

Stricto sensu VS lato sensu? Regulating Participatory Processes Between «The Force of Law» and «The Force of Will»

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In the last decade, different countries and governance levels have institutionalised several participatory mechanisms through a wide range of diverse regulatory practices. This paper focuses on how and to what extent various forms of regulation drive creativity and incentives, or generate stiffness which risk to atrophy and jeopardise participatory processes' capacity to create substantive forms of citizens' engagement in policymaking. The authors propose some reflections on the «*liaisons dangereuses*» between the guarantee of continuity and the risks of ritualisation and ossification of the various forms of participatory processes' regulation, and on their ability to establish themselves as permanent innovative laboratories of creativity, spaces of responsabilisation of different actors towards common interests and resilience, and adaptability of procedures.

1. Introduction

Academic and grey literature converge in recognising that participatory processes need permanent creativity, adaptivity, self-assessment and resilient behaviours to create dynamics of self-responsibilisation of different actors and spaces of social accountability with significative and concrete impacts on the transformation of real socio-political environments¹. In this perspective, the effects and impacts on policies (and representative institutions' change) of any attempt to institutionalise participatory processes (through a wide range of formal acts and legal formats) remain ambiguous, if we try to read their capacity to incentivise and/or stabilise those practices. In the following paragraphs, this article will focus on different regulatory patterns that favour such «stabilisation» or extend participation's capacity to root itself into organisational settings of democratic regimes.

Our inductive analysis is an overview of different ways that «the law» (in *lato sensu* as a wide range of institutionalised and institutionalising measures) shows when interacting with the broad notion of «citizens participation». We argue that there is an asymmetry of which actors and stakeholders can «activate» and «trigger» participatory arenas, and such imbalances of power can hinder their transformative potential. Unless the framework is hinged on collective rights that absorb the «imperative to participation»², which values the role of civic engagement far beyond its «instrumental capacity» of supporting and guiding public policies, recognising – instead – that, first of all, participation is an essential epistemological space of discovery and leverage to promote community cohesion. The examples used in the article (taken from countries which have significant experiences in participatory practices) have been selected for their capacity of significantly represent the different phenomena illustrated in fig. 2: a further criteria was that of having been already the object of some published reflexive analysis, as the space of this overview does not allow to describe in detail the complexity of new cases.

2. A fundamental right in the Constitutional State?

In the Encyclopaedia of Law, U. Allegretti³ highlighted at least 14 concurrent uses that social sciences propose for «participatory democracy» in Western contexts. The clusters of meaning encompass very different dynamics, referred to representative democracy functioning (including taking part in acts related to direct democracy), as to society's self-organising capacity to interact with political/administrative institutions, and even the active use of subjective rights provided by public administrative procedures (such as the access to administrative documents).

In between these poles, the word «participation» is increasingly used to depict specific arenas which are imagined as a bridge between representative institutions and the inhabitants of specific territories: spaces of interaction, which are conceived as a «non-state public sphere»⁴ where citizens could «have access to the State without mediations» while «maintaining their autonomy». Often defined as «democratic innovations»⁵, these practices well depict how the concept of participation constantly crosses the notion of democracy and others as citizenship, subsidiarity and cooperation, with overlapping areas and different meanings depending on contexts and cultural perspectives from which one can read them⁶.

In the State of Democratic Rule of Law, constitutions are usually based on the principle of popular sovereignty, the protection of fundamental rights, and strengthening democracy. These texts often merge legal mechanisms of representative, semi-direct and participatory democracy that guarantee the right to universal suffrage, individual participation through plebiscites and referendums, and procedural participation as a right to act and a right to join associations and trade unions.

In some cases, participation is integrated into a vision of social transformation entrusted to the Republic, as happens in the art. 3 of Italian Constitution, linked to the tasks of full development of the human being (provided for in art. 2)⁷ and democratisation of power. In this perspective, participation appears intimately associated with the growth of awareness about citizenship, and related to the principle of subsidiarity, which affects «the external border of the institutions and involves the relationship between them, citizens and society»⁸. Thus, citizen participation can be viewed as one of the Republic's objectives to guarantee freedom, and as a tool to implement equality and dignity in society⁹.

In other cases, as in Portugal (where art. 2 of the Constitution states that «deepening participatory democracy» is a central task of the State of the Rule of Law), the relation of mutual complementarity established between State competencies and the activation of participatory processes is explicit. Despite this, for decades, little has been done to reshape institutions in a way that could fulfil such a central principle¹⁰ until the culture of many local institutions changed and several experiences were promoted, which translated this abstract principle into concrete facts¹¹. Possibly, if – slowly – changes are being made, this is because representative democracy's crisis growingly exposes problems of representation as a form of government¹². The model of liberal democracy, based on the principle of majority rule, electoral systems and representation, fails to meet the demands for accountability and multiple identities and needs diverse social actors¹³, configuring what Bobbio named as «undelivered promises of democracy»¹⁴.

The lack of representation of several social actors in the public sphere and the growing heterogeneity of society raise a discussion about political representation and voting rights not constituting commitment (and a social contract between representatives and the represented) that would transcend as an instrument for the spontaneous choice of representatives. It ends up being a mere competition system for political power among some groups¹⁵. Therefore, advocates of participatory democracy underline «the importance of responsible citizenship through participation in

the political and decision-making process, considering participation as a fundamental right of the components of society»¹⁶. In the same sense, Allegretti considers that «[...] participation and participatory democracy [should] be considered not only as contents of an 'objective' principle that govern political and administrative decision-making procedures, but also as contents of a real and proper 'subjective right' in the form of a fundamental individual right – which could restore the traditional conception of a citizens' political activity as the true expression of a fundamental (political) right»¹⁷.

74 Considering that institutions of representative democracy can legitimately decide (despite the crisis of political parties and elective assemblies reveal their growing inability to intercept the citizens' needs and difficulties in communicating with the real recipients of public policies¹⁸), a crisis of effectiveness and efficiency and a crisis of consensus becomes visible¹⁹. Therefore, a periodic electoral verification is not enough, as permanent mediation opportunities and channels among politics, institutions and society often appear opaque or obstructed. Moreover, society itself does not seem to find effective spaces for the collective representation of its differentiated interests, and seldom results in a straightforward, non-contradictory linear social question²⁰.

Enjoying rights achieved by a democratic State also means being able to exercise them directly. As Allegretti points out, democracy consists of many interconnected and increasingly complex elements; therefore, participation is crucial in democratic experience, playing the role of a principle which legitimises decisions²¹. This is also exemplified by the Council of Europe, when stating that «the right of citizens to participate in the conduct of public affairs is one of the democratic principles that is shared by all member states of the Council of Europe [...]. This right shall be exercised by assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute»²².

Nevertheless, in the face of existing practices, there is still a long road ahead for this right to become part of the form of State (constitutionally guaranteed) rather than part of the form of government. Thus, when offered, spaces of participation still look as a sort of «concession», given via «discretionary actions of elected public powers – when they want, and to the extent they want»²³. As Valastro summarised: «without rules there can be no method», although without the latter «there can be no guarantees of the effectiveness of the participation but only good practices entrusted to contingent political sensitivities»²⁴.

3. Different ways of regulating participatory processes: a brief overview

3.1 *Leading with a polysemic concept*

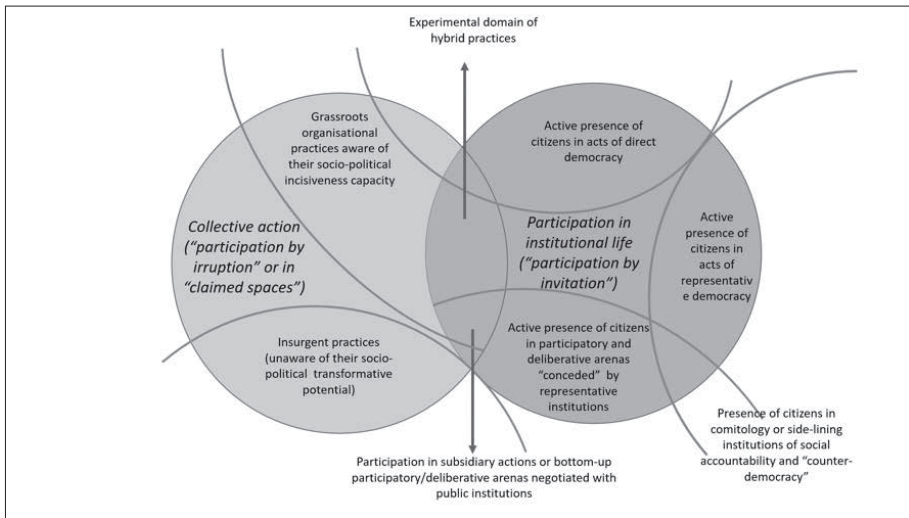
The large family of participatory practices, usually named «democratic innovations» (DIs), is a hybrid outcome of cross-fertilisation and cross-pollination processes among repeated global experiences with a vast range of names and tools (i.e., participatory budgeting, participatory/integrated planning, town meetings, public debates, etc.). Also, they include a sub-family of deliberative practices – such as citizens juries or panels, *planungszelle*, deliberative polls and other «mini-publics»²⁵ – that aim to improve the argumentative quality of civic participation and the effectiveness of interactions between lay and expert knowledge²⁶.

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Literature has been considering these forms as «participation by invitation»²⁷ because they are often initiated or «conceded» by public (or private) institutions that are aware of how the crisis of perceived legitimacy and authoritativeness of representative democracy affects their functionality, efficiency and effectiveness, and to what extent they could compensate, if not revert, such losses²⁸. However, literature today tends to recognise as «democratic innovations» also several processes of a bottom-up origin (which Blas & Ibarra²⁹ name as «participation by irruption» and Gaventa labels as «claimed spaces»³⁰) that try to reach and stabilise structural forms of constructive dialogue between grassroots dynamics and representative structures of decision-making, via the creation of institutionally recognised procedures and more informal spaces of negotiation³¹.

In Fig. 1 above, the left side shows the coexistence of such meanings with another Southern/Meridian perspective³² of *citizens' participation*, mainly suggested by the practices of indigenous cultures and communitarian forms of democracy external to mainstream Western-centric modernity³³. Thus, the pluriverse of meanings embedded in the notion of participation enlarges. In fact, it enters a domain of relational practices embedded in communities' construction of everyday life³⁴, or those forms of alliances for negotiated solidarity known as «insurgent practices»³⁵, characterised by a reduced level of awareness about their socio-political transformation capacity³⁶. In this perspective, the traditional «instrumental value» of participation (as a supporting tool for policymaking) shrinks. Simultaneously, its epistemological role and capacity to affirm the mutual recognition and the coexistence of bodies as an initial condition for cognition and emancipation increases³⁷.

Fig. 1 - Participation as a complex and polysemic notion: its different domains of action



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Indeed, such a wide range of diverse meanings place the polysemic notion of participation at a crossroad, where it risks becoming a buzzword due to the impoverishing contents generated by political rhetoric's misuses. Such complexity impacts how regulatory frameworks interact with the notion, revealing a very different capacity to activate concrete processes and cultural shifts, consolidate and multiply pre-existing practices, or even damage them.

3.2 Ambiguities and potentials of «regulating participation»

Regulatory acts which seek to make participation happen and root it into specific contexts, usually consist of activating a *participatory procedure*. Under this perspective, the act of «regulating» has different forms, such as laws, decrees, statute, regulation, bylaw, explanatory circulars about due procedures, the establishment of a subject (a department, an authority or a deliberative or consultative council) or the deliberation of principles in the executive or legislative organs (from constitutions to local statutes). The same budgetary acts (when they include provisional funding which can make the organisation of a participatory or deliberative arena more effective and articulate) are fundamental tools for regulating participation, even if they formally do not describe how and/or to what

extent it will have to take place. They encompass a vital role in recognising participation in policymaking and building the public sphere at large: as participation needs resources to take place with fairness and incisiveness, and its presence in governance systems start to be recognised as a substantive engine for enlarging and consolidating governance.

Regulatory acts (with different levels of contents) can be undertaken for (and by) virtually any governmental level, according to national rules and socio-institutional cultures where explicit constitutional guarantees are in place. Hence, any public organisation is authorised to establish a participatory practice, as it is a democratic institution. The plurality of legal sources through which one can regulate participation may generate conflicts of competence, but the latter – as happened in Apulia in 2018, when the Constitutional Court partially amended the Law on Participation – can also play as an opportunity to remark the indispensable contribution of participatory and deliberative practices to the State of the rule of Law³⁸.

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When participatory processes are institutionalised, it can be for recognition that facilitates investments in them, or to explicitly transform these arenas into a «stabilised part» of government structure: this can increase formal ties between participatory/deliberative processes results and their capacity of impacting the decision-making process. Also, it adds new layers of complexity to the enforceability of the rights that practices configure³⁹ and can drive them into a direction that allows reframing the State action based on a «deliberative vision of democracy»⁴⁰, as a permanent dialogue between representative structures and deliberative and participatory spaces. Coupling the two in a combined vision would multiply the number of spaces that help to hold all fundamental institutes of democracy (i.e., parties and intermediary bodies of civil society) more accountable, increase their responsiveness, foster a better quality of argumentation in discussing policy measures, aid policies in overcoming the limits posed by their tendential approach to follow the «administrative theory of needs»⁴¹ and reach the effectiveness and transformative capacity of different actors and behavioural patterns.

Whether «regulation» can be a creative/funding act which, *ex nihilo*, can generate and activate adequate and strong participatory settings has a complex and never-univocal answer. Results differ in time and space, depending on different traditions and participatory cultures, as political conjunctures that make participation seem an «imperative»⁴² or just an «added value» but not an indispensable one...

In most countries where a wide range of complementary and effective practices exist, we can observe the process through three steps: 1) consti-

tution assumes participation as a central value of the State of the Rule of Law; 2) the gradual stabilisation of concrete experiences of participatory spaces and institutions favour different regulatory provisions (mostly bylaws and local forms of deliberative acts); 3) a slow process of consolidation through scattered legal measures of superior hierarchical value, which often operate in single territories or policy sectors, increasing the visibility and enforceability of *de facto* procedures of civic engagement which gradually consubstantiate into *de iure* rights.

78 The second step is fundamental but still non-sufficient for building political willpower of enforcing legal measures that make participation due. In many countries/cultures, the juridical field (including the academic milieu) tend to ignore all praxes that are not already regulated by law, even if they are the object of significative investments by policies, projects and polity in general. However, the existence and multiplication of such practices are pivotal in reducing their intermittence and dependence on elected officials' discretionary and increasing sustainability and scope. It can reduce the perception of lawmakers that participatory arenas reduce institutions' power, unveiling to what extent they can contribute to their increased authoritativeness during a crisis of legitimacy. Possibly, it is the only way for lawmakers to invest in measures that reinforce State-recognition of participation through legal acts, which can consolidate their diffusion, legitimacy and strength. Only a new injection of political may sustain the virtuous circle between participatory/deliberative arrangements' success and the strengthening of institutions that are in favour of formally allocating new spaces for participation⁴³. Conversely, de-constitutionalisation can occur⁴⁴ as in Bolivia's case, where the provisions in the 2009 Constitution which granted «demo-diversity»⁴⁵ and deep dialogue between tools of representative, direct and participatory democracy and communitarian traditions of indigenous democracies have been ignored, neutralising the decolonising potentials of the Magna Carta. In this case, the «incomplete proceduralisation» made a generic call to respect varied pre-existing civic engagement traditions, but did not enforce their experimentation, which was not translated into respectful practices by any willpower.

In the last two decades, public debate about limiting participation opportunities has focused on the need to guarantee participation as a right that must be enforced, regardless of policy-makers political will – so granting practices despite political overturns. On the other side the risk of hyper-proceduralism, ossifying and bureaucratising participation, caging it inside modalities that are slower to evolve than the actors who take part

in concrete participatory processes. So, they become empty formulas that generate frustration, as they are regarded by public officials as mere mandatory pre-requirements, in a formalist tick-the-box approach, not centred on effectiveness – and incisiveness-based perspectives.

Brazil's case illustrates both situations. Different laws on Policy Councils saved many of President Bolsonaro attempts to abolish citizens' interference in political decision-making⁴⁶. In contrast, many municipalities violated the imperative provided by the 2001 Law on the Statute of the City to shape local masterplans with citizens participation, creating fake or light consultations to fulfil formal requirements. In both cases, the existence of stated rights for citizens participation allowed different courts (although commonly considered a barely progressive power in Brazil) to restore the obligations of real and meaningful participation, for example, blocking the approval of masterplans of Salvador, São Paulo or Florianópolis. This experience reveals that participation regulation is necessary, but slow to produce constructive effects, unless coupled with a strong political will.

3.3 *Clustering some regulatory measures*

Literature has made few attempts to identify and categorise the diverse patterns followed to regulate participation⁴⁷, considering that different types of measures are often overlapped or combined. We argue that the most usual form to guarantee participation is including mandatory requirements, as a condition for validity, in sectorial regulations such as urban planning, environmental, health or housing policies. Consequently, creating participatory mechanisms to support specific processes (*ad hoc practices*) but rarely linked with other sectors or participatory practices. In other cases, citizens' engagement is guaranteed as a constitutive part of policymaking (included, in some cases, the budgeting procedures⁴⁸), even not as mandatory. Often, those who had no constitutional prerogatives for creating their statutes (i.e., municipalities in Portugal) created Charters of Principles or Ethical Charters (in Lisbon, Cascais or Lagos) where several inviolable rules for the processes are stated. Thus, the procedural regulations can be reviewed yearly (as they need to evolve fast) but remain within the values and limits established by those documents. For instance, the Network of Participatory Local Authorities of Portugal (RAP) members, in 2017, collectively built a Charter of Quality for Participatory Budgets⁴⁹, translated into a System of Evaluation for quality levels⁵⁰ in June 2020. When evident, this «constitutional-like approach» allows a wide

spectrum of actions (not necessarily legally bounding) that establish a sort of hierarchy of commitments to grant participation in policymaking. It establishes values that can orient more flexible transformation of procedural rules, designs and organisational architectures, avoiding binding them into difficult procedures for upgrading and updating them, which could risk to reduce their effectiveness and authoritativeness rapidly.

80 A less frequent and more exigent alternative institutionalisation incentivises participation by promoting and supporting its implementation, creating departments or authorities, possibly allocating specific funding and human resources. Still not frequent, these enact as a guarantor of the right-to-participation enforcement, as an activator of processes and a figure that brings a «third party» approach, or even «equiproximity» (an approach proposed by Luigi Bobbio to counterbalance a cold «neutrality-based» perspective⁵¹).

Such institutions are founded and maintained in very diverse ways and have different levels of commitments. For the National level, the Commission of Public Debate (CNDP) of France⁵² is one example, which has a granted a pot of resources assigned to function and exert a coercive authority on several public (and private-based) decision-making processes⁵³, and is a model of almost-independent authorities. Nevertheless, its privileged link with the executive branch of institutional powers can reduce its authoritativeness. At provincial and metropolitan scales, examples as BAPE of Quebec⁵⁴ and the Office of Public Consultation of Montreal (OCPM⁵⁵) have similar advantages and limits to CNDP⁵⁶. In fact, they are also tied to the Executives, so that their acts are seen by many not as an expression of independence, although their budgets, established by laws or bylaws, guarantee them a certain level of freedom and «distance» from representative powers.

The Regional Authority for the Guarantee and Promotion of Participation of Tuscany (APP⁵⁷) has a stronger legitimacy-base (being named by the Regional Assembly, including the opposition). However, it is diminished by not being able to impose public debates on infrastructures to the private sector and not having a pre-assigned budget, which oscillates according to the Assembly Presidency's will, directly impacting its functioning and the number of participatory/deliberative processes it can annually promote. Paradoxically, many independent authorities prove weaker than more «embedded figures» (i.e., the Technical Guarantor of Emilia Romagna Region⁵⁸, which is a top-level civil servant, articulating the work on participation with the Legislative Assembly). In fact, they tend to be viewed as «enemies» and «administrative burdens» by executive/

legislative powers, which try to bypass their role and rarely cooperate with them for the sake of affirming a real cross-cutting culture of participation across sectors and administrative levels.

The Foundation for Urban Innovation (FIU), a non-profit private legal entity founded by the City and the University of Bologna, provides a different model. An evolution of the former Urban Center, it is supported by major local stakeholders in the city (which contributes to its budget, partially self-funded via participation to EU research and innovation actions), being that this composition serves to reinforce its «third party» approach, as a plural autonomous stakeholder in the local panorama. Perceived as both internal and external actor, FIU is an interesting example, especially for its responsibility in managing the Regulation on Collaboration Between Citizens and the City for the Care and Regeneration of Urban Common (2014), which represent an innovative legal and administrative framework for citizens' collective action. It embeds a series of «pre-formatted» and legally verified models of agreements for citizens (e.g., informal social gatherings around a specific space or service) to care for urban commons in Bologna. This type of regulatory provision (currently existing in more than 235 cities)⁵⁹ is a ground-breaking solution in reducing administrative/legal obstacles, which often are the most effective barriers to participatory innovation inside the often «inertial» public administrations.

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Such examples of institutions, created to incentivise participation, clarifies how the enforcement of substantive rights to «significant participation»⁶⁰ relays in the capacity of catalysing and leveraging energies, reducing obstacles and consolidating the will for experimentation in specific contexts and conjunctures.

Therefore, the width of the scope of regulatory frameworks can variate, as can their importance in term of formalisation and capacity of intervening in a specific sector of State action or in the activation of cross-cutting dynamics, where the right to participation operates as a guiding principle. Some experiences show that even mono-sectoral/thematic provisions can act as wedges, which gradually allow the centrality of participatory principles to extend into more sectors and broader policies: it is the case of Tuscany, where since 1995⁶¹, the legal framework on Territorial and Urban Management has been exploring a gradual increase in understanding what participation implies, how and to what extent it increases the effectiveness of governance and the sustainability of planning acts and rulemaking. Starting from a corner position, the positive effects (visibly reflected in bolder attention to participation pervasiveness in the trans-

forming legal framework of the initial sector of experimentation) have been gaining more room in regional policies, through a cross-sectoral law (n° 69/2007) that had a long process of co-writing and extended societal debate⁶², which allowed it to conceive participation as a cross-sectoral principle, albeit not managing to transform it into a new «administrative culture». This incremental expansion was interrupted, as the support of the political will diminish, and some «feuds of action» – among the Legislative Assembly and the Executive – took shape, possibly shrinking the capacity of the new regional Law on participation (n. 46/2013) – to permeate a large set of policies in a coordinate way⁶³.

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The legal «coverage» financial solidity provided to the promotion of participation is a central discriminating factor consolidating its culture and reaching incisiveness and effectiveness, visualising democratic innovations as authoritative institutes of democracy. Hence, it is also an indicator of the real political will advancing in recognising centrality to participation and recognition. Frequently, institutions show «shy» formal support to participation, justified for risk of instrumentalisation by oppositions, media or public opinion; consequently, they reduce investments in organisation, publicity and facilitation of democratic innovations (as if one could promote participation without professional commitment). Support to participatory practices end up being hidden behind generic budget-entries in sectors as communication or culture, giving no official recognition to the diligent work done by the personnel involved in participatory activities.

Thus, laws and regulations must state financial support to expand the quality and quantity of democratic innovations, starting from sectors (i.e., health, infrastructures, territorial management) where participation is already acknowledged as a fundamental contribution to governance policymaking. Could it be possible, for example, devoting a percentual budget of general costs related to projects and policies for granting democratic innovations connected to them? This general rule would grant (at least in those sectors) a principle of concrete «executability», readable as serious enforcement of rights to participation, regardless of the discretionary endorsement (or not) by political representatives who are in power.

It seems that, in the cases where is established a combined legal and financial upstream commitment of State institutions, democratic innovations can better respond to a holistic vision and more complex approaches, which can expand their capacity to improve the quality of democratic institutions. It is the case of Citizens' Initiative Reviews (CIR), a hybrid

model of deliberative mini-publics (adopted as a State policy by Oregon and Massachusetts in the USA⁶⁴) that work on local and State referenda to elaborate with citizens meaningful and balanced peer-to-peer spaces of information, that prevent trivialisation and reductionism of the yes/no formula. Their contribution expands the State's role from merely granting the vote to happen to foster a higher quality of deliberation for voters⁶⁵; and public investments strongly support it.

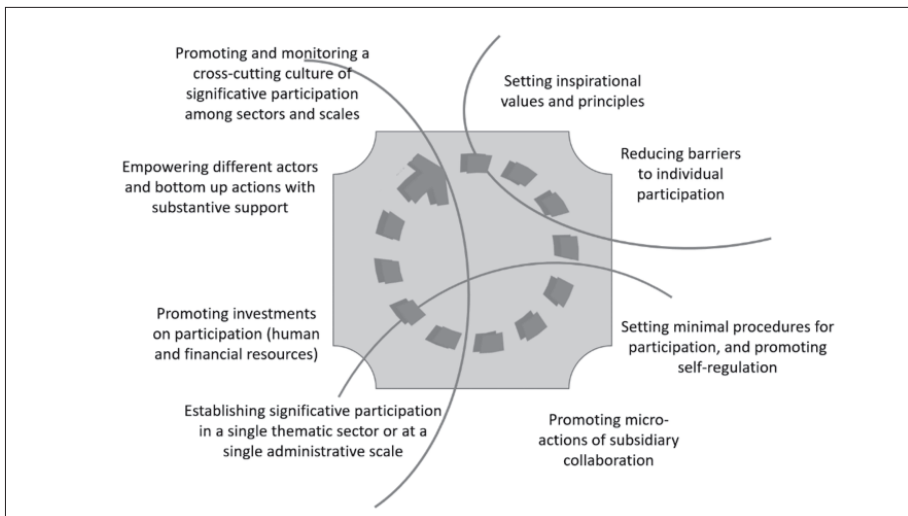
Possibly, to increase DIs' capacity to improve their quality and positive impacts gradually over time, institutions must consider the need for structures for monitoring and assessment (such as mixed policy observatories). In fact, the multidimensional evaluation of effects on actors, policies, and democratic spirit can trigger a virtuous circle of the positive interaction between representative institutions and participatory initiatives. However, it requires specific investments and a «third party» observation standpoint⁶⁶. Cases of State investments trying to diffuse a participatory culture, such as the Law on Deliberative Poll in Mongolia, the Law on Solecki Fund of 2009 in Poland to support participatory budgets in rural communes, or the Regional Sicilian Law 5/2014 (renewed in 2018 in order to make it mandatory for municipalities to use for fueling participatory budget a fixed percentage of regional transfers to them), all failed to monitor and assess their performance. The lack of similar structures does not allow to properly value the impacts of the investments done, while providing significant funds to incentivise participation: a missed opportunity to distinguish to what extent a programme of incentives fosters real and concrete practices of participation or, conversely, just hollow and soulless answers to formal legal requirements.

Finally, it is worth stressing a few cases in which a legal framework related to participation provides opportunities for citizens to require from bottom-up activation of participatory processes, i.e., collecting a certain number of signatures – as is in the case of the institutive bylaw of OPCM in Montreal, or the Tuscany Law 46/2013 on participation (especially to what refers to the activation of Public Debates). In France, the last modification of the Law on Public Debates (2016) incorporates a similar perspective (named *pouvoir de interpellation citoyenne*). However, the parallel proposal presented by the French Platform of Alliance Citoyenne (which demanded to establish a fixed percentage of funding dedicated to parties, for the activation and conduction of grassroots participatory processes), was ignored by the French President and Parliament⁶⁷. The case of Sicily shows that, even when their role is not formally part of regulatory arrangements, citizens initiatives can complete the institutional

structure created to promote participation. In fact, in Sicily – where since 2014 a regional law incentivises participatory budgeting-like practices at municipal level through a specific funding chapter⁶⁸ – a monitoring system of the quality of participatory practices has been not set in place by the government, despite the need to be returned the resources not spent accordingly to participative prerequisite set in 2018; but in 2021 a series of civic groups – coordinated by the «Libellula» NGO – created a monitoring website called «Let's spend them together»⁶⁹, that acts as an indispensable grassroots watchdog, using the open data obligations of local authorities and an analysis of local media.

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Fig. 2 - Ideal types of regulatory interventions about participatory practices



In fig. 2, a sort of Weberian guidance-scheme⁷⁰ allows to imagine where it could be possible to locate those examples which we presented in this section and in the previous paragraphs, along with others which expand into the type of situations in which the construction of regulatory frameworks (i.e., «the law» *lato sensu*) could affect the functioning of participatory practices as their outcomes/impacts.

Gradually, there has been a convergence of positions on the fact that «light» forms of regulation⁷¹ can better balance the formal recognition of citizens' right to have a direct say and/or a vote on decision-making procedures. Flexibility is part of the ontology of any process of social dialogue,

which must be resilient and readapt not only to the conjunctural changes of the sociocultural and political-economic milieu where perceptions of participants are formed⁷². The latter, indeed, are pivotal in a perspective of a socially-constructed reality⁷³ where trust-building between citizens and institutions is constitutive of the solidity and the authoritativeness of institutions, and of the participative institutes themselves.

As Santos & Avritzer put it⁷⁴, a certain «distance» needs to accompany the collaboration between democratic innovations and representative institutions, as a bond which is too-tight (or an ancillary/subservient position) can foster that «double disease of liberal democracy» where citizens do not commit to participatory/deliberative practices, because these practices are too dependent on elected officials and bureaucratic structures which citizens do not trust. Consequently, democratic innovations' incisiveness appears limited, and civic engagement looks like a waste of energy, worthy only for those who already have their more effective «channels of incidence» at work to have their interests heard and incorporated in traditional decision-making.

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4. An open conclusion

Our inductive analysis has been conceived as an overview of different ways that «the law» (intended *lato sensu* as a wide range of institutionalised and institutionalising measures, from constitutional one to local bylaws, which can activate and/or consolidate different initiative of social dialogue) shows when interacting with the broad notion of «citizens participation». We took into account that – according to a large literature which converge on depicting its growing complexity – the notion of civic participation encompasses not only meanings that are strictly related to socio-political struggles and management fields, but also «pre-political» actions and behaviours which are indispensable for preparing different actors to relate to «the political».

In the activation and consolidation of DIs, clues emerge about the asymmetric relationships existing between «the force of will» and «the force of law»⁷⁵, the first being somehow indispensable for the conception of all the existing sound experiences, and the second seeming necessary but not sufficient. Arguably, the force of law has levels of enforcement, which can intervene at any time: it comprises constitutional frames and wide regulatory provision within whose margins DIs can manoeuvre (by referring to values and principles which exist even in regimes which

are only formally democracies). In contrast, regulatory frameworks can encompass measures which can incentivise the diffusion of participatory culture (in sectors and/or scales of institutional activity), to favour investments, increase incisiveness of outputs, strengthen the capacity of different actors to enforce their rights to take part in decision-making, and to make participation mandatory, and its results are binding.

86 The relationship between participatory practices and representative democracy cannot be ignored: because the first operates within the boundaries established by the latter, but also because the DI's functioning clarifies that imitative formats that use representational patterns to promote participation do not necessarily work in environments where not only is there widespread discredit which weakens State institutions, but where the evolution of individualist societies cast doubts on every form of representation of interest which does not include the formal possibility to involve each citizen as an individual, if s/he wants and commits to that. Therefore, it is crucial that every legal framework established to regulate DI's should foster a cultural transition in decision-making patterns and possibly promote hybrid forms of social dialogue (not merely top-down) or where systems of different channels are the best-performing solution⁷⁶.

As Boaventura Santos claimed⁷⁷, if we want to head toward a New Legal Common Sense where the law can increase its «emancipatory» – instead of merely regulatory – role, possibly the debates around participation and about how and to what extent legal provisions (in their extremely wide and diverse scope) can promote and secure conditions of permanent political mobilization around the expansion and intensification of democracy and defence of democratic goods, will prove a central field of action for the future.

Note

¹ See A. FUNG, E.O. WRIGHT, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, Verso, London 2002.

² See J. MINSON, *The Participatory Imperative*, in ID. (org), *Questions of Conduct: Sexual Harassment, Citizenship, Government. Language, Discourse, Society*, Palgrave Macmillan, London 1993.

³ U. ALLEGRETTI, *Democrazia partecipativa*, in AA. VV., *Enciclopedia del diritto*, Annali IV, Giuffrè, Milano 2011, pp. 295 ss.

⁴ See T. GENRO, *O Orçamento Participativo e a Democracia*, in ID., U. DE SOUZA, *Orçamento Participativo*, Fundação Perseu Abramo, S. Paulo 1997.

⁵ See G. SMITH, *Democratic Innovations. Designing Institutions for Citizen Participation*, Cambridge University Press, Cambridge 2009.

⁶ See G. MORO, *Cittadinanza*, Mondadori Università, Milano 2020.

⁷ See V. ATRIPALDI, *Contributo alla definizione del concetto di partecipazione nell'art. 3 della Costituzione*, in P. RESCIGNO (a cura di), *Strutture di potere, democrazia e partecipazione*, Ed. scientifica, Napoli 1974.

⁸ See G. PASTORI, *La sussidiarietà orizzontale alla prova dei fatti nelle recenti riforme legislative*, in A. RINELLA, L. COEN, R. SCARCIGLIA (a cura di), *Sussidiarietà ed ordinamenti costituzionali. Esperienze a confronto*, Cedam, Padova 174.

⁹ See M. PICCHI, *Il diritto di partecipazione*, Giuffrè, Milano 2012.

¹⁰ See N. PEREIRA, *A Participação das Populações na Decisão Orçamental Municipal - A Experiência do Orçamento Participativo em Portugal*, Master Thesis in Law, University of Coimbra 2011.

¹¹ G. ALLEGRETTI, *When Citizen Participation Unexpectedly Grows in Quality and Quantity: A Side Effect or an Inherent Consequence of «Austeritarian» Approaches?*, in I. DAVID (org.), *Crisis, Austerity, and Transformation. How Disciplinary Neoliberalism is Changing Portugal*. Lexington, London 2018, pp. 157-178.

¹² See P. NORRIS, *Democratic Deficit*, Oxford University Press, Oxford 2011.

¹³ B. SANTOS, L. AVRITZER, *Introduction: Opening Up the Canon of Democracy*, in B. SANTOS (ed.), *Democratizing Democracy. Beyond the Liberal Democratic Canon*, Verso, London 2007, pp. xxxiv-lxxiv.

¹⁴ See N. BOBBIO, *Future of Democracy*, Polity Press, Durham 1991.

¹⁵ M. PICCHI, *op. cit.*, p. 4

¹⁶ *Ibidem*.

¹⁷ U. ALLEGRETTI, *Basi giuridiche della democrazia partecipativa in Italia: alcuni orientamenti*, in «*Democrazia e diritto*», 3/2006, p. 154.

¹⁸ See M. LUCIANI, *Il paradigma della rappresentanza di fronte alla crisi del rappresentato*, in N. ZANON, F. BIONDI (a cura di), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, Atti del Covegno, Milano, 16-17 marzo 2000, Giuffrè, Milano 2001; I. MASSA PINTO, *Rappresentanza*, in «*Rivista AIC*», n. 3/2017.

¹⁹ See A. FRAGAI, *Presentazione*, in M. MORISI, A. PACI, *Il bisogno di decidere. Termovalorizzatori: dalla politica dei rifiuti al rifiuto della politica*, il Mulino, Bologna 2009.

²⁰ See M. MORISI, A. PACI, *op. cit.*

²¹ See U. ALLEGRETTI, *L'amministrazione dall'attuazione costituzionale alla democrazia partecipativa*, Giuffrè, Milano 2009; ID. (ed.), *Democrazia partecipativa. Esperienze e prospettive in Italia e in Europa*, FUP, Firenze 2010.

²² See COUNCIL OF EUROPA, *European Charter of Local Self-Government*, European Treaty serie n. 122, Strasbourg 1985.

²³ E. FERNANDES, Interview «How can URBiNAT contribute to the right to the city?», D1.8 Urbanat Project deliverable, CES, Coimbra 2021 (forthcoming).

²⁴ A. VALASTRO, *La democrazia partecipativa alla prova dei territori: tendenze e prospettive dei regolamenti comunali*, in «*Osservatoriosullefonti.it*», fasc. 3/2016, p. 30.

²⁵ See Y. SINTOMER, *Le pouvoir au peuple. Jurys citoyens, tirage au sort et démocratie participative*, La Découverte, Paris 2007; J. FISHKIN, *Democracy When the People Are Thinking: Revitalizing Our Politics Through Public Deliberation*, Oxford Scholarship online, Oxford 2018.

²⁶ Such practices (often based on the use of different modalities of random-based or sociologically-stratified selection of participants) are generally imagined as methodologically refined, expensive and related to an ideal of «representativity» of complex social environments through small and «easy-manageable» samples of citizens: but, in relation to the previous generation of participatory practices, they were also detached from the real incising capacity in the socio-spatial transformation of the territories where they took place, often becoming laboratory-operations with a much reduced political impact and a limited scope. See A. BÄCHTIGER, J.S. DRYZEK, J. MANSBRIDGE, M. WARREN (org.), *The Oxford Handbook of Deliberative Democracy*, Oxford Scholarship online, Oxford 2018.

88 ²⁷ See A. BLAS, P. IBARRA, *La participación: estado de la cuestión*, in «Cuadernos de Trabajo de Hegoa», n. 39, Jan. 2006.

²⁸ Y. CABANNES, *Contribution of Participatory Budgeting to provision and management of basic services: municipal practices and evidence from the field*, in «Environment & Urbanization», 27(1)/2015, pp. 257–284.

²⁹ A. BLAS, P. IBARRA, *op. cit.*, p. 3.

³⁰ J. GAVENTA, *Reflections on the Uses of the 'Power Cube'. Approach for Analyzing the Spaces, Places and Dynamics of Civil Society Participation and Engagement*. Learning by Design, Mfp Breed Netwerk 2005.

³¹ See M. SORICE, *Partecipazione democratica. Teorie e problemi*. Mondadori Università, Milano 2019.

³² See F. CASSANO, *Southern Thought and Other Essays on the Mediterranean*, Fordham Univ Press, New York 2012.

³³ Here, we can also include milieus governed by specific forms of collective participation, as the collective lands in some European countries: i.e., «Baldios» in Portugal; «tierras comunales», in Spain; «usi civici» or «partecipanze», in Italy; and «ademprivi», in Sardinia (See R. SERRA, G. ALLEGRETTI, *Democracies in common places: stories from baldios and fire-tales in Portugal*, in «Scienze del Territorio», n. 8/2020, pp. 91-109).

³⁴ See G. ALLEGRETTI, M. MELONI, B. DORRONSORO, *Civic participation as a Travelling Ideospace: Which Direction?*, in S. Makoni, A. Kaiper, L. Mokwena, *The Routledge Handbook of Language and the Global South*, Routledge, London 2021 (forthcoming).

³⁵ See L. SANDRECOCK, *Making the Invisible Visible: A Multicultural Planning History*, University of California Press, Berkeley 1998.

³⁶ See G. PABA, *Corpi Urbani. Differenze, interazioni, politiche*, Franco Angeli, Milano 2010.

³⁷ See B. SANTOS, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South*, Duke University Press Books, Durham 2018.

³⁸ See Sentenza C. Cost., 235/2014, and commentaries in U. ALLEGRETTI, *Qualche avanzamento sulla via della democrazia partecipativa: riflessioni su alcune leggi regionali e una sentenza della Corte costituzionale*, in «Le Regioni», 2/2019, pp. 389-412.

³⁹ See A. FLORIDIA, *Le 'buone ragioni' di una legge: dilemmi e argomenti sul senso della partecipazione (e sui modi del governare)*, in M. MORISI, C.

PERRONE (org.), *Giochi di potere. Partecipazione, piani e politiche territoriali*, UTET Università, Torino 2013; I. FONSECA, *Participação como método de governo: experiências transcalares no Rio Grande do Sul, Brasil e na Toscana, Itália*, IPEA, Brasília 2019; R. LEWANSKI, *Institutionalizing Deliberative Democracy: the 'Tuscany laboratory'*, in «Journal of Public Deliberation», n. 9(1), 2013.

⁴⁰ See A. FLORIDIA, *From Participation to Deliberation: A Critical Genealogy of Deliberative Democracy*, ECPR Press, Colchester 2017.

⁴¹ Tosi depicts this tendency of public administration as the difficulty of - not only - imagining new solutions for an enlarging varied range of needs in complex societies, but also of understanding claims for needs to which the administration has not an already pre-moulded and already experimented solution to offer (see A. TOSI, *Abitanti*, iOl Mulino, Bologna 1994).

⁴² L. BLONDIAUX, Y. SINTOMER, *L'impératif délibératif*, in «Rue Descartes», 2009/1, n° 63, pp 28-38.

⁴³ See E. GANUZA, F. FRANCÉS, *El círculo virtuoso de la democracia: los presupuestos participativos a debate*, CIS, Madrid 2012.

⁴⁴ B. SANTOS, *Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad*, in ID., J.L. RODRIGUEZ (org.), *Justicia indígena, plurinacionalidad e interculturalidad en Bolivia*, Abya-Yala, 2012, p. 27.

⁴⁵ See B. SANTOS, J.M. MENDES, *Demodiversity: Toward Post-Abyssal Democracies*, Routledge, London 2020.

⁴⁶ See S. HOLZ, G. ALLEGRETTI, A. RAMOS, *Conferências e Conselhos Nacionais de Participação: a luta pela sobrevivência num governo autoritário*, in M.A. COSTA (org.), *Qual o Caminho do Brasil? Instituições, cultura e política no século XXI*, Appris Editora, Rio de Janeiro 2021.

⁴⁷ See C. CHWALISZ, I. ČESNULAITYTĖ, *Innovative Citizen Participation and New Democratic Institutions Catching the Deliberative Wave*, OECD, Paris 2020.

⁴⁸ This occurred especially in the «Leis Organicas» of Brazil, at municipal and State-level, after the end of the '90s, and especially after the «Statute of the City Law» of 2001.

⁴⁹ See CHARTER OF QUALITY FOR PARTICIPATORY BUDGETING IN PORTUGAL: http://portugalparticipa.pt/upload_folder/table_data/97196eb8-fb0b-425f-ab-b6-0f98debf9bdb/files/2017_CARTA_QUALIDADE_ENG.PDF.

⁵⁰ See <https://www.oficina.org.pt/rap-inscricao.html>.

⁵¹ See L. BOBBIO, *La qualità della deliberazione. Processi dialogici tra cittadini*, Carocci, Napoli 2013.

⁵² See <https://cpdp.debatpublic.fr>.

⁵³ In this sense, the Italian Inter-Ministerial Commission for Public Debate instituted in December 2020 on the base of Leg. Decree 50/2016 and DCPM 76/2018 is a pale and powerless imitation (<https://www.mit.gov.it/comunicazione/news/infrastrutture-grandi-opere/infrastrutture-istituita-commissione-nazionale-per>).

⁵⁴ See <https://www.bape.gouv.qc.ca>.

⁵⁵ See <https://ocpm.qc.ca>.

⁵⁶ L. BHERER, M. GAUTHIER, L. SIMARD, *Developing the Public Participation Field: The Role of Independent Bodies for Public Participation*, in «Administration & Society», 53(5), 2021, pp. 680–707.

⁵⁷ Established by Reg. Law 46/2013 – but pre-existing in similar forms since Law 69/2007. See <http://www.consiglio.regione.toscana.it/oi/default?idc=47>.

⁵⁸ See <https://partecipazione.regione.emilia-romagna.it/tecnico-di-garanzia/chi-siamo>.

⁵⁹ See <https://www.labsus.org/i-regolamenti-per-lamministrazione-condi-visa-dei-beni-comuni>.

⁶⁰ See B. GEISSEL, *On the Evaluation of Participatory Innovations - A Preliminary Framework*, in EAD., M. JOAS (eds.), *Participatory democratic innovations in Europe. Improving the quality of democracy?*, Barbara Burch, Berlin 2013.

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⁶¹ See Reg. Laws n° 1/1995; 5/2005 and 65/2014.

⁶² G. SGUEO, *La democrazia partecipativa nelle regioni. La legge n. 14 del 2010 della Regione Umbria*, in «Quaderni Regionali», II, 2011, pp. 559-575.

⁶³ See I. FONSECA, *op. cit.*; G. ALLEGRETTI, I. CASILLO, *Promover a Cultura da Participação a partir do nível regional. O caso da Toscana*, in «REDE: reflexões (in) oportunas», 2, 2015, pp. 24-31.

⁶⁴ Experiments also occurred in Colorado, Arizona, California: <https://healthydemocracy.org/cir>.

⁶⁵ See J. GASTIL, K. KNOBLOCH, *Hope for Democracy. How Citizens Can Bring Reason Back into Politics*, Oxford University Press, Oxford 2020.

⁶⁶ In this perspectives, both examples as the ObservaPoa in Porto Alegre (Brazil) and the OCPM of Montreal (Canada), despite implementing a policy of analysis of experiments done, lack of a «tertiary» and more neutral vision on the performance of their own role in those.

⁶⁷ See <https://blogdudroitectoral.fr/tag/bacque/page/2/> and https://alliancecitoyenne.org/wp-content/uploads/2016/08/rapport_-mechmache_-bacque_politique-de_la_ville.pdf.

⁶⁸ G. ALLEGRETTI, M. BASSOLI, G. COLAVOLPE, *On the Verge of Institutionalisation? Participatory Budgeting Evidence in Five Italian Regions*, in «Finansovij žhurnal - Financial Journal», 2, 2021, pp 25-45.

⁶⁹ See <https://www.spendiamolinsieme.it>.

⁷⁰ It is worth underlining that such a Weberian approach aims to develop ideal-type models to orientate the reader, knowing the scheme would never completely reflect empirical data, but allows classifying and systematizing the puzzling variety of real cases.

⁷¹ See U. ALLEGRETTI, *Democrazia partecipativa*, in AA. VV., *Enciclopedia del diritto*, cit.

⁷² G. ALLEGRETTI, *Paying attention to the participants perceptions in order to trigger a virtuous circle*, in N. DIAS (org.), *Hope for Democracy: 25 Years of Participatory Budgeting Worldwide*, in Loco S. Brás de Alportel 2014, pp. 47-64.

⁷³ See P. NORRIS, *op. cit.*

⁷⁴ See B. SANTOS, L. AVRITZER, *op. cit.*

⁷⁵ See S. HOLZ, *A força da lei e a força de vontade: um estudo comparado da participação cidadã no planeamento urbano*, PhD Thesis, Faculty of Economics, University of Coimbra, 2015.

⁷⁶ P. SPADA, G. ALLEGRETTI, *When Democratic Innovations Integrate Multiple and Diverse Channels of Social Dialogue. Opportunities and Challenges*, in M. ADRIA (org.), *Using New Media for Citizen Engagement and Participation*, IGI Global, Hershey 2020, pp. 35-59.

⁷⁷ See B. SANTOS, *El futuro comienza ahora. De la pandemia a la utopía*, Akal, Madrid 2021; ID., *Poderá o direito ser emancipatório?*, in «Revista Crítica de Ciências Sociais», n. 65/2003, pp. 3-76.