

DOMINANT DEMOCRACY IN SOUTH AFRICA? A RESPONSE TO CHOUDRY

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1 Introduction

Choudhry's essay is not just an interesting take on the prominence of the controversy around Hlophe JP and judicial politics in South Africa over the last few years. It uses that set of political events as a springboard, as he puts it, to 'explore a different set of issues'.¹ Before turning to the essay in more detail, a couple of observations regarding the form and content of the Hlophe JP controversy are nevertheless in order.

First and perhaps most significantly, yes, Hlophe JP said he had a mandate, but a mandate from whom? There is another possibility beyond the two that Choudhry explores (that Hlophe JP may be hypothesised to have had a mandate from 'elements within the ANC' or that he acted 'on his own initiative').² This is that he was indeed in at least some degree of contact with the intelligence structures of the South African state.³ Given the recent findings of an official commission regarding the non-observance of the rule of law in this sector, this possibility is a real one that the Constitutional Court and we arguably ignore at our peril.

Second, as I have argued elsewhere, it was legally permissible for the Court to issue a press release of its complaint. The Supreme Court of Appeal got that question right.⁴ Still, as Choudhry recognises, and

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¹ S Choudhry "“He had a mandate ...”: The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 2.

² Choudhry (n 1 above) 2.

³ See J Klaaren 'Judicious transparency' (unpublished paper) (available at <http://web.wits.ac.za/Academic/CLM/Law/About/Staff/JonathanKlaaren.htm>).

⁴ Klaaren 'Judicious transparency' (n 3 above).

as Roux has argued,⁵ the decision to lay the complaint may have been a strategic error on the part of the Constitutional Court. In addition to the difficulty of discerning the substantive content of these judicial politics, the wisdom of that particular judgment is of course very difficult to assess close to the time of the event; the analysis becomes somewhat easier and clearer as time goes on. As a matter of judicial ethics, the choice to lay the complaint remains unexplored. The broader point here is that there is another strategy that may serve as a response to a situation of political dominance as Choudhry understands that term, a strategy that is implicit in the Court's actual response to Hlophe JP. This is the strategic response of transparency.

2 Choudhry in brief: a beginner's guide

Once through the events of the Hlophe JP controversy, Choudhry's essay does four things in its exploration of dominance and democracy in South Africa. First, the choice and presentation of topic itself says something. Or at least it can be interpreted that way, particularly now that we know that Hlophe JP was neither appointed to the Constitutional Court nor will he be appointed to head the South African Judicial Educational Institute (and, of course, it also seems unlikely that he will be disciplined by the JSC anytime soon).⁶ Choudhry is drawing a line between recent judicial politics and broader questions of constitutionalism. The Hlophe JP affair, in the end, in comparative perspective, is not so significant. It is symptomatic of other things. Let's look at these other things.

Second, Choudhry argues in favour of doing South African comparative constitutional law differently. Here, if not done directly as a matter of developing the law of democracy in South Africa (see below), then it is certainly to be done as a matter of developing the comparative law of South Africa. Choudhry, who has written innovatively elsewhere on comparative constitutional law,⁷ declares forthrightly that he wishes to 'change the way we read South Africa in the field of comparative constitutional law', drawing on the above-

⁵ See T Roux 'The South African Constitutional Court and the Hlophe controversy' (paper presented at the Melbourne Law School Centre for Comparative Studies 21st Anniversary Celebration, *International and Comparative Perspectives on Constitutional Law*, Melbourne, 27 November 2009).

⁶ For one perspective on current judicial politics, see J Klaaren 'Hlophe JP and the current politics of the South African judiciary' (unpublished paper presented at the School of Social Studies, University of the Witwatersrand, 5 October 2009) (available at <http://web.wits.ac.za/Academic/CLM/Law/About/Staff/JonathanKlaaren.htm>). With respect to the judicial education body, see the South African Judicial Education Institute Act 14 of 2008.

⁷ S Choudhry 'After the rights revolution: Bills of rights in the post-conflict state' (2010) 6 *Annual Review of Law and Social Sciences* (forthcoming).

discussed preference for structure-based rather than rights-based analyses of constitutionalism.

Third, Choudhry is calling attention to what he sees as a particular problem in South Africa – the problem of dominant party constitutionalism. Choudhry asserts that South Africa is beset by dominant party constitutionalism. Hlophe JP and his alleged approach to the Constitutional Court – even if it did not in fact happen – is an event waiting to happen. For Choudhry, dominant party democracy is a real structure with real societal power implications. Indeed, it is ‘the notion of the dominant political party’ which he places ‘at the heart of [his] account of South African jurisprudence.’

Further, Choudhry is calling attention to a particular solution: the development of conceptual and analytical resources to combat a state of democratic dominance. The second part of the claim is that the failing of the *Glenister* challenge to the Cabinet’s approval of legislation effectively dissolving the Scorpions (an action that is emblematic of dominant party constitutionalism) was a failing of counsel.⁸ As Choudhry puts it

counsel have done an inadequate job in explaining the concept of dominant party democracy, its pathologies, and the pressure it puts on what [is] otherwise a formally liberal democratic system because of the lack of alternation of power between political parties.⁹

Here, Choudhry is calling for something quite different from banging the drum of irrationality. Rather, as his broader intellectual agenda confirms, he is really calling for the development in South Africa of a law of democracy. Indeed, this law should be real¹⁰ and not exist solely as a field of study within the legal academy.¹¹ Here, Choudhry calls for ‘harnessing the structural reasoning in the *Certification Case* ... to the subsequent application of more traditional constitutional doctrines to cases in these same areas’.¹² Likewise, Choudhry argues that scholars and advocates need to pay more attention to questions of institutionalisation and constitutional design than those of rights in order to deal with dominant party democracy. Indeed, the subtopics of South African constitutional law that Choudhry explores and pays further attention to are indeed ones that usually fit into the structures of government section of textbooks and commentaries rather than the bill of rights section. These subtopics are essentially three in number and consist of (a) the maintenance of party

⁸ *Glenister v President of the Republic of South Africa & Others* 2009 1 SA 287 (CC); 2009 2 BCLR 136 (CC).

⁹ Choudhry (n 1 above) 3.

¹⁰ Choudhry (n 1 above) 3-4.

¹¹ Choudhry (n 1 above) 6.

¹² Choudhry (n 1 above) 4.

dominance through floor-crossing legislation; (b) ‘federalism’ and the deployment of dominant party cadres to provincial legislatures and executives in ways that fatally undermined the pro-democratic structure of South African federalism; and (c) the constraining of the constitutional independence of non-political institutions of the state through a process of ‘colonisation’.¹³

Before considering the main claims, a couple of comments on the first two tasks undertaken by Choudhry are in order. First, does drawing this line and moving on to other questions of constitutionalism implicitly suggest a type of quiet confidence in the judiciary? In terms of the questions addressed by Choudhry here, does it mean that the judiciary can provide a counterweight to dominant party democracy? It seems to me likely that according to both the Roux and Klaaren analyses that Choudhry notes in his framing, the initial answer should be in the positive here: the Court can do something. Roux might well agree with that – it just may be that the post-Chaskalson Court is not as strategically nuanced and knowledgeable as the Chaskalson Court was and has suffered a quick self-inflicted wound. From a different perspective, I would argue that the Constitutional Court currently has significant room for maneuver within the legal system. The constraint is that the judiciary itself is one of the institutional structures of government, albeit one with independence (as apparently recently and positively implemented as between the new Chief Justice and the Minister of Justice and Constitutional Development).

Second, there are perhaps three pertinent points to make regarding Choudhry’s utilisation of and suggestions for comparative constitutional law. First, as a basic step, we need to assess and of course bring into the analysis the comparators, so as not to try to do comparative law in one country. Choudhry’s suggestion is to move from the rights-based jurisdictions of current dominant comparative constitutional law to the dominant party democracies which are not dominant in the scholarship. Interestingly, India (and Israel) are often placed in both categories and thereby appear to surface as a particularly good set of comparators for South Africa. I would also agree with the suggestion to bring in the consolidating African states, though I think others that might not be considered in the consolidating group (such as Botswana) might have even more to teach South African constitutional jurists. The African and the Indian focus would also have the salutary effect, in my view, of working with rather than against the grain of some of the racial constructions that lie close beneath the surface of the topic. In any case, it is the jurisdictions of

¹³ Choudhry (n 1 above) 2.

Germany, Canada, the UK, New Zealand, and the USA that will lose out.¹⁴

Second, it may be linked to this last point to observe that what our field needs at the moment is an update to Klug's argument regarding the making of the South African Constitution, *Constituting Democracy*.¹⁵ Yes, there was a significant set of constraints placed by a nonetheless thin international political culture and yes, this political culture interacted with domestic political actors and movements. But what about now? What are the transnational processes and dynamics now? What has changed, not only changed in South Africa, but changed in the global set of transnational fields?

Finally, while I would agree with Choudhry that a comparative analysis that is completely rights-based must be missing important and significant parts of the picture it is looking into, that does not mean that comparative constitutional law must go to the other extreme and attend only to structures.¹⁶ Indeed, as in the fields of rights and regulation, what may be most fruitful although difficult for comparative constitutional analysis would be to examine the instances of overlap of rights and structures, and to do so with attention to the bodies of scholarship they bring along with them.

Choudhry's analysis can be usefully compared with the argument in Klug's most recent book. Whereas Choudhry characterises South Africa as a dominant democracy, Klug characterises it as a unipolar one. The difference is more than a matter of terminology. For Klug, there are five general themes that contextualise the South African constitution: the legacies of colonialism and apartheid; pervasive social problems, such as crime, gender relations and HIV/AIDS; legal pluralism; aspiration for a rights-based culture; and democratic governance. This is a significantly different approach to the view of South Africa as a dominant democracy.¹⁷

3 A response to Choudhry

Choudhry's principal claims cover the need for developing a law of democracy. As I have noted above, he sees a potential South African contribution that can be made to an emerging (but US-originated) law in this respect. In 1996, I published a piece on democracy and human

¹⁴ Or, as pointed out by a reviewer of this piece, one possible interesting implication of Choudhry's piece is that comparative engagement should shift from federal to state level in the US.

¹⁵ H Klug *Constituting democracy* (2000).

¹⁶ M Kende *Constitutional rights in two worlds: South Africa and the United States* (2009).

¹⁷ H Klug *The constitution of South Africa* (2010).

rights in the *South African Journal on Human Rights* entitled 'Structures of Government in the 1996 Constitution: Putting Democracy back into Human Rights'.¹⁸ As the body of memorial jurisprudence would suggest, now is perhaps the time to recall that piece, asking whether its arguments must be updated or shifted in light of Choudhry's essay.¹⁹

The argument there was in favour of a particular normative perspective associated with an emerging interpretative approach in the jurisprudence of the Constitutional Court, which the piece termed 'structural interpretation'. Like Choudhry's essay, the argument drew on the *First Certification Case*, but was based almost entirely on that case (see below), in contrast with the greater range of Choudhry's sources.²⁰ The appropriate normative perspective, I argued, should attend to both democracy and human rights, and attempt to be neutral as between the two. Indeed, to do so would be to invite the elaboration of a theory of substantive justice, a move not particularly controversial in legal scholarship, both in South Africa and abroad. Additionally, such a perspective needed to be historically and culturally contextual, and one that examined structures of power critically. The sources for such a normative perspective came from the Constitution, from the struggle history in South Africa (particularly the internal mass democratic struggle) and its resulting popular culture, and from political theorists such as Ian Shapiro.²¹

'A structural approach,' the piece argued

derives constitutional rules by inference from the relationships the Constitution mandates between the structures that it sets up. A structural approach begins with an analysis of the institutional relationships created by the Constitution and infers rules for a specific situation from those relationships. As developed here, a structural approach is also a style of constitutional interpretation implementing the normative perspective developed [above]. That normative perspective includes a critical view which both analyses structures of power as social constructions with own dynamics and argues for an equivalence of power.²²

¹⁸ J Klaaren 'Structures of government in the 1996 constitution: putting democracy back into human rights' (1997) 13 *South African Journal on Human Rights* 3-27.

¹⁹ L du Plessis 'Affirmation and celebration of the "religious other" in South Africa's constitutional jurisprudence on religious and related rights: memorial constitutionalism in action?' (2008) 8 *African Human Rights Law Journal* 376.

²⁰ *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC).

²¹ See, for example, I Shapiro *Democracy's Place* (1996) 222.

²² Klaaren (n 18 above) 20.

This approach could be discerned in Chaskalson's analysis in *Premier, Western Cape*²³ and in the *First Certification Case* as well as (of course!) a Sachs J concurrence (also in *Western Cape*). A relatively simple application of the approach then contended that that the anti-defection clause should not outlive its transitional context, further arguing that as long as it was in place, 'legally sanctioning the powerful position of political parties in South African society, the argument is strengthened for public supervision of the internal democratic practices of the parties'.²⁴ This argument thus tilled some of the same ground as Choudhry does in his essay.

Of course, that was then and this is now. What of the three aspects of the normative perspective? Has the passage of time, or what we have learnt since 1996, changed anything?

On the relationship of democracy and human rights, the argument still holds in favour of a normative perspective that was neutral as between democracy and rights. Indeed, to argue such is not likely to be regarded as particularly controversial. It is instead, as stated before, to argue for a substantive conception of the meaning of democracy. Despite his democracy-regarding analysis, Choudhry may also be of that persuasion. His attention in particular to the negative side of democracy including its pathologies may lead one to that surmise. In any case, this line of thought might be interesting to pursue further.

In terms of a historical and contextual appreciation, Choudhry's implicit argument that greater attention should be paid to comparative jurisdictions and their democracies is a compelling one. The world has changed in ways where transnational processes have themselves changed as well as grown in importance. While that influence should not be exaggerated, neither should it be minimised. For example, a controversial legal event such as the recent conclusion of a bilateral investment treaty between South Africa and Zimbabwe cannot be regarded as a mere contract between two equal bargaining partners, free from domestic constitutional duties and authorities to negotiate and conclude agreements.

In terms of examining structures of power critically, this should remain a feature of a preferred normative perspective. This is a place where it appears that Choudhry would agree, concerned as he is about the situation of dominant party democracy. Still, there may be other structures of power in South Africa to be examined critically beyond the dominant political party system. Poverty, racism, sexism, and the

²³ *Premier of the Western Cape & Another v Electoral Commission & Another* 1999 11 BCLR 1209.

²⁴ Klaaren (n 18 above) 24.

structure of the political economy all form part of South African social reality. I take this to be part of the point of an analysis like that of Klug's (see above) that distinguishes between a social reality of a unipolar democracy and that of a dominant democracy.

Choudhry's suggested way forward for constitutional interpretation, at least in the strong version, appears to have some significant differences, both from current Constitutional Court jurisprudence and from my suggested structural approach. If I understand him correctly, Choudhry wishes to have dominant party democracy as a factor in constitutional interpretation.²⁵ Presumably, this would mean that judges would be free to justify their decisions on the basis of the character of South Africa as a dominant party democracy. This factor could then have acted as a thumb on the scales, or been give some other weight in the analysis, in order to, for instance, decide *Glenister* or subsequent litigation in favour of the applicant rather than the state, and thus save the Scorpions.²⁶ Part of the project is to develop the conceptual resources to enable counsel to persuade the Court to be alive to the pathologies of a dominant party democracy.

This 'law of democracy with bite' would be a real distinction from the existing jurisprudence of the Court. Thus far, the Constitutional Court has contented itself with identifying the balance between majority and minority rule, with different members of the Court preferring different points of balance. Indeed, in the public involvement line of cases, the identification of the point of balance between representative and participatory democracy advocates appeared to determine the results. Choudhry would clearly be on the side of the participatory democracy advocates, but, if I read him right, he is proposing that a dominant party democracy approach ought to do more than simply vote with one side of the existing line of analysis. Clearly, such an approach as I have outlined it here would also be distinct from the structural approach to interpretation, which would read the *First Certification* judgment not so much as the Court proceeding from 'an assumption of ANC dominance' but rather as being alive to the ways in which constitutional structures could be manipulated by a political party.

²⁵ Choudhry (n 1 above) 4.

²⁶ From the viewpoint of a structural approach, the Court's characterisation in *Glenister I* para 55 is perhaps significant. Who else could have acted? Even if not Parliament, what about the Chapter 9 institutions? In any event, the case was indeed premature, possibly constituting an example of the judicialisation of politics and in any case ripe for a post-litigation analysis.

4 Conclusion

On the reading (call it the strong reading) that I have identified thus far, Choudhry is suggesting a law of democracy with bite. Choudhry's discussion of the doctrinal area of floor-crossing is especially useful here in maximising the current legal conceptual thinking on democracy in South Africa. But we should perhaps step back to his principal claims themselves. First, we may ask whether this suggestion for a law of democracy with bite is built upon a correct empirical view. As Klug's analysis shows, recognising the dominant position of the ANC as a political party does not necessarily entail a reading of South Africa as a dominant party state. As an even more direct challenge, there are at least some developments at the provincial level in South Africa that might suggest that Choudhry's picture of non-alternation and a dominant democratic state are over-drawn. One development that could be pointed to here is the form of alternation within the African National Congress that has been recently witnessed in Gauteng. This might most appropriately be termed dispersal of power rather than pure alternation, since it extends in a less than clear fashion across the structures of party and state. Still, joined together with several initiatives at party and government level which have occurred in Gauteng over the past five or ten years, including legislation on political party funding, integrity commissions, petitions, and legislation for scrutiny of subordinate legislation, there is a case to be made for an institutionalised model of government at provincial level that differs not radically but nonetheless in significant respects from the national level.²⁷ To the extent that this case is valid, this development would impact most severely on Choudhry's reasoning in his discussion of federalism and the doctrine of anti-cadre deployment.

Even if we assume that Choudhry is right in the empirical truth of South Africa consisting of a dominant party democracy, we could debate the direction to be taken. Rather than either further developing its democracy line of cases along the lines of a robust conception of a dominant party democracy or exploring how to apply the constitution to the internal operation of political parties, a more fruitful direction for the Court to engage in might well be exploring giving even greater content to provincial powers and the separation of powers doctrine through a structural interpretation. This would amount to taking institutions such as the provinces and the South

²⁷ See, for example, J Klaaren & S Sibanda 'Introducing the Gauteng Scrutiny of Subordinate Legislation Act' (2009) 25 *SAJHR* 161 - 173.

African Human Rights Commission seriously.²⁸ To do so would be to go back to the conceptual resources invested in the drafting of the Constitution and to maximise and draw upon those.²⁹ In this respect, Choudhry's defence of the independence of constitutional institutions and the best way forward remains ripe for further development.

A weak reading of Choudhry may indeed be fully consistent with this suggested direction. This weak reading would locate the argument appropriately and convincingly at a place neutral between the poles of rights and democracy. In any case, if I read him correctly, Choudhry is not calling for a direct application of a comparatively derived 'robust conception of dominant party democracy', but is rather seeking to 'bring[] to bear the insights of comparative politics on constitutional doctrine'.³⁰ This would be consistent with a developmental and incremental approach to existing doctrine. In the specific areas of federalism (including cadre deployment), independence of institutions, and floor-crossing, the dominant party democracy concept may assist with implementing a structural approach to interpretation. If this weak interpretation is the correct one (and even if it is not), then we have further specific creative constitutional interpretations to look forward to from Choudhry in these areas of South African constitutional doctrine.

²⁸ See, for example, J Klaaren 'Human Rights Commission' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd ed, 2006) suggesting use of the basic structure doctrine to protect the chapter nine institutions). This aligns with Choudhry's suggested re-reading of the Indian history on the basic structure doctrine. See Choudhry (n 1 above) 28-29.

²⁹ This is memorial jurisprudence with bite. See du Plessis (n 19 above).

³⁰ Choudhry (n 1 above) 4.