POLICY BRIEF

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What policies and laws can enable inclusive e-participation?

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Executive Summary

Digital and electronic methods for public participation in government decision-making are now widely recognised as important. However, each country, town and government entity has distinctive laws and policies related to public and 'e'-participation with implications for the role of technology and the effectiveness and inclusiveness of civic engagement. Through a high-level review of legislation and governance activities in several countries, and an in-depth discussion of South Africa, there are three considerations worth noting. First, the use of technology can result in new forms of inequality and harm, so e-participation adoption may need to be embedded within a wider digital rights framework. Second, because of the increase in online forms of civic-led engagement, governments may need to define rules, processes and capabilities for engaging such forms of 'bottom-up' interaction, but also to clarify expectations concerning the relationship between direct public engagement and representative decision-making. Finally, and more broadly, given the growing use of social media, data-driven and algorithmic technologies, there will need to be proactive policy and legal reform to address the risk that bias, disinformation and privacy violations affect the integrity of participation.

Introduction

The right to public participation in government decision-making is defined in many countries founding laws or constitutions. The specific scope and processes of participation are then outlined in various policies and laws which determine how government departments and agencies should go about realising this right. Increasingly, these policies and laws have had to consider the role of electronic technologies as a requirement or enabler for 'e'-participation. For example, in South Africa, municipalities are required to publish financial reports on their own or a National Treasury website.[1]

In recent years, e-participation has evolved significantly, with new opportunities and risks. In large part, this is because of increased access to the internet and associated applications. There are many new online information sources competing with governments for attention and legitimacy.[2] In addition, social media platforms have become vulnerable to manipulation and are being used to amplify existing prejudices. This is evident in both developed and developing countries, including South Africa.[3] There is also innovation in public participation methods, such as the current interest in citizen assemblies, which practitioners are connecting to virtual spaces.[4]

Whilst the potential for e-participation to increase transparency, oversight and access to decision-making is well-known, so too are concerns that unequal access to technology can further enhance the dominance of well-resourced, technology-savvy groups in government planning and implementation. It is not clear whether emerging technologies and methods will enable more inclusive outcomes.

Nonetheless, the current use of digital tools and ongoing changes suggest that the rules and processes related to e-participation, and even public participation broadly, need to be reviewed on a regular basis.

In response, this policy brief describes some of the key activities and trends related to e-participation globally and how governments are designing processes, policies and laws towards ensuring more effective and inclusive processes. The brief also highlights some of the key legislation and policy relevant to the South African context, and points to specific examples in which learning and linkages could be made.

Research Approach

This policy brief is based on a landscape review of legislation and governance activities in several countries, and an in-depth discussion of South Africa. This involved the desktop-based identification and collection of policy, legal and practice documentation from selected countries. Following an initial screening of material, a qualitative content analysis was performed on the included documents to uncover key initiatives and themes.

Global e-Participation Initiatives

There was a step-change in activity around e-participation during the late 2000's when several countries sought to demonstrate a willingness to open decision-making and to use technology. The launch of the Open Government Partnership (OGP) in 2011 reflected this shift. For many African governments, their commitments under OGP are an important rallying point for e-participation action. For example, in Kenya, under the OGP National Action Plan (NAP) for 2020-2022 there is a commitment to "Mainstream meaningful public participation" which includes promoting the use of technology as an alternative channel for participation.[5] The NAP is endorsed by the Deputy President and Speakers of the National Assembly and Senate. Kenya has actively promoted OGP involvement by county governments which have submitted actions plans covering the use of web platforms and open data to support information sharing.

[1]Local Government: Municipal Systems Act 32 of 2000 (MSA); Local Government: Municipal Finance Management Act, No. 56 of 2003 (MFMA)
[2]Stocking, G., Mitchell, A., Matsa, K. E., Widjaya, R., Jurkowitz, M., Ghosh, S., Smith, A., Naseer, S., & St. Aubin, C. (2022). The Role of Alternative Social Media in the News and Information Environment. Pew Research Centre. 06 October. Available at: https://www.pewresearch.org/journalism/2022/10/06/the-role-of-alternative-social-media-in-the-news-and-in-formation-environment/
[3]Onslow, S. (2021). Social media's impact on political discourse in South Africa. LSE Ideas, Digital IR Working Paper Series 05/2021. Available at: https://eprints.lse.ac.uk/110841/
[4] Parsons, A. (2019). Digital Tools for Citizens Assemblies. mySociety. Available at: https://research.mysociety.org/publications/digital-tools-citizens-assemblies
[5]Government of Kenya. (2020). OGP National Action Plan IV 2020 – 2022: Open Recovery Open Resilience. Available at: https://www.opengovpartnership.org/documents/kenya-ac-tion-plan-2020-2022/

In Asia, during 2011, the Government of India drafted a *Framework for Citizen Engagement in e-Governance* as a guide for departments on the types of engagement and media channels that can be used.[6] This was followed by the 2014 launch of the MyGov.in website as the country's flagship online engagement platform.[7] The Framework and MyGovt. in have been adopted by sector departments *and* subnational governments. For example, the Government of Nagaland runs a subdomain on MyGov.in to source comments on eco-tourism and road networks.[8] Similar to India, the Malaysian government promotes e-participation initiatives and a guiding 'policy' which is implemented by sector departments.[9]

A key point in the United States (US) e-participation trajectory was the 2009 Memorandum on Transparency and Open Government which focused on three principles: that government should be transparent, to ensure accountability; participatory, to improve the quality of decision-making; and collaborative, to encourage cross-department and cross-sector cooperation.[10] The first step of the associated US Open Government Directive is to "Publish Government Information Online". The Open, Public, Electronic and Necessary Government Data Act (OPEN Government Data Act) was passed in 2018 as part of the Foundations for Evidence-Based Policymaking Act. Implementation of the Act has been tentative, with largely voluntary action taken by a handful of federal agencies.

The European Union (EU) is instructive from the perspective of both the regional approach to e-participation and amongst member countries. At a regional level, a 2021 European Parliament resolution calls for pilot projects on participatory budgeting and crowd sourcing for the co-creation of policies with decision-makers.[11] However, it emphasises that digital technologies should be a complement to face-to-face participation, and should be targeted at encouraging participation among populations that have difficulty participating via traditional mechanisms. A Council of Europe (CoE) study makes recommendations to mitigate the harmful effects of emerging digital technologies, including algorithmic tools, on representative, direct, deliberative and participatory democracy.[12] This includes ensuring that voting advice applications are more transparent, and considering how to migrate face-to-face deliberative or participatory processes online without increasing exclusion. The same CoE study calls for the use of technology to be anchored in the '12 Principles of Good Democratic Governance' which form part of the 'Strategy of Innovation and Good Governance at Local Level'.

This concern for ethical aspects of technology use is reflected in various forms of country and local governance. In Germany, the International Youth Service has produced 'Guidelines for successful e-participation by young people'.[13] This guideline outlines high-level principles, describes types of participation and proposes specific actions for each phase of an e-participation process. The City of Barcelona is a founding member of the Cities Coalition for Digital Rights (CCDR) which has developed a Digital Rights Governance Framework.[14] This framework identifies a number of intersecting digital rights that influence participation, as one of the rights. More practically, the city is a user of the Decidim e-participation platform[15] and has promoted the DecidimFemDev initiative which aims to equip women to shape the direction of the Decidim platform development.[16]

The above examples point to a diverse mix of law, policy, guidelines and incentives being used to accelerate progress on e-participation but also mitigate potential harms.

South African Policy and Legislation

South Africa's Constitution provides the basis for the country to function as both a representative and a participatory democracy. Specifically, under Chapter 10, a basic value and principle governing public administration is that "People's needs must be responded to, and the public must be encouraged to participate in policy-making". Various other policies and laws since the late 1990s expand on this provision, including a requirement that the public is involved in decisions that affect them[17] and that the executive consults directly with the public on the consideration and approval of budgets.[18]

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[6] Ministry of Communications & Information Technology, Government of India (2011). Framework for Citizen Engagement in e-Governance. Department of Information Technology. Available at: https://onlineasdma.assam.gov.in/kmp/pdf/1485173094citizen_engagement_in_egovernance.pdf

[7] MyGov.in. Available at: https://www.mygov.in/

[8] Nagaland.MyGov.in. Available at: https://nagaland.mygov.in/

[9] MyGovernment, Government of Malaysia. e-Participation. Available at: https://www.malaysia.gov.my/portal/category/823

[10] The White House, United States of America. (2009). Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government

[11] European Parliament. (2021). European Parliament resolution of 7 July 2021 on Citizens' dialogues and Citizens' participation in the EU decision-making (2020/2201(INI)). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0345_EN.html

[12] European Committee on Democracy and Governance (CDDG), CoE. (2021). Study on the Impact of Digital Transformation on Democracy and Good Governance https://rm.coe.int/study-on-the-impact-of-digital-transformation-on-democracy-and-good-go/1680a3b9f9

[13] International Youth Service, Federal Republic of Germany. (2014). Guidelines for successful e-participation by young people in decision-making at local, regional, national and European levels. Available at: https://ijab.de/fileadmin/redaktion/PDFs/Shop_PDFs/Guidelines_eParticipation_engl.pdf

[14] CCDR. (2021). The Digital Rights Governance Framework. Available at: https://citiesfordigitalrights.org/framework

[15] Decidim. Available at: https://decidim.org/

[16] DecidimFemDev. Available at: https://ajuntament.barcelona.cat/digital/en/iniciativa_ecosistema/decidimfemdev

[17] Promotion of Administrative Justice Act 3 of 2000

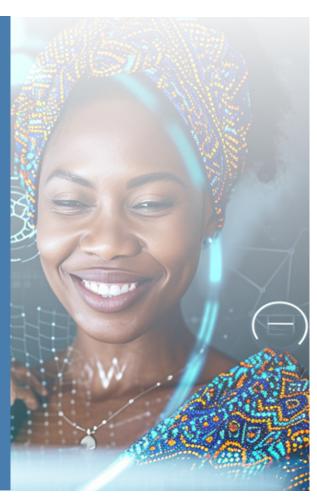[18] Public Finance Management Act 29 of 1999 (PFMA)

In addition, case law has helped to clarify our understanding of what is appropriate for public participation in a representative democracy, with implications for the use of technology. This includes recognising that (1) a 'reasonable' form of public participation depends on the nature of the legislation, the importance of the legislation, and the potential impact on the public, amongst other considerations; (2) that participation should be conducted in 'good faith' although the public's views may not necessarily prevail, and (3) that there are many ways of fulfilling public involvement.[19]

Local Government Perspective

There are various pieces of intersecting legislation and policy shaping how municipalities approach public participation, from the establishment of ward committees[20] and involving traditional authorities[21] to more explicit instructions about what is expected during engagement activities.

Municipalities need to address specific public participation requirements which have implications for the role of digital technologies:

- Establish processes and mechanisms for receiving public comment, holding public hearings and consultative sessions, allowing the local community to submit petitions, and reporting back to the community. This highlights the diversity of processes that e-participation may need to support.

- Establish a culture of participatory governance. This involves building capacity in the local community to participate in the affairs of government, but also the capacity of councillors and public officials to foster participation. For e-participation this would mean the ongoing development of skills to use available technologies.

- Consider the special needs of people who cannot read or write, people with disabilities and women and disadvantaged groups, as well as language preferences in the municipality. For e-participation this means that design and implementation must explicitly address accessibility and (digital) literacy issues.

Whilst digital technologies seem to offer a radically new set of opportunities for direct and deliberative democracy practices, it is important to recognise that there are legally defined roles and mandates for governing that constrain the scope of online influence.[22] Moreover, the potential for e-participation success depends on addressing some of the more fundamental challenges South Africa faces with respect to public participation.[23]

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[19] Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008) para 50 Available at: http://www.saflii.org/za/cases/ZACC/2008/10.html; King and Others v Attorneys Fidelity Fund Board of Control and Another (561/2004) [2005] ZASCA 96; [2006] 1 All SA 458 (SCA); 2006 (4) BCLR 462 (SCA) (29 September 2005) para 22. Available at: http://www.saflii.org/za/cases/ZASCA/2005/96.html
[20] Local Government: Municipal Structures Act 117 of 1998
[21] Chapter 2 of the Traditional Leadership and Governance Framework Act 41 of 2003
[22] Govender, J. P. (2006). Citizen participation in the budget process in local government: A case study of the eThekwini Municipality (Doctoral dissertation, University of the Western Cape).
[23] Planact. (2020). Review of Public Participation Policy and Legislation in Local Government, Planact – Policy Submission (COGTA Legislative Review Process). Final draft, 31 March 2020. Available at: https://planact.org.za/wp-content/uploads/2020/07/Review-of-Public-Participation-Policy-and-Legislation-in-Local-Government-Draft.pdf

Technology Legislation, Policy and Programmes

In response to participation challenges as well as the opportunities presented by digital platforms, public officials have adopted a variety of tools to support their outreach activities.

Making planning and budget documentation available on websites is seen as a key foundation of public engagement. Under the amended MSA and MFMA, documents that must be made public are required to be made available on the municipality website, or a site provided by National Treasury, within a specific period, and the information must be regularly updated. The 2021 Metro Open Budget Survey gives an indication of the online availability of budget documents in large municipalities, and there has been a survey of procurement information on websites, both of which suggest that few local governments are likely to be complying with all aspects of the legal requirement.[24] At the same time, National Treasury (NT) has sought to ensure municipal planning and financial reporting information is made available through its own website, via the GoMuni portal[25] and the Municipal Money platform as a more interactive service.[26]

Looking at e-participation more broadly, a key example of government policy intent is evident in the formal partnership established between the Ministry of Cooperative Governance and Traditional Affairs and the privately-developed GovChat application. The service was launched for residents to engage with their municipality administrations, as a "real-time complaints management platform" and mechanism by which communities can make service requests, but potentially also for wider public participation activities.[27]

Such partnerships with local civic participation innovators reflect an ambition outlined in the 2019 White Paper on Science, Technology and Innovation which seeks to build a more open innovation system anchored in social and grassroots innovation. A particular mention is made of ICT applications and e-government using an approach that will involve "widening the range of stakeholders and deepening their engagement in deliberative planning".[28]

Various other departments seek to enable or guide the use of technology in governance activities, from the Department of Public Service and Administration which hosts South Africa's OGP work, to the Department of Communications and Digital Technologies (DCDT) which published a National e-Government Strategy and Roadmap in 2017.[29] Although the Strategy mentions supporting participation in government decision-making, the emphasis is much more on electronic enablement of services. Open data and data availability have also gained prominence in this and other DCDT policies, including a Draft National Policy on Data and Cloud which does recognise data's role in accountability and transparency, and simulating local innovation around social issues.[30]

Finally, there is a package of technology-related legislation that shapes how e-participation may be implemented. First, is the the Promotion of Access to Information Act 2 of 2000 (PAIA) and associated regulations which has created the framework by which individuals and organisations can request public interest information from public and private entities, with rules on timelines and fees. Second, is the Protection of Personal Information Act 4 of 2013 (POPIA) which outlines rules for the collection and use of personal information, issues that public participation practitioners will need to consider carefully when using digital tools. Third, is the Electronic Communications and Transactions Act 25 of 2002 (ECTA) which is an enabling legislation in that it establishes the legality of electronic transactions, including allowing – not requiring - public bodies to accept and issue documents in an electronic form, and in specifying the required document format and signature method. Fourth, is the Competition Act 89 of 1998, the Competition Commission and the Competition Tribunal. These entities have shown their willingness to intervene in how locally developed civic applications such as GovChat and Let's Talk interact with global platforms like WhatsApp and clients in government[31] and, more recently, in relation to emerging technologies, the media industry, elections and public participation.[32]

[24] Metro Open Budget Survey 2021. Asivikelane. Available at: https://asivikelane.org/metro-obi-2021/
[25] GoMuni. National Treasury, Republic of South Africa. Available at: https://lg.treasury.gov.za/ibi_apps/public
[26] Municipal Money. National Treasury, Republic of South Africa. Available at: https://municipalmoney.gov.za/
[27] Department of Cooperative Governance (DCoG), Republic of South Africa. (2022). Annual Performance Plan 2022/23 and Updated Strategic Plan 2019-2024. Available at: https://www.cogta.gov.za/cgta_2016/wp-content/uploads/2021/11/DCOG-Annual-Performance-Plan-2022-2023-and-Updated-Strategic-Plan-2019-2025.pdf
[28] See p.38 in Department of Science and Innovation, Republic of South Africa. (2019). White Paper on Science, Technology and Innovation. Available at: https://www.dst.gov.za/images/2019/WHITE_PAPER_ON_SCIENCE_AND_TECHNOLOGY_web.pdf
[29] Department of Communications and Digital Technologies, Republic of South Africa. (2017). National e-Government Strategy and Roadmap. Available at: https://www.gov.za/sites/default/files/gcis_document/201711/41241gen886.pdf
[30] Department of Communications and Digital Technologies, Republic of South Africa. (2021). Draft National Policy on Data and Cloud. Available at: https://www.gov.za/sites/default/files/gcis_document/202104/44389gon206.pdf
[31] Simelane, L. (2022). WhatsApp says it gave government the boot for selling your private data. The Citizen. March 16. Available at: https://www.citizen.co.za/news/south-africa/whatsapp-gave-gvt-the-boot-for-selling-private-data/
[32] The Competition Commission. (2023). Media and Digital Platforms Market Inquiry. Available at: https://www.compcom.co.za/media-and-digital-platforms-market-inquiry/

Policy Implications

South African policy and legislation place a strong emphasis on inclusion and the rights of marginalised groups with respect to public participation. This legal foundation creates a mandate and space which all spheres of government can draw on when looking to implement e-participation initiatives, and can practically inform organisational policy, programming and design decisions. For example, government entities may focus on how technology can be used to enable participation by those not usually able (or willing) to access or contribute during policy consultation processes. Also, they may consider how technology can be integrated with existing place-based and in-person interactions which are still highly valued. Finally, e-participation initiatives may support local networks or communities of practice, especially those that prioritise the involvement of marginalised groups in platform development and operation similar to DecidimFemDev.

Closely connected is the need to develop supporting policy and regulatory frameworks and tools, similar to the CCDR mentioned above. By linking e-participation with a wider system of digital rights, it is more likely that participation outcomes will be inclusive.

Interestingly, social media and similar services can support more civic-led and bottom-up forms of mobilisation. It is not clear whether existing national or organisational legislation and policies, such as on (e-)petitions, address this form of interaction in sufficient detail. More broadly, e-participation has the potential to amplify expectations related to direct democratic processes, and governments may need to clarify the role and relationship to representative decision-making.

Given the rapid development of technology, policy and law will need to respond to evolving opportunities and risks that directly affect e-participation effectiveness and inclusion. The growing adoption of generative and other forms of artificial intelligence (AI) is likely to require some proactive reform of privacy, electronic transaction, and/or competition regulations to address issues related to algorithmic bias, disinformation and use of personal information in e-participation.

About the ePPMOSA project

Building a capable and developmental state is one of the six priorities outlined in the National Development Plan (Vision 2030). The realisation of this priority requires that the public sector, in particular municipalities, adopts innovations and uses technology to improve service delivery. The 2019 White Paper on Science, Technology and Innovation (STI) echoes this call by proposing the creation of an enabling municipal/public sector policy environment for the adoption and upscaling of innovative technology solutions to improve the quality of basic services in government. The White Paper further recognises the need for an appreciation of STI in all spheres of government, and the use of STI in municipal planning, delivery and operational processes.

In response, the Viability and Validations of Innovations for Service Delivery Programme (VVISDP) has been established as a programme by the Department of Science and Innovation (DSI), in partnership with the South African Local Government Association (SALGA) and the Ministry of Cooperative Governance and Traditional Affairs (CoGTA), with funding from the European Union Sector Budget Support Programme and the National Treasury. The programme is designed to help municipalities to pilot technology and innovations that could assist in improving the delivery of basic services and the functioning of municipalities through innovation.

VVISDP comprises six, separate, innovation-enabling projects. Project 5 of VVISDP, the e-Participation and Policy Modelling Platform for South Africa (ePPMOSA), aims to pilot e-participation and policy modelling technologies and methods in selected municipalities between 2022 and 2025, with the goal of supporting and enhancing existing local government public participation initiatives.

DSI appointed the Human Sciences Research Council (HSRC), the Council for Scientific and Industrial Research (CSIR), and the University of KwaZulu-Natal (UKZN) as implementing entities for the ePPMOSA project.