# Introduction

This is a book that is concerned with democracy. It aims to contribute to the defence of democracy, and to achieve this goal it aims to contribute to the broad understanding of democracy – that is, to enhance comprehension of the historical processes through which democracy developed, of its social foundations and of the expectations that people who live in democratic societies can reasonably entertain. In particular, a key objective of this book is to set out an analysis of democracy that responds to currently widespread reactions against established democratic arrangements, which are evident, in different expressions, across Eastern and Western Europe, the USA and parts of Latin America. A characteristic of these reactions is that they commonly involve a rejection of the transnational normative elements that typically underpin contemporary democratic systems, and they advocate a renationalization of democracy. Such reactions have of course not yet come close to reversing the great successes in global democratic formation that have been witnessed since the 1980s. But they demand extreme vigilance. For this reason, this book aims to account for democratic government in terms that are immune to both populist and nationalist impulses and to inflationary ideas of democratic representation, which inform many such reactions.

With these objectives in mind, this book renounces the normative terrain of much democratic theory, and it does not attempt to assess either the relative value of different models of democracy or the normative grounds for commitment to democracy. Instead, it seeks to alter the focus and the vocabulary of debate about democracy, observing democracy as a reality brought into life by quite contingent events, precarious circumstances and highly improbable – often clearly undemocratic – processes. As a result, it implies that much of the formal normative defence of democracy, which sees democratic institutions as justified by clear normative principles, has limited value. This book questions the

1

idea that obligations expressed through democratic government can be attached to the primary concepts, such as self-legislation, reasonable freedom and collective autonomy, that are used in classical democratic analysis.[1] It argues, at one level, that the defence of democracy has been made unnecessarily difficult because democracy is often explained and justified in historically unreflected, sociologically ill-construed categories. Democracy is often conceived and legitimated in conceptual forms that have little to do with the actual reality of democracy, and this burdens democratic institutions, in their factual structure, with expectations that are hard to satisfy. In fact, the terms in which democracy is usually defended acquire a spurious plausibility, and they can easily be turned against democracy as a social given reality, leaving democratic institutions vulnerable to internal criticism. In response to this, this book attempts to provide a more cautious and realistic account of democracy as a governance system, rejecting much of the classical conceptual apparatus of democratic theory, and it then defends democracy on this revised, more cautious and contingent basis. In so doing, it indicates that much of the common critique of democracy, demanding a return to nationalized, immediate experiences of participation, results from a miscomprehension of democracy, which is partly induced by the terms in which democracy is explained and advocated. Overall, this book tries to show that democracy has been misunderstood by those who defend it, and this misunderstanding is proving detrimental to its chances of continued consolidation. On the account offered here, democracy is both more and less than commonly assumed, and it needs to be vindicated as such.

In setting out this defence of democracy, this book also proposes a particular defence of sociology, and in particular of legal sociology, as a method for interpreting the rise of democracy, and for assessing the demands that we can channel towards democratically authorized institutions. Indeed, it defends the sociology of law as the most appropriate source of a plausible defence of democracy. It claims that democracy is most accurately understood and most effectively – i.e. realistically – defended if it is approached from a legal-sociological perspective. That is, democracy is best comprehended if categorical normative claim-making is renounced, if its functions are traced to underlying social processes, if its normative foundations are located within broad societal contexts and – above all – if the claims to obligation and legitimacy made by democratic

---

[1]  See pp. 17–8 below.

institutions are observed in a perspective that probes at the social reali-
ties underlying legal-normative constructs. A sociology of democratic
normativity is required to explain and, ultimately, to vindicate democratic
organization – indeed, the more sociological analysis of democracy is, the
more robust the defence of democracy is likely to be.

In this respect, this book makes the distinctive methodological claim
that the sociology of law is the original and eminent science of democracy.
The sociology of law, it is claimed here, first developed as an ambivalently
affirmative inquiry into early democratic institutions, and, in its rejection
of the simplified registers of classical democratic theory, it still provides
the perspective in which democracy can be most accurately explained
and protected.[2] To be sure, this book argues that the sociology of law has
followed many stray paths along its historical course. However, this has
usually occurred when it has digressed from the basic principles of the
legal-sociological outlook. Consequently, this book attempts to consoli-
date the position of the sociology of law as a basic science of democracy by
restating its core principles, and by applying a distinctive legal-sociological
focus to processes of democratic formation in different parts of contempo-
rary global society.

Before this book addresses its major questions, however, this introduc-
tion attempts to establish a definition of democracy, to identify the core
conceptual elements of democracy and, above all, to account for the social
and institutional implications of the categories in which democratic gov-
ernment is usually envisaged. In so doing, it aims to provide a framework
in which, in subsequent chapters, the factual development of democracy
can be analysed. Using this framework, later chapters in this book explain
how democracy assumed a form that deviated from its classical construc-
tion, and they show how classical ideas of democracy contained internal
normative constructs that inevitably steered democratic formation onto
unpredicted pathways.

## I.1 What Is a Democracy?

For the sake of simplicity, democracy is defined here, in relatively uncon-
troversial, practical terms, as follows. At an institutional level, democracy
is *a societal condition in which individual members of a population or a*

---

[2] Law was a very important focus in early sociology, and the deep connection between legal
analysis and sociology has often been noted (see Parsons 1977: 11; Gephart 1993: 86). Later,
law's importance as a core object of sociological study declined.

*designated political group, acting in the role of citizens, are included in a system of political representation, in which they have an equal participatory (that is, usually, electoral) role in constructing the general order of governance and in authorizing the particular laws that regulate their actions.* At a normative level, thus, democratic institutions are defined and legitimated by the fact that they conduct processes of collectively endorsed legislation, so that citizens recognize the laws by which they are obligated as expressions of collective commitments.[3] On this basis, shared obligation, often understood as shared freedom, lies at the normative core of democracy. The original principle of modern democracy was formulated in the political philosophies of the Enlightenment. This principle was, namely, that democracy is a political system in which laws acquire legitimacy because they publicly express reasonable freedoms – freedoms

---

[3] My definition of democracy is close to that proposed by Rosanvallon, stating that: 'Equality in the polling station' is the 'first precondition of democracy, the most elementary precondition of equality, and the indisputable foundation of the law' (1992: 11). For a variation on this basic claim see Böckenförde (1991: 291). One recent analysis makes this point most clearly, stating that democracy presupposes a 'people, which is politically self-governing' and which 'is able to interpret the decisions of state as its own' (Haack 2007: 303). Iris Marion Young claims simply that the 'normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making process' (2000: 5–6). My definition is also close to that of Tilly, who sees democracy as involving 'broad, equal, protected, binding consultation of citizens with respect to state actions' (2007: 34), and as presupposing 'broad citizenship, equal citizenship', and 'protection of citizens from arbitrary action by government officials' (2000: 4). My definition also overlaps with Dahl's theory of polyarchy, claiming that in a democracy: 'Citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in the government' (1989: 220). Like my account, Dahl also states that 'democracy is uniquely related to freedom … It expands to maximum feasible limits the opportunity for persons to live under laws of their own choosing' (1989: 89). See also Dahl's insistence on full inclusion as one of the criteria of democracy, such that '[t]he citizen body … must include all persons subject to the laws of that state except transients and persons proved to be incapable of caring for themselves' (1998: 78). Similarly, Beetham defines democracy as a 'mode of decision-making about collectively binding rules and policies over which the people exercise control', adding that a democracy is most perfectly realized 'where all members of the collectivity enjoy equal rights to take part in such decision-making directly' (1993: 55). Shapiro's definition of democracy (2003: 52) as a political system designed for 'structuring power relations so as to limit domination' is also compatible with mine. For the classical Hellenic definition of democracy, which also contained a presumption of equal participation of citizens, see Meier (1970: 37). The values of equality and freedom are also central to more recent attempts to calibrate the degree of democracy that exists in different polities (see Lauth 2015: 7; Munck 2016: 11). The norm of freedom as an element of democracy has been proclaimed most boldly by Goodhart, who observes democracy as resting on a 'political commitment to universal emancipation' (2005: 150).

that reasonable subjects (citizens) are likely to exercise.[4] In fact, democracy rests normatively on a *double obligation*, in which citizens accept their obligation towards political institutions because these institutions recognize their obligation to express reasonable freedoms and to translate these freedoms into law. In realized form, both institutionally and normatively, democracy inevitably means more than this. Clearly, democracy can assume a multiplicity of forms – it can appear as direct democracy, parliamentary democracy, presidential democracy, council democracy, economic democracy, industrial democracy or even commissarial democracy. But democracy cannot easily mean less than this. Of course, democracy has been widely reconceived in recent years, especially in light of the supposed diminishing importance of national political institutions.[5] Owing to the increasingly transnational form of contemporary society, the assumption that members of the single national people should act as the sole source of governmental legitimacy has become questionable.[6] In fact, even at the origins of modern national democracy, national sources of constitutional agency were not fully separated from global normative orders.[7] However, the above definition contains some necessary conditions that a political system – that is, *the mass of institutions in society responsible for producing legislation* – must satisfy in order to be qualified as democratic.

First, in order for a political system to be classified as democratic, there must be an ongoing practical authorization of the governmental order by its citizens. That is, there must be a *chain of communication*, reflecting both contestation and consent over the sources of legitimate

---

[4]  In the early construction of democratic theory, however, this claim was developed to imply that freedom is a condition in which the human being behaves in accordance with generalized maxims of practical reason: in which the human being finds a source of obligation in its own rationality, and acts in accordance with this. The legitimate state, then, is a state that externalizes the rational self-obligation of the citizen, so that the person acquires an objective obligation to the state as a legal guarantor of his or her subjective self-obligation. The freedom provided by the state is thus primarily not freedom, but obligation. We can find this argument in Rousseau and in the theorists of the French Revolution, who viewed freedom and virtue as coterminous and implied that citizens possessed an enforceable obligation to be free, in virtuous fashion (see p. 78 below). This argument finds the most distilled expression in Kant. For Kant, the human capacity for 'inner freedom' is linked to the fact that the human being is a 'being that is capable of holding obligations'. Human freedom is thus an obligation 'toward oneself', and the human being enters a 'contradiction to itself', violating its own inner freedom, if it acts in breach of generally obligatory laws (Kant 1977b [1797]: 550).

[5]  See examples below at pp. 195–8, 201.

[6]  See analysis below at pp. 432–3.

[7]  See the impact of global norms in the French Revolution, reflected in Abbé Grégoire's draft for a *Declaration of the Rights of Nations* (1793). This is reprinted in Grewe (1988: 660–1).

legislation, that connects citizens with different organs of the political system, and this communication must be institutionally entrenched, so that it cannot be unilaterally abrogated. This is an ineradicable part of a democracy.

Second, to be defined as democratic, a political system must be centred around a construction of the citizen as an individual person, capable equally of reflexively responsible and politically implicated decisions that impact on acts of legislation, processes of inclusion and the distribution of goods in society. This cannot be left out of any definition of democracy.[8] Indeed, democracy revolves around a construct of the citizen as a basic focus of legitimacy or as a basic *subject of democracy*, and the recognition of the citizen as a source of law's obligatory force is foundational for the democratic political system as a public order.[9] Democracy, therefore, is a mode of government in which the citizen forms the core *legitimational figure* for the political system. From the first emergence of the basic elements of modern democracy, the political system explained its legitimacy and authorized its functions on the basis both of the legal-normative recognition of rights of citizens and of the translation of the interests, commitments and freedoms of citizens into legal form.[10]

On this basis, third, to be considered democratic, a political system cannot, except perhaps on grounds of age, incapacity or avowed hostility to democracy, exclude distinct sectors of society from the factual exercise of citizenship rights.[11] As discussed below, democracy presupposes the

[8] See Seyla Benhabib's definition: 'Popular sovereignty means that all full members of the *demos* are entitled to have a voice in the articulation of the laws by which the *demos* is to govern itself. Democratic rule, then, extends its jurisdiction in the first place to those who can view themselves as the authors of such rule' (2004: 20). See the definition of the citizen as a person 'associating with other persons to have voice and action in the making of our worlds' in Pocock (1995: 52). See Habermas's claim that 'citizens of a democratic legal state understand themselves as the authors of the laws, which they, as addressees, are obliged to obey' (1998: 152).

[9] The American Supreme Court has stated accordingly: 'This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right. Citizenship *is* man's basic right, for it is nothing less than the right to have rights.' *Perez* v. *Brownell* 356 U.S. 44 (1958).

[10] I agree with Charles Tilly's claim that citizenship is a necessary but not sufficient condition of democratization (2004: 8).

[11] Representative government, therefore, is not necessarily democratic, and it may often be the opposite of democracy. Representative government does not presuppose factual inclusion of citizens. See for this argument Schmitt (1928: 2009); Pitkin (1967: 190–1). Both the French and the American Revolutions were driven in part by hostility to pure

equality of citizens as a precondition of legitimate legislation, and it contains an essential disposition towards full political inclusion of citizens, so that as many people as possible in society participate in creating laws and recognize legislation as expressing their own claims to liberty.[12] Political systems that make it impossible for some social groups who are affected by law to participate in making law belong outside the category of full democracy.

In the definition of democracy set out above, it is clear that democracy is, above all, a system of inclusive and authoritative legislation. In this definition, laws only become legitimate to the degree that they are passed by a legislative body, whose acts originate in procedures for collective participation, expressed most essentially in elections. Notably, in the eighteenth century, when the conceptual basis for modern democracy was first established, it became an article of faith that personal freedom could be most effectively guaranteed by a legislature, representing the people or the nation as a whole. The direct correlation between personal freedom and the collectively mandated legislature thus became a defining feature of early democratic theory. At different global locations, the legislature was conceived as the dominant organ of government, in which collective freedoms could be enforced as the foundation for society's legal order.[13] Early in the American Revolution, James Otis saw

representative government, and some of their protagonists saw the democratic exercise of popular or national sovereignty as an alternative to inherited ideas of representative government. The French Revolution reacted – initially – against established ideas of representative government (see Rosanvallon 2000: 19–21). During the Jacobin period, notably, Saint-Just claimed that government spoke directly for the people (see Jaume 1997: 133). In the American Revolution, there was less hostility to representation than in the French Revolution, but, ideologically, it renounced the English doctrine of virtual representation (see Pole 1966: 54; Wood 2008: 8, 26). For an early critique of virtual representation in America, see the claims in Otis (1769: 28). Rousseau's theory of national sovereignty, which gave conceptual impetus to the French Revolution, was based on a critique of democracy as representation (1966 [1762]: 134).

[12] Amongst early proto-democratic theorists, Rousseau argued that citizens all become 'equal through the social contract' (1966 [1762]: 137). Kant argued that citizens (*Staatsbürger*) are the members of a particular society – a state – and they are defined by the fact that they are 'unified for legislation'. For Kant, the essence of citizens resides in their equality, and it is expressed in the exercise of political rights: in 'the capacity for participation in elections constitutes the qualification for citizenship'. Crucially, for Kant, a citizen is not obliged to show obedience to a law to which he or she has not 'given approval' (1977b [1797]: 432–33).

[13] Of course this principle was stimulated by Locke. It was then elaborated by Blackstone (1765: 143). It later became an article of faith in revolutionary France. In the USA, early constitutional rebellions were deeply marked by insistence on 'the colonial right to control of legislative power' and early state constitutions clearly placed the legislative branch at the centre of the constitution (Pole 1966: 29–31).

the 'supreme legislative' power as the 'sovereign power of a state' (1769: 4), and he claimed that 'supreme and subordinate powers of legislation should be free and sacred in the hands where the community have once rightfully placed them' (1764: 52). The 1776 Constitution of Maryland declared simply that 'the right of the people to participate in the legislature is the best security of liberty, and the foundation of all free government'. One account argues that the French Revolution witnessed the birth of a 'unique conception of legislative authority', capable of radically transforming society as a whole (Achaintre 2008: 21). Accordingly, during the French Revolution, Saint-Just stated that the 'legislative body is like the unmoving light that distinguishes the form of all things … It is the essence of liberty (1791: 102).

The primacy accorded to the legislature in democratic theory means that laws not created through inclusive popular participation in legislative acts have questionable, contestable legitimacy. Moreover, this means that laws created through popular participation have higher-order status, they override other laws, or other legal norms, that a society may contain, and, above all, they have primacy over laws created in other institutions. This latter fact possessed particular importance in the historical rise of democratic institutions, as, in most pre-democratic societies, legislation was not a dominant source of law, much law existed in piecemeal informal normative orders and there was no clear hierarchy between different normative structures in different parts of society.[14] Consequently, popular participation in law making evolved as a norm that allowed governments to centralize society's law-making powers and to establish strict hierarchy between different laws. As a result, legislation is the central element of democracy, and the legitimacy of democracy depends on its claim to channel the will of the people or the nation, through the legislative organs of government, into law.

Of course, this is not to say that in a democracy participatory acts are channelled without filtration into law. It is necessarily the case that democracies establish constitutional systems, centred on human rights guarantees, to ensure that all citizens in society can participate adequately in political will formation. Indeed, the common theoretical claim that democracy presupposes rights is perfectly sustainable, and it is not

---

[14] Before the French Revolution, governments did not monopolize powers of legislation, and, thereafter, they did so only notionally. In medieval societies, law was not made, but found in local sources in conventions, and even monarchical attempts to bring order to such conventions caused friction between central institutions and local elites (see Grinberg 1997: 1021, 1025).

contradicted here.[15] On the contrary, it is argued throughout this book that there is little sense in imagining a modern democracy without also imagining the citizen, defined as a holder of general and temporally secure rights, as the basic point of legitimational reference for the political system.

Nonetheless, in a strictly constructed democracy, basic rights – for instance, rights regarding personal inviolability, freedom of movement and expression, access to justice – obtain value to the extent that they underpin the participatory dimension of democracy, securing and maximizing access to the procedures required for electoral authorization of law. Such rights, therefore, must be rights that shape democratic procedure, which prevent exclusion of social actors from collective decision-making processes, and which stabilize a general, equal and inclusive construct of the citizen as a participant in legislation. Democracy always presupposes that the citizen, as an equal participatory agent, stands at the origin of law making, and law is created by acts of citizens oriented towards legislation. In consequence, democracy contains the normative implication that rights are willed by citizens as principles that promote equal inclusion in legislative processes, and that rights obtain legitimacy because they act to ensure that the citizens retain a position at the origin of laws. Guarantees for rights lose democratic legitimacy if they obstruct their origin in democratic choice making. In a strictly constructed democracy, it is legitimate to assume that basic rights themselves are designed by constitution-making decisions, or at least by practical consensus between citizens, such that any normative or procedural constraint placed on acts of popular will formation possesses a clearly political origin.[16]

## I.2   The Citizen

In this definition, the idea of the citizen is central to the norms, the practices and the obligations that support modern democracy. Notably, the period in which the modern democratic state began to take shape, the revolutionary period of the late eighteenth century, implanted in society the idea that the state and the citizen are integrally connected, and that the state is formed and legitimated as an entity that stands in an immediate and directly constitutive relation to the persons that it integrates – that is,

---

[15] For different expressions of this theory see Habermas (1994: 88–9); Beetham (1999: 93); Benhabib (2009); Benvenisti and Harel (2017: 40).

[16] See this claim in Bellamy (2007: 51); Loughlin (2010).

to citizens (see Bendix 1996 [1964]: 89–90). Democracy, in consequence, is originally a system of legislation that is created by, and remains centred around, citizens. In Europe, this association between state and citizen is underlined most symbolically by the Declaration of the Rights of Man and the Citizen in France in 1789. In the USA, the positive state-founding implications of citizenship were defined in equally forceful fashion.[17]

During the early rise of democracy, first, the state consolidated itself – functionally – as a public order by defining and legally demarcating the persons subject to its power, by bestowing, variably, certain equal rights upon them, and, in so doing, by removing them from alternative local affiliations (Gosewinkel 2001: 138; Gironda 2010: 70, 343). This involved the recognition of persons as citizens. In some states, in fact, the concept of the citizen was constructed quite instrumentally by political actors in order to weaken the power of aristocratic estates, to create a vertical hierarchy – that is, a 'rational order of rank' – in society, and so to establish 'closer relations between the nation and the constitution of state'.[18] The construction of the citizen was thus integral to practices of institutional formation and territorial integration that underpin modern statehood.[19] In close connection to this, in its early emergence, the modern state was formed, normatively, as an entity that was authorized through the voluntary commitment of single persons, and it extracted legitimacy and legislative power from the generic construct of the citizen – by granting extended rights of participation, and by establishing preconditions for civil and political inclusion.

In both these respects, the modern state was formed as an entity that was correlated with the citizen as a *claimant to rights*, and the state acquired public authority for its functions by including citizens in this capacity. The modern state was elaborated as a system of shared rights, allocated to citizens, in which political institutions were able to incorporate their constituents and authorize legislation on the basis of these rights. Consequently, Shklar argues – quite persuasively – that there is 'no notion more central in politics than citizenship' (1991: 1). Similarly, Dahrendorf states that the

---

[17] On the American Revolution as reflecting a strong positive ethic of political foundation see Wood (1992: 325); Edling (2003: 4).

[18] This was the plan in Hardenberg's designs to reform the Prussian state after its military defeat by Napoleon (1931 [1807]: 316–18).

[19] The modern construction of the citizen was of course linked to earlier structural processes. It accelerated and consolidated pre-existing processes of territorial state formation, in which the increasing unity of legal order had already stimulated the growth of centralized, territorially concentrated political institutions (see Brunner 1942: 261).