

Conclusion

It is central to the idea of democracy that it is associated with the self-legislative acts of a group of national citizens. Moreover, it is central to the idea of democracy that it forms a political system in which members of a national society exercise their collective faculties to establish laws that guarantee a condition of generally maximized freedom. On this basis, democracy is viewed as a political system in which members of society progressively form a public order which is rationally acceptable for all, or in which all members of society at least find some subjective grounds for recognizing the laws that are applied to them as objectively reasonable. As discussed, democracy is widely seen both as the result of a process of nationalization, and as the result of a process of rationalization, through both of which processes members of society construct the political system as a focus of general obligations. In each respect, further, the normative core of democracy resides in the figure of the participatory citizen, such that citizens authorize democratic law by actively engaging in its formation.

This book argues, however, that there is no obvious rational foundation for democracy. Democracy was not typically brought into life by self-legislative collective subjects, and it often evolved on highly contingent, contradictory premises, which had little to do with collective demands for autonomy or freedom. Even more importantly, democracy was not created through the national construction of society, or by the formation of a national body of citizens. In fact, the converse was commonly the case. Almost without exception, national societies, or national groups of citizens, did not create democracies. In many cases, national societies created partial, selective or incomplete democracies, in which, typically, leading social groups obstructed the admission of other social groups to the full exercise of citizenship rights. Generally, it was only when societies stopped constructing their citizens in terms based solely on national law that they began effectively to establish democracy as a system of equal inclusion. Widely, it was only as global norms, typically linked to international

human rights law, entered national political systems that these systems began to approach their domestic constituencies as aggregates of democratically entitled, legally equal citizens. Democracy became a real material form in national societies as national political institutions integrated their populations through normative constructions extracted from global models of citizenship, based on concepts of international human rights law that became widespread after 1945. Prior to this, virtually all national societies contained embedded constituencies that obstructed the societal generalization of citizenship practices, and prevented the growth of democratically mandated political institutions. The classical concept of the national citizen, based on the expectation of general freedoms, normally resulted in the creation of very particularistic political systems. For this reason, the idea of the participatory citizen had to be renounced, or at least substantially revised, before democracy could be created as an inclusive legal/political order.

As a result of this, national democracy has typically evolved on a pattern in which the political system extracts its essential reserves of legitimacy from a construct of the citizen that does not factually exist – which is separated from the formative political locations of national society, and which is primarily defined outside national society, under international law. In the first emergence of proto-democratic political systems, organs of government acquired legitimacy by institutionalizing a legitimational cycle of communication with citizens within national societies, and, as this cycle became more expansive, societies became more nationalized and more democratic. However, it was only as the national political system began to correlate its legitimational exchanges with a construct of the citizen located not in national society, but in the global legal domain, that it finally obtained fully democratic legitimacy and finally included its population in equal, even, democratic fashion. Typically, the national political system became democratic as it institutionalized a cycle of communication with its citizens through the formal medium of global human rights law, so that the citizen appeared to the political system as a holder of globally defined rights. The establishment of democracy occurred, thus, through the effective differentiation of the global legal system, which, often quite contingently, created the conditions in national societies in which inclusive democratic institutions could be constructed and gain societal purchase. It is vital to democracy that it extracts legitimacy from a citizen that is constructed within the globally differentiated legal system, and which is not identical with real citizens in society: usually, it is only where it is separated from the citizens to which it is accountable that a political system becomes fully

democratic. Consequently, the paradigmatic core of national democracy – the citizen – only became real as it merged with a global legal system. This involved the splitting of the citizen into two figures, one political and the other legal, which communicated with the political system through different lines of articulation. Today, democracy is not yet established at a global level, and we cannot identify, even in outline, a political system that stands above national societies. In some respects, however, every national democratic polity has global foundations, and some element of global law stands, constitutively, at the core of every democratic political order.

What is particularly striking in these processes is that through the rise of democracy, the principle that democracy is a political system focused on simple acts of legislation, mediated through an elected legislature, has become very questionable. Only very few national legislatures have been able to overcome structural opposition to complete the process of inner-societal democratization. In most cases, judicial institutions, closely aligned to global norm setters, have played a leading role in the construction of democracy, and in fact they have promoted the formation of national political institutions more widely. One reason for the dependence of national democracy on global law is that global law weakens the exclusive political monopoly of nationally constructed legislatures, populated by national citizens, and it places alternative sources of legitimacy alongside legislative bodies, allowing social actors to engage with the legislative process through new avenues. The role of legal institutions in creating democracy means, above all, that social actors can use legal patterns of norm construction to shape legislation, often through actions and exchanges quite specific to the legal system.

As discussed, the global structure of contemporary democracy has transformed our basic understandings of politics, as many classical political functions are now essentially internalized within the legal system. However, the fact that the legitimacy of the national political system is partly detached from real citizens does not mean that the cycles of political exchange around the political system have become less vital. On the contrary, by displacing its primary source of legitimacy into the global legal system, the national political system has, in many instances, become better equipped to integrate its addressees in forms and procedures that are adequate to the complexity of their factual societal locations. In fact, once legitimated by the global citizen, the political system is able to evolve multiple articulations with the persons (citizens) in its environment, and citizens are able to exercise political agency and shape the legislative outputs of the political system in many different ways. In many instances, this

gives rise to new political subjects, often of a transnational character, as transnational human rights norms separate new subjects out from the uniform body of national populations. New patterns of political agency and political subjectivity, linked outwardly to the global normative system, have become commonplace in contemporary democracies, and the basic category of political-democratic practice has been expanded. The global-legal pre-construction of democracy does not only reinforce classical patterns of democracy; it engenders decentred models of democracy, in which legislation can be stimulated by multiple actors in society.

The core insights of legal sociology have particular value for interpreting the distinctive global form of contemporary democracy. As discussed, classical legal sociology understood democracy as a political system that evolves relatively independently of the citizens that it incorporates, and which cannot be seen as the expression of a collective political subject, endowed with faculties of rational volition. Legal sociology also accorded a core role to law itself, and to rights stored in the law, as media of integration formative of democracy. These founding insights in fact persisted into the core canon of more recent legal sociology. Notably, classical legal sociology viewed the growth of democracy as a process that occurs as the political system and the legal system extend their own societal penetration, such that persons are constructed as citizens as part of a process of autonomous institutional formation, adapted to relatively expansive, individualized, differentiated societies. Most crucially, leading outlooks in classical legal sociology intuited the fabric of contemporary democracy by observing democracy as a political system that cemented itself not by solidifying general freedoms, but by reacting to plural demands for freedom, and by contributing to their distinct local institutionalization. In each of these respects, in reacting against the rationalist philosophy of the Enlightenment, early legal sociology anticipated many basic characteristics and formative processes underlying contemporary democracy.

Contra the intuitions of classical legal sociology, however, the patterns of institutional formation that underpin democracy only finally approached reality as national political systems internalized an idea of the global citizen, and as they generated a legal construction of the national citizen through global human rights law. Early legal sociology viewed the construction of democracy as a process in which an institutional system was created that was capable of performing integrational functions for modern society, after the dissolution of the local patchwork form of early modern social orders. Most sociologists concluded, then, that democracy had to be held

together by distinctively political patterns of rationality, expressed by the state, so that the state became the integrational fulcrum of society. In fact, democracy was constructed as the political system looped its exchanges through the global legal system, so that the primary addressee of the political system – the citizen – was partly formed in global law. Broadly, the institutional shift from the political system to the legal system, in which the political system becomes a secondary component of the legal system, is the most essential precondition of contemporary democracy.

Paradoxically, in consequence, although classical legal sociologists clearly perceived the contingent premises of democracy, they did not perceive the centrality of the legal system in creating democracy. As discussed, most classical legal sociologists intuited the autonomous role of law in establishing democracy, but all, at some point, renounced the *legal* dimension of sociology, and they opted instead for a strongly *political* focus, attaching democratic legitimacy and democratic stability to more classical political concepts of collective rationality and will formation. Classical legal sociologists almost invariably emerged as deeply political theorists of social formation. As a result, they partly effaced the greatest explanatory achievements of their own academic discipline.

Now, however, the reality of contemporary democracy invites us to think through the categories of classical legal sociology to understand democracy in terms which were closed to classical sociologists themselves – that is, to understand democracy, in a global sociological perspective, as a construction of the legal system, in which even core political subjects and practices are produced by law. If we accentuate the strictly legal implications of classical sociology, we acquire a much clearer framework for comprehending the global rise of democracy than if we adhere to its political principles: legal sociology comprehends democracy most accurately where it ceases to be political sociology and becomes, resolutely, legal sociology.

Some influential lines in political theory have expressed awareness of the deep linkage between the national citizen and the global citizen. As discussed, this insight is common among theorists associated with cosmopolitan outlooks. However, legal sociology, where it develops a global focus, is able to provide quite compelling, empirically reinforced insights into the overlaid relation between national and global citizenship. As a theory of democracy, legal sociology provides the basis for a refined realistic cosmopolitanism, which is able to perceive and reconstruct the essentially global foundations of national societies and their democratic institutions.

In this spirit, global legal sociology is likely to differ very sharply from more conventional cosmopolitan views. As a theory of democracy, first, global legal sociology is unlikely to show enthusiasm for the democratically expansive ideals of some cosmopolitan theorists, assuming the existence of highly evolved deliberative procedures or even state-like structures, close to a *world polity*, at the supranational level. In fact, global legal sociology may make very uncomfortable observations about the decreasing centrality of real people in the final construction of democracy. As a theory of democracy, second, legal sociology is likely to reject the cosmopolitan claim that democratic institutions above nation states grow out of, and so extend, democratic structures established at a national level. The sociological approach outlined above implies that the contrary is the case – national democracies do not precede global citizenship norms. Overall, legal-sociological variants on cosmopolitanism are likely to emphasize the primary sociological intuition that democracy is constructed without a subject and that democracy results from contingent, fragile patterns of autonomous institutional formation and integration, which are now inextricably linked to the global arena.

Despite its natural caution about democracy, however, global legal sociology may move close to cosmopolitan thinking by indicating that democracy requires a condition in which the national citizen, normatively, is as close as possible to the global citizen, to the citizen of *world law*. Here again, to be sure, global legal sociology can only offer a very sceptical variant on cosmopolitan ideals. For the legal-sociological outlook, the proximity between national and global citizenship is required not to transfer given democratic practices to the global level, but to remedy weaknesses of democratic formation that are inherent in national polities. Nonetheless, a basic claim of cosmopolitan theory – namely, that national and global citizenship are not separable – is deeply corroborated by empirical legal-sociology inquiry, where it thinks in a global dimension. Most importantly, global legal sociology may concur with more conventional inquiry in suggesting that it is impossible to cut through the abstracted transnational norms that surround contemporary democracy, that there is no intensified political idyll behind the plural, filtered reality of global democracy, and that the price paid for any substantial move away from the global form of democracy is – in all probability – the price of democracy itself.