposition within their parties. The government’s anticipated moves to delay sending a bill that prohibits a no deal Brexit to the Queen to effectively frustrate its injunctions and

to secure an electoral timetable that best suits its political fortunes will, if they happen, follow the script.

Second, legal or not, these moves are constitutionally shameless. They are incremental micro-assaults on the constitution, which makes judicial intervention very difficult. They may have precedents, but these precedents were usually of a smaller scale (in terms of the number of MPs expelled, the period of prorogation, the period for which a Bill was held up etc), and did not happen in such quick succession. A robust constitution can withstand occasional micro-assaults, just as robust individuals can cope with occasional casual racism. They become a problem when they become all too frequent.

Third, Johnson's rhetoric is decidedly democratic. There is the characteristic appeal to the [real] British people, the invocation of the narrowly-won referendum, a refusal to read any change in popular opinion that the general elections after the referendum might have evidenced, a political past littered with the endorsement of lies and xenophobic ideas. Most critically, there is a presentation of himself as the sole representative of popular will, and of every opponent—even elected ones—as seeking to frustrate popular will. These are all very familiar tools to the 21st century autocrat.

The only thing that is not clearly established in Johnson's case—because he simply hasn't been the premier for long enough—is whether these moves pertain to a single policy issue [Brexit], or represent a more *systemic* *modus operandi*. If Johnson is using these measures simply to win on this single policy issue, then Nick Barber's characterisation of the events in Mark Tushnet's terms as 'constitutional hardball' will be correct. If they turn out to be a systemic feature of how Prime Minister Johnson functions—especially if he returns to power with a solid majority in the next elections—hardball will fail to capture what is going on. Then, we would be in executive aggrandizement territory.

Only time will tell, but there are reasons to be pessimistic. Constitutional shamelessness (or, hardball, if you may) incurs a political cost, and normal political actors are willing to pay it only for big ticket policy issues (like the Parliament Act 1911 or the appointment of a US Supreme Court judge). Constitutionally shameless actors, on the other hand, either don't care about this cost, or turn it into political virtue by fashioning themselves as 'draining the swamp'. Temperamentally, Johnson appears to not care about this cost, and even profits from it. If he returns with a solid majority, I would expect many more micro-assaults on the British constitution.

But this is not just about Johnson—even a different premier might be tempted. Brexit is but one of many existential questions facing the British constitution [Scotland, Northern Ireland, immigration, the Human Rights Act, economic recession, security and surveillance, climate change, and judicial power to name a few]. With the stakes as high as they are, the United Kingdom is likely to see many

more shameless Johnsons, especially when the political rewards of constitutional shamelessness outweigh its costs. Even heavily entrenched, judicially enforceable, written constitutions have struggled to survive incremental onslaughts from a committed autocratic-democrat. The British constitution, with its heavy reliance on soft norms and conventions, is pretty much a sitting duck. The only thing that has held it together is a chivalrous commitment to protect its honour—honour codes cannot be sustained when dishonourable conduct becomes sufficiently profitable. I have characterised the incremental techniques used against other constitutions as death by a thousand cuts. Far fewer cuts will suffice to eviscerate the squishier British constitution.

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1



Roger on September 6, 2019 at 10:29 am Reply
“shameless” – absolutely, nothing to be ashamed about.

But what we do need is to make MPs and political parties accountable for their promises and more directly to their electorates. Try giving that some thought and analysis.

MPs doing the opposite of their undertakings, parties switching from their promises, these are the people who should be ashamed. Too ashamed to leave their homes.

And as for a coup, who needs a coup when they are already the country’s leader? Exercising the full powers in order to carry out a “do or die” promise is nothing to be ashamed about. In fact I’d be proud of it, it shows I’d be doing all I can to meet my obligation, unlike the last

PM, who history will mark down as THE most pathetic example of the ex power of all time.

2

I-CONnect – What's New in Public Law on September 16, 2019 at 8:27 am

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