QUOTE OF THE WEEK

Two years ago, the ESPN host Bomani Jones appeared on the network’s morning show wearing a T-shirt that seemed, at first glance, to bear the logo of Cleveland’s baseball team, but, in place of the trademark cursive “Indians,” the shirt read “Caucasians”; the crude caricature of a Native American had also been altered to look like a grinning white man. The reaction was swift: ESPN demanded that he cover up the shirt while on air; many white people criticized Jones’s “racism” on social media. The point was easy to discern: Native Americans continue to be depicted in derogatory ways and relegated to a kind of racist stereotype in a manner that many white people would find intolerable were it directed at them.

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PREVIOUS QUOTES OF THE WEEK (quotespage)

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NEW ARTICLE BY SUJIT CHOUDHRY ON DOMINANT PARTY DEMOCRACY IN SA

He Had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy

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Abstract:
A dominant party democracy is a democracy whose constitutional design is liberal democratic, which provides an entrenched framework for multiparty democracy through universal suffrage and regular elections, and which contemplates political competition and the alternation of political parties in power, but in which one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by force or fraud. South Africa is emerging as a leading example of a dominant party democracy, with the ANC having won every national election since 1993, now in power in eight of nine provinces, and with no sign of a credible electoral competitor on the horizon. The question I explore in this paper is how the Constitutional Court of South Africa should respond to the dominant status of the ANC.
I begin by setting a characteristic set of pathologies for dominant party democracies: the use of public resources by dominant political parties as political to distort electoral competition; deliberate attempts by dominant parties to change the rules of electoral competition to fragment opposition parties and diminish their ability to offer a credible alternative; the erosion of federalism to undermine the ability of opposition parties to form governments at the sub-national level and deploy the political resources provided by incumbency to enhance their competitiveness at the national level; the subordination of the parliamentary wing of a dominant political party to its non-parliamentary wing, thereby shifting politics into the party and out of the legislature, diminishing the central role of the legislature in national political life. The presence of a dominant political party has predictive value – if these pathologies do not yet exist, they are likely to eventually emerge. Moreover, although these pathologies are distinct, they are connected. Where one sees one, others are likely present as well, or will soon follow. Finally, these pathologies do not merely arise as a consequence of party dominance; they are factors that contribute to its maintenance.

I then turn to the case-law of the Constitutional Court, and demonstrate that the various pathologies of dominant party democracies are at play in a scattered and otherwise disconnected set of cases across a range of substantive areas which have been decided by, and which could soon come before, the Court. The first set arises out of the relationship between the design of the electoral system and the relationship between elected representatives and their parties – in particular, the relationship between proportional representation, floor-crossing and constitutional amendment. The second set emerges from the relationship between independent institutions and the elected government, and raises for consideration the pressure on the constitutional guarantees of institutional independence created by the phenomenon of cadre deployment by the ANC.

A third set of cases includes those arising out of the constitutional imbroglio concerning trans-border municipalities. Although these appeals turn on the constitutional duty of provincial legislatures to facilitate public involvement in the legislative process, as well as claims of irrationality, they serve to highlight the manner in which the control exerted by unelected ANC party officials over democratically elected ANC politicians has undermined the structure of representative democracy and federalism in South Africa. This set of cases also includes the constitutional challenge to the abolition of the Directorate of Special Operations, the special investigatory unit that conducted the investigation that led to criminal charges being laid against President Zuma.

A robust conception of dominant party democracy can assist the Constitutional Court. The task is both analytical and prescriptive, and brings to bear the insights of comparative politics on constitutional doctrine. This work is of pressing importance. On the occasions when the dominant status of the ANC has been raised before the Constitutional Court, it quickly dismissed the relevance of ANC domination to the constitutional challenge. This reflects the Court's inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what it otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges.

If the current Constitutional Court takes the notion of ANC domination seriously, this yields a set of constitutional doctrines, some of which emerge from a recasting of the existing jurisprudence. I term these anti-domination, anti-capture, non-usurpation, anti-seizure and anti-centralization. These doctrines will not ensure that South African democracy functions as it would were the ANC to lack political dominance. Rather, they serve to check the harms that flow from the ANC's dominant status, and that operate to reinforce its dominance.

Keywords: South Africa, Constitutional Court, African National Congress, constitutional design, dominant party democracy, political competition, democratic consolidation