



Comparative Constitutional Law Symposium

POPULAR WILL, ELECTORAL DEMOCRACY AND THE COURTS

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Constitutional democracies tend to channel decision-making through the processes and institutions of representative democracy.

Citizens elect representatives who have the constitutional authority to make laws and form governments. However, these majoritarian processes are constrained by laws that are interpreted by courts. Constitutional scholarship tends to focus on the interaction between these three constitutional actors, conceptualised as a tripartite separation of powers.

Three further factors complicate the relationships between peoples, courts and democratic processes. First, many constitutional orders are animated by the presence of another constitutional actor: the unitary people acting through plebiscite or referendum. In some constitutional orders, the courts have jurisdiction to review the content of decisions made by the people and their elected representatives. Separate from that role, the courts in many constitutional orders have jurisdiction to structure the democratic process itself, setting standards for the conduct of elections and policing the boundary between popular decision-making and representative decision-making. Second, citizens rarely engage directly with the structure of government but

instead do so through political parties. The culture and regulation of political parties, as well as shifting configurations of political parties, have significant implications for the structure of government. Third, these constitutional orders are enmeshed in systems of international and supranational regulation. Courts that are not rooted in a particular polity make decisions that constrain the democratic processes within polities.

This symposium takes a comparative and theoretical approach to these relationships. Among the questions to be addressed are the following. What is the appropriate boundary between popular and representative democracy? Is it democratically justifiable for courts to control the processes of democracy? What is the role of political parties? How does the balance of power between political parties affect the constitutional structure? What standards should the courts use in policing the boundary between popular and representative democracy? How are international courts to be sensitive to the character of democratic polities that they may not understand? How are citizens to engage in political processes that are heavily controlled by the courts?